

**PHILIPPINE SOVEREIGNTY AS
A SIDE-SHOW: THESES ON
THE VISITING FORCES AGREEMENT**

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I

In the present discussion, I propose to return home to the basic issue, namely, the constitutionality of the Visiting Forces Agreement with the United States (VFA). Does this agreement contravene the conditions set forth in section 25, Article XVIII of the Constitution? This issue combines the main thrusts of *Bayan v. Executive Secretary* and *Nicolas v. Romulo*.

This constitutional provision reads:

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

This provision indeed is in the nature of a prohibition, but its full measure becomes all the more compelling because it is a mandate of the fundamental law. It carries the force of law that, as reaffirmed by the Civil code in Article 5, “Acts executed against the provisions of mandatory or prohibitory laws shall be void”

If the VFA fails to comply with the constitutional requisites set forth in Section 25, Article XVIII, it falls within the prohibition and must be consigned to nullity. In applying this prohibitory rule, it necessarily carries the import that it must be interpreted strictly in order to carry out the reason of the law.

In October 2000, the Supreme Court decided in *Bayan vs. Executive Secretary* (GR No. 138570, 10 October 2000) that the VFA has complied with all the requirements under section 25, Article XVIII of the Constitution, and thus it stands valid and constitutional. Two weeks ago, on February 11, it reaffirmed its *Bayan* decision, reiterating the constitutionality of the VFA in *Nicolas v. Romulo* (GR No. 175888).

The crux of the controversy deals with the following question: Has the United States Government recognized the VFA as a “treaty”, as required by section 25, Article XVIII of the Constitution? This question arises from the undisputed fact that the US Government has concluded the VFA as an **executive agreement**, and not a treaty as known in the constitutional law systems of both the Philippines and the US.

In defiance of the constitutional text plainly indicating that the VFA does not conform to the standards of validity under the fundamental law, the US Government has never shown any intention of transforming the VFA into a treaty as characterized by the US Constitution. It has insisted all the time that VFA is in compliance with the Philippine Constitution because the US Government recognizes it as a binding agreement under international law. This position, reflected in a letter of the US Ambassador to the Philippines (Thomas C. Hubbard) and made part of the record of the case, appears to have been the line of reasoning accepted by *Bayan* and pursued in *Nicolas*.

In the process, the term “treaty” as used in section 25, Article XVIII of the Constitution has suffered so much torture that it becomes unrecognizable as *Bayan* engages in relentlessly liberalizing the interpretation of the constitutional text. As a result, the term has lost its plain meaning as understood in the Philippine Constitution as well as in the US Constitution as *Bayan* eliminates the distinction between “treaty” and

“executive agreement”. In the end, *Bayan* implies that the US Government has recognized the VFA as a treaty by concluding an executive agreement.

Since it would seem inevitable, pursuant to the concept of a treaty as used and recognized in the context of domestic law, that the constitutionality of the VFA cannot be sustained, *Bayan* transports the meaning of the term “treaty” to the international plane under international law.

II

Bayan goes into a double shift in fact, accomplished in the following manner:

(a) The first shift consists in the transference of interpretation of the term “treaty” from its constitutional meaning to its “ordinary” meaning, as follows:

This Court is of the firm view that the phrase “*recognize as a treaty*” means that the other contracting party accepts or acknowledges the agreement as a treaty¹. To require the other contracting state, the United States of America in this case, to submit the VFA to the United States Senate for concurrence pursuant to its constitution, is to accord strict meaning to the phrase.

Well-entrenched is the principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed, in which case the significance thus attached to them prevails. Its language should be understood in the sense they have in common use.²

(b) The second shift is the transference of interpretation of the concept of treaty from domestic law to international law, i.e., to the international plane in the relations of States:

Moreover, it is inconsequential whether the United States treats the VFA only as an executive agreement because, under international law, an

¹ This proposition is footnoted in *Bayan*: “Ballantine’s Legal Dictionary, 1995”. See 343 SCRA 449, at 488.

² 343 SCRA 449 at 488.

executive agreement is as binding treaty.³ To be sure, as long as the VFA possesses the elements of an agreement under international law, the said agreement is to be taken equally as a treaty.

A treaty, as defined by the Vienna Convention on the Law of Treaties, is “an international instrument [sic] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation”....⁴

* * *

Thus, in international law, there is no difference between treaties and executive agreements in their binding effect upon States concerned, as long as the negotiating functionaries have remained within their powers. International law continues to make no distinction between treaties and executive agreements: they are equally binding obligations upon nations.

