

**ARTHUR D. LIM AND PAULINO R. ERSANDO, PETITIONERS, VS.
HONORABLE EXECUTIVE SECRETARY AS ALTER EGO OF HER
EXCELLENCY GLORIA MACAPAGAL-ARROYO, AND HONORABLE
ANGELO REYES IN HIS CA...**

G.R. No. 151445. April 11, 2002

Ponente: DE LEON, JR., J.

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DE LEON, JR., J.:

This case involves a petition for certiorari and prohibition as well as a petition-in-intervention, praying that respondents be restrained from proceeding with the so-called “Balikatan 02-1” and that after due notice and hearing, that judgment be rendered issuing a permanent writ of injunction and/or prohibition against the deployment of U.S. troops in Basilan and Mindanao for being illegal and in violation of the Constitution.

The facts are as follows:

Beginning January of this year 2002, personnel from the armed forces of the United States of America started arriving in Mindanao to take part, in conjunction with the Philippine military, in “Balikatan 02-1.” These so-called “Balikatan” exercises are the largest combined training operations involving Filipino and American troops. In theory, they are a simulation of joint military maneuvers pursuant to the Mutual Defense Treaty,[1] a bilateral defense agreement entered into by the Philippines and the United States in 1951.

Prior to the year 2002, the last “Balikatan” was held in 1995. This was due to the paucity of any formal agreement relative to the treatment of United States personnel visiting the Philippines. In the meantime, the respective governments of the two countries agreed to hold joint exercises on a reduced scale. The lack of consensus was eventually cured when the two nations concluded the Visiting Forces Agreement (VFA) in 1999.

The entry of American troops into Philippine soil is proximately rooted in the international anti-terrorism campaign declared by President George W. Bush in reaction to the tragic events that occurred on September 11, 2001. On that day, three (3) commercial aircrafts were hijacked, flown and smashed into the twin towers of the World Trade Center in New York City and the Pentagon building in Washington, D.C. by terrorists with alleged links to the al-Qaeda (“the Base”), a Muslim extremist organization headed by the infamous Osama bin Laden. Of no comparable historical parallels, these acts caused billions of dollars worth of destruction of property and incalculable loss of hundreds of lives.

On February 1, 2002, petitioners Arthur D. Lim and Paulino P. Ersando filed this petition for certiorari and prohibition, attacking the constitutionality of the joint exercise.[2] They were joined subsequently by SANLAKAS and PARTIDO NG MANGGAGAWA, both party-list organizations, who filed a petition-in-intervention on February 11, 2002.

Lim and Ersando filed suit in their capacities as citizens, lawyers and taxpayers. SANLAKAS and PARTIDO, on the other hand, aver that certain members of their organization are residents of Zamboanga and Sulu, and hence

will be directly affected by the operations being conducted in Mindanao. They likewise pray for a relaxation on the rules relative to locus standi citing the unprecedented importance of the issue involved.

On February 7, 2002 the Senate conducted a hearing on the “Balikatan” exercise wherein Vice-President Teofisto T. Guingona, Jr., who is concurrently Secretary of Foreign Affairs, presented the Draft Terms of Reference (TOR).[3] Five days later, he approved the TOR, which we quote hereunder:

- POLICY LEVEL

- The Exercise shall be Consistent with the Philippine Constitution and all its activities shall be in consonance with the laws of the land and the provisions of the RP-US Visiting Forces Agreement (VFA).

- The conduct of this training Exercise is in accordance with pertinent United Nations resolutions against global terrorism as understood by the respective parties.

- No permanent US basing and support facilities shall be established. Temporary structures such as those for troop billeting, classroom instruction and messing may be set up for use by RP and US Forces during the Exercise.

- The Exercise shall be implemented jointly by RP and US Exercise Co-Directors under the authority of the Chief of Staff, AFP. In no instance will US Forces operate independently during field training exercises (FTX). AFP and US Unit Commanders will retain command over their respective forces under the overall authority of the Exercise Co-Directors. RP and US participants shall comply with operational instructions of the APP during the FTX.

- The exercise shall be conducted and completed within a period of not more than six months, with the projected participation of 660 US personnel and 3,800 RP Forces. The Chief of Staff, AFP shall direct the Exercise Co-Directors to wind up and terminate the Exercise and other activities within the six month Exercise period.

- The Exercise is a mutual counter-terrorism advising, assisting and training Exercise relative to Philippine efforts against the ASG, and will be conducted on the Island of Basilan. Further advising, assisting and training exercises shall be conducted in Malagutay and the Zamboanga area. Related activities in Cebu will be for support of the Exercise.

- Only 160 US Forces organized in 12-man Special Forces Teams shall be deployed with AFP field commanders. The US teams shall remain at the Battalion Headquarters and, when approved, Company Tactical headquarters where they can observe and assess the performance of the APP Forces.

- US exercise participants shall not engage in combat, without prejudice to their right of self-defense.

- These terms of Reference are for purposes of this Exercise only and do not create additional legal obligations between the US Government and the Republic of the Philippines.

- EXERCISE LEVEL

- TRAINING

- The Exercise shall involve the conduct of mutual military assisting, advising and training of RP and US Forces with the primary objective of enhancing the operational capabilities of both forces to combat terrorism.

- At no time shall US Forces operate independently within RP territory.

- Flight plans of all aircraft involved in the exercise will comply with the local air traffic regulations.

- ADMINISTRATION & LOGISTICS

- RP and US participants shall be given a country and area briefing at the start of the Exercise. This briefing shall acquaint US Forces on the culture and sensitivities of the Filipinos and the provisions of the VFA. The briefing shall also promote the full cooperation on the part of the RP and US participants for the successful conduct of the Exercise.
- RP and US participating forces may share, in accordance with their respective laws and regulations, in the use of their resources, equipment and other assets. They will use their respective logistics channels.
- Medical evaluation shall be jointly planned and executed utilizing RP and US assets and resources.
- Legal liaison officers from each respective party shall be appointed by the Exercise Directors.
- PUBLIC AFFAIRS
- Combined RP-US Information Bureaus shall be established at the Exercise Directorate in Zamboanga City and at GHQ, AFP in Camp Aguinaldo, Quezon City.
- Local media relations will be the concern of the AFP and all public affairs guidelines shall be jointly developed by RP and US Forces.
- Socio-Economic Assistance Projects shall be planned and executed jointly by RP and US Forces in accordance with their respective laws and regulations, and in consultation with community and local government officials.

Contemporaneously, Assistant Secretary for American Affairs Minerva Jean A. Falcon and United States Charge d' Affaires Robert Fitts signed the Agreed Minutes of the discussion between the Vice-President and Assistant Secretary Kelly.[4]

Petitioners Lim and Ersando present the following arguments:

I

THE PHILIPPINES AND THE UNITED STATES SIGNED THE MUTUAL DEFENSE TREATY (MDT) in 1951 TO PROVIDE MUTUAL MILITARY ASSISTANCE IN ACCORDANCE WITH THE 'CONSTITUTIONAL PROCESSES' OF EACH COUNTRY ONLY IN THE CASE OF AN ARMED ATTACK BY AN EXTERNAL AGGRESSOR, MEANING A THIRD COUNTRY AGAINST ONE OF THEM.

BY NO STRETCH OF THE IMAGINATION CAN IT BE SAID THAT THE ABU SAYYAF BANDITS IN BASILAN CONSTITUTE AN EXTERNAL ARMED FORCE THAT HAS SUBJECT THE PHILIPPINES TO AN ARMED EXTERNAL ATTACK TO WARRANT U.S. MILITARY ASSISTANCE UNDER THE MDT OF 1951.

II

NEITHER DOES THE VFA OF 1999 AUTHORIZE AMERICAN SOLDIERS TO ENGAGE IN COMBAT OPERATIONS IN PHILIPPINE TERRITORY, NOT EVEN TO FIRE BACK "IF FIRED UPON".

Substantially the same points are advanced by petitioners SANLAKAS and PARTIDO.

In his Comment, the Solicitor General points to infirmities in the petitions regarding, inter alia, Lim and Ersando's standing to file suit, the prematurity of the action, as well as the impropriety of availing of certiorari to ascertain a question of fact. Anent their locus standi, the Solicitor General argues that first, they may not file suit in their capacities as taxpayers inasmuch as it has not been shown that "Balikatan 02-1" involves the exercise of Congress' taxing or spending powers. Second, their being lawyers does not invest them with sufficient

personality to initiate the case, citing our ruling in *Integrated Bar of the Philippines v. Zamora*.^[5] Third, Lim and Ersando have failed to demonstrate the requisite showing of direct personal injury. We agree.

