



OSSERVATORIO SUI TRIBUNALI INTERNAZIONALI PENALI N. 5/2022

1. RECENT DEVELOPMENTS CONCERNING THE ICC INVESTIGATION INTO THE SITUATION IN THE PHILIPPINES

1. *Introduction*

It has been more than 6 years since the Office of the Prosecutor (OTP) expressed concern over events occurring in the Philippines under former President Rodrigo Duterte's War on Drugs campaign in an October 13 statement (*see* the [Statement of the Prosecutor concerning the situation in the Republic of the Philippines](#), 13 October 2016). Incidents continued whilst accountability remained nonexistent, despite the presence of national remedies set in place to address extrajudicial killings (*see* the remedies of [Writ of Amparo](#) and [Habeas Data](#) protecting individuals if, for instance, their rights to life, liberty or security are violated by a public official or employee: such remedies should also cover extralegal killings and enforced disappearances or threats. *See also* [Republic Act No. 1035](#), also known as the The Anti-Enforced or Involuntary Disappearance Act of 2012).

Citizens turned to protests and activism, human rights groups publicly condemned Duterte and his actions, and communications were filed before the ICC pushing for the then Prosecutor, Fatou Bensouda, to open a preliminary investigation (*see* [Jude Sabio's 77-page communication](#) asking the International Criminal Court (ICC) to charge Duterte and 11 other government officials with mass murder and crimes against humanity; and [then-senator Antonio Trillanes IV and congressman Gary Alejano's communication](#)).

Finally, on 8 February 2018, the then Prosecutor, Fatou Bensouda, decided to open a preliminary examination of the situation into the Philippines which would look into alleged crimes against humanity committed by the government – including the possible criminal responsibility of the President himself (*see* the [Statement of the Prosecutor of the International Criminal Court](#) on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018). In reaction to this, a month later Duterte announced the Philippines' withdrawal from the Court (*see* [the Philippines' notice of withdrawal from the ICC to the UN](#), 15 March 2018).

Prosecutor Bensouda requested the authorization to open an investigation on 24 May 2021 after determining that there was sufficient evidence to establish that the situation fell under the Court's jurisdiction. Three months after the end of her term as Prosecutor and following the appointment of the new Prosecutor, Karim Khan, Pre-Trial Chamber I ("PTC I") authorized the opening of an official investigation (*see* PTC I's [Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15\(3\) of the Statute](#), No. ICC-01/21, 15 September 2021 – hereinafter: *PTC I's decision*). Prosecutor Khan openly urged the Duterte government to cooperate with the investigation, although the Philippines' cooperation obligations in light of the withdrawal remain a topic of discussion.

Though this was an important step towards seeking accountability for the alleged crimes, it was soon met with resistance from the Philippine government (Duterte had already [voiced its opposition towards the ICC](#) in the past). Barely two months after the opening of the investigation, the Duterte government formally requested the ICC to suspend its current investigation since investigations were already taking place at the national level (*see* [Philippine Ambassador to the Netherlands J. Eduardo Malaya's notification to the Prosecutor](#), 10 November 2021). Thus, Prosecutor Khan paused the investigation a few days later, all the while continuing to analyse information at hand regarding the situation. He also stated that the acceptance of deferral means that the government must provide proof that investigative steps have been or are being undertaken with the aim of holding perpetrators accountable for the alleged crimes (*see* [Prosecutor notifies Pre-Trial Chamber I of a request from the Republic of the Philippines to defer his investigation under article 18\(2\) of the Rome Statute](#), 23 November 2021).

As of today, the investigation is still officially suspended. The Prosecutor filed a request before PTC I on 24 June 2022 seeking to resume the investigation, stating that the Philippine government had "not demonstrated that it has investigated or is investigating its nationals or others within its jurisdiction within the meaning of article 18(2)" (*see* [Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18\(2\)](#), para.2 – hereinafter: *Prosecutor's request to resume the investigation*). However – unsurprisingly – this was again met with resistance from the government: on September 8 (the deadline set by PTC I for the Philippine government to comment on Prosecutor Khan's request to resume the investigation), Solicitor General Menardo Guevarra submitted a statement formally asking the Court to deny the request to resume said investigation, raising the argument that the ICC has no jurisdiction over the situation in the Philippines since the incidents are already being investigated at the national level (*see* ["SolGen asks ICC to deny request to resume 'drug war' probe"](#), 8 September 2022).

