

A Critical Review of the Enhanced Defense Cooperation Agreement Between the Republic of the Philippines and the United States of America

Merlin M. Magallona*

I. STATEMENT OF THE CONSTITUTIONAL PROHIBITION	453
A. <i>Scope of the Prohibition</i>	
B. <i>Senate Concurrence as a Constitutional Mandate</i>	
II. EDCA AS A TREATY OF “FOREIGN MILITARY BASES, TROOPS, OR FACILITIES”	460
III. THE QUESTION OF RECOGNIZING EDCA AS A TREATY	464
A. <i>Culpability of the Philippine President</i>	465
IV. EDCA AND THE MUTUAL DEFENSE TREATY.....	467
A. <i>Individual Self-Defense</i>	
B. <i>Collective Self-Defense</i>	
V. EDCA AND THE STRATEGIC GUIDANCE.....	473
A. <i>EDCA Spells Out the Primary Mission of the U.S. Armed Forces</i>	
B. <i>EDCA and the Operational Concept of the Strategic Guidance in “Pivot Asia”</i>	
VI. STATE RESPONSIBILITY	478
VII. CONCLUDING STATEMENT	479

I. STATEMENT OF THE CONSTITUTIONAL PROHIBITION

The 1987 Philippine Constitution in Article XVIII, Section 25 mandates that “military bases, troops, or facilities shall not be allowed in the Philippines[.]”¹ unless specified conditions are fulfilled.

* ’58 LL.B., University of the Philippines College of Law. The Author was the Dean of the University of the Philippines College of Law in 1995-1999. He was also the Undersecretary of Foreign Affairs in 2001-2002.

Cite as 59 ATENEO L.J. 453 (2014).

1. PHIL. CONST. art. XVIII, § 25.

In the aforementioned provision, the said conditions are the following:

- (1) that the foreign military bases, troops, or facilities, shall be provided under a treaty;²
- (2) that such treaty shall be concurred in by the Senate;³
- (3) that when the Congress so requires, it shall be “ratified by a majority of the votes cast by the people in a national referendum held for that purpose;”⁴ and
- (4) that such treaty shall be “recognized as a treaty by the other contracting state.”⁵

What deserves immediate recognition is the fact that this provision is a prohibitory rule. Its imperative character is subject to the civil law rule that “[a]cts executed against the provisions of mandatory or prohibitory laws shall be void, except when the law itself authorizes their validity.”⁶ In the instant case, such acts may be saved from nullity by the conditions set forth in the constitutional mandate.⁷

A. Scope of the Prohibition

The Constitution does not restrict the prohibition to what are traditionally regarded as *military bases*.⁸ Even in the absence of military bases, this prohibition still applies to the presence of *troops* without the military bases.⁹ Further, the prohibition applies to the presence of *facilities* that may be in Philippine territory independent of the military bases.¹⁰

The foregoing interpretation takes the terms *military bases*, *troops*, and *facilities* in relative independence from each other, because the textual

2. PHIL. CONST. art. XVIII, § 25.

3. PHIL. CONST. art. XVIII, § 25.

4. PHIL. CONST. art. XVIII, § 25.

5. PHIL. CONST. art. XVIII, § 25.

6. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 5 (1950).

7. See PHIL. CONST. art. XVIII, § 25.

8. *Bayan (Bagong Alyansang Makabayan) v. Zamora*, 342 SCRA 449, 484-85 (2000).

9. *Id.*

10. *Id.*

composition of Article XVIII, Section 25 affirms the separation of these terms by the conjunctive “or.”¹¹

The wording of the constitutional prohibition does not limit itself to military bases that are to be established on a permanent basis, and thus it reasonably applies to those of temporary structures that are without duration as to their presence.¹²

The avowal of United States (U.S.) policy-makers, including their Head of State, President Barack H. Obama II, that the U.S. Government does not intend to establish permanent military bases in the Philippines under the Enhance Defense Cooperation Agreement (EDCA),¹³ may have been intended to appease the anxiety or opposition of the Philippine public vis-à-vis the constitutional prohibition. However, such avowal is of no consequence on account of the comprehensive scope of the prohibition.¹⁴ At any rate, the EDCA is so designed as “not to establish a permanent military presence or base in the territory of the Philippines[.]”¹⁵

As mentioned, the reality that dictates this policy is articulated by U.S. President Obama himself.¹⁶ But even as he proclaimed U.S. military hegemony in his instruction to the U.S. Department of Defense for a new strategic guidance, the U.S. President underscored the need to “put [their]

11. *Id.* See PHIL. CONST. art. XVIII, § 25.

12. The Court explained that “[t]he 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.” *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 484.

13. Aurea Calica, *Obama: No US bases*, PHIL. STAR, Apr. 29, 2014, available at <http://www.philstar.com/headlines/2014/04/29/1317298/obama-no-us-bases> (last accessed Sep. 30, 2014).

14. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 484.

15. Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America on Enhanced Defense Cooperation, Phil.-U.S., pmb., Apr. 28, 2014, available at <http://www.gov.ph/2014/04/29/document-enhanced-defense-cooperation-agreement/> (last accessed Sep. 30, 2014) [hereinafter EDCA].

16. Calica, *supra* note 13.

fiscal house in order [] at home and renew [the] long-term economic strength [of the U.S.]”¹⁷ To wit —

*The fiscal choices we face are difficult ones, but there should be no doubt [—] here in the [U.S.] or around the world [—] we will keep our Armed Forces the best-trained, best-fed, [and] best-equipped fighting force in history. And in a changing world that demands our leadership, the [U.S.] will remain the greatest force for freedom and security that the world has ever known.*¹⁸

In short, the U.S. Government cannot afford to maintain permanent military bases in foreign countries by reason of its own financial crisis, and certainly not out of respect for the Philippine Constitution. The new strategy for defense and security is designed towards resolving President Obama’s fiscal difficulties as a strategic weakness involving reduction in Pentagon’s defense spending.¹⁹

On this point, released by the Pentagon on 5 January 2012 is the defense strategic guidance entitled, *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense*,²⁰ (Strategic Guidance) prepared upon the instruction of President Obama “to identify [the U.S.’s] strategic interests and guide [their] defense priorities and spending over the coming decade.”²¹ The U.S. Congressional Research Service describes the Strategic Guidance as “intended to reshape future Department of Defense [] priorities, activities, and budget request for the following decade ... [and this] reshaping meant, in part, reducing defense spending by about \$487 billion over 10 years, to meet

17. Barack H. Obama II, President, United States of America, 21st Century Defense Priorities, Press Release on the Issuance of a New Strategic Guidance to the U.S. Department of Defense (Jan. 3, 2012) (transcript *available at* http://georgia.usembassy.gov/latest-news/transcripts2012/21st_century_defense_priorities.html (last accessed Sep. 30, 2014)).

18. *Id.* (emphasis supplied).

19. Nick Simeone, Hagel Outlines Budget Reducing Troop Strength, Force Structure, *available at* <http://www.defense.gov/news/newsarticle.aspx?id=121703> (last accessed Sep. 30, 2014).

