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Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, A Plan for the Future, 4 Asian-Pac. L. & Pol'y J. 320 (2003)

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I. INTRODUCTION

Ang bayan kong Pilipinas. . .
Dayuhan ay nahalina
Bayan ko! Binihag ka
Nasadlak sa dusa.
My country, the Philippines. . ./ Foreigners are enchanted by you/
My country! You were captured/ And left in hardship.[1]

Although the United States granted independence to the Philippines in 1946, the U.S. military has occupied the nation consistently since 1898.[2] United States troops left the Philippines in 1992, leaving behind a legacy of environmental disaster.[3] But the U.S. soldiers had not gone for good. The U.S. military returned to its former bases in the Philippines the following year to embark on Balikatan,[4] the annual joint military exercises with the Philippine Armed Forces.[5]

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[1] "Bayan ko" was written in 1928. The nationalist anthem was banned during the 1970s, but resurrected in the 1980s by the masses at the EDSA/People Power revolution. *See* DAVID JOEL STEINBERG, THE PHILIPPINES: A SINGULAR AND A PLURAL PLACE 143 (4th ed. 2000).

[2] *See* DONALD KIRK, LOOTED: THE PHILIPPINES AFTER THE BASES 7-20 (1999). *See also infra* Part II.

[3] *See* U.S. GEN. ACCT. OFF., MILITARY BASE CLOSURES: U.S. FINANCIAL OBLIGATIONS IN THE PHILIPPINES 27-28, GAO/NSIAD-92-51 (Jan. 1992) [hereinafter GAO PHILIPPINES REPORT]. U.S. officials found contamination of toxic materials used by the military in the soil and the drinking water in and around Subic Bay Naval Facility and Clark Air Base. *Id.*

[4] Although italics are used in formal writing to signal the use of a foreign language within a text, I feel that the effect of this convention is only to interrupt the flow of thoughts. Therefore, I will not be employing this writing custom. *Compare* WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE 81 (4th ed. 2000) (urging that the use of a foreign language in writing is a "bad habit"), *with* GLORIA ANZALDÚA, BORDERLANDS/ LA FRONTERA: THE NEW MESTIZA (1987) (where the author writes interchangeably in both her native languages, Spanish and English).

[5] KIRK, *supra* note 2, at 192. Kirk describes the inaugural Balikatan exercise:

> Strangely, however, a year after the last Americans had left Subic Bay, joint exercises resumed under the rubric, "Balikatan"—shoulder-to-shoulder. The war games were a vestige of imperial glory that was. From late 1993 to mid-1996, small elements of the U.S. Army, Navy and Air Force coordinated with their Filipino counterparts, in order, as a joint press release stated, "to enhance their joint capabilities to respond to mutual defense efforts and civil military operations pursuant to the Mutual Defense Treaty of August 30, 1951."

After President George W. Bush declared a War Against Terror in September 2001, President Gloria Macapagal-Arroyo announced her whole-hearted support of the U.S.-led mission.[6] The Philippine government demonstrated its alliance to the United States by making local training facilities available to the U.S. military.[7] Thereafter, participants in Balikatan focused on developing counter-terrorism techniques.[8] The designation of these military operations as "joint activities" with the Philippine Armed Forces is significant because current Department of Defense (DoD) policy exempts cooperative efforts with other sovereigns from the regulation of U.S. environmental laws.[9] As a result, no liability scheme exists to protect the people of the Philippines from the dangers of environmental degradation that will likely result from the ongoing war games.

Displacing the responsibility for environmental harms in the way that the United States and its DoD has done is anathema to international law. For example, the United Nations Charter declares that the right to non-discrimination is a fundamental human right and a basic element for world peace.[10] Non-discrimination, or environmental justice, refers to the

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Id. (citing to Press Release, RP-U.S. Mutual Defense Board, Media Release for Combined Philippine/U.S. Exercise Balikatan '95 (Oct. 22, 1995)).

A joint command of the U.S. and Philippine militaries oversees Balikatan exercises each year in different parts of the Philippines. In 2002, the Balikatan war games took place in the southern part of the Philippines, in the Zamboanga and Basilan areas. In 2003, observers expect the exercises to return to the Mindanao area, where the terrorist organization, the Abu Sayyaf maintains its headquarters. *See* Exercise Balikatan, *at* http://www. globalsecurity.org/military/ops/balikatan.htm (last visited June 17, 2003). *See also infra* Part II.B (discussing the annual Balikatan exercises in detail).

[6] Albert Del Rosario, A Progress Report on the Philippines: The Balikatan Exercises, the Abu Sayyaf, and Al-Qaeda, Heritage Foundation, Washington, D.C. (Mar. 19, 2002), HERITAGE LECTURES, NO. 738 at 1, *available at* http://www.heritage.org/Research/AsiaandthePacific/HL738.cfm (last visited June 17, 2003). Ambassador del Rosario is the Ambassador of the Republic of the Philippines to the United States of America. *Id.* at 4. *See also* INTERNATIONAL SOLIDARITY MISSION AGAINST US ARMED INTERVENTION IN THE PHILIPPINES, BEHIND THE "SECOND FRONT" 71 (2002), *available at* http://www.ism2002.freeservers.com (last visited June 17, 2003) [hereinafter SECOND FRONT].

[7] *See* Del Rosario, *supra* note 6, at 2.

[8] *See* Maricel Cruz, *Lawmakers Thumb Down Sulu Balikatan*, MANILA TIMES (Apr. 11, 2003), http://www.manilatimes.net/national/2003/apr/11/top_stories/20030411top10.html (last visited June 17, 2003) (noting that since September 11, 2001, the Balikatan exercises now concentrate on antiterrorism exercises and maneuvers).

[9] *See infra* Part V.B.

[10] U.N. CHARTER art. 1, para. 3.

idea that fairness should be accorded to all persons and all groups, both domestically and internationally.[11] Although the DoD takes a strong policy stance regarding non-discrimination and the environment, in practice, the DoD's assurances have proven to be little more than pretense.[12] On overseas military installations, under official policy, the U.S. military is supposed to follow the environmental regulations of the United States or of the host-country, whichever are more stringent.[13] In

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> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and *in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.*

Id. (emphasis added).

[11] In the United States, the non-discrimination principle has come to be known as "environmental justice." The concept of environmental justice developed in protest against the regular government practice of situating disproportionate numbers of pollution disposal activities or other environmentally dangerous activities in areas inhabited predominantly by people of color. *See, e.g.*, UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (detailing the practice of environmental racism in the United States and encouraging the practice of environmental stewardship); U.S. GEN. ACCT. OFF., SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES, GAO/RCED-83-168, (June 1983) (providing "information on the racial and economic characteristics of communities surrounding four hazardous waste landfills in three southeastern States"). The idea that the disproportionate burden that communities of color bear with regard to environmental risks is alternatively called "environmental racism," in recognition of many environmental activists' ties to the civil rights movement. *See* Ann E. Carlson & Jonathan Zasloff, *Environmental Justice*, *available at* http://www.ioe.ucla.edu/publications/report01/EnvironmentalJustice.htm (last visited June 17, 2003).

Through an executive order issued by President Bill Clinton, the concept of environmental justice became a part of U.S. law and policy. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). President Clinton's Executive Order requires that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of programs, policies, and activities on minority populations and low-income populations in the United States and its territories[.]" *Id.*

[12] *See infra* Part V.B.

[13] *See* M. Victoria Bayoneto, Comment, *The Former U.S. Bases in the Philippines: An Argument for the Application of U.S. Environmental Standards to Overseas Military Bases*, 6 FORDHAM ENVTL. L.J. 111, 113 (1994); Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 49 (1996).

fact, in violation of international expectations and norms,[14] the DoD applies neither U.S. nor Philippine law to its activities in the Philippines, even when the difference between the two is negligible.[15]

In this Comment I suggest that, upon entering a new agreement with the United States for the Balikatan exercises, the Philippines is in a legal position to insist on a comprehensive clean-up and remediation plan for the extensive damage at the former U.S. military bases. Under a new agreement, the Philippines can also address the pressing need to prevent further degradation of the environment under the ongoing Balikatan exercises. Nearly all U.S. military facilities require the use of hazardous, sometimes ultra-hazardous, toxic substances.[16] United States government reports establish that environmental degradation affecting at least two of its former military bases in the Philippines, including contamination of the drinking water and the threat of unexploded ordnance in and around the former bases, is the direct result of U.S. military activity.[17] The U.S. government is aware that its military activities caused substantial harm to the environment, but denies any responsibility for the remediation.[18]

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[14] *See infra* Part IV (discussing international environmental law principles such as the non-discrimination norm, the prohibition against transboundary harm, and the Polluter Pays Principle).

[15] *See* Bayoneto, *supra* note 13, at 153. Bayoneto explains that no conflict exists between U.S. and Philippine regulations because "Philippine environmental laws are comprehensive, and are modeled on U.S. laws." *Id.* at 138 (citing to Teresa Albor, *As U.S. Vacates Philippines Bases, Toxic Wastes Remain*, SAN DIEGO UNION-TRIB., Nov. 29, 1992, at A-46).

[16] Ted H. Schettler, *Reverberations of Militarism: Toxic Contamination, the Environment, and Health*, 1 MED. & GLOBAL SURVIVAL 7-18 (1995), http://www.ippnw.org/MGS/V2N1Schettler.html (last visited June 17, 2003) [hereinafter Schettler, *Reverberations of Militarism*].

[17] *See* PAUL BLOOM, ALEX CARLOS, JORGE EMMANUEL & THEODORE SCHETTLER, ENVIRONMENTAL AND HEALTH IMPACT REPORT ON KNOWN AND POTENTIALLY KNOWN CONTAMINATED SITES AT FORMER U.S. MILITARY BASES IN THE PHILIPPINES 5-19 (1994) (on file with U.S. Working Group for Philippine Bases Clean-Up, c/o Arc Ecology, 833 Market Street, Suite 1107, San Francisco, CA 94703) [hereinafter BLOOM ET AL.]. Bloom and his co-authors used the two sets of documents released by the DoD: (1) *Potential Restoration Sites on Board the U.S. Facility, Subic Bay*, dated October 1992 and (2) *Environmental Review of the Drawdown Activities at Clark Air Base, Republic of the Philippines*, not dated. *Id.* at 5. The DoD had redacted some material from the reports before providing them to the authors. *Id.*

[18] GAO PHILIPPINES REPORT, *supra* note 3, at 5. The GAO PHILIPPINES REPORT concludes:

> The services [U.S. Navy and Air Force officials] have identified contaminated sites, such as fire-fighting training facilities and underground storage tanks. The

In reviewing the terms of the Balikatan joint military exercises each year, the Philippine government should negotiate a more equitable

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> cost of bringing all contaminated sites into compliance with U.S. environmental standards could approach Superfund proportions, according to Air Force and Navy officials. However, under the current agreement [the 1947 Military Bases Agreement], the United States has no liability for this damage.

Id.

The United States relies on the bare terms of the 1947 Military Bases Agreement to exculpate itself from liability. One scholar has noted that although the Military Bases Agreement contained a "no repair" clause, it "did not give the United States carte blanche to return the land contaminated with toxic waste." Bayoneto, *supra* note 13, at 125 (citing to Agreement Concerning Military Bases, Mar. 14, 1947, U.S.-Phil., art. XVII, § 2, 61 Stat. 4019, 4029-30 [hereinafter Military Bases Agreement]). Article XVII, section 2 provides in relevant part: "There shall be no obligation on the part of the United States or of the Philippines to rebuild or repair any destruction or damage inflicted from any cause whatsoever on any of the said buildings or structures owned or used by the United States in the bases." Military Bases Agreement, art. XVII, § 2, 61 Stat. at 4027. The no repair clause in Article XVI refers only to "buildings or structures" on the bases. *Id.*

Presumably, the Philippines bargained away its right to hold the United States liable for any destruction or damage to the buildings for the right to keep the buildings and any improvements at the expiration of the 1947 Military Bases Agreement. *See* Margaret M. Carlson, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVAL L. REV. 62, 82 (2000) (noting that in their SOFAs with the United States, Japan and South Korea reached a similar compromise). Article XVII, section 2 further provides:

> The United States is not obligated to turn over the bases to the Philippines at the expiration of this Agreement or the earlier relinquishment of any bases in the condition in which they were at the time of their occupation, nor is the Philippines obliged to make any compensation to the United States for the improvements made in the bases of for the buildings or structures left thereon, all of which shall become the property of the Philippines upon the termination of the Agreement or the earlier relinquishment by the United States of the bases where the structures have been built.

Military Bases Agreement, art. XVII, § 2, 61 Stat. at 4027.

The "no repair" clause does not, however, exonerate the United States for the injuries it caused to human health and the environment. *See* PHILIPPINE SENATE, 11TH CONGRESS, 2D SESSION, COMMITTEE REPORT NO. 237, ON TOXIC CONTAMINATION IN THE FORMER U.S. BASES IN THE PHILIPPINES (2000), *available at* http://yonip.com/toxicwaste/senate.html (last visited Mar. 11, 2003) [hereinafter Senate Report].

The Philippine Senate Committees on Environment and Natural Resources, Health and Demography, and Foreign Relations clearly stated its official position: "No article or section in the 1947 Military Bases Agreement or in its amendments referred to any right or authority granted to the United States to inflict damage to the environment or to commit toxic tort with impunity." *Id.*

agreement with the United States.[19] A fair and balanced agreement would require specific provisions detailing liability for potential environmental degradation as a result of the joint exercises. The current military activities in the Philippines will result in further damage to the environment.[20] In order to achieve an equitable arrangement, the United States must admit that it has a responsibility to remedy the hazardous waste contamination at its former military bases in the Philippines. By reviewing past wrongs and the effect of ecological harm on the human inhabitants of the areas affected, both countries can move towards creating a new, mutually acceptable covenant, in conformity with international expectations of non-discrimination and equitable treatment. Three different sources of law are relevant to my analysis: international environmental law, Philippine domestic law, and U.S. federal environmental statutes.

Part II provides an abbreviated historical introduction to the archipelago now known as the Republic of the Philippines. Although the Philippines had always been a gathering place of diverse peoples, it was not until the Spaniards arrived in Mactan, Cebu that a colonial history began.[21] The colonial period continued after 1898, when the United States inaugurated an era of imperial domination, military occupation, and social and cultural control that still flourishes today.[22] Although the Philippines

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[19] Each year before Balikatan resumes, the governments of the Philippines and the United States agree to a Terms of Reference (TOR) regarding the rules that will govern the joint military exercises. In the midst of ongoing controversies surrounding Balikatan 2003-1, Philippine President Macapagal-Arroyo sent Avelino Cruz, Jr., Chief Presidential Legal Counsel, to Washington, D.C. to resolve arrangements for the 2003 TOR. President Macapagal-Arroyo stated that once finalized, she will review the 2003 TOR to ensure that it does not violate the Philippine Constitution. *See* Anthony Taberna, *GMA Wants Tighter Rein on Balikatan TOR*, ABS-CBN NEWS.COM, June 6, 2003, *at* http://www.abs-cbnnews.com/abs_news_flash_article.asp?FlashOID=9127 (last visited June 4, 2003); Recto Mercene, *Start of Balikatan in Limbo*, ABS-CBN NEWS.COM, June 3, 2003, *at* http://www.abs-cbnnews.com/abs_news_body.asp?section=Provincial&oid=24748 (last visited June 4, 2003).

[20] *See infra* Part II.B. *See also* SECOND FRONT annex B, *supra* note 6, at 85. The Balikatan Watch human rights organization documented reports of U.S. military planes dumping barrels of waste in coastal areas of Sulu. *Id.* Without an agreement explicitly addressing liability for environmental damages, my fear is that the United States will again be allowed to pollute in the Philippines with impunity.

See also infra Part III (describing the environmental disaster left by the U.S. military when they vacated Subic and Clark).

[21] *See* STEINBERG, *supra* note 1, at 53-54.

[22] *See generally* VESTIGES OF WAR: THE PHILIPPINE-AMERICAN WAR AND THE AFTERMATH OF AN IMPERIAL DREAM, 1899-1999 (Luis H. Francia & Angel Velasco Shaw eds., 2003) (employing a multidisciplinary approach to critique the contemporary

was granted independence from direct U.S. governance in 1946,[23] the constant presence of the U.S. military since that time undercuts the true sovereignty of the Republic of the Philippines. The control and authority that the United States continues to exercise over the Philippines provides a compelling historical reason why damage to the environment caused by the U.S. military, as discussed in Part III, should be acknowledged and paid for by the United States government.

In attempting to create a legal context for the United States' liability for prospective and past damage to the environment in the Philippines, Part IV outlines several principles of international environmental law. This section covers a wide range of issues, including the impact of environmental degradation on universally applicable human rights, prohibitions on pollution, and liability regimes. Although international law contains many "soft" law provisions and therefore can be criticized as having no force or effect, an analysis of the applicable environmental laws of the United States in Part V will reveal that domestic U.S. laws concerning the environment capture essentially the main principles of international law. United States environmental statutes, such as the National Environmental Policy Act (NEPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) impose the same restrictions on pollution and the same duties for remediation that are found in international as well as Philippine domestic law.[24]

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consequences of U.S. colonialism in the Philippines). *See also infra* Part V.A.1 and accompanying notes (relating a few examples of the influence and power that the United States continues to enjoy in the Philippines today).

[23] STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 335 (1989). In his chapter entitled "Dependent Independence," Karnow recounts the historical and political forces that shaped the incipient Philippine Republic. *See id.* at 323-55. *See also infra* Part II.A and accompanying notes.

[24] Philippine environmental laws incorporate many principles of international law, most importantly, the Polluter-Pays Principle, which means that the party responsible for pollution should be responsible for the clean-up. *See infra* Part IV and accompanying notes.

