



**International
Commission
of Jurists**

10/1 Soi Aree 2
Phaholyothin Road
Samsennai, Phayathai
Bangkok 10400
Thailand

t +66 2 61 98 477/478
f +66 2 61 98 479
www.icj.org

H.E. Rodrigo R. Duterte

President of the Republic of the Philippines

19 March 2018

Your Excellency,

We write to express our concern about the Government of the Philippines' intention to withdraw from the Rome Statute of the International Criminal Court (ICC).

The International Commission of Jurists (ICJ) is an international non-governmental organization, established in 1952 and headquartered in Geneva, Switzerland. It consists of some 60 eminent jurists representing different justice systems throughout the world and has national sections and affiliated organizations in all regions of the world. The ICJ has regional offices around the world, including Bangkok, Thailand, where its Asia-Pacific Programme is based. The ICJ works to advance the rule of law and the progressive development and implementation of international human rights law.

We understand that the Government has transmitted this notice to withdraw to UN Chef de Cabinet Maria Luiza Ribeiro Viotti on 16 March 2018. In a letter dated 15 March 2018, the Permanent Mission of the Republic of the Philippines informed the UN Secretary General of its decision to withdraw from the Rome Statute, asserting that "the decision to withdraw is the Philippines is a principled stand against those who politicize and weaponize human rights..." The notice followed your issuance of a written statement posted in various outlets which sets out at greater length the rationale for the withdrawal.

We consider that the withdrawal of the Philippines from the Rome Statute would not only be a setback to the protection of human rights in the country, but also send a message that the Philippines is turning its back on the rule of law and international justice.

Irrespective of ICC jurisdiction, we reiterate our previous call that the Government must respect its obligations under human rights law, including the International Covenant on Civil and Political Rights (ICCPR), to take immediate and effective measures to address the thousands of cases of extrajudicial killings in the country.

We also continue to urge you to unequivocally denounce and effectively address extrajudicial killings, whether of alleged criminals or of any person in the Philippines. We hold you to the commitment you made during your inaugural speech when you assumed your post as the 16th President of the Republic of the Philippines that your "adherence to due process and the rule of law is uncompromising."

We recall that the ICC Office of the Prosecutor is bound by its own Code of Conduct, as well as the ICC Statute and the Regulations of the Court, which contain provisions to uphold and enforce the impartial and professional standards of the Office of the Prosecutor.

Withdrawal from the Rome Statute will not prevent the ICC from conducting its preliminary examination

The withdrawal of the Philippines from the Rome Statute will not remove the ICC's jurisdiction to conduct a preliminary examination because any conduct being examined will have occurred prior to the date on which the withdrawal would become effective. Under Article 127 of the Rome Statute, "withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date."

The Philippines became a State Party when it ratified the Rome Statute on 30 August 2011. The Rome Statute entered into force for the Philippines on 1 November 2011, sixty days from the date that the instrument of ratification was deposited with the UN Secretary General. Thus, the Prosecutor may still examine all acts complained of which took place from the time the Rome Statute entered into force at least until 16 March, 2019, a year after the Government submitted its written notice of intent to withdraw to the UN Secretary General. Even if the withdrawal indeed becomes effective in March of next year, the Philippines will be under a continuing and indefinite obligation to cooperate with any investigations and proceedings that may be ongoing in relation to conduct occurring when the Rome Statute was in force.

There is no evidence that the Philippines' Ratification of the Rome Statute was "fraudulent"

You have alleged in your 13 March statement there that there was "fraud" in the country's becoming a State Party to the said treaty, citing that the Philippines government was "made to believe" that the principle of complementarity, and the rights to due process and presumption of innocence would be respected. The statement also asserted that the ratification never took effect by virtue of the fact that the instrument of accession was never published in the Official Gazette.

There is in fact ample evidence in the public domain that shows that the Government of the Philippines has understood very well what it would entail to be a State Party to the Rome Statute. In fact, prior to its ratification of the Rome Statute, the Philippines enacted the Republic Act 9851 (or, the Act on Crimes Against International Humanitarian Law, Genocide, and other Crimes Against Humanity). The law was enacted on 11 December 2009 prior to the Philippines becoming a State Party to the Rome Statute. The law set out the obligations of the Government of the Philippines to penalize crimes similarly covered by the Rome Statute.

We would like to remind the Government of the Philippines that it reaffirmed its support for the principles of the Rome Statute and the ICC as recently as 7 December 2017 during the General Debate of the 16th Assembly of States Parties to the Rome Statute of the International Court. The Government of the Philippines even actively campaigned to have one of its nationals, Raul Pangalangan, elected as judge of the Court. This also manifests the Philippines' acceptance and understanding of the Rome Statute and the obligations it must fulfill as a State Party. These facts upend the claim that the Philippines was fraudulently induced to become a State Party to the Rome Statute.