The next step in the process must emanate from PTC I, which should issue a decision on the OTP's request to resume the investigation. One can imagine that there is a high likelihood that the answer will be affirmative since in its September 2021 decision to authorise the opening of an investigation, PTC I found that there is a reasonable basis to believe that crimes against humanity were committed in the Philippines. However, in this comment I will not only focus on the request to resume the investigation: in a more general aim, I will attempt to provide a short analysis of the legal issues under consideration before the ICC.

I will first focus on presenting the scope of the investigation. I will base my analysis on PTC I's decision and its relevant findings. From this I will also be able to deduce what impact the withdrawal may have on the scope of the investigation. In Section 3, I will turn to the Prosecutor's request to resume the investigation and discuss the admissibility of the situation. In so doing, I will also provide a brief overview of the relevant provisions contained in the Rome Statute (notably Article 18) before tackling each of the parties' arguments on said admissibility. In the final section I will share my views regarding the prospects for the investigation in light of my analysis.

2. *The scope of the investigation*

a) Relevant findings in PTC I's decision to authorise the investigation

In accordance with the PTC's decision to authorise the opening of an investigation into the situation in the Philippines, the crimes within the jurisdiction of the Court, allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign, will be considered in the investigation (*see PTC I's decision*, paras. 70-71). In addition, the Pre-Trial Chamber found that the Court's temporal jurisdiction is not affected by the Philippines' withdrawal from the Statute as the alleged crimes occurred while it was still a State Party (*see paras. 109-111 PTC I's decision*, in line with Article 70 of the [Vienna Convention on the Law of Treaties](#) – hereinafter: *VCLT*).

Therefore, the PTC affirms that the scope of the authorised investigation will extend to “any crime within the jurisdiction of the Court, limited by the temporal, territorial and factual parameters of the situation as defined in the Article 15(3) Request. In the assessment of the Chamber, the parameters of the situation are sufficiently defined to satisfy the requirements of Article 15(4) of the Statute.” (*see PTC I's decision*, para. 118). Such scope is confirmed in the most recent communication of the Prosecutor (*see paras. 7-8 of the Prosecutor's request to resume the investigation*).

b) Impacts of the withdrawal: the OTP's claim to jurisdiction over crimes within the investigation

While it is clear that the withdrawal came into full effect on 17 March 2019, thus ending the Philippines' membership to the ICC, I consider it relevant to discuss the impact of the withdrawal matter on the Court's temporal jurisdiction.

In PTC I's decision, the Chamber found itself confronted with the following question: can the ICC claim jurisdiction over crimes that occurred in a State that has already withdrawn from the Statute? The PTC I affirms that despite the withdrawal having taken effect on 17 March 2019, the Court retains jurisdiction over crimes that occurred in the Philippines within the duration that it was a State Party – that is, from 1 November 2011 up to 16 March 2019 (*see PTC I's decision*, para. 111). This affirmation is in perfect accordance with the principle governing the Court's exercise of jurisdiction, enshrined in Article 12(1) of the Rome Statute: when a State becomes Party to the Rome Statute, it agrees to submit itself to the jurisdiction of the ICC with

respect to the crimes enumerated in the Statute (*see* the Court’s digital publication ‘[Understanding the International Criminal Court](#)’).

In this fashion, by ratifying the Rome Statute, the withdrawing State Party thus accepts the Court’s jurisdiction for crimes that occurred in the period of its membership, without regard to its current status. PTC I’s arguments include recourse to the Article 70(b) *VCLT* and Article 127 ICC Statute, establishing that the withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination (*see PTC I’s decision*, paras. 110-111).

The Rome Statute also prescribes, in Article 127(2), that the withdrawing State Party is by no means discharged by the obligations arising from the Statute while it was still a State Party. Finally, PTC I referred to ICC case law in its deliberations to further prove its point: in the [Burundi](#) situation, Pre-Trial Chamber III affirmed that a State Party’s withdrawal from the Rome Statute does not affect the Court’s exercise of jurisdiction over crimes committed prior to the effective date of the withdrawal (*see* paragraph 24 of [Pre-Trial Chamber III’s Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi \(Public redacted version\)](#), 25 October 2017 – hereinafter: *Burundi decision*).

However, the difference with the Burundi situation is that the PTC authorised a formal investigation just two days before Burundi’s withdrawal became effective, whereas the request for the opening of an investigation was filed more than two years after the Philippines’ withdrawal took effect. In the Burundi decision, PTC III confirmed that any cooperation obligations arising for Burundi would “survive the withdrawal”, and at the same time seemed to introduce the condition that the authorization to open an investigation must be filed before the withdrawal takes effect (*see* paragraph 26 of *Burundi decision*).

