

BALIKATAN NO MORE? SOFAS AND INTERNATIONAL LAW IN LIGHT OF THE TERMINATION OF THE UNITED STATES- PHILIPPINE VISITING FORCES AGREEMENT

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On February 11, 2020, President Duterte announced the termination of the U.S.-Philippines Visiting Forces Agreement (VFA), the bilateral status of forces agreement concerning U.S. personnel in the Philippines. President Duterte subsequently suspended termination, but the catalyzing domestic and international forces that drove termination remain. In light of this potential for upheaval in a decades-long regional security partnership, this Article identifies the complex history of the U.S.-Philippine defense relationship, contextualizes the VFA within international law, considers the origins of demands within the Philippines for termination, and explores the legal impact of VFA termination on the network of bilateral defense agreements between the U.S. and the Philippines, especially the long-standing Mutual Defense Treaty and recent Enhanced Defense Cooperation Agreement.

I. NARROWLY AVOIDING DISASTER: CHANGING THE WORLD IN 180 DAYS

A clock started ticking on February 11, 2020. That clock ticked quietly as the world focused on understanding and responding to the spread of a novel coronavirus. The looming 180-day deadline would bring legal rather than medical challenges to the rules-based world order, but would nonetheless disrupt business as usual and potentially impact the United States' strategic position in the Pacific for generations.

On February 11, 2020, the government of Philippine President Rodrigo Duterte, a strident critic of U.S. involvement in the Philippines, announced via Twitter that he was exercising the termination clause of the Visiting Forces Agreement (VFA),¹ which governs the status of United States armed forces visiting the Philippines on matters including customs, immigration, and criminal jurisdiction.² Under the VFA, either party can terminate the agreement by providing notice of intent to terminate, which becomes effective after 180 days. While the VFA's termination clause appears clear, the consequences of termination for U.S. forces and existing international agreements between the Philippines and the United States under international law would be significantly less so. The VFA is among a class of agreements known as status of forces agreements (SOFA). Since 1998, the VFA has provided the legal framework for U.S.-Philippine military cooperation and, more generally, reinforced an important regional partnership. Moreover, the VFA is one of a series of mutually reinforcing

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¹ Agreement Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998, T.I.A.S. No. 12931 [hereinafter Visiting Forces Agreement].

² Andrew Yeo, *President Duterte Wants to Scrap a Philippines-U.S. Military Agreement. This Could Mean Trouble*, WASH. POST (Feb. 13, 2020), <https://wapo.st/3gJW6Ha>.

agreements between the U.S. and the Philippines, including the Mutual Defense Treaty (MDT)³ and Enhanced Defense Cooperation Agreement (EDCA),⁴ that enables a strategic military partnership in the region to the benefit of both parties.

Fortunately, President Duterte agreed to suspend the termination for now, but a “suspended termination” is a far cry from a fully restored security partnership.⁵ The very real threat of termination provides an inflection point for both parties to consider what is at stake, both in terms of the VFA itself and the broader relationship between the U.S. and the Philippines. The current impasse between the U.S. and a key ally in the Pacific is a familiar one, though perhaps both the stakes and obstacles are greater than at any time since the end of the Cold War. At issue are decades-old legal arguments, concerns over regional stability, and the Philippines’ evolution as a post-colonial sovereign state. While many echoes of the past can be found in the current debate over the VFA, key differences also exist; namely, an already-resurgent China actively encroaching in the South China Sea and a Philippine President seemingly willing to roll the dice with his country’s defense partnerships with no apparent replacement plan in place. The uncertainty surrounding the VFA is only one part of the larger challenges to the rule of law and the U.S. strategic position in the region. In this moment of suspended termination, U.S. leaders should revisit the importance of the Philippines as a partner.

This Article will briefly discuss the history of visiting forces agreements between the Philippines and United States. Section two will first look at the complicated history of U.S. forces in the Philippines, then place visiting forces agreements in a larger context of international law, and finally discuss the implications of the current impasse between the two states on both the legal and geopolitical order of the region. After highlighting the importance of the VFA, section three will discuss the forces at play in the Philippines’ move to withdraw. Finally, section four will discuss the legal implications of President Duterte’s threatened withdrawal and then analyze the effect a potential withdrawal from the VFA would have on the MDT and EDCA by applying customary international law principles found in the Vienna Convention on the Law of Treaties (VCLT).

II. COLONIALISM, INTERDEPENDENCE, AND NEGOTIATION: BALANCING SOVEREIGNTY AND SECURITY INTERESTS THROUGH SOFAS

A. *A Brief History of the U.S.-Philippine Security Relationship and Visiting U.S. Forces*

The U.S. and Philippines held the 35th annual Balikatan military exercise in 2019, marking almost four decades of military cooperation.⁶

³ Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 U.S.T. 3947 [hereinafter Mutual Defense Treaty].

⁴ Enhanced Defense Cooperation Agreement, Phil.-U.S., Apr. 28, 2014, as amended April 13, 2016, T.I.A.S. 16-413.1, <https://bit.ly/2XN3XwV>. In addition, a reciprocal agreement regarding the treatment of Philippine forces visiting the U.S. will be discussed later in this Article. See Agreement Regarding the Treatment of Philippines Personnel Visiting the US, Phil.-U.S., Oct. 8, 1998, T.I.A.S. 12931, <https://bit.ly/2XOWsp1>; see also *infra* note 104 and accompanying text.

⁵ See, e.g., Alyssa Rola, *Defense Chief Cites COVID-19 Pandemic, Need For International Cooperation in PH Decision to Suspend VFA Termination*, CNN PHIL. (June 3, 2020), <https://bit.ly/38KE3xQ>; Paolo Romero, *Senators Still Want VFA Review*, THE PHILIPPINE STAR (June 4, 2020), <https://bit.ly/2ZkmjWZ>.

⁶ *Balikatan* means “shoulder-to-shoulder” in Tagalog or, as phrased by the Chief of Staff of the Armed Forces of the Philippines when discussing Balikatan 2019, “carrying the load together on our shoulder, however heavy the load, however huge the obstacle, and whatever the cost.” Priam Nepomuceno,

However, the historical relationship between the U.S. and the Philippines complicates the present security and political relationships between the two countries. A 48-year period of American colonization began in 1898, after the Spanish ceded the territory at the end of the Spanish-American War.⁷ The year after the Philippines gained independence, the issue of continued U.S. military presence came to the forefront during the negotiation of the 1947 Military Bases Agreement.⁸ Negotiations over military basing took place concurrently with discussions about trade and U.S. financial and military assistance to the newly-independent state.⁹ The final Military Bases Agreement contained a version of a SOFA.¹⁰ The agreement provided the U.S. with extensive jurisdiction over its own servicemembers, allowing the U.S. military, as opposed to the Philippine government, to prosecute U.S. servicemembers who committed crimes within the Philippines.¹¹ Four years later, the two countries signed the 1951 Mutual Defense Treaty which, along with the 1947 Military Bases Agreement, established Subic Bay as the largest naval facility in the world during the Cold War and facilitated the presence of U.S. forces in the Philippines for decades.¹² Jurisdictional provisions remained a source of tension in the years that followed, however, leading to a new SOFA in 1965 that repealed a number of the controversial jurisdictional provisions, including distinctions between on-base and off-base crimes.¹³

While other agreements and amendments have been made between the U.S. and the Philippines regarding visiting forces since the 1947 agreement, the modern VFA has functioned as a SOFA for U.S. armed forces personnel stationed in the Philippines since 1998, providing clarity and predictability in the relationship between the sending and receiving states. The agreement outlines a rubric of both exclusive and concurrent jurisdiction for the parties.¹⁴ It draws from the North Atlantic Treaty Organization (NATO) SOFA model, giving the Philippines primary jurisdiction over U.S. personnel who commit offenses in the Philippines punishable under Philippine law, but giving the U.S. authority to keep physical custody of an accused until completion of all judicial proceedings.¹⁵ Similar compromises, balancing the strategic interests of both states, are also reflected in the VFA, EDCA, and the MDT. For example, while the agreements grant the U.S. an important strategic position in the Pacific, the VFA benefits the Philippines in tangible ways, such as facilitating U.S. assistance to the Philippines

⁷ 'Balikatan' Highlights Historic PH-US Military Ties, PHILIPPINE NEWS AGENCY (Apr. 1, 2019), <https://bit.ly/3gmM6E5>. The 2020 iteration of Balikatan was cancelled due to COVID-19. Press Release, U.S. Indo-Pacific Command, U.S. Indo-Pacific Command Cancels Balikatan 2020 (Mar. 26, 2020), <https://bit.ly/31ds74i>.

