

**PUNISHING THE PUNISHER: THE ROLE OF THE  
INTERNATIONAL CRIMINAL COURT IN ENDING  
DUTERTE’S “WAR ON DRUGS”**

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**ABSTRACT**

In the Philippines, President Rodrigo Duterte’s “war on drugs”—an extrajudicial killing campaign waged by his administration through the Philippine National Police—has claimed an alarming 13,000 lives in just the first two years of his term. President Duterte, “The Punisher,” is currently the subject of a preliminary examination by the International Criminal Court into whether his “war on drugs” exposes him to criminal liability for crimes against humanity. Although Duterte is attempting to withdraw the Philippines from the ICC in a futile effort to preclude the Court from holding him criminally liable, he has pledged to wage his “war on drugs” until the conclusion of his term—if he keeps that promise and his administration maintains its current rate of brutality, 60,000 or more people could die by 2022. In order to provide justice for the thousands of victimized families in the Philippines, end a senseless campaign of violence, and puncture President Duterte’s belligerent sense of impunity, this Comment urges ICC Prosecutor Bensouda to request authorization from the Pre-trial Chamber to initiate a full investigation into Duterte for the commission of crimes against humanity.

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### I. INTRODUCTION

Drug trafficking, addiction, and the violent crime that often follows presents an immense challenge for states around the world.<sup>1</sup> The United States (U.S.) is currently in the midst of an opioid overdose crisis that claims more than 115 lives per day.<sup>2</sup> In Mexico, an estimated 150,000 people have been killed since 2006 due to organized crime-related incidents while Mexican drug cartels take in over \$19 billion annually from U.S. drug sales.<sup>3</sup> On the other side of the globe in East Asia and the Pacific, there are an estimated 3.3 million heroin users according to a United Nations (U.N.) Office of Drugs and Crime study, and they expect that number to rise.<sup>4</sup> Only one

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1. See generally World Summit on Social Development, *The Social Impact of Drug Abuse*, U.N. Int'l Drug Control Programme (UNDCP), (Mar. 6-12, 1995) (detailing a broad international perspective on how drug abuse and production affects social norms and country development).

2. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> (last updated Mar. 2018).

3. *Mexico Drug War Fast Facts*, CNN, <http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html> (last updated July 16, 2018, 6:04 PM).

4. U.N. Office on Drugs and Crime, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment*, at 51 (Apr. 2013),

head of state, however, has initiated a campaign of extrajudicial killings<sup>5</sup> branded as a “war on drugs” which took the lives of 7,025 people during his first seven months in office.<sup>6</sup> President Rodrigo Duterte of the Philippines.<sup>7</sup> According to official data provided by the Philippine government, Duterte’s anti-drug police operations have resulted in the death of about 4,000 people since he assumed the presidency.<sup>8</sup> Human Rights Watch (HRW), however, announced in its 2018 World Report that Duterte’s “war on drugs” has claimed an alarming 12,000 lives.<sup>9</sup>

Rodrigo Duterte was elected president of the Philippines<sup>10</sup> on May 6, 2016, in a landslide victory—earning nearly double the votes of the runner-up.<sup>11</sup> Duterte has garnered media attention for himself during his short presidency for crude behavior and bombastic public statements.<sup>12</sup> For example, in September 2016, he used profane

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[http://www.unodc.org/documents/southeastasiaandpacific//Publications/2013/TOCTA\\_EAP\\_web.pdf](http://www.unodc.org/documents/southeastasiaandpacific//Publications/2013/TOCTA_EAP_web.pdf).

5. See Antonio P. Contreras, *Depoliticizing the Term ‘Extrajudicial Killing’*, THE MANILA TIMES (Oct. 6, 2016), <http://www.manilatimes.net/depoliticizing-term-extrajudicial-killing/289735/> (“[Extrajudicial killing] is commonly defined as a killing committed by an agent of the state without the sanction of a judicial proceeding.”); see also Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (2006) (“[T]he term ‘extrajudicial killing’ means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”).

6. Amnesty Int’l, *“If You Are Poor, You Are Killed”*: Extrajudicial Executions in the Philippines’ “War on Drugs”, AI Index ASA 35/5517/2017, at 6 (Jan. 2017), available at <https://www.amnesty.org/download/Documents/ASA3555172017ENGLISH.PDF> [hereinafter *If You Are Poor*].

7. See *Profile: Duterte the Controversial ‘Strongman’ of the Philippines*, BBC NEWS (Oct. 4, 2016), <http://www.bbc.com/news/world-36659258> (discussing the political career of Rodrigo Duterte and his rise to the presidency of the Philippines).

8. See Hannah Ellis-Peterson, *ICC Launches Crimes Against Humanity Inquiry into Duterte’s War on Drugs*, GUARDIAN (Feb. 8, 2018, 8:34 AM), <https://www.theguardian.com/world/2018/feb/08/icc-claims-crimes-against-humanity-duterte-philippines> (noting the official death toll from Duterte’s “war on drugs”).

9. Human Rights Watch, *World Report 2018: Events of 2017*, at 429 (Sept. 16, 2017), available at [https://www.hrw.org/sites/default/files/world\\_report\\_download/201801world\\_report\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf) [hereinafter *World Report 2018*].

10. See *Philippines Election: Maverick Rodrigo Duterte Wins Presidency*, BBC NEWS (May 10, 2016), <http://www.bbc.com/news/world-asia-36253612> (reporting on Duterte’s victory in the Philippine presidential election).

11. Georgia McCafferty, *Rodrigo Duterte: from ‘Punisher’ to Philippines President*, CNN (Sept. 5, 2016, 10:39 PM), <http://www.cnn.com/2016/04/21/asia/philippines-rodrigo-duterte-profile/index.html>.