The first shift begins with the assumption that the term “treaty” should be understood in its “ordinary meaning”, i.e., in the sense it has “in common use”. This means a treaty is an agreement, pursuant to the “principle that the words used in the Constitution are to be given their ordinary meaning except where technical terms are employed.” On this understanding, the Court “is of the view that the phrase *recognized as a treaty* means that the other contracting party accepts or acknowledges the agreement as a treaty”.

In this interpretation, *Bayan* is confused as to the meaning to be given to the term “treaty”. It is misplaced to use the so-called “ordinary meaning” of “treaty” as lifted from Ballantines’s Legal Dictionary and to impute it to this term as used in Section 25, Article XVIII of the Constitution. Under this provision, “treaty” is not a term “in common use”; it is of special signification in that it is an international agreement concurred in by the Philippine Senate subject to a procedure required by the Constitution. Its special nature is emphasized all the more not only by Senate concurrence but as well by another

³ This proposition is provided with a footnote in *Bayan*: “*Altman Co. vs. United States*, 224 U.S. 263 [1942], cited in Coquia and Defensor, *International Law*, 1998 ed., p. 497.”

⁴ The term “treaty” in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) states that it “means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instrument and whatever its particular designation”.

category of agreement classified as executive agreement which is executed by the President alone or with congressional authority, but acquiring validity without need of Senate concurrence. In comparable terms, the term “treaty” under the US Constitution is an agreement made by the US President with the advice and consent of the US Senate and excludes obviously executive agreements.

It is a misconception to disregard the special character of a “treaty” in this constitutional sense, more so because it is replaced by the notion that it is to be understood in its “ordinary meaning” applied “in common use”. The misconception acquires a sharper focus owing to the clear implication that “treaty” taken in its ordinary meaning in common used, as explained by the Supreme Court in *Bayan*, eliminates the difference between a treaty and executive agreement. The ordinary meaning of “treaty” embraces an executive agreement; a treaty and an executive agreement are both agreements understood as treaty in ordinary meaning as adopted by *Bayan*. This misconception becomes a fundamental premise of *Bayan’s ratio decidendi*, considering that the United States, the other contracting party, executed the VFA as a mere executive agreement.

III

This line of reasoning then brings the interpretation of the term “treaty” along the logic of the other contracting party, the United States of America, which argues that it recognizes the VFA as a treaty although it has executed it as an executive agreement. By the magic of this reasoning in the misconceived context provided in *Bayan*, the constitutional difference between a treaty and executive agreement disappears. In effect, *Bayan* throws overboard the obvious constitutional standard and adopts in its place the position of the United States as the “other contracting state” of the VFA. Thus, *Bayan* asserts:

The records show that the United States Government, through Ambassador Thomas C. Hubbard, has stated that the United States government has fully committed living up to the terms of the VFA. For as long as the United States of America accepts or acknowledges the VFA as

a treaty, and binds itself further to comply with its obligations under the treaty, there is indeed marked compliance with the mandate of the Constitution.⁵

This assertion is based on the letter of U.S. Ambassador Hubbard to Senator Miriam Defensor-Santiago, which is read into the record of the case. It appears that this reasoning conforms to Hubbard's letter thus:

As a matter of both US and international law, an international agreement like the Visiting Forces Agreement is legally binding on the US Government. In international legal terms, such an agreement is a "treaty"....

IV

As to the second shift, *Bayan* upholds the constitutionality of the VFA by means of reasoning which transports the interpretation of the term *treaty* to the regime of international law operating in the international plane, wrenching it away from its proper context set in the text of the Constitution in section 25, Article XVIII. Thus, *Bayan* makes use of the term treaty in Article 2(1)(a) of the Vienna Convention on the Law of Treaties (1969) in which it is understood as "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and *whatever its particular designation*".⁶ This usage embraces such category of agreements without respect to their nomenclature or how it is entitled; in this sense, the term "executive agreement" is merely a designation of an international agreement categorized as a treaty. Thereby, the distinction between "treaty" and "executive agreement", in the language of U.S. Ambassador Hubbard, "[i]n international legal terms, such agreement is a 'treaty'".