⁸ *The Philippines, 1898-1946*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, <https://bit.ly/2XijB37> (last visited Aug. 1, 2020).

⁹ Rafael A. Porrata-Doria Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 74 (1992). The SOFA was controversial at the time of its negotiation, as it provided U.S. military basing privileges at 16 locations, rights to use the adjacent territorial air and water space, and expansive criminal jurisdiction modeled on the NATO SOFA, giving the U.S. jurisdiction to certain offenses off base and nearly exclusive jurisdiction on base. An amendment later gave the Philippines jurisdiction over most offenses committed off base. *Id.*

¹⁰ *Id.*

¹¹ See Agreement Concerning Military Bases, Phil.-U.S., Mar. 14, 1947, 61 Stat. 4019.

¹² *Id.* art. XIII ¶¶ 1(b)(c), 4(a). The U.S. had near-exclusive jurisdiction of all crimes committed on military bases and those crimes committed off base in which both the victim and the perpetrator were members of the U.S. forces.

¹³ Peter G. Strasser, *A Marine's Murder Trial and the Drug War: The "Delicate Balance" of Criminal Justice in the Philippines*, 14 U. PA. ASIAN L. REV. 158, 174 (2019).

¹⁴ See Agreement on Military Bases in the Philippines: Criminal Jurisdiction Arrangements, U.S.-Phil., Aug. 10, 1965, 16 U.S.T. 1090.

¹⁵ Porrata-Doria Jr., *supra* note 8, at 76.

¹⁶ Visiting Forces Agreement, *supra* note 1, art. 5.

during the Haiyan super typhoon in 2013, when the U.S. provided extensive and timely humanitarian assistance and disaster relief operations, deploying 13,400 troops, 66 aircraft, an aircraft carrier, and a whole host of other military assets.¹⁶

B. The Philippine Agreements in Context

The VFA sits within a body of law that helps states meet their larger strategic aims by negotiating the limits of the exercise of sovereignty in relation to other states. While the definition of sovereignty can vary, customary international law supports broad and absolute control over state affairs. A state may voluntarily waive portions of exclusive territorial jurisdiction over visiting forces.¹⁷ In this way, SOFAs are a unique instrument in international law. For example, under customary international law sovereign states generally have jurisdiction over crimes committed in their territory.¹⁸ The practice of waiving the underlying principles regarding jurisdiction arose in the context of visiting warships. The U.S. Supreme Court commented as early as 1812, that “a sovereign is understood to cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominions By exercising it, the purpose for which the free passage was granted would be defeated”¹⁹ Modern states negotiate this waiver of jurisdiction, and the resulting relationship between the two states, through SOFAs.²⁰

The negotiated immunity of foreign armed forces is considered essential for forces stationed on foreign territory, making SOFAs critical to strategic goals of States with overseas military interests.²¹ From the perspective of the sending state, retaining jurisdiction over servicemembers is critical for maintaining good order and discipline. The U.S., like any other state, seeks to maximize its foreign criminal jurisdiction over troops deployed overseas.²² In the case of the Philippines, the agreements were negotiated as the number of U.S. servicemembers stationed around the globe grew substantially in the years after World War II. SOFAs, VFAs, and other such arrangements became critical not only to foster predictable criminal jurisdiction, but also to ensure quality of life issues such as the ability to secure housing or a driver’s license. Favorable SOFA terms on jurisdiction and quality of life issues are especially significant to the U.S., whose armed forces personnel, often with family members and a civilian workforce in tow, are stationed in and transiting through countries around the world in both temporary and long-term assignments.

Given their importance, states seek to negotiate favorable terms in SOFAs, and the 1965 U.S.-Philippine SOFA was no exception. The 1965 agreement repealed some of the more controversial provisions in the Military

¹⁶ Richard Heydarian, *Philippines Risks Danger by Abruptly Terminating US Defense Agreement*, NIKKEI ASIAN REV. (Feb. 27, 2020), <https://s.nikkei.com/2Zk6G1Z>.

¹⁷ Porrata-Doria Jr., *supra* note 8, at 86.

¹⁸ See Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994).

¹⁹ *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 139 (1812).

²⁰ Porrata-Doria, Jr., *supra* note 8, at 86.

²¹ THE HANDBOOK OF THE LAW OF VISITING FORCES 3 (Dieter Fleck ed., Oxford Univ. Press 2d ed. 2018).

²² See Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say “No,”* 40 A.F. L. REV. 1, 8 (1996). The U.S. Department of Defense has reason to be concerned about criminal jurisdiction in the Philippines in particular. The U.S. Embassy warns that “[e]xperience has shown that arrests and trials in the Philippines are often unpredictable. Significant deviations from prescribed procedures do occur, arrestees are often not given clear information about procedures and charges, and allegations of corruption are common.” U.S. Citizen Serv., *Arrest of a U.S. Citizen, U.S. Embassy in the Philippines*, U.S. EMBASSY IN THE PHIL., <https://bit.ly/2XnzogV> (last visited Aug. 2, 2020).

Bases Act, but retained many favorable terms for the United States. The agreement had a renewal requirement and was due to expire in 1991. Though the leaders of the two states signed an extension of the agreement, the Philippine Senate failed to ratify an extension or a replacement that would protect U.S. forces in the Philippines.²³ One of the main arguments against ratification centered around Philippine sovereignty in the light of the history of U.S. colonialism in that country.²⁴ Philippine Senator Agapito Aquino, in a speech on the Senate floor, argued that a vote against renewal “is a vote for a truly sovereign and independent Philippine nation. It is a vote to end a political adolescence tied to the purse strings of America—a truly crippling dependence.”²⁵

When ratification failed, it ended U.S. control of two of the most strategic locations in the Pacific: Clark Air Force Base and Subic Bay Naval Base, located just north of Manila. Both locations had been leased to the U.S. since 1946.²⁶ The loss of the bases meant the loss of critical logistical capacity for supplies, repairs, and staging services that had sustained efforts in Korea, Vietnam, and even the Gulf War.²⁷ However, increasingly aggressive behavior by the Chinese in the South China Sea near Philippine-controlled reefs in the 1990s eventually led Philippine political leaders to renegotiate the U.S. presence in the country. Eventually, those negotiations led to the 1998 VFA.²⁸

C. *A New Cycle of the U.S.-Philippine Security Relationship*

History appears to be repeating itself, though perhaps with higher stakes and uncertainty. The current rift between the U.S. and the Philippines carries refrains of the movement for greater independence and empowerment that led the Philippine Senate to refuse to ratify an extension to the SOFA in 1991. Withdrawal from the VFA is consistent with President Duterte’s position on the U.S., including general antipathy regarding the value of the alliance and concern over U.S. interference in the internal affairs of the Philippines.²⁹ Philippine sovereignty is a recurring theme in the discussions of Philippine leaders on the VFA, and Presidential spokesperson, Salvador Panelo, even explained the withdrawal by saying, the “VFA was terminated because [Duterte] does not want, as a matter of principle, interference with or attacks against our sovereignty.”³⁰

A growing economy, improving bilateral relations with China, and declining worries over a communist insurgency are empowering Duterte to move the country away from its long-standing reliance on the United States.³¹ In a 2016 meeting in Beijing, President Duterte said, “I want, maybe in the next two years,

²³ Porrata-Doria, Jr., *supra* note 8, at 86.

²⁴ *Id.* at 74.

²⁵ Philip Shenon, *Philippine Senate Votes to Reject US Base Renewal*, N.Y. TIMES (Sept. 16, 1991), <https://nyti.ms/38N3oqV> (quoting Senator Agapito Aquino).

²⁶ Strasser, *supra* note 12, at 173.

²⁷ For a short history of the Philippine bases, see James A. Gregor, *The Key Role of U.S. Bases in the Philippines*, HERITAGE FOUND. BACKGROUNDER (Jan. 19, 1984), <https://bit.ly/3ir4qwl>.

²⁸ See *Visiting Forces Agreement*, *supra* note 1.