It is also contended that the petitioners are indulging in speculation. The Solicitor General is of the view that since the Terms of Reference are clear as to the extent and duration of “Balikatan 02-1,” the issues raised by petitioners are premature, as they are based only on a fear of future violation of the Terms of Reference. Even petitioners’ resort to a special civil action for certiorari is assailed on the ground that the writ may only issue on the basis of established facts.

Apart from these threshold issues, the Solicitor General claims that there is actually no question of constitutionality involved. The true object of the instant suit, it is said, is to obtain an interpretation of the VFA. The Solicitor General asks that we accord due deference to the executive determination that “Balikatan 02-1” is covered by the VFA, considering the President’s monopoly in the field of foreign relations and her role as commander-in-chief of the Philippine armed forces.

Given the primordial importance of the issue involved, it will suffice to reiterate our view on this point in a related case:

Notwithstanding, in view of the paramount importance and the constitutional significance of the issues raised in the petitions, this Court, in the exercise of its sound discretion, brushes aside the procedural barrier and takes cognizance of the petitions, as we have done in the early Emergency Powers Cases, where we had occasion to rule:

‘x x x ordinary citizens and taxpayers were allowed to question the constitutionality of several executive orders issued by President Quirino although they were involving only an indirect and general interest shared in common with the public. The Court dismissed the objection that they were not proper parties and ruled that ‘transcendental importance to the public of these cases demands that they be settled promptly and definitely, brushing aside, if we must, technicalities of procedure.’ We have since then applied the exception in many other cases. [citation omitted]

This principle was reiterated in the subsequent cases of *Gonzales vs. COMELEC*, *Daza vs. Singson*, and *Basco vs. Phil. Amusement and Gaming Corporation*, where we emphatically held:

‘Considering however the importance to the public of the case at bar, and in keeping with the Court’s duty, under the 1987 Constitution, to determine whether or not the other branches of the government have kept themselves within the limits of the Constitution and the laws that they have not abused the discretion given to them, the Court has brushed aside technicalities of procedure and has taken cognizance of this petition. xxx’

Again, in the more recent case of *Kilosbayan vs. Guingona, Jr.*, this Court ruled that in cases of transcendental importance, the court may relax the standing requirements and allow a suit to prosper even where there is no direct injury to the party claiming the right of judicial review.

Although courts generally avoid having to decide a constitutional question based on the doctrine of separation of powers, which enjoins upon the departments of the government a becoming respect for each others’ acts, this Court nevertheless resolves to take cognizance of the instant petitions.^[6]

Hence, we treat with similar dispatch the general objection to the supposed prematurity of the action. At any rate, petitioners’ concerns on the lack of any specific regulation on the latitude of activity US personnel may undertake and the duration of their stay has been addressed in the Terms of Reference.

The holding of “Balikatan 02-1” must be studied in the framework of the treaty antecedents to which the Philippines bound itself. The first of these is the Mutual Defense Treaty (MDT, for brevity). The MDT has been described as the “core” of the defense relationship between the Philippines and its traditional ally, the United

States. Its aim is to enhance the strategic and technological capabilities of our armed forces through joint training with its American counterparts; the “Balikatan” is the largest such training exercise directly supporting the MDT’s objectives. It is this treaty to which the VFA adverts and the obligations thereunder which it seeks to reaffirm.

The lapse of the US-Philippine Bases Agreement in 1992 and the decision not to renew it created a vacuum in US-Philippine defense relations, that is, until it was replaced by the Visiting Forces Agreement. It should be recalled that on October 10, 2000, by a vote of eleven to three, this court upheld the validity of the VFA.[7] The VFA provides the “regulatory mechanism” by which “United States military and civilian personnel [may visit] temporarily in the Philippines in connection with activities approved by the Philippine Government.” It contains provisions relative to entry and departure of American personnel, driving and vehicle registration, criminal jurisdiction, claims, importation and exportation, movement of vessels and aircraft, as well as the duration of the agreement and its termination. It is the VFA which gives continued relevance to the MDT despite the passage of years. Its primary goal is to facilitate the promotion of optimal cooperation between American and Philippine military forces in the event of an attack by a common foe.

The first question that should be addressed is whether “Balikatan 02-1” is covered by the Visiting Forces Agreement. To resolve this, it is necessary to refer to the VFA itself. Not much help can be had therefrom, unfortunately, since the terminology employed is itself the source of the problem. The VFA permits United States personnel to engage, on an impermanent basis, in “activities,” the exact meaning of which was left undefined. The expression is ambiguous, permitting a wide scope of undertakings subject only to the approval of the Philippine government.[8] The sole encumbrance placed on its definition is couched in the negative, in that United States personnel must “abstain from any activity inconsistent with the spirit of this agreement, and in particular, from any political activity.”[9] All other activities, in other words, are fair game.

We are not left completely unaided, however. The Vienna Convention on the Law of Treaties, which contains provisos governing interpretations of international agreements, state:

SECTION 3. INTERPRETATION OF TREATIES

Article 31

General rule of interpretation

- A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

- The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a)

any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b)

any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the party.

- There shall be taken into account, together with the context:

(a)

any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b)

any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c)

any relevant rules of international law applicable in the relations between the parties.

- A special meaning shall be given to a term if it is established that the parties so intended.

Article 32

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a)

leaves the meaning ambiguous or obscure; or

(b)

leads to a result which is manifestly absurd or unreasonable.

It is clear from the foregoing that the cardinal rule of interpretation must involve an examination of the text, which is presumed to verbalize the parties' intentions. The Convention likewise dictates what may be used as aids to deduce the meaning of terms, which it refers to as the context of the treaty, as well as other elements may be taken into account alongside the aforesaid context. As explained by a writer on the Convention,

[t]he Commission's proposals (which were adopted virtually without change by the conference and are now reflected in Articles 31 and 32 of the Convention) were clearly based on the view that the text of a treaty must be presumed to be the authentic expression of the intentions of the parties; the Commission accordingly came down firmly in favour of the view that 'the starting point of interpretation is the elucidation of the meaning of the text, not an investigation ab initio into the intentions of the parties'. This is not to say that the travaux préparatoires of a treaty, or the circumstances of its conclusion, are relegated to a subordinate, and wholly ineffective, role. As Professor Briggs points out, no rigid temporal prohibition on resort to travaux préparatoires of a treaty was intended by the use of the phrase 'supplementary means of interpretation' in what is now Article 32 of the Vienna Convention. The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.[10]

The Terms of Reference rightly fall within the context of the VFA.

After studied reflection, it appeared farfetched that the ambiguity surrounding the meaning of the word “activities” arose from accident. In our view, it was deliberately made that way to give both parties a certain leeway in negotiation. In this manner, visiting US forces may sojourn in Philippine territory for purposes other than military. As conceived, the joint exercises may include training on new techniques of patrol and surveillance to protect the nation’s marine resources, sea search-and-rescue operations to assist vessels in distress, disaster relief operations, civic action projects such as the building of school houses, medical and humanitarian missions, and the like.

Under these auspices, the VFA gives legitimacy to the current Balikatan exercises. It is only logical to assume that “Balikatan 02-1,” a “mutual anti-terrorism advising, assisting and training exercise,” falls under the umbrella of sanctioned or allowable activities in the context of the agreement. Both the history and intent of the Mutual Defense Treaty and the VFA support the conclusion that combat-related activities — as opposed to combat itself — such as the one subject of the instant petition, are indeed authorized.

That is not the end of the matter, though. Granted that “Balikatan 02-1” is permitted under the terms of the VFA, what may US forces legitimately do in furtherance of their aim to provide advice, assistance and training in the global effort against terrorism? Differently phrased, may American troops actually engage in combat in Philippine territory? The Terms of Reference are explicit enough. Paragraph 8 of section I stipulates that US exercise participants may not engage in combat “except in self-defense.” We wryly note that this sentiment is admirable in the abstract but difficult in implementation. The target of “Balikatan 02-1,” the Abu Sayyaf, cannot reasonably be expected to sit idly while the battle is brought to their very doorstep. They cannot be expected to pick and choose their targets for they will not have the luxury of doing so. We state this point if only to signify our awareness that the parties straddle a fine line, observing the honored legal maxim “Nemo potest facere per alium quod non potest facere per directum.”[11] The indirect violation is actually petitioners’ worry, that in reality, “Balikatan 02-1” is actually a war principally conducted by the United States government, and that the provision on self-defense serves only as camouflage to conceal the true nature of the exercise. A clear pronouncement on this matter thereby becomes crucial.