20. *Sustaining U.S. Global Leadership: Priorities for 21st Century Defense* (Strategic Guidance to the U.S. Department of Defense), *available at* http://www.defense.gov/news/defense_strategic_guidance.pdf (last accessed Sep. 30, 2014) [hereinafter Strategic Guidance].

21. Obama II, *supra* note 17.

the initial budget cap in the Budget Control Act (BCA) of 2011.”²² The Center for Strategic and International Studies in Washington D.C. has observed that this estimate did not consider “the \$580-600 billion in additional reductions specified under the [BCA.]”²³

Accordingly, the Strategic Guidance makes use of cost-cutting devices which become operational in the EDCA. Because of the no-permanent bases policy, no rentals are to be paid.²⁴ Instead, the main policy concept of the Pentagon is for the rotational presence of U.S. forces to use the military bases and facilities of the host country.²⁵ As applied to the Philippines as a Party to the EDCA, the Strategic Guidance employs the concept of “partnering” and of “burden-sharing.”²⁶ Since the EDCA is the implementing mechanism of the Strategic Guidance, the Philippines has become an integral resource of the Strategic Guidance of the Pentagon in the Asia-Pacific region.²⁷ Hence, the Philippines, under the EDCA, is well within the scope of the “Primary Missions and Priorities”²⁸ spelled out in the Strategic Guidance. In this context, the EDCA becomes the means by which the Philippines is partnering with the U.S. in burden-sharing as to its strategy — “Pivot Asia.”²⁹

-
22. Catherine Dale & Pat Towell, In Brief: Assessing the January 2012 Defense Strategic Guidance (Congressional Research Service Report for the U.S. Congress) 1, available at http://assets.opencrs.com/rpts/R42146_20130813.pdf (last accessed Sep. 30, 2014).
 23. Center for Strategic and International Studies, The U.S. Defense Budget and Changes in U.S. Strategy (An Unpublished Pre Fiscal Year 2013 Budget Submission Report dated 23 January 2012) 8, available at http://csis.org/files/publication/120123_us_new_strategy_budget_med.pdf (last accessed Sep. 30, 2014).
 24. The EDCA provides that “[g]iven the mutuality of benefits, the Parties agree that the Philippines shall make Agreed Locations available to the [U.S.] forces without rental or similar costs.” EDCA, *supra* note 15, art. III, ¶ 3.
 25. *Id.* art. I, ¶ 1 (b); art. II, ¶ 4; & art. III, ¶ 1.
 26. *Id.* arts. III, IV, V, & VII.
 27. Strategic Guidance, *supra* note 20, at 1-2. See Ankit Panda, Philippines, United States Agree on New Security Accord, available at <http://thediplomat.com/2014/04/philippines-united-states-agree-on-new-security-accord/> (last accessed Sep. 30, 2014).
 28. Strategic Guidance, *supra* note 20, at 10-13.
 29. John Feffer, Obama’s Half-Pivot to Asia, available at <http://www.ipsnews.net/2014/04/obamas-half-pivot-asia/> (last accessed Sep. 30, 2014).

B. Senate Concurrence as a Constitutional Mandate

The other side of the constitutional prohibition is that it excludes the conclusion of an executive agreement by the President instead of a treaty.³⁰ The mandate of the Constitution that foreign military presence thus described is not allowed “except under a treaty duly concurred in by the Senate”³¹ implies that the President, should he decide to overcome the prohibition, must perform all acts prerequisite to such concurrence — transmission of the treaty to the Senate, with the request for its concurrence together with the information of his or her approval in ratification.³²

If the President withholds such prerequisites and fails to transmit the treaty to the Senate, or, in the alternative, concludes it as an executive agreement, the constitutional prohibition against such foreign military presence in the Philippines applies in full force.³³

The present Constitution has two provisions dealing with treaties as governed by Senate concurrence. The first one, stipulated in Section 21, Article VII of the Constitution or the “treaty clause,” comprehends treaties in general.³⁴ The second, provided in Article XVIII, Section 25 of the Constitution, contemplates only one particular kind of treaty as a saving device.³⁵ The special treatment of the treaty as governed by Senate concurrence in the second case, as differentiated from the treaty clause for treaties in general, is necessitated by the prohibitory mandate of the Constitution and both of which require strict interpretation.³⁶ Thus, the circumstances requiring Senate concurrence in Article XVIII, Section 25 of

30. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 489–90 (citing *Commissioner of Customs v. Eastern Sea Trading*, 3 SCRA 351, 356–57 (1961)).

31. PHIL. CONST. art. XVIII, § 25.

32. Office of the President, Providing for the Guidelines in the Negotiation of International Agreements and its Ratification, Executive Order No. 459 [E.O. No. 459] (Nov. 25, 1997).

33. Article XVIII, Section 25 provides that “foreign military bases, troops, or facilities *shall not be allowed* in the Philippines *except under a treaty* duly concurred in by the Senate[.]” PHIL. CONST. art. XVIII, § 25 (emphasis supplied).

34. PHIL. CONST. art. VII, § 21.

35. PHIL. CONST. art. XVIII, § 25.

36. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 482–83.

the Constitution are qualitatively different from the concurrence of treaties in general under Article VII, Section 21 of the Constitution.³⁷

The thesis that the EDCA is not subject to Senate concurrence because it is merely an implementing agreement of the Mutual Defense Treaty (MDT)³⁸ which was already concurred in by the Senate in 1951 is an attempt to circumvent the constitutional prohibition.³⁹ Whatever might be the imagined connection between the two agreements, it is verifiable from the text of EDCA itself that it falls within the constitutional prohibition as a treaty allowing “foreign military bases, troops, or facilities ... in the Philippines.”⁴⁰ The prohibition is not qualified by any means as to how the treaty is related to any existing international agreement.

Moreover, the special treatment of a treaty of one particular kind under Article XVIII, Section 25 of the Constitution is *lex specialis* that pertains only to the EDCA’s typology.⁴¹ This treatment of a treaty characterized as special, owing to its prohibitory context, cannot be equated with the status of the MDT as to its treatment under the treaty clause of the 1935 Constitution, which simply provided that “[t]he President shall have the power, with the concurrence of a majority of all the Members of the National Assembly, to make treaties[.]”⁴² Thus, the treaty clause by which the MDT was concurred in by the National Assembly in 1951⁴³ is *not* comparable to the treaty clause of the present Constitution, which requires the concurrence of “at least two-thirds of all Members of the Senate.”⁴⁴

Hence, being a treaty subject to the prohibitory context of Article XVIII, Section 25 of the Constitution, it becomes inevitable that EDCA must be specially governed by Senate concurrence as a condition for its

37. *Id.* at 483.

38. Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 177 U.N.T.S. 133.

39. Again, the Constitution provides that, “[a]fter 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[.]*” PHIL. CONST. art. XVIII, § 25 (emphasis supplied).

40. PHIL. CONST. art. XVIII, § 25.

41. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 483.

42. 1935 PHIL. CONST. art. VII, § 11 (7) (superseded 1973).