II. HISTORICAL BACKGROUND

Many influences, colonial and otherwise, have shaped the unique culture of the Philippine Islands. Long before the Spanish descended upon Cebu in 1521, the various peoples who lived on the 7,200 islands that make up the territory of the present-day Republic of the Philippines involved themselves in sophisticated international relations.[25] The peoples of the Philippine archipelago conducted regular international trade between China, Japan, and even Portugal.[26] Commerce among the different regions of the archipelago was also well-established.[27] The concept of a Philippine nation did not yet exist, however, and each region conducted its affairs independently.[28]

Spanish occupation marked the first colonial period in the Philippines.[29] Datu Lapu Lapu and his warriors vanquished Ferdinand Magellan in 1521, but more Spanish colonizers followed.[30] Armed with sophisticated weapons and the Bible, Spanish conquerors quickly cemented their rule over the Philippine Islands, which lasted for more than 300 years.[31] The shared experience of harsh Spanish colonial rule was

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[25] Two Muslim sultanates in the southern islands of Mindanao—Sulu and Maguindanao—were great centers of government, trade, and culture. SAMUEL K. TAN, INTERNATIONALIZATION OF THE BANGSA MORO STRUGGLE 27 (1993). The sultanates participated in the community of nations by entering into formal treaties with China, Great Britain, the Netherlands, and even the United States. Wadja Esmula, *Bangsa: The Notion of Nationhood*, *in* CULTURE OF NATIONALISM IN CONTEMPORARY PHILIPPINE SOCIETY: CONFERENCE PROCEEDINGS 121 (Cordillera Studies Center, 1995).

[26] WILLIAM HENRY SCOTT, BARANGAY: SIXTEENTH-CENTURY PHILIPPINE CULTURE AND SOCIETY 207 (4th ed. 1999).

[27] *Id.* at 208-09.

[28] *Id.* at 275. When the Spanish first came to the Philippine Islands in the sixteenth century, a multitude of ethnolinguistic groups existed, each of which functioned as an autonomous entity. However, historians and ethnographers note with awe that although each unit was indeed separate, replete with individual languages, cultures, and environments, a discernable "Philippine culture" had endured for at least three centuries across most of the archipelago. *Id.*

[29] *See* RENATO CONSTANTINO, THE PHILIPPINES: A PAST REVISITED 12 (8th prtg. 1984) [hereinafter CONSTANTINO, REVISITED]. Constantino noted wryly: "The Filipino people have had the misfortune of being 'liberated' four times during their entire history." *Id.* The Spanish instigated the first liberation "from the 'enslavement of the devil'"; the second was led by the Americans against the Spanish; the third, led by the Japanese against the Americans; and the fourth and final liberation, led again by the Americans against "the Japanese facists." *Id.*

[30] *Id.* at 87.

[31] *See* ROSALITA TOLIBAS-NUÑEZ, ROOTS OF CONFLICT: MUSLIMS, CHRISTIANS, AND THE MINDANAO STRUGGLE 10 (1997).

actually the catalyst that galvanized the disparate peoples of the Philippine Islands. Although previously fragmented, the Pilipino[32] people were now united by a common goal—independence from Spain—and the concept of a Philippine nation was born.[33] In 1896, the Kagalanggalang Kataastaasang Katipunan ng mga Anak ng Bayan (Katipunan), an underground organization, launched Asia's first revolution for national liberation.[34] The revolutionary leaders were not aware, however, that independence, once achieved, would be short-lived.

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[32] In this Comment, I use "Pilipino" to refer to the people living in the Philippines. I use the adjective "Philippine" to identify non-person/al items, e.g., "the Philippine Armed Forces." *See* Theo Gonzalves, *"The Show Must Go On": Production Notes on the Pilipino Cultural Night*, 2 HITTING CRITICAL MASS: A JOURNAL OF ASIAN AMERICAN CULTURAL CRITICISM (Spring 1995), *available at* http://socrates.berkeley.edu/~critmass/v2n2/ gonzalvesprint.html (last visited June 5, 2003) (employing "Filipino" and "Filipino American"). A lively debate occasionally re-enters Pilipino identity discourse, centering around the use of "P" versus "F." *See* DOROTHY FUJITA-RONY, *Note on Terminology*, *in* AMERICAN WORKERS, COLONIAL POWER: PHILIPPINE SEATTLE AND THE TRANSPACIFIC WEST xvii-xviii (2003). Some argue that since Tagalog (the national language of the Philippines) does not have an "F," using "Filipino" is an expendable vestige of Spanish and U.S. colonialism. *See* ROYAL F. MORALES, MAKIBAKA: THE PILIPINO AMERICAN STRUGGLE (2d ed., 1998) (noting that the "P" has a social significance rooted in the political and social movements of the 1960s); Allan G. Aquino, *To "P" Or Not to "P"*, *at* http://paccoregon.net/Articles/PorF.php (last visited June 5, 2003) (explaining "the 'F' is therefore 'colonial' and unsuitable for a new self-determined and decolonized identity"). Others note that using "P" is impolitic when modern languages in the Philippines have incorporated the letter "F" and its pronunciation. *See* Penelope V. Flores, *Pilipino Vs. Filipino*, *at* http://store.escalate.com/store/turoturo/article11.jsp (last visited June 5, 2003) (concluding that over "Pilipino" or "Philippino," "Filipino" is the most appropriate term). Also, since "P(h)/Filipin(n)o/a" is derived from Las Islas Felipinas, named after King Felipe II of Spain, perhaps the most revolutionary and de-colonial action would be to come up with a completely different name. Most scholars have resolved that the choice between "P" or "F" is a personal one. *See* Aquino, *To "P" Or Not to "P"*, *supra* note 32.

[33] *See* WILLIAM J. POMEROY, THE PHILIPPINES: COLONIALISM, COLLABORATION, AND RESISTANCE! 20 (1992). Jose Rizal spearheaded a nationalist organization called La Liga Filipina, and made the first call for unity of "the whole archipelago into one compact vigorous and homogenous body." *Id.* Readers should note that the solidarity cry organized by Rizal was a Tagalog revolutionary ideal, not necessarily shared with the rest of the diverse peoples in the Philippine Archipelago. *See, e.g.*, TOLIBAS-NUÑEZ, *supra* note 31, at 14-15 (indicating that, in 1899, an alliance between the incipient Philippine Republic in Luzon and the sultanates in Mindanao still did not exist).

[34] Under the leadership of the Andres Bonifacio, the Katipunan led a successful revolution and overthrew the Spanish colonial government. Thereafter, the First Philippine Republic was formed under the Malolos Constitution. *See* SECOND FRONT,

When Pilipino revolutionaries finally forced the Spanish out, the United States took advantage of an opportunity to betray its wartime ally.[35] The United States made a secret deal with Spain, and thereafter seized control of the Philippine Islands.[36] In 1898, the United States began an occupation of the Philippines that was to last for more than a century.[37] Thus began the second colonial period of the Philippines.

A. *U.S.-Philippine Relations: Establishing Jurisdiction and Control*

During treaty talks in Paris after the Spanish-American War, Spain ceded the Philippines to the United States for US$20 million.[38] Eleven days after the Treaty of Paris was signed, President William McKinley

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supra note 6, at 92. For more on the development of the Malolos Republic, see SONIA M. ZAIDE, THE PHILIPPINES: A UNIQUE NATION 263-77 (2d ed. 1999).

[35] *See* KARNOW, *supra* note 23, at 110. The United States and the nascent Philippine Republic were allies during the Spanish-American War. During the midst of the war, U.S. military officials were concerned only with the goal of defeating the Spanish. "To achieve that goal, they sought the help of the Filipinos, indulging them with pledges that had no foundation in reality. The Filipinos naïvely believed the promises until they discovered, to their dismay, that they had been manipulated." *Id. See also id.* at 113-14 (relating the difference between Philippine expectations and U.S. promises).

[36] *See* POMEROY, *supra* note 33, at 1-2.

[37] *See* KARNOW, *supra* note 23, at 436-42. On August 13, 1898, U.S. military forces entered Manila. They did not leave until 1992. *See* ZAIDE, *supra* note 34, at 405.

[38] Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754. The treaty also granted the United States power over Guam and Puerto Rico. *Id.* at art. II. Spain officially ceded "to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies." *Id.*

The Treaty of Paris signaled the United States' official introduction as a global colonial power. In addition to the Philippines, Puerto Rico, and Guam, the Treaty gave the United States effective political control over Cuba. The United States had already acquired the former Kingdom of Hawai`i by joint resolution of Congress earlier the same year. *See* Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 226 (1996); Ediberto Roman & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 475-76 (2002).

See also KARNOW, *supra* note 23, at 129-30. Spain was willing to accept the loss of Cuba, Puerto Rico, and Guam, but Spanish officials argued that Spain could not cede the Philippines because Spanish troops did not control the archipelago outside of the city of Manila at the time of the U.S. capture. *Id.* at 130.

issued a proclamation of Benevolent Assimilation to the Pilipinos.[39] McKinley ordered U.S. military forces, still in Manila, to use force to pacify the Pilipinos.[40] Within weeks, the Philippine-American War erupted.[41] The United States underestimated the resolve of the Pilipinos, terming the revolution an "insurrection," expecting the fighting to last only a few weeks.[42] In the end it took five years and 126,468 U.S. troops to quash the Philippine Revolution.[43]

In 1934, the United States allowed the Philippines to become a self-governing commonwealth, promising full independence in 1944.[44] Independence was postponed, however, when Japan invaded and occupied the Philippines during World War II.[45] The U.S. forces in Manila were forced to evacuate and eventually regrouped in Australia.[46] From Allied Headquarters in Australia, General Douglas MacArthur organized the U.S. military strategy in the Pacific.[47] Pilipino American soldiers serving in the U.S. Army were smuggled into the Philippines to work as reconnaissance scouts, clandestinely reporting on the movements of the Japanese occupation forces.[48] The Hukbalahap, an underground socialist group,

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[39] CONSTANTINO, REVISITED, *supra* note 29, at 223. *See also* STEINBERG, *supra* note 1, at 65. President McKinley's plan of "Benevolent Assimilation" towards the Pilipinos was "to educate [them], and uplift and civilize and christianize them, and by God's grace do the very best we could by them." *Id.*

[40] CONSTANTINO, REVISITED, *supra* note 29, at 223.

[41] ZAIDE, *supra* note 34, at 268.

[42] *See id.*

[43] *See id.* at 268, 277. *See also* Renato Constantino, *The Origin of a Myth*, *in* REDISCOVERY: ESSAYS IN PHILIPPINE LIFE AND CULTURE 99, 112 (Cynthia Nogales Lumbera & Teresita Maceda eds., 1977).

The U.S. efforts to end the five-year long Philippine-American War cost more than the war against Spain. "Thus a movement that had started as an effort to liberate the Cubans [the Spanish-American War] ended in a drive to subjugate the Filipinos." RICHARD HOFSTADTER ET AL., THE AMERICAN REPUBLIC 340 (1959).

[44] *See* POMEROY, *supra* note 33, at 86-87 (describing Independence Act which allowed Philippine political self-governance while maintaining economic dependence on the United States).

[45] *Id.* at 101.

[46] RENATO CONSTANTINO & LETIZIA R. CONSTANTINO, THE PHILIPPINES: THE CONTINUING PAST 132-33 (prtg. 1984).

[47] *Id.*

[48] Linda A. Revilla, *The 1st & 2nd Filipino Infantry Regiments, U.S. Army*, *in* HISTORY, HEROES, AND UNTOLD TRIUMPHS: FILIPINO AMERICANS AND WORLD WAR TWO (Linda A. Revilla ed. 2003). *See also* AN UNTOLD TRIUMPH: THE STORY OF THE 1ST AND 2ND FILIPINO INFANTRY REGIMENTS, U.S. ARMY (2002) (documenting the long-

also helped to organize resistance against the Japanese, and aided U.S. forces when they returned.[49] The United States defeated the Japanese Imperial Army with the help of these two guerilla forces and thereafter set about to fulfill the pledge for independence made before the war.[50]

After 400 years of occupation by colonial forces, the Philippines finally became an independent nation in 1946.[51] Despite the appearance of complete independence, however, the United States installed a neo-colonial rule with U.S. influence continuing to permeate throughout the governance of the Philippines.[52] In 1947, U.S. negotiators gained the use of twenty-three different military bases in the Philippines for a period of ninety-nine years, free of rent.[53] Four years later, the two nations signed the Mutual Defense Treaty (MDT) of 1951, which enshrined the Philippine-U.S. security alliance.[54] Then, during the twenty-two years that

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forgotten stories of Pilipino American soldiers who were instrumental in the U.S. victory over the Japanese Imperial Army during World War II).

[49] POMEROY, *supra* note 33, at 126, 131.

[50] *See id.*

[51] KIRK, *supra* note 2, at 7. Philippine Congressman Satur C. Ocampo describes the U.S. action as a grant of unsubstantial "flag independence." Satur C. Ocampo, *U.S. Armed Intervention in the Philippines and the People's Struggle for National Freedom*, *in* SECOND FRONT, *supra* note 6, at 67.

[52] *Id. See also* KARNOW, *supra* note 23, at 323-24 (chronicling General MacArthur's role in "perpetuating the dependent connection" between the United States and the Philippines).

[53] Military Bases Agreement, pmbl., art. 1, §§ 2-3, 61 Stat. at 4019-20.

[54] Mutual Defense Treaty, Aug. 30, 1951, U.S.-Phil., *available at* http://www.dfa.gov.ph/vfa/content/mdt. htm (last visited Mar. 19, 2003) [hereinafter MDT].

Although the U.S. military has occupied Philippine bases under treaty since 1951, many different groups have expressed objections to the presence of a foreign military in the Philippines. *See* STEINBERG, *supra* note 1, at 111. Philippine nationalist leaders, as early as the 1940s, insisted that the 1947 Military Bases Agreement was a violation of Philippine sovereignty. Senator Claro M. Recto asserted that U.S. bases on Philippine soil were more likely to provoke outside attacks rather than to deter them. *Id.*

Karnow notes that, at the conclusion of the 1947 negotiations, even the most "pro-American Filipinos" were opposed to the Military Bases Agreement. *See* KARNOW, *supra* note 23, at 332. The Pro-American sect considered it an affront to the dignity of the nation that the United States pursued harsher base acquisition tactics with the Philippines, its longtime ally, than with Japan, a recent enemy. *Id.*

On December 26, 1984, future President of the Philippines Corazon Aquino signed a Declaration of Unity demanding that: "Foreign military bases on Philippine territory must be removed and no foreign military bases shall hereafter be allowed." JOVITO R. SALONGA, THE SENATE THAT SAID NO 191 (1995). The Declaration was co-

Ferdinand E. Marcos was president, the United States provided aid and assistance to the Philippine government, without which Marcos could not have maintained his dictatorship.[55] Through its control of Marcos, the United States achieved many foreign policy objectives, the most important of which was to retain a solid military presence in the Asia-Pacific region.[56] The United States considered U.S. military bases in the Philippines vital to U.S. national security interests during the Cold War, since those bases served as the launching pad for many anti-communist missions.[57]

The Military Bases Agreement of 1947 (MBA) expired in 1991 and that same year the Philippine Senate voted not to ratify a treaty that would have extended its terms.[58] In spite of the Senate rejection,

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signed by Jaime Ongpin, Lorenzo Tañada, Agapito "Butz" Aquino, Jose W. Diokno, Raul S. Manglapus, Ramon V. Mitra, and Jovito R. Salonga. *Id.*

[55] *See* KARNOW, *supra* note 23, at 375-78. The Johnson and Nixon administrations gave Marcos generous amounts of military and economic aid, a policy designed to maintain Marcos' support of the U.S. military bases in the Philippines. *Id.* In exile, Marcos later blamed the U.S. government and the U.S. press for his downfall. *Id.* at 410. Foreign policy experts noted: "the prevailing view of Marcos had long been closer to Franklin D. Roosevelt's remark about Anastasio Somoza, the Nicaraguan dictator of the 1930s: 'He may be a son of a bitch, but he's *our* son of a bitch.'" *Id.* at 388.

See also STEINBERG, *supra* note 1, at 176 (calling Marcos a "puppet" of the United States); ZAIDE, *supra* note 34, at 388-89. Zaide maintains that during the Martial Law period under Marcos, the Philippines attempted to develop an independent foreign policy. *Id.* at 388. The Philippine government, however, granted the United States many special privileges. *Id.* For example, the United States retained its military bases in the Philippines, Subic and Clark being among the largest in Asia. *Id.*

[56] *See generally* POMEROY, *supra* note 33, at 229-81 (discussing U.S. foreign policy goals with respect to the strategic location of the Philippines).

[57] *See* DONALD M. SNOW, NATIONAL SECURITY: ENDURING PROBLEMS IN A CHANGING DEFENSE ENVIRONMENT 173 (2d ed. 1991). *See also* SECOND FRONT, *supra* note 6, at 67-68. The authors note that the United States initiated "hundreds of military operations in 70 countries" from the Philippines. More specifically, the United States used its military bases in the Philippines as "major staging areas" in the Korean and Vietnam Wars. *Id.*

[58] SALONGA, *supra* note 54, at 4-5. Dr. Jovito L. Salonga served as the President of the Philippine Senate from 1987 to 1991. Salonga records, in precise detail, the debates and policy arguments made and considered by the twelve senators in 1991 when faced with the option of indefinitely extending the terms of the 1947 Military Bases Agreement. *Id.* at 191-292. Of particular importance to Salonga are the terms of the 1987 Constitution and the Bill of Rights contained therein. *Id.* at 9-16 (citing to PHIL. CONST. art. III). Among the provisions in the 1987 Constitution are: a declaration to pursue an independent foreign policy, PHIL. CONST. art. II, § 7; an adoption of a nuclear-

representatives from the Philippines and the United States negotiated a separate agreement allowing the United States continuing access to bases in the Philippines for training and military preparedness.[59] On February 10, 1998, Philippine Secretary of Foreign Affairs Domingo L. Siazon and U.S. Ambassador Thomas Hubbard signed the Visiting Forces Agreement (VFA).[60] The VFA grants continued access and control rights to the U.S. armed forces. Under the VFA, U.S. military personnel are allowed to enter and depart the Philippines exempt from the normal passport and visa requirements.[61] The VFA also establishes a scheme for criminal jurisdiction over U.S. personnel. The Philippines is accorded the primary and exclusive jurisdiction over U.S. personnel with respect to offenses committed in the Philippines punishable under Philippine laws.[62] Additionally, both nations waive all civil liability claims, which apparently include claims for environmental torts.[63]

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free policy, *Id.* § 8; and the recognition of the State's duty to "protect and advance the right of the people to a balanced and healthy ecology," *Id.* § 17.