In our considered opinion, neither the MDT nor the VFA allow foreign troops to engage in an offensive war on Philippine territory. We bear in mind the salutary proscription stated in the Charter of the United Nations, to wit:

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

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4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

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In the same manner, both the Mutual Defense Treaty and the Visiting Forces Agreement, as in all other treaties and international agreements to which the Philippines is a party, must be read in the context of the 1987 Constitution. In particular, the Mutual Defense Treaty was concluded way before the present Charter, though it nevertheless remains in effect as a valid source of international obligation. The present Constitution contains key provisions useful in determining the extent to which foreign military troops are allowed in Philippine territory. Thus, in the Declaration of Principles and State Policies, it is provided that:

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SEC. 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations.

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SEC. 7. The State shall pursue an independent foreign policy. In its relations with other states the paramount consideration shall be national sovereignty, territorial integrity, national interest, and the right to self-determination.

SEC. 8. The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in the country.

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The Constitution also regulates the foreign relations powers of the Chief Executive when it provides that “[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate.”[12] Even more pointedly, the Transitory Provisions state:

Sec. 25. After the expiration in 1991 of the Agreement between the Republic of the Philippines and the United States of America concerning Military Bases, foreign military bases, troops or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratified by a majority of the votes cast by the people in a national referendum held for that purpose, and recognized as a treaty by the other contracting state.

The aforequoted provisions betray a marked antipathy towards foreign military presence in the country, or of foreign influence in general. Hence, foreign troops are allowed entry into the Philippines only by way of direct exception. Conflict arises then between the fundamental law and our obligations arising from international agreements.

A rather recent formulation of the relation of international law vis-à-vis municipal law was expressed in *Philip Morris, Inc. v. Court of Appeals*,[13] to wit:

xxx Withal, the fact that international law has been made part of the law of the land does not by any means imply the primacy of international law over national law in the municipal sphere. Under the doctrine of incorporation as applied in most countries, rules of international law are given a standing equal, not superior, to national legislation.

This is not exactly helpful in solving the problem at hand since in trying to find a middle ground, it favors neither one law nor the other, which only leaves the hapless seeker with an unsolved dilemma. Other more traditional approaches may offer valuable insights.

From the perspective of public international law, a treaty is favored over municipal law pursuant to the principle of *pacta sunt servanda*. Hence, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”[14] Further, a party to a treaty is not allowed to “invoke the provisions of its internal law as justification for its failure to perform a treaty.”[15]

Our Constitution espouses the opposing view. Witness our jurisdiction as stated in section 5 of Article VIII:

The Supreme Court shall have the following powers:

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(2) Review, revise, reverse, modify, or affirm on appeal or certiorari, as the law or the Rules of Court may provide, final judgments and order of lower courts in:

(A) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.

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In *Ichong v. Hernandez*,^[16] we ruled that the provisions of a treaty are always subject to qualification or amendment by a subsequent law, or that it is subject to the police power of the State. In *Gonzales v. Hechanova*,^[17]

xxx As regards the question whether an international agreement may be invalidated by our courts, suffice it to say that the Constitution of the Philippines has clearly settled it in the affirmative, by providing, in Section 2 of Article VIII thereof, that the Supreme Court may not be deprived “of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error as the law or the rules of court may provide, final judgments and decrees of inferior courts in —(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question.” In other words, our Constitution authorizes the nullification of a treaty, not only when it conflicts with the fundamental law, but, also, when it runs counter to an act of Congress.

The foregoing premises leave us no doubt that US forces are prohibited from engaging in an offensive war on Philippine territory.

Yet a nagging question remains: are American troops actively engaged in combat alongside Filipino soldiers under the guise of an alleged training and assistance exercise? Contrary to what petitioners would have us do, we cannot take judicial notice of the events transpiring down south,^[18] as reported from the saturation coverage of the media. As a rule, we do not take cognizance of newspaper or electronic reports per se, not because of any issue as to their truth, accuracy, or impartiality, but for the simple reason that facts must be established in accordance with the rules of evidence. As a result, we cannot accept, in the absence of concrete proof, petitioners’ allegation that the Arroyo government is engaged in “doublespeak” in trying to pass off as a mere training exercise an offensive effort by foreign troops on native soil. The petitions invite us to speculate on what is really happening in Mindanao, to issue, make factual findings on matters well beyond our immediate perception, and this we are understandably loath to do.

It is all too apparent that the determination thereof involves basically a question of fact. On this point, we must concur with the Solicitor General that the present subject matter is not a fit topic for a special civil action for certiorari. We have held in too many instances that questions of fact are not entertained in such a remedy. The sole object of the writ is to correct errors of jurisdiction or grave abuse of discretion. The phrase “grave abuse of discretion” has a precise meaning in law, denoting abuse of discretion “too patent and gross as to amount to an evasion of a positive duty, or a virtual refusal to perform the duty enjoined or act in contemplation of law, or where the power is exercised in an arbitrary and despotic manner by reason of passion and personal hostility.”^[19]

In this connection, it will not be amiss to add that the Supreme Court is not a trier of facts.^[20]

Under the expanded concept of judicial power under the Constitution, courts are charged with the duty “to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government.”^[21] From the facts obtaining, we find that the holding of “Balikatan 02-1” joint military exercise has not intruded into that penumbra of error that would otherwise call for correction on our part. In other words, respondents in the case at bar have not committed grave abuse of discretion amounting to lack or excess of jurisdiction.

WHEREFORE, the petition and the petition-in-intervention are hereby DISMISSED without prejudice to the filing of a new petition sufficient in form and substance in the proper Regional Trial Court.

SO ORDERED.

Bellosillo, Melo, Mendoza, Quisumbing, and Carpio, JJ., concur.

Davide, Jr., C.J., and Puno, J., join the main and separate opinion of J. Panganiban.

Vitug, J., in the result.

Kapunan, J., see dissenting opinion.

Panganiban, J., see separate opinion.

Ynares-Santiago, and Sandoval-Gutierrez, JJ., join the dissenting opinion of J. Kapunan.

[1] For ready reference, the text of the treaty is reproduced herein:

“MUTUAL DEFENSE TREATY
BETWEEN THE REPUBLIC OF THE PHILIPPINES
AND THE UNITED STATES OF AMERICA
30 August 1951

“The parties to this Treaty,

“Reaffirming their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all Governments, and desiring to strengthen the fabric of peace in the Pacific Area,

“Recalling with mutual pride the historic relationship which brought their two peoples together in a common bond of sympathy and mutual ideals to fight side-by-side against imperialist aggression during the last war,

“Desiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific Area,

“Desiring further to strengthen their present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific Area,

“Agreeing that nothing in this present instrument shall be considered or interpreted as in any way or sense altering or diminishing any existing agreements or understandings between the United States of America and the Republic of the Philippines,

“Have agreed as follows:

“ARTICLE I.

“The Parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security and justice are not endangered and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purpose of the United Nations.

“ARTICLE II.

“In order more effectively to achieve the objective of this Treaty, the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.

“ARTICLE III.

“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.

“ARTICLE IV.

“Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.

“Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

“ARTICLE V.

“For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft used in the Pacific.

“ARTICLE VI.

“This Treaty does not affect and shall not be interpreted as affecting in any way the rights and obligations of the Parties under the Charter of the United Nations or the responsibility of the United Nations for the maintenance of international peace and security.

“ARTICLE VII.

“This Treaty shall be ratified by the United States of America and the Republic of the Philippines in accordance with their respective constitutional processes and will come into force when instruments of ratification thereof have been exchanged by them at Manila.

“ARTICLE VIII.

“This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other party.

“IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Treaty.

“DONE in duplicate at Washington this thirtieth day of August, 1951.”

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[2] The day before, the first petition in connection with the joint military enterprise was filed -- G.R. No. 151433, entitled “In the Matter of Declaration as Constitutional and Legal the ‘Balikatan’ RP-US Military Exercises.” Petitioner therein Atty. Eduardo B. Inlayo manifested that he would be perfectly “comfortable” should the Court merely “note” his petition. We did not oblige him; in a Resolution dated February 12, 2002, we dismissed his petition on the grounds of insufficiency in form and substance and lack of jurisdiction. After extending a hearty Valentine’s greeting to the Court en banc, Atty. Inlayo promised to laminate the aforesaid resolution as a testimonial of his “once upon a time” participation in an issue of national consequence.

[3] Annex 1 of the Comment.

[4] Annex 2 of the Comment. The Minutes state:

“Secretary Guingona and Assistant Secretary Kelly welcomed the holding of Balikatan 02-1 exercise (‘the Exercise’) and the conclusion of the Terms of Reference for the Exercise. Assistant Secretary Kelly thanked Secretary Guingona for Secretary Guingona’s personal approval of the Terms of Reference.

“Both Secretary Guingona and Assistant Secretary Kelly emphasized the importance of cooperating, within the bounds provided for by their respective constitutions and laws, in the fight against international terrorism.

