

“CONTROL WITHOUT THE COSTS OF CONQUEST”[†]: REIMAGINING U.S. MILITARY BASES IN THE PHILIPPINES

ELIZA FAYE LAFFERTY*

ABSTRACT

Since 1898, the United States has sought to exercise control over the Philippines, originally through conquest and overt imperial rule. Though the United States formally recognized Philippine independence in 1946, it has not relinquished its functional sites of control over the archipelago. While the Philippines acceded to sovereign recognition as an independent state, the U.S. military remained within its territory and secured control over key bases. In the transition to formal independence, the United States managed to confer upon itself the right to use those bases rent-free while unbundling itself of many other costs associated with traditional colonial rule.

This Note traces two phases of U.S. dynamics in the Philippines: before and after Philippine independence from the United States. Applying international legal theoretical frameworks of colonial “conquest” and “consent,” this Note traces the strategic shifts in U.S. colonial dynamics in the Philippines. Part II discusses nineteenth- and twentieth-century U.S. imperialism, including the Spanish- and Philippine-American Wars, Philippine resistance to colonization, and legal justifications for Philippine subjugation. Part III identifies how U.S. control over the Philippines has shifted post-independence. This Note connects nineteenth- and twentieth-century U.S. imperialism, exerted through uneven base agreements and U.S. military control, to modern-day, twenty-first-century dynamics in the Philippines.

In addition, this Note proposes mechanisms for reimagining U.S.-Philippine military base agreements. Adopting a Third World Approaches to International Law (TWAIL) framework, this Note considers methods to address colonial legacies and form more equitable base agreements. Ultimately, this Note claims that U.S.-Philippine base agreements must be renegotiated to be genuinely consent-based and conscionable.

[†] Kal Raustiala, *Empire and Extraterritoriality in Twentieth Century America*, 40 SW. L. REV. 605, 615 (2011).

* Eliza Faye Lafferty: J.D., Georgetown University Law Center, 2024; B.A., Georgetown University, December 2020. *Salamat* to the Lafferty, Reyes, and Obille families. My thanks to Professor James Campbell for his guidance and feedback throughout the writing process, along with the *Georgetown Journal of International Law* editorial board and staff. © 2024, Eliza Lafferty.

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I. INTRODUCTION

On November 24, 1992, the U.S.S. Belleau Wood left Cubi Point in the Philippines.¹ Around 800 U.S. marines were aboard—the last members of the U.S. military to leave the Islands at the time.² A photograph of the scene captures the departure.³ It shows Filipinos standing at the Cubi Point dock in the foreground. One man raises a scarf above his head, waving goodbye.⁴ In the distance, the large vessel floats away across the Subic Bay.⁵ Some of the spectators on the dock turn to walk away, expecting the ship never to return.⁶ The previous year, the Philippine Senate had rejected a treaty to extend U.S. military base leases, so the United States withdrew its troops.⁷

But the U.S. military would soon return to the Philippines. Today, the U.S. military has established its largest presence in the Philippines⁸ in the last thirty years, with nine bases on the Islands.⁹ In recent

1. Romeo Gacad, *Filipino Spectators Watch the USS Belleau Wood Leave Cubi Point* (photograph), in GETTY IMAGES (1992), <https://www.gettyimages.com/detail/news-photo/filipino-spectators-watch-the-uss-belleau-wood-leave-cubi-news-photo/51432076>.

2. William Branigin, *U.S. Military Ends Role in Philippines*, WASH. POST (Nov. 24, 1992 12:00 AM), <https://www.washingtonpost.com/archive/politics/1992/11/24/us-military-ends-role-in-philippines/a1be8c14-0681-44ab-b869-a6ee439727b7/>.

3. Gacad, *supra* note 1. Photography and archival imagery serve important functions to further public memory. See, e.g., Eliza Lafferty & Olivia Lafferty, *Theorizing the Archive*, PAKINGGAN ARCHIVE, <https://pakingganarchive.omeka.net/listening> (last visited Feb. 20, 2024); Eliza Lafferty, *Pakinggan! A Case For Filipino Community Archives*, POSITIVELY FILIPINO (May 26, 2021), <https://www.positivelyfilipino.com/magazine/pakinggan-a-case-for-filipino-community-archives>.

4. Gacad, *supra* note 1.

5. *Id.*

6. *Id.*

7. VICTORIA REYES, *GLOBAL BORDERLANDS: FANTASY, VIOLENCE, AND EMPIRE IN SUBIC BAY, PHILIPPINES* 33–34 (2019).

8. In addition to U.S. bases on the archipelago, the U.S. military has a long history of recruiting service members from the Philippines. See CHRISTOPHER CAPOZZOLA, *BOUND BY WAR: HOW THE UNITED STATES AND THE PHILIPPINES BUILT AMERICA’S FIRST PACIFIC CENTURY* 7 (2020) (“For most of the twentieth century, service in the US armed forces offered the clearest path to migration and US citizenship for Filipinos who wanted it. It’s not hard to see traces of this on the landscape, as some of the communities with the greatest number of Filipino Americans also happy to be US Navy towns”); *Filipinos in the United States Navy*, NAVAL HIST. & HERITAGE COMMAND (Nov. 23, 2020), <https://www.history.navy.mil/research/library/online-reading-room/title-list-alphabetically/f/filipinos-in-the-united-states-navy.html> (detailing the number of Filipinos enlisted in the Philippines in the mid-twentieth century, along with Filipinos’ limited opportunities for advancement in the U.S. Navy).

9. See David Vergun, *New EDCA Sites Named in the Philippines*, U.S. DEP’T OF DEF. NEWS (Apr. 3, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3350297/new-edca-sites-named-in-the-philippines/> (noting the bases are not permanent but involve bringing assets to facilitate combined training and responses to natural disasters in the region).

decades, U.S.-Philippine bilateral agreements have empowered the United States to rebuild its military presence on the Islands.¹⁰ In some ways, the contemporary resurgence of the U.S. military presence in the Philippines is simply a return to normal. Aside from the brief withdrawal in the 1990s, the U.S. military's presence on the Islands has been effectively uninterrupted since 1898.¹¹ Even following Philippine independence in 1946, the United States maintained a strong presence on the Islands through its various military bases.¹²

Today, U.S. military bases on the Islands exist under formal bilateral agreements between the two countries.¹³ For example, one agreement commits to “unity” and acknowledges the “common bond of sympathy and mutual ideals” between both parties.¹⁴ And both parties have justified the U.S. military base presence as a necessary measure to protect security interests.¹⁵ Beyond acknowledging these justifications, the merits of the shared security interests between the United States and the Philippines are beyond the scope of this Note. Rather, this Note identifies provisions in the base agreements that have led to devastating consequences, including harm to the Philippines’ environment and violence against Filipina women living nearby bases. It posits that these provisions are a result of uneven negotiations that have not accounted for colonial legacies.

Fundamentally, this Note argues that U.S.-Philippine base agreements must be reimagined to accept them as consent-based, conscionable relationships. This Note traces the chronological development of U.S.-Philippine relations—before and after Philippine independence. Comparing early colonial and modern-day relations under a theoretical framework, this Note identifies current forms of unchecked control exerted through base agreements. To reimagine future U.S.-Philippine dynamics, this Note proposes using a TWAIL framework. TWAIL—a scholarly movement that investigates the role of colonization in

10. REYES, *supra* note 7 (discussing the Visiting Forces Agreement and the Enhanced Defense Cooperation Agreement). *See also* Section III.C.2, *infra*.

11. *See* CAPOZZOLA, *supra* note 8, at 7–10 (discussing the nineteenth- and twentieth-century role of the U.S. military in the Philippines and for Filipinos).

12. *Id.* at 219.

13. REYES, *supra* note 7, at 34–39 (discussing the Visiting Forces Agreement and the Enhanced Defense Cooperation Agreement). *See also* Section III.C.2, *infra*.

14. Mutual Defense Treaty Between the United States and the Republic of the Philippines, Phil-U.S., Aug. 30, 1951, 3 U.S.T. 3947.

15. *See, e.g., U.S.-Philippines Bilateral Defense Guidelines*, U.S. DEP’T OF DEF. (May 3, 2023), <https://www.defense.gov/News/Releases/Release/Article/3383607/fact-sheet-us-philippines-bilateral-defense-guidelines/>.

developing international law—offers a lens for identifying the uneven power dynamics between the United States and the Philippines in base agreements. With this framework, this Note proposes strategies for renegotiating base agreements to make the agreements consent-based and conscionable and address former colonial dynamics.

A. *Theoretical Framework: “Conquest” and “Consent” Paradigms*

This Note builds on international law scholar Chimène I. Keitner’s usage of a “conquest paradigm” and a “consent paradigm” to characterize U.S.-Philippine dynamics pre- and post-independence.¹⁶ Keitner develops these paradigms in the context of Puerto Rico’s territorial status and the enduring legacy of the *Insular Cases*.¹⁷ Recognizing the legacy of the *Insular Cases*, Keitner proposes how genuine free association for Puerto Rico could be viable.¹⁸ For this Note, Keitner’s theory helps to connect the two periods of control and explain the implications of bilateral agreements that do not address colonial histories.

First, countries may assert control via the conquest paradigm—the more recognizable form of empire. Under the conquest paradigm, land acquisition through conquest was legal, and countries maintained de jure control over colonies.¹⁹ Keitner identifies how the *Insular Cases* build on a conquest paradigm for territorial governance.²⁰ The *Insular Cases* are “not easily summarized” but generally refer to twentieth-century U.S. Supreme Court decisions determining that the U.S. Constitution does not apply to overseas possessions.²¹ Keitner cites one of the *Insular Cases*, *Downes v. Bidwell*,²² which holds that territories may both “belong[] to” and “not be a part of the United States.”²³ *Downes* is an example of the Supreme Court licensing the U.S. political branches to control large swaths of land internationally. As another example of

16. Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospects of Genuine Free Association*, in RECONSIDERING THE INSULAR CASES 77, 78 (Gerald Neuman & Tomiko Brown-Nagin eds., 2015).

17. *Id.* at 77.

18. *Id.* at 101.

19. *Id.* at 78. Notably, Keitner’s analysis focuses on U.S. imperialism abroad. Federal Indian Law scholars note that acquisition of land through conquest has been accepted as legal through the doctrine of discovery. See, e.g., Angela R. Riley, *The History of Native American Lands and the Supreme Court*, 38 J. SUPREME CT. HIST. 369, 372 (2013).

20. Keitner, *supra* note 16, at 78–79.

21. See James T. Campbell, *Aurelius’s Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories”*, YALE L.J. 2542, 2548 (2022).

22. *Downes v. Bidwell*, 182 U.S. 244 (1901).

23. *Id.* at 287.

the conquest paradigm, following the Spanish-American War, the 1898 Treaty of Paris provided the U.S. Congress with the power to determine the civil rights and political status of inhabitants of former Spanish colonies, including the Philippines.²⁴ Similar to the *Insular Cases*, the Treaty of Paris also gave legal responsibilities to the United States as a result of their territorial conquest.

Second, in contrast to the conquest paradigm, the consent paradigm emphasizes “choice.”²⁵ Emerging after World War II (WWII) and alongside the developing United Nations,²⁶ the consent paradigm made a territory’s choice—for example, in their government structure—an international norm.²⁷ The U.N. Charter is grounded in consent paradigm language; its purpose is to “develop[] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.”²⁸ Under the consent paradigm, countries maintain de facto control over former colonies.

The persistence of modern colonial dynamics owes largely to legal formalities that mask domination with the guise of consent. For example, in Puerto Rico in 1952, the U.S. Congress approved the Puerto Rican Constitution, giving the appearance that Puerto Rico achieved a “full degree of self-government.”²⁹ The U.N. General Assembly even voted to remove Puerto Rico from the list of non-self-governing territories.³⁰ However, the U.S. Congress still retains the plenary power³¹ over Puerto Rico under the territories clause, which allows the United States to make and regulate laws in the territory.³² Historically colonial

24. Keitner, *supra* note 16, at 78–79.

25. *Id.* at 79.