²⁹ Ian Storey, *US-Philippine Alliance Facing Major Stress Test*, THE STRAITS TIMES (Feb. 14, 2020), <https://bit.ly/3fkb32p>. Some examples of U.S. intervention include supporting an anti-insurgency campaign in the 1950s and Ferdinand Marcos in the 1970s, which sparked anti-basing sentiment throughout the 1980s.

³⁰ Alexis Romero, *No New Defense Deal with US, Says Palace*, PHILIPPINE STAR (Mar. 2, 2020), <https://bit.ly/2ZhUv5C>.

³¹ Aileen Baviera, Opinion, *The Philippines Moving to Active Middle Power Diplomacy*, PRESENZA INT’L PRESS AGENCY (Apr. 8, 2020), <https://bit.ly/2Wb9iNE>.

my country free of the presence of foreign military troops. I want them out.”³² While recent economic concerns may have affected the decision to suspend termination, strategic partnerships benefit more from stability than do markets.³³ Moreover, concerns that SOFAs create the perception that a state cannot provide for its own defense and is dependent on another state for protection have dominated Philippine rhetoric.³⁴ Panelo, when discussing the reasons for withdrawal, argued the VFA “has been disadvantageous to us, plus the fact that our country believes we have to stand on our own as a country. We can’t always rely on other countries for our defense.”³⁵ Just as politicians in 2020 echo their predecessors from the 1990s, legal scholarship from the 1990s is salient anew, as one law review author argued:

The renegotiation of the Philippine Bases and Status of Forces Agreement proved to be an extremely difficult endeavor. To begin with, the current Agreement was a somewhat unusual one and always has remained highly controversial in the Philippines. Furthermore, these negotiations commenced at a time when many of the strategic assumptions upon which the United States based its presence in the Philippines have changed drastically and when the United States was struggling to deal with a budget deficit. At the same time, the Philippines was undergoing a period of severe political and economic stress and turmoil. Not surprisingly, almost every word of the current Agreement appeared to be in controversy.³⁶

Despite these challenges, the VFA was negotiated just a few years later, and there have been several other indicators of the importance of the U.S.-Philippines strategic partnership. One key agreement has been the 2014 Enhanced Defense Cooperation Agreement (EDCA), a ten-year defense agreement that allows the United States to access and use designated areas controlled by the Armed Forces of the Philippines, in support of the larger Mutual Defense Treaty (MDT) framework.³⁷ In 2018, the first EDCA warehousing project began and the Department of National Defense Secretary, Delfin Lorenzana, argued,

EDCA is a demonstration that our two nations are interested to long term solutions to shared problems. . . . The prepositioning of equipment and supplies in a consolidated location increases our ability to respond quickly. Hence, it is the Filipino community that will ultimately benefit from this project which is not only a testament to our countries’ commitment to having a stronger alliance, but also to our desire to help one another grow capabilities together.³⁸

³² Adam Taylor, *The Philippines’ Duterte Is Trying to Trump Trump*, WASH. POST (Feb. 13, 2020), <https://wapo.st/2AULne0> (quoting President Duterte).

³³ Maria Siow, *Philippines’ Move to Keep US Military Pact Reveals Shift in South China Sea Calculations*, S. CHINA MORNING POST (June 6, 2020), <https://bit.ly/3ekgMUL>.

³⁴ Porrata-Doria, Jr., *supra* note 8, at 87.

³⁵ Romero, *supra* note 30.

³⁶ See Porrata-Doria, Jr., *supra* note 8, at 101.

³⁷ Frances Mangosing & Matikas Santos, *What Is the Enhanced Defense Cooperation Agreement and what does it Mean for PH?*, PHIL. DAILY INQUIRER (Apr. 28, 2014), <https://bit.ly/2ZknG8j>.

³⁸ Priam Nepomuceno, *EDCA to Allow PH, US to Respond to Regional Security Challenges*, PHIL. NEWS SERV. (Apr. 18, 2018), <https://bit.ly/2Zmj2GW>.

As the Secretary indicates, being positioned, with both people and logistical supplies, enables States interested in maintaining rule of law to respond to security challenges quickly, hopefully minimizing escalation.

The historical relationship of the U.S. and the Philippines adds a layer of complexity to the negotiations between the two countries, but the underlying issues can also impact U.S. relations with other regional allies, such as Vietnam, Singapore, Japan, and South Korea. The U.S. “pivot to Asia” and subsequent regional policy of “rebalance”³⁹ highlight the significance of the Asia-Pacific region to U.S. security interests, and U.S. presence in the region not only reassures partners but reinforces those strategic relationships. Many countries in the western Pacific, in addition to the Philippines, have expressed concerns over China’s increasing military strength and excessive maritime claims, leading them to look to the U.S. for the regional leadership exercised in the 1990s.⁴⁰ Recent actions during the pandemic in the South China Sea have brought advances of anti-submarine warfare and reconnaissance aircraft to the Spratly Islands as well as the creation of two “administrative districts” in the disputed Paracel Islands, areas of interest for many claimants in the region.⁴¹ At the same time, Beijing has attempted to employ soft power through development grants and has courted leaders like President Duterte in an effort to establish regional supremacy. The suspension of VFA termination is seen by some as a strategic loss for China, one that demonstrates that countries in the region wish to retain a counterbalance to China’s agenda.⁴² Other Association of Southeast Asian States (ASEAN) states may be watching the VFA as an indicator of U.S. commitment to a Pacific free from Chinese domination.

III. STRATEGY IN A MULTIPOLAR WORLD: TERMINATION AS A TOOL OF NEGOTIATION

President Duterte’s decision to terminate and then suspend termination reflects the complicated political and strategic impacts of the VFA. Without the VFA’s legal protections, the U.S. would likely suspend most defense cooperation activities with the Philippines, thereby undermining strategic initiatives such as the Free and Open Indo-Pacific policy.⁴³ The VFA’s significance exceeds its strict terms regarding the movement of U.S. personnel in the Philippines; it provides a means through which the U.S. can support its other mutual defense obligations in the region through the positioning of forces and logistical supplies, promoting peace and stability.⁴⁴ Termination, especially if abrupt and without replacement, may embolden China, whose encroachment in the South China Sea ultimately threatens Philippine interests and regional security, much as it did in the 1990s. Such concerns mean the decision to withdraw from the VFA was not met with universal praise in the Philippines, or even within the Duterte administration. Foreign Secretary Teodoro Locsin told the Senate the withdrawal was likely to “foster aggression” in the South China Sea, presumably by China.⁴⁵ The spring of 2020 saw an emboldened China taking a more aggressive stance

³⁹ Ash Carter, *The Rebalance and Asia-Pacific Security: Building a Principled Security Network*, FOREIGN AFF. (2016).

⁴⁰ See, e.g., Rajeswari Pillai Rajagopalan, *The Danger of China’s Maritime Aggression Amid COVID-19*, THE DIPLOMAT (Apr. 10, 2020), <https://bit.ly/300fFnV>.

⁴¹ Siow, *supra* note 33.

⁴² Jason Gutierrez, *Philippines Backs Off Threat to End U.S. Alliance*, N.Y. TIMES (Jun. 3, 2020), <https://nyti.ms/3gPXUys>.

⁴³ Storey, *supra* note 29.

⁴⁴ Derek Grossman, Opinion, *There’s Still Life in the U.S.-Philippines Visiting Forces Agreement*, FOREIGN POLICY (May 1, 2020), <https://bit.ly/38OT9CM>.

⁴⁵ Storey, *supra* note 29.

throughout the region, from a border skirmish with India to a takeover of Hong Kong and an increasing number of military interactions at sea.⁴⁶ Given the history between China and the Philippines, particularly over the South China Sea, and China's expansionism over the past decade, one must ask what would prompt the Philippines to undermine cooperative defense efforts with the U.S. at this point in time.

