

The Visiting Forces Agreement (VFA) in the Philippines: Insights on Issues of Sovereignty, Security and Foreign Policy

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Abstract - *The study intends to compare the Visiting Forces Agreement (VFA) between the Philippines and the United States of America and the VFA between the Philippines and Australia. The research piece is arranged in the following flow of ideas. The first and the second part provides the foundations by highlighting issues on definition, historical background, provisions of the agreement and concerns faced by the agreement of the Visiting Forces Agreement (VFA) between the Republic of the Philippines and the United States of America and the Status of the Visiting Forces Agreement (SOVFA) between the Republic of the Philippines and Australia. The third part is an analysis of the VFA and the SOVFA under the tutelage of the framework on the non-intervention principle. As a result, the provisions of SOVFA were in consonance with the legal arrangement in the Philippines than the VFA with the United States of America.*

Keywords-*Visiting Forces Agreement, Principle of Non-Intervention; Principle of Sovereignty; National Security; Foreign Policy*

INTRODUCTION

After the September 11 terrorist attacks on the soil the United States of America, national security has been one of the most pressing issues and primary concern for the Philippines. Hence, the Philippines turned to the United States of America for military assistance, enhancement and upgrading of Philippine military skills and equipment through the visiting forces agreement (VFA). However, the agreement is questioned on its constitutionality since some of the provisions are in contrary to the Constitution and the sovereignty of the Philippines.

Visiting Forces Agreement: Republic of the Philippines and United States of America

The visiting forces agreement (VFA) is an accord between the Republic of the Philippines (RP) and the United States of America (USA) that provides the “legal framework for the treatment of US personnel visiting the Philippines as approved by the Philippine government” [1]. In ratifying the agreement in 1991, the Philippine senate clearly understood that the visiting forces agreement,

... as the legal mechanism to promote defense cooperation between the two countries,

enhancing the preparedness of the Armed Forces of the Philippines against external threats; and enabling the Philippines to bolster the stability of the Pacific Area in a shared effort with its neighbor states.

In its essence, the agreement is aimed at “improving the RP-US combined planning, combat readiness, and interoperability while enhancing security relations with the goal for the American military prowess to support the Republic of the Philippines against external aggression” [2]. Moreover, as a legal framework, the agreement provides important guidelines that will define the standards on the interaction between the US and the Philippine armed forces. It also lays down the obligations of each party in the duration of the agreement.

Before the visiting forces agreement is conceived, ratified and enforced in 1999, its roots can be traced way back in 1946 when the Philippines attained its independence and self-governance from the United States of America. After liberation, the Philippines was not yet totally independent as evidently seen in the acts of the United States of America to maintain

its influences by entering into different economic, trade, political and security agreements or treaties.

One of the most significant treaties that the Philippines entered into with the US was the Philippine – American Military Bases Agreement (MBA) on 14 March 2007 [3]. It is stipulated in this agreement that “a military agreement by which the [Philippines] granted the [United States of America] the right to retain the use of bases in Philippines for a period of 99 years, to permit the US to use such bases as [it] may determine according to military necessity, and to enter into negotiations with the US concerning the expansion of such bases”. Further stipulations in the agreement include a creation of a military advisory group which was later named the Joint U.S. Military Advisory group (JUSMAG), logistical assistance, training assistance and security [4].

The JUSMAG provides pieces of advice and assistance to the Armed Forces of the Philippines (AFP) concerning defense and military training to Filipino armed forces. In terms of logistical assistance, the US will provide military equipment, supplies and maintenance to the Philippines. The US armed forces will also provide trainings to the AFP. The military training also specified that US giving opportunities to Filipino soldiers to study abroad particularly in the US. Because of the threat against external aggressors, the US will also provide security and defense to the Philippines while it maintains its bases in the country. Included in the security matters is the sharing of security information between the two countries¹.

In 30 August 1951, the Philippines entered into another agreement with the United States of America – the Mutual Defense Treaty [5]. The primary objective of the treaty can be read in Article III which states that,

The Parties, through their Foreign Ministers or their deputies, will consult together from time to time regarding the implementation of this Treaty and whenever in the opinion of either of them the territorial integrity, political independence or security of either of the Parties is threatened by external armed attack in the Pacific.

