International Law and the 1951 Philippines-US Mutual Defense Treaty (MDT)

About the Author

Julius A. Yano holds a Bachelor of Arts degree Major in Political Science, minor in Hispanic Studies from the Ateneo de Manila University. He obtained his first law degree from the University of the Philippines and his Master of Laws degree in International Maritime Law with distinction from the IMO-International Maritime Law Institute (IMLI) in Malta. Subsequently, he attended the Summer Academy at the International Tribunal for the Law of the Sea in Hamburg. For the academic year 2017-2018 he was the Nippon Foundation Lecturer on International Maritime Security Law at the IMO-IMLI. He is a reserve officer in the Armed Forces of the Philippines and spent years with the Intelligence Service Armed Forces of the Philippines (ISAFP) for his annual active duty training. He is likewise a member of the Philippine Coast Guard Auxiliary

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Julius A Yano, JD, LL.M

For the past 70 years challenges have been encountered to understand the provisions of the 1951 Philippines-US Mutual Defense Treaty (MDT). Thus through the years, there have been apprehensions over the relevance and utility of the MDT. As has been observed, discourse on the subject matter fails to take into account the pertinent legal framework for the interpretation of the MDT. Indeed, the MDT provides for a collective defense mechanism between the Philippines and the US. Hence, an understanding of international law on the use of force is essential to interpreting the MDT so that it can more effectively address the parties' security interests.

Introduction

The Mutual Defense Treaty (MDT) was entered into in 1951 by the Republic of the Philippines and the United States of America (US). It has produced accessory agreements that, among others, support the presence of American troops in the Philippines and allow for joint military exercises within Philippine territory. Likewise, the modernisation of the defence capability of the Armed Forces of the Philippines is encouraged by said treaty.

The essence of the MDT has yet to be fully appreciated though. For 70 years there have been questions over whether the US will indeed defend the Philippines and under what circumstances and what defence measures are to be taken under the treaty. As can be observed, the legal framework of the MDT is not aptly understood. A sufficient understanding of said framework assists to address questions such as what triggers the MDT, how it will be triggered and what the US response will be.

UNDERSTANDING THE MDT AND JUS AD BELLUM

The MDT is an international agreement between two states. Hence, it is a source of international obligations between the parties as per Article 38 of the Statute of the International Court of Justice.

Military exercises, exchange programmes for military personnel, other trair military assistance during times of peace, et cetera are but one aspect of the MDT stemming particularly from its Article II which provides:

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

More importantly, the essence of the MDT is the parties' commitment to collective defence. This idea is expressed in its Article IV providing for the parties' obligation in the event of an armed attack –

> ARTICLE IV. Each Party recognizes that an armed attack in the Pacific area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes.
>
> Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations, such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

As any international lawyer knows, such provision of the 1951 MDT resembles the international law regime on the use of force as reflected in the United Nations (UN) Charter of 1945. Hence, the MDT cannot be sufficiently understood without taking into account this framework: jus ad bellum or the branch of international law dealing with the legality of use of force. To be sure, no state is to act in a manner contrary to the rule of law. Thus, an understanding of jus ad bellum is essential to interpreting the MDT and operationalising the same.

Under international law the use of force by states in their inter-state relations is prohibited. This general prohibition is the culmination of efforts by the international community to put an end to the erstwhile practice of employing military force and waging wars as part of state policy. Thus, Article 2(4) of the UN Charter provides:

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

Restricting states' rights to conduct their affairs using military force, the UN system established a collective security system through the UN Security Council (SC). It has the primary responsibility of taking measures including military force 'to maintain and restore international peace and security' per Chapter VII of the UN Charter.

However, the UN Charter has also preserved the state's inherent right of self-defence in the event of an armed attack. Under the UN Charter this situation is the only instance permitting a state's use of military force outside the collective security system –

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

In brief, under international law as reflected in the UN Charter, use of force is generally prohibited. However, two qualifications (or exceptions) to this general prohibition are recognised:

a) the exercise of a state's right of self-defence, individual or collective, in relation to an armed attack under Article 51; and,

b) the collective security system through a Chapter VII authorisation by the UNSC.

Indeed, any use of military force by a state has to be within the framework of international law lest it be a violation thereof. Article VI of the MDT is mindful of this principle –

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

THE MDT TRIGGER: ARMED ATTACK

The essence of the MDT is triggered in the event of an armed attack. Understanding 'armed attack' for the purposes of the MDT is primarily governed by international law and complementarily by US practice or policy.