26. See, e.g., *Decolonization*, UNITED NATIONS, <https://www.un.org/en/global-issues/decolonization> (last visited Feb. 21, 2024); *Decolonization of Asia and Africa, 1945-1960*, U.S. DEP’T OF STATE OFF. OF THE HIST., <https://history.state.gov/milestones/1945-1952/asia-and-africa> (last visited Feb. 20, 2024); *How Did Decolonization Reshape the World?*, WORLD 101 (Feb. 14, 2023), <https://world101.cfr.org/contemporary-history/global-era/how-did-decolonization-reshape-world>.

27. Keitner, *supra* note 16, at 79.

28. *Id.* at 83.

29. *Id.* at 90.

30. *Id.* at 91.

31. *Id.* at 92.

32. As another example of the consent paradigm in Puerto Rico, in 2011, the U.S. government determined that the people of Puerto Rico should decide “status” questions of remaining a territory or becoming a U.S. state. Thus, the decisions would ostensibly be Puerto Ricans’ choice. However, regardless of Puerto Ricans’ votes, the U.S. Congress would need to implement their choice via legislation, and the U.S. President would sign or veto the legislation. Requiring U.S. Congressional approval cuts against notions of independence and choice. *Id.* at 79.

dynamics, coupled with uneven bargaining power, can create the illusion of consent under the consent paradigm.

Agreements made under the consent paradigm require attentiveness to the history and circumstances of the parties. The agreements may be masked in consent-based language highlighting sovereignty and self-determination. But the policies underlying these agreements may also include stipulations creating external control and cutting away at a state’s sovereignty. Modern U.S.-Philippine agreements are similarly complex. Indeed, there is independent value in noting the uneven colonial dynamics driving the base agreements; such an analysis illuminates agreements beyond legal formalism and identifies how power operates beneath the veneer of bilateral consent. As Part III discusses, additional theoretical frameworks—including TWAIL scholarship—help to further illuminate the consent paradigm’s dimensions.

B. *Consent and Conscionability in Bilateral Agreements*

Fundamentally, this analysis requires a reimagining of asymmetrical base agreements to be content-based and conscionable. This section introduces how bilateral treaties should center consent and conscionability. Building on this section, this Note argues that the current base agreements obscure colonial legacies and will fail to vindicate themselves as consensual, bilateral agreements between two sovereigns. Without addressing the colonial histories between the United States and the Philippines, the agreements are susceptible to accusations of rechartering old-world colonial power dynamics. As discussed in Section III.A, TWAIL scholarship is useful to identify the lack of consent and conscionability of base agreements between the United States and the Philippines.

Consent and conscionability, two domestic contract law theories, help explain concerns with historically asymmetrical agreements. Professor Britta Redwood writes about applying contract theories—such as consent and conscionability—to the international treaty context.³³ Traditionally, treaties and international agreements are believed to be between “sovereigns [who] are equal in their ability to create and maintain international law[.]”³⁴ Redwood identifies how “[o]f course, sovereign equality is a legal fiction”—military, economic, location, and other forms of power, converge to give some states more power than

33. Britta Redwood, *When Some Are More Equal Than Others: Unconscionability Doctrine in the Treaty Context*, 36 BERK. J. INT’L L. 396, 440 (2019).

34. *Id.* at 400.

others.³⁵ Thus, there may often be asymmetrical power dynamics between two countries negotiating treaties, although it appears as a treaty between two equal sovereigns.³⁶ Redwood turns to domestic contract law principles, including consent and unconscionability, to analyze whether treaties are truly even between sovereigns.³⁷ This Note proposes that for agreements to be considered consent-based and conscionable, the United States and the Philippines must construct equitable agreements that vindicate both sides' interests.³⁸

Redwood acknowledges asymmetries between states that impact their bilateral negotiations. This Note examines the asymmetry in U.S.-Philippine bilateral base agreements. Analyzing the asymmetry helps illuminate a path forward for more consent-based, conscionable agreements.

C. Overview

Applying Keitner's framework, this analysis traces U.S.-Philippine dynamics—during the period of the conquest paradigm (1898–1946) and consent paradigm (1946–present). The consent paradigm ostensibly marks a change from the Philippines as a colony to an independent nation. Functionally, however, the United States has continued to exert control over the Islands to obtain military base agreements that highly favor U.S. interests.

Part II of this Note analyzes U.S. control through the conquest paradigm during the Spanish- and Philippine-American Wars and subsequent colonial subjugation of the Philippines. Part III discusses the

35. *Id.*

36. *Id.* at 412.

37. *Id.* at 440.

38. Additionally, bilateral agreements may also be asymmetrical because of historically colonial dynamics. In 2019, the International Court of Justice (ICJ) identified concerns with historically asymmetrical agreements. The Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 Advisory Opinion, although not binding, carries legal and moral weight. See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95 (Feb. 25) [hereinafter Chagos]; *Advisory Jurisdiction*, INT'L CT. OF JUST., <https://www.icj-cij.org/advisory-jurisdiction> (last visited Mar. 1, 2024). The Court considered if the decolonization of Mauritius was complete following its independence in 1968, and if there are international legal consequences for the United Kingdom (the former colonial power in Mauritius) to continue the relationship via bilateral treaties. See Chagos, 2019 I.C.J. at 102. Considering these bilateral treaties, the Court found that the agreements were “not based on the free and genuine expression of the will of the people concerned.” *Id.* at 137. Thus, the Court recognized the underlying asymmetry caused by colonialism and the need to follow international legal principles to respect the territorial integrity of the Chagos Archipelago.

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aftermath of Philippine independence under the consent paradigm. In the era of the consent paradigm, U.S. bases in the Philippines have become increasingly subtle and localized, contributing to a powerful form of control in the Pacific. Part IV argues that to address colonial legacies, the U.S.-Philippine base agreements should be reimagined under a TWAIL approach. Part V concludes the Note.

II. HISTORICAL OVERVIEW: THE “CONQUEST PARADIGM”

From 1898 to 1946, the United States maintained formal colonial rule over the Philippines, as justified by the conquest paradigm.³⁹ In this era, U.S. law and policy espoused overt racial animus towards Filipinos and justified imperial control through theories of ethnic superiority.⁴⁰ Filipinos, in turn, resisted colonization and took up arms in pursuit of independence from U.S. rule.⁴¹

A. *Colonial Conquest: The Philippine-American War and Philippine Resistance*

The Philippine-American War and the number of people who died in it are often overlooked. In fact, even well-regarded history books may characterize the Philippine-American War as a minor conflict following the Spanish-American War, but such a characterization would be misleading.⁴² This section reflects historians Daniel Immerwahr’s and H. W. Brands’ unique approaches to an under-studied war, including their detailed documentation of the power dynamics between the United States and the Philippines at the time.

As Immerwahr highlights, the Philippine-American War led to tens of thousands of deaths and marked the beginning of U.S.

39. The United States declared war on Spain in 1898. See *Spanish-American War and the Philippine-American War, 1898-1902*, NAT’L PARK SERV., <https://www.nps.gov/goga/learn/historyculture/spanish-american-war.htm> (last visited Feb. 20, 2024). The United States granted the Philippines independence in 1946. See *The Philippine-American War, 1899-1902*, U.S. DEP’T OF STATE OFFICE OF THE HIST. <https://history.state.gov/milestones/1899-1913/war> (last visited Feb. 20, 2024).

40. REYES, *supra* note 7, at 12 (2019) (“A[] key element of U.S. colonialism was the racialization of Filipinos.”).

41. CAPOZZOLA, *supra* note 8, at 23–24 (discussing the start of the Philippine-American War and Philippine resistance).

42. Beyond history books, public knowledge of the Philippine-American War is lacking in other forms. See *The Spanish-American War in the Philippines and the Battle for Manila*, AM. EXPERIENCE <https://www.pbs.org/wgbh/americanexperience/features/macarthur-spanish-american-war-philippines-and-battle-for-manila/> (last visited Mar. 1, 2024) (noting that the Spanish-American War was called America’s “splendid little war” with Spain and briefly mentioning the United States’ goals in the “Philippine situation.”).

empire.⁴³ The Philippine-American War is also a window into Philippine resistance to U.S. colonial conquest of the Islands. In addition, the U.S. Army's treatment of Filipinos reveals the racist undertones of U.S. foreign policy at the time, which set the foundation for an uneven relationship between the Philippines and the United States throughout the twentieth century.⁴⁴

1. The Spanish-American War

During the Spanish-American War, Filipinos fought for their independence from Spain.⁴⁵ Over the course of the war, as a consequence of this campaign, the United States and the Philippines formed an alliance against Spain.⁴⁶ Emilio Aguinaldo, the General of the Philippine Army at that time, received assurances that Filipinos would have their independence after the war.⁴⁷ However, once the Spanish government surrendered Manila, U.S. troops entered the city and forced Filipinos to “recognize the military occupation and authority of the United States.”⁴⁸ Aguinaldo's Philippine government maintained control of the surrounding land while U.S. President William McKinley proclaimed that Manila's military government was to “extend[] with all possible dispatch to the whole of the ceded territory.”⁴⁹ The Philippines resisted colonization, and the war turned into a Philippine defense effort against the United States, rather than Spain.⁵⁰

2. The Philippine-American War and U.S. War Tactics

A significant feature of the Philippine-American War was the emergence of certain U.S. counterinsurgency tactics—scorched earth strategies, torture, forcible resettlement of civilians, and concentration

43. DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A SHORTER HISTORY OF THE GREATER UNITED STATES* 103 (2019). *See also* CHRISTOPHER T. SANDERS, *AMERICA'S OVERSEAS GARRISONS: THE LEASEHOLD EMPIRE* 105 (2000) (explaining that the United States acquired the Philippines from Spain in the 1898 Treaty of Paris).

44. IMMERWAHR, *supra* note 43, at 96 (explaining how the Philippines' chief lawmaker at the time, William Howard Taft, called Filipinos “our little brown brothers.”).

45. CAPOZZOLA, *supra* note 8, at 17 (discussing the start of the “Philippine Revolution” against Spain).

46. *Id.* at 19.

47. IMMERWAHR, *supra* note 43, at 89.

48. *Id.*

49. *Id.* at 89–90.

50. Notably, Americans characterized Filipino resistance as an “insurrection,” which contrasts with “Filipinos' contention that they were fighting to ward off a foreign invader.” *The Philippine-American War, 1899-1902*, *supra* note 39.

camps.⁵¹ Driving these brutal strategies were racist ideologies and “Filipino-phobia”—a term Judge Juan R. Torruella used to describe targeted racism against Filipinos at the time of the *Insular Cases*.⁵² For example, as Brands explains, U.S. President William Howard Taft publicly announced that “[t]here is much greater danger in such a case [with Filipinos] than in dealing with whites. There is no doubt about that.”⁵³ Immerwahr notes that as part of the scorched earth techniques, a U.S. general directed his men to “kill and burn, [sic] the more you kill and burn the better you will please me.”⁵⁴ Torture included modern-day waterboarding techniques, termed the “water cure,” where the U.S. Army flooded prisoners’ mouths and noses with water.⁵⁵ The extreme tactics left the Philippines vulnerable to imperial control.

3. Concluding the Philippine-American War

The Philippine-American War left a devastating impact on the Islands, killing hundreds of thousands of Filipinos.⁵⁶ One reporter described the devastation: “[U.S.] soldiers took no prisoners, they kept no records; they simply swept the country, and wherever or whenever they could get hold of a Filipino they killed him.”⁵⁷ By one estimate, 775,000 Filipinos died in the war.⁵⁸

Traditional, dehumanizing conquest tactics—including the use of indiscriminate violence and concentration camps—failed to realize the political objectives of the United States, as Philippine resistance continued after U.S. leaders declared an end to the war.⁵⁹ In response, the United States narrativized the resistance as a fringe movement; as a

51. John Ramming Chappell, *Forgetting the Forever Wars*, THE FOOTNOTE (Apr. 4, 2021), <https://the-footnote.org/2021/04/04/forgetting-the-forever-wars/>.

52. Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 300 (2007).

53. H.W. BRANDS, *BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES* 57 (1992).

54. IMMERWAHR, *supra* note 43, at 100.

55. Matthew Wills, *The Ugly Origins of America’s Involvement in the Philippines*, JSTOR DAILY (May 10, 2017), <https://daily.jstor.org/the-ugly-origins-of-americas-involvement-in-the-philippines/>.

56. *Id.*

57. IMMERWAHR, *supra* note 43, at 101.

58. *Id.* at 103. There is significant dissensus about the estimated number of Filipinos killed during the Philippine-American War. *Id.* Compare *id.* at 103 (estimating 775,000 Filipino deaths), with *The Philippine-American War, 1899–1902*, *supra* note 39 (estimating 220,000 Filipino deaths).

59. IMMERWAHR, *supra* note 43, at 103. See also *Theodore Roosevelt: His Life and Times on Film*, LIBR. OF CONG., <https://www.loc.gov/collections/theodore-roosevelt-films/articles-and-essays/timeline-of-theodore-roosevelts-life/1900-to-1905/> (last visited Feb. 21, 2024) (noting that President Theodore Roosevelt, who had just acceded to the presidency after President McKinley’s assassination, declared an end to the war).

result, the substantially larger scale of the resistance was wholly forgotten by the American public.⁶⁰ Philippine resistance on the island of Mindanao persisted into the 1910s.⁶¹ Termed the “*Moro Rebellion*,” this “insurgency” was mostly led by Muslim Filipinos seeking self-government.⁶² Even naming the resistance the “Moro Rebellion” had the effect of portraying it as isolated and disconnected from greater Philippine resistance. Although ultimately defeated, Philippine resistance comprises the second-longest armed conflict the United States has ever been involved in.⁶³

The Philippine-American War led to devastation on the Islands—claiming thousands of lives and destroying large swaths of land. While the war marked the end of Spanish colonial rule, it also signaled the beginning of a new colonial order.

B. *Colonial Subjugation: The Insular Cases and the Philippines as a Territory*

During and after the Philippine-American War, the United States debated⁶⁴ the value of de jure control over the Philippines.⁶⁵ Ultimately, the United States “was motivated by perceived necessity to find overseas markets; alliances between private and public interests; ideologies on frontiers, jingoism, Anglo-superiority, and protestant missionaries; and the need to participate in global imperial competition.”⁶⁶ It was towards these ends that the United States established colonial rule in the Philippines, which would last for nearly fifty years.⁶⁷

60. See Mark Derewicz, *A Long-buried War with the Moros*, ENDEAVORS (Jan. 1, 2006), https://endeavors.unc.edu/win2006/feature_04.php (summarizing Tim Marr’s research regarding anti-Muslim ideology and the Philippine-American War).

61. *The Moro Rebellion*, THEODORE ROOSEVELT CTR., <https://www.theodorerooseveltcenter.org/Learn-About-TR/TR-Encyclopedia/War-and-Military-Affairs/The-Moro-Rebellion> (last visited Feb. 21, 2024).

62. *Id.*

63. Chappell, *supra* note 51.

64. REYES, *supra* note 7, at 11.

65. At the time, the United States did not yet appreciate the future strategic advantages of the Philippines’ location in a world of nuclear and air power. China’s twentieth- and twenty-first century technological and economic advancements have altered global politics since the Philippine-American War. See MARK HIBBS, *THE FUTURE OF NUCLEAR POWER IN CHINA* (2018), https://carnegieendowment.org/files/Hibbs_ChinaNuclear_Final.pdf.

66. Ernesto Hernández-López, *Guantánamo Outside and Inside the U.S.: Why Is an American Base a Legal Anomaly?*, 18 J. GENDER, SOC. POL’Y & THE L. 471, 482 (2010).

67. *Republic Day*, OFF. GAZETTE, <https://www.officialgazette.gov.ph/featured/republic-day/about/> (last visited June 1, 2024).

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1. Government Restructuring

Central to the United States’ colonial rule was its re-structuring of the Philippines’ government. When President McKinley appointed William Howard Taft as Governor-General of the Philippines, he imposed a new governmental structure on the Philippines.⁶⁸ Under McKinley and Taft, the Philippine government closely mirrored the United States’ own government, and American officials monitored the Islands.⁶⁹ Taft viewed himself in the role of a “missionary, spreading the gospel of ‘American democracy’ to the Pacific world.”⁷⁰

In 1916, the United States, through the Jones Act,⁷¹ specified that it would only grant the Philippines independence when it became a stable democracy modeled after the United States.⁷² The institutional design of the new colonial government made the Philippines highly dependent on American officials, laws, and courts. The United States manifested the conquest paradigm by imposing its own norms and ideals, in addition to its civil and military overseers.⁷³

For over three decades, the U.S. Constitution was the Philippines’ governing constitution. Then, in 1935, a Philippine Constitution began to govern the Islands.⁷⁴ The Philippine Constitution established a political system “virtually identical” to the United States and was part of the Philippines’ path to democracy, and then, independence.⁷⁵ The Constitution, however, was nominal at best, as it was signed by U.S. President Franklin Delano Roosevelt.⁷⁶ President Roosevelt’s power to sign and ratify this central legal document—an overt, public expression

68. Timothy J. Foley, *The Judicial Failsafe: American Legal Colonialism in the Philippines*, 62 AM. J. LEGAL HIST. 158, 158–59 (2022).

69. *Id.* at 171–72.

70. *Id.* at 158–59.

71. An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a more Autonomous Government for those Islands, Act No. 240, Preamble, <https://www.officialgazette.gov.ph/constitutions/the-jones-law-of-1916/> [hereinafter Jones Law] (stating “[w]hereas it is, as it has always been, the purpose of the people of the United States to withdraw their sovereignty over Philippine Islands and to recognize their independence as soon as a stable government can be established therein”).

72. *Constitutional History of Philippines*, CONST. NET, <https://constitutionnet.org/country/philippines> (last visited Feb. 26, 2024).

73. CAPOZZOLA, *supra* note 8, at 50 (discussing the civil government and military oversight in the Philippines in the early twentieth century).

74. *Constitutional History of Philippines*, *supra* note 72.

75. *Id.*

76. *Philippine Legal Research*, GLOBALEX, https://www.nyulawglobal.org/globalex/Philippines.html#_1_Introduction (last visited Jan. 7, 2023).

of control—also signals the conquest paradigm, even as the United States set the Philippines on the track for independence.

“Filipino-phobia” played an outsized role with respect to U.S. control over the Philippine judiciary. Armed with the prerogatives of conquest, Taft set plans in motion to “change the official language of legal proceedings to English in ‘three or four years.’”⁷⁷ Further, Taft affirmed his commitment to “appoint for a term at least US lawyers who will afford an example to these people of what Anglo-Saxon justice is.”⁷⁸ Terming Filipinos as “these people” and claiming “[U.S.] lawyers” would bring “Anglo-Saxon justice” channeled a broader national ethos—echoed in patronizing cultural sentiments such as the “white man’s burden” and “civilizing missions.”⁷⁹ The 1899 poem, *White Man’s Burden: The United States and The Philippine Islands*⁸⁰ demonstrates the place that these racist ideologies occupied in the national imagination at the time.⁸¹ Racism, or “Filipino-phobia,” at least partially fueled U.S. control over the archipelago in the nineteenth century.

The United States also ensured that the Philippine Supreme Court, while “Supreme” in name, would have no final authority. Instead, Philippine Supreme Court decisions were appealable to the U.S. Supreme Court.⁸² The U.S. Governor-General in the Philippines appointed all Philippine Supreme Court justices, and the majority—four of the seven justices—were Americans.⁸³ Of the three Filipino justices on the Philippine Supreme Court, McKinley appointed Cayetano Arellano as the Chief Judge of the Supreme Court of the Philippines.⁸⁴ Arellano, a Filipino lawyer and judge, was well respected by Filipinos, the Spanish, and Americans.⁸⁵ However, rather than an effort to empower Filipinos, Taft’s appointment was viewed as another strategic mechanism for control. As one scholar wrote,

77. Foley, *supra* note 68, at 168.

78. *Id.*

79. See generally Vicente L. Rafael, *Colonial Domesticity: White Women and United States Rule in the Philippines*, 67 AM. LITERATURE 639 (Dec. 1995) (discussing American civilizing missions in the Philippines).

80. “*The White Man’s Burden*”: Kipling’s Hymn to U.S. Imperialism, HIST. MATTERS, <https://historymatters.gmu.edu/d/5478/> (last visited Feb. 14, 2024) (“Your new-caught, sullen peoples [;] [h]alf devil and half child” referring to Filipinos).

81. Hernández-López, *supra* note 66, at 498.

82. *Philippine Legal Research.*, *supra* note 76.

83. *Id.*; Foley, *supra* note 68, at 170.

84. *Id.* at 169–70.

85. *Id.* at 169.

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While colonial leaders like Taft favored stocking the Filipino bench with [U.S.] transplants, the appointment of a Filipino as the first Chief Justice likely bolstered the facade that the people of the islands would be ‘taught’ to govern themselves without compromising colonial control due to Arellano’s favorable views toward the colonial project.⁸⁶

Thus, the United States effectively balanced direct control over the judiciary with indirect power and legitimacy through pro-American, Filipino judges. This also demonstrates Taft’s potential concern for the *appearance* of consent—or an appearance of local legitimacy—in his decisions. Taft’s appointment of a Chief Justice with “favorable views toward the colonial project”⁸⁷ foreshadows U.S.-Philippine relations after independence in 1945. Further, Taft’s focus on developing the judicial branch emphasizes the role of law and lawyers around questions of social consent and legitimacy. The United States later pursued control in similar ways by propping up the appearance of legitimacy, as discussed in Part III.

U.S. tactics of judicial control over the Philippines also deepened and reinforced the impact of Spain’s colonization. American occupation in the Philippines divided the country into “Hispanicized and non-Hispanicized peoples.”⁸⁸ In general, Hispanicized Filipinos were Christian elites.⁸⁹ The Philippine’s political system excluded peasants—poor, non-Hispanicized, non-Christian workers.⁹⁰ Only Filipino elites, called the “eligible class,” which constituted around ten percent of the Philippines’ population, could participate in the political process—including holding office, organizing political parties, or voting.⁹¹ Essentially, Filipinos with backgrounds to whom their former colonizer afforded power in many ways solidified their power in the following colonial regime. Deepening Spain’s colonial traces, in conjunction with a judiciary effectively controlled by the United States, even further restricted judicial independence in the Philippines; a significant portion of Filipinos—because of their status, ethnicity, and religion—remained unable to participate in systems of power.

86. *Id.*

87. *Id.*

88. *Id.* at 167.

89. *Id.*

90. See *id.*; Julian Go, *Colonial Reception and Cultural Reproduction: Filipino Elites and United States Tutelary Rule*, 12 J. OF HIST. SOC’Y 337, 339–40 (Dec. 1999).

91. *Id.* at 340.