The stage for withdrawal may have been set several years ago in the prosecution of a 2014 homicide. Criminal jurisdiction over U.S. forces in the Philippines has always been a contentious issue.⁴⁷ The 2014 murder of a Philippine national by a U.S. Marine, Private First Class (PFC) Scott Pemberton, became a flash point. PFC Pemberton met a woman, Jennifer Laude, at a Manila nightclub and brought her back to his hotel room. Upon discovering the woman was transgender, an altercation ensued, and PFC Pemberton killed Jennifer Laude.⁴⁸ The murder sparked outrage and allegations of a hate crime in the Philippines. Under Philippine law, bail would not be available due to the nature of the charges, but, in accordance with the terms of the VFA, PFC Pemberton remained in U.S. custody throughout the investigation and trial.⁴⁹ The proceedings caused some to argue that PFC Pemberton received special treatment while Filipinos were treated as second-class citizens in their own country as a result of the protections afforded to U.S. servicemembers under the VFA.⁵⁰ Following PFC Pemberton's conviction, a lawyer for the victim's family celebrated not only justice but Philippine independence: "[t]he fact that a member of the U.S. Marines was found guilty for breach of our criminal laws for the very first time is an affirmation of Philippine sovereignty."⁵¹ PFC Pemberton's crime and trial catalyzed a critique of U.S. military presence in the Philippines. Despite the words of the Laude's attorney, his conviction did not quell the outrage.

The legal and political legacy of the Pemberton case was reflected in a speech by Representative Roque in the House of Representatives in 2016:

While the President himself has said that he is not ready to abrogate the Visiting Forces Agreement and the EDCA, he has, nonetheless, said that this year's military exercise involving the Philippine and the U.S. Marines may well be the last military exercise. Of course, putting an end to this military exercise will ensure that there will be no more Jennifer Laudes, . . . In the first place, . . . Jennifer Laude would not have been [a] victim[] of U.S. servicemen if not because of the VFA which enabled the presence of these U.S. servicemen in Philippine territory. . . . [E]ven public officials were involved in the Jennifer Laude case, not to accord justice to the family or to the Filipino people, but to please the Americans for whatever reasons they may have. I am happy to note that two years after her murder, perhaps her death was not for naught. I am hoping

⁴⁶ Steven Lee Myers, *China's Military Provokes Its Neighbors, but the Message is for the United States*, N.Y. TIMES (Jun. 29, 2020), <https://nyti.ms/3a31cwi>.

⁴⁷ Porrata-Doria, Jr., *supra* note 8, at 71.

⁴⁸ Floyd Whaley, *U.S. Marine Guilty in Killing of Transgender Woman in Philippines*, N.Y. TIMES (Dec. 1, 2015), <https://nyti.ms/32bkhKG>.

⁴⁹ *Id.*

⁵⁰ See Per Liljsa, *Philippines: Transgender Murder Becomes Rallying Point for LGBT Rights*, TIME (Oct 24, 2014), <https://bit.ly/2OipJDj>.

⁵¹ Virgil Lopez, *CA Affirms Conviction of Pemberton for Killing Jennifer Laude*, GMA NEWS (Apr. 10, 2017), <https://bit.ly/2AOctmP>.

that the Filipinos have learned that only the Filipinos can promote the national interest. I am hoping that because of the painful experience of Jennifer Laude, more Filipinos will zealously guard Philippine sovereignty and Philippine jurisdiction.⁵²

Although the Pemberton case served as an important flash point in U.S.-Philippine relations, criminal jurisdiction is not the only issue driving the allies further apart. Since assuming the presidency, Duterte has been engaged in a war on drugs marked by violence, extrajudicial killings, and international condemnation.⁵³ While the Trump Administration took various stances on Duterte's drug programs, recently the U.S. denied a visa to one of the masterminds of the anti-drug program, former police chief Senator Ronald Dela Rosa, under an amendment passed by the U.S. Senate in accordance with the Global Magnitsky Human Rights Accountability Act.⁵⁴ Dela Rosa is accused of involvement in the wrongful imprisonment of another Philippine senator, Leila de Lima, an outspoken critic of the drug war.⁵⁵ The termination of the VFA was announced in conjunction with condemnation of the decision to deny Dela Rosa a visa, tying the withdrawal to the accusation of United States meddling in the Philippines' internal affairs.

Perhaps the most compelling reason for the Philippines to withdraw from the VFA, and the related EDCA, is the most concerning: a lack of a shared strategic purpose. Representative Roque of the Philippines summarized this concern:

If battle experience is what is important in a military exercise . . . it is the Americans that will benefit from the joint military exercises; they will benefit from the war, from the battle experience of Philippine soldiers.

They also say that the VFA is important because we need to modernize our Armed Forces. . . . I did not see the Armed Forces of the Philippines modernized despite the lapse of this 20-year period I find the EDCA completely worrisome [The EDCA] actually contemplates the stationing of U.S. troops and facilities in Philippine military bases, subject to the full control of American authorities

What are the dangers of the EDCA? We have seen very clearly . . . there is a difference between the Philippine national interest and the American national interest. Even in the West Philippine Sea controversy, the United States has made its position very clear. We do not take sides in the ongoing territorial dispute. The American concern is only freedom of navigation in the West Philippine Sea. In other words, even if the Chinese were to occupy all the islands that are currently

⁵² Representative Herminio L. Roque, Jr., Address to the Republic of Philippines House of Representatives (Oct. 12, 2016), <https://bit.ly/314uZ4X>.

⁵³ Regine Cabato, *Thousands Dead. Police Accused of Criminal Acts. Yet Duterte's Drug War Is Wildly Popular*, WASH. POST (Oct. 23, 2019), <https://wapo.st/3elmB44>.

⁵⁴ Yeo, *supra* note 2. The Act targets those accused of violating human rights around the world. See Global Magnitsky Human Rights Accountability Act of 2016, Pub. L. No. 114-328. Ironically, President Duterte has said that he once applied for, and was denied, a visa to visit the United States. Yeo, *supra* note 2.

⁵⁵ Yeo, *supra* note 2.

under the occupation of the Philippines, the Americans could not care less, provided that China will not consider the West Philippine Sea as part of its national territory

Perhaps, the greatest danger of the EDCA . . . is given this divergence of national interest between the Philippines and the United States, and given the worsening posturing between the United States and China, the EDCA, in case of a full-blown armed conflict between the United States and China, will make the Philippines yet their battleground It is for this reason, Mr. Speaker, that despite the Mutual Defense Treaty, the Americans did not lift a finger when China took away Mischief Reef and, recently, Scarborough Shoal from our possession.⁵⁶

Representative Roque's 2016 speech raises the fundamental question: if the agreements are themselves exercises of sovereignty, but the agreement no longer serves the strategic interests of the sovereign, is there a benefit to the country that is relinquishing some of its sovereignty? Representative Roque also highlights one of the most fundamental differences between the current crisis and the failure to renew the SOFA. In the 1990s, the Philippines saw the U.S. as a balance to Chinese aggression and a force for regional stability, but Representative Roque highlights the view that in recent years, the U.S. has demonstrated an unwillingness to take action to stop China's expansion into the South China Sea while also engaging in what many see as provocative freedom of navigation operations in the region. It is possible China's actions following the announced termination of the VFA have restored a shared strategic purpose for the Philippines and U.S. that resolves these sovereignty concerns as, since February 2020, China has been accused of pointing a laser gun at a Philippine frigate, ramming and sinking a Vietnamese vessel, and intimidation of Vietnamese and Malaysian oil and gas exploitation efforts.⁵⁷ While some see the decision to suspend termination as a response to China's increasingly aggressive posture in the South China Sea while the world responds to the pandemic, the U.S.-Philippines relationship is complex and the implications for Philippine sovereignty are keenly felt by many.⁵⁸ As a result, there will likely be continued calls within the Philippines that the VFA, along with EDCA and MDT, do not provide a useful framework to the host nation that bears the costs, politically and legally, of those agreements.

IV. A TWEET HEARD AROUND THE PACIFIC: LEGAL IMPLICATIONS OF PRESIDENT DUTERTE'S VFA TERMINATION

[T]he VFA strengthens the [MDT and EDCA] . . . if you remove it, that means the two deals would weaken. Then, you will get there. If the basis of the President is to be self-reliant, all the logical consequences will come.

- Presidential Spokesperson Panelo, regarding the effect of VFA termination⁵⁹

The VFA, EDCA, and MDT form a network of bilateral rights and responsibilities that underpin the U.S.-Philippines defense relationship. Withdrawal from any of the agreements limits the options for regional

⁵⁶ Roque, *supra* note 52.

⁵⁷ Siow, *supra* note 33.