43. Mutual Defense Treaty, *supra* note 38.

44. PHIL. CONST. art. VII, § 21.

validity.⁴⁵ In the strict constitutional sense, this Senate concurrence of a special type is intended as a device to save the treaty in question from the constitutional prohibition.⁴⁶

II. EDCA AS A TREATY OF “FOREIGN MILITARY BASES, TROOPS, OR FACILITIES”

Unless embodied in a treaty “duly concurred in by the Senate,”⁴⁷ together with other requirements stipulated in Article XVIII, Section 25 of the Constitution, “foreign military bases, troops, or facilities” are not allowed or are prohibited in the Philippines.⁴⁸ By its own text, however, the EDCA provides for the emplacement or maintenance of military bases, troops, or facilities,⁴⁹ despite the prohibition.

It would appear that the EDCA is of the assumption that the constitutional prohibition pertains only to permanent military bases.⁵⁰ Thus, it affirms in its fifth preambular paragraph that “the Parties share an understanding for the [U.S.] not to establish a permanent military presence or base in the territory of the Philippines[.]”⁵¹

The understanding or intention of the state parties that the U.S. would not establish a “permanent military presence or base in the territory of the Philippines”⁵² cannot be read as precluding the infringement of the Constitution by the EDCA, for an objective analysis of its provisions may give rise, as it does, to the contrary conclusion or, at any rate, reveal that it is a prohibited treaty short of constitutional requisites.

Preliminarily, the said preambular paragraph may raise the issue as to what indeed is the nature of a permanent military base that is not intended to

45. Compare PHIL. CONST. art. XVIII, § 25, with PHIL. CONST. art. VII, § 21.

46. CIVIL CODE, art. 5.

47. PHIL. CONST. art. XVIII, § 25.

48. PHIL. CONST. art. XVIII, § 25.

49. See, e.g., EDCA, *supra* note 15, art. III, ¶¶ 1, 3, & 4; art. IV, ¶¶ 1 & 3-5; art. V, ¶ 3; art. VI, ¶¶ 1, 3, & 4; & art. VII.

50. Frances Mangosing, ‘EDCA will make PH the biggest US military base in the world,’ PHIL. DAILY INQ., Apr. 30, 2014, available at <http://globalnation.inquirer.net/103246/edca-will-make-make-ph-the-biggest-us-military-base-in-the-world/> (last accessed Sep. 30, 2014).

51. EDCA, *supra* note 15, pmb1.

52. *Id.*

be established by the U.S. under the EDCA. If, as stipulated in Article XII, paragraph 4 of the EDCA,⁵³ the totality of rights, control, authority, and jurisdiction of the U.S. military forces in all Agreed Locations together with the complex of structures and facilities, will have a duration of “*initial [10] years, and thereafter, [] shall continue in force automatically unless terminated,*”⁵⁴ then may such indefinite duration be taken as contradicting the claim that EDCA does not provide for the establishment or maintenance of “a permanent military presence or base?”⁵⁵

Nevertheless, resort to specific provisions of the EDCA shows no difficulty in proving that it embodies the forbidden “military bases, troops, or facilities,”⁵⁶ with the result that the Senate concurrence as an imperative comes into operation as a condition for its validity under the Constitution.⁵⁷ It is to be stressed that the prohibition covers as well the presence of military troops or of military facilities even in the absence of military bases.⁵⁸ But the text of the EDCA is so composed that the terms *military bases, troops, or facilities* in specific provisions are integrated or consolidated as *one unified presence* for operational purposes.⁵⁹

Article II, paragraph 4 of the EDCA defines the term “Agreed Location” as “facilities and areas that are provided by the Government of the Philippines through the AFP and that [U.S.] forces, [U.S.] contractors, and others as mutually agreed, *shall have the right to access and use* pursuant to this Agreement.”⁶⁰

In the Philippine territory, “Agreed Locations” are the areas designated by the EDCA where the “[U.S.] forces” are to be stationed.⁶¹ Article II, paragraph 2 of the EDCA defines “[U.S.] forces” as the “entity comprising

53. *Id.* art. XII, ¶ 4.

54. *Id.* (emphasis supplied).

55. *Id.* pmb.

56. *See* PHIL. CONST. art. XVIII, § 25.

57. PHIL. CONST. art. XVIII, § 25.

58. *Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 484-85.

59. *See* EDCA, *supra* note 15, art. II, ¶ 2; art. III, ¶¶ 1, 3, & 4; art. IV, ¶¶ 1 & 3-5; art. V, ¶ 3; art. VI, ¶¶ 1, 3, & 4; & art. VII. Notice how the EDCA uses the words, “United States forces,” as a unified term in various aspects amounting to maintenance of military presence in the Philippines by way of partnership with the Philippines through the use of the latter’s land and military resources.

60. *Id.* art. II, ¶ 4 (emphasis supplied).

61. *Id.*

[U.S.] personnel and all property, equipment, and materiel of the [U.S.] Armed Forces present in the territory of the Philippines.”⁶² Separately in paragraph 1 of the same Article, the EDCA defines the term “[U.S.] personnel” as “[U.S.] military and civilian personnel temporarily in the territory of the Philippines in connection with activities approved by the Philippines[.]”⁶³

Moreover, the “Agreed Locations,” as spelled out in Article III, paragraph 1 of the EDCA, are constituted as the base of operations of the

[U.S.] forces, [U.S.] contractors, and vehicles, vessels, and aircraft operated by or for the [U.S.] forces [which] 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.⁶⁴

By means of the artifice that the Philippine Government shall have given consent or authority under the EDCA, the U.S. Armed Forces possess extraordinarily vast and expansive rights and control in areas in the Philippine territory beyond the boundaries of the so-called Agreed Locations, as shown by the following provisions in Article III of the EDCA:

- (1) in paragraph 2, “transit or temporary access by [U.S.] forces to 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)[;]”⁶⁵
- (2) in paragraph 4, “operational control of Agreed Locations for construction activities and authority to undertake such activities on, and make alterations and improvements to, Agreed Locations.”⁶⁶ It is specified by the EDCA that these projects are to be “undertaken by or on behalf of [U.S.] forces[;]”⁶⁷ and

62. *Id.* art. II, ¶ 2.

63. *Id.* art. II, ¶ 1.

64. *Id.* art. III, ¶ 1.

65. EDCA, *supra* note 15, art. III, ¶ 2.

66. *Id.* art. III, ¶ 4.

67. *Id.*

- (3) under paragraph 5, the strict jurisdiction of the U.S. forces over Agreed Locations is emphasized by the requirement that even as these Agreed Locations are in Philippine territory, Philippine authorities are required by the EDCA to comply with “operational safety and security requirements” for them to have “access to the entire area of the Agreed Locations.”⁶⁸ This conveys the implication that even in its own territory, the EDCA imposes restriction on the Philippine Government in the exercise of its sovereign rights and jurisdiction — a restriction which all the more exposes the reality that it is brought about by the rights and jurisdiction of the U.S. in the form of its military presence as set forth in the EDCA.