In its decision authorizing the investigation into the situation in the Philippines, PTC I also cited the *Abd-Al-Rahman* case, where Pre-Trial Chamber II confirmed that “[t]he withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court and takes effect only one year after the date of its receipt at the earliest; also, it has no impact either on already ongoing proceedings or on duties of cooperation with the Court in connection with investigations and proceedings having commenced prior to the date on which the withdrawal became effective” (*see* paragraph 33 of [Pre-Trial Chamber II, Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman, Decision on the Defence ‘Exception d’incompétence’](#) 17 May 2021).

In conclusion, PTC I affirmed that the Court retains jurisdiction over the crimes that took place in the Philippines up until 17 March 2019, notwithstanding the withdrawal taking full effect. However, I stress the importance of establishing a distinction between what Sergey Vasiliev calls the “mere existence of jurisdiction” and the Court’s “ability to exercise it” (*see* S. VASILIEV, [Piecing the Withdrawal Puzzle: may the ICC still open an investigation in Burundi? \(Part 2\)](#), in *Opinio Juris*, 6 November 2017). What he is referring to here are the two elements that make up the Court’s jurisdictional mechanism: (1) the preconditions to the exercise of jurisdiction – which according to PTC I have clearly been fulfilled; (2) the conditions under which said jurisdiction can be triggered. In short, the ICC’s jurisdiction can only be exercised if the requirements contained in Article 13 of the Rome Statute are fulfilled (either via referral from a State Party or

the United Nations Security Council, or through the initiation of an investigation *proprio motu* by the OTP).

This brings us to the question of the cooperation obligations of a State that is no longer a Party to the ICC, but is still under investigation: does the Court have the ability to exercise its jurisdiction in the case of the investigation into the situation in the Philippines? The legal issue is that the exact procedural context of this case is currently unprecedented at the ICC. I believe that the answer depends on one's interpretation of Article 127(2) of the Statute. Loosely paraphrased, it states that withdrawing from the ICC will not affect the broad term of "investigations" if these proceedings started prior to the effective date of withdrawal. Since the wording used in the Rome Statute is vague, it is uncertain whether the opening of a preliminary examination satisfies the conditions set forth in Article 127(2) to uphold the withdrawing State's cooperation obligations.

In sum, the Philippines is under no obligation to cooperate with the Court's proceedings if the preliminary examination launched by the OTP cannot be viewed as falling under the term "criminal investigations and proceedings" used in Article 127(2). However, if we choose a broad interpretation – that is, considering preliminary examinations as being part of the formal investigation – then the Philippines is bound by the Rome Statute to cooperate with the ongoing investigation. In this case, enforcement of the Philippines' cooperation will be a challenge since the Philippine government denies the Court's claim to jurisdiction over the acts being investigated.

There is no definite answer as the Court has yet to rule on this question.

3. *The request to resume the investigation*

a) Relevant provisions in the Rome Statute: Article 18

Article 18 of the Rome Statute is the main point of reference when touching upon preliminary rulings regarding admissibility of a situation, especially in the case where a deferral has taken place. In the *Prosecutor's request to resume the investigation*, he sets out two main legal issues which he argues PTC I must take into consideration when making a decision on whether or not to lift the deferral.

According to Article 18(2), the State requesting a deferral must first of all substantiate its request. In other words, the State requesting the deferral must bear the "evidential burden" to substantiate its request with relevant arguments and evidence. This refers to providing sufficient information and material to support the request and to enable a determination that the deferral is justified (*see para. 31 of the Prosecutor's request to resume the investigation*).

Next, the State requesting the deferral must demonstrate that such deferral is justified, meaning this State takes on the "burden of proof" making use of the records of past and current investigations, prosecutions, and court proceedings, including case files, police reports, court dockets or judicial decisions (*see Prosecutor's request to resume the investigation, para. 36*).

Still in reference to Article 18, the Prosecutor deduces some principles the Pre-Trial Chamber must follow in making its preliminary ruling on admissibility, notably, on the basis of an assessment of whether the State's investigation *sufficiently mirrors* the Court's intended

investigation. If it does, then the investigation should be deferred. This was confirmed in the [Decision on the admissibility of the case against SaifAl-Islam Gaddafi](#) (para. 72). In order to be considered as “sufficiently mirroring the Court’s intended investigation”, there must not be a *complete* overlap between the domestic proceedings and the case before the Court. Rather, what is required is a “judicial assessment of whether the case that the State is investigating sufficiently mirrors the one that the Prosecutor is investigating” (*see Prosecutor’s request to resume the investigation*, para. 50).

b) The admissibility of the situation: a debate between the Prosecutor and the Philippine government

The Philippine government presented two main arguments in support of its deferral request: first, that the ICC does not have jurisdiction because the alleged incidents do not amount to crimes against humanity; second, that the investigation should be referred in accordance with the rules on complementarity.