2. The *Insular Cases*

The U.S. Supreme Court's *Insular Cases* enshrine the conquest paradigm in the fabric of the U.S. constitutional system. The *Insular Cases* weighed the perceived stakes of extending the Constitution's promises of equal citizenship and self-government to Filipinos and other colonized populations.⁹² They contemplated whether extending the U.S. Constitution to territories would mean bringing "racially inferior" people within the U.S. political community.⁹³ Alongside the judiciary, Congress debated whether the Constitution "follows the flag"⁹⁴ to territories. Congressional debates surrounding the Philippines were often couched in "Filipino-phobia" and racist language. For example, one Senator characterized Filipinos as "physical[] weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet."⁹⁵ The Senator warned the United States not to adopt Filipinos as citizens, saying, "[L]et us beware!"⁹⁶ The *Insular Cases* molded the politics of "Filipino-phobia" into law.⁹⁷

Among the *Insular Cases*, *Dorr v. United States*⁹⁸ discusses the Philippines. As background to *Dorr*, the United States conceptualized the Philippines in a realm distinct from the other territories. For example, as Congress debated a bill to grant Puerto Ricans citizenship, representatives offered remarks about the Philippines' fate.⁹⁹ Contrasting the Philippines and Puerto Rico, one Congressman insisted on "establish[ing] a precedent for the Filipinos, the unruly and disobedient" compared to Puerto Ricans.¹⁰⁰ As such, Congress resolved not to extend U.S. citizenship to the Philippines, describing it as "an archipelago of seventeen hundred islands 7,000 miles distant, of diverse races, speaking different languages, having different customs, and ranging all the way from absolute barbarism to semi civilization."¹⁰¹

92. Campbell, *supra* note 21, at 2548 (discussing how the *Insular Cases* consider whether "the federal government is not bound by certain otherwise-applicable constitutional rights and guarantees when it acts upon overseas possessions.").

93. SAM ERMAN, *ALMOST CITIZENS* 8 (2018).

94. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 81–87 (2009).

95. Torruella, *supra* note 52, at 298.

96. *Id.*

97. *Id.* at 300–12.

98. 195 U.S. 138 (1904).

99. Torruella, *supra* note 52, at 298.

100. *Id.*

101. *Id.* at 297.

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Indeed, in *Dorr*, the Supreme Court held that the Constitution did not apply to the Philippines, which was an “unincorporated territory.”¹⁰² *Dorr* was decided in the context of Philippine resistance to American colonization, so the United States was “concerned about having to hold jury trials with juries picked from a population presumed to be at least partially hostile.”¹⁰³ In less veiled terms, Filipinos could not properly understand the jury system because they “liv[ed] in compact and ancient communities, with definitely formed customs and political conceptions.”¹⁰⁴ Thus, *Dorr* demonstrates both the “Filipino-phobia” and the conquest paradigm, both of which established an unequal relationship between the Philippines and the United States.

In sum, the U.S.-Philippine relationship from the Spanish-American War to independence illustrated the conquest paradigm of colonial control. The Philippines’ long-sought independence in 1946 would mark a shift in the tactics and oversight of the United States over the archipelago. To other countries similarly committed to the U.N.’s self-determination goals, the United States’ formal control of the Islands ended in 1946. But 1946 was also a beginning of control via the consent paradigm, exerted through military bases.

III. AFTER INDEPENDENCE: THE “CONSENT PARADIGM” AND U.S. MILITARY BASES IN THE PHILIPPINES

After WWII, the United States shifted away from colonial control under the conquest paradigm. Rather than control via “claiming large swaths of land,”¹⁰⁵ Immerwahr notes that U.S. foreign policy in the post-WWII era included creating strings of U.S. military bases across the globe.¹⁰⁶ Immerwahr terms these small loci of control the United States’ “pointillist empire”¹⁰⁷—conjuring images of Georges Seurat’s paintings with small dots of color.¹⁰⁸ Similarly, anthropologist David Vine notes that after WWII, the United States had a “truly global network of bases” around the world, including in Trinidad, Burma,

102. The *Dorr* holding, that the U.S. Constitution does not apply to the Philippines, is notable, especially given the U.S. Constitution was the Philippines’ seminal law for the first few decades of colonial rule.

103. Torruella, *supra* note 52, 316.

104. *Balzac v. Porto Rico*, 258 U.S. 298, 347 (1922).

105. IMMERWAHR, *supra* note 43, at 216; DAVID VINE, *BASE NATION* (2015).

106. IMMERWAHR, *supra* note 43, at 216–18.

107. *Id.* at 213.

108. *Georges Seurat*, ART INST. OF CHI., <https://www.artic.edu/artists/40810/georges-seurat> (last visited Mar. 1, 2024).

Portugal, and the Northern Marianas.¹⁰⁹ By 1945, the United States had over 2,000 bases with more than 30,000 installations around the world.¹¹⁰ After the war, the United States left about half of these bases but kept the others as “permanent institution[s]” abroad, basically as “fully fledged US towns on other people’s lands.”¹¹¹ Establishing a pointillist empire of overseas bases has essentially allowed the United States to exert power and influence abroad without ever formally claiming territory.

This part proceeds in three sections. First, Section III.A provides additional theoretical framing to analyze post-independence dynamics. Second, Section III.B discusses twentieth-century U.S.-Philippine dynamics and various base agreements favoring U.S. interests. Section III. B also charts how Filipino activists have resisted those bases. Lastly, Section III.C analyzes current base agreements between the nations and the costs associated with these contemporary arrangements.

A. *TWAIL Theorizing the Shift from “Conquest” to “Consent”*

TWAIL scholarship analyzes the complex dynamics between former colonies and colonial powers, and the theories are particularly useful because they articulate the enduring legacies of outmoded colonial relationships.¹¹² Applied to Keitner’s framework, discussed in Section I. A, TWAIL scholarship helps to identify nuances within the consent paradigm of control.

Many TWAIL scholars claim that international law has institutionalized colonial legacies.¹¹³ Antony Anghie summarizes that TWAIL scholars have identified “at a number of different levels—conceptual, doctrinal, institutional—how colonial hierarchies were reproduced and how colonial relations, which basically facilitated the transfer of wealth from the poor countries to the rich countries, were reinforced.”¹¹⁴ As part of this study on colonial legacies, TWAIL scholar James Thuo Gathii has defined imperialism and informal control

109. David Vine, *No Bases? Assessing the Impact of Social Movements Challenging US Foreign Military Bases*, 60 CURRENT ANTHROPOLOGY S158, S162 (2019).

110. *Id.*

111. *Id.*

112. Antony Anghie, *Rethinking International Law: A TWAIL Perspective*, 34 EUR. J. INT’L L. 7, 36 (2023).

113. James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1612–13 (2021).

114. Anghie, *supra* note 112, at 36.

distinctly from colonialism and formal control.¹¹⁵ Gathii describes how modern property, tort, and contract law enshrine “informal empire imperialism” in former colonies.¹¹⁶ This contrasts with “formal empire,” which is characterized by annexation or occupation.¹¹⁷

TWAIL scholar Ali Hammoudi builds on Gathii’s “informal empire imperialism” and identifies forms of “semi-colonialism.”¹¹⁸ Hammoudi explains the complexity of “semi-colonialism” in former colonies.

As an analytic framework, semi-colonialism is useful in that it allows one to see the complexities of the hidden practices of informal domination, in particular emphasizing its historicity, contingency, imperial multiplicity, as well as, its role in the multi-layered processes of capitalist underdevelopment and fragmentation. It would therefore be quite useful for international legal scholars concerned with the study of imperialism, particularly to analyze the prominent legal instruments and mechanisms of informal domination, whether it was the carving up of extraterritorial consular jurisdiction, the imposition of unequal treaties, and/or the regimes of protection— a combination of which were used to economically and politically dominate states such as China, Siam, Japan, Persia and the Ottoman Empire.¹¹⁹

Hammoudi highlights that “the imposition of unequal treaties” may be a new mechanism for “semi-colonial” control. Indeed, Hammoudi warns that “legal techniques and maneuvering [may] obfuscate the reality of power relations.”¹²⁰ Hammoudi’s “semi-colonial” theory illuminates the strategic maneuvering under Keitner’s consent paradigm.

U.S.-Philippine agreements must be cautious of potential unevenness or techniques that distort power relations. In the ensuing sections, this Note closely examines U.S.-Philippine base agreements following independence. The analysis locates sites of concern about unchecked U.S. control in the Philippines and their devastating consequences on Philippine populations near U.S. bases. To address modern imperialism, TWAIL scholars have supported laws that “acknowledge[] and

115. James Thuo Gathii, *Imperialism, Colonialism, and International Law*, 54 BUFF. L. REV. 1013, 1014 (2007).

116. *Id.* at 1014, 1019.

117. *Id.* at 1019.

118. Ali Hammoudi, *The International Law of Informal Empire and the ‘Question of Oman’*, 1 TWAIL REV. 121, 125–26 (2020).

119. *Id.* at 126–27.

120. *Id.* at 140.

further[] the interests of the people of the Third World.”¹²¹ As Part IV discusses, for U.S.-Philippine base agreements to be accepted as consent-based, conscionable agreements, they must be fundamentally reimagined to address the colonial past.

B. Bases Following Philippine Independence

In the twentieth century, the U.S. military continually occupied bases in the Philippines, besides a brief period in the 1990s.¹²² Under the original agreement between the Philippines and the United States, the U.S. military could retain bases rent-free for ninety-nine years.¹²³ Since those ninety-nine years elapsed, U.S.-Philippine relations have evolved: from the initial base agreements, to the bases during Martial Law in the Philippines, to the 1990s Filipino resistance movement against the bases.

1. 1946 Military Bases Agreement

Philippine independence “signaled no abrupt change” to the relationship between the Philippines and the United States.¹²⁴ The United States “refused to leave [the Philippines] entirely after independence.”¹²⁵ So, the United States established strategic base agreements with the Philippines to continue their presence on the Islands.¹²⁶ Especially in the first military base agreement, “Filipinos were justified in their belief that they received unequal treatment from the United States.”¹²⁷ Although the bases were nominally established by consent, for people living near them, “it could feel like colonialism.”¹²⁸

In 1934, the Tydings-McDuffie Act granted the Philippines independence but left open the question of U.S. bases in the Philippines.¹²⁹ President Harry S. Truman even announced that the United States no longer owned any territories, although he clarified that the United

121. Anghie, *supra* note 112, at 8.

122. Sanya Mansoor & Simone Shah, *Why the Philippines Is Letting the U.S. Expand its Military Footprint in the Country Again*, TIME (Feb. 3, 2023), <https://time.com/6252750/philippines-us-military-agreement-china/>.

123. John Ramming Chappell & Katie Dames, *Make Flan Not War*, INKSTICK (Nov. 22, 2021), <https://inkstickmedia.com/make-flan-not-war/>.

124. BRANDS, *supra* note 53, at 352.

125. IMMERWAHR, *supra* note 43, at 344.

126. Stephen R. Shalom, *Securing the U.S.-Philippine Military Bases Agreement of 1947*, 22 BULL. CONCERNED ASIAN SCHOLARS 3, 7 (1990).

127. *Id.*

128. IMMERWAHR, *supra* note 43, at 356.

129. Shalom, *supra* note 126, at 4.

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States would “maintain the military bases necessary for the complete protection of our interests and of world peace.”¹³⁰ Essentially, “[a]s the United States loosened its grip on large colonies, it grabbed bases . . . more tightly.”¹³¹ The United States created devices that appeared grounded in consent—namely base agreements—while still maintaining functional control in the region. Notably, the United States retained the Clark Air Base and Subic Naval Base—two large bases in the Philippines.¹³²

The United States wanted to ensure that it would maintain its bases following Philippine independence, so before 1946, it began to negotiate base agreements.¹³³ As leverage, the United States set the price of reconstruction aid as ninety-nine-year leases on twenty-three U.S. bases and military installations on the Islands.¹³⁴ During WWII, the Philippines endured Japan’s brief colonial rule under a military administration and was left with severe inflation, major cities in ruins, and failed industries.¹³⁵ The Philippines, in need of reconstruction support, thus entered into base agreements reliant on, and with less bargaining power than, the United States.

The Military Bases Agreement, which was operative from 1946 to 1991,¹³⁶ allowed the United States both to retain the bases it had acquired during the war and to acquire any additional necessary sites, all rent-free.¹³⁷ The United States also negotiated unrestricted movement between bases.¹³⁸ It retained criminal jurisdiction over U.S. base personnel and dependents,¹³⁹ whether or not incidents were committed on or off U.S. bases.¹⁴⁰ Further, the Agreement did not specify

130. IMMERWAHR, *supra* note 43, at 344.

131. *Id.*

132. Shalom, *supra* note 126, at 8.

133. *Id.* at 7.