We recall the statement made upon ratification on 06 March 2011 by the Philippine Executive Secretary that "[r]atification of the Rome Statute enhances Philippine commitment to human

rights and is our contribution to an effective international criminal justice system. It complements Republic Act 9851, which enables our country on its own to prosecute international crimes and strengthens human rights enforcement in our country.”

There is no violation of the principle of complementarity

The Government is correct that the Rome Statute operates in accordance with the principle of complementarity, namely that the ICC shall only exercise jurisdiction if member States lack the capacity or will to prosecute the crimes falling within the subject matter jurisdiction of the Rome Statute. The ICC may only intervene where a State is unable or unwilling to carry out the investigation and prosecution of perpetrators of the listed crimes.

The conduct of a preliminary examination is entirely consistent with that principle. In fact, it is in part through the preliminary examination process that the Court will determine if it is permissible and appropriate to take jurisdiction and to move towards a full investigation, including on an assessment of the complementarity principle. This will require an assessment of the Government’s efforts to address impunity for alleged extra-judicial killings in the national justice system.

The Government should welcome this preliminary examination, since it will provide it the opportunity to make a showing that national judicial systems are indeed effectively investigating and prosecuting these allegations. The ICJ, therefore, encourages the Government to engage with the Prosecutor by discussing with her Office relevant investigations, prosecutions or other efforts to ensure accountability at the national level. This would also signify that the Philippines is committed to upholding the rule of law, and combatting impunity for human rights violations in the country.

The preliminary examination does not violate the right to due process and presumption of innocence

In its communication to the Secretary General, the Government also claimed that the public pronouncement by the ICC Prosecutor of a preliminary examination into allegations of extrajudicial killings violates due process and the presumption of innocence enshrined in the 1987 Constitution.

There is no conflict between international law and the 1987 Constitution on this point. International human rights law and international criminal law guarantee the rights to due process and the presumption of innocence.¹ The UN Human Rights Committee has asserted “it is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused.”²

Neither the question of the presumption of innocence nor due process have arisen at this early stage. Notably, as Prosecutor Fatou Bensouda explained in an official statement on the activities of her office on 8 February 2018 that the preliminary examination is “not an investigation”. The preliminary examination stage involves a process that will examine the information available “in order to reach a fully informed determination on whether there is a reasonable basis to proceed with an investigation pursuant to the criteria established by the Rome Statute.” Even moving to a full investigation will require the approval of the judges of the ICC’s pre-trial chamber, providing for another independent check on the Prosecutor.

¹ See Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 66 of the Rome Statute.

² UN Human Rights Committee, *General Comment No. 32 on Article 14, the right to equality before courts and tribunals and to fair trial*, UN Doc. CCPR/C/GC/32 (23 August 2007), para. 30.

The existence of a preliminary examination in no way suggests guilt, or even indicates that charges will ultimately be brought for crimes within the jurisdiction of the ICC. The Prosecutor merely laid out that her Office is at the most initial phase of the process to analyze the seriousness of the allegations and identify whether the crimes alleged would fall within the jurisdiction of the ICC.

Non-publication in the Official Gazette is immaterial to international obligations

From the perspective of international law, it is immaterial whether or not the Rome Statute or the instrument of ratification is published in a particular manner or publication, such as the Official Gazette. As the Government's letter clearly points out, the Statute enters into force 60 days from the day that the instrument of ratification is deposited with the UN Secretary General. Under Article 46 of the Vienna Convention on the law of treaties a State may not invoke internal law irregularities as invalidating its consent to be bound by treaty, except in narrow circumstances not applicable to the question raised here.

In the document of withdrawal, the Government alleges that the acts that are the subject of the preliminary examination cannot be considered crimes against humanity because the deaths are a "direct result of a lawful exercise of police duty" and that under Philippine criminal laws, self-defense is a justifying circumstance.

There is no doubt that extra-judicial killings can be considered crimes against humanity. All international instruments, since the Charter of the International Military Tribunal at Nuremberg, have included murder in the list of acts that constitute crimes against humanity when they are committed in a massive or systematic practice or as part of a widespread or systematic attack.³ The UN General Assembly has likewise pointed out that "extrajudicial, summary or arbitrary executions may under certain circumstances amount to crimes against humanity, international law, including the Rome Statute of the International Criminal Court."⁴ More to the point, Article 7 of the Rome Statute expressly provides that certain unlawful killings, when committed as part of a systematic or widespread attack on a civilian population, fall within the jurisdiction of the ICC.