Indeed, international law is not static. The interpretation of the MDT, which interpretation is anchored on international law, is likewise not static, especially given that the treaty is meant by the parties to be in force indefinitely –

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

To be sure, armed attack is not limited to invasion of territory; other emanations of the state can be the objects of an armed attack. And the MDT recognises this possibility in its Article V. Indeed, the use of the word 'include' therein precludes a restrictive interpretation of the concept of 'armed attack' –

> ARTICLE V. For the purpose of Article IV, an armed attack on either of the Parties is deemed to include an armed attack on the metropolitan territory of either of the Parties, or on the Island territories under its jurisdiction in the Pacific Ocean, its armed forces, public vessels or aircraft in the Pacific.

The International Court of Justice in 1986 in the Military and Paramilitary Activities in and against Nicaragua case provided for the 'scale and effects'(1) criterion to classify a situation as an 'armed attack'. According to the Court, a distinction has to be made between 'less grave' forms and 'most grave' forms of use of force, only the latter constituting an armed attack. Further, Dinstein describes 'armed attack' as 'a use of force producing (or liable to produce) serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property.'(2) (Thus, it should be understood that the use of armed force against Filipino fishermen exercising sovereign rights pertaining to the Philippine state is an armed attack against the Philippines.) Further, even events which singularly may not reach the threshold of an armed attack but when accumulated produce serious consequences may be deemed an armed attack. (3) It is additionally understood that an armed attack may occur not only in the traditional land, sea and air domains but also in space as well as cyberspace. Certainly, the specific circumstances play a crucial role on whether or not a situation can be considered an 'armed attack'.

An understanding of US practice in relation to use of force in national defence likewise assists. Armed attack is indeed not given a restrictive interpretation. As a case in point, in 1993 the US regarded the assassination attempt against former president George Bush whilst he was in Kuwait and not on US soil as an armed attack. The attack was attributable to Baghdad which would subsequently be the target of Tomahawk missiles launched by American forces. In his address to the nation President William Clinton explained that 'the Iraqi attack against President Bush was an attack against our country and against all Americans. We could not, and have not, let such action against our nation go unanswered.'(4)

A limited interpretation of 'armed attack' (for the purposes of the MDT) is inconsistent with international law as well as with US policy. Ergo, such approach does not appear tenable.

Given the foregoing, the meaning of 'armed attack' for the purposes of the MDT is to be governed necessarily by international law as it has developed and has been developing. Having a definite and exhaustive list of events constituting an armed attack appears impractical and may even be disadvantageous because it potentially arrests the evolutive interpretation of the concept of armed attack under international law.

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(1) Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.
(2) Y Dinstein, War, Aggression, and, Self-Defence (5th edn, CUP 2011) 208.
(3) Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment) [2003] ICJ Rep 161.
(4) Public Papers of the Presidents of the United States: William J. Clinton (1993, Book I) (US Government Publishing Office) 938.

MEASURES AGAINST AN ARMED ATTACK

Article IV of the MDT quoted above states that the parties would 'act to meet the common dangers' stemming from an armed attack. There is no iota of doubt that the meaning of this phrase includes actual use of military force by the parties – sending troops, launching military attacks, using drones, et cetera – under the concept of self-defence, individual and collective. To be sure, per Article VI of the MDT rights and obligations under the UN Charter are unaffected by the MDT.

Under international law individual self-defence is the lawful use of force by a state that is a victim of an armed attack. In its plainest form, collective self-defence (5), on the other hand, refers to the situation where another state assists the victim state. The purpose of self-defence is to repel and/or halt the armed attack, not (merely) to retaliate. (6)

In its essence, the MDT is an expression by the Philippines and the US of their commitment to collective defence. This idea of collective defence is clearly expressed in the preamble of the MDT –

> Recalling with mutual pride the historic relationship which brought their two peoples together in a common bond of sympathy and mutual ideals to fight side-by-side against imperialist aggression during the last war.
>
> Desiring to declare publicly and formally their sense of unity and their common determination to defend themselves against external armed attack, so that no potential aggressor could be under the illusion that either of them stands alone in the Pacific area.
>
> Desiring further to strengthen their present efforts for collective defense for the preservation of peace and security pending the development of a more comprehensive system of regional security in the Pacific area.