12. See Sheena McKenzie & Kevin Liptak, *After Cursing Obama, Duterte Expresses Regret*, CNN (Sept. 6, 2016, 12:08 PM), <http://www.cnn.com/2016/09/05/politics/philippines-president-rodrigo-duterte-barack-obama/index.html> (reporting on how President Obama cancelled his scheduled trip to the Philippines after Duterte gave a profanity-laden press conference discussing the visit).

and obscene language to describe then-President Barack Obama.<sup>13</sup> In fact, Duterte began cultivating an international reputation decades earlier while serving as the Mayor of Davao City from 1988 through 1998.<sup>14</sup> The legacy of Duterte's mayoral administration led *Time Magazine* to nickname him "The Punisher" in 2002.<sup>15</sup>

As Mayor, Duterte launched a widespread law enforcement initiative targeted at criminals suspected of using and selling drugs,<sup>16</sup> foreshadowing his Presidential administration's current initiative.<sup>17</sup> Estimates show that since the 1990s, "death squads" linked to Duterte's mayoral administration killed more than 1,400 people, "most of whom were alleged criminals and 'drug users.'"<sup>18</sup> In December 2016, Duterte told reporters that as Mayor, he would ride around the city on a motorcycle patrolling the streets, looking for criminal suspects to kill.<sup>19</sup> In the face of the international outrage this admission predictably caused, Duterte doubled down by stating, "I killed about three of them because there were three of them," and adding "[i]t happened. I cannot lie about it."<sup>20</sup> In response, the Philippine Commission on Human Rights suggested opening an investigation to determine if Duterte had any potential administrative or criminal responsibility, but the Philippine authorities failed to take any substantial investigative steps to follow through on the Commission's recommendation.<sup>21</sup> The utter lack of accountability Duterte faced for his murderous actions as Mayor of Davao City created the current political environment in which he, as President, enjoys a disgraceful level of impunity.

President Duterte has explicitly displayed a complete disregard for human rights—even going as far as saying he does not "give a shit" about them.<sup>22</sup> Duterte sees human rights "as a Western obsession that keeps the Philippines from taking the action necessary to clean up the country."<sup>23</sup> When Duterte discusses cleaning up the Philippines, he is euphemistically referring to the vicious "drug war" he has

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13. See *id.* (reporting that Duterte called Obama a "son of a bitch").

14. See McCafferty, *supra* note 11 ("As mayor of Davao City, a metropolis of 1.5 million people on the southern Philippine island of Mindanao, Duterte first made his name nationally for his no-nonsense approach to crime."); see also *Rodrigo Duterte Fast Facts*, CNN (Mar. 1, 2018), <https://www.cnn.com/2016/12/16/asia/rodrigo-duterte-fast-facts/index.html>.

15. Phil Zabriskie, *The Punisher*, TIME MAG. (July 19, 2002), <http://content.time.com/time/magazine/article/0,9171,265480,00.html>.

16. See *If You Are Poor*, *supra* note 6, at 11 (noting that Duterte's method of dealing with drug dealers and users through extrajudicial killings began while he served as Mayor of Davao City).

17. See *infra* Part II.B.2 for a discussion on the Duterte administration's "war on drugs."

18. *Id.*

19. Russell Goldman, 'I Cannot Lie,' *Rodrigo Duterte Says, Confirming He Did Kill People as Mayor*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/world/asia/philippines-rodrigo-duterte-confirms-killings-davao.html>.

20. *Id.*

21. *If You Are Poor*, *supra* note 6, at 11.

22. Adrian Chen, *When a Populist Demagogue Takes Power*, NEW YORKER (Nov. 21, 2016), <https://www.newyorker.com/magazine/2016/11/21/when-a-populist-demagogue-takes-power>.

23. *Id.*

relentlessly waged since securing the Presidency.<sup>24</sup>

Many of Duterte's victims are completely innocent Filipino civilians. On August 16, 2017, seventeen-year-old Kian Loyd delos Santos was murdered, becoming yet another victim of Duterte's "drug war".<sup>25</sup> The Philippine police said that they shot him in self-defense because he was carrying a handgun and "fought it out" with them.<sup>26</sup> Surveillance footage later emerged, which eyewitness accounts confirmed, showing police officers dragging the boy to a cul-de-sac, handing him a gun, and then shooting him as he turned to run away.<sup>27</sup> The boy's father told reporters that Kian had wanted to be a police officer.<sup>28</sup> In late August 2017, thousands of demonstrators took to the streets of Manila to protest the Duterte administration's "war on drugs" following Kian's murder.<sup>29</sup> Although Duterte vocally supported the investigation into the death of Kian in the face of mounting public pressure,<sup>30</sup> he has steadfastly vowed to continue waging his vicious "war on drugs" through the end of his term in 2022.<sup>31</sup>

Following the scandal surrounding Kian's death, in October 2017, President Duterte named the Philippine Drug Enforcement Agency (PDEA) as the only drug enforcement agency and tasked the Philippine National Police (PNP) with providing intelligence information to the PDEA.<sup>32</sup> "Duterte implicitly acknowledged that the decision was linked to growing domestic and international furor over the drug campaign's horrific human toll by stating the suspension will be 'better for the bleeding hearts and the media.'"<sup>33</sup> Although this seemed like a promising development at the time, the fact that Duterte declared a similar suspension following the January 2017 HRW report and promptly lifted that suspension a month later tempered hope that he has changed his ways.<sup>34</sup> HRW predicted that the most recent suspension might have been different because it "appears to be a response to growing domestic outrage over the deliberate targeting of children by police on anti-

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24. See *If You Are Poor*, *supra* note 6, at 6 (discussing how Duterte's "war on drugs" is a violent campaign that has resulted in thousands of deaths).

25. Felipe Villamor, *Death of Philippine Teenager Stokes Opposition to Duterte's Drug Crackdown*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/world/asia/duterte-drug-crackdown.html>.

26. *Id.*

27. *Id.*

28. *Id.*

29. See *Thousands Demand End to Killings in Duterte's Drug War*, AL JAZEERA (Aug. 21, 2017), <http://www.aljazeera.com/news/2017/08/thousands-demand-killings-duterte-drug-war-170821124440845.html> (reporting on the protests in Manila against Duterte's "war on drugs").