In Solicitor General Menardo Guevarra’s request to the ICC to deny the resumption of the investigation, he substantiates the former claim by arguing that the incidents do not qualify as an “attack” against the civilian population, but rather against illegal activities. He further stated that the said occurrences were not in furtherance of a state or organizational policy to commit such an attack, following the wording used by Article 7 in the Rome Statute. To defend these statements, Guevarra argued that the anti-drug campaign is a ‘legitimate law enforcement operation’.” (*see* Abogado article [‘SolGen Guevarra on ICC: PH, Duterte didn’t commit crimes against humanity’](#) and an article published in CNN Philippines [‘Gov’t to ICC: PH did not commit crimes against humanity’](#)).

The second argument presented by the Philippine government is that the principle of complementarity has not been respected by the Prosecutor and thus the investigation should be deferred. However, this should be read *in tandem* with the principle that the local investigation must sufficiently mirror the one intended by the Court in order to justify the deferral. According to Article 17(1)(a) of the Rome Statute, a case is admissible if domestic authorities did not start any investigation or in case it can be proved that the State is unwilling or unable genuinely to carry out the investigation or prosecution. In the Solicitor General’s statement, he indicates that the alleged crimes are “already being investigated and prosecuted by the proper agencies and that the state is neither unwilling or unable to carry out these domestic proceedings”.

Following the notification of withdrawal, in his notification to PTC I of a request from the Republic of the Philippines to defer his investigation in November 2021, the Prosecutor has stated that the Philippine government must provide proof that investigative steps have been or are being undertaken with the aim of holding perpetrators accountable for the alleged crimes. In September 2022, the Solicitor General gave some comments regarding the investigations [in an interview with CNN Philippines](#), stressing that the government is indeed conducting a genuine investigation, and that they are “willing and able” to do it, but that they needed “ample time” which he justified with the lengthiness of proceedings when investigating criminal offenses. However, to this day there have been no official updates that such investigative steps are ongoing.

The Prosecutor on the other hand, in his request to resume the investigation, set out several factors which should be considered in determining whether the local investigation launched by the Philippine government sufficiently justifies the deferral request – in other words, whether the local investigation sufficiently mirrors the Court’s intended investigation. First, the Prosecutor supports that a significant part of the materials provided by the Philippine government are irrelevant for the analysis under article 18(2), because they relate to domestic proceedings and initiatives that do not result in criminal prosecutions. He alleges that most of the proceedings are administrative by nature, and do not seem to lead to any meaningful investigations (*see Prosecutor’s request to resume the investigation*, paras. 73-95). To further complete his analysis and come to the conclusion that the cases and activities referenced by the Philippine government do not sufficiently mirror the Prosecution’s investigation, the Prosecutor asserts no concrete investigative steps have been proved by the Philippine government in a vast majority of the referred cases, and that these cases represent only a small fraction of the alleged criminal conduct and concern only low-level perpetrators (*see paras. 104-114 of the Prosecutor’s request to resume the investigation*). This conduct is similar to the case of Afghanistan in which the government shifted the focus of the national proceedings to only the low-profile cases in an attempt to shield the high-ranking politicians from being investigated (*see G. FERRER, [The Question of Deferral Within the ICC’s Philippines Investigation](#), in PILPG Blog, 3 January 2022*). Eventually, this led to the [authorization to resume the investigation](#).

In light of the above, the Prosecution submits that the domestic investigation does not sufficiently mirror the Court’s intended investigation since the requirements of Article 18 have not been met; thus, the investigation should be resumed.

All in all, I believe the Philippine government’s rejection of the Court’s jurisdiction once again looks to be a political strategy to avoid investigation. Moreover, the government’s arguments are at times conflicting. On the one hand, it states that the alleged incidents do not fall under the category of crimes against humanity, therefore negating the Court’s material jurisdiction; but on the other hand, it claims that the government “is investigating or has investigated its nationals or others within its jurisdiction with respect to the alleged crimes against humanity of murder under Article 7(1)(a) of the Statute ‘committed throughout the Philippines between 1 July 2016 and 16 March 2019 in the context of the so-called “war on drugs” campaign, as well as in the Davao area between 1 November 2011 and 30 June 2016”’. At the national level, he states that the crimes committed fall under offences present in Philippine law, such as homicide, murder, parricide, or reckless imprudence resulting in homicide. Administrative and civil sanctions can also be invoked which apply specifically to members of the Philippine National Police (hereinafter: *PNP*) by the Internal Affairs service, which was established for the purpose of ensuring proper disciplinary action against *PNP* members (*see the [Philippine Ambassador to the Netherlands’ letter to the OTP](#)*). One could interpret these statements as silent acquiescence to the Court’s material jurisdiction. However, it is up to PTC I to determine whether the arguments and material presented by the Philippine government support a finding that the relevant national proceedings sufficiently mirror those of the Court.