The Armed Forces of the Philippines interpreted this treaty as an agreement between the United States of America and the Philippines that in the event of attack by foreign forces in the territories of either country, both are committed to aid one another in resisting the armed attacked [6]. In the judgment of Victor Felix (2005), the treaty was to complement and strengthen the Military Bases Agreement (MBA). To put the treaty effectively, the parties separately or jointly, by self-help and mutual aid, agreed to maintain and develop their individual and collective capacity to resist armed attack [1],[2].

In 1991, the Philippine senate terminated the Military Bases Agreement (MBA) [1]. The termination leads to the pull-out of US military troops from Subic and Clack. Hence, the only legal framework left is the Mutual Defense Treaty of 1951. However, after the termination and pull-out of US military forces from the Philippines, the United States of America downgraded its political and military relations with the Philippines. The US argued that they cannot assure the Philippines of protection against external aggressors since the American forces lost a significant facility in the country which they could operate as argued by De Castro in 2003 [cited in 1].

In 1999, the Philippines realized the importance of the presence of the US armed forces in the country because of an external threat from China. The threat came when China is creeping to occupy the islands in South China Sea [1]. The presence of the US in the country will preserve the balance of power in the region [1] since there is a force that has the capacity to neutralize any aggression. Hence, the Visiting Forces Agreement (VFA) was ratified by the Philippine Senate in 1991. This agreement revitalizes again the military relations between the United States of America and the Philippines.

In addition, the military alliance further expanded when the terrorist attacks in the US on September 11, 2001. This event urged the US to forge greater military and defense alliances with the East and Southeast Asian countries [1]. In fact, it is the Philippines, among Southeast Asian nations to declare support to the campaign of George W. Bush against terrorism [1],[7].

The enforcement of the Visiting Forces Agreement (VFA) made into realization and concrete actions on how the Philippines manifested its support with the United States of America. The Philippines pledged its Armed Forces of the Philippines to under joint

¹ The discussion on the details of the Military Bases Agreement was derived from the Military Bases Agreement document signed in 1947.

military trainings and exercises to counter terrorist attacks if it occurs. The joint military training includes RP-US combined planning, combat readiness, and interoperability while enhancing security relations [2].

The Visiting Forces Agreement (VFA) has the following provisions that define the interaction and extent of the military training that the US armed forces will render to its counterparts in the Armed Forces of the Philippines. It includes:

In Article II of the agreement, the visiting forces, which are the United States Armed Forces, will respect the laws of the Republic of the Philippines by not doing actions that are contrary to Philippine laws. Respect for the laws of other countries is fundamental in international law.

In cases where criminal offense is committed by a member of the visiting forces, the criminal liabilities of the accused and the obligations of the Philippine government are given in Article V of the agreement. In this section of the agreement, it was made clear that the Philippine government has the jurisdiction over the members of the US visiting forces with respect to criminal offense committed within Philippine territories. Jurisdiction entails that the accused member of the visiting forces may face charges in the Philippine courts. Significant rights of the accused are speedy trial, the right to have legal defense and assistance from the embassy. However, custody of the accused shall remain in the military authorities during judicial proceedings and if convicted, both the Philippine government and the US government shall decide where the convict will remain in custody. In addition, the provision adds that the US government can request the custody of the convicted member of the visiting forces.

The manner of entry and departure of the visiting forces is provided in Article III of the agreement. The military personnel of the visiting forces are exempted from having passport and visa upon entering the country but civilian members are required to have their passports. In lieu of not having the standard travel documents, each military personnel shall present an identification card issued by the US government and a certificate authorizing the travel while the entire contingent through its commander must certify that the vessel or aircraft is free from diseases to be quarantined. It is not stipulated in the agreement the limit size and equipment to enter the country.