⁵⁸ *Id.*

⁵⁹ Romero, *supra* note 30.

engagement. While VFA termination appears to have been suspended, the crisis is not past. The underlying factors that motivated President Duterte's VFA termination efforts persist, and future termination efforts would further test the strength of the legal instruments effecting the U.S.-Philippines relationship. As leaders in both countries assess the challenges facing the region and the future of U.S.-Philippines defense cooperation, the existing agreements may be revised—or targeted anew for termination, as some Philippine leaders have threatened. While EDCA or MDT withdrawal would potentially be more destructive, VFA termination remains most likely. A sober look at the ways in which VFA termination would dismantle more than 60 years of legal architecture—with and especially without the consent of both parties—may prove valuable.

Procedurally, the VFA includes a termination clause that allows either party to notify the other of their intent to withdraw; the agreement then terminates 180 days after notification.⁶⁰ Negotiating for termination of an international agreement is consistent with the principle of state sovereignty under customary international law and as articulated in the Vienna Convention on the Law of Treaties, Article 54.⁶¹ In the VFA, the explicit termination clause likely ameliorated domestic concerns in the Philippines over sovereignty and coercion during the 1990s negotiations.⁶² However, as a practical matter, should termination proceed, any legal protections and privileges the VFA afforded to the U.S. armed forces—as organizational entities and at the level of individual servicemembers, civilian employees, and dependents accompanying them—will cease to exist.

Less clear would be the fate of *other* defense treaties and agreements under international law if the VFA is terminated or if those treaties are themselves targeted for termination. Some political leaders within the Philippines have made broad statements that the VFA's termination would render other U.S.-Philippines agreements null and void.⁶³ Other members of the administration have made more cautious statements, promising that the Philippine Senate will examine the impact of the VFA's termination on the MDT and EDCA, the latter of which is largely

⁶⁰ Visiting Forces Agreement, *supra* note 1, art. 9.

⁶¹ Vienna Convention on the Law of Treaties art. 54, Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter VCLT] (“The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.”). This Article focuses solely on the effect of customary international law and the VCLT on the status of the VFA, MDT, and EDCA. Although a discussion of the impact of U.S. and Philippines domestic law on international agreements is outside the scope of this Article, it warrants brief mention. Some Philippine political leaders question whether President Duterte has unilateral power in the Philippines to withdraw from the treaty. The Philippines Senate has asked the Philippines Supreme Court to clarify whether the President can even unilaterally withdraw from a treaty that required the concurrence of the Senate before it was passed. *Clarifying Senate Role In Ending A Treaty*, MANILA BULL. (Mar. 12, 2020), <https://bit.ly/31GHd2q>. Additionally, in 2016, the Philippines Supreme Court found the EDCA was constitutional as an executive agreement implementing the VFA, and therefore did not require approval by the senate. *Saguisag v. Ochoa*, G.R. No. 212426 (S.C., Jan. 12, 2016) (Phil.), <https://bit.ly/3gMCS4n>. At the time, this finding allowed the EDCA to enter into force for both parties. Following the VFA's termination, it may now serve to undermine the EDCA domestically in the Philippines. Additionally, the EDCA is an “Agreement” but is also listed by the U.S. Department of State in its “Treaties in Force” publication. There is an extensive body of literature on the distinction in U.S. law between treaties made in accordance with Article II of the U.S. Constitution, international agreements made with congressional approval, and executive agreements more generally, and the implications for their termination under domestic law. *See generally*, e.g., Harold J. Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432 (2018); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615 (2018).

⁶² Porrata-Doria, Jr., *supra* note 8, at 91.

⁶³ *See, e.g.*, Eimor Santos, *Philippines Formally Ends Visiting Forces Agreement with US*, CNN PHIL. (Feb 11, 2020), <https://bit.ly/324JBH>.

seen as implementing the VFA.⁶⁴ Moreover, there are at least 24 defense-related treaties in force between the U.S. and the Philippines supporting the strategic partnership and underlining its significance, but also which may be related to the VFA.⁶⁵ As a result, understanding the procedure and impacts of termination is critical to understanding the significance of the action. Perhaps most importantly, future attempts at termination by the Philippines may signal continued interest in aligning with Beijing. However, as described below, not all termination rationales are equally viable and not all require the same level of upheaval in the defense relationship between the U.S. and the Philippines. The selection of rationale, therefore, speaks volumes about the intended security orientation of the Philippines in the years ahead.

A. *Which Termination Rules Apply?*

With 116 state parties and another 15 signatory states, the VCLT provides an architecture for understanding the legal effect of President Duterte's notification on other U.S.-Philippines treaties.⁶⁶ That architecture is useful, if imperfect, in this case: while the Philippines is a party to the VCLT, the U.S. is not, having signed but never ratified the treaty.⁶⁷ The Philippines could argue that, as the U.S. is not a party to the VCLT, its terms create no privileges for the U.S. and no duties for the Philippines in bilateral treaties with the U.S. Indeed, Article 4 of the VCLT provides that,

[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.⁶⁸

As the Convention has not entered into force for the U.S., the second clause of Article 4 likely precludes any insistence by either party to rights or privileges purely under the VCLT.

⁶⁴ See, e.g., Enhanced Defense Cooperation Agreement art. I, Phil.-U.S., Apr. 28, 2018 [hereinafter EDCA] ("This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states 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,' and within the context of the VFA."); see also *Saguisag v. Ochoa*, G.R. No. 212426 (S.C., Jan. 12, 2016) (Phil.), <https://bit.ly/3gMCS4n> ("What EDCA has effectively done, in fact, is merely provide the mechanism to identify the locations in which US personnel may perform allowed activities pursuant to the VFA. As the implementing agreement, it regulates and limits the presence of US personnel in the country.")

⁶⁵ The U.S. Department of State's most recent *Treaties in Force* publication lists 22 bilateral, defense-related treaties between the U.S. and Philippines. See U.S. DEPARTMENT OF STATE, *TREATIES IN FORCE* (Jan. 1, 2019), <https://bit.ly/3gMEomS>. An additional two agreements (signed in 2017 and 2019) are available on the State Department's *Treaties and Other International Acts Series* (T.I.A.S.) database. See *Agreement Concerning Defense Cooperation*, Phil.-U.S., Sept. 15, 2017, T.I.A.S. 17-915, <https://www.state.gov/17-915/>; *Special Security Agreement*, Phil.-U.S., Apr. 15, 2019, T.I.A.S. 19-415, <https://www.state.gov/philippines-19-415>.

⁶⁶ VCLT, *supra* note 61, art. 54.

⁶⁷ See UNITED NATIONS TREATY COLLECTION, <https://bit.ly/30DCyPS> (last visited Jul. 23, 2020), listing the status of the VCLT.

⁶⁸ VCLT, *supra* note 61, art. 4.

The first clause, however, conceives of independent sources of international law that may apply even where the Convention does not.⁶⁹ Historically, the VCLT was the result of a project to codify existing customary international law around treaty creation, interpretation, and termination.⁷⁰ The VCLT is regularly referenced by states who are not parties, including the U.S., and applied by international tribunals as persuasive, even where it is not controlling.⁷¹ Several of these decisions specifically address grounds for termination.⁷² Because the VCLT largely codifies customary international law on the subject of treaty interpretation, it is a valuable tool to evaluate the existing duties and rights under U.S.-Philippines treaties. These decisions are relevant should the Philippines or U.S. ultimately request an international tribunal's judgment on the legal effect of the VFA's termination, however unlikely such a request may be considering both parties' past practice. As a member of the ASEAN, the Philippines has almost 50 years of experience in an international organization with an intentionally consensus-based approach to conflict resolution.⁷³ Perhaps more strikingly, in the 73-year history of the International Court of Justice (ICJ), the Philippines has not been party to a single case.⁷⁴ Finally, though the Philippines sought and obtained a favorable ruling by the Permanent Court of Arbitration under the United Nations (UN) Convention on the Law of the Sea regarding possession of the Spratly Islands, the Philippines have yet to enforce that ruling against the People's Republic of China.⁷⁵ For its part, the U.S. has demonstrated historical support for international tribunals, supporting the creation of the International Criminal Tribunals for Yugoslavia and Rwanda by the UN Security Council,⁷⁶ and has had a U.S. member of the

⁶⁹ See generally A. Watts, *The International Court and the Continuing Customary International Law of Treaties*, in THE HAGUE: KLUWER LAW, LIBER AMICORUM JUDGE SHIGERU ODA 251, 251–66 (N. Ando, E. McWhinney and R. Wolfrum eds., 2002).