Integral to the object and purpose of the EDCA in establishing and maintaining the presence of U.S. forces operating in Philippine territory are the following provisions that are closely related to Article III as mentioned above:

- (1) In Article IV of the EDCA, the U.S. forces have the authority “to preposition and store defense equipment, supplies, and materiel [] at Agreed Locations[,]”⁶⁹ on the condition that “the prepositioned materiel of [U.S.] forces *shall be for the exclusive use of [U.S.] forces*, and *full title* to all such equipment, supplies, and materiel *remains with the [U.S.]*”⁷⁰ and that the [U.S.] “shall have control over the access to and disposition of such prepositioned materiel [as well as] have the unencumbered right to remove such prepositioned materiel at any time *from the territory of the Philippines.*”⁷¹
- (2) In Article V of the EDCA, “[U.S.] forces 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 [U.S.] forces.*”⁷² Also, [U.S.] forces have the authority to construct

68. *Id.* art. III, ¶ 5.

69. *Id.* art. IV, ¶ 1.

70. *Id.* art. IV, ¶ 3 (emphasis supplied).

71. EDCA, *supra* note 15, art. IV, ¶ 3 (emphasis supplied).

72. *Id.* art. V, ¶ 3 (emphasis supplied).

permanent buildings in Agreed Locations, which “shall be used by [U.S.] forces *until no longer required* by [U.S.] forces.”⁷³

- (3) In Article VII, U.S. forces are granted the “use of water, electricity, and other public utilities on terms and conditions [] no less favorable than those available to the [Armed Forces of the Philippines (AFP)] or the Government of the Philippines in like circumstances.”⁷⁴
- (4) Lastly, as a necessary complement to its military presence in the Philippine territory, the EDCA authorizes the U.S. “to operate its own telecommunication systems ... [including] the right to utilize such means and services as required to ensure the full ability to operate telecommunication systems[.]”⁷⁵

Synthesizing the overall rights, authority, control, and jurisdiction of the U.S. is the EDCA provision which ensures that the “[U.S.] forces are authorized to exercise all rights and authorities within Agreed Locations that are necessary for their operational control or defense[.]”⁷⁶

Clearly, the totality of sovereign rights and power on the part of the U.S., as characterizing the nature of its military presence under the EDCA, makes the term “Agreed Locations” a euphemism for “military bases, troops, or facilities” as declared prohibited by Article XVIII, Section 25 of the Constitution.⁷⁷

III. THE QUESTION OF RECOGNIZING EDCA AS A TREATY

Despite the unconstitutional character of the EDCA as an instrument allowing the U.S. to establish and maintain its military presence in Philippine territory, the Philippine Government itself is disposed to avoid the concurrence of the Senate by proclaiming the EDCA, as it did, as an executive agreement instead.⁷⁸ By construing the EDCA as an executive

73. *Id.* art. V, ¶ 4 (emphasis supplied).

74. *Id.* art. VII, ¶ 1.

75. *Id.* art. VII, ¶ 2 (emphasis supplied).

76. *Id.* art. VI, ¶ 3.

77. PHIL. CONST. art. XVIII, § 25.

78. Department of Foreign Affairs, Frequently Asked Questions (FAQs) on the Enhanced Defense Cooperation Agreement, available at <http://www.dfa.gov.ph/index.php/2013-06-27-21-50-36/dfa-releases/2693-frequently-asked-questions-faqs-on-the-enhanced-defense-cooperation-agreement> (last accessed

agreement, and thereby escaping the constitutional prohibition, the U.S. is also given justification not to recognize the EDCA as a treaty as well.⁷⁹

It is likely that the Philippine posture to that effect grows out of the influence of the U.S. Government in that requiring the EDCA to be a treaty involves the difficulty of obtaining the advice and consent of the U.S. Senate, which has been described by U.S. policymakers themselves as the “graveyard of treaties.”⁸⁰ In the result, the Philippine Government is constrained to yield to the expediency of the U.S.

As it omits the requirement of ratification, Article XII, paragraph 1 of the EDCA⁸¹ may imply that the exchange of notes between the Parties forms the basis of EDCA’s entry into force and, hence, precludes both its concurrence by the Philippine Senate as well as the advice and consent of the U.S. Senate.⁸² This EDCA provision reads — “This Agreement shall enter into force on the date of the last note exchanged between the Parties, through diplomatic channels, *confirming the completion of all necessary internal procedures required for the entry into force thereof.*”⁸³

It appears that this procedural finality is intended by the Parties that, inherently, the EDCA is not to be considered as a treaty.

A. Culpability of the Philippine President

Sep. 30, 2014). See also Senate of the Philippines, Drilon: Treaty or agreement? Let SC decide on EDCA, available at https://www.senate.gov.ph/press_release/2014/0430_drilon1.asp (last accessed Sep. 30, 2014) & Paolo Miguel Q. Bernardo, *Edca: Treaty or executive agreement?*, PHIL. DAILY. INQ., Nov. 18, 2014, available at <http://globalnation.inquirer.net/114476/edca-treaty-or-executive-agreement/> (last accessed Sep. 30, 2014).

79. See Vince Alvic A.F. Nonato, *Senate to hold public hearing on deal allowing US troops on Philippine soil*, BUSINESS WORLD, Nov. 27, 2014, available at <http://www.bworldonline.com/content.php?section=Nation&title=senate-to-hold-public-hearing-on-deal-allowing-us-troops-on-philippine-soil&id=98712> (last accessed Sep. 30, 2014) & Carl Thayer, *Analyzing the US-Philippines Enhanced Defense Cooperation Agreement*, available at <http://thediplomat.com/2014/05/analyzing-the-us-philippines-enhanced-defense-cooperation-agreement/> (last accessed Sep. 30, 2014).

80. See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247, 248 (2012).

81. EDCA, *supra* note 15, art. XII, ¶ 1.

82. See *Commissioner of Customs*, 3 SCRA at 357.

83. EDCA, *supra* note 15, art. XII, ¶ 1 (emphasis supplied).

In concluding the EDCA, the following acts of the Executive are contrary to the mandate of the Constitution as such are in defiance of its prohibition in Article XVIII, Section 25 by:

- (1) allowing a foreign government to establish and maintain, military bases, troops, or facilities, or their combined military presence in Philippine territory absent a valid treaty providing for such;⁸⁴
- (2) avoiding Senate concurrence of EDCA, as required by the fundamental law;⁸⁵
- (3) entering into an agreement allowing foreign military presence in the Philippines in the absence of the other contracting Party recognizing EDCA as a treaty;⁸⁶
- (4) permitting a foreign government to use and exercise military activities in the bases and facilities of the AFP, in circumvention of the constitutional prohibition;⁸⁷
- (5) giving full powers to a cabinet member to sign, as he did, the EDCA, an agreement violative of the fundamental law;⁸⁸ and
- (6) exposing the Filipino people to the potential nuclear disaster arising from the presence of nuclear-armed U.S. naval and air force while in Philippine territory, taking into account that the Constitution outlaws such weapons.⁸⁹

84. PHIL. CONST. art. XVIII, § 25. *See also* Genalyn D. Kabling & Mario B. Casayuran, *EDCA may put PNoy in trouble*, MANILA BULL., Nov. 28, 2014, available at <http://www.mb.com.ph/edca-may-put-pnoy-in-trouble/> (last accessed Sep. 30, 2014).

85. *See* PHIL. CONST. art. XVIII, § 25.

86. PHIL. CONST. art. XVIII, § 25. *See Bayan (Bagong Alyansang Makabayan)*, 342 SCRA at 503-05 (J. Puno, dissenting opinion).