30. *Id.*

31. Human Rights Watch, *Philippines: Country Summary*, 1 (Jan. 2018), available at [https://www.hrw.org/sites/default/files/philippines\\_3.pdf](https://www.hrw.org/sites/default/files/philippines_3.pdf).

32. Phelim Kine, *Philippines' Duterte Backpedals on Abusive 'Drug War'*, HUMAN RIGHTS WATCH (Oct. 12, 2017, 4:03 PM), <https://www.hrw.org/news/2017/10/12/philippines-duterte-backpedals-abusive-drug-war>.

33. *Id.*

34. *Id.*

drug operations.”<sup>35</sup> Unfortunately, Duterte crushed the hopeful predictions of HRW when he ordered the PNP to rejoin the drug war on December 5, 2017.<sup>36</sup> Between then and March 1, 2018 officials admitted to killing more than 100 “drug suspects.”<sup>37</sup>

Amnesty International (AI)<sup>38</sup> asserts that the Duterte administration’s “drug-related killings represent a flagrant violation of international human rights law.”<sup>39</sup> International Criminal Court (ICC)<sup>40</sup> Prosecutor Fatou Bensouda<sup>41</sup> warned Philippine officials—without naming President Duterte directly—stating that she was “deeply concerned about these alleged killings and the fact that public statements of high officials of the Republic of the Philippines seem to condone such killings.”<sup>42</sup> Prosecutor Bensouda has since launched a preliminary examination into whether the ICC has jurisdiction over allegations of crimes against humanity committed by President Duterte through his “war on drugs.”<sup>43</sup> According to Gary Alejano, a political opponent to the Duterte administration in the Philippines, this move by the ICC offered a “ray of hope for the victims of his ‘war on drugs’, which is still ongoing right now.”<sup>44</sup> In order to provide recourse to the tens of thousands of victimized families, end this senseless campaign of violence, and puncture President Duterte’s belligerent sense of impunity, this Comment argues that ICC Prosecutor Bensouda can and should initiate a full investigation into Duterte for the commission of crimes against humanity.

Part II demonstrates that the ICC has the legal authority to adjudicate

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35. *Id.*

36. Agence France-Presse (AFP), *More Than 100 Killed Since Philippine Police Returned to Duterte’s Drug War*, EXPRESS TRIB. (Mar. 3, 2018), <https://tribune.com.pk/story/1650085/3-100-killed-since-philippine-police-returned-dutertes-drug-war/>.

37. *Id.*

38. See generally AMNESTY INT’L, <https://www.amnesty.org/en/> (last visited Oct. 5, 2018) (“Amnesty International is a global movement of more than 7 million people in over 150 countries and territories who campaign to end abuses of human rights.”).

39. See *If You Are Poor*, *supra* note 6, at 7 (discussing how Duterte’s “War on Drugs” has led to a violent campaign resulting in many deaths).

40. See generally INT’L CRIM. CT., <https://www.icc-cpi.int/> (last visited Oct. 5, 2018).

41. See *Ms. Fatou Bensouda: Prosecutor*, INT’L CRIM. CT., <https://www.icc-cpi.int/about/otp/who-s-who/pages/fatou-bensouda.aspx> (last visited Oct. 5, 2018) (noting that Fatou Bensouda of The Gambia was elected by the Assembly of State Parties to serve as ICC Chief Prosecutor in December of 2011 after having held the position of ICC Deputy Prosecutor for several years).

42. Emily Rauhala, *Duterte Says the International Criminal Court Doesn’t Worry Him*, WASH. POST (June 4, 2017), [https://www.washingtonpost.com/world/asia\\_pacific/duterte-says-the-international-criminal-court-doesnt-worry-him/2017/06/03/8a8f0c62-44d6-11e7-b08b-1818ab401a7f\\_story.html?utm\\_term=.c5e4eea42ada](https://www.washingtonpost.com/world/asia_pacific/duterte-says-the-international-criminal-court-doesnt-worry-him/2017/06/03/8a8f0c62-44d6-11e7-b08b-1818ab401a7f_story.html?utm_term=.c5e4eea42ada) (quoting ICC Prosecutor Fatou Bensouda).

43. Ellis-Peterson, *supra* note 8; Martin Petty, *Philippines’ Duterte Says ‘Not In A Million Years’ Does ICC Have Right To Try Him*, REUTERS (Mar. 6, 2018, 11:47 PM), <https://www.reuters.com/article/us-philippines-drugs-icct/philippines-duterte-says-not-in-a-million-years-does-icc-have-right-to-try-him-idUSKCN1GJ0ER>; Office of the Prosecutor, *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*, INT’L CRIM. CT. (Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>.

44. Ellis-Peterson, *supra* note 8.

allegations against President Duterte for crimes against humanity. It lays out the jurisdictional framework of the ICC and explains why the jurisdiction, triggering, and admissibility requirements of the ICC are met by Duterte's "war on drugs." Accordingly, this would provide the ICC Prosecutor with a reasonable basis to proceed in her investigation against Duterte.

Part III contends that there are strong policy arguments in favor of commencing the international criminal legal process against Duterte and that these arguments substantially outweigh the foreseeable negative consequences of such action. Pursuing criminal charges against Duterte at the ICC could provide immense benefits to victims of his drug war. Although Duterte could become alienated and radicalized by an ICC decision to investigate him, an attempt by his administration to escape liability by withdrawing from the ICC would prove legally futile. Initiating a full investigation into Duterte for crimes against humanity will grant the ICC legitimacy because (1) the Court will have chosen the pursuit of justice rather than folding to the pressures of political pragmatism, and (2) the ICC's role as a deterrent would be substantially reinforced.