⁷⁰ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 8 (2013) 5–6.

⁷¹ *Id.* at 10–11. For examples of such decisions, see, e.g., *Kasikili/Sedudu Island (Botswana v. Namibia)* ICJ Reports (1999), p. 1045, ¶ 18; ILM (2000) 310, 320; 119 ILR 467 (applying the VCLT to interpret an 1890 treaty despite VCLT's explicit non-retroactivity); see also Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 777 (2014) (noting that “although the United States is not a party to the Convention, Executive Branch officials have stated at various times that they regard the Convention as largely reflective of binding rules of international custom, and U.S. courts also regularly refer to the Convention”).

⁷² *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1973 I.C.J. 3, ¶¶ 24, 36 (Feb. 2) (interpreting a pre-VCLT treaty in light of VCLT Articles 50 and 62, finding those articles codified international law); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 94 (June 21); *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment, 1997 I.C.J. 7, ¶¶ 42–48 and 92–100 (Sept. 25) [hereinafter *Gabcikovo*] (analyzing VCLT Articles 60 to 62 and finding they generally reflected customary international law).

⁷³ See Rodolfo C. Severino, Secretary-General, Association of Southeast Asian Nations, *The ASEAN Way and the Rule of Law*, Address at the International Law Conference on ASEAN Legal Systems and Regional Integration (Sept. 3, 2001) (charting the development of ASEAN as an organization without legal dictates and noting “thirty-four years after its founding, ASEAN adheres to the evolutionary approach, relying largely on patient consensus-building to arrive at informal understandings or loose agreements”); RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH FOR COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL 1–37* (2006) (describing the “ASEAN Way” of decision making through consensus and, often, unanimity as a response to the historical experience of colonization and foreign influence); Asian Development Bank Institute, *THE ASEAN READER 184–85* (2015) (assessing consensus as an effective decision-making tool for security and defense matters but identifying concerns about the use of consensus for economic decisions).

⁷⁴ *List of All Cases*, INT'L CT. OF JUST., <https://bit.ly/2ATufoU> (last visited July 10, 2020).

⁷⁵ *The Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility (Perm. Ct. Arb.), 55 I.L.M. 805 (2014).

⁷⁶ S. C. Res. 827 (May 25, 1993) (establishing the International Tribunal for the former Yugoslavia (ICTY)); and S. C. Res. 955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda (ICTR)).

International Court of Justice (ICJ) since the Court's founding in 1946.⁷⁷ However, the U.S. has also criticized some nations' recourse to the ICJ as overtly political.⁷⁸ Moreover, the U.S. withdrew from an Optional Protocol creating ICJ jurisdiction for matters regarding consular relations, and declined to ratify the Rome Convention establishing the International Criminal Court.⁷⁹ Both the U.S. and Philippines have substantial practice resolving disputes outside the fora of international courts. They can be expected to rely on that experience if they assess their national interests are best served outside an international court's jurisdiction.

However, even if one assumes neither party would bring the matter to an international tribunal, the termination rationales articulated in the VCLT and interpreted by the ICJ provide an important framework and vocabulary. A reputation for fulfilling the terms of one's defense treaties is not inconsequential.⁸⁰ Both states are therefore likely to frame their actions in these terms as complying with international law, even if they take opposing views.

Four customary international law termination rationales⁸¹ are the most likely contenders if President Duterte and other leaders seek to dismantle the bilateral agreements that structure the U.S.-Philippines defense relationship. Each termination rationale has an analogue in the VCLT: (1) the treaties' explicit terms; (2) material breach; (3) supervening impossibility of performance; and (4) fundamental change of circumstances.⁸² Several of these rationales would provide the U.S. grounds to terminate the MDT or EDCA, though none require that the U.S. seek termination and, given the regional significance of the U.S.-Philippines defense relationship, it is unlikely the U.S. would pursue termination at this time. The last rationale provides perhaps the strongest argument for termination by the Philippines, though its invocation poses interesting legal and political questions for both parties.

1. Explicit Terms (Art. 54, VCLT)

The most straightforward way to terminate a treaty is according to that treaty's own explicit terms. To the extent the Duterte regime and its successors seek to alter the nation's network of defense agreements while preserving the Philippines' international reputation as a reliable partner, this termination rationale provides the best chance of success. Presently, there is no viable legal argument that termination of the VFA would automatically terminate either the

⁷⁷ *All Members*, INT'L CT. OF JUST., <https://bit.ly/3gObN0c> (last visited July 10, 2020).

⁷⁸ See Office of the Legal Advisor to the U.S. Secretary of State, *International Courts and Tribunals and the Rule of Law* (May 11, 2006), <https://bit.ly/2WbKS6G>.

⁷⁹ In 2005, the U.S. withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. The effect of the withdrawal was to terminate submission of U.S. consular actions to ICJ jurisdiction. See United Nations Treaty Collection, Status of Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, <https://bit.ly/30HNPi2> (last visited on Aug. 9, 2020).

⁸⁰ See e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 105–8 (1984) (arguing that “[i]n the absence of specific retaliation, governments may still have incentives to comply with regime rules and principles if they are concerned about precedent or believe that their reputations are at stake”); ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25 (1995) (arguing that the driving force for states' behavior within treaty regimes is reputational, forged through “an iterative process of discourse among the parties, the treaty organization, and the wider public”).

⁸¹ See AUST, *supra* note 70, at 10–11; see also *supra* notes 70–71 and accompanying text.

⁸² VCLT, *supra* note 61, arts. 54, 60–62. See AUST, *supra* note 70, at 10–11, for a discussion of customary international law status and at 252, 257, 260–64 for a discussion of each termination rationale. As an additional note, if either party intends to invoke these bases for termination, VCLT Articles 62 to 65 require specific procedures for effecting that termination, none of which have been exercised in this case.

MDT or EDCA under the explicit terms of those agreements. Both agreements include their own termination procedures. Specifically, Article VIII of the MDT provides that either party may terminate the MDT, effective one year after providing notice to the other party.⁸³ No such notice has been offered and therefore, termination of the MDT has not been triggered under that treaty's explicit terms. The EDCA's own terms do not allow termination until the year 2024. The EDCA provides that it shall have an initial term of ten years and then continue in force unless and until either party gives one year's written notice through diplomatic channels of intent to terminate.⁸⁴

However, if the relationship between the U.S. and the Philippines deteriorates, or if the Duterte regime considers termination threats likely to create political leverage, it is possible the MDT or, in 2024, the EDCA could be President Duterte's next target for termination. Terminating these agreements would be a dramatic move. The Philippines conceivably could exercise the EDCA's termination clause to renegotiate the specifics of the U.S.-Philippines defense relationship. However, the MDT is a straightforward and comprehensive mutual defense agreement. Exercise of the MDT's termination clause would be unlikely to result in an agreement more favorable to the Philippines and therefore would likely indicate a commitment to a future with heavy ties to Beijing.

2. Material Breach (Art. 60, VCLT)

Because the Duterte administration invoked the VFA's termination clause, it cannot now invoke its own action as forming a material breach of the MDT or EDCA to terminate those agreements.⁸⁵ The U.S. could theoretically cite the Philippines' act of terminating the VFA as material breach, though the argument is not a strong one and, at present, most U.S. leaders have expressed interest in preserving U.S.-Philippines defense agreements.⁸⁶

In order to support termination, the breach must be *material* and of the treaty itself, not of another treaty or other duties under international law.⁸⁷ To be material, a breach must be a repudiation of the treaty or a violation of a provision that is "essential to the accomplishment of the object and purpose of the treaty."⁸⁸ For example, the UN Security Council characterized Iraq's refusal to fully comply with investigations by the International Atomic Energy Commission as material breaches of Iraq's duties under UNSCR 687.⁸⁹

VFA termination alone likely does not constitute material breach of the MDT. The essential terms of the MDT are that the U.S. and the Philippines will act in each other's defense and mutual defense can be performed without a SOFA.

⁸³ Mutual Defense Treaty, *supra* note 3, art. VIII.

⁸⁴ EDCA, *supra* note 64, art. XII, ¶ 4.

⁸⁵ See AUST, *supra* note 70, at 259, 262; Gabcikovo, *supra* note 72, ¶ 110.

