

# COMPLEMENTARITY AND THE IMPLEMENTATION OF INTERNATIONAL CRIMINAL LAW IN THE PHILIPPINES

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*The International Criminal Court (ICC) Prosecutor's preliminary examination of alleged international crimes committed in the "war on drugs" in the Philippines highlights frictions between the ICC's universalist aspirations and the diversity of domestic approaches toward prosecuting international crimes. These remain prominent following the withdrawal of the Philippines from the Rome Statute of the ICC. This article argues that whether the ICC still commences a full investigation, or actors within the Philippines pursue investigations or prosecutions concerning the "war on drugs", legislation within the Philippines will play an important role. First, the legal framework for prosecuting international crimes in the Philippines affects ICC action by virtue of the complementarity principle. Secondly, in the absence or continued delay of any ICC investigation, any prosecutions of the alleged international crimes are more likely to occur within the Philippines under its laws, in which case those laws' connections to international criminal law are of interest. Thirdly, the content of the laws that allow domestic courts to prosecute international crimes reveals information about how international criminal law is influenced and implemented in different contexts, including the Philippines. This article argues that examining domestic international crimes laws in the Philippines, and their enforcement, demonstrates how the ICC's approach to international criminal law can affect, and be adapted by, politicians, civil society and other actors, institutions and procedures. Apart from establishing legislative ability, this information might contribute to assessments of whether a state is unwilling genuinely to prosecute or investigate cases, as well as broader information about the implementation of international criminal law.*

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## I INTRODUCTION

The Prosecutor of the International Criminal Court (ICC) has opened a preliminary examination into alleged international crimes committed in the Philippines since 1 July 2016, when Rodrigo Duterte was inaugurated as President of the Philippines.<sup>1</sup> Before his inauguration, Duterte had discussed plans for "death squads" to execute suspected drug criminals.<sup>2</sup> He reiterated this intention after he took office, after which a "war on drugs" led to thousands of deaths, particularly in urban areas and including extrajudicial executions during police operations.<sup>3</sup> The preliminary examination was the ICC's first concerning international crimes allegedly committed in Southeast Asia, which includes only two state parties to the Rome Statute of the ICC (Rome Statute)<sup>4</sup> – though the Prosecutor later sought the authorisation of an investigation into crimes against humanity committed partly in both Bangladesh and Myanmar.

The Philippines' preliminary examination would expand the ICC's operations into new territory. It could also serve as another test for the global aspirations of the international criminal justice "project".<sup>5</sup> Yet, attitudes toward that project have been mixed and dynamic in the Philippines. The Philippines signed the Rome Statute in 2000, but did not ratify it until 2011 after significant advocacy by civil society groups and certain legislators, who had already secured the passage of domestic international crimes legislation – the "IHL Act" – in 2009.<sup>6</sup> Philippines law, therefore, offers a framework for investigating and prosecuting international crimes concerning the war on drugs as, for instance, "crimes against humanity". On the other hand, the drug policy has enjoyed public support –

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- 1 Office of the Prosecutor of the International Criminal Court (ICC) "Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela" (8 February 2018) International Criminal Court <icc-cpi.int> [ICC Prosecutor's Statement].
  - 2 AFP "Philippine president-elect Rodrigo Duterte says 'shoot-to-kill' orders on criminals not rhetoric" (16 May 2016) ABC News <www.abc.net.au>.
  - 3 AFP "Philippines President Rodrigo Duterte tells people to 'go ahead and kill' drug addicts" (2 July 2016) ABC News <www.abc.net.au>; Human Rights Watch "License to Kill' Philippine Police Killings in Duterte's War on Drugs" (March 2017) <www.hrw.org>; and Ateneo de Manila University "Research and Data on Government's Anti-Drug Campaign Launched" (2 July 2018) <http://ateneo.edu>.
  - 4 Considering Southeast Asia comprises the 10 members of the Association of Southeast Nations (ASEAN) and Timor-Leste, only the latter and Cambodia are parties to the Rome Statute of the International Criminal Court 2187 UNTS 3 (opened for signature 17 July 1998, entered into force 1 July 2002) [Rome Statute].
  - 5 See Frédéric Mégret "International Criminal Justice: A Critical Research Agenda" in Christine Schwöbel (ed) *Critical Approaches to International Criminal Law* (Routledge, London, 2014) 17 at 17. See also Kathryn Sikkink and Hun Joon Kim "The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations" (2013) 9 ARLSS 269 at 271.
  - 6 Rep Act No 9851 (2009) (An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide, and other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes) (The Philippines) ["IHL Act"].

as indicated by Duterte's election on that platform and popularity.<sup>7</sup> President Duterte responded to news of the preliminary examination by confirming that the "war" "will not stop" and inviting its prosecution by "a country that allows prisoners to be executed by firing squad" – although he also indicated a desire to meet with the Prosecutor.<sup>8</sup> By March 2017, the Philippines had announced its withdrawal from the Rome Statute, which became effective in March 2019.<sup>9</sup> Yet, the Prosecutor had not yet sought authorisation to commence a formal investigation.

The Philippines' preliminary examination highlights frictions between any universalist aspirations for the ICC and a diversity of "local" perspectives toward prosecuting international crimes.<sup>10</sup> The Rome Statute's principle of complementarity is directed toward this tension. This principle ensures that national jurisdictions have the primary responsibility to prosecute international crimes, because cases will only be admissible before the ICC where states with jurisdiction have not investigated or prosecuted the case, or are unwilling or unable genuinely to do so.<sup>11</sup> A broader "positive" conception of complementarity encompasses initiatives by the ICC to encourage *domestic* prosecutions of alleged international crimes.<sup>12</sup> Both aspects are relevant for the Philippines. Indeed, in her February 2018 statement, the ICC Prosecutor clarified that in "conformity with the complementarity principle ... [her] Office will be engaging with the national authorities concerned with a view to discussing and assessing any relevant investigation and prosecution *at the national level*".<sup>13</sup>

This article does not seek to predict or analyse the ICC Prosecutor's assessment of admissibility during her preliminary examination or whether the Pre-Trial Chamber might authorise an

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7 "Survey shows Filipinos more satisfied with Duterte government than any other" (18 January 2018) Reuters <[www.reuters.com](http://www.reuters.com)>; and Roselle Rasay "Drug war unsettles civil society in the Philippines" (14 December 2016) Civicus <[www.civicus.org](http://www.civicus.org)>. But see the coalition of NGOs iDefend (In Defence of Human Rights and Dignity Movement) (August 2016) <<https://idefend.ph>>; and recent indications of reduced popularity: Andreo Calanzo "Duterte's Popularity Takes Hit Amid Inflation, Attacks on Church" (10 July 2018) Bloomberg <[www.bloomberg.com](http://www.bloomberg.com)>.

8 Nestor Corrales "Duterte to ICC: Drug war will last until the day I step down" *The Philippine Daily Inquirer* (online ed, The Philippines, 12 February 2018).

9 ICC "ICC Statement on the Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law" (press release ICC-CPI-20180320-PR1371, 20 March 2018).

10 See for example Kamari Maxine Clarke *Fictions of Justice: the International Criminal Court and the Challenges of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press, New York, 2009).

11 Rome Statute, above n 4, art 17.

12 William W Burke-White "Implementing a Policy of Positive Complementarity in the Rome System of Justice" (2008) 19 CLF 59; Luke Moffett *Justice for Victims before the International Criminal Court* (Routledge, Milton Park, 2014); International Criminal Court Office of the Prosecutor *Prosecutorial Strategy 2009-2012* (1 February 2010) at 5; and Assembly of States Parties *Report of the Bureau on Stocktaking: Taking Stock of the Principle of Complementarity: Bridging the impunity gap* ICC-ASP/8/51 (18 March 2010).

13 ICC Prosecutor' Statement, above n 1 (emphasis added).

investigation, or analyse ICC cases concerning complementarity. Now that the Philippines has left the Court, the Prosecutor will find it even more challenging to proceed with an investigation and there may be legal barriers to doing so (see below). Instead, it argues that, whether an ICC case proceeds or not, or if the Prosecutor encourages national prosecutions, the content of the existing legal framework for prosecuting alleged international crimes in the Philippines will remain important for broader understandings of international criminal law. These laws not only establish whether the Philippines is "able" to prosecute the same conduct domestically as would the ICC. Rather, a closer examination of the relevant domestic laws – and their enforcement – reveals additional contextual information that is relevant for the ICC Prosecutor and others interested in the actors and factors that influence responses to international crimes.