To conclude, Part IV suggests that because ICC Prosecutor Bensouda has a reasonable basis to believe that President Duterte's "war on drugs" constitutes a crime against humanity, she should, therefore, launch a full investigation by invoking her Article 15 authority.

## II. THE ICC HAS THE AUTHORITY TO ADJUDICATE ALLEGATIONS AGAINST DUTERTE FOR CRIMES AGAINST HUMANITY

Prior to discussing the factual basis for an investigation into Duterte for crimes against humanity, the following section will establish the legal framework of the ICC's authority.

### A. *The ICC Jurisdictional Framework Explained*

In accordance with the negotiations of the 1998 U.N. diplomatic conference,<sup>45</sup> the Rome Statute of the International Criminal Court went into force on July 1, 2002<sup>46</sup> and established the ICC's jurisdiction, structure, and operations.<sup>47</sup> The jurisdiction of a court is defined as its power and authority to hear and make binding decisions for the parties to a case.<sup>48</sup> The ICC's jurisdiction is expressly limited by the general principles of gravity and complementarity as espoused in Article 1 of the Rome Statute: the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this

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45. ANDREW NOVAK, *THE INTERNATIONAL CRIMINAL COURT: AN INTRODUCTION* 23 (2015).

46. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

47. *See id.* at 25 (describing the goals the Rome Conference and the purposes of the ICC).

48. *What is Jurisdiction?*, BLACK'S LAW DICTIONARY (2nd ed.), <https://thelawdictionary.org/jurisdiction/> (last visited Oct. 5, 2018).

Statute, and shall be complementary to national criminal jurisdictions.”<sup>49</sup>

The ICC must have three types of jurisdiction to legally initiate its criminal process: (1) subject matter jurisdiction, (2) jurisdiction over the situation through the nationality of the defendant or the territory in which the alleged crimes occurred—unless the situation is referred by the U.N. Security Council (UNSC)<sup>50</sup>—and (3) jurisdiction in time.<sup>51</sup> In other words, “the Court must have jurisdiction over the crime itself, over either the location of the crime or the nationality of the perpetrator (but both are not necessary) and over the period of time in which the crime was committed.”<sup>52</sup>

### 1. Subject Matter Jurisdiction—The Crime

Article 5 of the Rome Statute narrowly tailors the ICC’s jurisdiction to include only four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>53</sup> In determining whether extrajudicial killings constitute crimes against humanity, one must first look to Article 7 of the Rome Statute, which defines crimes against humanity.<sup>54</sup> Crimes against humanity include, but are not limited to: murder; rape; extermination; forced pregnancy; the crime of apartheid; enforced disappearance of persons; and persecution, when committed as part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>55</sup> Therefore, acts like murder and rape are considered crimes against humanity only when they “occur in a context that warrant[s] international adjudication.”<sup>56</sup>

Article 7’s “chapeau”<sup>57</sup> and the provisions set out in Article 7(2)<sup>58</sup> establish the requisite elements for conduct to qualify as crimes against humanity.<sup>59</sup> These

49. Rome Statute, *supra* note 46, art. 1.

50. *See id.* art. 52 (explaining that jurisdiction by the court is triggered by a referral from the U.N. Security Council).

51. NOVAK, *supra* note 45, at 43.

52. *Id.*

53. Rome Statute, *supra* note 46, art. 5.

54. *Id.* art. 7.

55. *Id.*

56. Cameron Charles Russell, *The Chapeau of Crimes Against Humanity: The Impact of the Rome Statute of the International Criminal Court*, 8 EYES ON THE ICC 25, 26–27 (2011); *see* Erin Creegan, *Criminalizing Extrajudicial Killings*, 41 DENV. J. INT’L L. & POL’Y 185, 195 (2013) (“[C]rimes against humanity are useful as a legal tool only in a narrow setting: when a ‘widespread’ attack on the civilian population is in progress. This requirement is one that only gets the international community involved when governments killing [sic] their people, and when the scale is so grave that the massacre has risen to the level of international concern.”).

57. Rome Statute, *supra* note 46, art. 7, ¶ 1; *see* GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 155 (Oxford University Press 2005) (explaining that the “chapeau” of crimes against humanity requires that the crime be committed as part of a widespread attack against a large group of civilians).

58. Rome Statute, *supra* note 46, art. 7, ¶ 2.

59. *See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 151–58 (Antonio Cassese et. al. eds., 2002) (outlining all of the elements under Article 7’s “chapeau”) [hereinafter Cassese].



elements include: (1) an attack directed against any civilian population, (2) a state or organizational policy, (3) an attack of a widespread or systematic nature, and (4) knowledge of the attack.<sup>60</sup> Although the language of Article 7 continually references the word “attack,” conduct purported to be a crime against humanity need not take place in armed conflict,<sup>61</sup> as evidenced by the jurisprudence of the Rwanda tribunal.<sup>62</sup> Additionally, the Rome Statute disposed of the requirement that a discriminatory intent need be proven to prosecute a crime against humanity.<sup>63</sup> Next, each requisite element of a crime against humanity is defined.

a. Attack Directed Against Any Civilian Population

The ICC’s first significant application of Article 7 took place when the Court considered crimes against humanity in the Democratic Republic of the Congo in the case of *Prosecutor v. Katanga*.<sup>64</sup> Most importantly, *Katanga* defined “civilian population,” which the Rome Statute failed to do.<sup>65</sup> The Court explained that “[A]rticle 7 of the Statute affords rights and protections to ‘any civilian population’ regardless of their nationality, ethnicity or other distinguishing feature.”<sup>66</sup> Furthermore, an attack on a civilian population occurs when particular crimes against humanity listed in Article 7(1)<sup>67</sup>—such as murder, enslavement, or torture—are committed multiple times.<sup>68</sup>

b. State or Organizational Policy

There is significant disagreement among judges and international legal scholars regarding the proper definition of the next Article 7 requirement—that crimes against humanity be committed because of a state or organizational policy.<sup>69</sup> This debate plays out most clearly in the “dissenting and majority opinions in Pre-trial

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60. NOVAK, *supra* note 45, at 45.