Articles IV, VII and VIII are provisions on the entry and use of vehicles, importation and exportation

of materials and equipment to be used during the military exercise and the movement of vessels and aircraft within Philippine territories respectively. It is said in the agreement that vehicles of the visiting forces are exempted from registration but should have markings when used during the conduct of activities related to the agreement. The Philippine government also accepts as valid without any driving test or license by those who operate vehicles.

Importation and exportation of materials, supplies and equipment are not subject to taxes or duties upon entering or departing the Philippine territories provided that such materials, supplies and equipment will be used during the conduct of the agreement. Furthermore, the vehicles, vessels and aircraft may enter the Philippine territories with the approval of the Philippine government. The vessels and aircraft are exempted from port of airport duties/fees.

The visiting forces agreement even before its ratification is challenged and questioned in terms of its constitutionality and respect for the sovereignty of the Philippines. According to several critics like the Public Interest Law Center (n.d.) [8] who is arguing that the agreement is unconstitutional since there are provisions in the agreement which is in contrast with the Philippine constitution. On one hand, Francisco Nemenzo [9] is arguing against VFA because he perceived that ratifying the treaty is just like surrendering our sovereignty to the United States of America. Nemenzo pointed to some of the provisions in the agreement that the US armed forces can enter the country at their own judgment on how large the size of their contingent and how many military equipment will enter the country. Despite the critics mentioned and still proliferating up to this date, the visiting forces agreement came into effect after the Philippine senate ratified it in 1991.

Visiting Forces Agreement: Republic of the Philippines and Australia

Even the visiting forces agreement between the Republic of the Philippines and the United States of America is still being enforced, the Republic of the Philippines entered into another visiting forces agreement with Australia. The agreement is dubbed as the Status of Visiting Forces Agreement (SOVFA) with Australia since it is still waiting for the ratification of the Philippine Senate.

The agreement was signed in 31 May 2007 in Canberra, Australia by both the Defense Secretary of the Philippines, Hermognes Ebdane, and his

counterpart Defense Minister of Australia Brendan Nelson. The agreement, like the RP-US visiting forces agreement, also provides a legal framework and mechanism on the conduct of trainings and military exercises between the two parties involved [10].

More concretely, the agreement is a mutual relationship between the Armed Forces of the Philippines (AFP) and the Australian Defense Force (ADF) since there will be joint military trainings and exercise which both parties will undergo. According to the report and statements made by the Australian government, the SOVFA will enable both parties to learn from each other during military trainings and exercises [10]. In addition, the Australian visiting forces will enhance the capability of the Armed Forces of the Philippines in counter terrorism measures. Moreover, the Australian government will be donating 30 high-speed gunboats and other equipment to further bolster the capacity of the AFP to counter terrorism and insurgencies.

The conception of the SOVFA between the Philippine Government and the Australian Government has its roots in the long history of relationship between the Philippines and Australia. Rommel Banlaoi [11] traces from historical documents the relationship between the Philippines and Australia. He found out that as early as the 19th century, there have been contacts between the Filipinos and the Australians through the Australian missionaries who went to the Philippines to spread the Christian faith. However, there have been no concrete evidences in the Philippine – Australian history in further contacts between the two nations until the Second World War.

During World War II, the Royal Australian Navy (RAN) and more than 4,000 Australian fought side by side with the Filipino and American soldiers against the imperial Japan. Then, in 1951, after the Philippines gained independence, Australian government established a consular office in Manila. The Australian government also aids the Philippines in economic reconstruction. It is also the same year that the Philippines open its Defense Attaché Office in Australia. During the Cold War period, both the Philippines and Australia were members of the Southeast Asia Treaty Organization (SEATO) initiated by the United States of America. In the Martial Law Period, the Philippine government opened its doors to other security partners in the Asia Pacific region. President Marcos began serious talks on security issues with the Australia that ended with

the Defense Cooperation Program (DCP) in 1973 [11].