“Both Secretary Guingona and Assistant Secretary Kelly expressed the belief that the Exercise shall not in any way contribute to any escalation of other conflicts in Mindanao, shall not adversely affect the progress of ongoing peace negotiations between the Government of the Philippines and other parties, and shall not put at risk the friendly relations between the Philippines and its neighbors as well as with other states. Secretary Guingona stated that he had in mind the ongoing peace negotiations with the NDF and the MILF and he emphasized that it is important to make sure that the Exercise shall not in any way hinder those negotiations.

“Both Secretary Guingona and Assistant Secretary Kelly stated that they look forward to the realization of the nearly US\$100 million in security assistance for fiscal years 2001-2002 agreed upon between H.E. President Gloria Macapagal-Arroyo and H.E. President George W. Bush last November 2001.

“Secretary Guingona stated that the Philippines welcomes the assistance that the U.S. will be providing, saying that while Filipino soldier does not lack experience, courage and determination, they could benefit from additional knowledge and updated military technologies.

“Assistant Secretary Kelly said that he is glad the U.S. is able to provide advice, assistance and training and reiterated the policy position expressed by H.E. President George W. Bush during his State of the Nation Address that U.S. forces are in the Philippines to advise, assist and train Philippine military forces.

“Both Secretary Guingona and Assistant Secretary Kelly reiterated that, as provided in the Terms of Reference, U.S. Forces shall not engage in combat during the Exercise, except in accordance with their right to act in self-defense.

Both Secretary Guingona and Assistant Secretary Kelly reiterated that, pursuant to Article II of the Visiting Forces Agreement, U.S. forces are bound to respect the laws of the Philippines during the Exercise.

“Both Secretary Guingona and Assistant Secretary Kelly recognized that, pursuant to Article VI of the Visiting Forces Agreement, both the U.S. and Philippine Governments waive any and all claims against the other for any deaths or injuries to their military and civilian personnel from the Exercise.

“Secretary Guingona and Assistant Secretary Kelly designated Ambassador Minerva Falcon and Charge d’ Affaires, a.i. Robert Fitts to initial these minutes.

“Both secretary Guingona and Assistant Secretary Kelly agreed to consult from time to time on matters relating to the Exercise as well as on other matters.”

[5] 338 SCRA 81, 100-101 (2000).

[6] BAYAN, et. al. v. Zamora, 342 SCRA 449 (2000).

[7] BAYAN, et. al. v. Zamora, et. al., 342 SCRA 449 (2000).

[8] Article I [Definitions], VFA.

[9] Article II [Respect for Law], VFA.

[10] I.M. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 71-72 (1973).

[11] “No one is allowed to do indirectly what he is prohibited to do directly.”

[12] Sec. 21, Art. VII.

[13] 224 SCRA 576, 593 (1993).

[14] Vienna Convention on the Law of Treaties, art. 26.

[15] Id, art. 27. However, this is without prejudice to the provisions of art. 46 of the convention, which provides:

“1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

“2. A violation is manifest if it would be objectively evident to any State conducting itself in the manner in accordance with normal practice and in good faith.”

[16] 101 Phil. 1155, 1191 (1957).

[17] 9 SCRA 230, 242 (1963).

[18] Pertinent sections of Rule 129 provide: “SECTION 1. Judicial notice, when mandatory.—A court shall take judicial notice, without the introduction of evidence, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, the official acts of the legislative, executive and judicial departments of the Philippines, the laws of nature, the measure of time, and the geographical divisions.” Likewise, it is also provided in the next succeeding section: “SEC. 2. Judicial notice, when discretionary.—A court may take judicial notice of matters which are of public knowledge, or are capable of unquestionable demonstration, or ought to be known to judges because of their judicial functions.”

[19] Sanchez v. National Labor Relations Commission, 312 SCRA 727 (1999).

[20] Hervas v. Court of Appeals, 319 SCRA 776 (1999); Valmonte v. Court of Appeals, 303 SCRA 278 (1999).

[21] Article VIII, section 1.

DISSENTING OPINION

KAPUNAN, J.:

On September 11, 2001, terrorists, with the use of hijacked commercial airplanes, attacked the World Trade Center Building in New York City and the Pentagon Building in Washington D.C., U.S.A., killing thousands of people.

Following the attacks, the United States declared a “global war” against terrorism and started to bomb and attack Afghanistan to topple the Taliban regime and capture Osama bin Laden, the suspected mastermind of the September 11, 2001 attacks. With the Northern Alliance mainly providing the ground forces, the Taliban regime fell in a few months, without Osama bin Laden having been captured. He is believed either to be still in Afghanistan or has crossed the border into Pakistan.

In line with President Gloria Macapagal-Arroyo’s pledge to render all-out aid to the US in its campaign against “global terrorism,” an arrangement for a joint military exercises known as “RP-US Balikatan 02-1 Exercises” was entered into between the US and Philippine authorities, allegedly within the ambit of the Visiting Forces

Agreement (VFA) with the main objective of enhancing the operational capabilities of the countries in combating terrorism. The US government has identified the Abu Sayyaf Group (ASG) in the Philippines as a terrorist group forming part of a “terrorist underground” linked to the al-Qaeda network of Osama bin Laden.

Beginning January 21, 2002, American troops started arriving in Mindanao as part of the total contingent force of 660 soldiers, 160 to be stationed in Basilan, 200 to 250 in Zamboanga, and 250 in the Air Force base in Mactan, Cebu.

The salient features of the joint military exercises as embodied in the Terms of Reference (TOR) are summarized as follows:

- (a) The exercise shall be consistent with the Constitution and other Philippine laws, particularly the RP-US Visiting Forces Agreement;
- (b) No permanent US bases and support facilities will be established;
- (c) The exercise shall be implemented jointly by RP and US Exercise Co-Directors under the direction of the Chief of Staff of the AFP and in no instance will US Forces operate independently during field training exercises;
- (d) It shall be conducted and completed within a period of not more than six months, with the projected participation of 660 US personnel and 3,800 RP forces, and the Chief of Staff of the AFP shall direct the Exercise Co-Directors to wind up the Exercise and other activities and the withdrawal of US forces within the six-month period;
- (e) The exercise “is a mutual counter-terrorism advising, assisting and training exercise” relative to Philippine efforts against the Abu Sayyaf Group and will be conducted on the Island of Basilan. Further advising, assisting and training exercises shall be conducted in Malagutay and the Zamboanga area. Related activities in Cebu will also be conducted in support of the Exercise;
- (f) Only 160 US troops organized in 12-man Special Forces Teams shall be deployed in Basilan, with the US Team remaining at the Company Tactical Headquarters where they can observe and assess the performance of the troops; and
- (g) US exercise participants shall not engage in combat, without prejudice to their right to self-defense.

Petitioners now seek the issuance of a writ of prohibition/injunction to prevent US troops from participating in areas of armed conflict on the ground that such is in gross violation of the Constitution. They argue that:

I

THE PHILIPPINES AND THE UNITED STATES SIGNED THE MUTUAL DEFENSE TREATY (MDT) IN 1951 TO PROVIDE MUTUAL MILITARY ASSISTANCE IN ACCORDANCE WITH THE “CONSTITUTIONAL PROCESSES” OF EACH COUNTRY ONLY IN THE CASE OF AN ARMED ATTACK BY AN EXTERNAL AGGRESSOR, MEANING A THIRD COUNTRY AGAINST ONE OF THEM.

BY NO STRETCH OF THE IMAGINATION CAN IT BE SAID THAT THE ABU SAYYAF BANDITS IN BASILAN CONSTITUTE AN EXTERNAL ARMED FORCE THAT HAS SUBJECTED THE PHILIPPINES TO AN ARMED EXTERNAL ATTACK TO WARRANT US MILITARY ASSISTANCE UNDER THE MDT OF 1951.

II

NEITHER DOES THE VFA OF 1999 AUTHORIZED AMERICAN SOLDIERS TO ENGAGE IN COMBAT

OPERATIONS IN PHILIPPINE TERRITORY, NOT EVEN TO FIRE BACK “IF FIRED UPON.”

Sanlakas and Partido ng Manggagawa as intervenors seek the same relief as petitioners, stressing that the Constitution prohibits the presence of foreign military troops or facilities in the country, except under a treaty duly concurred in by the Senate and recognized as a treaty by the other state.

The petition is impressed with merit.

There is no treaty allowing
US troops to engage in
combat.

The Constitution prohibits foreign military bases, troops or facilities unless a treaty permits the same. Section 25, Article XVIII of the Constitution provides:

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

There is no treaty allowing foreign military troops to engage in combat with internal elements.