Even as *Bayan* emphasizes the usage of "treaty" in the international sphere as provided in paragraph 1 of Article 2 of the Vienna Convention on the Law of Treaties it fails or avoids to make a correlation with its companion provision in paragraph 2 which is directly relevant to the interpretation of "treaty" in the context of the national or internal law as involved in *Bayan*. Paragraph 2 of Article 2 of this Convention provides:

⁵ *Bayan v. Executive Secretary*, 342 SCRA 449, at 490.

⁶ Emphasis added.

The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them *in the internal law of any State*.⁷

While under paragraph 1, as given above, an executive agreement belongs to the species of treaty and is subsumable under the meaning of “treaty”, to the effect that no distinction exists between a treaty and an executive agreement in international law; in paragraph 2 of the same Article as shown above, the Vienna Convention recognizes the distinction which the internal law of the Philippines gives to a “treaty” and an “executive agreement”.

In Philippine constitutional law, the jurisprudence of the Supreme Court has established that an executive agreement is to be distinguished from a treaty in that it acquires validity and effectiveness without the concurrence of the Senate. “While treaties are required to be ratified by the Senate under the Constitution,” affirms the Supreme Court in *Commissioner of Internal Revenue vs. John Gotamco & Sons, Inc.*, less formal types of international agreements, may be entered into by the Chief Executive and become binding without the concurrence of the legislative body,” referring to executive agreements. *Commissioner of Customs v. Eastern Sea Trading*⁸ has pronounced that “the right of the Executive to enter into binding agreements without the necessity of subsequent congressional approval has been confirmed by long usage.” Earlier, in *USAFFE Veterans Association vs. Treasurer of the Philippines*, the Court has declared that “Executive Agreements may be entered into with other states and are effective, concurrence of the Senate.” Hence, “treaty” as used in the Treaty Clause of the Constitution, being subject to Senate concurrence, does not contemplate executive agreements.

By the nature of the controversy involved in *Bayan* and in *Nicolas*, the Supreme Court is not engaged in the adjudication of rights and duties of States parties to the VFA in the international sphere. Certainly *Bayan* has nothing to do with treaty enforcement or

⁷ Emphasis added.

⁸ 3 SCRA 351, 356 [1961]

breach of obligation in international law when it deals with the VFA. *By itself alone*, therefore, paragraph 1 in Article 2 of the Vienna Convention does not apply to the issue at bar. Accordingly, it is out of place for *Bayan* to assert that “an executive agreement is as binding as a treaty ... [and that] International law continues to make no difference between treaties and executive agreements.”

Rather, *Bayan* deals with the issue of interpretation of constitutional text as composed in section 25, Article XVIII of the fundamental law. This is strictly a problem of internal law, which connects the import of paragraph 2 of Article 2 of the Vienna Convention to the application of Philippine internal law which maintains the distinction between a treaty and executive agreement, as explained above.

V

If the logic of *Bayan* and of *Nicolas* is to be pursued in the application of the concept of treaty under international law, the risk of absurdity becomes apparent. This pertains to the principle that in the international plane *a treaty overrides the national law, including the Constitution*. This approach in *Bayan* consequently and, in *Nicolas* becomes an unrelenting anomaly in regard to the nature of the controversy at bar involving as it does a constitutionality attack: the issue as to *whether the VFA is in contravention of the Constitution or not*. *Bayan* and *Nicolas* are engaged in deciding the question whether the VFA contravenes the Constitution and yet it is resolving this problem in the context of international law in the international sphere where treaty stands supreme over the Constitution.

Obviously referring to the obligations under the VFA, *Bayan* sounds a warning that the Philippines will be subject to international responsibility should it violate such obligations, implying that it is its duty as a State to interpret and apply the Constitution and the law to the end that it will not defeat its international obligations. Taking the viewpoint of international law applied in the international plane, *Bayan* reasons out:

As a member of the family of nations, the Philippines agrees to be bound by generally accepted rules for the conduct of its international relation. While the international obligation devolves upon the State and not upon any particular branch, institution, or individual member of its government, the Philippines is nonetheless responsible for violations committed by any branch or subdivision of its government or any official thereof. As an integral part of the community of nations, *we are responsible to assure that our government, Constitution and laws will carry out our international obligations. Hence, we cannot readily plead the Constitution as a convenient excuse for non-compliance with our obligations, duties and responsibilities under international law.*

With this vantage point, *Bayan* may have created the need to remind the Court that it is not sitting as an international tribunal which subordinates the Constitution to treaty obligations and, in doing so, does violence to the nature of the law at bar which is instituted for the purpose of determining whether the treaty in question — the VFA — contravenes the Constitution. *Bayan* now turns the table and instead raises the issue whether the Constitution should be interpreted in conformity with the said treaty!