Many factors were considered by the Senate, not the least important of which was the actual language of the proposed treaty. Quoting Alfredo Bengzon, a key Philippine negotiator to that proposed treaty, Salonga notes that it was really the "arrogant and heavy-handed insistence on squeezing out every possible advantage for the United States that resulted in a treaty so lopsided and so iniquitous that the Senate justly rejected it." SALONGA, *supra* note 54, at 290.

[59] DEPARTMENT OF FOREIGN AFFAIRS, PRIMER ON THE VISITING FORCES AGREEMENT, *at* http://www. dfa.gov.ph/vfa/content/Primer.htm [hereinafter VFA PRIMER].

[60] Visiting Forces Agreement, Feb. 10, 1998, U.S.-Phil., *available at* http://www.dfa.gov.ph/vfa/content/ Vfa.htm (last visited Mar. 19, 2003) [hereinafter VFA].

[61] VFA, *supra* note 60, art. III, § 2. Article III also allows U.S. civilian personnel to bypass the visa requirement, though they must present valid passports upon entry and departure. *Id.* art. III, § 4.

[62] *See id.* art. V, § 1. The section of the VFA providing for the exclusive and primary jurisdiction of Philippine courts also contains a waiver clause. *See id.* art. V, § 3(c). Indeed, the Philippines did waive criminal jurisdiction over three U.S. Navy men in 2000. *See infra* Part V.A.1.

[63] VFA, art. VI, § 1. Both nations waive "any and all claims against each other for damage, loss or destruction to property of each other's armed forces or for death or injury to their military and civilian personnel." *Id.*

The VFA is greatly beneficial to the United States, to the detriment of Philippine interests. For example, the U.S. waiver of any civil claims it may have against the Philippines is not a substantial relinquishment of rights. *See id.* In the environmental context, the military operations under the VFA are all situated on Philippine soil making the Philippines and its people the sole bearers of any adverse environmental burdens that will result.

Military bases in the Philippines remain essential to U.S. security interests today.[64] In the Philippines, the U.S. military has an irreplaceable strategic base from which missions can be launched into the South China Sea, the Indian Ocean, and the Persian Gulf.[65] The United States maintains a controlling presence in the Philippines today through millions of dollars in foreign military assistance and humanitarian aid. The United States currently has US$3.4 billion invested in the Philippines.[66] And in 2004, for example, the Philippines will receive US$87 million in "counter-terror assistance" designed to strengthen internal counter-terrorism capabilities, complete with funding for U.S. military assistance and counter-terrorism training.[67]

B. *They Shall Return: The Balikatan Exercises*

Each year, the United States sends its troops to the Philippines to engage in joint military exercises (war games) with the Armed Forces of the Philippines. The joint effort has been dubbed Balikatan, Tagalog for "shoulder to shoulder."[68] Under the current arrangement, the joint forces conduct an average of ten to twelve military exercises each year.[69] The first Balikatan exercises commenced in 1991.[70] In 1995, the Philippine government suspended the war games, due to the U.S. Pentagon's refusal to submit its troops to the primary jurisdiction of Philippine courts,[71] but

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[64] *See* Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 82 (1992).

[65] *Id. See also* SNOW, *supra* note 57, at 172-73 (noting that after World War II, U.S. national security aims in Southwest Asia are defined by the "triple criteria of protecting Israel's right to existence, guaranteeing the free flow of Persian Gulf petroleum, and minimizing Soviet influence in the region").

[66] VFA PRIMER, *supra* note 59.

[67] The Philippines is now sixth on a list of twenty-five countries that the United States has named "frontline states" on the war against terrorism. Felipe F. Salvosa, *RP a 'Frontline State' in Fight Against Terrorism-US Gov't (Philippines to Receive $87M in Counter-Terror Assistance)*, BUSINESSWORLD (Manila), Feb. 11, 2003, at P12, 2003 WL 4284191.

[68] Although officially, "Balikatan" denotes only a special set of military operations, in this paper, I will use "Balikatan" as a general descriptor for the myriad U.S.-Philippine joint exercises that occur in the Philippines each year.

[69] VFA PRIMER, *supra* note 59.

[70] John Pike, *Balikatan: "Shouldering the Load Together"*, GLOBAL SECURITY.ORG, *at* http://www. globalsecurity.org/military/ops/balikatan.htm (last visited June 9, 2003).

[71] KIRK, *supra* note 2, at 194.

Balikatan resumed in 1999, over strong objection from several non-governmental organizations (NGOs) as well as the Catholic Church.[72]

The Balikatan 2002-1 war games series involved 1650 U.S. soldiers, including 150 Special Forces troops.[73] The exercises were conducted in Zamboanga and Basilan Island in southern Mindanao—the stronghold of the Abu Sayyaf group.[74] The international media noted that this deployment was the largest gathering of U.S. troops after the success of the joint mission with the Northern Alliance in Afghanistan that deposed the Taliban regime.[75] Unlike prior exercises, Balikatan 2002-1 was governed by a Terms of Reference (TOR), and not by the typical rules of engagement.[76] The 2002-1 TOR allows U.S. military personnel to advise, assist, and train Philippine units, but bans them from engaging in

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[72] Pike, *supra* note 70.

[73] *Id*. *See also* Professor Roland G. Simbulan, U.S. Military Intervention in the Philippines: A New Phase, Lecture Before the Third World Studies Center and the Institute of Islamic Studies, Asian Center, University of the Philippines, Diliman Campus (Feb. 7, 2002), *at* http://www.yonip.com/YONIP/Articles/war_01.htm (last visited Mar. 27, 2003). The U.S. Special Forces are an elite command cadre, consisting of elements from the special operations forces of the Army, Navy, and Air Force. The U.S. Special Forces are now part of the Central Command of the U.S. Armed Forces, currently leading the "war against terror" in the Middle East. *Id.*

[74] *See* Del Rosario, *supra* note 6, at 2-3. The Abu Sayyaf is reputedly connected with the al-Qaeda terrorist network. *Id*. *See also* Paolo Pasicolan, *Strengthening the U.S.-Philippine Alliance for Fighting Terrorism*, HERITAGE FOUND. EXECUTIVE MEMORANDUM (Heritage Found., Wash., D.C.) No. 815, May 13, 2002, at 1, *available at* http://www.heritage.org/library/execmemo/em815.html (last visited Apr. 16, 2003) (alleging links between al-Qaeda and the Abu Sayyaf).

Some background on the Heritage Foundation: "Some of the finest conservative minds in America today do their work in The Heritage Foundation." Heritage Foundation website, Endorsement statement by Rush Limbaugh, *at* http://www.heritage.org/about/ (last visited May 1, 2003). The Foundation's mission statement provides:

> Founded in 1973, The Heritage Foundation is a research and educational institute - a think tank - whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.

[75] Bernardette S. Sto. Domingo & Friena P. Guerrero, *Weekender Politics—Security, Rigodons*, BUSINESSWORLD (Manila), Dec. 27, 2002, at P21, 2002 WL 103399492.

[76] Terms of Reference for RP-US Exercise Balikatan 02-1 (Feb. 9, 2002), *available at* http://www. pacomm.mil/imagery/archive/0202photos/termsofreference.doc (last visited June 7, 2003) [hereinafter TOR].

direct combat.[77] The only exception is that U.S. soldiers are allowed to defend themselves if they come under attack.[78]

Various NGOs have mounted considerable protests against U.S. military presence in the Philippines.[79] Philippine nationalist advocates[80]

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[77] *Id.* art. I, §§ 6, 8. Article I, section 6 of the TOR provides: "The Exercise is a mutual counter-terrorism advising, assisting and training Exercise relative to Philippine efforts against the ASG [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 be for support of the Exercise." *Id.*

[78] *Id.* art. I, § 8. "U.S. exercise participants shall not engage in combat, without prejudice to their right of self-defense." *Id.*

The joint troops have had direct confrontations resulting in actual combat with the Abu Sayyaf. During one such encounter in July 2002, joint forces killed Abu Sayyaf spokesman Abu Sabaya. Later, Philippine Defense Secretary Angelo T. Reyes admitted that the purpose of Balikatan 2002-1 was to eliminate the Abu Sayyaf and free foreign nationals, including two Americans, who were being held hostage by the Abu Sayyaf. Felipe F. Salvosa II & Cecille S. Visto, *Defense Chief Favors New TOR*, BUSINESSWORLD (Manila) Feb. 19, 2003, at P12, 2003 WL 4284769; Domingo & Guerrero, *supra* note 75.

[79] In 2002, an estimated 1000 protestors gathered in front of the U.S. Embassy in Manila to protest the continued occupation of the U.S. military of the Philippines in the form of the annual Balikatan exercises. *Militants Stage Biggest Protest Action Vs. War Games* (Feb. 4, 2002), *available at* http://www.inq7.net/brk/2002/feb/04/ brkpol_8-1.htm (last visited May 31, 2003). *See also* SECOND FRONT, *supra* note 6, at 9-15 (reporting on the International Solidarity Mission (ISM) Against U.S. Armed Intervention in the Philippines which took place on July 24-31, 2002 in Mindanao). The ISM was sponsored by Bayan Muna (People First Party), Bagong Alyansang Makabayan (Bayan, New Patriotic Alliance), Karapatan (Alliance for the Advancement of People's Rights), and the Moro-Christian People's Alliance. *See id.* at 4.

Protestors allege that the presence of U.S. troops in war-torn Mindanao not only violates the Philippine Constitution, but could also lead to direct U.S. intervention in domestic Philippine affairs. Luis Jalandoni, international representative of the National Democratic Front, recently spoke out against Balikatan and warned, "the United States could use the Balikatan military exercises to 'provoke another Tonkin Gulf incident' that 'could lead to another U.S. war of aggression.'" Jaime Espina, *NDF Warns Vs. Repeat of Tonkin Gulf "Attack" in Balkatan*, ABS-CBNNEWS.COM, May, 28, 2003, *at* http://www.abs-cbnnews.com/abs_news_body.asp?section=Provincial &oid=24229 (last visited June 5, 2003). Philippine Supreme Court Associate Justice Santiago Kapunan had previously expressed this same concern. *See* Lim v. Macapagal-Arroyo, G.R. No. 151445 (Apr. 11, 2002, J. Kapunan dissenting), *available at* http://www.supremecourt.gov.ph/2002/apr2002/151445_kapunan.htm (last visited Apr. 5, 2003) [hereinafter Lim Opinion, Dissent] (describing the Gulf of Tonkin incident).

[80] A number of non-governmental organizations in both the Philippines and the United States can be characterized as "Philippine nationalist" in nature. *See, e.g.*, Junk the VFA Movement, *Junk the Visiting Forces Agreement* (Sept. 10, 1998), *at*

argue that Balikatan violates the Philippine Constitution, which forbids foreign troops from amassing on Philippine soil absent a treaty ratified by a two-thirds Senate majority.[81] The Philippine Constitution specifically states that "foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate."[82] The Philippine President has not yet approached the Senate for its advice or consent regarding the annual Balikatan war games.[83]

Both Philippine and U.S. officials try to differentiate the Balikatan exercises from a "permanent" foreign military presence necessitating ratification by the Philippine Senate. The Visiting Forces Agreement (VFA) of 1998 provides the legal basis of the current U.S. presence in the Philippines.[84] Proponents of the VFA argue this arrangement can bypass the constitutional requirement of consent from the Philippine Senate because of a separate treaty arrangement with the United States under the Mutual Defense Treaty of 1951 (MDT).[85] The DoD maintains that since the U.S. troops will not be based in the Philippines, but train only there on

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http://makabayan.tripod.com/junkvfa.htm (last visited May 31, 2003) (stating the purpose of the Junk the VFA Movement); Network in Solidarity with the People of the Philippines (NISPOP), *Uphold Philippine Sovereignty!*, *at* http://www.nispop.org/outnowstatement.html (last visited May 31, 2003) (describing NISPOP's coalition work in supporting Philippine sovereignty with other organizations, such as the League of Filipino Students, the First Quarter Storm Movement, and various members of the Catholic clergy).

[81] PHIL. CONST. art. XVIII, § 25. The Constitution prohibits the presence of foreign military troops in the Philippines:

> 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 contacting State.

Id.

[82] *Id.*

[83] The 2003 Balikatan exercises, as have each of the joint exercises preceding it, operate under the auspices of the Mutual Defense Treaty of 1951 (MDT) and the Visiting Forces Agreement of 1998 (VFA). *See infra* Part II.B and accompanying notes. In the eyes of the U.S. government, the VFA is not a "treaty," only an "executive agreement." SECOND FRONT, *supra* note 6, at 36, 70.

[84] VFA, *supra* note 60.

[85] MDT, *supra* note 54. Article VI of the MDT obligates both the Philippines and the United States to act and meet common dangers "in the event of an armed attack in the Pacific Area." *Id.* art. VI.

a "temporary duty" basis, the annual deployment does not violate any Philippine laws.[86]

In April 2002, the Supreme Court of the Philippines held the Balikatan exercises are legal, and found President Macapagal-Arroyo did not commit a grave abuse of discretion in facilitating the deployment of U.S. troops in Mindanao for the Balikatan 2002-1 series.[87] Philippine citizen-taxpayers and former Integrated Bar of the Philippines officials Arthur D. Lim and Paulino R. Ersando[88] filed a petition for prohibition in the Supreme Court, arguing the Balikatan exercises were unconstitutional.[89] Interestingly, the Court first noted that although the petitioners did not have standing, the procedural requirement would be relaxed because of the "transcendental importance" of the issue involved.[90] In the Court's words, the issue at hand was "the VFA permits United States personnel to engage in 'activities,' the exact meaning of which was left undefined."[91] The majority, led by Justice Sabino de Leon, Jr.,[92] held the Balikatan 2002-1 exercises were legal and covered under the scope of both the 1951 MDT and the 1998 VFA.[93] The Court reasoned simply, "it is only logical to assume that 'Balikatan 02-1,' a 'mutual anti-terrorism advising, assisting and training exercise,' falls under the

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[86] VFA PRIMER, *supra* note 59.

[87] Lim v. Macapagal-Arroyo, G.R. No. 151445 (Apr. 11, 2002), *available at* http://www.supremecourt. gov.ph/2002/apr2002/151445.htm (last visited June 19, 2003) [hereinafter Lim Opinion]. *See also* Askia Muhammed, *R.P. Supreme Court: Balikatan Legal*, THE PHILIPPINE NEWS, Apr. 25, 2002, *available at* http://news.ncmonline.com/news/view_article.html?article_id=178 (last visited June 19, 2003); Michael Lim Ubac, *Supreme Court Rules RP-U.S. War Games Legal*, INQUIRER NEWS SERVICE, Apr. 12, 2002, *at* http://www.inq7.net/ nat/2002/apr/12/text/nat_21-p.htm (last visited Mar. 11, 2003) (reporting on the *Lim* decision).

[88] Lim Ubac, *supra* note 87.

[89] *Id.*

[90] *Id.* "[I]n 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." *Id.* (citing to Kilosbayan v. Guingona, Jr., 232 SCRA 110 (1994)).

[91] *Id.* (citing to VFA, *supra* note 60, art. 1) (providing definitions for terms used in the Visiting Forces Agreement)).

[92] Joining Justice de Leon's majority opinion were Chief Justice Hilario Davide Jr. and Associate Justices Josue Bellosillo, Jose Melo, Reynato Puno, Jose Vitug, Vicente Mendoza, Artemio Panganiban, Leonardo Quisumbing, and Antonio Carpio. Lim Ubac, *supra* note 87. Associate Justice Santiago Kapunan wrote a dissenting opinion, with Associate Justices Consuelo Ynarez-Santiago and Angelina Sandoval-Gutierrez joining him. *See* Lim Opinion, Dissent, *supra* note 79.

[93] Lim Opinion, *supra* note 87.

umbrella of sanctioned or allowable activities" under the VFA.[94] The Court also noted, however, no agreement between the United States and the Philippines allows foreign troops to engage in an offensive war in the Philippines.[95] The Court did not entertain the petitioners' final argument—that U.S. troops were in fact actively engaged in combat "under the guise of an alleged training and assistance exercise."[96] The Court held that because it is not a trier of fact, it was constrained to limit its ruling to the issue of executive abuse of discretion.[97]

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[94] *Id.*

[95] *Id.* The court mused about the offensive war issue without coming to a legal ruling:

> That is not the end of the matter, though. Granted that "Balikatan 02-1" is permitted under the terms of the VFA, what may U.S. 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 U.S. 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 by 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 will straddle a fine line, observing the honored legal maxim "*Nemo potest facere per alium quod non potest facere per directum*" ["no one is allowed to do indirectly what he is prohibited to do directly"].

Id.

[96] *Id.* Disposing of the plaintiff's claim by concluding that the Supreme Court of the Philippines is not a trier of fact seems to me to contradict the first statement made by the Court, brushing aside the procedural standing requirement.

[97] *Id.*

> 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 to, we cannot take judicial notice of the events transpiring down south, 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. . . .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*.

Id. (internal citations omitted).