Part II examines the nature of the international criminal justice "project" and the Rome Statute's principle of complementarity. Part III outlines the context of the Philippines' preliminary examination at the ICC and the allegations concerning international crimes in the "war on drugs". Part IV analyses the content and enforcement of the laws in the Philippines for investigating and prosecuting crimes committed in the Philippines' "war on drugs", with reference to the Rome Statute. Having identified the connections between international criminal law and international crimes laws in the Philippines, part V reviews how these may affect ICC action and the prosecution of alleged international crimes in the "war on drugs". While these domestic laws could support investigations and prosecutions that would prevent ICC cases being admissible, they also demonstrate the dynamic nature – and broader relevance – of the domestic implementation of the Rome Statute crimes.

## ***II INTERNATIONAL CRIMINAL JUSTICE AND COMPLEMENTARITY***

The Rome Statute's preamble situates the ICC within a global context, in which "all peoples are united by common bonds", where "unimaginable atrocities ... deeply shock the conscience of humanity" and "serious crimes of concern to the international community as a whole must not go unpunished".<sup>14</sup> Scholars have identified the establishment of the ICC as the culmination of many years of international norm making, with the Court acting as the institutional capstone of the normalisation of international criminal justice.<sup>15</sup> The ICC's Assembly of States Parties to the Rome Statute (ASP), as well as civil society groups<sup>16</sup> and international organisations<sup>17</sup> have promoted the

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14 Rome Statute, above n 4, preamble at [1], [2] and [3].

15 Frédéric Mégret "In defense of hybridity: Towards a representational theory of international criminal justice" (2005) 38 CILJ 725; and Michael J Struett *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (Palgrave Macmillan, New York, 2008).

16 ICC "ICC hosts launch of civil society forum to commemorate the 20th anniversary of the Rome Statute" (press release ICC-CPI-20180216-PR1358, 16 February 2018).

17 United Nations "UN chief urges universal ratification of International Criminal Court's founding treaty" (4 December 2017) <news.un.org>.

universal ratification of the Rome Statute, which has 123 state parties. They have also called for "the integration of its norms into national legal systems".<sup>18</sup> This involves states parties incorporating the Rome Statute crimes into domestic legislation, instituting legal frameworks for cooperating with the ICC and prosecuting international crimes that occur within states' jurisdictions. An understanding that international criminal justice involves the prosecution of individuals for international crimes with international involvement, especially via ICC proceedings, has been described as the international criminal justice "project".<sup>19</sup> Scholars have drawn attention to the voices mis- and unheard by this "project" and the plurality of understandings of international criminal justice.<sup>20</sup>

The Philippines government historically contributed to the normalised vision for the Rome Statute by adopting domestic international crimes legislation, ratifying the Statute, establishing national accountability mechanisms and promoting the election of Philippines nationals as ICC judges as a way of "affirm[ing] its continuing support" for the ICC.<sup>21</sup> The Philippines statements at the annual ASP meetings have consistently called for other states, especially in the Asia-Pacific, to ratify the Rome Statute.<sup>22</sup> Yet, they also argued that the principle of complementarity should involve helping a state to "strengthen its domestic capability to devise their *own system* of protecting its citizens".<sup>23</sup> Well before Duterte's election, the government had used an ASP statement to caution that "Rome was not built in one day. True Indeed. But it can also be said that Rome began its decay when it failed to be cognizant of the changing needs of the times."<sup>24</sup> The Philippines approach to the ICC has, therefore, been supportive, but has promoted domestic prosecutions and the recognition of states parties' differing priorities.

The drafters and promoters of the Rome Statute have always been cognisant of the challenges that arise from operating alongside national legal systems. One of the most prominent tools for managing

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18 Assembly of States Parties "Assembly of States Parties to the Rome Statute elects a new President and six judges" (press release ICC-ASP-20171207-PR1348, 8 December 2017).

19 Mégret, above n 15.

20 Michelle Burgis-Kasthala "Scholarship as Dialogue? TWAIL and the Politics of Methodology" (2016) JICJ 1; and Clarke, above n 10.

21 Assembly of States Parties *Election of a judge to fill a judicial vacancy of the International Criminal Court* ICC-ASP/13/14 (14 April 2015) at 10.

22 See for example Republic of the Philippines "Statement of the Philippines, General Debate at the 14th session of the Assembly of States Parties of the Rome Statute of the International Criminal Court" (19 November 2015) <icc-cpi.int>.

23 Emphasis added.

24 Republic of the Philippines "Statement by HE Libran N Cabactulan, Permanent Representative of the Republic of the Philippines to the United Nations" (21 November 2013) <asp.icc-cpi.int>.

these tensions is the principle of complementarity.<sup>25</sup> Article 17 of the Rome Statute confirms that "the Court shall determine that a case is inadmissible where ... [t]he case is being investigated or prosecuted by a State which has jurisdiction over it", or such a state has investigated a case and decided not to prosecute, unless the state is (or was) unwilling or unable genuinely to carry out the investigation or prosecution. Cases must comply with this principle in order to be admissible before the ICC, which arguably reflects states' duties to prosecute international crimes.<sup>26</sup> Thus, one of the matters that the Prosecutor will consider during her preliminary examinations, including regarding the Philippines, is "whether the case is or would be admissible under article 17".<sup>27</sup>

The ICC Chambers have clarified that complementarity requires the "same person" to be investigated or prosecuted for "substantially the same conduct" as is the subject of the ICC case.<sup>28</sup> However, the use of the word "substantially" does not mean that states can prosecute individuals for less serious or significantly fewer crimes.<sup>29</sup> Domestic cases should address similar criminal acts and incidents as the ICC, although these need not be defined as occurring at the exact same times and places. This requires a case-by-case analysis of whether the domestic proceedings address "substantially the same conduct as alleged in the proceedings before the Court".<sup>30</sup>

Article 17(3) explains that inability concerns "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings". According to Meisenberg, there "is an overwhelming consensus that the wording of 'otherwise unable to carry out its proceedings' covers the absence or inadequacy of substantive legislation, and that in such

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25 Markus Benzig "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity" (2003) 7 Max Planck YUNL 591; and Mohamed M El Zeid *The principle of complementarity in international criminal law: origin, development, and practice* (Martinus Nijhoff Publishers, Leiden, 2008).

26 Rome Statute, above n 4, preamble at [6]; and Benzig, above n 25, at 596. See also El Zeid, above n 25, concerning the history of the principle.

27 Rome Statute, above n 4, art 53(1)(b).

28 *Prosecutor v Muthaura (Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute)* ICC Pre-Trial Chamber II, ICC-01/09-02/11-96, 30 May 2011 at [38].

29 *Prosecutor v Gaddafi (Prosecution's Response to "Libyan Government's further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi")* ICC Pre-Trial Chamber I, ICC-01/11-01/11-276-Red2, 12 February 2013 at [28]–[29].

30 *Prosecutor v Muthaura (Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute")* ICC Appeals Chamber, ICC-01/09-02/11-274, 30 August 2011 at [39].

circumstances a case would be admissible before the ICC".<sup>31</sup> This suggests that states can best ensure that they can maintain primacy over prosecutions by ensuring that domestic legislation is consistent with the Rome Statute. Indeed, some non-governmental organisations (NGOs) and actors used the principle of complementarity to persuade states to implement international crimes laws that replicated the Rome Statute obligations, including via offering checklists and model laws that drew on the Rome Statute provisions.<sup>32</sup> The Philippines is, therefore, among many Rome Statute parties that have adopted domestic legislation for prosecuting Rome Statute crimes (see part IV).