The dilemma this vantage point presents may have seriously affected the temper of the Court in the exercise of its judicial review power over the constitutionality of a treaty or executive agreement under section 5(2)(a)), Article VIII of the Constitution. This provides that the Court possesses the power to “[r]eview, revise, modify, or affirm on appeal on *certiorari* ... final judgments and orders of lower courts in “All cases in which the *constitutionality or validity of any treaty, international or executive agreement ... is in question*”. It is to be assumed that if the Court finds justification to strike down a treaty as unconstitutional, it is aware that under international law its decision becomes an act of the Philippines as a State which is constituted as an internationally wrongful conduct by which the Philippines would incur international responsibility pointed out in *Bayan*, as quoted above. Will the Court be motivated to avoid making a decision adverse to the treaty pursuant to the approach taken by *Bayan* and *Nicolas* even if the Constitution and the facticity of the case warrant?

Parties come to the Supreme Court in reliance of the faith that it will exercise the power of judicial review by which on the basis of constitutional standards it may declare

a treaty or executive agreement unconstitutional. Instead, they are told, as in *Bayan* and *Nicolas*, that the Philippine Government together with the parties, that they must conduct themselves under the Constitution and the laws in such a manner as to give due respect to obligations under the international law of treaties over and above the Constitution.

VI

Nicolas derives its rationale on the constitutionality of the VFA from two reasons:

(a) The VFA “has been recognized as a treaty by the United States as attested and certified by the duly authorized representative of the United States government”;

(b) The VFA “is simply an implementing agreement to the main RP-US Mutual Defense Treaty” and as such “it was not necessary to submit the VFA to the US Senate for advice and consent” — the logic being that the VFA was included in the RP-US Mutual Defense Treaty when the latter agreement was “ratified and concurred in by both the Philippine Senate and the US Senate”.

As to the first reason stated above, it is nullified by the *Nicolas ponencia* itself when it implies that the VFA was transmitted to the US Congress as a requirement under the US law called the Case–Zablocki Act. This Act requires the US President through the Secretary of State to transmit to the US Congress international agreements entered into by the US government, or by its officials or agencies, *which are not characterized as treaties*, i.e., those which have not been executed as treaties with the advice and consent of the US Senate under the US Constitution.

The following extract from *Nicolas* is a refutation of its own argument:

Accordingly as an implementing agreement of the RP-US Mutual Defense Treaty, it was not necessary to submit the VFA to the US Senate for advice and consent, but *merely to the US Congress under the Case-Zablocki Act within 60 days of its ratification*. (Emphasis added)

Pursuing this argument, *Nicolas* goes on to state that —

... the US has certified that it recognizes the VFA as a *binding international agreement, i.e., a treaty*, and this substantially complies with

the requirements of Art. XVIII, Sec. 25 of our Constitution. (Emphasis added.)

This kind of reasoning is self-defeating. Under Section 112b of the Case—Zablocki Act,

The Secretary of State shall transmit to the Congress the text of any international agreement . . . , *other than a treaty*, to which the United States is a party as soon as practicable *after such agreement has entered into force with respect to the United States* (Emphasis added.)

Under this Act, an agreement of which the US is a party may be binding on the US when it enters into force but the fact that it is covered by this law testifies that it is not a treaty.

The question in *Nicolas* is not whether the VFA is a binding agreement on the part of the US. The issue is whether it is a treaty on the side of the US as a “contracting state” under the VFA. And on this issue, the VFA is not qualified to be valid and constitutional for the reason that it is not recognized as a treaty by the US as a contracting State on the account of its own Constitution and law.

VII

As to the second reason relied on by *Nicolas*, the theory that the VFA is simply an implementing agreement to the RP-US Mutual Defense Treaty (MDT) is speculative as to the intention of the parties concerning the VFA-MDT connection. The two agreements may be complementary and closely related in the practice of the two governments, but in all indications the VFA, both under national law and in international law, stands independent in its legal status. Throughout all the stages of treaty-making, *Nicolas* does not show any means of identifying VFA’s validity or entry into force nor the performance of its rights and obligations as in any way dependent on the MDT. *Nicolas* fails to appreciate the distinction between the legal status of the VFA from its politico-military function in the practice of the states parties.