134. *Id.* at 8–9.

135. Ricardo Jose, *July 4, 1946: The Philippines Gained Independence from the United States*, NAT’L WWII MUSEUM (July 2, 2021), <https://www.nationalww2museum.org/war/articles/july-4-1946-philippines-independence>.

136. The Military Bases Agreement has been amended, including to shorten the length of the base agreement from ending in 2046 to 1991. The amendments beside the base agreement are “purely cosmetic,” and the central concern about the U.S. maintaining unhampered military operations in the bases has not been challenged. Shalom, *supra* note 126, at 12.

137. Vine, *supra* note 109, at S158.

138. Shalom, *supra* note 126, at 7.

139. *Id.* at 8.

140. A. JAMES GREGOR, THE KEY ROLE OF U.S. BASES IN THE PHILIPPINES 2 (Jan. 10, 1984), <https://www.cia.gov/readingroom/docs/CIA-RDP88T00528R000100010046-1.pdf>.

whether the United States would retain title to real property on naval reservations.¹⁴¹

The Military Bases Agreement unevenly favored the United States and raised “serious questions concerning violations of Philippine sovereignty.”¹⁴² The Agreement replicated several characteristics of direct U.S. imperial control on the Islands: rent-free occupation of sites, control over taxation, and U.S. criminal jurisdiction over the bases.¹⁴³ The Agreement did not give the United States title to naval reservations, although it did not specify otherwise either.¹⁴⁴ The United States did not need formal title to the land to exercise its desired control. In fact, without title to the land, the United States operated under the consent paradigm—allowing the Philippines to nominally retain property rights (as they were not otherwise specified) while still asserting control.

2. Dictatorship and Evading the “Costs of Conquest”¹⁴⁵

Another instance of U.S. power under the consent paradigm occurred during U.S. support for the dictator, Ferdinand Marcos, during the 1960s–1980s. Quietly backed by the United States, Marcos established Martial Law in the Philippines and precipitated countless human rights violations while consolidating executive and legislative power in himself.¹⁴⁶ He instituted widespread arrests and detentions of Filipinos and authorized disappearances, killings, and torture of dissidents.¹⁴⁷ Marcos later admitted that 50,000 people—specifically “church workers, human rights defenders, legal aid lawyers, labour leaders and journalists”—were arrested and detained under Martial Law from 1972 to 1975.¹⁴⁸ Notably, the United States maintained control over the Clark and Subic bases, under the 1946 Military Bases Agreement, during Marcos’ rule.¹⁴⁹

141. Shalom, *supra* note 126, at 10.

142. GREGOR, *supra* note 140, at 2. Whether the Military Bases Agreement violated international legal principles of sovereignty is outside the scope of this Note. See *Nicaragua v. United States and the Friendly Relations Doctrine. Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

143. Vine, *supra* note 109, at S158.

144. Shalom, *supra* note 126, at 10.

145. Raustiala, *supra* note †, at 615.

146. See *Five things to know about Martial Law in the Philippines*, AMNESTY INT’L (Apr. 25, 2022), <https://www.amnesty.org/en/latest/news/2022/04/five-things-to-know-about-martial-law-in-the-philippines/>.

147. *Id.*

148. *Id.*

149. Marcos had several negotiations with the United States regarding the bases. He was considering gaining more control over the bases but was nevertheless planning to allow the

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In tacitly helping to advance Marcos’ regime, the United States conveniently retained its strategic strongholds while disclaiming any of the costs—material or political—associated with maintaining them. During Marcos’ dictatorship, the United States avoided three key costs or obligations by employing the consent paradigm: (1) the need to outwardly further democracy; (2) the expectation to intervene; and (3) accountability to U.S. political systems or checks.

First, under the consent paradigm, the United States was not obligated to further democracy in the Philippines. As Part II discussed, during colonial rule of the Philippines under the conquest paradigm, the United States adopted de jure control over the Islands, but to the American public, were outwardly committed to building a democracy in the archipelago.¹⁵⁰ But under the consent paradigm, the United States sacrificed its outward commitments to democratic values to attain expedient forms of geopolitical control.

Indeed, the United States supported Marcos’ election partly so that (among other economic and labor interests) it could preserve access to the Clark and Subic bases on the Islands: “[w]ith their eyes open[,] they decided that America’s security interests in the Philippines outweighed—for the United States—the interests of the Filipino people in good government and national development.”¹⁵¹ In 1973, President Richard Nixon met with U.S. Ambassador to the U.N., John Scali, and said the following regarding the Philippines:

Take Marcos[—]I won’t lecture him on his internal structure, either the Philippines [sic] or the Communists. Our concern is foreign policy except for something like genocide, etc. We will aid dictators if it is in our interest. We have objectives to give aid to Yugoslavia, Romania, Poland. Our concern with Cuba, China, and the USSR is their external policy of external aggression and subversion.¹⁵²

United States to maintain some forms of control. See *Marcos Says He Wants Control Over U.S. Bases in Philippines*, N.Y. TIMES (July 8, 1975), <https://www.nytimes.com/1975/07/08/archives/marcos-says-he-wants-control-over-us-bases-in-philippines.html>; Fox Butterfield, *Marcos Outlines Campaign for More Control Over U.S. Bases*, N.Y. TIMES (Sept. 7, 1975), <https://www.nytimes.com/1975/09/07/archives/marcos-outlines-campaign-for-more-control-over-us-bases.html>.

150. Jones Law, *supra* note 71, Preamble.

151. BRANDS, *supra* note 53, at 355.

152. Memorandum of Conversation, WHITE HOUSE (Feb. 13, 1973, 11:30 AM), <https://www.fordlibrarymuseum.gov/library/document/0314/1552556.pdf>.

In fact, scholars suggest that it was easier for the United States to occupy bases in countries with dictators.¹⁵³ In practical terms, for U.S. military bases, international affairs scholar Kent Calder determines that dictatorships are preferable to democracies because “‘base politics’ operate most smoothly when the mass public is *not* involved.”¹⁵⁴ Calder defines “base politics” as the dynamics between the basing and host nations regarding the status and operation of the military facilities.¹⁵⁵ Thus, it was likely easier for the United States to control the Philippine bases under Marcos’ dictatorship.

Second, under the consent paradigm, the United States was freed from obligations to intervene. After independence, the Philippines became a sovereign state. International law treats sovereigns as equal in the global system, including in their ability to make and further international laws.¹⁵⁶ Without *de jure* control over the archipelago, the United States could treat the Philippines as an independent nation. Even if the Philippines violated international laws and human rights standards, the United States could justify inaction based on sovereign independence. Under a realist view of international law, the Philippines would also be expected to survive in a self-help system, not relying on another sovereign’s support.¹⁵⁷

Third, the United States avoided any resistance to the basing agreements from domestic U.S. politics. If the United States were still operating under the conquest paradigm during the second half of the twentieth century, the United States would endure scrutiny from the American public for supporting a dictator.¹⁵⁸ Without colonial control of the Philippines, the Islands were not considered part of the United States, “sever[ing] popular sovereignty and constitutional authority from territorial control,” and also, “when governing overseas, the political branches are less encumbered.”¹⁵⁹ Thus, the United States was

153. Vine notes that the United States’ support for dictators has been a common strategy for maintaining U.S. bases abroad. See generally VINE, *supra* note 105, at 97–113 (discussing U.S. support for dictators in Guam, Honduras, Egypt, and other States, to secure U.S. bases).

154. KENT E. CALDER, EMBATTLED GARRISONS: COMPARATIVE BASE POLITICS AND AMERICAN GLOBALISM 116–17 (2008).

155. *Id.* at 65.

156. Redwood, *supra* note 33, at 399–400.

157. See COLIN ELMAN, REALISM READER 15–27 (2014).

158. President Biden recently received criticism for meeting with dictators he has otherwise opposed. See Matt Vise & Yasmeen Abutaleb, *On Foreign Trip, Biden Meets with Dictators He Has Criticized*, WASH. POST. (Nov. 16, 2022), <https://www.washingtonpost.com/politics/2022/11/16/biden-meets-with-dictators/>.

159. Ernesto Hernández-López, *Guantánamo as a “Legal Black Hole” A Base for Expanding Space, Markets, and Culture*, 45 UNIV. S.F. L. REV. 141, 168 (2010).

insulated from U.S. politics, but also benefited from the bases, during Marcos’ dictatorship.

3. Closing the Military Bases

In the early 1990s, the “people of the Philippines forced the military of their former colonial ruler . . . to leave the two largest overseas US military bases.”¹⁶⁰ After a successful movement to overthrow Marcos, the Philippine antibase movement also gained momentum.¹⁶¹ The movement pressured the Philippine Senate to refuse a renegotiated base agreement, as the original agreement was set to expire in 1991.¹⁶² Following ninety-four years of the United States in the Philippines, the U.S. military withdrew from its Philippine bases in 1992.¹⁶³ The original base agreement expired, so U.S. withdrawal ultimately did legally comply with the agreement.¹⁶⁴ And the Clark base had closed shortly before the withdrawal, due to a volcanic eruption.¹⁶⁵ So, the withdrawal focused mostly on the Subic base, which was the U.S. Navy’s principal supply and ship repair location in the region.¹⁶⁶

Specifically, in 1987, the Philippines responded to activism and amended its Constitution to ban foreign bases and troops unless the Philippine Senate approved a treaty allowing their presence.¹⁶⁷ American officials still hoped to extend the U.S. presence on the Islands.¹⁶⁸ Both states considered renewing the treaty, which would lease Subic for another ten years, and the United States would pay \$203 million in annual aid.¹⁶⁹ However, with the new amendment to the Philippine Constitution, the Philippine Senate did not approve the treaty, so the treaty did not pass.¹⁷⁰

By honoring the Philippines’ constitutional amendment, the United States ostensibly affirmed its formal commitment to the consent paradigm.

160. Vine, *supra* note 109, at S158.

161. *Id.*

162. *Id.*

163. CAPOZZOLA, *supra* note 8, at 329.

164. *See id.*

165. David E. Sanger, *Philippine Orders U.S. to Leave Strategic Navy Base at Subic Bay*, N.Y. TIMES (Dec. 28, 1991), <https://www.nytimes.com/1991/12/28/world/philippines-orders-us-to-leave-strategic-navy-base-at-subic-bay.html>.

166. *Id.*

167. CONST. (1987), art. XVIII, § 25.

168. CAPOZZOLA, *supra* note 8, at 331–35 (discussing the United States’ exit and return to the Philippines in the 1990s).

169. Sanger, *supra* note 165.

170. REYES, *supra* note 7, at 34.

At the same time, withdrawal marked yet another pivot in the mechanisms of control under the consent paradigm. Withdrawal forced the United States to find new ways to preserve its interests in the Philippines—to continue asserting extraordinary power over the Islands despite the Philippines’ constitutional amendment. Although the U.S. military departed in 1992, U.S. officials claimed a “hope to come back . . . as soon as we can.”¹⁷¹ Indeed, the United States soon returned under new military base agreements.¹⁷² As current dynamics demonstrate, U.S. strategy in the Philippines shifted from maintaining only larger-scale bases—such as Clark and Subic—to occupying several smaller bases, of varying sizes.¹⁷³

C. *Current Dynamics*

The United States briefly held no bases in the Philippines from 1992 to 1998, but soon after, new basing agreements re-introduced the U.S. military to Philippine bases.¹⁷⁴ According to Vine, the return of U.S. military bases to the Philippines after the Philippines’ constitutional amendment and expulsion of U.S. troops is “the most powerful cautionary tale” for those advocating for base reform.¹⁷⁵ In 1996, the United States and the Philippines signed the Visiting Forces Agreement (VFA) to enable U.S. troops to return to the Philippines for training and exercises.¹⁷⁶ In addition, building on the VFA, the 2014 Enhanced Defense Cooperation Agreement (EDCA) created new opportunities for the United States to add bases (although not permanently).¹⁷⁷ The VFA and EDCA agreements illuminate the United States’ evolving strategies to assert formal control in the Philippines under ostensibly consent-based frameworks.¹⁷⁸ And the agreements have led to drastic consequences for Philippine populations local to bases. Comparing the base agreement

171. Branigin, *supra* note 2.

172. John Schaus, *What Is the Philippines-United States Visiting Forces Agreement, and Why Does It Matter?*, CSIS (Feb. 12, 2020), <https://www.csis.org/analysis/what-philippines-united-states-visiting-forces-agreement-and-why-does-it-matter>.