However, there is no obligation upon states to prosecute individuals for the exact same "international crimes" as in the Rome Statute. It is possible for "ordinary crimes" provisions such as murder to be charged rather than "murder as a crime against humanity", as long as the other requirements are met.<sup>33</sup> Thus, cases may be inadmissible if (among other jurisdictional and gravity criteria) the Philippines can establish that the same persons are or have been investigated or prosecuted for substantially the same conduct as is the subject of ICC proceedings, if the issue comes before the ICC Pre-Trial Chamber.<sup>34</sup>

The lack of clear requirement to prosecute individuals specifically for international crimes may seem to minimise the significance of how the Rome Statute is specifically implemented in domestic law, from the perspective of the ICC. It might even be argued that there is no need for specific international crimes legislation, or that any analysis beyond simply identifying the *ability* of domestic judiciaries to respond to alleged crimes is unnecessary or moot. However, the choice between "ordinary" or international crimes prosecutions may have domestic political and practical ramifications. For example, "international crimes" have additional elements to prove (such as that crimes occurred as part of a widespread or systematic attack). There are also several reasons why a comparison between national laws and the Rome Statute remains important for the ICC – and why

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31 Simon M Meisenberg "Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court" (2014) 5 AJIL 123 at 125; Bacio J Terracino "National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC" (2007) 5 JICJ 421; and ICC "Informal Expert Paper: The Principle of Complementarity in Practice" (2003) <icc-cpi.int>.

32 Christian De Vos "All roads lead to Rome: Implementation and domestic politics in Kenya and Uganda" in Christian De Vos, Sara Kendall and Carsten Stahn (eds) *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, Cambridge, 2015) 379. See for example Amnesty International "International Criminal Court: Updated Checklist for Effective Implementation" (6 May 2010) <www.amnesty.org>.

33 Terracino, above n 31; and *Prosecutor v Gaddafi (Decision on the admissibility of the case against Abdullah Al-Senussi)* ICC Pre-Trial Chamber I, ICC-01/11-01/11-466-Red, 11 October 2013 [*Gaddafi*] at [85].

34 *Prosecutor v Katanga (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* ICC Appeal Chamber ICC-01/04-01/07-1479 OA 8, 25 September 2009 at [56].

such a comparison should not be limited to the crimes the Prosecutor appears most interested in (such as killings in the Philippines).

First, there may be cases in which "ordinary" domestic crimes legislation does not address "substantially the same conduct" as the ICC is considering, such as specific war crimes, some forms of sexual and gender-based violence, or where the crime is not readily captured by domestic crimes provisions – including acts committed against a group, as for the crime of genocide. Secondly, domestic international crimes legislation may incorporate differences in definitions, elements of crimes and exclusions of liability that restrict the scope for adequate state prosecutions. Comparing the state's laws to the Rome Statute provisions will help to identify such "gaps". Thirdly, the ICC Prosecutor's Office might analyse domestic legislation if it is seeking to encourage domestic prosecutions. Whether the potential for domestic investigations and prosecutions becomes the focus of attention because of admissibility proceedings or for positive complementarity, or even for "lower-level" perpetrators, it is relevant to know which laws are available for that purpose. Fourthly, the extent to which a state has implemented the Rome Statute provisions into its domestic law may reveal the presence of influential actors, arguments, institutions and procedures that represent important context for the ICC in its investigations. Apart from establishing legislative ability, this information might contribute to assessments of whether a state is unwilling genuinely to prosecute or investigate cases, as well as broader information about the implementation of international criminal law.

There are, therefore, multiple reasons for analysing domestic laws for prosecuting international crimes, especially when the ICC may pursue cases in that country. This article considers the laws and institutions for prosecuting international crimes in the Philippines in that light, after reviewing the background to the ICC's preliminary examination.

### **III THE PHILIPPINES' PRELIMINARY EXAMINATION**

Article 53 of the Rome Statute provides the legal framework for the Prosecutor's determination as to whether there is "a reasonable basis to proceed with an investigation". In the case of the Philippines, the preliminary examination was initiated at the Prosecutor's initiative (*proprio motu*) under art 15, rather than by referral by a state or the Security Council. Without pre-empting the Prosecutor's conclusions, this section reviews the general parameters of that preliminary examination, including questions of jurisdiction and admissibility, simply to begin demonstrating how the ICC's actions are interrelated with international criminal law and legal activities within the Philippines.

After President Rodrigo Duterte took office in July 2016, there began to be reports that thousands of alleged drug users and criminals were being killed without trial.<sup>35</sup> By August, two United Nations

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<sup>35</sup> AFP, above n 3.



Special Rapporteurs<sup>36</sup> and the Philippines Commission for Human Rights had raised the prospect of an ICC investigation into the killings.<sup>37</sup> Representative Harry Roque, who was later the President's spokesperson, warned the President that international criminal law could apply to the "war on drugs", noting that "the principle of state immunity is not an effective shield against the International Criminal Court".<sup>38</sup> In October 2016, the ICC Prosecutor noted that "any person in the Philippines who incites or engages in acts of mass violence ... is potentially liable to prosecution before the Court".<sup>39</sup> The Prosecutor received a number of communications requesting an ICC investigation. These included one from Jude Sabio, a lawyer of "self-confessed hitman Edgar Matobato", who submitted a communication in relation to what he called "the situation of mass murder in the Philippines".<sup>40</sup> Then in June 2017, two legislators filed a "supplemental complaint" with the ICC, which they said affirmed Sabio's allegations.<sup>41</sup>

The Prosecutor indicated that the preliminary examination would focus upon events occurring since 1 July 2016, when Duterte became President, and upon allegations of extra-judicial killings, including "extra-judicial killings in the course of police anti-drug operations".<sup>42</sup> The term "extra-judicial killings" does not appear in the Rome Statute or in the Philippines' IHL Act. One of the main charges to be considered was crimes against humanity of murder, although the Prosecutor's inquiries might reveal evidence of other international crimes.

These appear to be the type of crimes that might fall within the jurisdiction of the ICC (though the Prosecutor will continue to examine information related to the killings) if perpetrated within the territory or by nationals of a state party to the Rome Statute. The Prosecutor would also need to consider whether the case would be admissible under art 17 ("complementarity"), sufficiently "grave", and whether "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice".<sup>43</sup> This process requires the Prosecutor (and later, ICC Chambers) to consider

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36 Office of the High Commissioner of Human Rights (OHCHR) "UN experts urge the Philippines to stop unlawful killings of people suspected of drug-related offences" (18 August 2016) OHCHR <ohchr.org>.

37 See for example Jefferson Antiporda "Int'l court can look into drug killings – CHR" (23 August 2016) *The Manila Times* (online ed, Manila, 23 August 2016).

38 Harry Roque "Privilege Speech of Rep Roque (H)" (1 August 2016) Philippines Congress <congress.gov.ph>.

39 ICC Prosecutor "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines" (13 October 2016) <icc-cpi.int>.

40 See James Biron "Full Text of the Complaint before the International Criminal Court (ICC) against Pres Rodrigo Duterte" (24 April 2017) Biron Law <jamesbiron.com>.

41 Jodesz Gavilan "Additional 'communication' vs Duterte filed before Int'l Criminal Court" (6 June 2017) Rappler <rappler.com>. Another communication was submitted in August 2018: Lindsay Offutt "Philippines citizens file ICC complaint" (31 August 2018) Jurist <jurist.org>.

42 ICC Prosecutor's Statement, above n 1.

43 Rome Statute, above n 4, art 53.

the legal framework for investigating and prosecuting alleged international crimes in the Philippines, alongside the Rome Statute.

In relation to jurisdiction, the Philippines became a state party to the Rome Statute in 2011 with approval by the Senate (all but one voted in favour,<sup>44</sup> although the Constitution only requires the agreement of two-thirds of Senators).<sup>45</sup> This was nearly ten years following signature and involved significant advocacy by NGOs, politicians and lawyers in the Philippines.<sup>46</sup> In particular, the Philippines Coalition for the International Criminal Court (PCICC):<sup>47</sup>

... pursued the campaign for more than a decade, which included filing a *mandamus* case before the Supreme Court urging it to compel the Executive to transmit the ratification papers to the Senate.

The Philippines Official Gazette website published reports of joining the ICC,<sup>48</sup> though the Duterte administration suggested that the Philippines did not fulfil its internal requirements for ratification or to make the Rome Statute valid law in the Philippines, because the treaty was not published in that Gazette.<sup>49</sup> Lawyers in the Philippines rejected that argument and it does not seem to have been pursued.<sup>50</sup>

On 17 March 2018 the Philippines formally deposited its notice of withdrawal from the Rome Statute. A case before the Supreme Court of the Philippines argued that this withdrawal was ineffective as a matter of domestic constitutional law, highlighting potential connections between compliance with the Philippines' domestic legal framework and its international criminal law obligations under the Rome Statute.<sup>51</sup> However, it did not proceed to judgment before the withdrawal

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44 Edwin Lacierda "Statement of the Presidential Spokesperson on the Philippines joining the ICC" (24 August 2011) Official Gazette <officialgazette.gov.ph>.