The issue as to whether the VFA (1998) is an implementing agreement to the MDT (1951) — separated in their conclusion by almost 50 years — is a matter left to the intent of the parties. That intent must be shown by some objective indicia, as to which *Nicolas* is a failure. As it stands in *Nicolas*, intent to that effect appears to be a judicial imputation to the states parties.

The thesis that the VFA is an implementing agreement of the MDT may become an artifice, leading to the absurdity that the VFA-MDT connection becomes a compliance almost 50 years earlier than the constitutional requirement under the 1987 Constitution, which it seeks to comply. This theory is a temptation to entertain the thought that the VFA, deriving its status as a treaty from MDT, had already complied with section 25, Article XVIII of the fundamental long before the constitutional mandate to be complied with came into existence.

In the internal mechanics of the Mutual Defense Treaty (MDT) nowhere is their any implication that it would require a separate treaty or agreement for its implementation. It appears to depend on its own means of implementation under its own provisions. Thus, under its Article III, it is provided 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. (Emphasis added)

Moreover, under Article IV of the MDT in case of an armed attack within its contemplation, each Party “would act to meet the common dangers in accordance with its constitutional processes.”

Hence, the MDT in itself does appear to preclude any means of implementation external to its own measures of implementation.

Another factor may belie the VFA-MDT connection imputed by *Nicolas*. In an exchange of notes between Philippine Secretary of Foreign Affairs Felixberto Serrano and US Ambassador Charles Bohlen of 15 May 1958, the Mutual Defense Board was created for the purpose of providing “continuing intergovernmental machinery for direct liaison and consultation between appropriate Philippine and United States authorities on military matters of mutual concern so as to develop and improve, through continuing military cooperation, the common defense of the two sovereign countries”.

The Mutual Defense Board under this exchange of notes has been operating as a comprehensive implementation mechanism covering the US Military Bases Agreement, the Military Assistance Agreement, the Mutual Defense Treaty and, currently, it is actively engaged in the implementation of the VFA. It deserves emphasis therefore that the VFA is not an implementing treaty at all with respect to any military-related RP-US agreement but that the VFA finds the Serrano-Bohlen Exchange of Notes as its implementing agreement. We may advance the idea that the “implementing” agreement of the MDT is not the VFA but the Serrano-Bohlen agreement.

VIII

The main thrust of *Nicolas* pursues the thesis in *Bayan vs. Executive Secretary* that the VFA’s validity is to be determined by its status under international law; in particular, *Bayan* accepts the position of the United States Government that it considers the VFA a binding agreement under international law, by which the execution of the VFA by that government as an executive agreement holds no legal significance on account of the fact that in the international law of treaties executive agreements are regarded as treaties.

The *Bayan* thesis disregards the fundamental point that the enforcement of obligations embodied in treaties under international law rely on the requirements of national law of the States parties, which are embodied in their respective constitutions or laws. The crux of the VFA controversy is not simplistically the issue of VFA validity in international law, as *Bayan* defines it into its *ratio decidendi*. The real issue deals with

the VFA’s compliance with the Philippine Constitution — concretely, whether the VFA is “recognized as a treaty by the other Contracting state”.

As previously noted, the jurisprudence of the Supreme Court itself strikes a distinction between a treaty and an executive agreement. The intent of the Constitutional Commission in requiring a “treaty” in that constitutional provision is fully spelled out in the dissenting opinion of Justice Puno in *Bayan*, as articulated by Commissioner Bernas in the Commission’s deliberations quoted above.

It is significant that Justice Puno’s dissent also spelled out the distinction between a treaty and an executive agreement under the constitutional law system of the United States — a distinction which may put to doubt the recognition and enforcement of the VFA as to its legal status, not only under the law of the individual states of the United States but as well by the US federal courts.

On the assumption that under the US Constitution, textually an executive agreement is not a treaty, the consequences of this exclusion are defined by clause 2, Article VI of that fundamental law, as follows:

This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and *all Treaties made, or which shall be made*, under the Authority of the United States, *shall be supreme Law of the Land*; and *the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary of notwithstanding*. (Emphasis added)

The “treaties” which enjoy supremacy over the laws and courts of the states of the United States in this provision are understood as those which the US President makes “*by and with the Advice and Consent of the Senate*” under section 2, Article II of the US Constitution.” (Emphasis added)

IX

By textual interpretation, if the VFA as an executive agreement is excluded from these constitutional provisions and does not have the benefit of supremacy, it stands in grave doubt as to its binding character in the regime of the states of the United States and their courts. May the VFA be recognized as law in the US such that will supersede or displace federal and state laws. Is it enforceable by the US courts, especially with respect to private rights of US citizens?