87. *See* PHIL. CONST. art. XVIII, § 25.

88. *See* Thayer, *supra* note 79.

89. InterAksyon.com, *Filipino scientists raise nuclear weapons alarm vs EDCA in 69th year of Nagasaki, Hiroshima bombings*, available at <http://www.interaksyon.com/article/92999/filipino-scientists-raise-nuclear-weapons-alarm-vs-edca-in-69th-year-of-nagasaki-hiroshima-bombings> (last accessed Sep. 30, 2014). *See* PHIL. CONST. art. II, § 8.

The foregoing acts may be deemed constitutive of “culpable violation of the Constitution” as a ground for impeachment under Article XI, Section 2 of the fundamental law;⁹⁰ as well as a breach of the President’s oath of office by which he solemnly swore to “preserve and defend the Constitution.”⁹¹

IV. EDCA AND THE MUTUAL DEFENSE TREATY

A. *Individual Self-Defense*

The EDCA relates itself to the MDT between the Philippines and the U.S. which entered into force on 27 August 1952.⁹² It conveys the understanding of the Parties that the EDCA is the implementing instrument of the MDT.⁹³

Built into paragraph 1, Article I of the EDCA is the purpose of the MDT in its Article II that “the Parties separately and jointly by self-help and mutual aid will maintain and develop their *individual and collective capacity to resist armed attack*[.]”⁹⁴ The operative provisions of this object and purpose are set forth in Articles IV and V of the MDT, as follows —

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.

...

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, on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels[,] or aircraft in the Pacific.⁹⁵

These provisions deal with the right of self-defense which is the response of the MDT to armed attack.⁹⁶ It is necessary to assess the MDT’s

90. PHIL. CONST. art. XI, § 2.

91. PHIL. CONST. art. VII, § 5.

92. Mutual Defense Treaty, *supra* note 38.

93. The DFA provides that the “EDCA is an agreement between the Philippines and the [U.S.] which is envisioned to advance the implementation of the PH-US [MDT].” Department of Foreign Affairs, *supra* note 78.

94. EDCA, *supra* note 15, art. I, ¶ 1 (emphasis supplied).

95. Mutual Defense Treaty, *supra* note 38, art. IV, ¶ 1 & art. V (emphasis supplied).

96. *Id.* pmb. & art. II.

conception of self-defense on the basis of Article 51 of the United Nations (U.N.) Charter which provides —

Nothing in the present Charter shall impair the inherent right of *individual or collective self-defense if an armed attack occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall immediately be reported to the Security Council[.]⁹⁷

In case of conflict, Article 51 acquires supremacy over the MDT, on account of Article 103 of the U.N. Charter which states that “[i]n the event of a conflict between the obligations of the Members of the [U.N.] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁹⁸

Except in case of self-defense under Article 51, the general prohibition in Article 2, paragraph 4, of the Charter applies against all States as the latter provides that, “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the [U.N.]”⁹⁹ Thus, this prohibition restricts the application of the right of self-defense.

Under Article 51, the right of self-defense may only be exercised as a response to an actual armed attack;¹⁰⁰ a deviation from this may be subject to the prohibition against the threat or use of force under the U.N. Charter.¹⁰¹

Thus, self-defense may only be applied by a State whose right against the illegal use of force has been violated.¹⁰² It pertains to a State reacting against the violation of its own right by the illegal conduct of another State.¹⁰³

97. U.N. Charter art. 51(emphasis supplied).

98. U.N. Charter art. 103.

99. *Id.* art. 2, ¶ (4).

100. See Daniel Bethlehem, *Principles Relevant to the Scope of a State's Right of Self-Defense Against an Imminent or Actual Armed Attack By Nonstate Actors*, 106 AM. J. INT'L L. 1, 2 (2012).

101. See U.N. Charter art. 2, ¶ (4).

102. See Case concerning Oil Platforms (Iran v. US), 2003 I.C.J. 4, 161, 181, & 190 (Nov. 6).

103. MALCOLM N. SHAW, INTERNATIONAL LAW 1131 (6th ed. 2008).

Summing up the nature and function of the right of self-defense under Article 51 of the U.N. Charter, Professor Hans Kelsen has observed that

Article 51 provides — for all practical purposes — the only exception of Article 2, paragraph 4. The effect of Article 51, however, is to limit the right of employing force in self-defense to the one case of a prior armed attack. The words ‘if an armed attack occurs’ are therefore deemed critical in determining the scope of self-defense afforded by Article 51 of the Charter and they are interpreted to forbid the taking of anticipatory measure of self-defense.¹⁰⁴

In this respect, Articles IV and V of the MDT radically depart from the right of self-defense as defined by Article 51. When the MDT provides in Article IV for “an armed attack [] on either of the Parties,”¹⁰⁵ it is understood to be dealing with an illegal attack against the Philippines and is deemed by the MDT as an attack against the U.S. at the same time.¹⁰⁶ When such illegal attack is directed against the U.S., the MDT is of the intent to consider the same attack as directed against the Philippines as well.¹⁰⁷

As a consequence, under Article V of the MDT, the Philippines will assume the right to exercise self-defense if the attack is against “the metropolitan territory [] or on the island territories”¹⁰⁸ of the U.S. in the Pacific or on the U.S. “armed forces, public vessel[,] or aircraft in the Pacific,”¹⁰⁹ even if such illegal attack is not directed against the Philippines, or, conversely, the U.S. will exercise the right of self-defense even if the illegal attack is not directed against itself but against the Philippines.¹¹⁰ This is the result of the MDT’s formula that an attack against one Party is an armed attack against the other, growing out of its textual composition of “armed attack on either of the Parties.”¹¹¹

In so far as the MDT’s conception of the right of self-defense is far in excess of what Article 51 allows, the supremacy of the U.N. Charter will

104. HANS KELSEN, *COLLECTIVE SECURITY UNDER INTERNATIONAL LAW* 62 (1957).

105. Mutual Defense Treaty, *supra* note 38, art. IV.

106. *Id.*

107. *Id.*

108. *Id.* art. V.

109. *Id.*

110. *Id.*

111. See Mutual Defense Treaty, *supra* note 38, arts. IV & V.

prevail on account of its Article 103.¹¹² In that case, the armed attack under the MDT falls within the general prohibition against the threat or use of force under Article 2, paragraph 4 of the U.N. Charter.¹¹³ In other words, an armed attack by the U.S., in the exercise of self-defense under the MDT as its reaction to an illegal use of force, not against itself, but directed against the Philippines, may constitute a violation of the U.N. Charter.¹¹⁴ Under Article 51, the U.S. cannot engage in self-defense as a reaction to a violation of a right which does not pertain to itself but, rather, to another state.¹¹⁵

The exercise of the right of self-defense under Article 51 operates under the aegis of the U.N. Security Council.¹¹⁶ Pursuant to both the U.N. Charter and the MDT, measures taken in the exercise of the right of self-defense “shall be immediately reported to the Security Council[.]”¹¹⁷ which has the authority “to take at any time such action as it deems necessary[.]”¹¹⁸ The moment the Security Council takes over the authority over the exercise of self-defense as a response to the illegal attack — that marks the end of the application of self-defense.¹¹⁹

The realities of power relations in the contemporary world have long ago shifted away from the object and purpose of the MDT when it was concluded in 1951. To begin with, the exercise of self-defense under the U.N. Charter is well subject to the relations of the permanent members and

112. Article 103 provides that “[i]n the event of a conflict between the obligations of the Members of the [U.N.] under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” U.N. Charter art. 103.