45 Constitution of the Republic of the Philippines (1987), art VII, s 21: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate".

46 Senate of the Philippines "Legarda Lauds Fellow Senators for International Criminal Court Treaty's Swift Approval" and "Co-Sponsorship Speech, Senator Loren Legarda" (17 August 2011) <senate.gov.ph>.

47 "Asia-Pacific Update" (December 2011) Coalition for International Criminal Court <iccnw.org> at 4; *Pimentel v Office of the Executive Secretary* [2005] GR No 158088 at [6]; and Soliman M Santos Jr "Correspondents' Reports: The Philippines" (2003) 6 YIHL 561.

48 Lacierda, above n 44; and Department of Foreign Affairs "Philippines deposits instrument of ratification for Rome Statute of the International Criminal Court" (31 August 2011) Official Gazette <officialgazette.gov.ph>.

49 Anna Felicia Bajo "ICC treaty must be published in gov't publication, Duterte insists" (18 March 2018) GMA News Online <gmanetwork.com>.

50 Audrey Morallo "Publication not among usual requirements for treaties, agreements" *The Philippine Star* (online ed, Manila, 15 March 2018); and Nicole-Anne C Lagrimas "CenterLaw: No requirement of publication to make Rome Statute binding" (15 March 2018) GMA News <gmanetwork.com>.

51 *Pangilinan v Cayetano* [2018] GR No 238875; and *Philippine Coalition for the International Criminal Court [PCICC] v Office of the Executive Secretary* [2018] GR No 239483 [*PCICC cases*].

took effect. On that point, art 127(1) of the Rome Statute confirms that the "withdrawal shall take effect one year after the date of receipt of the notification" and, in art 127(2), that such withdrawal:<sup>52</sup>

... shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

In relation to Burundi's withdrawal from the Rome Statute, the ICC Pre-Trial Chamber indicated that art 127(1) ensures that the Court retains jurisdiction over crimes perpetrated before withdrawal. This suggests that, as the Court's website concerning the Philippines maintains,<sup>53</sup> the ICC does retain jurisdiction over crimes committed in the Philippines before 17 March 2019.<sup>54</sup> It is not clear whether the second part of art 127(2) requires states to *cooperate* where a *preliminary examination* was underway, but a formal investigation had not yet been authorised at the withdrawal date. Moreover, if a preliminary examination is *not* considered a "matter which was already under consideration by the Court" upon withdrawal, as opposed to a formal investigation or case, this might allow scope for withdrawal to restrict the "continued consideration" of such a "matter". In the case of Burundi, the Pre-Trial Chamber authorised an investigation one day prior to Burundi's withdrawal becoming effective, so this issue was avoided. Here, because no formal investigation seems to have been authorised prior to 17 March 2019, the Philippines is probably not obliged to cooperate with any ICC proceedings and there may even be questions about its jurisdiction.<sup>55</sup>

In practice, the ICC has experienced challenges in securing state cooperation with ICC investigations and prosecutions even before states have withdrawn from the Statute.<sup>56</sup> This context makes the Prosecutor's task especially challenging in relation to the Philippines. A Pre-Trial Chamber may even consider that the practical and political barriers to holding an effective investigation would mean that the process is not in the "interests of justice".<sup>57</sup> The Philippines also does not have domestic

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52 Rome Statute, above n 4, art 127.

53 ICC "Preliminary Examination: The Philippines" (31 July 2019) <icc-cpi.int>.

54 See *Situation in the Republic of Burundi (Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi")* ICC Pre-Trial Chamber III, ICC-01/17, 9 November 2017 [*Burundi Decision*] at [24].

55 At [26].

56 *Prosecutor v Kenyatta (Second decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute)* ICC Trial Chamber V(b), ICC-01/09-02/11, 19 September 2016.

57 *Situation in the Islamic Republic of Afghanistan (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan)* ICC Pre-Trial Chamber II, ICC-02/17-33, 12 April 2019 (under appeal). See for example Parisa Zangeneh "The ICC's Afghanistan Decision and the Interests of Justice" (19 April 2019) IntLawGrrls <ilg2.org>.

legislation in place to facilitate the cooperation of its institutions, though there are some individuals and organisations that have supported the ICC and may have welcomed additional legal instruments to facilitate state cooperation (see below).

Turning to art 17, the legal framework and justice processes in the Philippines are directly relevant to the ICC's assessment of admissibility concerning the "complementarity" principle. There have been limited domestic criminal investigations and prosecutions for police officers related to specific killings in the "war on drugs" in the Philippines.<sup>58</sup> It would first be necessary to consider whether these amount to "cases" investigated or prosecuted that address substantially the same conduct as an ICC investigation. Given the rarity of such cases and the likelihood that the Prosecutor's attention is directed to additional and separate conduct, incidents and perpetrators than those addressed in these limited situations, the ICC could determine that cases are admissible even without considering whether the Philippines is unable or unwilling genuinely to conduct investigations and prosecutions – since no similar cases have occurred to begin with.<sup>59</sup> In order to conclude that there had been no relevant "cases", it would still be helpful to examine what laws and specific offences had been – or could have been – drawn upon by Philippines investigators and courts (see part IV).

If they were considered to be "cases", the question of whether the state was or had been "unable or unwilling genuinely" to carry out investigations or prosecutions would arise. Duterte is quoted as saying that police officers who kill during drug operations would be pardoned and promoted.<sup>60</sup> There has also been a potentially "unjustified delay" in pursuing prosecutions<sup>61</sup> given the period elapsed since Duterte became President and the "war" began. Moreover, there have been allegations of interference with the actors that would be most important for investigating and ensuring domestic prosecutions, including the Philippines Commission on Human Rights and via the imprisonment on drug charges of a Senator and former Chair of the Philippines Commission on Human Rights, Leila de Lima, since February 2017, as well as the removal of the Chief Justice of the Supreme Court, Maria Lourdes Sereno, from her position. Both de Lima and Sereno had sought investigations into the killings.<sup>62</sup> These issues raise serious questions about the willingness of authorities in the Philippines to investigate or prosecute alleged crimes occurring during the "war on drugs". They also exhibit the

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58 Phelim Kine "A Whisper of Accountability in Philippine 'Drug War' Rare Prosecution of Police Underscores Need for UN-Led Probe" (29 January 2018) Human Rights Watch <hrw.org>; and Lian Buan "19 cases of drug war deaths filed in court – DOJ" (8 September 2017) Rappler <rappler.com>.

59 See Sarah MH Nouwen *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge University Press, Cambridge, 2015) at 43.

60 Manuel Mogato "Philippines war on drugs and crime intensifies, at least 60 killed in three days" (17 August 2017) Reuters <reuters.com>.

61 Rome Statute, above n 4, art 17(2)(b).

62 "Sereno spokesperson: Chief Justice to attend SC session on ouster petition" (3 April 2017) CNN Philippines <cnnphilippines.com>.

tensions between international and varied local positions toward the alleged international crimes. The key laws, actors and institutions involved in any investigations or prosecutions can also be illuminated by analysing the legal framework for prosecuting international crimes in the Philippines (as in parts IV and V).

On the other hand, while the situation could certainly change, the Philippines justice framework remains "able" to the extent that it is currently functional and (subject to the issues raised below) national authorities are in theory capable of exercising judicial authority, obtaining custody of accused persons, gathering evidence and carrying out proceedings.<sup>63</sup> There is also legislation that could allow Philippines courts to prosecute international crimes, which, as noted above, arguably forms a component of assessing "ability". The remainder of this article demonstrates what can be gained by further analysing these laws.

#### ***IV PROSECUTING INTERNATIONAL CRIMES IN THE PHILIPPINES***

The Philippines legal system provides several avenues to respond to international crimes. The Constitution includes a Bill of Rights and "adopts the generally accepted principles of international law as part of the law of the land".<sup>64</sup> Many international humanitarian law treaties have been ratified, including the Rome Statute.<sup>65</sup> The Philippines also has the capacity to prosecute international crimes under national legislation, showing a clear and close connection to the Rome Statute, although amnesties and immunities may apply.