Having passed judicial scrutiny, Balikatan 2003 was scheduled to commence in April 2003.[98] The desire to host U.S. troops is, in large part, motivated by the expectation of financial investment that usually accompanies U.S. presence. On March 28, 2003, in the midst of the ongoing negotiations about the 2003 Balikatan war games, the U.S. government donated US$5.3 million in medical equipment and US$1 million in medical supplies to a Jolo community hospital.[99] President Macapagal-Arroyo insisted that the donation was not a quid pro quo, but local reporters highlighted the ulterior motive.[100] United States officials used the donation to give the Jolo residents an economic incentive to hosting the war games, "an idea of what may be in store for them, should they host Balikatan 03-1."[101] This exchange demonstrates the power the United States can exert in the Philippines through foreign aid.

The current presence of U.S. troops in the Philippines poses a real threat to human health and the environment. No environmental impact statements have been conducted for the 2003 Balikatan exercises, therefore neither the Philippines nor the United States has an official or publicly available estimate of environmental damages that the war games may cause.[102] I believe that the potential for future harm is best measured by reviewing the specific and quantifiable environmental damages done to two former U.S. military bases in the Philippines—Subic Bay Navy Facility (Subic) and the Clark Air Base (Clark).

III. ENVIRONMENTAL DAMAGE CAUSED BY U.S. MILITARY ACTIVITIES IN THE PHILIPPINES

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[98] Salvosa, *Frontline State*, *supra* note 67. In 2003, at least twelve Philippine-U.S. joint exercises are scheduled. *Id.*

[99] Mia Gonzalez, *R.P.-U.S. Exercise Will Still Be in Sulu—GMA*, ABS-CBNNEWS.COM, Apr. 9, 2003, *at* http://www.abs-cbnnews.com/abs_body.asp?section=National&oid=20312 (last visited Apr. 9, 2003).

[100] *Id.*

[101] Mia Gonzalez, *Sulu Folk Get U.S. Medical Supplies, Equipment*, ABS-CBNNEWS.COM, Mar. 28, 2003, *at* http://www.abs-abnnews.com/Abs_cbn_body.asp?section=Provincial&oid=19312 (last visited Mar. 28, 2003).

[102] Instead, NGOs in the Philippines observe and report on the various environmental concerns raised by the ongoing joint military exercises. *See infra* Part III and accompanying notes.

When U.S. troops left the Philippines in the early 1990s, the DoD relinquished all responsibility for the huge environmental cleanup task that remained as a result of its presence at Subic and Clark.[103] The U.S. military dumped millions of gallons of sewage on the ground and in the water, and the chemicals have seeped into the soil and water table.[104] In 1992, the U.S. General Accounting Office (GAO) estimated the clean-up would cost more than $12-15 million per site.[105] Nearly all U.S. foreign military bases share this story.[106] The environmental hazards that exist on each U.S. military base are numerous, including toxic waste, hazardous

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[103] *See* GAO PHILIPPINES REPORT, *supra* note 3, at 3.

> The Air Force and Navy have identified significant environmental damage to their facilities in the Philippines. However, the current basing agreement does not impose any well-defined environmental responsibility upon the United States either while it operates the bases or for cleanup upon withdrawal. Nevertheless, Air Force and Navy officials said that if the United States applied U.S. Environmental restoration standards, cleanup and restoration costs could approach Superfund proportions [averaging $25 million per site].

Id.

See generally BLOOM, ET AL., *supra* note 17; Videotape: Toxic Sunset: On the Trail of Hazardous Waste From Subic and Clark (Philippine Center for Investigative Journalism 1993) (on file with University of Hawai`i Wong Audiovisual Center).

For a complete timeline of events regarding the environmental damage at the former U.S. military bases in the Philippines, see People's Task Force on Bases Clean-Up, *Chronology of Events Related to the Struggle for Environmental Justice at the Former Bases in the Philippines*, *available at* http://www.boondocksnet.com/centennial/sctexts/bases_env_chron.html (last visited Feb. 13, 2003) [hereinafter CHRONOLOGY]. The CHRONOLOGY reveals that U.S. officials knew of the environmental damages as early as June 1986, five years before the 1947 Military Bases Agreement expired. *Id.* A classified report by the DoD records "serious disposal problems" in U.S. military waste management in the Philippines. *Id.* Furthermore, although the U.S. Air Force conducted an environmental review of Clark, it did not give a copy to the Philippine government before vacating the base. *Id.*

[104] GAO PHILIPPINES REPORT, *supra* note 3, at 27.

[105] Bayoneto, *supra* note 13, at 112 (citing to GAO PHILIPPINES REPORT, *supra* note 3, at 28).

[106] *See* Schettler, *Reverberations of Militarism*, *supra* note 16. Dr. Schettler writes: "The mission of virtually every U.S. military facility has required the use of hazardous, toxic substances by military personnel and military contractors over the course of decades." *Id. See also* J. Martin Wagner & Neil A.F. Popovic, *Environmental Injustice on United States Bases in Panama: International Law and the Right to Land Free From Contamination and Explosives*, 38 VA. J. INT'L L. 401, 425 (1998) (citing to U.S. GEN. ACCT. OFF., HAZARDOUS WASTE: MANAGEMENT PROBLEMS CONTINUE AT OVERSEAS MILITARY BASES 4, 45, GAO/NSIAD-91-231 (1991)).

chemicals, and explosive materials.[107] Yet, there is a marked difference in the way the U.S. government has chosen to deal with its cleanup duties in the Philippines compared to the duties it has voluntarily shouldered in developed countries, such as Germany.[108]

Just before the 1947 Military Bases Agreement expired in 1991, the U.S. Senate commissioned the General Accounting Office (GAO) to determine the nature of any environmental damages on military facilities in the Philippines and whether the United States had any obligation to cleanup or to restore the bases.[109] The GAO concluded the United States had no liability.[110] This conclusion is astonishing because the report also acknowledged that U.S. Air Force and U.S. Navy officials had identified "significant environmental damage[s]" at both Clark and Subic that did not comply with U.S. environmental standards.[111] The environmental

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[107] Wagner & Popovic, *supra* note 106, at 423.

[108] *See* Michael Satchell, *What the Military Left Behind Toxic Legacy; Angeles City, Philippines*, U.S. NEWS & WORLD REP., Jan. 24, 2000, *available at* 2000 WL 7717357. U.S. News reported that "[t]his year, the DOD will spend $2 billion on cleaning up at installations in the United States and its territories, but only $18.6 million in Great Britain, Germany, Belgium, Italy, Japan, and South Korea. The Philippines gets nothing." *Id.*

[109] GAO PHILIPPINES REPORT, *supra* note 3, at 1-2. *See also* CHRONOLOGY, *supra* note 103. The GAO report was commissioned in 1990, but Dr. Jorge Emmanuel later discovered that the DoD knew about the environmental damage on the bases as early as 1986. *Id.* A classified report by the DoD Defense Inspector General revealed the health risks and environmental dangers associated with poor hazardous waste management by the U.S. military were present in 1986, but this information was kept secret from the Philippine government. *Id.*

[110] GAO PHILIPPINES REPORT, *supra* note 3, at 5, 27. The report's authors conclude:

> Although the Air Force and the Navy have identified significant environmental damage at both Clark Air Base and the Subic Bay Navy Facility, the current basing agreement does not impose any well-defined environmental responsibility on the United States for environmental cleanup and restoration.

Id. at 27.

[111] *Id.* "Environmental officers at both Clark Air Base and the Subic Bay Navy Facility have identified contaminated sites and facilities that would not be in compliance with U.S. environmental standards." *Id.* The GAO PHILIPPINES REPORT describes in detail some of the "significant environmental damage[]" sites that U.S. Navy and Air Force environmental officials had identified. *Id.* at 27-28. For example:

> The Subic Bay Navy Facility's power plant contains unknown polychlorinated biphenyl (PCB) and emits untreated pollutants directly into the air. No testing has been performed to analyze the content of

problems listed in the report are directly related to the daily operations of the military on those bases. For instance, since the Subic Facility did not have a complete sanitary sewer system and waste treatment facility, sewage and waste from the complex were discharged directly into Subic Bay.[112] The full extent of these environmental damages was never measured, since the United States never conducted testing in the contaminated areas.[113]

University of Maryland scientists, however, conducted a comprehensive study of the Clark and Subic sites in 1993.[114] The study analyzed soil, water, and air samples from Clark and found traces of polychlorinated biphenyls (PCBs), heavy metals, and high concentrations of a pesticide.[115] The Philippine government later commissioned U.S.-based consulting firm, Weston International, to perform a baseline study of the soil and water at Clark.[116] Among other things, the Weston study confirmed that: (1) at least one pollutant (including mercury, lead, pesticide dieldrin, benzene, and toluene) existed in twenty-one test sites and none of these sites met drinking water standards;[117] (2) unsafe levels of contaminants remained in the soil at thirteen different test sites;[118] and

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emissions, but officials stated that air emissions would not meet U.S. clean air standards.

Id. at 28.

[112] *Id.* at 27.

[113] *Id.*

[114] Bayoneto, *supra* note 13, at 122 (citing to Larry LaMotte, *Military Mess Part 4: Third World Peoples Suffer* (CNN Specials television broadcast, Nov. 7, 1993), available in LEXIS, News Library, ALLNWS File)).

[115] *Id.* Some of the aforementioned chemicals are Persistent Organic Pollutants (POPs), which scientific research has linked to various health problems including falling sperm count, testicular and breast cancer, behavioral disorders, and immune system deficiencies. Aimee Suzara, *Facing the Toxic Legacy: A Personal Encounter*, *in* MAGANDA MAGAZINE 63 (1999). The Philippine Clean Air Act of 1999 defines POPs as "the organic compounds that persist in the environment, bioaccumulate through the food web, and pose a risk of causing adverse effects to human health and the environment. These compounds resist photolytic, chemical and biological degradation, which shall include but not be limited to dioxin, furan, polychlorinated biphenyls (PCBs), organochlorine pesticides, such as aldrin, dieldrin, DDT, hexachlorobenzene, lindane, toxaphere and chlordane." Philippine Clean Air Act of 1999, Republic Act No. 8749, ch. 1, art. 2, § 5(s).

[116] Suzara, *supra* note 115, at 63.

[117] *Id.* Each of these pollutants "ha[s] been linked to health conditions such as birth defects, tumors, cancers, and seizures. Benzene and various pesticides have been connected to leukemia." *Id.*

[118] *Id.*

(3) many of these test sites were located within or very close to communities.[119]

When Mount Pinatubo erupted in 1991, about 20,000 families were relocated to the recently vacated Clark Air Base Command (CABCOM).[120] The U.S. military had used the facilities inhabited by the dislocated families as a motor pool.[121] Soon after the relocated groups took up their temporary residence at CABCOM, reports of vomiting, diarrhea, respiratory problems, and miscarriages began to rise.[122] A subsequent study of twelve barangays[123] surrounding Clark found that these communities had unusually high rates of female urinary tract infections and nervous system disorders.[124] Today, children conceived or born at Clark are afflicted with conditions such as congenital heart disease, seizure disorders, and other debilitating birth defects.[125] These conditions provide undeniable evidence of the horrible effects that poorly regulated military activities can have on human safety.

Today, both U.S. and Philippine officials, aware of the environmental contamination in and around former U.S. military bases in the Philippines, have not yet repaired the contaminated areas.[126] The public health risks associated with the toxic pollution continue to plague

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[119] *Id.*

[120] Satchell, *supra* note 108. In 1991, Mount Pinatubo erupted, spewing rain and volcanic ash across 2000 acres of the Philippine countryside. The eruption left 1.2 million people homeless and was one of the primary motivations in the U.S. military's swift retreat from Clark. Although the eruption rendered Clark "virtually useless" to the U.S. military, Philippine official in charge of relocating the thousands displaced by the natural disaster decided to use CABCOM as the main resettlement site. *See* STEINBERG, *supra* note 1, at 12, 178-79.

[121] Suzara, *supra* note 115, at 63.

[122] *Id.* at 64.

[123] The "barangay" is the smallest unit of government in the Philippines. SCOTT, *supra* note 26, at 5. A barangay is roughly equivalent to the "barrio" in Mexico or a "town" or "hamlet" in the United States.

[124] Suzara, *supra* note 115, at 64 (citing to a comprehensive health survey conducted by Canadian Institute for the Concern for Public Health).

[125] *Id.* at 65.

[126] *See* Ted H. Schettler, *Military Base Contamination in the Philippines. The U.S. Role*, 1 MED. & GLOBAL SURVIVAL 7-18 (1995), http://www.ippnw.org/MGS/V2N1Schettler.html (last visited June 17, 2003) [hereinafter Schettler, *Military Base Contamination*]. "At the present time rusting and bulging barrels of hazardous material are sitting uncovered at Clark." *Id.* *See also* Toxic Sunset, *supra* note 110 (filming some of these leaking canisters).

the surrounding communities.[127] The current Balikatan military operations, being conducted under a "joint command" of U.S. and Philippine military officials, threatens to exacerbate the environmental conditions that have caused the death of many Pilipinos.[128] Recent reports indicate that the Balikatan exercises may take a serious toll on the environment and the people in the Philippines.

On March 23, 2002, residents of Bundok Sinomaan, Patikul, Sulu reported that a U.S. plane dropped a silver coated drum barrel.[129] The inhabitants evacuated the surrounding area, fearing that the barrel may contain explosives or chemical wastes.[130] Less than three weeks later, Basilan Governor Wahab Akbar complained that U.S. spy planes dropped more barrels into the coastal waters of Sumisip town. Soon after, the reported drops, children in the area experienced nausea, vomiting, and diarrhea.[131] Representative Hussin Amin of Sulu provided a more specific account of similar activities affecting three towns in his province.[132] Amin announced that "U.S. P3 Orion planes were dropping what appeared to be drums of toxic chemicals."[133] The United States responded through spokesperson Major Cynthia Terramae, who denied the allegations and challenged Representative Amin to produce evidence to the contrary.[134]

Reports like these illustrate the urgent need to establish specific environmental guidelines to which the Balikatan military command must adhere. Principles of international environmental law, establishing duties and liability schemes for breaches of those duties, provide an important and very relevant starting place. The environment is, by its very nature, of

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[127] *See* Schettler, *Military Base Contamination*, supra note 126. Dr. Schettler wrote in 1995: "Meanwhile, as the political resolution of this issue unfolds, thousands of Filipinos, many of whom are living in marginal refugee conditions, are drinking and bathing in water that is contaminated with hazardous substances resulting from U.S. military activities." *Id.* Moreover, residents around Subic eat fish and shellfish harvested from Subic Bay, the waters of which were, for years, the dumping ground of the U.S. Navy's shipyards. *Id.*

[128] SECOND FRONT, *supra* note 6, at 89, 105.

[129] *Id.*

[130] *Id.* at 89.

[131] *Id.* at 89.

[132] Patikul, Luuk, and Indanan are the Sulu three towns mentioned by Amin. *Id.*

[133] *Id.*

[134] *Id.*

international concern.[135] Water and wind currents can transport the impact of a seemingly local environmental incident throughout the globe.[136]

IV. INTERNATIONAL ENVIRONMENTAL LAW PRINCIPLES

International law provides both general and specific norms that govern the protection of the environment.[137] General principles of international law have been incorporated into the domestic law of many nations, including both the Philippines and the United States. The environmental laws of the Philippines reflect various doctrines of international environmental law, including the Polluter Pays Principle.[138] The United States also recognizes international law as domestic law in appropriate circumstances.[139] Therefore, the United States may be bound, by customary international law and written international conventions, to pay the environmental remediation costs for its former military bases in

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[135] Stanley W. Spracker & Ethan S. Naftalin, *Applying Procedural Requirements of U.S. Environmental Laws to Foreign Ventures: A Growing Challenge to Business*, 25 INT'L LAW. 1043, 1051-52 (1991).

[136] *See, e.g.*, Terry Hall, *"...Carried By the Wind Out to Sea" Ireland and the Isle of Man v. Sellafield: Anatomy of a Transboundary Pollution Dispute*, 6 GEO. INT'L ENVTL. L. REV. 639, 654 (1994); Schettler, *Reverberations of Militarism*, *supra* note 16 (discussing the transmigration of environmental damage through wind and water currents).

[137] *See infra* Parts IV.A-C. (discussing various international law conventions and customary laws including the U.N. Charter, the Rio Declaration, the non-discrimination principle, and the Polluter Pays Principle).

[138] The environmental laws of the Philippines utilize the Polluter Pays Principle to assign liability for violations of environmental regulations. The Philippine Environmental Code, effective as of 1977, affirms: "It shall be the responsibility of the polluter to contain, remove and clean-up . . . pollution incidents at his own expense." Presidential Decree No. 1152, Philippine Environment Code of 1977 § 20 (June 6, 1977) (Phil.).

[139] *See* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (holding that, in the absence of congressional enactment, federal courts are "bound by the law of nations, which is a part of the law of the land"); The Paquete Habana, 175 U.S. 677 (1900). During the Spanish-American War, U.S. Navy ships seized as war prizes two Cuban fishing smacks flying Spanish flags. The fishing vessels were thereafter sold at auction. The United States Supreme Court held that international law prohibited the taking of fishing vessels as prizes of war. More importantly, the Court explicitly stated that: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for determination." *Id.* at 700. *See also infra* at Part IV.A (discussing the domestic applicability of international environmental law in the United States).

the Philippines. The current presence of U.S. troops in the Philippines, albeit on a "temporary" basis,[140] reinforces the urgent need for the United States to acknowledge its duties under international law.