⁸⁶ See, e.g., Dzirhan Mahadzir, *U.S. Warns China Will Gain Edge if the Philippines Ends Visiting Forces Agreement*, USNI NEWS (Feb. 12, 2020), <https://bit.ly/33HcSDy> (quoting Secretary of Defense Mark Esper that "I do think [VFA termination] would be a move in the wrong direction as we both bilaterally with the Philippines and collectively with a number of other partners and allies in the region are trying to say to the Chinese, 'You must obey the international rules of order. You must obey, you know, abide by international norms As we try and bolster our presence and compete with [China] in this era of great power competition, I think it's a move in the wrong direction for the longstanding relationship we've had with the Philippines for their strategic location, the ties between our peoples, our countries.'").

⁸⁷ See AUST, *supra* note 70, at 259; Gabcikovo, *supra* note 72, ¶ 106.

⁸⁸ VCLT, *supra* note 61, art. 60(3); see also AUST, *supra* note 70, at 260.

⁸⁹ S.C. Res. 707, ¶ 2 (Aug. 15, 1991).

There is no requirement in the MDT to maintain a SOFA and, indeed, the 1998 VFA was signed following a period of lapse where no SOFA existed. Under these circumstances, any argument that the absence of a SOFA is a material breach of the MDT appears flimsy.

Though it is unlikely to do so, the U.S. could more plausibly argue that the Philippines has breached its duties under the EDCA by terminating the VFA. The EDCA, signed in 2014, is characterized as implementing the VFA.⁹⁰ Members of the Philippines government, while surely not attempting to bolster a potential U.S. claim of material breach, have perhaps strengthened such an argument by stating the VFA's termination obviates the EDCA.⁹¹ However, even this is a stretch. Closer analysis of the nature of any alleged breach would be required if the U.S. sought to claim VFA termination constituted material breach of the EDCA or MDT. Any such argument would likely fail on both the question of materiality and on whether the breach was "of the treaty itself."

Though the treaties are closely related, the EDCA's provisions never explicitly require the existence of a SOFA. For example, the VFA provides that "[t]he Government of the Philippines shall facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by this agreement."⁹² The EDCA provides that "[w]hen requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States 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)."⁹³ At first blush, elimination of the Philippines' VFA duty to facilitate admission and departure may seem to support an argument that the Philippines had breached its duties under the EDCA. However, a fact-specific analysis of these and other closely related clauses suggests the Philippines' duties under the EDCA are sufficiently distinct from those of the VFA that termination of one does not constitute breach of the other. Considering the clauses cited *supra*, one might imagine a situation in a post-VFA world in which no U.S. personnel were present within the Philippines, but the U.S. made a request under the EDCA for the Philippines to facilitate temporary access by U.S. forces to ports or airfields controlled by local governments. If the Philippines flatly refused to assist in the requested facilitation, the Philippines may be in breach of the EDCA itself, regardless of the VFA's status. The U.S. would then have to decide whether to invoke that breach as grounds to terminate the EDCA. The legal analysis would return to the question of whether the breach was "material" but would at least have resolved the question of whether the breach was "of the treaty itself": if the Philippines refuses to comply with a request under the EDCA, it would be in breach of the EDCA itself.

There remains, of course, the possibility that either the U.S. or the Philippines could take another action that constitutes material breach of the MDT or EDCA—or even of the VFA while it remains in effect. However, if only one party to a bilateral treaty is interested in terminating the agreement, material breach is an unlikely rationale. As articulated above, the state seeking to end an agreement cannot use their own action-in-breach as grounds for termination. The party desiring to maintain the status quo can therefore avoid this rationale for

⁹⁰ Renato Cruz de Castro, *Philippine Supreme Court Approves EDCA: Unlocking the Door for the Return of U.S. Strategic Footprint in Southeast Asia*, ASIA MAR. TRANSPARENCY INITIATIVE (Feb. 1, 2016), <https://bit.ly/3gUuvmZ>.

⁹¹ See Santos, *supra* note 63.

⁹² Visiting Forces Agreement, *supra* note 1, art. III, ¶ 1.

⁹³ EDCA, *supra* note 64, art. III, ¶ 3.

termination by continuing to fulfill its duties and claim its privileges under the agreement.

Finally, and hypothetically, the Philippines could intentionally and directly breach the VFA, EDCA, or MDT to force the U.S. to terminate the agreements. However, such an action would not be guaranteed to result in termination and would place the Philippines in a precarious security position. Such an approach is therefore unlikely, barring a formal alliance between the Philippines and China.

3. Supervening Impossibility of Performance (Art. 61, VCLT)

Statements from leaders in the Philippines that VFA termination renders the MDT moot have, to date, been framed in political rather than legal terms. The closest legal analogue to this rhetoric is the treaty termination basis of supervening impossibility of performance. As in the case of material breach, international law precludes the Philippines from invoking their own action as the supervening impossibility of performance under the MDT or EDCA, whether that be VFA termination or some other state action.⁹⁴ Again, though the U.S. is unlikely to do so, it could potentially invoke an action by the Philippines as terminating the agreements.

If the U.S. were so inclined, its strongest argument for termination of the EDCA under the rationale of “supervening impossibility of performance” is that Article 1 of the EDCA states the treaty operates “in the context of the VFA.” The VCLT provides that “[w]hen a treaty specifies that it is subject to . . . an earlier or later treaty, the provisions of that other treaty prevail.”⁹⁵ The U.S. could argue that the EDCA can only be implemented “in the context of the VFA” and so, absent that context, the VFA cannot be implemented.

However, the threshold for supervening impossibility of performance is high. Article 61 of the VCLT requires that “the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.”⁹⁶ Examples of objects’ permanent disappearance or destruction recognized in international law are physical in nature: the submergence of an island, the destruction by fire of loaned art, or the destruction of tents at issue in a defense treaty.⁹⁷

Considering first whether VFA termination would constitute supervening impossibility of performance: while not a frivolous legal argument, the lack of a pre-agreed status for armed forces personnel is likely distinguishable from the destruction of the physical object of a treaty. The ICJ has not addressed the question of whether a legal regime could qualify as an “object,” the disappearance of which could justify termination. Significantly, in considering

⁹⁴ VCLT, *supra* note 61, arts. 61(2), 62(1); *see also* AUST, *supra* note 70, at 262 (noting that a state seeking to terminate a treaty on the basis of supervening impossibility of performance cannot cite an impossibility created by its own action); *see* Gabcikovo *supra* note 72, ¶ 103 (rejecting Hungary’s argument that it was no longer bound by a treaty due to supervening impossibility of performance on the grounds that “Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party’s own breach of an obligation flowing from that treaty”).

⁹⁵ VCLT, *supra* note 61, art. 30.

⁹⁶ *Id.* art. 61(1).

⁹⁷ AUST, *supra* note 70, at 262.

Hungary's and Slovakia's series of treaties regarding energy production on the Danube River, the ICJ avoided this question by finding the parties had sufficient tools to resolve their dispute.⁹⁸ In the case of the U.S. and the Philippines, continued consular and defense communications following any termination of the VFA could be expected to undermine an argument for supervening impossibility. It is a thorny, yet surmountable challenge.

However, even if the termination of a related treaty were found theoretically sufficient to qualify as supervening impossibility of performance, the actual duties and rights established by the VFA, MDT, and EDCA may not support such a claim. As discussed *supra*, the VFA concerns itself with the status of U.S. personnel within the physical space of the Philippines. By contrast, the EDCA is largely concerned with materiel, contracting, use of "agreed locations," security, and utilities. In the absence of a SOFA, the EDCA is unlikely to be used as extensively as it has been since its signing in 2014, but there are no explicit requirements in the EDCA—for example, jurisdiction over personnel in agreed locations—which would be impossible to execute if the VFA were terminated.

It remains possible that actors within the Philippines seeking to alter the U.S.-Philippines security relationship may take political or legal action to *create* a supervening impossibility of performance. Given the prospective nature and broad language of the MDT, it is difficult to imagine an action by the Philippines that would render performance of the MDT impossible. The EDCA, with its concrete and specific duties and privileges, is a more likely candidate for termination under this rationale, though, as previously stated, the U.S. appears unlikely to seek such termination. The actions that would be required by the Philippines to create a supervening impossibility of performance would be a significant break with current policy and likely deeply destabilizing to Philippine security.