Further relationship on defense and security issues between the Philippines and Australia was strengthened when the Military Bases Agreement (MBA) between the Philippines and the United States of America was terminated. The Philippine government deliberately sought the assistance of the Australian government as it seeks a reliable security counterpart in Southeast Asia. The AFP and the ADF conducted several bilateral security dialogues from 1992 to 1994 that culminated the historical Philippines-Australia Defense Cooperation Agreement in 1995. The Defense agreement include “mutual access to training facilities, the joint training and military exercises, access to defense facilities and courses, exchange of information, cooperation in Defense and science and technology and Defense industry” [11]. From this agreement sprung several military but small military dialogues, exercise and activities in the Philippines. It is small since the agreement must pass through the Philippine senate for ratification before it can further expand its scope. There were other agreements that the Philippines and Australia entered into following and complementing the Philippine-Australia Defense Cooperation Agreement.

The different agreements and military exercises between the Philippines and Australia was further cemented when the Status of Visiting Forces Agreement was signed in 2007. The SOVFA still awaits the ratification of Philippine senate before it can be enforced. Moreover, the Status of Visiting Forces Agreement (SOVFA) has the following provisions that define the interaction and extent of the military training that the Australian Defense Force will render to its counterparts in the Armed Forces of the Philippines.

The agreement opens with an article stating that the visiting forces, referring to the Australian military troops, will uphold with utmost respect the law of the receiving state, referring to the Philippine government, while the agreement is being enforced and military activities is being done in the Philippines (Article II). This declaration in the agreement is in adherence to fundamental norm in international law which is respect for the sovereignty of another country.

Hence, in circumstances that a member of the visiting forces committed a crime within the Philippine territories, he/she will be subject to the

laws of the Philippines. The accused will be subject to the proceedings of the Philippine courts. In terms of custody, the Philippine government and the Australian government will have a concurrence as to whom and where the accused will be held. Both parties in the agreement will need to decide whether the accused committed the crime in performance of “official duty”. The accused shall also have the right to speedy trial, legal counsel and assistance from the embassy.

Article III, IV and V of the agreement specifies the size of the visiting forces, manner and entry of the visiting forces and military trainings and activities to be held in the receiving state respectively. Both parties are given the opportunity to decide on the size of the visiting forces. Upon entry in the receiving state, the members of the visiting forces are not required to present passport and visa, rather an identification card and a certificate of travel issued by the authorities of the sending government. The Philippine authorities are also given the responsibility to conduct quarantine inspection to the vessels and aircrafts upon arrival in the receiving state. In addition, both countries, through their designated authorities shall decide on the activities to be done as well as the facilities to be used during the military exercises and activities.

The vessels and aircrafts of the visiting forces are given the freedom to enter the receiving country upon the approval of the receiving state and with the concurrence of the visiting forces authorities (Article 7). The article even goes further by allowing the vessels and aircrafts freedom of movement to perform lawful activities.

In article 7A or the mortuary affairs, it stipulates that in case a member of the visiting forces died in performance of “official duty” within the Philippine territories, the receiving state has the following obligations, first, the authorities of the visiting forces shall take charge of the mortuary affairs in accordance with the law of the receiving state. Second, the receiving state should help in the recovery of the remains of the dead person if it is missing and believed to be dead. Third, with the concurrence of the receiving state and the family members of the dead member of the visiting forces, the remains of the person can be buried in the receiving state. Fourth, the receiving state has the obligation of helping the visiting forces in the investigation of the death of a member of the visiting forces.

The agreement also specifies in Article 12 that the environment of the receiving state shall be protected from any harm or hazardous actions and the health of

the persons residing in the receiving state shall also be protected. In this article, both parties committed to restrain actions that will degrade and destroy the environment. Article 13 continues with providing a provision on the exemption of imported and exported materials, supplies and equipment from duties and taxes upon entering and departing the receiving state’s territory for the purpose of the military training and activities.

VFA (RP and USA) and VFA (RP and AUS): A Comparison

The visiting forces agreement (VFA) between the Philippines and the United States of America poses some similarities and differences with the visiting forces agreement that the Philippines entered into with Australia very recent as awaiting to be ratified by the Philippine senate. In this part, an examination of the differences and similarities will be illustrated.