General principles found in international law provide a comprehensive framework for analyzing and assessing State responsibility for environmental degradation. This section addresses three elements of this framework. First, each State has a duty to apply environmental regulations even-handedly without discriminating on the basis of citizenship, national origin, or state of development.[141] The United States has breached this duty through its policy of non-responsibility in the Philippines. Second, countries have a further duty to use their resources in

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[140] *See* BAYAN v. Zamora, 32 SCRA 449 (2000) (J. Puno, Dissenting), *available at* http://www.yonip.com/YONIP/Articles/dissenting.html (last visited Mar. 26, 2003). In his dissenting opinion, Justice Puno found that the war games that U.S. and Philippine troops engage in each year under the auspices of the VFA are not "temporary" and are thus violative of Article XVIII, section 25 of the Philippine Constitution. Justice Puno cites to an intriguing exchange between Senator Aquilino Q. Pimentel, Jr. and Secretary of Foreign Affairs Domingo L. Siazon during the public hearings on the VFA regarding the semantics of the word "temporary."

> Sen. Pimental: . . . In other words, this kind of activities are not designed to last only within one year, for example, the various visits that can cover eternity until the treaty is abrogated?
>
> Mr. Siazon: Well, your honor, this is an exercise for the protection of national security, and until conditions are such that there is no longer a possible threat to our national security, then you will have to continue exercising, Your Honor, because we cannot take a chance on it.
>
> Sen. Pimentel: So, this will be temporary permanent, or permanently temporary?
>
> Mr. Siazon: Permanently temporary, Your Honor.

Id. (citing to Transcript of Committee Meeting, Committee on Foreign Relations, at 21 (Jan. 26, 1999)).

[141] *See infra* Part IV.A. The idea that general non-discrimination principles in international law are applicable and appropriate in the environmental law context is not new. In their article on environmental justice and U.S. bases in Panama, Wagner and Popovic provide a conceptual outline of the development of the right to non-discrimination, as between nations, in regards to domestic and international environmental policy-making. Wagner & Popovic, *supra* note 106, at 423-26, 489-92 (citing to, among others, Anne F. Badefsky, *The Principal of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1 (1990)).

a manner that avoids transboundary harm.[142] The U.S. military previously breached this duty by allowing toxic contamination to leak into the soil and water on its former military bases in the Philippines.[143] Current U.S. military activity under Balikatan poses the same threat. Third and finally, the Polluter Pays Principle assigns liability for these two breaches of established international environmental law duties: the United States must pay for the environmental cleanup at the sites already damaged and assume responsibility for future environmental damage in the Philippines during the Balikatan exercises.[144]

A. *Duty and Breach: Application of Different Environmental Standards as a Violation of International Law*

In its treatment of former military bases in the Philippines, the United States has utilized a double standard for the application of its environmental laws. The U.S. government has failed to treat hazards created by the U.S. military outside of the country with the same degree of seriousness that it has accorded defense sites within its territorial borders.[145] Although DoD operations within the fifty states, the District of Columbia, and each of the fourteen U.S. territories and possessions[146] are subject to the strict regulation of federal environmental laws,[147] its

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[142] *See infra* Part IV.B. The duty to avoid transboundary harm arises from customary international law and is also found in international covenants such as the Rio and Stockholm Declarations. Further, the ICJ has recognized the prohibition against transboundary pollution in more than one case.

[143] *See supra* Part III.

[144] *See infra* Part IV.C.

[145] *See* Wagner & Popovic, *supra* note 106, at 424.

[146] The fourteen U.S. territories and possessions are: American Samoa, Baker Island, Guam, Howland Island, Jarvis Island, Johnson Atoll, Kingman Reef, Midway Islands, Navassa Island, Commonwealth of the Northern Marianas, Palmyra Atoll, Puerto Rico, the U.S. Virgin Islands, and Wake Island. *See* Trade Information Center, U.S. Dep't of Commerce, *at* http://www.trade.gov/td/tic/tariff/us_territories.htm (last visited Apr. 26, 2003).

[147] U.S. GEN. ACCT. OFF., ENVIRONMENTAL CONTAMINATION: CLEANUP ACTIONS AT FORMERLY USED DEFENSE SITES 2, GAO-01-557 (2001) [hereinafter GAO-01-557]. GAO-01-557 was prepared to assist the House Committee on Energy and Commerce in assessing the properties potentially eligible for environmental clean-up under the Defense Environmental Restoration Program. *Id.* at 3.

The existence of strict regulations for domestic bases does not mean that the DoD actually adheres to them. In fact, the DoD is notorious for its reluctance to apply federal regulations to bases within the United States and its territories. In 1992, the DoD approached the Congressional Committee with a proposal requesting exemption from

overseas installations are not.[148] This double standard violates international law.[149]

The right to non-discrimination is a basic human right, recognized in the United Nations Charter[150] and the International Covenant on Civil and Political Rights.[151] The United States is a ratifying party to both of these documents, as well as to the Universal Declaration of Human Rights (UDHR), all of which reverberate with the right to freedom from discrimination.[152] The non-discrimination norm entitles everyone to

> all the rights and freedoms set forth in [the UDHR], without discrimination of any kind. . . . Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[153]

The UDHR's description of non-discrimination is broad and therefore, academics and practitioners have translated this human rights norm into the international environmental arena.[154]

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federal environmental laws. *See* Harry H. Kelso, *Preparing to Win in the Pentagon's Environmental Clean-Up System and Recognizing Warning Signs on the Horizon*, NAT'L ASS'N OF ATT'YS GEN.: NAT'L ENVTL. ENFORCEMENT J., No. 14-2, Mar. 1999, at 3.

[148] Phelps, *supra* note 13, at 49.

[149] *See, e.g.,* Wagner & Popovic, *supra* note 106, at 423-36 (arguing that U.S. treatment of environmental risks at its bases in Panama violates the international law principle of non-discrimination).

[150] *See* U.N. CHARTER art. 1, para. 3.

[151] International Covenant on Civil and Political Rights, Dec. 9, 1966, 999 U.N.T.S. 171, arts. 2(1) and 26 [hereinafter ICCPR]. The United States ratified the ICCPR in 1992. *See* Office of the High Commissioner for Human Rights, ICCPR, Status of Ratifications, *at* http://www.unhchr.ch/pdf/report.pdf (last visited June 18, 2003).

[152] Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, art. 2, U.N. Doc. A/810 (1948) [hereinafter UDHR]. Some international scholars consider the UDHR part of customary international law. *See*, *e.g.*, Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 319 (1995/1996).

[153] UDHR art. 2.

[154] Drafters of several international documents have utilized the human right to freedom from discrimination in the environmental law context. *See infra* Part IV.A and accompanying notes (describing the non-discrimination norm as found in the Stockholm Declaration, the UNEP Draft Principles of Conduct, and the Organization for Economic Cooperation and Development (OECD) Principles).

International environmental documents extend the non-discrimination concept to decision-making that affects the global ecosystem. For instance, the Stockholm Declaration links the three elements of freedom, equality, and environmental quality as fundamental freedoms and universal human rights.[155] More specifically, Principle 13 of the United Nations Environment Programme (UNEP) Draft Principles of Conduct states:

> It is necessary for States, when considering, under their domestic environmental policy, the permissibility of domestic activities, to take into account the potential adverse environmental affects arising out of the utilization of shared natural resources, *without discrimination as to whether the effects would occur within their jurisdiction or outside it.*[156]

See also Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1-4 (Alan E. Boyle & Michael R. Anderson eds., 1996). Anderson suggests two ways to describe the relationship between human rights and the environment, in light of the "fashionable view that human rights and environmental protection are interdependent, complementary, and indivisible." *Id.* One, protecting the environment can be viewed as one way to achieve the more general goal of upholding human rights standards. Two, "the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection." *Id.*

[155] *See* Wagner & Popovic, *supra* note 106, at 490 n.381 (citing Declaration of the United Nations Conference on the Human Environment, June 16, 1972, U.N. Doc. A/Conf. 48/14 (1972) (adopted by the U.N. Conference on the Human Environment at Stockholm), *reprinted in* 11 I.L.M. 1416 (1972), princ. 1 [hereinafter Stockholm Declaration]). Principle 1 states the common conviction that:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial, and other forms of oppression and foreign domination stand condemned and should be eliminated.

[156] United Nations Environment Programme (UNEP) Draft Principles of Conduct, In the Field of the Environment for Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, princ. 13, U.N. Doc. UNEP/1G12/12 (1978), *reprinted in* 17 I.L.M. 1097, 1099 (1978) (emphasis added).

The norm of non-discrimination, therefore, applies equally to decisions impacting the environment.[157]

Under the non-discrimination principle, then, the United States may not treat domestic efforts to repair and restore environmental degradation differently from the efforts to do so abroad. International observers note that had the bases been located in the United States, they would not have qualified for turnover under the strict standards of RCRA and CERCLA,[158] as U.S. environmental laws place strict restrictions on property transferred from military to civilian hands.[159] The U.S. government's refusal to admit that it owes repair and restoration costs to the Philippine government and the Pilipino people—in spite of official recognition that its military activities did cause harm[160]—implicates both human rights law as well as narrower international environmental concerns.

Several criticisms arise from the presentation of the non-discrimination principle in this context. The non-discrimination norm is "soft" law, merely hortatory, and thus, unenforceable. The application of environmental laws abroad might have the unintended effect of discouraging legislators from developing strict protections domestically. Realistically, effective diplomacy requires the discretionary ability to discriminate in appropriate situations. These three important concerns can begin to be answered by remembering that the Republic of the Philippines,

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[157] Support for the environmental non-discrimination rule can be found in various sources. *See, e.g.*, Experts Group on Environmental Law of the World Commission on Environment and Development, Legal Principles for Environmental Protection and Sustainable Development, art. 1, U.N. Doc. WCED/86/23/Add.1 (1986) ("States shall, when considering under their domestic policy or law the permissibility of an environmental interference or a significant risk thereof, take into account the detrimental effects which are or may be caused by the environmental interference without discrimination as to whether the effects would occur *inside or outside the area under their national jurisdiction*") (emphasis added); Draft Principles on Human Rights and Environment, Review of Further Developments in Fields With Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Annex I, princ. 3, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) ("All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment").

[158] *See* Carlson, *supra* note 18, at 81. *See also infra* Part V.A.2 (discussing the FACES lawsuit against the U.S. Air Force and U.S. Navy under the citizen suit provision of CERCLA).

[159] *See infra* Part V.

[160] *See* GAO PHILIPPINES REPORT, *supra* note 3, at 27.

to this day, remains in the U.S. sphere of influence.[161] The United States, by virtue of its continued control and jurisdiction over the Philippines, cannot treat the Philippines as it would any other nation.[162] On a global policy level, "arms-length" negotiation justifications run counter to the ideal of being a good international player.[163]

The unresponsive manner in which the United States has dealt with its obligations in the Philippines seems especially irresponsible when compared to the burdens it has voluntarily shouldered in developed nations like Germany.[164] Under the German Supplemental Agreement (SA), the exacting rules of German environmental law will apply to all United States military activity on its bases in Germany.[165] The German SA "reflects the growing trend in host-nations of increased international sensitivity to environmental issues."[166] The disparate treatment in which

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[161] *See* Nicholas O. Berry, *The Conflict Between United States Intervention and Promoting Democracy in the Third World*, 60 TEMP. L. Q. 1015 (1987) (submitting that U.S. military intervention in countries like the Philippines, Korea, and the Dominican Republic has left a legacy of dependence on U.S. markets, troops, loans, aid, and investment).

[162] The Philippines may arguably have a "special status" under international law as a former colony of the United States. *See* John Heffner, Note, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities Worldwide*, 37 TEX. INT'L L.J. 591, 599 (2002) (citing Rice v. Cayetano, 963 F. Supp. 1547, 1551 (D. Haw. 1997) (citing Morton v. Mancari, 417 U.S. 535, 552 (1974))). The United States Supreme Court accorded a special political status to Native Americans in recognition of the fact that "the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence." Morton, 417 U.S. at 552. Extending similar consideration to the Philippines could be justified under the same reasoning.

[163] *See, e.g.,* Adam L. Aronson, Note, *From "Cooperator's Loss" to Cooperative Gain: Negotiating Greenhouse Gas Abatement*, 102 YALE L.J. 2143, 2149-52 (1993); Jonathan Baert Weiner, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 749-50 (1999) (critiquing the reluctance of States to participate in international agreements as a "free rider" problem).

[164] *See* Carlson, *supra* note 18, at 82 (comparing provisions of different international agreements regarding overseas DoD installations).

[165] Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany (Mar. 18, 1993) art. 53, para. 1 [hereinafter German SA].

[166] Carlson, *supra* note 18, at 82. The German SA is still a relatively unique arrangement in U.S. foreign policy. Other developed nations in which the United States maintains military bases, such as Japan and South Korea, have not yet sought similar protections. *Id.*

the United States engages, differentiating between the Philippines and Germany, violates the most basic understanding of the principle of non-discrimination.[167]

A guideline to applying the non-discrimination norm in an environmental law context already exists. In order to implement the environmental protections first enunciated in the Stockholm Declaration, the Organization for Economic Cooperation and Development (OECD)—of which the United States is a member[168]—has formulated a series of principles on the prevention of transboundary harm.

> *Countries should initially base their action on the principle of non-discrimination*, whereby[:]
>
> polluters causing transfrontier pollution should be subject to legal or statutory provisions no less severe than those which would apply for any equivalent pollution occurring within their country, under comparable conditions and in comparable zones.[169]

The OECD recommendation specifically addresses the disparate treatment of countries in regards to environmental risks, acknowledging the existence of an international expectation that certain principles of equality and non-discrimination will be utilized in policy making.[170]

Here, the polluter is the U.S. military. Had the U.S. government applied the principle of non-discrimination to its operations at Clark, Subic, and the other military installations it controlled in the Philippines, it would not have abandoned the bases without regard to the environmental hazards posed by its activities there.[171] Had the U.S. government applied the principle of non-discrimination to its military activities in the

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[167] *See infra* Part VI for a discussion surrounding the United States' duties to protect for the environment of Germany under the Supplementary Agreement. *See also supra* note 116.

[168] Wagner & Popovic, *supra* note 106, at 491. *See also* OECD Member Countries List, *available at* http://www.oecd.org/EN/countrylist/0,,EN-countrylist-0-nondirectorate-no-no-159-0,00.html (last visited Apr. 16, 2003).

[169] Guidelines Governing Transfrontier Pollution and Transboundary Issues, O.E.C.D. Doc. C(74) 224 (Annex), adopted Nov. 14, 1974, *available at* http://www.elr.info/International/ielpre92/CHAP09.pdf (last visited June 7, 2003) [hereinafter OECD Guidelines].

[170] Wagner & Popovic, *supra* note 106, at 491.

[171] *See* David Armstrong, *A Toxic Legacy Abroad: The Military Has Polluted in Ways that Would be Illegal in the United States*, BOSTON GLOBE, Nov. 15, 1999.

Philippines, it would not have been able to relinquish its former defense sites without first repairing and restoring them to a condition suitable for civilian use.[172] Instead, the United States ignored the fact that its military operations created a state of environmental disaster in the communities surrounding its former military bases by refusing to clean up its mess before it left.[173]

B. *Duty and Breach: The United States Caused Transboundary Harm*

The prohibition against transboundary harm is one of the most elementary principles of international environmental law.[174] Principle 21 of the Stockholm Declaration inscribed into written international law the customary expectation that States will "ensure that activities within their jurisdiction and control [do] *not cause damage to the environment of other states*."[175] The aspirations of Principle 21 have become further engraved in international law by the texts of subsequent treaties and declarations. The Rio Declaration on Environment and Development (Rio Declaration) and the Convention on Environmental Impact Assessment in a Transboundary Context require that all States conserve, protect, and restore the health and integrity of the Earth's ecosystems to prevent, reduce, and control significant adverse transboundary environmental impacts.[176] The Rio Declaration further requires States to ensure that

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[172] *See* Carlson, *supra* note 18.

[173] *See* GAO PHILIPPINES REPORT, *supra* note 3.

[174] *See* Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 938 (1997) (describing the prohibition against transboundary pollution as having "a fairly high degree of consensus under both international customary law and U.S. statutory law").

[175] Stockholm Declaration, *supra* note 155, at princ. 21 (emphasis added).

[176] Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, Annex I, U.N. Doc. A/CONF.151/26, *reprinted in* 31 I.L.M. 874 (1992), princ. 7 (providing in relevant part: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem")[hereinafter Rio Declaration]; Convention on Environmental Impact Assessment in a Transboundary Context, Sept. 3, 1991, UNECE, *reprinted in* 30 I.L.M. 800 (1991), art. 2(1) [hereinafter Espoo Convention]. Article 2(1) of the Espoo Convention provides: "The Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce, and control significant adverse transboundary environmental impact from proposed activities." *Id.*

activities within their jurisdictions or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[177]

The United States is bound by this principle because the obligation not to cause transboundary harm is generally accepted and followed by the international community, making it customary international law.[178] Furthermore, the United States has long availed itself of the *sic utere tuo ut alienum non laedas*[179] principle.[180] In 1941, the United States claimed that Canada should accept State responsibility for the air pollution caused

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The Rio Declaration is a non-binding document, but David Hunter and his co-authors submit that it contains many emerging international environmental law principles.

> By confirming that a consensus exists among States on the importance of these principles, the *Rio Declaration* may significantly further the development of international environmental law, as well as the possibility of incorporating specific principles in subsequent treaties, and even the possibility of formal codification of an international binding covenant on environment and development in the future.

DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 307 (1998).

Aspirational international documents such as the Stockholm and Rio Declarations have a heightened status in the liability context because international tribunals like the ICJ base their decisions on international custom and general principles of international law. Statute of the International Court of Justice, T.S. No. 993, 59 Stat. 1055, art. 38 (1)(b) and (c)(respectively) (June 26, 1945) [hereinafter ICJ Statute]. *See also* David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 602-03 (1995) (suggesting that although the Stockholm and Rio Declarations are not "technically binding," they are "influential in establishing 'good practice standards,' which may later be codified in binding treaties or may mature into binding customary obligations").

[177] Rio Declaration, *supra* note 176, princ. 2.