113. See U.N. Charter art. 2, ¶ (4).

114. *Id.*

115. *Id.* art. 51. *But see* SHAW, *supra* note 103, at 1147.

116. Article 24, ¶ (1) provides that “[i]n order to ensure prompt and effective action by the [U.N.], its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.” U.N. Charter art. 24, ¶ (1).

117. U.N. Charter art. 51. *See also* Mutual Defense Treaty, *supra* note 38, art. VI.

118. U.N. Charter art. 51.

119. Eric Myjer, *The Principle of Approximate Treaty Application*, in *EVOLVING PRINCIPLES OF INTERNATIONAL LAW: STUDIES IN HONOUR OF KAREL C. WELLENS* 56 (Eva Rietier & Henri de Waele eds., 2012).

their veto power,¹²⁰ particularly relations between the U.S. and China which are permanent members of the Security Council with the right of veto.¹²¹

At the time the MDT was concluded, it aimed at the Philippines as integral to the defense system of the U.S. against “communist aggression” vis-à-vis the victorious Chinese revolution and the Soviet Union at that time.¹²² The implicit premise of the MDT is that defense of the Philippines was no different from defense of the U.S. territory because its largest military bases were installed in the Philippines as a bulwark for containment of communism.¹²³

However, radical changes have swept away the object and purpose of the MDT. The Nixon Administration initiated diplomatic relations with China as early as 1972.¹²⁴ The U.S. now maintains limited military cooperation with China,¹²⁵ and confronts the prospect of the Chinese economy to be the largest in the world over and above that of the U.S. within the next five years.¹²⁶ The Soviet Union is but a memory after its implosion in 1990.¹²⁷ The major powers had long withdrawn from the

120. U.N. Charter art. 23. See also THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 (Vaughan Lowe et al. eds., 2010).

121. See Liselotte Odgaard, *Between Integration and Coexistence: US-Chinese Strategies of International Order*, 7 STRATEGIC STUD. Q. 3, 23-36 (2013).

122. See generally Edgardo E. Dagdag, *The Philippines and the Quest for Stable Peace in Southeast Asia: A Historical Overview*, 35 ASIAN STUD. 85 (1999).

123. See JOSE B. CAPINO, DREAM FACTORIES OF A FORMER COLONY: AMERICAN FANTASIES, PHILIPPINE CINEMA 37 (2010).

124. U.S. Department of State Office of the Historian, *Rapprochement with China 1972*, available at <https://history.state.gov/milestones/1969-1976/rapprochement-china> (last accessed Sep. 30, 2014).

125. Wang Dong, et al., *Resetting U.S.-China Relations*, N.Y. TIMES, Nov. 10, 2014, available at http://www.nytimes.com/2014/11/11/opinion/resetting-us-china-relations.html?_r=0 (last accessed Sep. 30, 2014).

126. Bloomberg News, *China Set to Overtake U.S. as Biggest Economy in PPP Measure*, available at <http://www.bloomberg.com/news/2014-04-30/china-set-to-overtake-u-s-as-biggest-economy-using-ppp-measure.html> (last accessed Sep. 30, 2014).

127. See U.S. Department of State Office of the Historian, *The Collapse of the Soviet Union*, available at <https://history.state.gov/milestones/1989-1992/collapse-soviet-union> (last accessed Sep. 30, 2014).

Southeast Asian Collective Defense Treaty¹²⁸ which the U.S. intended to be the regional collective self-defense as an extension of the MDT.¹²⁹ An example of such was the Southeast Asia Treaty Organization (SEATO) that grew out of it but died as early as the mid-1970s.¹³⁰ All this bears significance to the necessity of the termination of the MDT by the Philippines, on the ground of “fundamental change of circumstances” as set forth in Article 62 of the Vienna Convention on the Law of Treaties,¹³¹ i.e., “circumstances which [have] occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties[.]”¹³²

B. Collective Self-Defense

By way of implementing collective self-defense under Article 51, U.N. Members may organize collective defense arrangements based on agreements concluded for the purpose,¹³³ but subject to the prohibition against the threat or use of force under Article 2, paragraph 4 of the U.N. Charter.¹³⁴

It is in this respect that the U.S. initiated the conclusion of a Collective Defense Treaty with Australia, France, New Zealand, Pakistan, Philippines, Thailand, and the United Kingdom.¹³⁵ Under Article II of the Treaty, “the Parties, separately and jointly, [] will maintain and develop their individual and collective capacity to resist armed attack and to prevent and counter subversive activities directed from without against their territorial integrity and political stability.”¹³⁶

Forming part of the Southeast Asian Collective Defense Treaty, however, is the understanding of the U.S. that “its recognition of the effect of aggression and armed attack [applies] only to communist aggression[.]”¹³⁷

128. Southeast Asia Collective Defense Treaty, Feb. 19, 1955, 209 U.N.T.S. 28.

129. U.S. Department of State Office of the Historian, Southeast Asia Treaty Organization (SEATO), available at <http://history.state.gov/milestones/1953-1960/seato> (last accessed Sep. 30, 2014).

130. *Id.*

131. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 1155 U.N.T.S. 331.

132. *Id.* art. 62.

133. SHAW, *supra* note 103, at 1146.

134. U.N. Charter art. 2, ¶ (4).

135. Southeast Asia Collective Defense Treaty, *supra* note 128, art. II.

136. *Id.*

137. *Id.* Understanding of the United States of America.

But even as the SEATO, which grew out of the Collective Defense Treaty, was consigned to irrelevance, the MDT continues to be maintained by the U.S. Government as a means of controlling the defense and security policy of the Philippines; MDT has become an expansive vehicle of U.S. military presence, including its anti-terrorism campaign.¹³⁸ The MDT continues to be operative against an enemy that is long gone, as envisaged by the Parties at the time of its conclusion.¹³⁹ As a politico-legal frame of imperialist intervention, the MDT has turned its thrust from “communist aggression” to “war on terror.”¹⁴⁰

V. EDCA AND THE STRATEGIC GUIDANCE

The EDCA finds its reason for being as the implementing mechanism of the U.S. Department of Defense’s “new strategic guidance” intended “to articulate priorities for a 21st [c]entury defense that sustains U.S. global leadership”¹⁴¹ and that “will of necessity rebalance toward the Asia-Pacific region.”¹⁴² This Strategic Guidance pointedly expresses its military and defense rationale by providing what it refers to as the “Primary Missions of the U.S. Armed Forces.”¹⁴³ These primary missions will determine the activities of the U.S. forces in their military presence in the Philippine territory as they are applied and developed under the EDCA; they explain the purposes of the U.S. forces in their Agreed Locations in Philippine territory, thus:

- (1) In the mission that may be complementary to the MDT’s Article V,¹⁴⁴ the U.S. forces “will be capable of deterring and defeating aggression by any potential adversary[,]” with the aim “to impose unacceptable costs on the aggressor.”¹⁴⁵ More specific to EDCA, under the Strategic Guidance, “U.S. forces

138. See MANAGING NATIONALISM: UNITED STATES NATIONAL SECURITY COUNCIL DOCUMENTS ON THE PHILIPPINES, 1953–1960 35, 64, 130–38, 143, & 154 (Nick Cullather ed., 1992).