##### ***A Domestic Legislation***

There are several mechanisms in the Philippines for investigating and prosecuting conduct that could be characterised as an international crime of the type considered by the ICC. First, there are mechanisms that specifically address extrajudicial killings: the focus of the ICC Prosecutor's preliminary examination. Administrative Order No 35 in 2012 created an "Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and other Grave Violations of the Right

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63 See *Gaddafi*, above n 33. But see Argee Abadines and John Pennington (eds) "Philippine judiciary and criminal justice system under pressure: An inside look" (6 February 2017) ASEAN Today <aseantoday.com>; and United Nations Human Rights Council *Report of the Working Group on the Universal Periodic Review – Philippines* A/HRC/36/12 (2017).

64 Constitution of the Republic of the Philippines, art II, s 2. See the argument that the "constitutional requirement that the treaty be concurred in by no less than two-thirds of ... the Senate ... is, for legal intent and purposes, an equivalent to the required transformation of treaty law into municipal law": *Government of the United States of America v Hon Guillermo G Purganan and Mark B Jiminez, a.k.a. Mario Batacan Crespo* [2002] GR No 148571 per Vitug J (dissenting).

65 See International Committee of the Red Cross (ICRC) "Treaties, States Parties and Commentaries: Philippines" ICRC <[https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=PH](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=PH)>.

to Life, Liberty and Security of Persons" to combat the "impression of a culture of impunity" by investigating unresolved historic and contemporary cases.<sup>66</sup> The Operational Guidelines for the Administrative Order define "extra-legal" or "extra-judicial killings" as killings where the victim was an advocate and:<sup>67</sup>

[W]as targeted and killed because of the actual or perceived membership, advocacy, or profession; the person/s responsible for the killing is a state agent or non-state agent; [and] the method and circumstances of attack reveal a deliberate intent to kill.

The same article clarifies that:<sup>68</sup>

[for the] purposes of the focused mandate of AO No 35, killings related to common criminals and/or the perpetration of their crimes shall be addressed by other appropriate, mechanisms within the justice system.

The Philippines police could argue that the killings of alleged "common criminal" drug users or dealers in the "war on drugs" do not fall within the scope of this definition, although it seems directed toward excluding "common" offences of murder or homicide from the Committee's mandate. Still, Administrative Order No 35 only establishes a mechanism (Committee) to investigate relevant cases – it is not a criminal law providing for prosecutions.

The Philippines Rule on the Writ of *Amparo* covers "extralegal killings and enforced disappearances or threats thereof", but does not define these terms.<sup>69</sup> The Supreme Court has noted that "extra-judicial killings and enforced disappearances in this jurisdiction are not crimes penalized separately from the component criminal acts undertaken to carry out these killings".<sup>70</sup> The writ is a constitutional procedure allowing for various forms of court-ordered relief, rather than an representing an offence for criminal prosecution.

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66 Administrative Order No 35 (2012) (Creating an Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and other Grave Violations of the Right to Life, Liberty and Security of Persons).

67 Art I(1). See also Republic of the Philippines Department of Justice "Inter-Agency Committee on Extra-Legal Killings and Enforced Disappearance Meet to Adopt Guidelines for Investigation and Prosecution: Operational Guidelines" (19 April 2013); and "Salient Provisions of the Operational Guidelines of Administrative Order No 35 Series of 2012" <didm.pnp.gov.ph>.

68 "Salient Provisions of the Operational Guidelines of Administrative Order No 35 Series of 2012", above n 67.

69 Republic of the Philippines Supreme Court "The Rule on the Writ of Amparo" AM No 07-9-12-SC, 24 October 2007, s 1.

70 *Razon v Tagitis* [2009] GR No 182498 at [3], discussed in Ateneo Human Rights Centre "Summary & Extrajudicial Killings in the Philippines: A Submission to the United Nations Human Rights Council for the Universal Periodic Review of the Philippines" (2017) <ateneo.edu>.

Senator Leila de Lima filed a Bill known as the Anti-Extrajudicial Killing Act<sup>71</sup> in October 2016 when she was the Chair of a Senate Inquiry into the "war on drugs" killings.<sup>72</sup> The Bill provided for greater cooperation between the Philippines National Police, Commission on Human Rights and National Bureau of Investigation, sought to create an Inter-Agency Council Against Extrajudicial Killings and specified a penalty of life imprisonment for those found guilty of extrajudicial killings. However, this Bill was not passed.<sup>73</sup>

Secondly, the underlying criminal conduct that the ICC Prosecutor is concerned with could be prosecuted under the Philippines Penal Code, for example as murder,<sup>74</sup> homicide,<sup>75</sup> illegal detention,<sup>76</sup> slavery<sup>77</sup> or rape.<sup>78</sup> Murder and homicide would be most relevant in relation to extrajudicial killings and the limited number of prosecutions of police officers pursued in 2018 involved those charges.<sup>79</sup> If an ICC investigation into the situation in the Philippines is authorised, other crimes against humanity might be relevant beyond killings. There are also parts of the Philippines that are arguably experiencing non-international armed conflict, especially in Mindanao,<sup>80</sup> which remains subject to martial law,<sup>81</sup> meaning that war crimes could be relevant for any future investigation, too.

Thirdly, other legal instruments and mechanisms in the Philippines have addressed international crimes. Legislation was passed in 2009 to allow the prosecution of torture and other cruel, inhuman

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71 An Act Defining Extrajudicial Killing, Providing for its Penalty, and Other Purposes 2016 (Senate Bill No 1197).

72 Section 4 of Senate Bill No 1197 (2016) defined "extrajudicial killings" as the unlawful and deliberate killing of targeted individuals or groups thereof, carried out by agents of the state and under its order or acquiescence in lieu of arrest, investigation and prosecution. Extrajudicial killing includes summary killing perpetrated by private individuals for purposes of carrying out on their own or in the context of vigilantism, a campaign or policy of the state.

73 At the time of writing, there was likely to be another attempt. See Lian Buan "Landmark bill vs extrajudicial killings pushed" (7 July 2019) Rappler <rappler.com>.

74 Revised Penal Code 1930 (Philippines), art 248.

75 Art 249.

76 Art 267.

77 Art 272.

78 Art 335.

79 See Kine, above n 58, and Buan, above n 58.

80 See for example Virtual OpCen Disaster Response Operations Monitoring and Information Center (DROMIC) "Armed Conflict in Maguindanao [08 March 2018]" (15 March 2018) <dromic.dswd.gov.ph>.

81 Proclamation No 216 (2017) extended the state of martial law until 31 December 2018.

and degrading treatment (Torture Act)<sup>82</sup> and in 2012, the perpetration of enforced or involuntary disappearances was made a crime under the Enforced Disappearances Act.<sup>83</sup> Finally, the IHL Act clarified the incorporation of war crimes, genocide and crimes against humanity into Philippines law in 2009. Thus, in relation to the first reason for analysing domestic legislation suggested in section II, there are offences for prosecuting international crimes in the Philippines – but this article will show that our analysis should not stop here.

### ***B The IHL Act***

Given the challenges faced by advocates in securing the ratification of the Rome Statute,<sup>84</sup> civil society in the Philippines pursued the adoption of domestic international crimes legislation. Over time, their strategy evolved from framing the proposed legislation as consistent with the Geneva Conventions and Additional Protocol II<sup>85</sup> (so as to avoid seeming to circumvent executive ratification processes),<sup>86</sup> to returning to the Rome Statute model as the most appropriate representation of existing international criminal law.<sup>87</sup>

Indeed, given that the Constitution incorporates "generally accepted principles of international law as part of the law of the land", the Act was conceived of as implementing the Philippines' existing obligations under international law and ensuring that the crimes in the Rome Statute could be prosecuted within Philippines courts (before and after ratification).<sup>88</sup> The Act, therefore, comprehensively adopts the Rome Statute crimes, but there are some differences that appear to reflect the domestic drafting process and context.

For instance, due to a controversy concerning the status of non-state actors in internal conflicts in the Philippines,<sup>89</sup> s 2(g) of the IHL Act confirms that it "shall not affect the legal status of the parties

82 Torture Act 2009 (Philippines).

83 Enforced Disappearances Act 2012 (Philippines).

84 Harry L Roque Jr "Combating Impunity: Legal Nuances of the Philippine IHL Act and the Philippine Ratification of the Rome Statute of the International Criminal Court" (2008–2011) 4 APYIHL 262 at 262.