It can be observed that both the VFA and the SOVFA are perceived to be legal frameworks that guide the conduct and interaction between the visiting forces of the US and Australia with the Armed Forces of the Philippines. The conduct and interaction can be seen in the activities that both the visiting forces and the AFP will undertake. This includes military training through joint exercises, seminars/workshops and civil-military training among others rendered by the visiting forces to the AFP to enhance the tactical and military skills. Enhancing the military skills of the AFP is to prepare them against possible aggression from external forces, transnational crimes and internal conflict resolution.

Both the VFA and the SOVFA requires ratification from the Philippine senate and does not only remain as an executive agreement among two heads of state. Hence, the VFA and SOVFA are treated as treaties among two nations and can be terminated according to the will of Philippine senate where its members are elected and delegated representative of the Filipino people.

The main objectives of the VFA and the SOVFA also have parallelisms such as enhancing the military capability of the Philippines to rendered both by the US and Australia, strengthening alliances to ensure stability in the Asia-Pacific Region and to put blatantly, the three countries, The Philippines, Australia and the United States of America have intensified their campaign against terrorism and transnational crimes that affects the entire region.

Most of the provisions in the VFA are also resembled in the SOVFA. Both agreements acknowledged and respect the laws of the Philippines. Both agreements have the same provisions on the requirements being demanded from the visiting forces upon entry and departure in/from the Philippines. The vessels and aircrafts of the visiting forces are also allowed to enter the Philippines and have the freedom of movement within Philippine territories that has connection with military training and with the approval of the Philippine Government. The importation and exportation of military equipment, supplies and materials are allowed and exempt from custom duties and taxes as long as it is connected and will be used for the military activities/exercises. Most importantly, if any member of the visiting forces committed a criminal offense within the Philippine territories, the Philippines has a jurisdiction over the accused. Jurisdiction entails that the accused will undergo judicial proceedings in the Philippine courts with the rights to speedy trial, legal counsel of choice and assistance from one's embassy.

However, one can also critically observe the differences between the VFA and SOVFA. There are two significant differences between the VFA and the SOVFA. The first one is the provision on environmental protection. In article 12, section 1 of the SOVFA, it stipulates that "...the parties recognize and acknowledge the importance of environment protection in the context of combined training, exercises or other activities mutually approved by the Parties". This provision entails that both parties are responsible for protecting the environment and will do appropriate measures to prevent it from degradation.

The second is the provision in Article 7A of the SOVFA concerning "mortuary affairs". It states that mortuary affairs is the "identification, processing, repatriation and disposal of the remains of a deceased member of a Visiting Force or its civilian component and associated personal effects" (Article 7A, Sec. 8a). This two provisions in the SOVFA are concretely absent in the VFA.

Other differences between the VFA and the SOVFA can be characterized as a remedy or additions to correct past negative experiences and criticisms with the former agreement. First, in the SOVFA, there is a provision that both the RP and Australia are to determine the size of the visiting forces. Whereas in the VFA, there is no provision stating an opportunity for the RP to have a say on how many US forces will be entering the Philippines. This can also deliberately

mean that VFA is given the discretion to control the entry of its nationals in the country. Second, the entry of Australian forces in the Philippines will require a list of names from the contingent as well as allowing the Philippine authorities to inspect Australian Aircraft and vessels on health and quarantinable diseases. This would be more palatable to the Philippines since it creates awareness on the entry of other nationals. For the VFA, it is only the US authorities who will certify that the aircraft of the vessel is free of communicable and quarantinable diseases. Hence, there is no concrete power that the Philippine authorities can exercise.

Third, in matters of criminal jurisdiction, the Australian authorities will consult the Philippine authorities if the crime committed by the accused is within the bounds of performance of "official duty". During judicial proceedings, the Australian authorities commit itself to allow the custody of the accused in Philippine territories and facilities. Slightly, when a pending investigation is on-going, is the accused is in the custody of the Philippine authorities, it will remain with them. However, if the accused is in the custody of the Australian authorities, it will remain with them until the proceedings occur.

Fourth, individual members of the visiting forces in the SOVFA are allowed freedom of movement in the Philippine territories for lawful activities as stipulated in Article 7, Section 5 of the agreement. This can manifests that members of the visiting forces are allowed to go in places where they deem that they can exercise or do lawful activities. In this case, more appropriate locations can be determined in any activities and exercises without any regulatory constraints.