In the exercise of collective defence actual use of force is doubtlessly provided for in the MDT as amongst the measures against an armed attack. Firstly, under international law as expressed in the UN Charter armed attack is the only situation which permits the use of force in self-defence. The mere mention of 'armed attack' in the MDT already creates the link to the parties' use of force in the exercise of its inherent right of self-defence, individual and collective. If the 'act to meet the common dangers' phrase had meant only less than use of force, the mention of 'armed attack' would have been unnecessary and superfluous.

Given that the MDT is a mutual defence treaty, its essence, as expressed in its preamble, is collective defence. The phrase 'to act to meet the common dangers' necessarily includes the use of force in self-defence. A limited interpretation of the measures that can be expected of the parties to address an armed attack renders the defence treaty nugatory.

Secondly, from a reading of the MDT, particularly paragraph 2 of Article IV, it cannot be denied that the reporting requirement therein actually mirrors the

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(5) To avoid confusion the term 'collective defence' shall be used hereafter.
(6) Self-defence may – should – be exercised in an anticipatory manner under the Caroline doctrine. Hence, a state need not wait suffering a hit given 'the necessity of self-defense [being] instant, overwhelming, leaving no choice of means, and no moment for deliberation.'

reporting requirement for 'measures taken [...] in the exercise of self-defence', in accordance with Article 51 of the UN Charter.

Paragraph 2, Article IV, MDT:

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

Article 51, UN Charter:

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Such measures necessarily include, nay specifically refer to, use of military force; for only such measures as involving use of force are to be terminated by the UNSC. Thus, per the wording of the MDT, use of force is expected in the exercise of collective defence in relation to an armed attack.

Thirdly, US involvement in the Viet Nam Conflict was indubitably characterised by the actual participation of its military forces in the armed conflict, not just remote or indirect support. As it may be noted in the memorandum of the US State Department entitled The Legality of United States Participation in the Defense of Viet-Nam dated 4 March 1966, the US based its justification for its military action in Viet Nam on, among others, the right of collective defence under international law and on its being a party to the Southeast Asia Collective Defense Treaty of 1954.

What is more important is that the text of such treaty follows the 'act to meet the common dangers' text in the MDT. Thus, such wording indeed means 'use of force'.

Paragraph 1, Article IV, MDT:

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

Article IV, Southeast Asia Collective Defense Treaty:

Each Party recognizes that aggression by means of armed attack in the treaty areas against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. [...]

Owing to the concept of collective defence under international law and under the 1954 treaty, the US undertook to and did actually defend South Viet Nam using its own military forces. Consequently, it is without doubt that under the MDT, US military forces can be counted upon to defend the Philippines under the

international law concept of collective defence as expressed in the 'act to meet the common dangers' provision in the MDT.

Indeed, in the exercise of collective defence the assisting state is expected to use its own military force. Even contemporary events demonstrate this arrangement. Thus, in the exercise of collective defence US forces in 2014 launched military operations in Syria –

> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq, including by protecting Iraqi citizens from further attacks and by enabling Iraqi forces to regain control of Iraq's borders. In addition, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies. (7)

It is important to mention as well that the MDT, as a treaty, is a source of international obligations for the parties thereto. Indeed, the principle of pacta sunt servanda under customary international law applies.

It is most crucial to understand though that use of force in self-defence, individual and collective, is subject to such other requirements as provided for in international law. Needless to say, 'automaticity' – whatever it means – in a military response cannot disregard such requirements.

PULLING THE MDT TRIGGER

Conceptually, it is armed attack that triggers the state's inherent right of self-defence, individual or collective, a qualification or exception to the general prohibition on the use of force under international law.

Request for Assistance

There is no question that the MDT is in force and is binding between the Philippines and the US. Such status however does not necessarily mean that US forces will automatically participate in an armed conflict involving the Philippines in the exercise of collective defence. A precipitate military action can be deemed a breach of the international law principle on non-intervention. In the Military and Paramilitary Activities in and against Nicaragua case the International Court of Justice (ICJ) held that:

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(7) UNSC 'Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General' (23 Sep 2014) U.N. Doc. S/2014/695.

> [...] there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. The Court concludes that the requirement of a request is additional to the requirement that such a State should have declared itself to have been attacked.'(8)

In the Oil Platforms case the ICJ reiterated these two requirements but modified the requirement of a public declaration of having been a victim of an armed attack. According to the Court, it suffices that the state regards itself as a victim of such attack. (9)

Thus, before military force may be employed by another state in collective defence, there must first be a request for assistance by a state that regards itself as a victim of an armed attack.