Claims that police and other state actors were acting lawfully in the conduct of their duties, or in self-defense, require factual investigation and legal analysis. Cooperating with the preliminary examination would provide an opportunity for the Government to provide the evidentiary basis supporting these claims. And even if the preliminary examination were to lead to a full investigation and subsequently to actual indictments, any evidence in support of the charges would have to be rigorously tested in a fair trial, as would any defenses.

In addition, the letter asserts that the Government's campaign against illegal drugs "does not fall within the purview of a war crime because of the absence of the element of armed conflict, whether international or domestic." In fact, international law has long recognized that crimes against humanity, as distinct from war crimes, can be committed during peacetime and states of emergency, as well as in times of international and internal armed conflicts.⁵ This is why article 7 of the Rome statute requires no war nexus.

³ International Commission of Jurists, *Practitioners Guide No. 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Geneva, Switzerland, 2015, page. 102.

⁴ UN General Assembly, Resolution No. 63/182, *Extrajudicial, summary or arbitrary executions*, UN Doc. A/RES/63/182, para. 8 of Preamble.

⁵ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Article 1.b, See also International Commission of Jurists, *Practitioners Guide No. 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, Geneva, Switzerland, 2015, pages 98-99.

State actors are not protected by immunities for international crimes

The Government's letter asserts that the President of the Philippines cannot be subject to the jurisdiction of the ICC by virtue of the immunity doctrine. As correctly stated in the Government's letter, Article 27 of the Rome Statute is explicit that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction." The decision to exclude the possibility of immunities in the elaboration of the Rome Statute was part of an overwhelming and near-universal consensus of States, including the Philippines, during the drafting. Once again, in our view, the best way to defend against allegations would be to promptly order the investigation of all serious allegations, and cooperate with the preliminary investigation.

State obligation to investigate allegations of extrajudicial killings

The Government has the duty to investigate allegations of extrajudicial killings. This duty is clearly pronounced in Republic Act 9851. Moreover, this duty not only arises from the obligations arising under the Rome Statute, but also the obligation under international human rights law to respect and guarantee human rights, for example enshrined in Article 2(1) of the ICCPR. According to the UN Human Rights Committee, the legal obligation under Article 2(1) of the ICCPR is both negative and positive: while States parties must refrain from violating the rights recognized in the Covenant (e.g. they must not arbitrarily deprive persons of their life), they must also adopt legislative, administrative, judicial, educative and other necessary measures to protect these rights (e.g. they must protect against arbitrary deprivation of life, including by holding perpetrators to account).⁶

The best way to respond to these allegations, and the possibility of the ICC taking jurisdiction over them, would be to direct the prosecutors working under the Department of Justice to conduct investigations into these killings in accordance with international human rights law and standards, such as the *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (revised 2016).⁷ We also refer the Government to ICJ's *Briefer on Investigation of Extrajudicial Executions in the Philippines*⁸ and its *Practitioners Guide No. 9 on Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*.⁹

We are open to explore with the Government ways in which the ICJ may contribute its expertise in assisting the Philippines comply with its obligations under international criminal law and international human rights law, specifically on the obligation to undertake prompt, independent, and effective investigations into allegations of extrajudicial killings in the country.

We hold you to your commitment to support "the shared sovereign goals of peace and security and the importance of criminal accountability for the most serious crimes of concern to the international community."¹⁰

⁶ UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para.8.

⁷ See link: <http://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>

⁸ See link: <http://www.icj.org/wp-content/uploads/2016/08/Philippines-EJK-debate-Advocacy-Analysis-Brief-2016-ENG.pdf>

⁹ See link: <https://www.icj.org/enforced-disappearance-and-extrajudicial-execution-investigation-and-sanction-icj-practitioners-guide-no-9-now-also-in-english/>

¹⁰ Statement of the Philippines delivered by H.E. Mr. Harry Roque, Presidential Spokesperson, Office of the President during the General Debate of the 16th Assembly of States Parties to the Rome Statute of the International Criminal Court, UN Headquarters, New York, 7 December 2017.

We look forward to engaging with your administration to further human rights and the rule of law in the Philippines.

Very truly yours,



Sam Zarifi
Secretary General
International Commission of Jurists

For questions or clarifications, please contact Ms. Emerlynne Gil, Senior International Legal Adviser for Southeast Asia at +662 619 8499 (ext. 206) or at emerlynne.gil@icj.org.