173. Vine, *supra* note 109, at S169.

174. Schaus, *supra* note 172.

175. Vine, *supra* note 109, at S171.

176. *Id.*

177. Enhanced Defense Cooperation Agreement, Phil.-U.S., Apr. 28, 2014, as amended April 13, 2016, T.I.A.S. 16-413.1.

178. Again, Hammoudi suggests that “the imposition of unequal treaties, and/or the regimes of protection” are forms of “semi-colonialism.” Hammoudi, *supra* note 118, at 126–27. Hammoudi’s semi-colonialism framework “allows one to see the complexities of the hidden practices of informal domination.” *Id.* at 126.

against the U.S.-Japan agreement (a bilateral agreement between countries without colonial histories) further reveals the unevenness of current U.S.-Philippine agreements.

1. “Lily Pad” Bases

Post-1991 bases in the Philippines signal another shift in the consent paradigm. Following independence, the United States moved from large-scale, territorial control to exertion of power through military bases. After the United States left the Philippines in 1991, the United States began building smaller, more localized bases.¹⁷⁹

Vine refers to these smaller-scale bases as “lily pads”: often secretive, “cooperative security locations,” with minimal U.S. troop presence.¹⁸⁰ “Lily pads” suggests the United States’ power to jump from discrete locations across host countries and the globe.¹⁸¹ This formation serves a strategic advantage. Vine proposes that “lily pads, training, and exercises” have “allowed the military to make a remarkable return to the Philippines, within barely a decade of the eviction of U.S. bases from the country.”¹⁸² The secretive bases are far away from population centers, with fewer locals willing to challenge the bases’ presence.¹⁸³ Although sometimes subtle exertions of power, lily pads, along with other military exercises, have empowered the United States to continue exerting formal control in the Philippines.

Lily pads have not always been well received by host countries. Former U.S. Secretary of Defense Donald Rumsfeld even acknowledged that “[t]he presence and activities of our forces grate on local populations and have become an irritant for host governments.”¹⁸⁴ Rumsfeld, during a Senate Committee on Armed Services hearing in 2004, committed to “plans for a more flexible and effective force posture.”¹⁸⁵

Calder also notes the shifting character of military bases in the twenty-first century. The shifts are in part due to “changing technology and political-military imperatives,” along with the “age of terrorism,”

179. Vine, *supra* note 109, at S171 (noting the United States has again gained access to Subic and Clark bases in addition to the smaller, lily pad bases).

180. VINE, *supra* note 105, at 45–46.

181. Vine, *supra* note 109, at S169.

182. VINE, *supra* note 105, at 307.

183. Vine, *supra* note 109, at S169.

184. *Id.*

185. *The Global Posture Review of United States Military Forces Stationed Overseas: Hearing Before the S. Comm. On Armed Services*, 108th Cong. 9 (2004) (statement of Hon. Donald H. Rumsfeld, U.S. Secretary of Defense).

which demands quicker responses.¹⁸⁶ Thus, U.S. bases have moved from “physically formidable, expensive, yet strategic fortifications,” like Clark and Subic, to “lighter, more flexible, and more individually dispensable facilities for monitoring and communications, as well as military operations,” like current bases in the Philippines.¹⁸⁷ Lily pads can be a powerful form of control, and modern base agreements empower the United States to build these small, more discreet bases in the Philippines.

2. Modern Base Agreements

The VFA and EDCA enable the United States’ increased presence in the Philippines. Both agreements signal shifts under the consent paradigm. Following the 1946–1991 Base Agreement and the Philippine constitutional amendment, the United States withdrew from the Philippines and had to restructure its strategy to regain formal control in the region.¹⁸⁸ After the United States’ withdrawal, base agreements have focused less on large bases like Clark and Subic.¹⁸⁹ The VFA and EDCA have led to a “broad [U.S.] presence” in the Philippines, without the “economic and political costs of maintaining large garrison-like bases [like Clark and Subic] that can serve as visible symbols for the opposition.”¹⁹⁰ Thus, the new base agreements removed a key political constraint (large-scale bases) while rechartering many of the provisions that give the United States complete functional control without accountability.

The VFA is a 1998 agreement between the United States and the Philippines that provides the U.S. military with access to Philippine territory, along with procedures for resolving issues with the U.S. military and the Philippine population.¹⁹¹ Under the VFA, acceptable activities in the Philippines include bilateral training or military exercises, both of which rely on the U.S. military’s temporary presence on the Islands.¹⁹² Notably, the VFA passed through official channels, as the

186. CALDER, *supra* note 154, at 66.

187. *Id.*

188. See Vine, *supra* note 109, at S171 (discussing the United States’ return to the Philippines).

189. Subic base was recently purchased by a private, U.S. company, rather than the U.S. government. See Neil Jerome Morales, *Cerberus to Buy Philippine Shipyard at Ex U.S. Navy Base for \$300 Million*, REUTERS (MAR. 8, 2022), <https://www.reuters.com/business/cerberus-buy-philippine-shipyard-ex-us-navy-base-300-mln-sources-2022-03-08/>. According to Vine, lily pad bases are often owned by private contractors, which helps to disguise the U.S. military presence. See VINE, *supra* note 105, at 45–46.

190. *Id.* at 308.

191. Schaus, *supra* note 172.

192. *Id.*

Philippine Senate ratified the Agreement, and the VFA was deemed constitutional in the Philippines.¹⁹³

The VFA appears to be grounded in consent; its constitutionality confirms its compliance with the consent paradigm. Functionally, the VFA allowed U.S. troops to return to the Philippines at high rates, although the U.S. military presence appeared much more subtle and out of public view.¹⁹⁴ In fact, U.S. officials noted that “they had to hide such troop insertions under the cover of annual exercises.”¹⁹⁵ Heightened U.S. troop presence in the Philippines allowed the United States to “secur[e] . . . continuous access to the country where they [were] training.”¹⁹⁶ According to a U.S. Pacific Commander, the troop exercises led to “the eventual goal of being guaranteed use [of certain strategic locations] in a crisis.”¹⁹⁷

Similar to the 1946 Military Bases Agreement¹⁹⁸ the VFA has criminal provisions that demonstrate another mechanism for asserting formal power in the region. Article Five of the VFA grants the U.S. military jurisdiction when personnel violate U.S. military laws, U.S. national security, property, or security of U.S. property or people, and certain crimes under U.S. laws.¹⁹⁹ Also, the VFA grants primary jurisdiction to the U.S. military over crimes committed “in performance of official duty.”²⁰⁰

The VFA’s broad-sweeping criminal provisions unevenly favor the United States to adjudicate, or not adjudicate, crimes against Philippine locals. Thus, the VFA uses laws to create a promise—grounded in consent—while ensuring that the United States maintains control over the remedies if the promise is broken. The United States’ control of remedies again echoes colonial dynamics under the consent paradigm. The criminal courts may appear to be credible, but the United States’ control of remedies creates unchecked power over parties before the courts. And judiciary control seems reminiscent of control under the conquest paradigm, pre-independence, where the United States largely oversaw judicial decisions.

Also, in several instances, the United States denied Philippine jurisdiction over crimes committed by U.S. military personnel against

193. REYES, *supra* note 7, at 35.

194. Vine, *supra* note 109, at S171 (discussing the steady increase in the U.S. military presence in the Philippines in the mid- and late-1990s).

195. VINE, *supra* note 105, at 307.

196. *Id.*

197. *Id.*

198. REYES, *supra* note 7, at 42.

199. *Id.* at 34.

200. *Id.*

Filipinos.²⁰¹ The United States frequently refused to waive its primary right to exercise jurisdiction, even when the cases were of particular importance to the Philippines.²⁰²

The EDCA, which entered into force in 2014,²⁰³ also unequally favors the United States. The EDCA, a ten-year agreement that is automatically renewable, establishes that “[g]iven the mutuality of benefits,” the Philippines will make “Agreed Locations available to United States forces without rental or similar costs.”²⁰⁴ U.S. access to the “Agreed Locations” allows the United States to make “alterations and improvements” to the regions upon “consult[ation]” with the Philippines.²⁰⁵ The EDCA uses property terminology to separate U.S. ownership versus Philippine ownership in the “Agreed Locations.” For example, the Agreement distinguishes between “relocatable” and “non-relocatable” properties on these locations.²⁰⁶ And the United States maintains title over “relocatable” property, such as equipment, supplies, and moveable structures that U.S. forces imported into the Philippines.²⁰⁷ In contrast, the Philippines retains title over “non-relocatable” property—including the land and structures affixed to the land.²⁰⁸ While the EDCA may appear to favor both states, the agreement still unevenly bolsters U.S. power on the Islands.

There are three main concerns with the EDCA in terms of its capacity to expand unchecked U.S. control in the Philippines. First, the EDCA was passed through executive order, so it was not approved by the Philippine Senate as the 1987 Constitution requires.²⁰⁹ Ultimately, the Philippine Supreme Court held that the EDCA is constitutional;²¹⁰ under the Supreme Court’s reading of the EDCA, it determined that the EDCA was not a new agreement, so it did not require the Senate’s approval.²¹¹ Viewing the Philippines’ history with the United States military holistically, the Philippine Supreme Court traced the EDCA back to the VFA and earlier agreements.²¹² The Philippine Supreme

201. *Id.* at 35.

202. *Id.* at 34–35.

203. Enhanced Defense Cooperation Agreement, *supra* note 177.

204. *Id.* art. III(3).

205. *Id.* art. III(4).

206. *Id.* art. V(3)–(4).

207. *Id.* art. V(3).

208. *Id.* art. V(4).

209. REYES, *supra* note 7, at 37–38.

210. *Saguisag v. Sec. Gazmin, et al.*, G.R. No. 212426 (Jan. 12, 2016) (Phil.).

211. REYES, *supra* note 7, at 38.

212. *Id.*

Court decision allows the EDCA to operate under an ostensibly consent-based framework, but the Agreement did not receive the Philippine Senate’s approval.

Second, the EDCA sets the United States on track to maintain permanent bases in the Philippines again. Proponents of the EDCA offer that it addresses “short-term capabilities gap[s]” and “promote[s] long-term modernization.”²¹³ U.S. officials have emphasized that the bases should be seen as temporary and should not be interpreted as the United States establishing a permanent presence in the Philippines.²¹⁴ However, the EDCA does not specify temporal requirements or exit plans for the United States. Justifying the bases as a strategy to combat China, the bases could become permanent and looming as escalation in China, Taiwan, and the South China Sea have unpredictable timelines.²¹⁵ Also, “[m]ilitary facilities in the Philippines that Filipino troops might not be able to visit certainly sound like foreign bases.”²¹⁶ In 2024, the number of U.S. bases in the Philippines reached a new peak, nearing ten bases on the Islands.²¹⁷ The lily pads, which have allowed the U.S. military to again occupy the Islands, are more points of the United States’ powerful control in the Pacific.

Third, the EDCA lacks enforcement and accountability mechanisms to ensure the United States abides by certain promises, for example, for the United States to address environmental concerns. Although the EDCA commits the United States to address any environmental concerns arising from the bases, the EDCA does not provide mechanisms or processes for raising concerns to the United States.²¹⁸

In effect, the VFA and EDCA have expanded U.S. military presence in the Philippines, although in more subtle forms. From lily pads to

213. Renato Cruz De Castro, *The Death of EDCA and Philippine-U.S. Security Relations*, 42 ISEAS YUSOF ISHAK INST. 1, 2 (May 11, 2020).