The Mutual Defense Treaty (MDT) between the Republic of the Philippines and the United States of America does not authorize US military troops to engage the ASG in combat. The MDT contemplates only an “external armed attack.” Article III of the treaty cannot be more explicit:

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 supplied.]

Supporting this conclusion is the third paragraph of the MDT preamble where the parties express their desire

to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area. [Emphasis supplied.]

There is no evidence that
the ASG is connected with
“global terrorism.”

There is no empirical basis for the allegation that the “terrorism” which the ASG is accused of constitutes an “external armed attack.” The ASG has committed mostly crimes of kidnapping for ransom and murder — common crimes that are punishable under the penal code but which, by themselves, hardly constitute “terrorism.”

Parenthetically, there is lack of agreement as to the precise definition of terrorism. Indeed, one man’s terrorist may be another man’s freedom fighter. The divergent interests of States have caused contradicting definitions and conflicting perceptions of what constitutes “terrorist acts” that make it difficult for the United Nations to reach a decision on the definition of terrorism. Because of this “definitional predicament,” the power of definition is easily exercised by a superpower which, by reason of its unchallenged hegemony, could draw lists of what it considers terrorist organizations or states sponsoring terrorism based on criteria determined by the hegemon’s own strategic interests.[1]

In any case, ties between the ASG and so-called international “terrorist” organizations have not been established.[2] Even assuming that such ties do exist, it does not necessarily make the “attacks” by the ASG “external” as to fall within the ambit of the MDT.

Balikatan exercises are
not covered by VFA as
US troops are not
allowed to engage in
combat.

Neither is the present situation covered by the so-called Visiting Forces Agreement (VFA). The VFA was concluded after the removal of the US military bases, troops and facilities in the aftermath of the termination of the treaty allowing the presence of American military bases in the Philippines. The VFA is nothing more than what its formal name suggests: an “Agreement between the Government of the Republic of the Philippines and the Government of the United States of America regarding the Treatment of United States Armed Forces Visiting the Philippines.” The last paragraph of the VFA preamble also “recogniz[es] the desirability of defining the treatment of United States personnel visiting the Republic of the Philippines.”

The VFA was entered into to enable American troops to enter the country again after the removal of the American military bases so they can participate in military exercises under the auspices of the Mutual Defense Treaty. It provided the legal framework under which American soldiers will be treated while they remain in the country.

The military exercises contemplated in the VFA are those in accordance with the National Defense Plan (NDP) of the Philippines. The NDP was previously approved and adopted by the Mutual Defense Board, jointly chaired by the Chief of Staff of the Armed Forces of the Philippines and the Commander in the Pacific of the United States Armed Forces.

The NDP is directed against potential foreign aggressors, not designed to deal with internal disorders. This was what the Senate understood when it ratified the VFA in Senate Resolution No. 18, which reads:

The VFA shall serve 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.

The VFA’s ambiguous reference to “activities”[3] is not a loophole that legitimizes the presence of US troops in Basilan. In the treaty’s preamble, the parties “reaffirm their obligations under the Mutual Defense Treaty of August 30, 1951.” As the preamble comprises part of a treaty’s context for the purpose of interpretation, the VFA must be read in light of the provisions of the MDT. As stated earlier, the MDT contemplates only an external armed attack; consequently, the “activities” referred to in the VFA cannot thus be interpreted to include armed confrontation with or suppression of the ASG members who appear to be mere local bandits, mainly engaged in kidnapping for ransom and murder — even arson, extortion and illegal possession of firearms, all of which are common offenses under our criminal laws. These activities involve purely police matters and domestic law and order problems; they are hardly “external” attacks within the contemplation of the MDT and the VFA. To construe the vagueness of the term “activities” in the VFA as authorizing American troops to confront the ASG in armed conflict would, therefore, contravene both spirit and letter of the MDT.

Respondents maintain that the American troops are not here to fight the ASG but merely to engage in “training exercises.” To allay fears that the American troops are here to engage the ASG in combat, the TOR professes that the present exercise “is a mutual counter-terrorism advising, assisting and training Exercise relative to Philippine efforts against the ASG, and will be conducted on the Island of Basilan.” The TOR further provides that the

“exercise” shall involve the conduct of “mutual military assisting, advising and training of RP and US Forces with the primary objective of enhancing the operational capabilities of both forces to combat terrorism.”

These avowals of assistance, advice, and training, however, fly in the face of the presence of US troops in the heart of the ASG’s stronghold. Such presence is an act of provocation that makes an armed confrontation between US soldiers and ASG members inevitable.

The US troops in Basilan have been described as being “on a slippery slope between training and fighting.” Their very presence makes them a target for terrorist and for the local Moslem populace, which has been bitterly anti-American since colonial times. Though they are called advisers, the Americans will be going on risky missions deep into the jungle. A former Green Beret who is an analyst of Washington’s Center for Strategies and Budgetary Assessments notes that “when troops go out on patrol, they come as close as they can to direct combat.”[4]

“Advising” or “training” Filipino soldiers hardly describes the involvement of US troops (unaccompanied by Filipino counterparts) on board combat helicopters which land on the battlegrounds to evacuate Filipino soldiers wounded while fighting the ASG. For example, on April 5, 2002, US troops on board a Pave Hawk helicopter flew to the scene of a night battle on Basilan Island to evacuate a wounded Filipino soldier. This was reportedly the third time in recent weeks that chopper-borne US forces had evacuated Filipino soldiers fighting the ASG.[5]

Whatever euphemisms may be conjured to characterize American involvement, the RP-US Balikatan 02-1 Exercises are aimed at seeking out the ASG and exterminating it.

The prohibition contained in the TOR against US exercise participants from engaging in combat but “without prejudice to their right to self-defense” provides little consolation. Combat muddles the distinction between aggression and self-defense. US troops can always say they did not fire first and no one would dare say otherwise. The ASG has been so demonized that no one cares how it is exorcised. Significantly, the TOR does not define the parameters of “self-defense.” Militarily, a pre-emptive strike could be interpreted as an act of self-defense.

What I fear most is that the country would be dragged into a more devastating and protracted conflict as a result of the continued presence of US military troops in Basilan. A single ASG sniper’s bullet felling an American soldier could be used as an excuse for massive retaliation by US ground and air forces to attack and bomb out every suspected ASG lair, all in the name of “self-defense.”

Apprehensions over possible catastrophic consequence of US military involvement in our country are not without historical basis.

The US experience in Vietnam, for example, began as an expression of support for the establishment of South Vietnam under Bao Dai’s leadership in 1949 to counteract the support given by communist China and the Soviet Union to North Vietnam. In 1950, the US began providing military assistance in fighting North Vietnam by sending military advisors as well as US tanks, planes, artillery and other supplies. The US became more involved in the Vietnam conflict when in 1961, it sent the first 400 Green Beret “Special Advisors” to South Vietnam to train the latter’s soldiers in methods of counter-insurgency against the Viet Cong guerillas. It clarified that the American soldiers were not in Vietnam to engage in combat.[6]

However, due to the increased success of the Viet Cong guerillas, assisted by the Northern Vietnamese Army, the US eventually began to run covert operations using South Vietnamese commandos in speed boats to harass radar sites along the coastline of North Vietnam. In 1964, after an alleged torpedo attack by North Vietnam of the American destroyers USS. Maddox and USS. C. Turner Joy in the Gulf of Tonkin, the US decided to retaliate by conducting bombing raids in North Vietnam.[7]

The Vietnam War resulted in the death of two million Vietnamese and injuries to three million others. Twelve million Vietnamese became refugees and thousands of children became orphaned.[8] Millions of acres of Vietnam's forests were defoliated by a herbicide called Agent Orange, dropped from the air. Millions of mines and unexploded bombs and artillery shells are still scattered in the countryside, posing constant danger to life and limb.

US military presence is
essentially indefinite
and open-ended.

Already, there are indications that the US intends to reestablish a more enduring presence in the country. Defense Secretary Angelo Reyes was quoted to have declared on March 20, 2002 that 2,665 US soldiers will take part in the RP-US Balikatan 02-2 starting next month in Central Luzon and that 10 more military exercises will be held this year.[9] How many more war exercises are needed for "training and advising" Filipino soldiers? What conditions must be satisfied for the United States to consider the "war against terrorism" in Mindanao terminated? The endless frequency and successive repetition of the war exercises covering the two largest islands of the country amount, in a real sense, to the permanent presence of foreign military troops here sans a treaty in blatant violation of the constitutional proscription.

US President George W. Bush in his January 30, 2002 speech declared:

The men and women of our armed-forces have delivered a message to every enemy of the United States. You shall not escape the justice of this nation. x x x.