61. *See id.* at 8 (explaining that during the Rome Conference in 1998 the majority of states declared that crimes against humanity do not have to occur during an armed conflict); *see also* Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. SOC’Y INT’L L. 334, 334 (2013) (explaining that crimes against humanity may be prosecuted in peacetime).

62. Sadat, *supra* note 61, at 346–47 (detailing the International Criminal Tribunal for Rwanda’s adjudication of crimes against humanity); *see also The ICTR in Brief*, UNITED NATIONS INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <http://unictr.irmct.org/en/tribunal> (last visited Nov. 5, 2018) (describing that the United Nations Security Council created the International Criminal Tribunal for Rwanda to prosecute crimes in relation to the Rwandan genocide).

63. Sadat, *supra* note 61, at 345.

64. Sadat, *supra* note 61, at 359; *see generally* *Prosecutor v. Katanga*, Case No. ICC-0/04-01/07, Confirmation of the Charges (Sept. 30, 2008) (charging defendants with murder, rape, and sexual slavery as crimes against humanity).

65. *Katanga*, Case No. ICC-0/04-01/07, ¶ 399.

66. *Id.*

67. Rome Statute, *supra* note 46, art. 7, ¶ 1 (listing acts that qualify as crimes against humanity such as murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, sexual slavery, enforced disappearances of persons, and the crime of apartheid).

68. David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 102 (2004).

69. Sadat, *supra* note 61, at 335.

Chamber II's decision to approve the ICC Prosecutor's request to open an investigation . . . in Kenya."<sup>70</sup>

The dissenting Judge Hans-Peter Kaul argued for a narrower understanding of crimes against humanity, asserting that only states or "quasi-state-like organizations following criminal policies may commit crimes against humanity."<sup>71</sup> Others argue that Judge Kaul's position stifles the ability of the ICC to fulfill its "mandate to prevent and punish 'unimaginable atrocities that deeply shock the conscience of humanity.'"<sup>72</sup> Despite policy debate over the scope of the element, the underlying rationale of the state or organizational requirement necessitates something more than isolated individual actions—it requires some collective, institutional act.<sup>73</sup> The actions taken pursuant to a state or organizational policy must also constitute an attack of a widespread or systematic nature.<sup>74</sup>

c. An Attack of Widespread or Systematic Nature

The State or organizational policy requirement discussed above poses a problem because it muddles the distinction between "widespread" and "systematic" in Article 7(1).<sup>75</sup> In situations involving crimes against humanity in Kenya and Côte d'Ivoire, the ICC Prosecutor claimed that both the widespread and systematic requirements were satisfied.<sup>76</sup> Therefore, although the statute allows for a choice of either satisfying the widespread *or* the systematic requirement when seeking the Pre-Trial Chamber's authorization of an investigation, the ICC Prosecutor's practice in these cases has been to present a basis to satisfy both requirements.<sup>77</sup> Although this trend does not necessarily establish that both the widespread and systematic requirements need to be satisfied, it appears prudent to prove that relevant facts meet both requirements.

The *Katanga* Decision on the Confirmation of Charges explained that a widespread attack must be "thoroughly organized and follow a regular pattern," as well as follow a "common policy."<sup>78</sup> In *Prosecutor v. Bemba*, the Court defined the "widespread" element as encompassing "the large-scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims."<sup>79</sup> In *Situation in the Republic of Cote*

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70. *Id.*

71. *Id.* at 336.

72. *Id.* at 336–37.

73. See Luban, *supra* note 68, at 98 ("[T]he definition of crimes against humanity emphasizes the collective character of the perpetrator.").

74. Rome Statute, *supra* note 46, art. 7.

75. Russell, *supra* note 56, at 66.

76. Iryna Marchuk, *No Crimes Against Humanity During the Maydan Protests in Ukraine?: Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?*, 35 B.U. INT'L L. J. 39, 53 (2017).

77. *Id.*

78. Matt Halling, *Push the Envelope-Watch it Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT'L L. 827, 836-37 (2010).

79. *Prosecutor v. Bemba Gombo*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009).

*D'Ivoire*, the Court defined the “systematic” requirement as the “organized nature of the acts of violence and the improbability of their random occurrence.”<sup>80</sup> The ICC Prosecutor asserted factual circumstances, such as the time frame in which the alleged crimes were carried out, the large geographic range of alleged crimes, and the high number of reported victims to help prove that the widespread or systematic requirement for a crime against humanity was met.<sup>81</sup>

d. Knowledge of the Attack

The final element—the intent requirement for crimes against humanity—demands “only an intent to commit the particular act in question and knowledge of the broader context in which it takes place.”<sup>82</sup> Article 30 of the Rome Statute defines knowledge as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>83</sup> However, intent is also satisfied if a superior—other than a military commander—such as a head of state fails to act on information suggesting a subordinate was committing or about to commit a crime.<sup>84</sup> The “intent” element is, therefore, broader than it might initially appear.

## 2. Other Jurisdictional Requirements

Article 12 articulates that the Court may only exercise its jurisdiction if either the person accused is a national of a State Party or the conduct in question occurred within the territory of a State Party.<sup>85</sup> Despite having two ways to exercise jurisdiction in prosecutions, the Court has consistently exercised jurisdiction based on territory rather than nationality.<sup>86</sup>

Article 11 of the Rome Statute declares that the Court only has jurisdiction over crimes committed after July 1, 2002, when the Statute entered into force.<sup>87</sup> To fall under the Court’s jurisdiction, the State where the crimes were committed or where the national who committed the crimes is from must have ratified the Rome Statute.<sup>88</sup> Therefore, the ICC cannot investigate “even the most egregious, cruel, and

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80. Situation in the Republic of Cote d’Ivoire, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cote d’Ivoire, ¶ 54 (Oct. 3, 2011).