[178] A customary norm binds all States if it comes from the general and consistent practice of States and is followed by States out of a sense of legal obligation. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) (defining customary international law) [hereinafter RESTATEMENT]. *See also* ICJ Statute, *supra* note 176, at art. 38(1)(b) (requiring the ICJ "to apply international custom, as evidence of a general practice accepted as law").

[179] Latin for: "So use your own as not to injure another's property." BLACK'S LAW DICTIONARY 1690 (7th ed. 1999).

[180] This principle is also used in U.S. property and torts law. *See* Bove v. Donner-Hanna Coke Corp., 258 N.Y.S. 229, 231 (1932) (explaining that a claim for private nuisance arises when an owner uses her property to "the material annoyance of [her] neighbor, if the latter's enjoyment of life or property is materially lessened thereby"). "The old and familiar maxim that one must so use his property as not to injure that of another (*sic utere tuo ut alienum non laedas*) is deeply imbedded in our law." *Id.*

by a private smelter company.[181] An ore smelter located in Trail, British Columbia was emitting sulfur dioxide gas and these fumes were causing damage to crops, farm animals, and other private property across the border in Washington state.[182] The arbitral tribunal found for the United States and awarded damages.[183] Although the *Trail Smelter* ruling was defined in the context of a narrowly prescribed arbitration proceeding, it is widely cited for the customary international law proposition that "no state may allow its territory to be used in a way that causes environmental injury to the territory of another state."[184]

In 1949, the International Court of Justice (ICJ) echoed the reasoning of the *Trail Smelter* tribunal, ruling that every State has the obligation not to allow its territory to be used for activities that infringe on the rights of other States.[185] More recently, in the 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (*Advisory Opinion on Nuclear Weapons*), the ICJ specifically recognized that the general prohibition against transboundary harm extends to environmental issues.[186] The ICJ restated the obligation of States not to cause harm to others by noting that

> the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of *the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.*[187]

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[181] Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1905 (Apr. 16, 1938 & Mar. 11, 1941).

[182] *Id.*

[183] *Id.*

[184] *See* Wagner & Popovic, *supra* note 106, at 440 (citing to Trail Smelter Case (U.S. v. Can.), 3 R. Int'l Arb. Awards 1911 (1941)).

[185] *See* Corfu Channel Case (U.K. v. Albania), 1949 I.C.J. 4, 22-23 (Apr. 9).

[186] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226.

[187] *Id.* at 241-42 (emphasis added).

Under this principle, States are responsible for internal polluting activities that cause injury in neighboring States.[188] The ICJ's *Advisory Opinion on Nuclear Weapons* indicates that the United States can be held responsible under international environmental law for the effects of pollution originating on its former bases in the Philippines.

In assessing the political will of a State to implement measures required under treaties and other multilateral regimes, the international community has imposed a standard of "due diligence." This norm is the measure by which international tribunals judge whether States have used the "best practicable means at their disposal and in accordance with their capabilities"[189] to bring about the necessary changes in government to ensure that the aims of those international agreements are fulfilled. In the environmental context, the due diligence standard requires the United States to take all reasonable measures to ensure that its activities do not create substantial transboundary harm.[190] The United States has failed to act with due diligence because although it knew that its Philippine-based military activities caused harm to the environment, it did not prevent the harm, nor did it act later to rectify the harm.[191] The United States had a burden under international law to ensure that the activities within its military bases did not produce any degradation of the environment in the Philippines. Failure on the part of the United States to observe this duty comes with a concomitant obligation to provide a remedy.

C. *Assigning Liability Under the Polluter Pays Principle*

The Polluter Pays Principle supports the simple argument that because the United States is the party responsible for creating

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[188] James E. Hickey, Jr. & Vern R. Walker, *Refining the Precautionary Principle in International Environmental Law*, 14 VA. ENVTL. L. J. 423, 427 (1995).

[189] *See* Lisa M. Kaplan, Comment, *International Responsibility of an Occupying Power for Environmental Harm: The Case of Estonia*, 12 TRANSNAT'L LAW. 153, 199 (1999) (citing UNCLOS, art. 194(2)). *See also* Velasquez-Rodriguez Case, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, *reprinted in* 28 I.L.M. 294 (1989) (applying the due diligence standard in a human rights context).

[190] *See* Kaplan, *supra* note 189, at 159 n.38 (citing to Riccardo Pisillo-Mazzeschi, *Forms of International Responsibility for Environmental Harm*, *in* INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM (Francesco Francioni & Tullio Scovazzi eds., 1991), *reprinted in* EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 511 (1998)). Kaplan argues that the former Union of Soviet Socialist Republics violated the duty not to cause transboundary harm to occupied Estonia, as measured by the due diligence standard. *Id.*

[191] *See supra* Part III.

environmental hazards in and around the military bases at Subic and Clark, it has the obligation to compensate the Philippine government and the individuals directly injured.[192] In 1992, members of the world community declared their support of the Polluter Pays Principle. The Rio Declaration, in Principle 16, states:

> National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that *the polluter should, in principle, bear the cost of pollution*.[193]

The continued operation of the annual Balikatan exercises violates international law because it places the Pilipino people at grave risk of environmental disaster without providing adequate legal remedies.[194]

Various international and regional organizations are in the process of developing liability regimes based on the Polluter Pays Principle.[195] Many nations, including the Philippines and the United States, already have domestic legislation that embraces that basic principle.[196] The European Community (EC)'s White Paper, however, is one of the most outstanding achievements in developing an organized liability regime

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[192] *Cf.* Wagner & Popovic, *supra* note 106, at 477.

[193] Rio Declaration, *supra* note 176, at princ. 16 (emphasis added).

[194] *See* Jon M. Van Dyke, *The Legal Regime Governing Sea Transport of Ultrahazardous Radioactive Materials*, 33 OCEAN DEV. & INT'L L. 77, 77 (2002) (contending that although international treaties have established a liability regime for nuclear shipping accidents, lacunae still exist, placing coastal nations at "grave risk of environmental harm without any legal protections"). Professor Van Dyke predicts that, as a result of this situation, coastal nations will resort to unilateral actions to protect their coastal marine resources. *Id*. at 92.

[195] *See* HUNTER ET AL., *supra* note 176, at 384. It is mainly industrialized nations that have adopted or advocated the use of the Polluter Pays Principle. "Except for Principle 16 of the Rio Declaration and Agenda 21, developing countries have for the most part not accepted the polluter and user pays principle." *Id*. (citing OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, May 26, 1972, C(72)128 (1972); OECD Council Recommendation on the Implementation of the Polluter-Pays Principle, Nov. 14, 1974, C(74)223 (1974); European Charter on the Environment and Health, Principles for Public Policy, art. 11, Dec. 8, 1989, WHO Doc. ICP/RUD 113/Conf. Doc./1, *reprinted in* 20 ENVTL. POL. & LAW 57 (1990); Convention on Transboundary Lakes and Watercourses, art. 2(5)(b); EEC Treaty, *as amended by* Single European Act, Title VII, art. 130r, ¶ 2, Feb. 17, 1982; Agenda 21, ¶ 2.14, ¶ 30.3 (1992)).

[196] *See infra* Parts IV-V and accompanying notes.

under international environmental law.[197] The White Paper is a detailed and comprehensive proposal for an EC directive on civil liability regarding injuries to the environment, applying the Polluter Pays Principle.[198] As such, it provides one basis upon which the United States' liability can be measured.[199]

Noting that not all forms of environmental damage can be remedied through liability regimes,[200] the EC's Directorate-General for the Environment concluded that three elements are required for a liability scheme to be effective. These three conditions are: (1) one or more identifiable polluters; (2) concrete and quantifiable damage; and (3) a causal link between the damage and the identified polluters.[201] Each of these three prerequisites are satisfied in the case concerning the United States' former military bases in the Philippines. First, the United States,

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[197] White Paper on Environmental Liability, COM (00)66 final [hereinafter White Paper]. A directive to shape an EC-wide environmental liability regime was commissioned in 1994, by resolution of the European Parliament. Work on the White Paper began in 1997 and included consultation with EC Member States before the final report was published in 2000. *Id.* at 7, 11-12.

[198] *Id.* at 11.

[199] Raymond F. DuBois, the Deputy Under Secretary of Defense, Installations and Environment (DUSD (I&E)), is charged with fostering cooperation between the U.S. and foreign militaries, and encouraging the value of environmental stewardship on U.S. military installations worldwide. *See* DUSD (I&E) Biography, *at* http://www.acq.osd.mil/ie/ie_bio.htm (last visited June 5, 2003). The Defense Environmental Network and Information Exchange (DENIX) contains a hyperlink to the White Paper in a list of documents relating to the DoD's international environmental policy. These materials fall under the purview of the DUSD(I&E). *See* DENIX, Subject Areas, International, Documents, *at* http://www.denix.osd.mill/denix/Public/Intl/international.html (last visited June 5, 2003).

See About DENIX, DENIX Homepage, *at* https://www.denix.osd.mil/ (last visited June 6, 2003).

> DENIX serves as a central platform for the dissemination of environment, safety, and occupational health (ESOH) news, policy, and guidance within Department of Defense (DoD) activities worldwide, in support of the national defense mission. DENIX informs ESOH professionals of salient issues and provides them with tools to sustain their readiness and compliance efforts with Congressional and DoD requirements.

Id.

[200] *See* White Paper, *supra* note 197, at 13. Assigning liability for environmental degradation may be difficult in some scenarios. For example, it may be impossible to create a direct link between the negative effects of acid rain and the greenhouse effect to individual actors. *Id.*

[201] *Id.*

operating through its DoD, is the polluter. Second, although the full extent of damages was never completely ascertained, it was estimated that cleanup would cost approximately $12-15 million for each affected site.[202] Third, GAO reports document that the U.S. military caused the discharge of untreated chemical and heavy metal wastes into the air, ground, and water in and around Clark Air Force and Subic Bay Navy bases.[203] The EC's formulation of the Polluter Pays Principle, then, can provide an effective means of assessing the United States' liability for creating environmental dangers in the Philippines.

The White Paper does not provide the definitive method of assessing liability, but because the United States accepts the rationale behind the Polluter Pays Principle, it should submit to implementation of it under the terms detailed by the EC. The Polluter Pays Principle is recognized in U.S. environmental laws. The RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES records the view that:

> Where pollution originating in a state has caused significant injury to person outside that state, or has created a significant risk of such injury, the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies available in similar circumstances to persons within the state.[204]

The American Law Institute's coverage of the Polluter Pays Principle is interesting because it simultaneously invokes the principle of non-discrimination. Actually, United States law incorporates many of the principal elements of international environmental law discussed above. Foremost under the U.S. system is the requirement to remedy any harm done to the environment. The remediation provisions in CERCLA mirror the basic tenets of the Polluter Pays Principle under international law.[205] The United States also has a well-developed liability regime for

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[202] GAO PHILIPPINES REPORT, *supra* note 3, at 28.

[203] *Id.* at 27-28.

[204] RESTATEMENT, *supra* note 178, at §602(2).

[205] *See supra* Part IV.C; *infra* Part V.A.2.

environmental damages. In some respects, the U.S. scheme may be even more established and structured than the European Community's.[206]

V. U.S. FEDERAL ENVIRONMENTAL LAWS AND THE EXTRATERRITORIALITY PROBLEM

The federal government of the United States has an established, comprehensive environmental law regime. The United States can be credited as being one of the first nations in the world to have created a legal regime designed to protect its environmental resources for future generations.[207] A study of the applicable federal laws is appropriate here because they directly pertain to the actions of all federal agencies, including the military. Moreover, these regulations should remain in force regardless of the location of the military activity. In 1990, Congress demanded that the DoD develop and implement an overseas cleanup policy that would reconcile aberrant overseas practices with the requirements of domestic law.[208] The reason for this command was that although domestic military bases are obligated to conform to federal environmental laws, overseas installations are not.[209] The laws governing base closures in the United States therefore provide a valuable reference point for assessing U.S. obligations in the Philippines.[210] A survey of the laws applicable to DoD military installations overseas shows that the U.S. was obligated in 1992 and obligated today to clean up the environmental damages it caused on and in the vicinity of its former bases in the Philippines.

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[206] *See* Hila J. Alderman, Comment, *The Ghost of Progress Past: A Comparison of Approaches to Hazardous Waste Liability in the European Community and the United States*, 16 HOUS. J. INT'L L. 311, 320-24 (1993) (comparing CERCLA and the EC's Proposed Civil Liability Directive). "European nations are looking to the experiences of the United States with regard to CERCLA in formulating similar legislation concerning liability for hazardous wastes." *Id.* at 313.

[207] *See generally* George H. Keller, Casenote, *Greenpeace USA v. Stone: The Comprehensive Environmental Impact Statement and the Extraterritorial Reach of NEPA*, 14 U. HAW. L. REV. 751, 762-764 (1992) (examining the legislative history of NEPA). Congress enacted NEPA in 1969 in response to concerns that the poor condition of the environment would only worsen without federal legislative action. NEPA became the charter document thereafter guiding the United States federal government's environmental policymaking. *Id.*

[208] Phelps, *supra* note 13, at 55-56.

[209] Carlson, *supra* note 18, at 70.

[210] *See* Wagner & Popovic, *supra* note 106, at 426 (using U.S. base closure procedures as a tool for comparison in their argument regarding the closures of U.S. military bases in Panama).

A. *The Extraterritoriality Problem*

Domestic environmental laws are one element in the U.S. government's overseas environmental law formula. Applying domestic legislation abroad, however, poses the special problem of extraterritoriality. Congressional legislation is presumed to apply only within the territorial jurisdiction of the Untied States, unless, "language in the relevant act gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control."[211] The presumption against extraterritoriality is known as the *Foley* doctrine.[212] Congress does have the authority to regulate conduct outside the territory of the United States, and the determination of whether Congress has actually utilized this authority is a matter of statutory construction.[213]

The main hurdle in seeking to apply the environmental regulations established by Congress to the U.S. bases in the Philippines is determining

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[211] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)) [hereinafter ARAMCO].

[212] *See* Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). The federal legislation at issue in *Foley* provided that overtime compensation was due for any work in excess of an eight-hour workday. *Id.* at 282 (citing to Eight-Hour Law, 27 Stat. 340 (1892) (formerly codified as amended at 40 U.S.C. §§ 321-326). The plaintiffs claimed overtime pay for work performed in Iraq and Iran. *Id.* at 283. The United States Supreme Court ruled that the federal law did not apply extraterritorially to the plaintiffs. *Id.* at 285. The Court reasoned that federal legislation applies only within the territory of the United States unless there is a clear Congressional intent that the law is to apply extraterritorially. *Id.*

[213] *See* Jonathan Turley, *Legal Theory: "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 604-608 (1990) (discussing the exclusion of U.S. anti-trust laws from the general presumption against extraterritorial application). *See also* ARAMCO, 499 U.S. at 248 (explaining that the presumption against extraterritorial application is simply a rule of statutory construction).

Congress has enacted federal criminal laws that are intended to apply only when a U.S. citizen travels abroad. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XXXII, § 320935(e), 108 Stat. 2137, *reproduced at* 156 F.R.D. 497, 503 [hereinafter Violent Crime Act of 1994]. The Violent Crime Act of 1994 makes it illegal to travel with the intent to engage in a sexual act with a juvenile. *Id.* Criminal legislation like the 1994 Act reflects the principle of nationality jurisdiction, or the idea that a State has the competence under international law to promulgate laws regulating the conduct of its nationals wherever they may be located. *See* Jordan J. Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Violators of International Law Under the FSIA and the Act of State Doctrine*, *in* JORDAN J. PAUST ET AL., INTERNATIONAL LAW AND LITIGATION IN THE U.S. 403 (2000).

whether domestic laws can be enforced outside the territorial jurisdiction of the United States. The traditional policy against applying domestic laws overseas is motivated by a desire not to infringe on the sovereignty of the nation hosting the U.S. activity.[214] This rationale is mitigated when, as with the Philippines, the host country's laws are substantially similar to U.S. laws and when the host country does not object to the application of U.S. laws in place of their own laws.[215] Moreover, the international law principle of non-discrimination encourages the application of the strictest regulation of activities that can cause environmental harm, in recognition of the potentially irreparable destruction that can occur.[216]

1. NEPA[217]

The National Environmental Protection Act (NEPA) is important to the discussion regarding U.S. military bases in the Philippines because the purpose of this statute is to ensure that the federal government and its agencies consider the environmental consequences that follow government actions. As one court noted, NEPA "was designed explicitly to take account of impending as well as present cases in this country *and in the world as a whole*."[218] Under NEPA, all "major Federal actions significantly affecting the quality of the human environment" require the preparation of an environmental impact statement (EIS) before the major federal action commences.[219]

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[214] *See* Carlson, *supra* note 18, at 79. *See also infra* Part V.A.1 (discussing the Federal District Court for the District of Columbia's rationale in *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993)).

[215] *See* Bayoneto, *supra* note 13, at 138 (citing to Teresa Albor, *As U.S. Vacates Philippines Bases, Toxic Wastes Remain*, SAN DIEGO UNION-TRIB., Nov. 29, 1992, at A-46).

[216] *See supra* Part IV.A.

[217] *See* National Environmental Policy Act, § 102(2)(C), 42 U.S.C. §§ 4321, 4332(2)(C) [hereinafter NEPA]. NEPA requires that federal agencies prepare detailed statements on the environmental impact of all "major federal actions significantly affecting the quality of the human environment." NEPA provides strict requirements for the environmental impact statements (EISs) as well as the procedures for preparing them. *See id.*

[218] Wagner & Popovic, *supra* note 106, at 425 (citing to City of Los Angeles v. NHTSA, 912 F.2d 478, 491 (D.C. Cir. 1990)) (emphasis added).