Should any country be timid in the face of terror, if they do not act, America will.

President Arroyo, in a speech at the Regis Hotel in New York City on February 1, 2002, pledged her "full support" to US President George W. Bush in the fight against international terrorism. She declared that "the Philippines will continue to be a partner of the United States in the war to end terrorism" and that "(t)he anti-terrorism partnership will continue after the whole world is secure against the terrorist." [10]

In his speech on the White House Laws on March 11, 2002, President Bush exhorted:

America encourages and expects governments everywhere to help remove the terrorist parasites that threaten their own countries and the peace of the world. x x x. We are helping right now in the Philippines, where terrorist with links to Al Qaeda are trying to seize the southern part of the country to establish a military regime. They are oppressing local peoples, and have kidnapped both American and Filipino citizens." [11]

The Philippine Daily Inquirer in its March 17, 2002 issue carried the following report:

The United States wants to bring in more troops for the controversial Balikatan 02-1 training exercise aimed at wiping out the Abu Sayyaf bandits in Basilan.

The US military last week began calling the war-games "Operation Enduring Freedom-Philippines," giving credence to claims that the country has become, after Afghanistan, the second front of the US-led global war on terrorism.

Today's issue of April 1, 2002 reporting as its source New York News Service, quoted a senior Bush administration official as saying:

We are looking at prolonged training. x x x. It takes more to build up capabilities than saying here are some night vision goggles.

The declarations of the two Presidents on the war against terrorism and their avowal to secure the world against the terrorists would ineluctably suggest a long-drawn conflict without a foreseeable end. Worse, it is not unlikely that this war could expand and escalate to include as protagonists the Moro Islamic Liberation Front and the Moro National Liberation Front and — not improbably — the National People’s Army, all lumped-up as “terrorists” in a unilateral characterization.

No less than US Deputy Defense Secretary Paul Wolfowitz declared that the proposed \$48-billion increase to the US defense budget for 2003 is intended to sustain the war on terrorism,[12] including that fought in this country, thus:

Deputy Defense Secretary Paul Wolfowitz on Wednesday said the Pentagon needs a big budget increase next year on terrorism, which has expanded from Afghanistan to the Philippines and now appears to be moving to Georgia.[13]

The Court can take judicial notice of the foregoing pronouncements as they are of public knowledge,[14] having been widely circulated in all channels of the media. Neither have they been denied.

US military intervention
is not the solution to the
Mindanao problem.

Assuming that the ASG is a terrorist organization, U.S. military intervention is not the solution to achieve peace. The annihilation of the rebel bandits would be a futile quest so long as the root causes of their criminality are not addressed. A study[15] by the United Nations Secretariat, however, acknowledges that international terrorism springs from “misery, frustration, grievance and despair,” elements which, many believe, are present in Basilan. Two veteran Philippine journalists have described the province as Mindanao’s “war laboratory,” where lawlessness, government neglect, religious strife, poverty, and power struggle are rampant.[16]

If indeed acts of terrorism are cries of desperation, if terrorism is but a symptom of the greater maladies of “misery, frustration, grievance and despair,” then it cannot be remedied alone by ASG’s physical extermination, which appears to be the object of President Bush and President Macapagal-Arroyo’s joint campaign against global terrorism.” Admittedly, the State has the right to use force as a means of self-preservation. But perhaps we should all consider that a military solution is but a first-aid measure, not the prescription to these diseases. It has been opined that:

The issue of terrorism in the Philippines should be dealt with not from the perspective of Manila-Washington ties but from a serious study of how terrorism figures in the minds of leaders and armed men belonging to the large but deeply factionalized guerrilla movements in the country. Terrorism can never be dissociated from guerrilla warfare and the separatist movement in Mindanao. From these movements would arise religious extremists or millennialist groups. With the right resources and the right agenda, these movements will continue to attract men—skilled, intelligent, and experienced—who will come to grasp the practical realities of waging a war with the minimum of resources but maximum public impact.

The government does not have to look for foreign connections—and be motivated by the desire to help foreign friends to address a problem that has been and will be the making of its own homegrown armies.[17]

The presence of US troops in Basilan, whether from the legal, philosophical—or even from the practical perspective cannot be justified. On the contrary, it is counterproductive. It serves to fuel an already volatile situation. US troops are likely less able, if not less willing, to distinguish between the innocent and the enemy. The inevitable “collateral damage,” the killing of women and children, Muslims and Christians, the destruction of homes, schools and hospitals would fan the flames of fanaticism and transform mere rogues into martyrs.

The Filipino soldier has proven himself brave, courageous, fearless and tenacious in the field of battle as shown in Bataan and Corregidor, in the four long years of guerilla warfare thereafter against the Japanese, and in the struggle for independence against Spain and the United States at the turn of the last century. The local army and police have successfully battled in the past against Communist and other insurgents which were more organized and numerous, operating in larger parts of the country and fighting for their political beliefs. If our troops need training by US advisers or have to conduct joint exercises with US troops to improve their fighting capability, these could be more effectively achieved if done outside Basilan or away from the danger zones. Instead of bringing troops to the combat zones, the US can do more by supplying our soldiers with modern and high tech weaponry.

Prescinding from the foregoing disquisitions, it is totally erroneous to argue that petitioners do not have legal standing or that the issues raised by them are premature and not based on sufficient facts. The issues raised are of transcendental importance.[18] The Balikatan exercises pose direct injury to some of the petitioners (intervenor) who live in the affected areas. The presence of US troops in the combat zones “assisting” and “advising” our troops in combat against the ASG is a blatant violation of the Constitutional proscription against the stationing of foreign troops to fight a local insurgency and puts the country in peril of becoming a veritable killing field. If the time is not ripe to challenge the continuing affront against the Constitution and the safety of the people, when is the right time? When the countryside has been devastated and numerous lives lost?

I therefore vote to give due course to the petition.

[1] In a Lecture delivered on March 12, 2002 as part of the Supreme Court Centenary Lecture Series, Hans Koechler, Professor of Philosophy at the University of Innsbruck (Austria) and President of the International Progress Organization, speaking on “The United Nations, The International Rule of Law and Terrorism,” noted:

In the actual unipolar Context of international relations, the “fight against terrorism” has become one of the basic slogans when it comes to the justification of the use of force against certain states and against groups operating internationally. Lists of States “sponsoring terrorism” and of terrorist organizations are set up and constantly being updated according to criteria that are not always known to the public, but are clearly determined by strategic interests.

The basic problem underlying all these military actions — or threats of the use of force as the most recent by the United States against Iraq — consists in the absence of an agreed definition of terrorism.

Remarkable confusion persists in regard to the legal categorization of acts of violence either by states, by armed groups such as liberation movements, or by individuals.

The dilemma can be summarized in the saying “One country's terrorist is another country's freedom fighter.” The apparent contradiction or lack of consistency in the use of the term “terrorism” may further be demonstrated by the historical fact that leaders of national liberation movements such as Nelson Mandela in South Africa, Habib Bourguiba in Tunisia, or Ahmed Ben Bella in Algeria, to mention only a few, were originally labeled as terrorists by those who controlled the territory at the time, but later became internationally respected statesmen.

What, then, is the defining criterion for terrorist acts — the differentia specifica distinguishing those acts from eventually legitimate acts of national resistance or self-defense?

Since the times of the Cold War the United Nations Organization has been trying in vain to reach a consensus on the basic issue of definition. The organization has intensified its efforts recently, but has been unable to bridge the gap between those who associate “terrorism” with any violent act by non-state groups against

civilians, state functionaries or infrastructure or military installations, and those who believe in the concept of the legitimate use of force when resistance against foreign occupation or against systematic oppression of ethnic and/or religious groups within a state is concerned.

The dilemma facing the international community can best be illustrated by reference to the contradicting categorization of organizations and movements such as Palestine Liberation Organization (PLO) — which is a terrorist group for Israel and a liberation movement for Arabs and Muslims — the Kashmiri resistance groups — who are terrorists in the perception of India, liberation fighters in that of Pakistan — the earlier Contras in Nicaragua — freedom fighters for the United States, terrorists for the Socialist camp — or, most drastically, the Afghani Mujahedeen (later to become the Taliban movement): during the Cold War period they were a group of freedom fighters for the West, nurtured by the United States, and a terrorist gang for the Soviet Union. One could go on and on in enumerating examples of conflicting categorizations that cannot be reconciled in any way — because of opposing political interests that are at the roots of those perceptions.