4. Conclusions: prospects for the Court's investigation after the deferral request

As mentioned, the next step in the Philippines situation's procedural timeline belongs to PTC I. According to Article 18(3) of the Rome Statute, the deferral is open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation. The Prosecutor has effectively proven to be proactive in his request to resume the investigation in June 2022. On the other hand, it has been a year since the investigation was deferred and PTC I has yet to make a decision.

It is difficult to imagine the prospects for this investigation since there is not much case law on this matter. In respect to the [Venezuela I](#) situation, the Venezuelan government requested a deferral of investigations on 16 April 2022. The Prosecutor filed an application to seek authorisation to resume the investigation on 1 November 2022, using the same requirements as in the Philippines situation to determine whether the deferral is warranted or not, but adding the requirement that "the domestic proceedings must be genuine" (*see paras. 65-94 of the [Prosecution's request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18\(2\)](#)*).

In the [Afghanistan](#) situation, the Prosecutor was granted permission to resume his investigation after over 2 years of it being deferred in the [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation](#) (hereinafter: *Afghanistan decision*). In applying the same requirements we have seen in the other decisions, the Pre-Trial Chamber noted that the State of Afghanistan did not provide any observations (*see Afghanistan decision*, paras. 41-42) and that the documents it was able to assess were based on the Prosecution's translation of a (very) limited number of documents (*see Afghanistan decision*, paras. 48-57). In light of these considerations, PTC II concluded that the State of Afghanistan failed to show that such ongoing and/or past investigations presently exist as well as that it still wishes to pursue a deferral. In this case, it seems the State's unwillingness to investigate the situation is evident.

The case of the Philippines is different in that, despite the government being vocal about not wanting to cooperate with the ICC, it is still determined to prove that ongoing domestic investigations are genuine and justify the deferral. Whether or not PTC I will decide to resume the investigation, the outcome could also depend on the Philippines' political colours. As former president Duterte's stance made it very unlikely that his government would cooperate with the Court, there was some hope leading up to the May 2022 presidential elections, with one candidate – Leni Robredo – voicing her plan to rejoin the ICC if elected. However, she was beaten by a landslide victory by Ferdinand Marcos Jr, son of the late dictator Ferdinand Marcos (who was also responsible for many extrajudicial abuses and killings under his presidency – *see Amnesty International's concise overview of the abuses committed within Marcos' presidency in [Five things to know about Martial Law in the Philippines](#)*), with Duterte's daughter, Sara, running alongside him as Vice-President. Their continuation of Duterte's policies shatters hopes of a renewed relationship between the Philippines and the ICC. Throughout its communications and public statements, the Philippine government seems determined to prove that local investigations are doing a sufficient job in investigating the alleged crimes.

At this point, there are two scenarios with regard to the outcome of this proceeding. The first scenario entails PTC I declining the Prosecutor's request to resume the investigation on the grounds that the local investigations led by the Philippine government sufficiently fulfill the requirements provided under ICC case law. As a result, the deferral would continue to produce its effects. This, however, would not paralyse the Prosecutor's actions as he could still seek a review of such a decision after 6 months or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation (according to article 18(3) of the Rome Statute). Even in the case where the first review did not prove to be successful, the Prosecutor could always request a new review before the PTC on the basis of the fact that domestic authorities are showing unwillingness to prosecute (in accordance with Article 17).

The second scenario entails that the PTC grants the Prosecutor permission to resume his investigation. This, in my opinion, is the more plausible outcome since PTC I effectively authorised the opening of an investigation due to reasonable basis to believe that crimes falling under the jurisdiction of the Statute had been committed. It is important that the Court does not let deferrals be a way for States to evade accountability. Delaying investigations will run the risk of opening the ICC to accusations of succumbing to political interference, and might result in the erosion of trust in the Court as well as denial of justice to the victims of the crimes – that is, the scenarios the ICC strives to fight against.

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