Constitutional Processes

The MDT is a binding treaty that is a source of international obligations for the parties. Obligations arising therefrom are to be complied with in good faith. Assuming that there are constitutional obstacles to effectively carry out the obligations per the MDT – quod non – the parties are expected to work toward remedying these obstacles. This supposed scenario does not however render the MDT non-binding, invalid or without force.

The Philippine Constitution

Section 3, Article II of the Philippine Constitution states that '[t]he Armed Forces of the Philippines is the protector of the people and the State. Its goal is to secure the sovereignty of the State and the integrity of the national territory.' Section 18, Article VII states that 'the President shall be the Commander-in-Chief of all armed forces of the Philippines and whenever it becomes necessary, he may call out such armed forces to prevent or suppress lawless violence, invasion or rebellion.' Further, 'by constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy. (10)

Based on the foregoing, the President has the sole authority to put in operation the MDT, particularly the provision on 'act[ing] to meet the common dangers' involving the use of force in relation to an armed attack. To be sure, the calling-out power of the President in Section 18, Article VII is not meant as a limitation to the President's power as Commander-in-Chief to deploy the armed forces for matters relating to external defence; doubtlessly, external defence is part of the mandate of the Armed Forces of the Philippines – 'the protector of the people and the State.' Likewise, requesting the assistance of another state for collective defence is a power solely residing in the President as Head of State, Commander-in-Chief of the armed forces and chief architect of Philippine foreign policy.

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(10)BAYAN v Executive Secretary, GR No 138570, October 10, 2000.

A common misconception is that the operation of the MDT – or any use of military force for that matter – means engaging in a prohibited 'war'. Indeed, 'war' in its aggressive sense has been outlawed since 1928 through the Pact of Paris. (11) Such principle would eventually find its way in the 1935 Philippine Constitution; in the present Constitution this principle is in Section 2, Article II –

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

With the adoption of the UN Charter, not just aggressive wars but even use of force (short of 'war' in the classic sense of the word) in inter-state relations has been prohibited as a rule. Indeed, 'war' has already become legally extinct under international law. One exception is the right of self-defence under Article 51 of the UN Charter. Thus, the exercise of self-defence cannot be deemed violative of the principle renouncing war as an instrument of national policy.

Further, Section 23, Article VI of the Philippine Constitution has likewise become anachronistic –

> SECTION 23. (1) The Congress, by a vote of two-thirds of both Houses in joint session assembled, voting separately, shall have the sole power to declare the existence of a state of war.

It is also noteworthy that the authority of Congress under said provision is not even to 'go to war' but simply to 'declare the existence of a state of war.'

As an authority on Philippine Constitutional Law explains, even during the deliberations on the 1935 Constitution on the war power provision, it was clear that defensive wars had not been prohibited. Certainly, such wars need not be authorised by the legislature and falls within the power of the executive –

> Delegate Salvador Araneta asked: "¿En caso de que Filipinas fuera invadida por una nación extranjera, no estando la legislatura en funciones, qué acción podría tomar el gobierno entonces para defender la invasión? Delegate Singson-Encarnacion's answer was unequivocal: Resistir con todas sus fuerzas armadas. In other words, while the Constitution gives to the legislature the power to declare the existence of a state of war and to enact all measures to support the war, the actual power to make war is lodged elsewhere, that is, in the executive power which holds the sword of war. The executive power, when necessary, may make war even in the absence of a declaration of war. (Citation omitted) In the words of the American Supreme Court, war being a question of actualities, "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact." (Citation omitted)(12)

For various reasons ranging from commercial to political, a declaration of (the existence of a state of) war has been avoided; in fact, the last time that the US formally declared war was against Romania in 1942 during World War II. To be

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(11)General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57.

(12) J Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary (Rex Bookstore 2003) 746.

sure, it was not the last time that it has been involved in an armed conflict. Further, given that the law of armed conflict applies as soon as there is an armed conflict even without the declaration of war, (13) such formality has fallen into desuetude.