How, then, can those contradicting definitions and conflicting perceptions and evaluations of one and the same group and its actions be explained? In our analysis, the basic reason for these striking inconsistencies lies in the divergent interests of states. Depending on whether a state is in the position of an occupying power or in that of a rival, or adversary, of an occupying power in a given territory, the definition of terrorism will “fluctuate” accordingly. A state may eventually see itself as protector of the rights of a certain ethnic group outside its territory and will therefore speak of a “liberation struggle,” not of “terrorism” when acts of violence by this group are concerned, and vice-versa.

The United Nations Organization has been unable to reach a decision on the definition of terrorism exactly because of these conflicting interests of sovereign states that determine in each and every instance how a particular armed movement (i.e. a non-state actor) is labeled in regard to the terrorist-freedom fighter dichotomy. A “policy of double standards” on this vital issue of international affairs has been the unavoidable consequence.

This “definitional predicament” of an organization consisting of sovereign states — and not of peoples, in spite of the emphasis in the Preamble to the United Nations Charter! — has become even more serious in the present global power constellation: one superpower exercises the decisive role in the Security Council, former great powers of the Cold War era as well as medium powers are increasingly being marginalized; and the problem has become even more acute since the terrorist attacks of 11 September 2001 in the United States.

Koechler adds, however, that this failure to distinguish between terrorist acts and acts of national liberation did not prevent the international community from arriving at an implicit or “operative” definition. For example, in Article of the International Convention for Suppression of Terrorist Bombings, terrorist acts are referred to as “criminal acts ..., in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons” that are under no circumstances justifiable considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

[2] The following excerpts from “Under the Crescent Moon: Rebellion in Mindanao” by Marites Dañguilan Vitug and Glenda M. Gloria (Ateneo Center for Social Policy and Public Affairs and Institute for Popular Democracy, 2000) demonstrate the obscurity of the ASG’s *raison d’etre*:

...for all the warring [the Abu Sayyaf] it has done supposedly in the name of Islam, there is much confusion and mistrust surrounding the Abu Sayyaf, whose leaders had flaunted their ties with the police and the military. Even veterans of the Mindanao war find it hard to identify the Abu Sayyaf’s political direction—where it really wants to go, or what it wants to achieve as an organization. (At pp. 204-205.)

The military had long been divided on how to view the Abu Sayyaf. The dominant view held the group as a genuine extremist organization driven by an extreme view of Islam. But there are military strategists who have

downplayed the ideological component of Janjalani's cause, arguing that he merely wanted to steal the thunder from the MNLF and the MILF — and in the process also hijack their financial connections to the Arab World. (At p. 206.)

.... [Basilan Bishop Romeo] [de] la Cruz said he didn't think the Abu Sayyaf was truly espousing fundamentalism. "Initially I thought this was a religious conflict because of the so-called resurgence of Islam. For a while the Church even attributed the spate of kidnappings in Basilan to Islamic fundamentalism. "Later on we realized this was not the case. Islam was being used as a mere cover of these people.

Abdulgani "Gerry" Salappudin, governor of Basilan for 10 years, shares this view. The Abu Sayyaf was being used to destroy the image of Islam. He cited the fact that Janjalani's mother was a Christian. Was he out, therefore, the destroy Islam? "I am not saying that... It's just that he's not pure Muslim."

Thus, how and why exactly the Abu Sayyaf was founded is a question for which neither the military nor Janjalani had a solid answer. The group remains as nebulous as its beginning, and as shadowy as its charismatic founder. There is absolutely no doubt that it has been infiltrated by the military. What is uncertain is whether or not Janjalani, who was admired by many in the Muslim community, formed the Abu Sayyaf precisely to work for the military or if he had simply lost control over his own men. (At pp. 210-211.)

[3] Article III (1) on Entry and Departure, for example, imposes upon the Philippine Government the duty to "facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by this agreement." Article VI (1) also mentions "claims... from activities to which this agreement applies." The same reference to "activities to which this agreement applies" is found in Article VII on Importation and Exportation. Article I, in defining "United States personnel" as "United States military and civilian personnel temporarily in the Philippines in connection with activities approved by the Philippine Government," does not limit the scope of the "activities" that the Philippine Government may "approve."

[4] McGeary, Next Stop Mindanao, Time Magazine, January 28, 2002, p. 22.

[5] Philippine Daily Inquirer, April 6, 2002.

[6] See www.historyplace.com. Also Ambrose, Stephen, Rise to Globalism: American Foreign Policy since 1938 (Fifth Rev. Ed.).

[7] Id.

[8] Microsoft Encyclopedia Encarta (2000).

[9] Philippine Daily Inquirer, March 21, 2002.

[10] Manila Bulletin, February 2, 2002.

[11] Philippine Star, March 13, 2002.

[12] "Democratic Senate Majority Leader Tom Daschle criticized the US administration's war terrorism yesterday, charging that it has undergone an 'expansion without at least a clear direction.'"

"How long can we stand this kind of pressure on our treasury?... We seem to be good at developing enhance strategies, not so good at developing exit strategies, he charged." (The Philippine Star, March 2, 2002).

[13] The Philippine Star, March 2, 2002.

[14] Sec. 1, Rule 129, RULES OF COURT.

[15] Entitled "Measures to Prevent International Terrorism which Endangers or Takes Innocent Human Lives or

Jeopardizes Fundamental Freedoms and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence which Lie in Misery, Frustration, Grievance and Despair and which Cause Some People to Sacrifice Human Lives, including Their Own, in an Attempt to Effect Radical Changes.” 2 November 1972, 27[th] Session. The pertinent portions of the study state:

- Man is one of the few species that frequently uses violence against its own kind. He has done so since the dawn of history. In the past, periods in which violence has been especially conspicuous have been those of rapid social change. During the years of the existence of the United Nations, when in most parts of the world, and in both the developed and the developing countries, the patterns of society are changing with almost unprecedented speed, violence has been frequent.
- The interlinked growth of technology and growth of population have tended to create new hopes, expectations and needs in many social groups. These new attitudes mark a departure from the resignation and passivity with which most men in the past accepted the ills of life. The United Nations Charter is the voice of the aspirations of mankind when it contemplates the establishment of a world in which aggression and the threat or use of force in international relations would be effectively outlawed, friendly relations would exist among nations on the basis of respect for the principles of equal rights and self-determination of peoples, international disputes would be settled justly be peaceful, and international co-operation would solve international economic and social problems and promote respect for human rights and fundamental freedoms for all.
- The period of the existence of the United Nations, however, has shown very incomplete and uneven progress towards these goals. While major wars involving the great Powers have not occurred, force has often been resorted to, and has inflicted suffering and exile upon peoples. While progress has been made against colonialism and racism, those evils have not yet been completely eliminated. Even where political independence has been established, in many cases much remains to be done in assisting the populations to attain the minimum level necessary for decent conditions of life. Few advances have been made towards the peaceful settlement of some major international disputes, which are too often left to fester and poison international relations. Among groups where economic and social progress has been relatively slow, conditions have been unfavourable to the exercise of and the respect for human rights and fundamental freedom.
- The lack of slowness of advance towards these goals has contributed toward the “misery, frustration, grievance and despair” which, while not themselves causes of terrorism, are psychological conditions or states of being which sometimes lead, directly or indirectly, to the commission of acts of violence. While in the United Nations context it is perhaps appropriate to give special attention to the international factor that contribute to violence, there are also many situations in individual nations which may give rise to the grievance of a particular group or person, leading to acts having international repercussions. Purely personal circumstances can also often have the same result. There are also cases in which there is no genuine grievance at all, and a violent crime affecting more than one country seems to have been committed from mere cupidity, or a desire to escape criminal prosecution. The General Assembly, however, in stressing “misery, frustration, grievance and despair, seems to have singled out for special attention those situations which have the common characteristic of calling for redress.
- Why is it that violence resulting from these circumstances takes with increasing frequency the form of international terrorism, threatening, endangering or killing innocent victims? As the peoples of the world grow more interdependent the solution of many problems no longer hangs on any local ruler or government, but on actions and decisions taken thousands of miles away. Men think their ills have been produced by some vast impersonal force, which is deaf to their pleas for justice or impotent to find solutions, rather than by other men, striving for similar although opposed ends and bound to them by the claims of a common humanity. Modern communications and the growth of the public information media have transformed local incidents into world events, especially when the incidents have an international character. A terrorist act focuses world attention

upon the terrorist and upon any cause he may claim to represent. In these circumstances, some such acts—which, as has already been said, cannot possibly by themselves effect radical social changes—are really acts of communication. They are intended to show the world that the determination and devotion of the terrorists are sufficient to compensate in the long run for their apparent inferiority in strength; that their cause is more holy to them than life itself, must be taken seriously, and is worthy of support; and that neither their foe nor the world at-large is able to prevent their success in their purpose, or ensure punishment of their deeds and those of their associates.