[219] NEPA, *supra* note 217, 42 U.S.C. at § 4332(c). This section of NEPA describes in detail what elements should be included in an environmental impact statement (EIS):

> [A]ll Agencies of the Federal Government . . . shall include in ever recommendation or report on proposals for legislation and other major

Federal NEPA has been the subject of extensive litigation regarding its extraterritorial application. The language of the statute itself indicates the intent of legislators to bring any major federal action that poses a threat to the world environment within its purview. The statute uses broad language to describe its policy and objectives. In one section, it specifically mandates federal agencies to "recognize the worldwide and long-range character of environmental problems."[220]

Arguably, *Environmental Defense Fund (EDF) v. Massey*,[221] raises the possibility that NEPA does not raise any extraterritorial issues. In *Massey*, the EDF sought to enjoin the National Science Foundation (NSF) from incinerating food wastes at the U.S. research facility at McMurdo Station in Antarctica.[222] EDF argued that burning the garbage would produce a significant effect on the environment, and therefore that the NSF had violated NEPA by failing to prepare an EIS before using the incinerator.[223] The *Massey* court held that NEPA applied to the NSF's actions in Antarctica. The court gave two reasons for its holding. First, Antarctica had a unique status—it had no sovereign and it was the subject of substantial United States control.[224] Second, and more important, NEPA applied to the NSF's burning of food wastes because the decision-making process occurred primarily within United States borders.[225] The latter rationale is known as the "headquarters theory."[226] The court found

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federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

[220] *Id.* at § 4332(F).

[221] Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

[222] *Id.* at 529.

[223] *Id.* at 530.

[224] *Id.* at 533-34.

[225] *Id.* at 531.

[226] *See* Laura Carlan Battle, *A Transnational Perspective on Expanding NEPA: The Convention on Environmental Impact Assessment in a Transboundary Context*, 5 DUKE ENVTL. L. & POL'Y F. 1, 13 (1995).

that NEPA was designed to regulate the decision-making processes occurring in the United States, where federal agencies make their decisions. Under *Massey*, an analysis of the applicability of NEPA should not focus on where the impacts of the decision occur, but on where the deliberation takes place.[227]

Later that same year, the Federal District Court for the District of Columbia held that NEPA did not apply to U.S. Navy installations in Japan. In *NEPA Coalition of Japan v. Aspin*,[228] the plaintiffs argued that the DoD was required to prepare EISs for its military bases in Japan.[229] Deviating from the *Massey* precedent, the court distinguished Japan from Antarctica, emphasizing the intrusive nature of applying NEPA in Japan and the potential negative impacts on U.S. foreign policy.[230] The *Aspin* court held that if the DoD was required to prepare EISs, the court would be encroaching on political territory that is reserved to the executive branch.[231]

Initially, *Aspin* might appear to be the most relevant precedent when seeking to apply federal NEPA to U.S. military activities in the Philippines. The arguments espoused by the *Aspin* court against the extraterritorial application of NEPA, however, do not confront the special historical relationship between the United States and the Philippines. The primary concern of the *Aspin* court was that "[b]y requiring the DoD to prepare EISs, the Court would risk intruding upon a long standing treaty relationship," thereby infringing on Japanese sovereignty. [232] Under *Massey*, however, NEPA requirements cannot infringe on the sovereignty of the Philippines if the federal action in question—sending U.S. troops to engage in war games—exclusively affects U.S. operations.[233] The same is

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[227] *Massey*, 986 F.2d at 531-535.

[228] NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993).

[229] *Id.* at 467.

[230] *Id.*

[231] *Id.* at 468. The Court reasoned: "Plausible assertions have been made that EIS preparation would impact upon the foreign policy of the United States." *Id.*

[232] *Aspin*, 837 F. Supp. at 467. In the footnote to that sentence, the Court states:

> The preparation of EISs would necessarily require the DoD to collect environmental data from the surrounding residential and industrial complexes, thereby intruding on Japanese sovereignty. In addition the DoD would have to [assess] the impact of Japanese military activities at these bases. There is no evidence that Congress intended NEPA to encompass the activities of a foreign sovereign within its own territory.

Id. at n.5.

[233] *See* Carlson, *supra* note 18, at 91.

true even when the operations are located abroad.[234] Since the concerns over State sovereignty and separation of powers are not present in the issue surrounding U.S. liability for environmental harms to the Philippines, *Massey* remains the controlling authority. The *Massey* court cited to several situations in which the presumption against extraterritoriality is weak. The presumption is weak in cases where the United States exerts substantial control over the region at issue.[235]

The United States does exercise significant legislative and political control over military bases in the Philippines and their environs. For instance, the 1998 VFA subjects the military bases to U.S. domestic law.[236] An outstanding example of U.S. influence and control came in 2000, when the Philippine Department of Foreign Affairs waived its exclusive and primary jurisdiction over U.S. military personnel accused of crimes under Philippine law.[237] After a night of bar-hopping in Cebu City on March 12, 2000, three U.S. Navy personnel[238] allegedly pummeled taxi driver Marcelo Batestil over a dispute involving PP900 (US$18) cab fare.[239] The Batestil beating was seen by many as the first test of U.S. compliance with the 1998 VFA. During the height of publicity surrounding the Batestil case, Philippine Senator Loren Legarda commented that the Philippines would be considered "the laughing stock of the international community" if it waived jurisdiction, as requested by the United States.[240] This incident is a stark example of the real control

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[234] *Id.*

[235] *Massey*, 986 F.2d at 531-35 (citing ARAMCO, 111 S.Ct. at 1230; Sierra Club v. Adams, 578 F.2d 389 (D.C. Cir. 1978); People of Enewetak v. Laird, 353 F. Supp. 811 (D. Haw. 1973)). The *Enewetak* court concluded:

> By its own terms, NEPA is not restricted to United States territory delimited by the fifty states. . . . NEPA is framed in expansive language that clearly evidences a concern for all persons subject to federal action which has a major impact on their environment—not merely United States citizens located in the fifty states.

Enewetak, 353 F. Supp. at 816.

[236] *See supra* Part II.A.

[237] Aurea Calica, *Gov't Waives Jurisdiction Over 3 U.S. Sailors*, PHILIPPINE STAR, Apr. 1, 2000, http://www.philstar.com/philstar/print.asp?article=4110 (last visited Mar. 27, 2003).

[238] Perseus Echeminada, *Cebu Driver Vows Not to Settle with U.S. Sailors*, PHILIPPINE STAR, Feb. 22, 2000, http://www.philstar.com/philstar/print.asp?article=3906 (last visited Mar. 27, 2003).

[239] Calica, *supra* note 237.

[240] Echeminada, *supra* note 238.

that the United States continues to hold and assert when it deems appropriate.[241]

Under these circumstances, then, the application of NEPA to U.S. military installations in the Philippines, permanent or temporary, is not extraterritorial. Enforcing U.S. environmental law requirements abroad constitutes the straightforward application of U.S. laws on facilities, activities, and operations that are under substantial U.S. control. Further, application of NEPA's regulations on the DoD's activities abroad does not violate the strict rule regarding extraterritoriality announced in *Aspin*. The executive branch, through executive orders, has already committed to

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[241] Examples of the continuing U.S. control over Philippine affairs abound. Former Philippine President Joseph Estrada signed the Rome Statute, a multilateral treaty that creates the International Criminal Court (ICC), in December 2000. R.J. Villanueva, *Rights Advocates Press R.P.'s ICC Membership*, ABS-CBN NEWS.COM, Mar. 28, 2003, *at* http://www.abs-cbnnews.com/abs_news_body.asp?section=Provincial&oid=19313 (last visited Mar. 28, 2003). However, the Philippines was not able to nominate a national representative to the judicial panel of the ICC because the administrative officials have not yet transmitted the statute to Congress. Larry Roque, Professor of International Law at the University of the Philippines, alleged that the Philippine officials are withholding the release of the Rome Statute because "they want to prove their loyalty to the U.S." *Id*.

In order to protect its military personnel from the jurisdiction of the ICC, the United States has begun to negotiate bilateral treaties with other states with provisions that will contain the contracting state's pledge not to extradite U.S. military officials. The Philippines has not yet signed such an agreement. Human Rights Watch, International Criminal Court: U.S. Efforts to Negotiate Bilateral Immunity Agreements, Apr. 2, 2003, *available at* http://www.iccnow.org/documents/otherissuesimpunityagreem.html (last visited Apr. 16, 2003). At least thirteen other States have signed such treaties, including Romania, Israel, East Timor, Tajikistan, Micronesia, and Gambia. DAVID WEISSBRODT, ET AL., *Supplement to Chapter 8: Can Human Rights Violators Be Held Accountable?*, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS (3d ed. 2001), *available at* http://www1.umn.edu/ humanrts/intlhr/ (last visited June 9, 2003). The European Union, however, has been critical of the exemption attempts by the United States. *See* Resolution 1300, Parliamentary Assembly of the Council of Europe, Sept. 25, 2002, *available at* http://www.iccnow.org/html/coe20020925english.pdf (last visited June 9, 2003) (declaring that the U.S. bilateral attempts at exemption are invalid under the Vienna Convention on Law of the Treaties).

In 2002, President Bush signed the American Servicemembers Protection Act into law. *See* American Servicemembers Protection Act, 22 U.S.C. §§7401-7433 (2002). Since its promulgation, the United States has warned other States that they will lose U.S. military aid if they do not sign an exemption agreement. *See* WEISSBRODT ET AL., *supra*, at 5 (citing Elizabeth Becker, *U.S. Ties Military Aid to Peacekeepers' Immunity*, N.Y.TIMES, Aug. 10, 2002, *available at* 2002 WL 25400439).

broad environmental protections for federal agency actions overseas.[242] Moreover, the sovereignty of the Philippines would not be threatened since Philippine environmental laws are modeled after U.S. laws.[243]

2. CERCLA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, or Superfund[244]) authorizes the Environmental Protection Agency (EPA) to investigate and clean sites contaminated with hazardous substances.[245] Parties found responsible for contamination can be held jointly and severally liable to the government for cleanup costs and damages to natural resources.[246] The DoD has recognized that CERCLA applies to its military installations, and works cooperatively with the EPA to ensure that the federal regulations are followed.[247]

For example, when a military base is scheduled for closure, federal law requires that an EIS be performed.[248] In order to comply with this

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[242] In spite of the ruling in *Aspin*, NEPA can still be applied to U.S. overseas military bases. *Aspin* did not address federal agency requirements under the Federal Facility Compliance Act of 1992 (FFCA). *See* Bayoneto, *supra* note 13, at 147 (citing to FFCA, 42 U.S.C. §6901, et seq.). The FFCA was enacted specifically to address the gross violations of U.S. environmental laws by federal agencies, most notably, the DoD and the Department of Energy. *Id.* Prior to 1992, when the FFCA was passed, U.S. military bases were allowed to ignore federal environmental regulations. *See* Schettler, *Reverberations of Militarism*, *supra* note 16. In 1992, Congress enacted the FFCA and explicitly stated its intent to make the Resource Conservation and Recovery Act (regarding pollution control) applicable to "all actions of the federal government, past and present, which are subject to solid or hazardous waste laws." Bayoneto, *supra* note 13, at 135 (quoting H.R. Rep. No. 111, 102d Cong., 2d Sess., 5, *reprinted in* 1992 U.S.C.C.A.N. 1287, 1291).

[243] *See supra* note 215 and accompanying text.

[244] The remediation and liability provisions under CERCLA are more commonly collectively known as the "Superfund" program. For an overview of Superfund, see U.S. Envtl. Protection Agency, *About Superfund*, *at* http://www.epa.gov/superfund/about.htm (last visited June 10, 2003).

[245] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601-9675 as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, §§ 1-531, 100 Stat. 1613-1782 (1986) [hereinafter CERCLA].

[246] CERCLA, § 107(a), 42 U.S.C. § 9607(a).

[247] *See* Jessica K. Reynolds, *Military Base Closure Oversight Via Environmental Regulations: Replacing Judicial Review of Closure Decisions and Methods with Comprehensive Alternative Redevelopment Mechanisms*, 4 ALB. L. ENVTL. OUTLOOK 40, 45, 47 (1999).

[248] 10 U.S.C. § 2687(b)(1) (2003).

regulation, the DoD performs an Environmental Baseline Survey (EBS) on bases subject to closure.[249] In theory, the EBS is

> based on all existing environmental information related to storage, release, treatment or disposal of hazardous substances or petroleum products on the property to determine or discover the obviousness of the presence or likely presence of a release or threatened release.[250]

The investigation and clean-up provisions of CERCLA are triggered when the EBS indicates a release of hazardous contamination or a threat of such release.[251] Under CERCLA, after an initial warning of release or threat of release is identified by the EBS, the DoD is required to work under the supervision of the EPA to conduct another assessment of the base to determine whether its environmental situation poses a substantial risk to human health or the environment.[252] This process ensures that when formerly used defense sites are passed from military to civilian hands, "all remedial action necessary to protect human health and the environment with respect to any [hazardous] substance remaining on the property has been taken."[253]

EBS requirements are applied only to military bases within the territorial jurisdiction of the United States, including U.S. territories and possessions, but excluding former colonies, like the Philippines. As discussed, application of one set of strict environmental standards for domestic bases and another set for overseas bases is a violation of international law.[254] Abhorrence for this type of double standard should also guide U.S. jurisprudence, especially in light of the extensive control that the United States maintains in the Philippines. Utilizing the same analysis used by the *Massey* court in NEPA litigation,[255] the Superfund

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[249] Wagner & Popovic, *supra* note 106, at 427 (citing U.S. DEP'T OF DEFENSE, POLICY ON THE IMPLEMENTATION OF THE COMMUNITY ENVIRONMENTAL RESPONSE FACILITATION ACT 1-3 (1993)).

[250] *Id.* (citing to Secretary of Defense William Perry, Memorandum for Secretaries of the Military Departments, *DoD Policy on the Environmental Review Process to Reach a Finding of Suitability to Lease*, at 2 (Sept. 9, 1993)).

[251] *Id.* at 428.

[252] *Id.* (citing 42 U.S.C. § 9620 (1994); 40 C.F.R. § 300.420(b)(1)(i) (1997)).

[253] 42 U.S.C. § 9620(h)(3)(A)(ii)(I).

[254] *See supra* Part IV.A.

[255] *See supra* Part V.A.1.

provisions of CERCLA are equally accessible to extraterritorial application.

A case currently before the District Court for the Northern District of California will test whether CERCLA can be applied to U.S. activities outside the territorial borders of the United States. On December 3, 2002, Arc Ecology and the Filipino American Coalition for Environmental Solutions (FACES) filed a case against the U.S. Air Force and U.S. Navy on behalf of thirty-six residents of communities near the former U.S. military bases at Clark Air Field and Subic Naval Base.[256] The plaintiffs seek an assessment of environmental damage at the former bases.[257] The main legal issue in this case will be whether CERCLA's provisions apply to U.S. facilities outside U.S. territorial borders.[258]

CERCLA applies to the release of hazardous contaminants on the former U.S. military bases in the Philippines. Section 105(d) of CERCLA provides:

> *Any* person who is, or may be, affected by a release or threatened release of a hazardous substance or pollutant or contaminant, may petition the President to conduct a preliminary assessment of the hazards to public health and the environment which are associated by such release or threatened release.[259]

Under the clear terms of the statute, "environment" is defined as "any . . . water, ground water, drinking water supply, land surface subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."[260] The 1947 MBA provided the United States with

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[256] Plaintiff's Complaint, ARC Ecology v. United States Dep't. of the Air Force (N.D. Cal. filed Dec. 3, 2002) (on file with author), *available at* http://yonip.com/YONIP/PTFBC/lawsuit_filed.html [hereinafter NGO lawsuit]. The suit was filed under the citizen suit provision of CERCLA. *Id.* at para. 1. *See also* Leilani M. Gallardo, *U.S. Military Sued for Toxic Pollution at Subic, Clark*, BUSINESSWORLD (Manila), Dec. 5, 2002, at P12, 2002 WL 103398346 (reporting on the NGO-led lawsuit against the U.S. military).

[257] Gallardo, *supra* note 256, at P12.

[258] Chandler E. Ramas III, *Air Force, Navy Sued Over Toxic Wastes*, PHIL. NEWS ONLINE ED., Dec. 2, 2002, *at* http://www.philippinenews.com/issues/dec02/dec4-10/headlines.asp (last visited Mar. 4, 2003).

[259] CERCLA, *supra* note 246, 42 U.S.C. 9605(d) (emphasis added).

[260] *Id.* at 9601(8)(B).

jurisdiction and control of its military bases on sixteen different sites in the Philippines.[261]

The fact that CERCLA was promulgated in 1994, after the last of the permanently stationed U.S. troops left Clark and Subic, does not bar application of CERCLA's requirements. The DoD's obligation to clean up hazardous conditions on military bases is not extinguished even when they are transferred to civilian use. Formerly used defense sites transferred to civilian use come with a warranty binding the United States to perform any necessary additional remedial action after the date of transfer.[262] Furthermore, even if CERCLA does not apply here, the United States is bound by international law to compensate for the releases of hazardous substances on its former military bases in the Philippines.[263]

B. *The DoD's Specialized Implementation Program*

Bypassing the debate on the extraterritorial application of NEPA and other U.S. federal environmental laws, the U.S. military is bound by an alternate set of standards—the special regulations of the DoD. Much of the United State's overseas environmental law policy is developed through the DoD acting abroad.[264] Overseas environmental policy has been shaped by numerous and esoteric sources, including international agreements, federal domestic law, executive orders, and DoD policies.[265]

Executive Order 12114 avoids the judicial quandary presented by the legal issue of extraterritoriality. When President Carter signed Executive Order 12114 in 1979, he intended to further the purpose of federal NEPA by imposing environmental impact analysis requirements for all "major Federal actions . . . having significant effects on the environment *outside the geographical borders of the United States*, its territories and possessions."[266] Therefore, Executive Order 12114 eliminates any basis for a DoD argument that NEPA does not apply to its overseas military installations.