The foregoing demonstrates that military action in self-defence, individual and collective, per the MDT is not prohibited by the Philippine Constitution. Further, it is the exclusive prerogative of the President as Head of State, Commander-in-Chief of the armed forces and chief architect of Philippine foreign policy to authorise such military action. (14)

The US Constitution

With respect to the pertinent American constitutional process, the following text is instructive:

> Under the [US] Constitution, the war powers are divided between Congress and the President. Among other relevant grants, Congress has the power to declare war and raise and support the armed forces (Article I, Section 8), while the President is Commander in Chief (Article II, Section 2). It is generally agreed that the Commander-in-Chief role gives the President power to utilize the armed forces to repel attacks against the United States, but there has long been controversy over whether he is constitutionally authorized to send forces into hostile situations abroad without a declaration of war or other congressional authorization. (15)

> The War Powers Resolution [WPR] was enacted over the veto of President Nixon on November 7, 1973 [during the infamous Viet Nam conflict], to provide procedures for Congress and the President to participate in decisions to send U.S. Armed Forces into hostilities.(16) The common interpretation of the WPR has created a 60-day or 90-day window during which the president has a virtually free pass to use force. This is often referred to as the "sixty-day clock." (17) Section 4(a)(1) requires the President to report to Congress any introduction of U.S. forces into hostilities or imminent hostilities. When such a report is submitted, or is required to be submitted, Section 5(b) requires that the use of forces must be terminated within 60 to 90 days unless Congress authorizes such use or extends the time period. Section 3 requires that the "President in every possible instance shall consult with Congress before introducing" U.S. Armed Forces into hostilities or imminent hostilities. (18)

> The main purpose of the [WPR] was to establish procedures for both branches to share in decisions that might get the [US] involved in war. The drafters sought to circumscribe the President's authority to use armed forces abroad in hostilities or potential hostilities without a declaration of war or other congressional authorization, yet provide enough flexibility to permit him to respond to attack or other emergencies. (19)

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(13)Geneva Conventions (1949) Common Article 2.
(14) The 'power of the purse' residing in the Congress is nonetheless acknowledged.
(15) Matthew Weed, The War Powers Resolution: Concepts and Practice (CRS Report R42699) <https://crsreports.congress.gov/product/pdf/R/R42699/16> accessed 30 August 2021.
(16) ibid.
(17) K Gude, Understanding Authorizations for the Use of Military Force <www.americanprogress.org/issues/security/reports/2014/09/24/97748/understanding-authorizations-for-the-use-of-military-force/> accessed 30 August 2021.
(18)Weed (n 14).
(19) ibid.

consequence of the WPR, congressional sanction in the form of an ›rization for Use of Military Force is given to authorise and/or support the US lent's deployment of forces. This notwithstanding –

> Every President since the enactment of the [WPR] has taken the position that it is an unconstitutional infringement on the President's authority as Commander in Chief. (20) (21) Certainly recent Presidents have not considered prior congressional approval to be necessary in such cases. President Ford did not seek prior congressional authorization to use American troops to free the Mayagüez by force; nor did President Carter seek prior congressional authorization to undertake the attempt to rescue American hostages in Iran. President Reagan did not seek prior congressional authorization for the invasion of Grenada or for the ill-fated deployment of Marines to Beirut. None of these presidents was impeached. (22)

As the foregoing shows, there is nothing in the constitutions of the Philippines and the US that may hinder the implementation of the MDT, particularly on effectively and efficiently employing military forces in the exercise of collective defence. The presidents of both states are with full authority in this regard.

CONCLUSION

Indeed, use of force is a serious policy issue for any state pursuing its national interest. In any event, the highest policy-makers of the land are expected to take into account the rule of international law including its treaty obligations on whether or not military force is to be employed.

The MDT is a collective defence treaty between the Philippines and the US; it is more than a materiel acquisition agreement or military exercises agreement for both state-parties. In the interpretation of the MDT an understanding of international law on the use of force or jus ad bellum is essential. The legal framework definitely assists in interpreting the provisions of the MDT. Thus, questions on what 'armed attack' is, what measures in response thereto are possible and how the MDT is operationalised are addressed. Really and truly, an enhanced understanding of the MDT should engender a more prudent and strategic approach toward the parties' defence and security concerns: that neither of the parties will desire to even invoke it; instead, they would work toward preventing a situation wherein it can be invoked.

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(20) ibid.
(21) See President Nixon's Letter to the House of Representatives regarding his veto of House Joint Resolution 542 – the War Powers Resolution; also, the Memorandum of Opinion for the Attorney General dated 12 February 1980
(22) J Sidak, 'To Declare War' (1991) 41 DLJ <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3161&context=dlj> accessed 30 August 2021.