- Other such acts, however, seem to be more the result of blind fanaticism, or of the adoption of an extremist ideology which subordinates morality and all other human values to a single aim. In either case, the result is the same; modern life and modern weapons bring more and more strangers and foreigners within the reach of the terrorist, and he uses them as instruments for his purpose. As violence breeds violence, so terrorism begets counter-terrorism, which in turn leads to more terrorism in an ever-increasing spiral.

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- It thus appears that the “misery, frustration, grievance and despair” which lead to terrorism have many roots in international and national political, economic and social situations affecting the terrorist, as well as in his personal circumstances. The precise chain of causation of particular acts cannot be traced with scientific exactitude. Nevertheless, the General Assembly may wish to identify types of situations which, if a remedy could be found to bring them more into accord with justice, will cease to contribute to the spreading terrorism which has shocked the world.

[16] Dañguilan Vitug and Gloria (Under the crescent Moon: Rebellion in Mindanao, supra.) write:

Indeed, a man is inspired by his belief but is constrained by his environment. And Basilan, where Janjalani grew up, is a place where the laws set by men are flouted daily. It is a place where people of weak resolve could give in to the challenges posed by power, either the lack or possession of it. It certainly is not a place conducive for reflection or reinforcing pure religious thoughts. Mindanao’s best war laboratory, Basilan is one of the country’s poorest provinces where all sorts of armed groups dominate a populace long neglected by government. Local rulers compete for legitimacy with armed rebel groups, bandits, Muslim preachers, Catholic volunteers, loggers legal and illegal, the Marines, the Army. In this sense, the Abu Sayyaf was ripe for growth. Modern history has proven that whenever the legitimacy of the state suffers and the economy goes down, other forces come to force as alternative. Janjalani had offered solace to those who bothered to listen to him. The reality of Basilan, after all, is its deadly environment: grinding poverty, the absence of the rule of law, and the proliferation of arms and of men who thrive on them. It is no coincidence that a group with such amorphous beginnings as the Abu Sayyaf was established in a province that remains poor despite its fertile, lushly forested land and its proximity to Zamboanga City. It didn’t matter that Janjalani went to the Catholic-run Clarest school. Janjalani, or any local leader for that matter, would have found it difficult to detach himself from this environment.

Former MNLF members in Basilan who have known little more than how to fire a gun have resorted to easy ways of earning a living. One of these means was kidnapping, and it gave Abu Sayyaf away. No group espousing a true Islamic state would have resorted to kidnapping in such a random, blatant style as the Abu Sayyaf did in its heyday.

It also didn’t help that the government and the media unfairly lumped Islamic fundamentalism and terrorism together because the Abu Sayyaf, which espouses the former, has been suing the latter as a means to fight for its cause. (At 206-207.)

[17] DAÑGUILAN VITUG AND GLORIA, AT 244-245.

[18] Bayan vs. Zamora, 342 SCRA 449 (2002).

SEPARATE OPINION[*]**PANGANIBAN, J.:**

Through their “Petition for Certiorari and Prohibition,” Arthur D. Lim and Paulino R. Ersanda -- joined by Intervenor Sanlakas and Partido ng Manggagawa -- plead for the issuance of an order “restraining the respondents from proceeding or continuing and completing the so-called ‘Balikatan 02-1’” on the ground that the exercise is not sanctioned by any treaty and is, therefore, allegedly unconstitutional.

Agreeing with the Comment of the Office of the Solicitor General (OSG), the ponencia of Mr. Justice Sabino R. de Leon Jr. dismisses the Petition essentially on these procedural grounds:

- As taxpayers, petitioners do not have legal standing or locus standi, because Balikatan 02-1 “does not involve the exercise by Congress of its taxing or spending power.”
- Certiorari and prohibition are improper remedies, because petitioners have not alleged sufficient facts upon which grave abuse of discretion or excess/lack of jurisdiction could be argued from.
- The Petition is premature because the alleged violation of the Constitution is merely speculative, not actual or imminent.
- Though entitled “Certiorari and Prohibition,” the Petition is really one for declaratory relief which merely seeks an advice or opinion, not a decision. The Supreme Court has no jurisdiction to issue opinions or advices.

Ordinarily, the above reasons would indeed be sufficient to cause the dismissal of a petition. However, because of the “transcendental importance” of the main question raised — the constitutionality of the Balikatan exercise — the Court, I believe, could have exempted this case from these procedural requirements and tackled the case on the merits, if only to put to rest the legality of this major event of public interest in our country and even in the world. I, for one, would have voted to set aside these legalistic obstacles, had the Petition presented enough factual moorings upon which to base an intelligent discussion and disposition of the legal issues.

For instance, this Court cannot be called upon to decide the factual issues of whether the US forces are actually engaging the Abu Sayyaf Group in combat and whether they will stay in our country permanently. This Court has no authority to conduct a trial, which can establish these factual antecedents. Knowing what these antecedents are is necessary to determine whether the Balikatan violates the Constitution or the Mutual Defense Treaty (MDT) of 1951 or the Visiting Forces Agreement (VFA) of 1999. Verily, the Petition has not even alleged that the American troops have indeed been unconstitutionally engaged in actual offensive combat. The contention that they would necessarily and surely violate the Constitution by participating in the joint exercise in Basilan is merely speculative. Petitioners aver:

“American soldiers with high-tech weaponry, disguised as trainers or advisers to Filipino troops, will go to the war zones of Basilan. Hence, while dubbed as a military exercise, it is in reality a continuing combat operation by the AFP against the Abu Sayyaf to be participated in this time by U.S. troops. It has been admitted that U.S. ‘advisers’ will accompany Filipino soldiers on patrol in the combat zones.

Also, a base of operation will be in the Sampinit complex which is in the heartland of the Abu Sayyaf’s ‘territorial domain’ in Basilan island. A shooting war, not just an exercise, is unavoidable.”

That a “shooting war is unavoidable” is conjectural; at best, a conclusion that is not borne by solid factual moorings. Cases cannot be decided on mere speculation or prophecy. The Petition claims that while the US troops are “disguised” as “advisers” or “trainors” or “chaperons,” they are actually combatants engaged in an offensive war against local insurgents. Again, there is no solid factual basis for this statement. It may or may not be true. The Petition also alleges, again without firm factual support, that the American forces will stay here indefinitely — “for a year or even more depending on the need of the AFP for them.”

On the other hand, the OSG assures that petitioners’ “apprehensions are belied” by the Terms of Reference (TOR) approved by both the Philippines and the United States, which “expressly limit the conduct and completion of the exercise within a period not exceeding six (6) months and prohibits the American participants from engaging in combat, without prejudice to their right to self-defense.”

I stress that cases cannot be decided by this Court on the basis of speculative or hypothetical assumptions like “If the facts were these, then our decision would be this; on the other hand, if the facts change, then our ruling would be modified as follows.” Decisions of this Court especially in certiorari and prohibition cases are issued only if the facts are clear and definite. As a rule, courts may not consider or judge facts or matters unless they are alleged in the pleadings and proven by the parties. Our duty is to apply the law to facts that are not in dispute.

In the absence of firm factual findings that the Americans “will stay indefinitely” in our country or “are engaged in actual offensive combat with local insurgents” as alleged by petitioners, respondent Philippine officials who are hosting the Balikatan exercise cannot possibly be imputed with grave abuse of discretion — an indispensable element of certiorari.

True, there are some questions that may genuinely be raised in regard to the Balikatan 02-1 vis-à-vis our Constitution, the MDT and the VFA, like the following:

(1)

Is the Abu Sayyaf Group composed of “international terrorists” whose acts and practices violate the United Nations Charter to such an extent as to pose a threat to international peace and security?

(2)

Is there an “external armed attack” against the Philippines sufficient in force and magnitude as to justify an invocation of the MDT?

(3)

Are the size, the kind, and the location of the Balikatan deployment justified by the nature, the scope, the duration and the kind of “activities” allowed under the VFA?

(4)

Is it true that the real American objective is the rescue of ASG hostages Martin and Gracia Burnham, who are both American citizens? If so, is such rescue legally justified?

(5)

Does the Balikatan pose a “political question” which the Supreme Court has no authority to rule upon, and which may only be decided by our people directly or through their elected representatives?

Unfortunately, the foregoing and other similar nagging questions cannot be judicially taken up and answered until a petition, sufficient in form and substance, is properly presented to the appropriate court.

FOR THE FOREGOING REASONS, I vote to DISMISS the present Petition.

[*] At petitioners' insistent request, the Court had to speed up the deliberation and disposition of this case, as the Balikatan may soon be completed and the Petition rendered moot. Hence, I wrote this Opinion hurriedly without the benefit of the usual citations of legal authorities.

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