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[261] *See* Military Bases Agreement, art. XIII, 61 Stat. at 4025.

[262] 42 U.S.C. § 9620(h)(3)(A)(ii)(II) (2003). Wagner and Popovic note that "the DoD attempts to do the opposite in the case of overseas bases, that is, to disclaim any post-transfer obligations." Wagner & Popovic, *supra* note 106, at 435 n.177.

[263] *See supra* Part IV.

[264] *See* Carlson, *supra* note 18, at 67-68.

[265] Phelps, *supra* note 13, at 49-50.

[266] Exec. Order No. 12,114, 44 Fed. Reg. 1957 at § 2-1 (Jan. 4, 1979), *reprinted in* 42 U.S.C.A. § 4321 (emphasis added).

The Department of Defense implemented Executive Order 12114 by formulating DoD Directive 6050.7. The DoD directive narrowed the scope of "major federal actions," limiting the applicability to those federal actions "of considerable importance involving substantial expenditures of time, money, and resources that affects the environment on a large geographic scale."[267] In addition, the directive provides a broad list of exemptions,[268] including: actions taken by the President;[269] actions taken for national security;[270] votes and other actions in international conferences;[271] actions relating to nuclear activities, material, and waste;[272] and, even case-by-case exemptions.[273] When the DoD decides that one of its proposed actions indeed falls within the scope of "major federal actions" which significantly affect the environment "on a large geographic scale," then an EIS needs to be prepared.[274] Although the term "EIS" is borrowed from NEPA, the environmental impact statement required under the directive is significantly less stringent. According to the directive, the DoD EIS should be "concise and no longer than necessary to permit an informed consideration of the environmental effects of the proposed action . . . and the reasonable alternatives."[275]

Executive Order 12088 imposes a supplemental duty on the U.S. government.

> The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.[276]

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[267] Department of Defense Directive No. 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions* (Mar. 31, 1979), at para. 3.5 [hereinafter DoD Directive 6050.7].

[268] *Id*. at encl. 2, para. E2.3.3.

[269] *Id*. at encl. 2, para. E2.3.3.1.2.

[270] *Id*. at encl. 2, para. E2.3.3.1.4.

[271] *Id*. at encl. 2, para. E2.3.3.1.7.

[272] *Id*. at encl. 2, para. E2.3.3.1.10.

[273] *Id*. at encl. 2, para. E2.3.3.2.

[274] *Id*. at para. 3.5, encl. 1, para. E1.3.1.

[275] *Id*. at encl. 1, para. E1.4.1. *See also supra* note 219 (detailing EIS requirements under NEPA).

[276] Exec. Order No. 12,088, 43 Fed. Reg. 47,707 at § 1-801 (Oct. 13, 1978).

In implementing Executive Order 12088, the DoD developed an official overseas policy that ostensibly provides for very demanding environmental protections.[277] The DoD policy requires strict adherence to environmental laws of host countries or to U.S. laws, whichever are more stringent.[278] The applicable laws also include any international agreements and status of forces agreements.[279] Each department of the DoD also has its own implementation procedures. The Navy's Environmental and Natural Resources Program Manual, for example, specifically instructs that hazardous waste handling on overseas military bases "should go beyond host country environmental standards to ensure reasonable protection to the environment and human health."[280]

In 1992, the DoD published the Overseas Environmental Baseline Guidance Document (OEBGD).[281] Instead of a comprehensive accumulation of U.S. laws, this handbook provides only the minimum environmental protection standards to be observed at all overseas DoD installations and facilities.[282] The effect of the OEBGD is further limited because it does not apply to operational and training deployments or to the determination or conduct of remedial actions to correct environmental problems caused by the DoD's past activities.[283]

The complex web of DoD rules and regulations contain a number of loopholes, which the U.S. government has taken advantage of in order to evade its duties to account for the environmental damage caused by the presence of its military in the Philippines. For example, the current U.S. presence in the Philippines is framed as a "joint" undertaking between the U.S. military and the Philippine Armed Forces.[284] This cooperative characteristic is stressed because it allows the United States to do three things. First, it ameliorates the damage done to the military and security alliance relationship by the Philippine Senate's abrasive rejection of the 1991 proposed extension to the 1947 MBA.[285] Second, it allows the U.S.

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[277] *See* Bayoneto, supra note 13, at 137 (citing Dep't of Defense Directive No. 5100.50 (May 24, 1973, as amended) [hereinafter DoD Directive 5100.50]).

[278] *Id.*

[279] *Id.*

[280] U.S. GEN. ACCT. OFF., HAZARDOUS WASTE: MANAGEMENT PROBLEMS CONTINUE AT OVERSEAS MILITARY BASES 14, GAO/NSIAD-91-231 (1991).

[281] DEP'T. OF DEFENSE ENVTL. OVERSEAS TASK FORCE, OVERSEAS ENVIRONMENTAL BASELINE GUIDANCE DOCUMENT (1992) [hereinafter OEBGD].

[282] Phelps, *supra* note 13, at 67.

[283] *Id.* (citing OEBGD, *supra* note 281, at 1-1).

[284] *See* KIRK, *supra* note 2, at 192.

[285] *See id.*

troops to re-enter its former bases in the Philippines without addressing the issue of liability for damages done prior to 1991.

Third, it permits the DoD to evade its own environmental regulations. The designation of a "joint" military operation is critical because of certain provisions in the DoD's overseas environmental law policy that exempt from coverage any actions taken in conjunction with the host nation. Executive Order 12114 requires federal agencies engaging in major federal actions abroad to prepare an environmental impact analysis before making decisions about any activity.[286] The strict EIS requirement under Executive Order 12114 can be circumvented, however, when the foreign nation is "participating" or "otherwise involved."[287] Adhering to the non-discrimination principle means that the United States must not treat the Philippines differently from other nations, including itself. The United States cannot rely on the "joint" designation to exculpate itself from liability.

In 1994, the Clinton administration, through the National Security Council (NSC), proposed that the exclusion for major federal actions taken in conjunction with a foreign nation be eliminated.[288] The proposal, documented in Presidential Review Directive-23 (PRD-23), changed U.S. foreign policy regarding joint actions that had existed since 1979.[289] In contrast to longstanding DoD policy, the NSC advocated that federal agencies "should be mandated to ensure that environmental aspects of their actions in foreign countries be appropriately considered, *even where a foreign country is participating in, or involved with, the particular action*."[290] Critics lambasted the NSC proposal, arguing this change in policy would put foreign relations with nations hosting U.S. activities in

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[286] Exec. Order 12,114, 44 Fed. Reg. 1,957, at § 2-1 (Jan. 4, 1979).

[287] *Id.* at § 2-3(b).

[288] *See* George H. Brauchler, Jr., *United States Environmental Policy and the United States Army in Western Europe*, 5 COLO. J. INT'L ENVTL. L. &. POL'Y 479, 491 (1994).

[289] *Id.* at 489-90. In October 1998, the incomplete PRD-23 process had been suspended. *See* Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112, 144 n.130 (1998).

[290] Brauchler, *supra* note 288, at 491 (citing to Eileen Claussen, National Security Council, Memorandum on PRD-23: Proposed Package (Washington, D.C., Jan. 26, 1994)) (emphasis added). "[PRD-23], 'U.S. Policy on Extraterritorial Application on the National Environmental Policy Act (NEPA)' was initially issued on April 8, 1993. The purpose of a PRD is to evaluate the current status of an existing law/policy with the intent of remedying any major weaknesses it may have. The process includes several levels of exchange of Administration proposals and agency responses." *Id.* at n.1.

jeopardy.[291] One commentator suggested that lifting the exclusion for joint activities would infringe on the host nation's sovereignty and stymie time-sensitive military action with new bureaucratic processes.[292]

Although the concern for host nation sovereignty is crucial, the joint military activities of the Philippines and the United States present little danger of infringing sovereignty.[293] Moreover, the DoD recognizes that maintaining the United States' international influence requires the implementation of environmental diplomacy.[294] Sound environmental diplomacy requires that the DoD practice non-discrimination in the application of environmental regulations at its installations overseas. As one DoD official noted, "noncompliance is potentially damaging to our relations with the host-nation."[295] Initiating a comprehensive liability plan will serve U.S. foreign policy interests. In addition, under a scheme where the polluter pays, the benefits include deterring polluters from activities that take unnecessary environmental risks.[296] Deterrence is one means to achieve the goal of a better environment for the use and enjoyment of all.

VI. A PLAN FOR THE FUTURE: TOWARDS A SOLUTION

The Philippines should look to creating new formal agreements with the United States, incorporating the principles of international and U.S. federal environmental law addressed above, specifically considering the injuries done to the Philippines' public morale and environmental resources.[297] Including specific provisions regarding compensation for the

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[291] *See, e.g., id.*

[292] *See id.*

[293] *See supra* notes 215, 243 and accompanying text.

[294] *See, e.g*, Phelps, *supra* note 13, at 49.

[295] *Id.*

[296] *See, e.g.*, White Paper, *supra* note 197, § 4.4. "The person (or persons) who exercise control of an activity . . . by which the damage is caused (namely the operator) should be the liable party under an [European Community] environmental liability regime." *Id.* The policy behind the European Community's endorsement of the Polluter Pays Principle is that it "ensure[s] greater caution will be applied to avoid the occurrence of damage to the environment . . . [by imposing] liability on the party responsible for an activity that bears risks of causing such damage." *Id.* at 5.

[297] At one time, the United States apparently considered that some concessions to the Philippines regarding environmental regulations might be appropriate. *See* GAO PHILIPPINES REPORT, *supra* note 3, at 30 (insisting that, had the 1991 Treaty of Friendship, Cooperation, and Security had been ratified by the Philippine Senate, the United States would have been obliged to offer more environmental protections to the Philippines).

use of bases and restitution for social and environmental damage done could provide some relief to damages to the Pilipino psyche. Negotiating an equitable treaty would also provide a boost to the international reputation of the Philippines, setting the stage for economic growth and development based on internal production rather than labor export.[298]

The 1993 Supplementary Agreement (SA) with Germany can be taken as a model to shape a new agreement between the Philippines and the United States.[299] The SA covers basic expectations, namely that the U.S. and other NATO sending nations "acknowledge the importance of environmental protection in . . . all activities of their forces."[300] Specifically, the SA requires compliance with German environmental laws;[301] compliance with German permit-seeking procedures for activities on the accommodations made available for the forces;[302] the use of special low-pollutant fuels, lubricants, and additives;[303] observation of German

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> In contrast to the current basing agreement [the 1947 Military Bases Agreement], the proposed new agreement signed in August 1991 [the 1991 Treaty of Friendship, Cooperation, and Security] included a specific environmental protection provision for dealing with hazardous and toxic waste. It would have required that the commanders of the U.S. and Philippine forces establish an environmental program and formulate substantive environmental protection standards governing the disposal of hazsardous or toxic waste consistent with laws of general applicability in the Philippines. It would also have empowered the Philippine government to monitor and verify U.S. adherence to the substantive standards. However, with the rejection of the agreement by the Philippine Senate, the issue of potential liability under a new agreement became moot.

Id.

[298] The Philippine economy derives its main sustenance from remittances sent home by Pilipinos working overseas. *See* David M. Forman, *Protecting Philippine Overseas Contract Workers*, 16 COMP. LAB. L.J. 26, 33 (1994); Dan Gatmaytan, *Death and the Maid: Work, Violence, and the Filipina in the International Labor Market*, 20 HARV. WOMEN'S L.J. 229, 237 n.61 (1997); and Lori J. Pennay, Comment, *The Disproportionate Effect of the Asian Economic Crisis on Women: The Filipina Experience*, 21 U. PA. J. INT'L ECON. L. 427, 434 (2000).

[299] German SA, *supra* note 165.

[300] *Id.* art. 54A, para. 1. "The sending States recognize and acknowledge the importance of environmental protection in the context of all the activities of their forces within the Federal Republic." *Id.*

[301] *See id.* art. 53, para. 1.

[302] *Id.* art. 53A, para. 1.

[303] *Id.* art. 54B. Article 54B provides:

> The authorities of a force of a civilian component shall ensure that only fuels, lubricants and additives that are low-pollutant in

emission control standards;[304] and conformity with German standards on the transport of hazardous waste.[305] Most critical, however, is U.S. acquiescence to a liability regime based on the Polluter Pays Principle. Article 63 contains a provision that assigns responsibility for remediating hazardous substance contamination to the sending State (here the United States):

> A force or civilian component shall in accordance with this paragraph bear costs arising in connection with the assessment, evaluation and remedying of hazardous substance contamination caused by it and that exceeds then-applicable legal standards. . . . The authorities of the force or of the civilian component shall pay these costs as expeditiously as feasible consistent with the availability of funds and the fiscal procedures of the Government of the sending State.[306]

Important to note is that the substantive obligations that the United States voluntarily assumes under this provision of the SA are similar to the

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> accordance with German environmental regulations are used in the operation of aircraft, vessels and motor vehicles, insofar as such use is compatible with the technical requirements of such aircraft, vessels and motor vehicles. They shall further ensure that, with respect to passenger and utility motor vehicles, especially in the case of new vehicles, the German rules and regulations for the limitation of noise and exhaust gas emissions shall be observed to the extent this is not excessively burdensome. The competent German authorities and the authorities of the force and of the civilian component shall consult and cooperate closely in the application and supervision of these provisions.

Id.

[304] *Id.*

[305] *Id.* art. 57, para. 3. Article 57, paragraph 3 provides in relevant part:

> A force, a civilian component, their members and dependents shall, unless otherwise provided in the present Agreement, observe… regulations on the transport of hazardous material. Observance of such regulations shall be supervised by the competent authorities. In order to facilitate the control of the observance of these regulations, this supervision may be conducted jointly.

Id.

[306] *Id.* art. 63, para. 8*bis*(b). The clause limiting remediation to "available funds" was included at the insistence of U.S. negotiators. Wes Erickson, *Highlights of the Amendments to the Supplementary Agreement*, ARMY LAW., Dec. 1993, at 14, 22 (1993).

obligations to assess and remediate environmental contamination under federal CERCLA.[307]

The provisions regarding the environment in the German SA established a baseline in U.S. overseas environmental policy. The international law principle of non-discrimination does not allow the United States to continue the disparate treatment between nations hosting its troops. At the very least, the United States should be held accountable to its own environmental standards.[308] Extraterritorial application of federal environmental safety standards is not an unreasonable expectation.

Finally, Congress does have the power to create legislation with extraterritorial application in mind. For example, DoD Dependent Schools overseas must adhere to the requirements of the Asbestos School Hazard Abatement Act of 1984.[309] Drafting legislation with the clear intent of extraterritorial application—in line with Executive Order 12114, for example—eliminates the confusion with which NEPA litigation has been preoccupied. The U.S. government will reap the benefits of pursuing these types of policies. Many DoD insiders predict that the era of laissez-faire international environmental policies is coming to a close.[310] These scholars suggest that in order to retain its position as a respected world power, the U.S. military, in particular, must make a determined effort towards implementing environmental stewardship and environmental diplomacy practices.[311]

To that end, upon entering into negotiations with the United States regarding new Terms of Reference for the Balikatan 2003-1 exercises, the Philippine government should, at the very least, demand promises that the U.S. government will accept full responsibility for the environmental impacts of the current joint exercises. These demands are not extraordinary. The United States has status of forces agreements with seventy-seven other nations, some with very strict environmental guidelines and liability schemes.[312] As a longtime ally and intimate friend of the United States, the Philippines has every right to demand equitable

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[307] *See supra* at Part V.A.2.

[308] *See generally* Bayoneto, *supra* note 13 (asserting that U.S. federal regulations provide the most relevant guide in assessing U.S. obligations to the Philippines for the environmental damages at Subic and Clark).

[309] *See* Phelps, *supra* note 13, at 49-52 (citing Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. §§ 4011-4022 (West Supp. 1996) and Lead-Based Paint Poisoning Prevention Act of 1971, 42 U.S.C. §§ 4821-4846 (West 1995)).

[310] *See* Carlson, *supra* note 18; Phelps, *supra* note 13, at 49.

[311] *See* Phelps, *supra* note 13, at 49.

[312] *See supra* Part IV.A and accompanying notes.

treatment comparable to other countries. Just as the Philippines has benefited from U.S. money, patronage, and protection, so has the United States benefited from the use and continuing access to Philippine lands and resources. Furthermore, any good that the Pilipino people have been able to cull from the U.S. military occupation does not discharge the duty of the United States to remedy the contamination of the land caused by its military activity.

VII. CONCLUSION

Pilipinas kong minumutya,
Pugad ng luha ko't dalita,
Aking adhika
Makita kang sakdal laya.
The Philippines that I love/ Nest of tears and hardship/ My dream/ Is to set you free.

Working "shoulder to shoulder" in today's international arena should signify more than a single-minded, defense-oriented preoccupation with maintaining military alliances. For some time now, U.S. government and military officials have recognized that operating bases around the world requires attending to the environmental concerns of host States. This is simply good diplomatic policy. The United States may be entitled to protect legitimate security interests by stationing U.S. soldiers around the world, but the United States must no longer ignore the duty it owes to host nations like the Philippines to prevent environmental damages that result from its military presence. If the United States can acknowledge the duty to do no harm, it cannot deny the responsibility to provide for remediation in the event of an accident. These legal mandates emanate from both international law and U.S. domestic statutory and case law. The bilateral plan currently in place with Germany indicates that the two goals—security and environmentalism—are not incompatible.

A clear and comprehensive set of legal obligations to protect Philippine interests must be imposed on the United States. The current presence of U.S. military troops in the Philippines provides the opportunity for both nations to reflect on damages done and create solutions to repair those injuries. At no time is the need to establish an environmental liability regime for the Philippines more urgent than now, when 1,000 U.S. troops are again preparing to enter the Philippines.

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