214. Mansoor & Shah, *supra* note 122.

215. See *Territorial Disputes in the South China Sea*, GLOB. CONFLICT TRACKER (MAR. 19, 2024), <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea> (discussing escalating conflicts in the South China Sea).

216. VINE, *supra* note 105, at 308.

217. Brad Dress, *Here’s Where US Military Will Open Bases in the Philippines in Move to Counter China*, THE HILL (Apr. 3, 2023), <https://thehill.com/policy/defense/3931076-heres-where-us-military-will-open-bases-in-the-philippines-in-move-to-counter-china/>.

218. Clemente Bautista, *EDCA: An Environmental Hazard and Toxic Threat to the PH*, THE BULATLAT (May 2, 2014), <https://www.bulatlat.com/2014/05/02/edca-an-environmental-hazard-and-toxic-threat-to-the-ph/> (“[T]he EDCA did not clearly state that, in an event of nuclear or toxic contamination brought about by US military forces and operations, the US will take responsibility in compensating victims, cleaning up and rehabilitating the polluted environment, and shoulder all related expenses of such incidents.”).

training exercises, the U.S. military “has ‘everything—and arguably more—than it had in Subic and Clark.’”²¹⁹ The agreements, thus, have allowed the United States to build a pointillist empire by acquiring even more subtle points of control in the Philippines.

3. Comparing U.S. Military Base Agreements in the Philippines and Japan

The United States has base agreements with several other countries, including countries where it does not share colonial histories. For example, since 1960, the United States and Japan have abided by a Status of Forces Agreement (SOFA),²²⁰ which addresses many of the same issues as the VFA and EDCA. However, the U.S.-Japan SOFA differs in meaningful ways, including its provisions granting Japan significantly more judicial discretion than the Philippines in the VFA and EDCA.

At first glance, the SOFA’s criminal provisions mirror the VFA, similarly granting both countries certain realms of jurisdiction over cases.²²¹ The SOFA allows that if either party does not have exclusive jurisdiction over a case of “particular importance,” it may request that the other party waive its jurisdiction.²²² The VFA also grants either government the ability to request a waiver of its jurisdiction.²²³ In addition, the VFA requires that “upon request by the United States, the Philippines waive their primary right to exercise jurisdiction except in cases of particular importance to the Philippines.”²²⁴ Unlike the SOFA, which requires the requesting party to demonstrate “particular importance” in a case, the VFA compels the Philippines to waive jurisdiction unless the Philippines can demonstrate “particular importance.”

The U.S.-Japan SOFA contrasts sharply with the criminal provisions in the VFA and EDCA. In practice, the VFA significantly restricts the Philippine’s ability to prosecute U.S. personnel.²²⁵ In contrast, the U.S.-

219. VINE, *supra* note 105, at 308.

220. Eric Johnston, *Decades On, Text Governing U.S. Forces in Japan is Yet to Be Revised*, JAPAN TIMES (Jan. 21, 2021), <https://www.japantimes.co.jp/news/2022/01/21/national/us-japan-sofa-revision>.

221. Agreement regarding the Status of United States Armed Forces in Japan, Japan-U.S., art. XVII(1)–(2), Jan. 19, 1960, 11 U.S.T. 1652.

222. *Id.* art. XVII(3) (c).

223. Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil-U.S., art.3(c), Feb. 10, 1998, T.I.A.S. No.12931.

224. *Id.*

225. REYES, *supra* note 7, at 49–73 (discussing the VFA’s limitations in bringing justice to Filipina women victims of violence by U.S. personnel).

Japan SOFA demonstrates greater cohesion and balance of criminal authority. As a TWAIL approach to these agreements would suggest, the VFA and EDCA were both crafted under the shadow of several decades of colonialism, and thus, reproduced uneven provisions.

Notably, U.S. military bases in Japan, like in many other countries, have been met with significant pushback.²²⁶ Around the world, bases have “generated anger, opposition, and protest.”²²⁷ Globally, bases may displace local populations from their lands; lead to crimes committed by military personnel; fuel sex industries targeting military personnel; and cause environmental damage from military operations.²²⁸

Japan’s Okinawa base, in particular, is perhaps “the most controversial US base there [in Japan].”²²⁹ The base was under “international spotlight” after three U.S. military personnel “horrifically raped a 12-year-old” in 1995.²³⁰ The horrific incident led to large-scale rallies against the U.S. bases in Okinawa.²³¹ In accordance with the SOFA, the United States and Japan agreed to try the offenders in Japanese courts under Japan’s laws.²³² Public protests have still suggested that the U.S.-Japan SOFA does not go far enough to protect local people living around bases.

At the same time, if the case had occurred in the Philippines and under the VFA, the Philippines would have less leverage to attempt to try the case under its own laws. The costs of U.S. bases in the Philippines are uniquely concerning, as they replicate similar concerns as those arising under the conquest paradigm.

4. The Costs of U.S. Military Bases in the Philippines

Modern-day effects of U.S. bases in the Philippines echo historical concerns from the twentieth-century U.S. military occupation of the Islands. As part of building the pointillist empire, the United States has benefitted from yielding responsibility for the costs of their control. The effect of the U.S. military in the Philippines resonates in several

226. Vine, *supra* note 109, at S160.

227. *Id.* at S162.

228. *Id.*

229. *Id.* at S160.

230. *Id.*

231. May Lee, *Thousands Rally Against U.S. Bases in Okinawa*, CNN (Oct. 21, 1995), http://edition.cnn.com/WORLD/9510/okinawa_protest/index.html.

232. Teresa Watanabe, *Okinawa Rape Suspect’s Lawyer Gives Dark Account: Japan: Attorney of Accused Marine Says Co-Defendant Admitted Assaulting 12-Year-Old Girl ‘Just for Fun’*, LA TIMES (Oct. 28, 1995), <https://www.latimes.com/archives/la-xpm-1995-10-28-mn-62075-story.html>.

spheres, including the impact on the environment and the increase in violence against Filipina women, among other issues.²³³

To start, the U.S. bases have contributed to severe environmental degradation of the Islands, which the United States has not addressed. Historically, the United States has not been held liable for its environmental impact on the Islands. Following the United States' withdrawal from the Philippines in 1991, the U.S. Government Accountability Office (GAO)²³⁴ found the United States was not obligated to clean the bases and had no liability in the situation.²³⁵ This is especially surprising given that the GAO found that Clark and Subic bases caused "significant environmental damage" that was beyond compliance with the United States' environmental standards.²³⁶

Absolving the United States of responsibility, the GAO's report reinforces the United States' ability to maintain "control without the costs of conquest."²³⁷ Indeed, the United States engineered its relationship with the Philippines to avoid legal obligations, consistent with the consent paradigm of colonial control. Evading formal colonial structures, the United States has benefitted from using the Philippines' land without having to account for environmental damage.

In contrast to the GAO report, scientific studies find clear links between U.S. bases, health issues, and environmental degradation.²³⁸ For example, in 1991, 20,000 people were relocated to the former Clark base motor pool, which was then vacated.²³⁹ During their relocation, families reported symptoms such as vomiting, diarrhea, and respiratory issues.²⁴⁰ Several women suffered from miscarriages, and children conceived or born at the Clark base experienced health consequences, including congenital heart disease, seizure disorders, and birth defects.²⁴¹

In 1993, after the United States exited the Philippines, a different study found that the Clark and Subic regions both suffered long-term

233. Vine, *supra* note 109, at S162.

234. At the time, the GAO was titled the General Accounting Office.

235. Kim David Chanbonpin, *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, 343 (2003).

236. *Id.*

237. Raustiala, *supra* note †, at 615.

238. Chanbonpin, *supra* note 235, at 344.

239. *Id.* at 345.

240. *Id.*

241. *Id.*

environmental damage.²⁴² Specifically, the study noticed traces of polychlorinated biphenyls, heavy metals, and pesticides in the bases’ soil, water, and air.²⁴³ Other studies also found pollutants—such as mercury and lead—at the bases, contaminating the drinking water that nearby communities relied on.²⁴⁴

Second, U.S. military bases around the Philippines have furthered violence against Filipina women. The “colonial context” around Pacific U.S. bases inspires this dynamic, distinguishing it from prostitution around other U.S. military bases.²⁴⁵ Part of the dynamic includes harmful stereotypes against Filipina sex workers and treatment as “sex objects.”²⁴⁶ For example, Filipina sex workers frequently reported being treated like a “toy” or “pig” by American soldiers.²⁴⁷

The modern experiences of Filipinas are also echoed in historical accounts. During the Spanish-American War and Philippine resistance to colonization, American soldiers referred to Filipinas as “little brown [sex] machines powered by rice.”²⁴⁸ At the time, a whole sex industry developed in the Philippines to serve U.S. military men.²⁴⁹ As part of their marketing, the industries offered “a girl for the price of a burger.”²⁵⁰

Similar to the GAO report deciding that the United States committed no damage to the Islands, the VFA releases U.S. service members of liability for crimes. As part of this, the VFA provides limited immunity to U.S. military personnel while on duty.²⁵¹ The VFA also allows defendants to stay at the U.S. embassy throughout the trial.²⁵² Further, the VFA includes a provision that if the trial lasts for more than a year, the United States does not have to make its personnel available to Philippine officials.²⁵³ During trials, the Philippines accused the United

242. *Id.* at 344.

243. *Id.*

244. *Id.* at 334–35.

245. Sunny Woan, *White Sexual Imperialism: A Theory of Asian Feminist Jurisprudence*, 14 WASH & LEE J.C.R. & SOC JUST. 275, 285 (2008).

246. *Id.* at 286.

247. *Id.* at 285.

248. *Id.* at 283.

249. *Id.*

250. *Id.*

251. John Aglionby, *American Marines Charged with Rape in the Philippines*, THE GUARDIAN (Dec. 27, 2005, 7:02 PM), <https://www.theguardian.com/world/2005/dec/28/usa.philippines>.

252. Reynaldo Santos Jr., *Looking Back: Daniel Smith and the Subic Rape Case*, RAPPLER (Dec. 1, 2015, 6:07 AM), <https://www.rappler.com/newsbreak/iq/114585-looking-back-daniel-smith-subic-rape-case/>.

253. REYES, *supra* note 7, at 61.

States of taking unnecessary delays to try to avoid being held accountable for crimes.²⁵⁴ Again, the VFA serves as a mechanism to relieve the United States of responsibility in the Philippines. Under formal colonial rule per the conquest paradigm, U.S. responsibilities for adjudicating criminal trials would be more stringent. But under the guise of a base agreement, which the Philippines seemingly chose to join under the consent paradigm, the United States has manufactured another route to escape the costs of formal colonial control.

The “Subic rape case” exemplifies the protections U.S. military personnel receive under the VFA. The case was the first to be tried under the VFA.²⁵⁵ The defendant, Daniel Smith, a U.S. marine, was convicted of forty years in prison in Makati City for raping a Filipina under the pseudonym “Nicole.”²⁵⁶ After appealing his case, Smith was transferred to the U.S. embassy in the Philippines, despite the Philippine Supreme Court’s decision in 2009 denying his transfer.²⁵⁷ Nicole eventually dropped the allegations amid rumors of a deal with the United States, and Smith left the Philippines.²⁵⁸

The murder of Jennifer Laude also speaks volumes about the lack of justice for trans women experiencing violence in the Philippines. Laude, a trans-Filipina woman, was drowned to death by a U.S. marine, Joseph Pemberton.²⁵⁹ At trial, the marine claimed the “trans panic defense,” which could mean that Laude’s “sexual advance . . . [caused] a state of temporary insanity.”²⁶⁰ The Olongapo Regional Trial Court found Pemberton guilty of homicide and sentenced him to six to twelve years in prison.²⁶¹ On appeal, the judge lessened his sentence to a maximum of ten years.²⁶² Former President Rodrigo Roa Duterte ultimately pardoned Pemberton.²⁶³

Laude’s case occurred six months after the enactment of the EDCA, so the public was highly aware of how the United States handled the

254. *Id.*

255. Santos Jr., *supra* note 252.

256. *Id.* Court documents used the pseudonym “Nicole,” although her identity was ultimately made public. See REYES, *supra* note 7, at 214.