139. Dagdag, *supra* note 122.

140. See *Lim v. Executive Secretary*, 380 SCRA 739, 762 (2002).

141. Strategic Guidance, *supra* note 20, preface.

142. *Id.*

143. *Id.* at 4–6.

144. Mutual Defense Treaty, *supra* note 38, art. V.

145. Strategic Guidance, *supra* note 20, at 4.

will plan to operate whenever possible with allied and coalition forces[;]”¹⁴⁶

(2) the U.S. forces “must maintain [their] ability to project power in areas in which [their] access and freedom to operate are challenged.”¹⁴⁷ This power projection capability will include “electronic and cyber warfare, ballistic and cruise missiles, advanced air defenses, mining, and other methods[.]”¹⁴⁸ This mission gives a clearer view as to the weaponry and the methods of warfare that the U.S. air, naval, and ground forces will bring into the Agreed Locations in Philippine territory; and

(3) also, “the [U.S.] will maintain a safe, secure, and effective arsenal of [nuclear weapons].”¹⁴⁹ Further,

[the U.S.] will field nuclear forces that can[,] under any circumstances[,] confront an adversary with the prospect of unacceptable damage, [but i]t is possible that [the country’s] deterrence goals can be achieved with a smaller nuclear force, which would reduce the number of nuclear weapons in our inventory as well as their role in U.S. national security strategy.¹⁵⁰

That third mission corresponds to the question arising from the EDCA — “[w]ill the U.S. air and naval forces on rotational schedule in the Agreed Locations in the Philippines carry nuclear weapons?” The Strategic Guidance creates the presumption that the U.S. air and naval forces in rotational presence in Philippine territory would be nuclear-armed as a matter of military necessity on a regional scale, pursuant to their primary mission under the Strategic Guidance.¹⁵¹

It calls to mind that in the years of the U.S. Military Bases established in 1947 and throughout the Cold War period, the U.S. Government maintained the policy of “neither confirm nor deny” as to the presence of its nuclear weapons in Philippine territory.¹⁵² However, in September 2011 it

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 5.

150. *Id.*

151. Strategic Guidance, *supra* note 20, at 4-5.

152. See generally Robert E. White, *The Neither Confirm Nor Deny Policy Oppressive, Obstructive, and Obsolete (An Unpublished Working Paper for the Centre for Peace Studies)*, available at <http://www.disarmsecure.org/>

was disclosed that among the documents declassified by the U.S. State Department was one entitled, “Nuclear Weapons in the Philippines,” which indicated that nuclear weapons in the Philippines “have been there for many years.”¹⁵³

Expectedly, the U.S. will give assurances that no nuclear weapons are involved in the rotational presence of the U.S. forces in Philippine territory, as against the military-strategic necessity required by the Strategic Guidance.¹⁵⁴ But this, of course, will never be subject to verification, and, as in the past, Philippine negotiators are shut off from the question of nuclear weapons even as it pertains to the contravention of the policy in Article II, Section 8 of the Constitution that “[t]he Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.”¹⁵⁵

In connection with the EDCA, the Strategic Guidance has as the primary mission of U.S. Armed Forces the following — “U.S. forces will conduct a sustainable pace of presence operations abroad, including rotational deployments and bilateral and multilateral training exercises. These activities reinforce deterrence, help to build the capacity and competence of U.S., allied, and partner forces for internal and external defense, strengthen alliance cohesion, and increase U.S. influence.”¹⁵⁶

A. EDCA Spells Out the Primary Mission of the U.S. Armed Forces

Overall, the Strategic Guidance, starting with the EDCA in the Philippines and Australia as closely related to alliances with Japan and South Korea, appears to be a process of forming a regional network in the Asia-Pacific.¹⁵⁷ To this end, the Strategic Guidance provides that —

accordingly, while the U.S. military will continue to contribute to security globally, *we will of necessity rebalance toward the Asia-Pacific region.* Our

The%20Neither%20Confirm%20Nor%20Deny%20Policy%20Oppressive,%20Obstructive,%20and%20Obsolete.pdf (last accessed Sep. 30, 2014).

153. Jerry E. Esplanada, *US stored nukes in Philippines under Marcos–Bayan*, PHIL. DAILY INQ., Sep. 15, 2011, available at <http://newsinfo.inquirer.net/58985/us-stored-nukes-in-philippines-under-marcos%E2%80%93bayan> (last accessed Sep. 30, 2014).

154. Strategic Guidance, *supra* note 20, at 4–5.

155. PHIL. CONST. art. II, § 8.

156. Strategic Guidance, *supra* note 20, at 5.

157. *Id.* at 1–2.

relationships with Asian allies and key partners are critical to the future stability and growth of the region[.] ... We will also expand our networks of cooperation with emerging partners throughout the Asia-Pacific to ensure collective capability and capacity for securing common interests.

...

Over the long term, China's emergence as a regional power will have the potential to affect the U.S. economy and our security in variety of ways. Our two countries have a strong stake in peace and stability in East Asia[.] However, the growth of China's military power must be accompanied by greater clarity of its strategic intentions in order to avoid causing friction in the region[.]¹⁵⁸

B. EDCA and the Operational Concept of the Strategic Guidance in "Pivot Asia"

Integral to the operation of the Strategic Guidance is what the U.S. calls its "pivot to Asia,"¹⁵⁹ in which the EDCA becomes the participatory basis for the Philippines in the mobilization of U.S. forces in Asia-Pacific. Informed sources featured by the Washington Post on 25 March 2012 show a map of Southeast Asia depicting areas of operation of the U.S. forces, including rotational deployment of U.S. Marines, enhanced ship visits, bases for surveillance aircraft in the Philippines, and plans to locate in Singapore four U.S. Navy littoral combat ships.¹⁶⁰ This is in addition to the announcement of President Obama to the Australian Parliament in November 2011 as to the rotational presence of 2,500 U.S. marines in Darwin, Australia.¹⁶¹

On account of the EDCA, the Philippines would be directly involved in the increased deployment of U.S. Navy to Asia. In fact, U.S. Secretary of Defense Leon E. Panetta revealed that "by 2020 the [U.S.] Navy will re-

158. *Id.* at 2.

159. Reid Lidow, Obama in Asia: Rebalancing the Pivot, *available at* <http://thediplomat.com/2014/11/obama-in-asia-rebalancing-the-pivot/> (last accessed Sep. 30, 2014).

160. Laris Karklis, U.S. military expansion in Southeast Asia, *available at* http://www.washingtonpost.com/world/national-security/2012/03/25/gIQASFQXaS_graphic.html (last accessed Sep. 30, 2014).