85 For example Senate Bill No 2135 (2005).

86 Indeed, the passing of the Act prior to ratifying the Rome Statute was considered an "exceptional situation". See Tathiana Flores Acuña "The Enlargement and Definitions of Genocide and Crimes Against Humanity in the Philippines – RA No 9851" (2013) 58 Ateneo LJ 1 at 5.

87 The Philippines Thirteenth Congress "Draft Explanatory Note (for a "Philippine Statute on Crimes Against International Humanitarian Law")" (copy on file with author) [Draft Explanatory Note] at 3.

88 Flores Acuña, above n 86, at 4–5; and Roque, above n 84, at 263.

89 ICRC "Philippines, Application of IHL by the National Democratic Front of the Philippines: NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, 5 July 1996" (31 January 2012) <icrc.org/casebook>; and Cong Corrales "Army questions 'belligerency posturing' of NDF" (22 September 2011) Minda News <mindanews.com>.



to a conflict, nor give an implied recognition of the status of belligerency". Section 3 of the IHL Act includes most of the crimes against humanity definitions from art 7(2) of the Rome Statute, but in the IHL Act these also apply to war crimes and genocide. The IHL Act's crime against humanity of "arbitrary deportation or forcible transfer of population" is defined identically to the Rome Statute's "deportation or forcible transfer",<sup>90</sup> though the different name might suggest an additional requirement of arbitrariness, at least for deportation.<sup>91</sup> However, a change from the grave breach of "unlawful deportation" to "arbitrary deportation" could represent a lower threshold.<sup>92</sup> These distinctions may appear minor, but responded to the practice of forced evacuations known as "hamletting" in the Philippines and the frequency of incidents causing internal displacement. The definition of "forced pregnancy" in the Act also omits the Rome Statute's qualification that the "definition shall not in any way be interpreted as affecting national laws relating to pregnancy".<sup>93</sup>

The IHL Act clarified the penalties applicable to war crimes<sup>94</sup> and adopted the provisions in the Rome Statute, although with some differences. For instance, s 4(a) of the IHL Act includes delay in repatriating prisoners of war and other protected persons in an international armed conflict as an additional "grave breach of the Geneva Conventions" not included in the Rome Statute. Subsection (b) covers the crimes found in common art 3 of the Conventions. Section 4(c) of the IHL Act then sets out crimes drawn from Arts 8(2)(b) and (e) of the Rome Statute,<sup>95</sup> but does not distinguish between whether they were committed in a national or international armed conflict.<sup>96</sup> A delegate of the International Committee of the Red Cross delegate apparently recommended this structure based on some European and Canadian legislation.<sup>97</sup> However, this merge expanded the number of crimes considered relevant in the Philippines, given the relatively more common incidence of internal

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90 This discrepancy remains in House Bill No 3834 (2016) (An Act Amending Republic Act 9851 "An Act Defining and Penalizing Crimes Against International Humanitarian Law, Genocide and Other Crimes Against Humanity, Organizing Jurisdiction, Designating Special Courts, and for Related Purposes") [IHL Amendment Bill].

91 IHL Act, s 6(d). Compare Rome Statute, above n 4, art 7(1)(d).

92 IHL Act, s 4(a)(6). Compare Rome Statute, above n 4, art 8(2)(a)(vii). However, the IHL Amendment Bill would reverse this discrepancy.

93 IHL Act s 3(j). Compare Rome Statute, above n 4, art 7(2)(f). The IHL Amendment Bill reinserts this qualifier.

94 Roque, above n 84, at 269.

95 With the addition of launching an attack against works containing dangerous forces and ordering the displacement of the population without security or imperative military reason.

96 Though s 4(c) of the IHL Act requires that they be considered "within the established framework of international law".

97 Draft Explanatory Note, above n 87.

conflict.<sup>98</sup> Finally, s 4(c)(24) retains the Rome Statute's age limit of 15 years for conscription or enlistment into the armed forces, but provides a higher age of 18, with the addition of *recruiting* children "into an armed group other than the national armed forces".<sup>99</sup> The higher age limit was derived from the Optional Protocol to the Convention on the Rights of the Child,<sup>100</sup> but a lower age of 15 was considered necessary for *state* forces to allow the Philippine Military Academy to continue school recruitment activities.<sup>101</sup>

Section 5 of the IHL Act largely reflects the Rome Statute provision for the crime of genocide.<sup>102</sup> However, it introduced two additional groups beyond the "national, ethnical, racial or religious group[s]" covered by the Rome Statute:<sup>103</sup> "social groups"; and "any other similar and permanent group".<sup>104</sup>

Most relevantly, given the Prosecutor's indicated interest in extra-judicial killings, the provision for crimes against humanity, s 6, largely replicates the Rome Statute provision, but includes the crime of persecution on the ground of "sexual orientation or other grounds that are universally recognized as impermissible in international law".<sup>105</sup> This aimed to reflect developments in international human rights law.<sup>106</sup> Section 6 adopted the Rome Statute's definition of "torture", which can be perpetrated by any individual, whereas the Convention against Torture requires the crime to be committed "by or

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98 For example, s 4(c)(6) of the IHL Act is consistent with art 15 of Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) 1125 UNTS 609 (opened for signature 8 June 1977, entered into force 7 December 1978), though it is not included in the Rome Statute. Section 4(c)(7) of the IHL Act is drawn from Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflict (Protocol I) 1125 UNTS 3 (opened for signature 8 June 1977, entered into force 7 December 1978) and art 8(2)(b)(v) of the Rome Statute, but extends to non-international armed conflict, with the additional wording "making non-defended localities or demilitarized zones the object of attack". This is consistent with some state practice: see ICRC "Customary IHL" (2016) <icrc.org> at ch III, section C.

99 Compare arts 8(2)(b)(xxvi) (international armed conflict) and 8(2)(e)(vii) (non-international armed conflict) of the Rome Statute, above n 4.

100 Draft Explanatory Note, above n 87; and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2173 UNTS 222 (opened for signature 25 May 2000, entered into force 12 February 2002).

101 The Academy requires applicants to be graduates and enlistment is open to male citizens aged 18 to 30 years: National Defense Act 1935 (Philippines), s 27.

102 For a detailed discussion, see Flores-Acuña above n 86.

103 Rome Statute, above n 4, art 6.

104 Other states with legislation addressing genocide involving "social groups" include Estonia, Latvia, Paraguay and Slovenia: see Flores-Acuña, above n 86, at 12.

105 IHL Act, s 6(h).

106 Flores-Acuña, above n 86.

at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity".<sup>107</sup> The latter definition was adopted in the Torture Act prior to the passage of the IHL Act, meaning that Philippines law offers two provisions for prosecuting acts of torture. The IHL Act also implemented an offence against "enforced or involuntary disappearances" in the Philippines,<sup>108</sup> based upon the Rome Statute's definition of "enforced disappearance of persons".<sup>109</sup>

In relation to criminal responsibility, s 8 of the Act is modelled on art 25 of the Rome Statute. To confirm the approach in *Yamashita*, s 10 of the IHL Act provides for superior responsibility.<sup>110</sup> Section 12 adopts the Rome Statute position of allowing a limited defence of superior orders. The Act also includes provisions for witness and victim protection and for a legal representative to present victims' "views and concerns",<sup>111</sup> whereas victim participation is not provided for in the general Rules of Criminal Procedure.<sup>112</sup> Further, "in addition to existing provisions in Philippine law and procedural rules", the Act provides for reparations ordered "directly against a convicted person".<sup>113</sup> The IHL Act did not establish a "trust fund", though the government could legislate for state-paid reparations, as it did in 2013 in relation to the Marcos regime.<sup>114</sup>

Thus, the IHL Act reflects the provisions in the Rome Statute with some minor (largely progressive) differences arising from the domestic negotiations and context. With respect to the second reason for analysing domestic legislation suggested in section II, there are not necessarily "gaps" (though see below regarding immunities). This legislation could, in theory, facilitate prosecutions concerning the "war on drugs" using international crimes offences – whether at the ICC, or (responding to the third reason for this analysis) in domestic courts.

However, beyond that, the deviations from the Rome Statute throughout the IHL Act display elements of the domestic context that may be relevant for the ICC Prosecutor's, and others', approach toward international criminal law in the Philippines. These include the history and ongoing impact of

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107 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987), art 1(1); and Torture Act, 2009 s 3(a).