257. Santos Jr., *supra* note 252.

258. *Id.*

259. Mark Joseph Stern, *Marine Who Allegedly Killed Trans Woman Claims He Was Defending His Honor*, SLATE (Aug. 25, 2015, 2:59 PM), <https://slate.com/human-interest/2015/08/philippines-trans-murder-marine-uses-trans-panic-defense.html>.

260. *Id.*

261. Corinne Redfern, *He Killed a Transgender Woman in the Philippines. Why Was He Freed?*, N.Y. TIMES MAG. (Sept. 17, 2020), <https://www.nytimes.com/2020/09/17/magazine/philippines-marine-pardon-duterte.html>.

262. REYES, *supra* note 7, at 51.

263. Redfern, *supra* note 261.

“CONTROL WITHOUT THE COSTS OF CONQUEST”

case.²⁶⁴ Throughout Pemberton’s trial, under the VFA’s exclusive jurisdiction provisions, he received preferential treatment from the U.S. military. For example, after being positively identified as the perpetrator, the United States refused to turn him over. The Bayan Secretary Renato Reyes Jr. commented that “the US refusal to surrender Pemberton to Philippine authorities shows how it regards our country. The US doesn’t look at us on an equal footing. The entire [VFA] is premised on unequal relations. There is no mutuality in our relations.”²⁶⁵ Later, rather than being kept in a large Philippine detention facility, under the VFA, he was relocated to a private, air-conditioned cell where U.S. service members frequently monitored him.²⁶⁶ The U.S. military continued to pay Pemberton his regular salary monthly, allowed him to maintain his rank, and paid his legal fees.²⁶⁷ The pardon mirrors Nicole’s trial, which left both Filipina women without justice.

The environmental costs and violence against Filipina women are among several other effects of the U.S. military’s occupation of bases. Other costs—such as the displacement of people living on base land, Indigenous populations whose land has been stolen for the bases, and interference with Philippine sovereignty—also demonstrate the extreme impacts of the U.S. military in the region.²⁶⁸ These effects are the human costs of allowing U.S. expansion and unchecked control in the Pacific.

IV. REIMAGINING U.S.-PHILIPPINE RELATIONS

Fundamentally, this Note argues that the United States and the Philippines must reimagine base agreements to address colonial legacies. This part acknowledges the security concerns justifying military bases and also proposes methods for renegotiating agreements to be consent-based and conscionable.

A. *Security Concerns and Justifications*

Strategic justifications for the U.S. military presence in the Philippines are beyond the scope of this Note. However, it is useful to identify that there are arguments for the necessity of base agreements for security reasons, as well as arguments that bases will exacerbate existing tensions in the region.

264. REYES, *supra* note 7, at 53.

265. *Id.* at 57.

266. *Id.*

267. Redfern, *supra* note 261.

268. Vine, *supra* note 109, at S162.

The United States justifies its large military presence in the Philippines by alluding to security concerns, including President Joe Biden's goal to "promote a free and open Indo-Pacific."²⁶⁹ The current president of the Philippines, Ferdinand "Bongbong" Romuladez Marcos Jr., who has served since 2022, is the son of the former dictator Ferdinand Marcos.²⁷⁰ Under President Marcos, Jr., U.S. bases in the Philippines have multiplied to a point where there are now the most there have been in the past thirty years.²⁷¹

The justification for opening these bases under Marcos Jr. is that it sets the Philippines on a "path of slow but deliberate defense modernization," especially given that Philippine "[d]efense spending is also low and not on par with its regional neighbors."²⁷² In addition, U.S. military presence in the Philippines could potentially strengthen Philippine territorial claims to the South China Sea.²⁷³ The potential for a Chinese invasion of Taiwan could also lead to security risks for the Philippines, and the U.S. military's presence would help defend them.²⁷⁴ The Philippines may be unable to "stand up" to China on its own, so it would require the U.S. military's support.²⁷⁵

As for China's response to the EDCA, the Chinese government has largely criticized the deal as "selfish" and an escalation.²⁷⁶ In particular, the Philippines' close strategic location to Taiwan could risk greater

269. Statement on the National Security Strategy, 2022 DAILY COMP. PRES. DOC. 1 (Oct. 12, 2022). See also *FACT SHEET: U.S.-Philippines Bilateral Defense Guidelines*, U.S. DEP'T OF DEF., <https://www.defense.gov/News/Releases/Release/Article/3383607/fact-sheet-us-philippines-bilateral-defense-guidelines/> (May 3, 2023); Jim Garamone, *U.S., Philippines Look at Ways to Strengthen Alliance*, U.S. DEP'T OF DEF. (Apr. 18, 2022), <https://www.defense.gov/News/News-Stories/Article/Article/3002700/us-philippines-look-at-ways-to-strengthen-alliance/>; Joseph Clark, *DOD Officials Underscore 'Ironclad' Commitment to Philippines After China's Unsafe Maneuvers*, U.S. DEP'T OF DEF. (Dec. 11, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3613695/dod-officials-underscore-ironclad-commitment-to-philippines-after-chinas-unsafe/>.

270. *Marcos Family of the Philippines*, GENI, <https://www.geni.com/projects/Marcos-Family-of-the-Philippines/594> (last visited Apr. 15, 2024).

271. Sui-Lee Wee, *U.S. to Boost Military Role in the Philippines in Push to Counter China*, N.Y. TIMES (Feb. 3, 2023), <https://www.nytimes.com/2023/02/01/world/asia/philippines-united-states-military-bases.html>.

272. Julio S. Amador III, *Eyes on the Prize? The Philippines-US Alliance and Defense Modernization*, 297 ASIA PAC. BULL. 1, 2 (Dec. 18, 2014).

273. Renato Cruz De Castro, *The Death of EDCA and Philippine-U.S. Security Relations*, ISEAS PERSPECTIVE 2 (May 11, 2020).

274. Gregory B. Poling, *The Transformation of the U.S.-Philippines Alliance*, CTR. FOR STRATEGIC & INT'L STUD. (Feb. 2, 2023), <https://www.csis.org/analysis/transformation-us-philippines-alliance>.

275. Mansoor & Shah, *supra* note 122.

276. *Id.*

escalation, given the potential for armed conflict between Taiwan and China in the near future.²⁷⁷

B. *Consent, Conscionability, and Renegotiating Base Agreements*

Asymmetry persists in U.S.-Philippine base agreements.²⁷⁸ Reimagining base agreements requires addressing the colonial past. This section proceeds to offer three opportunities, although not an exhaustive list, for the United States and the Philippines to draft more even agreements. In particular, this section proposes (1) negotiating accountability and enforcement provisions in agreements; (2) engaging local Philippine populations in the negotiation process; and (3) reframing agreement language to better represent the countries’ histories.

First, negotiations should ensure greater accountability and enforcement provisions in base agreements. U.S. bases in the Philippines have led to significant harms to the environment and local populations near bases. As the United States and Philippines broach negotiations, the parties should review and document the damages the bases have left on the archipelago. The Malaya Movement, an activist organization committed to combating fascism in the Philippines, has urged the United States to acknowledge the effects of U.S. bases.²⁷⁹ U.S. negotiators must be willing to determine pathways for eliminating future harm in the Philippines as a result of bases.

Second, the United States should engage with populations local to Philippine bases. Meeting with local stakeholders will help follow the TWAIL goal of shaping policies that “acknowledge[] and further[] the interests of the people” in the Philippines.²⁸⁰ As part of this, social movements and activism will play an important role in shaping future U.S.-Philippine base agreements. “Antibase” movements, during the twenty-first century, have become more of a cohesive effort around the

277. *Id.*

278. TWAIL scholarship is useful to identify the lack of consent and conscionability of base agreements between the United States and the Philippines. Further, recalling Section I.B, Redwood’s proposal to apply contract principles about party evenness to bilateral treaties is instructive. This asymmetry demonstrates that the United States and the Philippines must reimagine base agreements to ensure they are consent-based and conscionable.

279. *Defend Philippine Sovereignty! No to Unequal Treaties!*, MALAYA MOVEMENT (Feb. 11, 2023), <https://www.malayamovement.com/statements/edca-bases>.

280. Antony Anghie, *Rethinking International Law: A TWAIL Retrospective*, 34 *EURO. J. INT’L L.* 7, 8 (2023).

world.²⁸¹ In general, antibase movements are often not opposed to the base's existence or fighting for a base's closure.²⁸² The movements instead have pushed back on the effects of unchecked control over bases, for example, for "greater environmental protections, the reduction of aircraft noise, the return of land, or the accountability for crimes committed by troops."²⁸³ Local stakeholders and activists, including those from antibase movements, will help to advance Philippine goals and create more conscionable decisions.

Third, during negotiations and in treaty language, the United States and the Philippines should acknowledge colonial histories. Currently, language in basing agreements glosses over colonial histories. For example, the Mutual Defense Treaty between the United States and the Philippines begins by "[r]ecalling with mutual pride the historic relationship" between the two countries.²⁸⁴ Or, in 2023, when the U.S. Department of Defense announced new EDCA sites, U.S. officials said, "The United States and the Philippines have stood together for more than seven decades, unwavering in treaty commitments and our shared vision for a more peaceful, secure and prosperous region."²⁸⁵ Language about the long-term, unified vision of the United States and the Philippines obscures a much more complex past—including the severe loss of life during the Philippine-American War, colonial subjugation for several decades, U.S. support for Marcos' dictatorship, and Philippine antibase activism in the 1990s. Concealing colonial history replicates the consent paradigm by asserting control through the appearance of an equitable relationship. Instead of reductive statements, the United States and the Philippines may consider investing in public memory projects, archives, and museums dedicated to collecting history.²⁸⁶ These projects are powerful tools for the United States and the Philippines to address history and inspire equitable base negotiations.

281. See Andrew Yeo, *Not in Anyone's Backyard: The Emergence and Identity of a Transnational Anti-Base Network*, 53 INT'L STUD. Q. 571, 571 (2009) (discussing the International Conference for the Abolition of Foreign Bases, which met in 2007, following the onset of the Iraq War).

282. Vine, *supra* note 109, at S161.

283. *Id.* Vine has diligently traced these movements and noted the differing degrees on "(1) people living in communities affected by foreign bases, including movement members; (2) other antibase movements internationally; (3) local, national, and international political-economic relations; and (4) US basing strategy and military operations." *Id.*

284. Mutual Defense Treaty Between the United States and the Republic of the Philippines, *supra* note 14, Preamble.

285. See Vergun, *supra* note 9.

286. See *Pakinggan! A Case For Filipino Community Archives*, *supra* note 3.

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Ultimately, creating consent-based, conscionable base agreements must be responsive to colonial histories. Recognizing the historic asymmetry between the two states, negotiations must be attentive to Philippine locals’ experiences. Reimagining the base agreements will be a collaborative process and may create workable models for future, more conscionable base agreements around the world.

V. CONCLUSION

U.S.-Philippine relations offer a unique window into transitions from formal to informal control. The Philippines has experienced a distinct form of American colonialism, but the dynamics still reveal greater lessons for global communities. In particular, the U.S.-Philippine relationship highlights how bilateral base agreements can contribute to empire-building.

Thus, applied to U.S. security dynamics in the Philippines and more broadly, this Note has cautioned how colonial dynamics are often disguised in modern international agreements. For the Philippines, connecting the period of direct colonial rule to current U.S. base agreements emphasizes that history necessarily informs present dynamics. Since 1946, the United States has continued to enjoy extraordinary control of the Philippines while escaping the costs of a self-proclaimed conquest. Without a more robust vision for consent and conscionability, that asymmetry will continue to perpetuate historical injustices.