Are the provisions of the VFA on criminal offenses and jurisdiction recognizable as law by US courts? Will these provisions be considered by the US courts as self-executory by itself, or merely the basis for legislative implementation by the US Government?

The resulting portrait of the VFA is that it has become domestic law in the Philippines no less by the decision of the Supreme Court; whereas in US jurisdiction, not being enforceable as law without statutory implementation, it would not be accorded recognition by US courts.

The overall consequence may be the breakdown of the VFA as a binding instrument of reciprocity and mutuality.

All these considerations are telescoped into the implications of the decision of the United States Supreme Court of 25 March 2008 in *Medellin v. Texas*.

The questions framed above are addressed to the status of the VFA in the United States taken in the context of the decision of the US Supreme Court in *Medellin vs. Texas*, promulgated on 25 March 2008. To start with, significance is attached to the fact that *Medellin* deals with agreements which undoubtedly have the status as *treaties* under the US Constitution and the law, namely, the United Nations Charter, the Vienna Convention on Consular Relations together with its Protocol on Compulsory Settlement of Justice, as these are the basis of the decision of the International Court of Justice in

question. All these as against the status of the VFA as merely an *executive agreement* under the US Constitution and laws.

In *Medellin v. Texas*, the US Supreme Court has ruled that the *Avena* judgment of the ICJ does not constitute directly enforceable federal law and does not pre-empt state procedural limitations. While an international treaty may constitute international commitment, says the Court, it is not binding domestic law unless the US Congress has enacted implementing statutes, or unless the treaty itself is self-executory. Without congressional or constitutional authority, the US President does not have the power to enforce international treaties or ICJ decisions.

X

On the question of detention, the provision of the Visiting Forces Agreement (VFA) in paragraph 10, Article V, assumes significance:

The confinement or detention *by the Philippine authorities* of the United States personnel shall be carried out in facilities agreed on by appropriate Philippine and United States authorities. *United States personnel serving sentences in the Philippines shall have the right to visits and material assistance.* (Emphasis added)

The master principle in this provision is that detention shall be under the control and authority of the Philippine Government. It *excludes* the choice as to whether one or the other Government will have the authority over detention.

The sense of this provision is that the agreement between the “appropriate Philippine and United States authorities will not deal with the said choice. Their agreement is restricted to implementation of the authority exercised by the Philippine authorities, for example, as to which jail facilities or prison establishment is desirable or appropriate under the circumstances. Their agreement must subserve compliance with the master principle.

The last sentence reinforces the continuing operation of the master principle. It assumes meaning only under the condition that the detention is under the authority of the Philippine authorities. The right to visit and material assistance on the part of the US personnel serving sentence holds no meaning if the detention were under the US authorities.

In this respect, the Romulo-Kenney Agreement contravenes the master principle itself. It has transferred the authority over detention from the Philippine authorities to the US authorities.

Hence, on the question of detention, the application of Article V(10) of the VFA application in *Nicolas* needs to be re-structured. Interpreting this provisions, *Nicolas* states:

And this specific arrangement clearly states not only that the detention shall be carried out in facilities agreed on by authorities of both parties, *but also that the detention shall be “by Philippine authorities”* (Emphasis added)

This interpretation appears to subordinate the imperative rule that detention shall be “by Philippine authorities” to the agreement of the parties. Rather, the meaning of the provision in question calls for that agreement to perform only one function, i.e., to determine the specific detention “facilities” by way of putting into concrete effect the authority and control of the Philippine Government over the detention. Such agreement, in other words, is addressed to one problem: which prison or jail facilities already established as such by the Philippine authorities will be the place of confinement or detention?

This interpretation is in accord with the demand of reciprocity and mutuality in relation to a comparable provision under the US-RP Agreement “Regarding the Treatment of Republic of the Philippines Personnel Visiting the United States of America”, in which Article IX(1) on “Confinement and Visitation provides:

Confinement imposed by a United States federal or state court upon Republic of the Philippines personnel shall be served *in penal institutions in the United States suitable for the custody level of the prisoners chosen after consultation between the two governments.* (Emphasis added)

This “second VFA” so-called leaves no doubt that the choice to be undertaken by the “consultation” — certainly the more appropriate word than “agreement” as implied in the “first VFA” applied in the Philippines — by the two parties. It is submitted that the same meaning be given to Article V(10) of the VFA in question.

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