108 IHL Act, ss 6(i) and 3(g). See also Enforced Disappearances Act 2012.

109 Rome Statute, above n 4, art 7(2)(i).

110 In conjunction with the definition of "superior" in s 3(r) of the IHL Act. See also *Prosecutor v Yamashita* (1945) 4 Law Reports of Trials of War Criminals 33 (United States Military Commission, Manila); and *In re Yamashita* 327 US 1 (1946).

111 IHL Act, s 13.

112 Revised Rules of Criminal Procedure 2000 (Philippines).

113 IHL Act, s 1.

114 For example, the Philippines government passed Rep Act 10368 (2013) in relation to crimes committed during the government of former President Marcos.

domestic internal conflicts, the prevalence of forced displacements ("hamletting"), the influence of human rights principles (from the 1935 Constitution or earlier and throughout political debates of the Marcos and post-Marcos era) and gender and reproductive health advocacy, a rich history of prosecuting international crimes and contributing influential jurisprudence, and the promotion of victim/survivor interests via a range of diverse civil society groups.

Further, rather than demonstrating the implementation of the Philippines' obligations to prosecute international crimes, the passage of the IHL Act reflected only one part of various actors' ongoing engagement with international criminal justice issues, both prior to and subsequent to this law being adopted. Other Bills seeking to amend the IHL Act have been submitted since the Rome Statute was ratified.<sup>115</sup> An inter-agency and civil society working group (including representatives of the University of the Philippines, for example) tasked with drafting an amendment to the IHL Act and an ICC cooperation bill initially reviewed foreign and model legislation, especially for the cooperation component. The resulting IHL Amendment Bill aimed to bring the IHL Act closer to the Rome Statute, in ways that might have *narrowed* the scope of the Philippines' international crimes legislation.<sup>116</sup> Nevertheless, the 2009 IHL Act remains the only domestic Philippines law specifically addressing the Rome Statute crimes, apart from the incorporation of the Rome Statute via ratification.<sup>117</sup>

### ***C Amnesties and Immunities***

Amnesties have been used in the Philippines for political and other crimes in the past, including for separatist groups since the 1970s and 1980s,<sup>118</sup> and official security actors.<sup>119</sup> Such amnesties typically do not cover "crimes against chastity, rape, torture, kidnapping for ransom, use and trafficking of illegal drugs and other crimes for personal ends".<sup>120</sup> However, the President retains power under the 1987 Constitution to grant pardons as well as, with Congress approval, amnesties<sup>121</sup> and the IHL Act does not exclude their potential operation for crimes against humanity, genocide or

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115 For example, to give "Philippine authorities the full jurisdiction over suspected or accused persons covered under the said law, regardless of an ongoing investigation or prosecution of another court or international tribunal": Senate Bill No 1290 (2015) (explanatory note) at 1.

116 IHL Amendment Bill, at 1.

117 See *PCICC cases*, above n 51.

118 See ICRC "Philippines: Practice Relating to Rule 159: Amnesty" (2016) IHL Database Customary IHL <icrc.org>.

119 ICRC, above n 118.

120 ICRC, above n 118.

121 Amnesties require the agreement of the majority of Congress: Constitution of the Republic of the Philippines, art VII, s 19.

war crimes. In contrast, the Torture Act and Enforced Disappearances Act stipulates that perpetrators "shall not benefit from any special amnesty law or similar measures".<sup>122</sup>

Section 9 of the IHL Act confirms the irrelevance of official capacity for prosecutions, "*other than* the established constitutional immunity from suit of the Philippine President during his/her tenure", or immunities arising from international law.<sup>123</sup> While the 1987 Constitution does not expressly provide for presidential immunities, Philippines courts have held that immunity for sitting Presidents arises from the constitutional principle of the separation of powers.<sup>124</sup>

The act of ratifying the Rome Statute *after* the adoption of the IHL Act should demonstrate the "specific intent of the President and the Senate – on behalf of the Philippine state – for the President to be legally bound by the [ICC] Statute" – including art 27.<sup>125</sup> However, while art II(2) of the Constitution incorporates "the generally accepted principles of international law" into Philippines law, legislation is normally needed to implement ratified treaties. Whether or not international law allows for Heads of State to be immune from prosecution while in office has been a controversial question, including at the ICC.<sup>126</sup> Thus, if Philippines courts find that the President remains immune from prosecution under the IHL Act and, or, other domestic or customary international law, this could render Philippines courts "unable" to prosecute the President for international crimes while he remains in office (although other perpetrators might be pursued). Overall, the Philippines has a robust legal framework for prosecuting international crimes, although it demonstrates how the ICC's approach to international criminal justice via the Rome Statute can intersect with domestic legislative processes and priorities.

#### ***D Domestic Cases***

Despite the adapted features of these laws and their connection to the Rome Statute, courts in the Philippines have not convicted perpetrators of international crimes.<sup>127</sup> In 2008, Alston noted that the "criminal justice system's failure to obtain convictions and deter future killings should be understood

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122 Torture Act 2009, s 16; and Enforced Disappearances Act 2012, s 23.

123 Emphasis added.

124 See Roque, above n 84, at 273–274. This is "settled in jurisprudence": *Lozada v Arroyo* [2012] GR Nos 184379–80 at [24].

125 See *PCICC cases*, above n 51.

126 Dapo Akande and Sangeeta Shah "Immunities of State Officials, International Crimes, and Foreign Domestic Courts" (2010) 21 EJIL 815. See also *Bayan Muna v Romulo* [2011] GR No 159618 [*Bayan Muna*] at [1] per Carpio J (dissenting): "The principles of law embodied in the Rome Statute were already generally accepted principles of international law even prior to the adoption of the Statute".

127 Roque, above n 84, at 276.

in light of the system's overall structure".<sup>128</sup> Today that structure includes a variety of bodies. The Philippines National Police and National Bureau of Investigation investigate crimes in the Philippines, while the IHL Act specifies that the police, the Department of Justice and the Commission for Human Rights "or other concerned law enforcement agencies shall designate prosecutors or investigators" for crimes under the Act.<sup>129</sup> Other bodies monitor the prosecution of alleged international crimes, including the Commission of Human Rights, the Ombudsman, a national monitoring mechanism and inter-agency committee. Yet the police are especially implicated in the "war on drugs", while other official bodies such as the Commission on Human Rights also face barriers to pursuing independent investigations.

Civil society actors and "victims" confront a number of challenges in bringing international crimes cases. These include security fears (especially for witnesses), difficulties gathering evidence and serious court delays – that is, factors associated with determining "inability", derived from a lack of official "willingness" to ensure the genuine prosecution of serious human rights violations. These barriers have affected the investigation and prosecution of incidents occurring well before the "war on drugs" and before the IHL Act was enacted in December 2009, such as the Maguindanao massacre of 2009.<sup>130</sup> As another example, in 2006, the Melo Commission named General Jovito Palparan as potentially responsible for numerous killings and disappearances.<sup>131</sup> In 2011, the Supreme Court ordered the immediate release of two missing women and named Palparan among those apparently responsible.<sup>132</sup> Palparan was eventually arrested in Manila in 2014 and in September 2018, Palparan was convicted for the kidnapping and illegal detention of Cadapan and Empeño, more than ten years after they disappeared and due to the persistence from the victims' families and other activists.<sup>133</sup>

In the *Bayan Muna* case of 2011, the Supreme Court rejected an argument that a Philippines–United States Non-Surrender Agreement "defeat[ed] the object and purpose" of the Rome Statute.<sup>134</sup>

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128 Philip Alston *Promotion and Protection of all Human Rights, Civil, Political and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* A/HRC/8/3/Add.2 (2008) at 45.

129 IHL Act, s 7.

130 Centre for International Law "Advocacy Cases" (2016) <<http://centerlaw.org/blog/advocacy-cases/>>.

131 Jose AR Melo and others "Independent Commission to Address Media and Activist Killings" (22 January 2007) <[pcij.org](http://pcij.org)>.

132 *Boac v Cadapan* [2011] GR Nos 184461–62, 184495, 187109 at [31] [*Cadapan*].

133 *People of the Philippines v M/Gen Jovito Palparan* [2018] RTC Bulacan Crim Case No 3905-M-2011 and 3906-M-2011.s.

134 *Bayan Muna*, above n 126.