81. See *id.* ¶¶ 55–56 (detailing the Prosecutor’s submissions to the Court).

82. See NOVAK, *supra* note 45, at 45 (distinguishing the intent requirement for crimes against humanity from the intent requirement for war crimes).

83. Rome Statute, *supra* note 46, art. 30, ¶ 3.

84. Johan D. Van der Vyver, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. MIAMI INT’L & COMP. L. REV. 57, 66 (2004).

85. Rome Statute, *supra* note 46, art. 12 (“[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction . . . (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.”); NOVAK, *supra* note 45, at 48.

86. NOVAK, *supra* note 45, at 48.

87. Rome Statute, *supra* note 46, art. 11.

88. *Id.* See also Cyril Arnesto, *Extrajudicial Killings and Forced Disappearances in the Philippines as Crimes Against Humanity Under the Rome Statute*, 4 ASIA-PACIFIC YEARBOOK OF INT’L HUMANITARIAN L. 305, 310 (2008–11).

inhumane acts committed prior to the entry into force of the Rome Statute on July 1, 2002, or prior to the date of ratification by a State after July 1, 2002[.]”<sup>89</sup>

### 3. Triggering ICC Jurisdiction

There are three ways for the ICC to obtain jurisdiction under the Rome Statute:<sup>90</sup>

First, a government may refer a situation to the Court involving its own territory or its own nationals; the government does not need to be a state party to the Rome Statute so long as it consents to the Court’s jurisdiction on a situational basis. Second, the UN Security Council may refer a case to the Prosecutor, even over nonmember states, in the interests of international peace and security. Finally, and most controversially, the Prosecutor may open an investigation into a state party on her own initiative. This is known as the Prosecutor’s *proprio motu* authority.<sup>91</sup>

There is no reasonably foreseeable scenario in which President Duterte would have his administration submit this situation to the ICC. Therefore, the first method of triggering jurisdiction is not applicable. The second method of triggering ICC jurisdiction is also irrelevant because the UNSC has not demonstrated any interest in using its authority to submit Duterte’s alleged crimes against humanity to the ICC.<sup>92</sup>

The third and most controversial triggering mechanism, the Prosecutor’s *proprio motu* power, allows the ICC Prosecutor to open an investigation on her own accord as long as she secures the approval of the Pre-Trial Chamber under Article 15 of the Rome Statute.<sup>93</sup> The Prosecutor of the ICC has been described as the “[t]he most important actor at the International Criminal Court” and Fatou Bensouda of The Gambia has held this position since 2012.<sup>94</sup> According to “the Rome Statute, the Prosecutor is responsible for both the investigation and the prosecution[.]”<sup>95</sup>

The Rome Statute also requires that the Prosecutor maintain a “strictly independent” character and “may not act on instructions from any external source, and cannot be influenced by external sources in determining whether to accept,

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89. Arnesto, *supra* note 88, at 310.

90. NOVAK, *supra* note 45, at 51.

91. *Id.*

92. U.S. Ambassador to the U.N. Nikki Haley, who has a history of strong persuasive pull among the international community, recently stated, “[t]he Philippines is suffocating. We must give President Duterte the space to run his nation. We must respect their independence . . . . It is not in our purview to decide administrative issues for the Philippines . . . . That is the job of the president.” Yen Makabenta, *Superstar Speaks: Give Duterte Space to Run the Philippines*, MANILA TIMES (Sept. 23, 2017), <http://www.manilatimes.net/superstar-speaks-give-duterte-space-run-philippines/352300/>. See also Laurel Wamsley, *Nikki Haley Resigns as U.N. Ambassador*, NPR (Oct. 9, 2018, 10:27 AM), <https://www.npr.org/2018/10/09/655794985/nikki-haley-resigns-as-u-n-ambassador> (explaining that Nikki Haley will leave her post as US ambassador to the U.N. at the end of 2018).

93. NOVAK, *supra* note 45, at 53; Rome Statute, *supra* note 46, art. 15.

94. NOVAK, *supra* note 45, at 26.

95. *Id.* at 27.

investigate, and prosecute a case.”<sup>96</sup> Additionally, the Prosecutor’s authority “is limited by the requirements of due process: she may not act arbitrarily or discriminatorily, and cannot abuse her power.”<sup>97</sup>

In previous decisions, the ICC articulated that in order to open an investigation under Article 15, the Prosecutor must establish a “reasonable basis to proceed,” which is the lowest evidentiary standard the Rome Statute provides.<sup>98</sup> Upon a finding that there is a reasonable basis to believe the jurisdiction and admissibility requirements are satisfied, Prosecutor Bensouda must submit a request for authorization to investigate, along with any supporting material, to the Pre-Trial Chamber.<sup>99</sup>

#### 4. Admissibility Under the Rome Statute

Admissibility and jurisdiction are entirely separate inquiries. The ICC may not prosecute every crime falling within the Court’s jurisdiction;<sup>100</sup> the Prosecutor must also determine whether the case is admissible.<sup>101</sup> In Article 17, the Rome Statute lays out the criteria for admissibility,<sup>102</sup> which requires two elements: complementarity and gravity.<sup>103</sup>

##### a. Complementarity

Complementarity is a fundamental procedural principle of the ICC, requiring that the Court defer to national prosecutions and only prosecute crimes where the relevant State is unwilling or unable to do so.<sup>104</sup> Complementarity allows the ICC to avoid conflicts of jurisdiction with State parties.<sup>105</sup> If a State with jurisdiction is prosecuting or investigating a case, the ICC may not open a case “unless the state is unwilling or unable to ‘genuinely’ proceed.”<sup>106</sup> The ICC only has jurisdiction to prosecute crimes that are currently the subject of domestic proceedings if there is evidence that the “national authorities are attempting to shield the accused from accountability for grave crimes.”<sup>107</sup> The policy behind the principle of complementarity is to encourage national prosecution and permit the ICC to intervene only in cases where there is an inability and unwillingness to prosecute by

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96. *Id.* at 26.