Fifth, there are other additional provisions in the SOVFA relating to claims in case damages of property has been inflicted during the military activities, handling and classification of information and employment of local civilians among others. These provisions are not stated or simply additional provisions in the SOVFA for its enhancement. Rather, these are provisions that allows for equal opportunities on both parties to exploit exchanges of practices and knowledge without depriving any party.

Framework of Analysis: National Security and the Principle of Non-Intervention

The non-intervention principle "is a by-product of the Westphalian state-system and defined as the duty of the states not to interfere with the internal affairs of

a sovereign state, it is the principal [and the] practical expression of the right of sovereignty in the context of inter-state relations” [12]. The prime thrust of this standard is to protect the right of every state to manage its own affairs without the influence of an external other state, entity or organization. However, the visiting forces agreement is said to be an expression of the US and in the future, Australia, their interference in the sovereignty of the Philippines.

Critics of the Visiting Forces Agreement (VFA)[15 & 18] argue that the agreement is an immense violation of the Philippine Constitution and Philippine sovereignty. It is known that the main thrust of the idea of a national sovereignty that is the capacity of national authorities to impose laws and rules over the people within their specified territory and can freely and independently stipulate its foreign policy, legal structure, form of government and national system according to Longlong in 1995 [cited in 13] is being violated. Hence the violation of the Constitution is also a violation of the Philippine sovereignty since the former is crafted according to will of the Filipino people.

The VFA and SOVFA can greatly enhance national security since there is alliance forged between the Philippines and the United States of America and Australia. It can also prevent external aggressors to enter Philippine territories since the alliance will assure aid to the Philippines.

Although the VFA awaits judgment from the Philippine Supreme Court on its constitutionality, critics and legal experts have presented arguments saying that the agreement is unconstitutional and thus violating Philippine sovereignty. Evidences advanced by known critics of the VFA, namely the Public Interest Law Center [8], Francisco Nemenzo [9] and legislators [18] in the lower house of congress, can be seen through the following,

First, it is stated in Art II Sec 2 of the Philippine Constitution that the Philippines renounces war and nuclear weapons as instruments of national policy. However, it is not clearly stipulated in the VFA what particular military activities that the US and Philippine Armed Forces to engage in. The implication is that the US and the Philippines can undertake any military activities even launching a missile against the neighboring countries in Asia.

Second, in terms of criminal jurisdiction, the Philippines can only request to the visiting forces, particularly the US visiting forces, on the custody of the accused member of the visiting forces who

committed criminal offense in the Philippines. This provision in the VFA again is a violation of Philippine sovereignty since anyone who enters Philippine territories should be subject to its laws and rules. In addition to this violation is the freedom of the visiting forces to mobilize anywhere in the Philippine territories.

Third, the requirements of the Philippine law for foreign troops, facilities or bases to be allowed in the Philippines are the following, only under treaty, duly ratified by senate, ratification by congress through national referendum and recognized as a treaty by the other contracting party. However, the US did not recognize that the VFA is a treaty rather an executive agreement.

Fourth, tax exemptions are to be passed in the lower house of congress before anyone or any entity gets exempted from paying taxes. It is evident that there are no resolutions by the Philippine congress on tax exemptions on military supplies, and equipment to be imported or exported in the Philippines.

The SOVFA, as it resembles the VFA provisions also violates the Philippine Constitution and the sovereignty of the Philippines. Hence, the sovereignty of the Philippines is limited to the dictates of the VFA which greatly favors the United States of America. In addition, Philippine foreign policy is directly influenced by the dictates of the agreements stipulated in the VFA.

CONCLUSION

The visiting forces agreement, both the VFA between the Philippines and the US and the SOVFA between the Philippines and Australia, can be of great benefit for the Philippines especially in upgrading military equipment and training of military personnel. However, the agreement should be framed in a context that is mutual to both parties. It should not interfere in the affairs of the Philippines and give due reverence to the sovereignty of the Philippine territories.

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