The Supreme Court refused to find that s 17 of the IHL Act<sup>135</sup> required the Philippines to surrender suspects to the ICC, because, the Court suggested, "there is, as yet, no overwhelming consensus, let alone prevalent practice ... that the prosecution of internationally recognized crimes of genocide, etc. *should be handled by a particular international criminal court*".<sup>136</sup>

Other constitutional and civil cases have involved international criminal law issues, such as the *Vinuya* "comfort women" case.<sup>137</sup> The Supreme Court has also employed the principle of superior responsibility to establish respondents' accountability (though not criminal responsibility) for disappearances in some petitions for constitutional writs of *amparo*.<sup>138</sup> However, following the passage of the IHL Act, it was considered to be "clear" that enforced disappearances should be understood with reference to that Act. This has meant that "the petitioner in an *amparo* case has the [additional] burden of proving by substantial evidence the indispensable element of government participation".<sup>139</sup> The adoption of domestic international criminal laws thus had an uncertain impact on the promotion of domestic prosecutions or convictions.

The Mamasapano incident of 2015 occurred subsequent to the adoption of the IHL Act and ratification of the Rome Statute. Civil society suggested that the case be referred to the ICC.<sup>140</sup> An "international monitoring team" advised that combatants should be prosecuted, including under the IHL Act,<sup>141</sup> with explicit reference to s 4(c)(7) – attacking undefended localities.<sup>142</sup> However, Department of Justice investigators considered that the international crimes provisions would not apply, as there was no "armed conflict" as defined by the Act.<sup>143</sup> Instead, 90 members of the Moro

135 Section 17 of the IHL Act allows Philippine authorities to surrender or extradite suspects to another state or "the appropriate international court" that is investigating or prosecuting the suspect.

136 *Bayan Muna*, above n 126.

137 *Vinuya v Romulo* [2010] GR No 162230 at [28].

138 See, with reference to Rome Statute, *Rubrico* and with reference to the IHL Act, separate opinions of Brion and Carop Morales J in *Rubrico; Cadapan; Rodriguez v Arroyo* [2011] GR No 191805, 193160 at [15].

139 *Navia v Pardico* [2012] GR No 184467, with reference to Brion J in *Rubrico*, above n 138. This definition was confirmed by s 3(b) of the Enforced Disappearances Act 2012.

140 Philippine Coalition for the International Criminal Court (PCICC) "Letter to His Excellency Benigno C Aquino Jr" (14 October 2010) (copy on file with author).

141 International Monitoring Team "Verification and Assessment Report – Ceasefire Violations Mamasapano Incident January 25, 2015" (5 April 2015) <archive.peace.gov.ph> at 16.

142 At 14. See also Loretta Ann P Rosales "Statement of the Commission on Human Rights Chair on the Senate Mamasapano Report" (21 March 2015) <gov.ph>. With reference to the Senate Report, see "Full Text: Senate panel's report on Mamasapano clash" *The Philippine Star* (online ed, Manila, 18 March 2015).

143 "Report of the Joint National Bureau of Investigation – National Prosecution Service Special Investigation Team (NBI-NPS SIT) on the January 25, 2015 Mamasapano Incident" (March 2015) <doj.gov.ph>. See also Board of Inquiry "The Board of Inquiry Mamasapano Report, March 2015" (13 March 2015) <gov.ph> at 91.

Islamic Liberation Front (MILF) and other separatist groups were reportedly charged with "direct assault with murder" in August 2016.<sup>144</sup> This reflects how international crimes often involve additional elements that can be difficult to establish when compared to other domestic criminal law provisions.

The first conviction under the IHL Act came in March 2019 in relation to the armed conflict surrounding the city of Marawi (Marawi siege), by the Maute–ISIS group in 2017. Junaid Awal was found guilty of rebellion as well as the crime against humanity of rape and other forms of sexual violence, with evidence presented by a minor at the time who was raped and treated as a slave during five months of captivity.<sup>145</sup> This case did not involve a perpetrator from official forces (Awal's group was in conflict with Philippines security forces) and did not relate to the "war on drugs", but does demonstrate a successful prosecution of crimes under the IHL Act, despite the additional elements that needed to be proven.

It seems that while the IHL Act has had some impact on Philippines jurisprudence, it is yet to result in convictions or even trials specifically for international crimes involving official perpetrators, including the police. Of interest to the ICC, these cases reveal the practical challenges involved in securing evidence (and accused persons), which can require cooperation with the conflicted military and police, as well as the difficulty involved in fulfilling the elements of the international crimes provisions in the domestic law of the Philippines.

In summary, the IHL Act largely replicates the provisions of the Rome Statute, although it slightly extends the reach of some crimes. These differences were drawn from international law, but also reflect influential domestic issues and civil society engagement. Ongoing legislative developments represent further engagement with international criminal law in the Philippines, which has involved a range of different actors from civil society, academia and government agencies. The input of these actors and institutions, and their earlier ability to progressively "adapt" domestic international criminal laws in light of the domestic context, suggests that the ICC Prosecutor is likely to have found an array of allies and divergent opinions within the Philippines during her preliminary examination, despite Duterte's opposition to the Court. Yet, despite the potential for pursuing a "positive" complementarity approach in the Philippines given its legislation, the enforcement challenges suggest reasons for caution. Security challenges cast doubt upon the "willingness" of authorities to investigate and prosecute international crimes *genuinely* even before the "war on drugs". These have translated into cases where "available" courts with robust legislative frameworks for prosecuting international crimes were nonetheless unavailable to conduct genuine proceedings, because they could not "obtain the

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144 Edu Punay "DOJ indicts 88 MILF, BIFF men over SAF deaths" *The Philippine Star* (online ed, Manila, 16 August 2016).

145 Kristine Joy Patag "Maute member convicted for rebellion, crime against International Humanitarian Law" *The Philippine Star* (online ed, Manila, 15 March 2019).



accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings": in effect, "inability" as envisioned by art 17(3) of the Rome Statute.

## ***V CONCLUSION***

The Philippines has passed progressive international crimes legislation and established mechanisms to respond to alleged international crimes. These affect the ICC, since these laws could render the Philippines state "able" to investigate and prosecute "cases", including beyond killings in the "war on drugs", as and if the Prosecutor and Pre-Trial Chamber consider a formal investigation. If the jurisdictional and other requirements are considered met, there would be opportunity for the ICC Pre-Trial Chambers to elaborate upon the relationship between (in)ability (including via the availability and content of legislation) and unwillingness. Otherwise, the ICC will miss an opportunity to further clarify the operation of the complementarity principle in a part of the world that it is yet to significantly engage with. If the Prosecutor's preliminary examination does not proceed, or turns toward supporting domestic initiatives, the domestic laws will be the main mechanism for any attempts toward prosecuting alleged international crimes in the Philippines.

Moreover, the drafting process and content of such laws reveals additional relevant information for the ICC – and others pursuing prosecutions in the "war on drugs". In the case of the Philippines, mechanisms and laws for responding to serious human rights violations display the influence of domestic human rights advocates, lawyers, academics and legislators, who take a range of evolving perspectives toward prosecuting international crimes. Legislative processes have been a core feature of engagement with international criminal law in the Philippines and have allowed relevant "local" issues to be incorporated into the Philippines' laws to an extent. These include the presence of internal armed conflicts, practices of forcible transfers and the influence of human rights principles. Further, the challenges faced by activists in securing prosecutions in the past show that the involvement of police in the "war on drugs" and protective statements by Duterte, while extreme, are also not completely novel, or uncontested. This represents relevant context for the ICC whether it is investigating crimes, attempting to secure cooperation or encouraging state investigations and prosecutions in the Philippines.

Analysing domestic international crimes laws in context reminds us that despite universalist visions for the Rome Statute, the domestic implementation of its provisions can involve local adaptation. Even when such differences appear progressive, the potential for prosecutions or convictions remains situated within political and legislative dynamics involving multiple interest groups and institutions. Likewise, the ICC Prosecutor is bound by the Rome Statute, but faces her own practical and political challenges, including the non-cooperation and withdrawal of the Philippines. The complementarity principle manages intersections between varied mechanisms for prosecuting international crimes, but must be applied with an awareness that these contexts are dynamic. The case of the Philippines tests the aspirations of international criminal justice "project" by highlighting the frictions – and connections – between the ICC and domestic legal frameworks.