97. *Id.* at 26–27.

98. Sadat, *supra* note 61, at 364; Rome Statute, *supra* note 46, art. 53.

99. NOVAK, *supra* note 45, at 53.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 53–54.

104. *Id.* at 54.

105. Arnesto, *supra* note 88, at 325.

106. NOVAK, *supra* note 45, at 55.

107. *Id.*; *see also* Rome Statute, *supra* note 46, art. 20 (“No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court . . . [w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court[.]”).

the State Party.<sup>108</sup> By limiting the scope of cases that the ICC has the authority to hear, the complementarity principle effectively makes the ICC a “court of last resort.”<sup>109</sup>

b. Gravity

The second element of admissibility at the ICC is gravity.<sup>110</sup> The Rome Statute describes gravity as a critical element of admissibility,<sup>111</sup> but never defines it.<sup>112</sup> The gravity threshold of Article 17(1)(d) requires that the ICC find a case inadmissible where “the case is not of sufficient gravity to justify further action by the Court.”<sup>113</sup> This gravity threshold ensures that the Court is only involved when the alleged crimes are of the type that “deeply shock the conscience of humanity,” and are so grave that they “threaten the peace, security, and well-being of the world.”<sup>114</sup>

The only standard for gravity ever espoused by the Court is described in Regulation 29(2) of the Regulations of the Office of the Prosecutor.<sup>115</sup> Regulation 29(2) explains, “[i]n order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, the manner of commission, and impact.”<sup>116</sup> The gravity analysis turns on several factors and should never be determined on the basis of a single factor in isolation, such as an allegedly low number of victims or a limited geographic scope.<sup>117</sup>

The Court’s deliberation about the gravity of an alleged crime indeed changes depending on the facts of the case before it. For example, the Pre-Trial Chamber in *Prosecutor v. Abu Garda*, a case concerning war crimes in Sudan, explained that “the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative

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108. See NOVAK, *supra* note 45, at 55 (discussing complementarity and more specifically the process by which the Pre-Trial Chamber and Prosecutor determine whether a state’s proceedings are genuine).

109. *Id.*

110. Rome Statute, *supra* note 46, art. 17, ¶ 1(d).

111. *Id.*

112. Anna Trenga, *The Gravity Threshold of Article 17(1)(D): How Grave is Grave Enough*, 11 EYES ON THE ICC 79, 80 (2015).

113. Rome Statute, *supra* note 46, art. 17, ¶ 1(d).

114. See *id.* at Pmbl. (offering overarching principles as part of the Preamble of the Rome Statute).

115. Int’l Crim. Court [ICC], *Regulations of the Office of the Prosecutor*, at 17, reg. 29(2), Doc. No. ICC-BD/05-01-09 (23 Apr. 2009), <https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf> [hereinafter Regulations of the Prosecutor].

116. *Id.*; see also Trenga, *supra* note 112 (stating that this regulation is the sole enumerated source of guidance for understanding the gravity standard).

117. See, e.g., *Prosecutor v. Goudé*, Case No. ICC-02/11-02/11, Decision on the Defence Challenge to the Admissibility of the Case Against Charles Ble Goudé for Insufficient Gravity, ¶ 19 (Nov. 12, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_05448.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_05448.PDF) (discussing how determination of gravity depends on a holistic consideration of all dimensions of the Prosecutor’s allegations); see also Trenga, *supra* note 112, at 86 (discussing the Chamber’s analysis in *Prosecutor v. Goudé*).

dimension of the crime should also be taken into consideration[.]”<sup>118</sup> The Pre-Trial Chamber also applied the factors listed in Rule 145 of the Rules of Procedure and Evidence to guide its assessment of gravity.<sup>119</sup> In *Prosecutor v. Charles Blé Goudé*, which considered alleged crimes against humanity in Ivory Coast, the factor which proved most determinative in the Pre-Trial Chamber’s gravity assessment was the fact that “the charged crimes constitute[d] . . . an attack against a civilian population with a broader widespread and systematic attack.”<sup>120</sup> Additionally, the defendant Goudé played a crucial role “in the adoption and implementation of the policy to carry out the attack.”<sup>121</sup>

There is an understanding in international criminal law that prosecutions of foot soldiers or low-level perpetrators carry far less gravity than those which fall on senior leaders or heads of state.<sup>122</sup> Article 27 of the Rome Statute grants the ICC the authority to prosecute heads of states by explicitly abolishing the immunity they typically enjoy before domestic courts.<sup>123</sup> Additionally, Rule 145 specifically cites “abuse of power or official capacity” as an aggravating circumstance that should significantly impact a potential case’s gravity assessment.<sup>124</sup> “Senior leaders are those most likely to avoid accountability for their crimes, but at the same time, their prosecution is likely to have the strongest deterrent effect.”<sup>125</sup> Prosecutions of heads of states, therefore, carry an inherent gravity that significantly increases the likelihood that such a situation satisfies the Article 17 requirement.

The legal framework of the ICC, as described above, will next be applied to the factual circumstances of the Duterte administration’s “war on drugs.”

### ***B. The ICC’s Jurisdiction, Triggering, and Admissibility Requirements are Fulfilled by Duterte’s “War on Drugs”***

ICC Prosecutor Fatou Bensouda stated in October 2016 that the Court “may have the jurisdiction to prosecute perpetrators of thousands of alleged extrajudicial

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118. *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 31 (Feb. 8, 2010).

119. Trenga, *supra* note 112, at 85; *see* RULES OF PROCEDURE AND EVIDENCE 145(1)(c) (explaining that the Court shall consider “the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person”); *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, ¶ 32.

120. *Prosecutor v. Goudé*, Case No. ICC-02/11-02/11, ¶ 20; *see also* Trenga, *supra* note 112, at 86 (discussing the nature of the cruel acts that led to the conclusion of crimes against humanity).