161. Alison Rourke & Jonathan Watts, *China uneasy over US troop deal in Australia*, THE GUARDIAN, Nov. 16, 2011, *available at* <http://www.theguardian.com/world/2011/nov/16/china-us-troops-australia> (last accessed Sep. 30, 2014).

posture its forces from today's roughly 50/50 percent split between the Pacific and the Atlantic to about 60/40 split between those oceans."¹⁶²

The Strategic Guidance deals as well with the evaluation of China's military power under the heading "Project Power Despite Anti-Access/Area Denial Challenges."¹⁶³ In this respect, the Strategic Guidance acquires focus on China, particularly in the implementation of the AirSea Battle (ASB) as operational concept.¹⁶⁴

The ASB, in fact, has elicited an analysis in the *Yale Journal of International Affairs*, which was provocatively entitled, *Who Authorized Preparations for War with China?*¹⁶⁵ In that article, the ASB Project was argued as implicitly consisting of preparations for war with China.¹⁶⁶ The U.S. Secretary of Defense gave instruction to the Chief of Staff to develop the ASB project.¹⁶⁷ The article details that

in September of 2009, [U.S.] Air Force Chief of Staff [General] Norton Schwartz and Chief of Naval Operations [Admiral] Gary Roughead signed a classified Memorandum of Agreement endorsing the [ASB project.] ... In late 2011, Gate's successor, Secretary of Defense Leon Panetta, also signed off on the ASB and formed the new Multi-Service Office to Advance AirSea Battle. Thus, ASB was conceived, born, and began to grow.¹⁶⁸

Quoting U.S. defense sources, Amitai Etzioni further reports that

[ASB] is already beginning to shape acquisition decisions. General Schwartz writes that, "[t]he first steps to implement [ASB] area already underway here at the Pentagon. In our [Fiscal Year] 2012 and [Fiscal Year] 2013 budgets

162. Leon E. Panetta, U.S. Secretary of Defense, Remarks at the Shangri-La Security Dialogue at the Shangri-La Hotel, Singapore (June 2, 2012) (transcript available at <http://www.defense.gov/speeches/speech.aspx?speechid=1681> (last accessed Sep. 30, 2014)).

163. Strategic Guidance, *supra* note 20, at 4.

164. See generally Air-Sea Battle Office, Air-Sea Battle: Service Collaboration to Address Anti-Access & Area Denial Challenges (An Unclassified Summary of the Air-Sea Battle Concept by the U.S. Department of Defense), available at <http://www.defense.gov/pubs/asb-ConceptImplementation-Summary-May-2013.pdf> (last accessed Sep. 30, 2014).

165. Amitai Etzioni, *Who Authorized Preparations for War with China?*, 8 *YALE J. INT'L AFF.* 37 (2013).

166. *Id.* at 48-49.

167. *Id.* at 39.

168. *Id.*

we increased investment in the systems and capabilities we need to defeat access threats.’ Admiral [Jonathan William] Greenert points to investments in anti-submarine warfare, electronic warfare, air and missile defense, and information sharing[.]

...

Indeed, as far as one can determine, the Pentagon decided to embrace the ASB concept over alternative ways for sustaining U.S. military power in the region that are far less likely to lead to escalation.¹⁶⁹

VI. STATE RESPONSIBILITY

In international law, a State is subject to responsibility if it is in breach of obligation arising from customary law or treaty rule;¹⁷⁰ such a breach constitutes an internationally wrongful conduct which gives rise to the duty to make reparation.¹⁷¹ Nothing in the EDCA makes mention of any means by which the Philippines has the right to exercise control over the conduct of naval and air forces of the U.S. in operations, as they use the AFP bases or Philippine territory in Agreed Locations. Yet, U.S. forces on rotational presence in Philippine territory are necessarily equipped or armed for offensive purposes.¹⁷² Power projection of these forces has demonstrated that they could commit acts of aggression, threats to peace, or acts in contravention of the prohibition against the threat or use of force under paragraph 4, Article 2 of the U.N. Charter.¹⁷³ Would this mean therefore that the Philippines will also be engaged in state responsibility?

In “Definition of Aggression,” (Definition) which the U.N. General Assembly adopted in Resolution 3314 (XXXIX) on 14 December 1974,¹⁷⁴ the term means “the use of armed force by a State against the sovereignty, territorial integrity[,], or political independence of another State, or in any

169. *Id.* at 41-42.

170. Articles on State Responsibility, art. 1, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

171. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 78 (2002).

172. *See generally* Strategic Guidance, *supra* note 20.

173. *See generally* Air-Sea Battle Office, *supra* note 164 & U.N. Charter art. 2, ¶ (4).

174. Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. Doc. A/RES/3314 (Dec. 14, 1974).

manner inconsistent with the Charter of the [U.N.]”¹⁷⁵ In particular, under Article 3, paragraph (f) of the Definition, there is also an act of aggression when “[t]he action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that State for perpetrating an act of aggression against a third State[.]”¹⁷⁶

Note that although yet inoperative, the “crime of aggression” as provided in Article 8 of the Rome Statute of the International Criminal Court¹⁷⁷ incorporates the foregoing act of aggression.¹⁷⁸ It is thus reckless to consign Philippine territory to the uncontrolled military operations of another State that may constitute aggression.

VII. CONCLUDING STATEMENT

The real nature and function of the EDCA is revealed in the context of the Strategic Guidance by which the Philippines is to be made into a war machine of the U.S. It is in the same context that the Philippines is brought into involvement in the U.S. Asia-Pacific regional security plans.

Beyond the constitutional issues, the totalizing impact of the Philippine integration into the Strategic Guidance would generate leverages on the part of the U.S., weighing upon the country’s economic and political life. The EDCA thus becomes the legal instrumentality whereby the Philippines implants the Strategic Guidance as its own defense-security policy, with formal affirmation as an integral accessory of the Pentagon.

The EDCA has also been argued as a necessity in the face of China’s intransigence as to its territorial claims against the Philippines. Ironically though, it is posited that it was the very intervention of the U.S. that exacerbated the tension between the claimants in the West Philippine Sea, and which created the need on the part of the Philippines to hang on to Pentagon’s apron strings. Hence, the increased military presence of the U.S. in the Philippines is the result of its manipulations of the Philippine-Chinese territorial dispute, toward the inter-connection of the Philippines with the “primary missions” of the U.S. forces under the Strategic Guidance.

175. *Id.* art. 1.

176. *Id.* art. 3, ¶ (f).

177. Rome Statute of the International Criminal Court art. 8, July 1, 2002, 2187 U.N.T.S. 90.

178. *Id.*

At any rate, the intervention of a third party in a bilateral territorial claim may preclude the application of the fundamental principle in international dispute settlement that the parties to the dispute shall have the means of settlement of their own choice.¹⁷⁹

In the end, the U.S. has the EDCA in place and sealed the integration of the Philippines under the Strategic Guidance as a major step toward the containment of China. As the U.S. goes into increased confrontation with the growing strength of China, the Philippines, as an American outpost, would be swept into armed antagonism with China not as an “independent force,” but as an auxiliary contingent of Pentagon’s AirSea Battle versus China’s anti-AirSea Battle.

179. U.N. Charter art. 33, ¶ (1).