4. Fundamental Change of Circumstances (Art. 62, VCLT)

The final termination rationale for the MDT or EDCA is the least well-established in customary international law.⁹⁹ It also has the broadest potential for termination by either party.

Termination under this rationale requires a change in circumstances that "constituted an essential basis of the consent of the parties to be bound by the treaty" and also that "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."¹⁰⁰ There is an open question in international law as to whether a government's change of policy could suffice.¹⁰¹ However, the ICJ found the political and economic transition of Hungary and Slovakia from communism to democracy did not qualify as a fundamental change of circumstances for the purposes of a bilateral treaty to develop energy plants along the Danube River because the political and economic changes did not radically transform the extent of obligations still to be performed under the treaty.¹⁰² If the end of communism, a turning point of global

⁹⁸ See Gabcikovo, *supra* note 72, ¶ 103 (finding it was not necessary to reach the question of whether a legal regime constituted an "object," the destruction of which would justify terminating a treaty under Article 61, VCLT, because the network of treaty relationships "made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives").

⁹⁹ See, e.g., AUST, *supra* note 70, at 263.

¹⁰⁰ VCLT, *supra* note 61, art. 62(1).

¹⁰¹ See, e.g., AUST, *supra* note 70, at 263.

¹⁰² See Gabcikovo, *supra* note 72, ¶ 104.

significance marking end of the Cold War, did not qualify as a fundamental change of circumstances, then that is a high bar indeed for any country seeking to claim a change in domestic policy voids its international obligations.

As above, though the Philippines is prohibited from invoking its own action as a fundamental change of circumstances terminating the MDT or EDCA, the U.S. could potentially invoke that argument. This argument may be tenable with respect to the EDCA. The U.S. could plausibly argue that the VFA was an essential basis of its consent to be bound by the EDCA and that the effect of VFA termination radically transforms the extent of obligations still to be performed under the EDCA. This is, facially, a reasonable argument with respect to the presence of U.S. personnel at “agreed locations” and the conduct of bilateral exercises, both of which are covered within the EDCA.

Because the VFA post-dates the MDT, the U.S. could not argue that the existence of the VFA was an essential basis of its consent to be bound by the MDT. However, this termination rationale could be far more sweeping than any other if the U.S. sought to employ it. While the former rationales for termination would require a close, fact-based analysis of whether specific terms of either treaty were truly breached or genuinely impossible following VFA termination, the U.S. could invoke the Philippines’s termination of the VFA as *evidence of a fundamental change of circumstances*, triggering the termination of not just the MDT and EDCA but all bilateral defense treaties between the two states. If the U.S. desired to terminate the agreements that structure its defense relationship with the Philippines, it could argue that the Duterte regime has repeatedly undermined that relationship with rhetoric, with increasingly close ties to China, and now with the threatened termination of the VFA. The plausibility of this argument will be shaped in the months and years to come by the response of leaders within the Philippines and the fate of the VFA.

Just as this termination basis is broader for the U.S., there is a potential rationale by which the Philippines could invoke it as well. Rather than citing the termination of the VFA as a fundamental change of circumstances, the Philippines could assert that the relationship between U.S. and the Philippines has fundamentally altered in ways that render the bilateral defense treaties impossible to execute. By this logic, the Philippines could cast their termination of the VFA as a response to that altered relationship. This rationale would resonate with Representative Roque’s assertion that the U.S.-Philippines partnership has not produced the anticipated modernization of the Philippine armed forces and that recent U.S. actions demonstrate the U.S. will not fulfill its security promises.

However, the more time passes without such an explicit invocation, the weaker the rationale becomes for both countries. The VCLT provides that states may lose their right to terminate a treaty if, following a fundamental change of circumstances, the state “must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.”¹⁰³ Admittedly, “must” is a strong word. If challenged on this point, the Philippines could plausibly point to the political statements suggesting the MDT and EDCA were untenable or the referral for legal review as conduct precluding an obvious conclusion of acquiescence.

¹⁰³ VCLT, *supra* note 61, art. 45(2); AUST, *supra* note 70, at 263.

B. *Future Forces in the Philippines.*

Absent from discussions to date, perhaps due to the global focus on responding to COVID-19, is the fact that the VFA has a twin: a reciprocal bilateral agreement governing the status of personnel from the Philippines visiting the United States.¹⁰⁴ Under that treaty, members of the Philippines' armed forces are able to receive training in the U.S. and on U.S. platforms. That agreement's explicit terms state it entered into force with the VFA and "will continue in force as long as [the VFA] remains in force."¹⁰⁵ Once part of a paired set embodying the commitment of the U.S. and the Philippines to interoperability and security cooperation in the Pacific, this twin would be a silent casualty of President Duterte's termination of the VFA.

By contrast, the MDT and EDCA could likely survive the VFA's termination under international law, but at a cost to both the U.S. and the Philippines. A glance at the last lapse in the Philippines-U.S. SOFA shows the potential for increased uncertainty in the Pacific. When the Military Bases Agreement expired in 1991, the U.S. began leaving the next year, finishing in 1995. That same year, the Chinese entered Mischief Reef in the absence of a strong deterrent, prompting a change of course in the Philippines that resulted in the VFA.¹⁰⁶ The months-long standoff over Scarborough Reef in 2012 tested the U.S. deterrent.¹⁰⁷ This time, if China continues to act in the "grey zone" of conflict, precluding a U.S. response, the Philippines is unlikely to see a new agreement as advantageous to their interests.

If the Philippines continues to seek termination of the VFA, both countries should anticipate extended friction as they unravel interrelated military operations and continue operating in close proximity in the Pacific. Arguments should be expected about rights and obligations under related treaties and especially under the MDT and EDCA. Those arguments, which are likely to employ the language of international law even if they are made in the court of public opinion, will necessarily be technical if made under the treaties' explicit terms, fact-specific if asserting material breach or impossibility of performance, and profoundly political if alleging a fundamental change of circumstances. Asserting termination of the MDT under its explicit terms, or of any defense treaty due to a fundamental change of circumstances, while perhaps most likely to succeed, would most powerfully signal an irrevocable break in a longstanding, if complex, regional security relationship.

IV. EXERCISING SOVEREIGNTY: LEGAL LIMITATIONS AND STRATEGIC CHOICES

The Philippines faces a choice between two partners: one with a mixed history of colonialism and partnership, and another offering support while also engaging in explicit violations of its sovereignty. The historical significance of the partnership with the U.S. and U.S. efforts to influence actions within the Philippines may have driven President Duterte closer to China and away from the

¹⁰⁴ Agreement Regarding the Treatment of Philippines Personnel Visiting the US, Phil.-U.S., Oct. 8, 1998, T.I.A.S 12931, <https://bit.ly/2XOWsp1>.

¹⁰⁵ *Id.*

¹⁰⁶ Cliff Venzon, *Will the Philippine-US Military Alliance Survive Duterte and Trump?*, NIKKEI ASIAN REV. (Mar. 24, 2020), <https://s.nikkei.com/38O3Bu0> (quoting military historian and defense analyst Jose Antonio Custodio as saying "[i]f not for China's takeover of the Mischief Reef, I doubt there would be a VFA").

¹⁰⁷ *Id.*

arrangements in the VFA. However, the pandemic has revealed the long-term goals of China's growing naval power.¹⁰⁸ One unforeseen benefit of the pandemic may end up being an opportunity for strategic pause and reassessment by both the U.S. and the Philippines regarding their defense relationship.

The Duterte administration has emphasized sovereignty and “self-reliance.” Perhaps counterintuitively, though, terminating the VFA would eliminate an avenue for the Philippines to build that self-reliance through training in the U.S. and with U.S. armed forces by automatically terminating the reciprocal agreement. Thirty years ago, the U.S. and the Philippines drifted apart and returned shoulder-to-shoulder, Balikatan. In the interval, however, China was able to expand its toehold in the Pacific. For the moment, the region is breathing a sigh of relief that the U.S. presence will not be adversely affected in the middle of the pandemic.¹⁰⁹ The coming months and years will reveal whether and at what cost the U.S. and the Philippines can chart a course for a new century of security cooperation—or whether one or both seeks new strategic partners to resolve their respective uncertainty in the Pacific and establish an acceptable balance of self-reliance and mutual defense.

¹⁰⁸ Gutierrez, *supra* note 42.

¹⁰⁹ Siow, *supra* note 33.