121. *Prosecutor v. Goudé*, Case No. ICC-02/11-02/11, ¶ 20.

122. NOVAK, *supra* note 45, at 57.

123. Beth Van Schaack, *African Heads of State Before the International Criminal Court*, INT’L CRIM. JUST. TODAY (June 21, 2015), <https://www.international-criminal-justice-today.org/arguendo/african-heads-of-state-before-the-international-criminal-court/>.

124. RULES OF PROCEDURE AND EVIDENCE, *supra* note 119, at 145(2)(b)(ii).

125. NOVAK, *supra* note 45, at 57.

killings in the Philippines' crackdown on drugs."<sup>126</sup> More recently, in February 2018, Prosecutor Bensouda launched a preliminary examination to determine whether there is a reasonable basis to proceed and request authorization for a full investigation from the Pre-Trial Chamber.<sup>127</sup> Additionally, Prosecutor Bensouda invoked her Article 15 authority to initiate a preliminary examination into President Duterte's "war on drugs," thereby triggering the ICC's jurisdiction.<sup>128</sup> For the reasons asserted below, the Duterte administration's treatment of Filipino citizens constitutes a crime against humanity, and provides the proper prerequisites for the case to be heard before the ICC.

### 1. Temporal and Territorial Jurisdiction Requirements are Satisfied

The potential case against Rodrigo Duterte for crimes against humanity satisfies the temporal jurisdiction requirement of the Rome Statute. The Rome Statute of the ICC entered into force for the Philippines on November 1, 2011, following the country's accession on August 11 of the same year.<sup>129</sup> Every act that would, in sum, constitute alleged crimes against humanity occurred after Duterte took office on June 30, 2016, thereby satisfying the temporal jurisdiction requirement.<sup>130</sup> Because Duterte's "war on drugs" is taking place within the territory of the Philippines,<sup>131</sup> the ICC's territorial jurisdiction requirement is also satisfied.

### 2. Duterte's "War on Drugs" Satisfies the Subject Matter Jurisdiction Requirement

In a recent report, AI expressed deep concern that "the deliberate and widespread killings of alleged drug offenders, which appears to be systematic, planned and organised by the authorities, may constitute crimes against humanity."<sup>132</sup> The concerns of AI are well-founded: the factual circumstances of the extrajudicial killing campaign carried out by the Duterte administration under the guise of a "war on drugs" do constitute crimes against humanity under Article 7 of the Rome Statute. The following section will apply each element of crimes against humanity to the factual circumstances of Duterte's "war on drugs."

#### a. The "War on Drugs" Constitutes an Attack Against a Civilian Population

According to Duterte's own government data, the police have killed an

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126. Ed Adamczyk, *Rodrigo Duterte Suggests Philippines May Withdraw from ICC*, UPI NEWS CURRENT (Nov. 17, 2016), [http://go.galegroup.com/ps/i.do?p=ITOF&sw=w&u=temple\\_main&v=2.1&id=GALE%7CA470475594&it=r&asid=b50d5c837725b6d08cf2a92c502cc7cd](http://go.galegroup.com/ps/i.do?p=ITOF&sw=w&u=temple_main&v=2.1&id=GALE%7CA470475594&it=r&asid=b50d5c837725b6d08cf2a92c502cc7cd).

127. Ellis-Peterson, *supra* note 8.

128. *Id.* See *supra* Section II.A.4 for a discussion of Article 15 jurisdiction.

129. *Philippines Ratifies the Rome Statute of the International Criminal Court*, U.N. NEWS (Aug. 30, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39416#.WmKC75M-dHQ>.

130. See *If You Are Poor*, *supra* note 6, at 6 (providing statistics on drug-related killings from July 1, 2016—the day after Duterte took office—to January 21, 2017).

131. See *supra* Part II.A for a discussion on whether the ICC has the authority to adjudicate allegations against Duterte.

132. *If You Are Poor*, *supra* note 6, at 7.



estimated 4,100 drug dealers in shootouts.<sup>133</sup> HRW, however, estimates that the Duterte administration is responsible for the murders of over 12,000 Filipinos as part of the Duterte administration's "war on drugs."<sup>134</sup> These facts indicate the broad requirement that the attack be directed against a civilian population is satisfied for the purpose of prosecuting Duterte for crimes against humanity.<sup>135</sup>

b. Duterte's "War on Drugs" Meets the State or Organizational Policy Requirement

To prosecute crimes against humanity at the ICC, the second requirement is that the crimes were carried out as part of a state or organizational policy.<sup>136</sup> Duterte is the president of the Philippines and he continually uses his authority as head of state to dictate law enforcement policies that encompass the extrajudicial killings of Filipino citizens.<sup>137</sup> "Based on credible information, these killings appear often motivated by pressure coming from the highest levels of the government and police force[.]"<sup>138</sup> The pressures placed on these officers arise directly from the PNP Chief's July 1, 2016 Command Memorandum Circular (CMC), which formalized the Duterte administration's "anti-illegal drug campaign plan."<sup>139</sup> As a result, Duterte's "war on drugs" evidently satisfies the requirement that crimes against humanity be committed as part of a state or organizational policy.

c. An Attack of a Widespread or Systematic Nature

For the ICC to have jurisdiction to prosecute crimes against humanity, the alleged attack must also have been of a "widespread or systematic" nature.<sup>140</sup> The "war on drugs" fits well within the ICC's definition of the widespread requirement as an attack of a large-scale which is "massive, frequent, carried out collectively with considerable seriousness, and directed against a multiplicity of victims."<sup>141</sup> Data gathered by AI from the PNP indicates that "police officers and unknown armed persons collectively carried out 7,025 drug-related killings between 1 July 2016 and 21 January 2017, roughly an average of 34 per day."<sup>142</sup> These thousands

133. Petty, *supra* note 43.

134. *World Report 2018*, *supra* note 9, at 11.

135. *See id.* at 429–30 ("[T]he Philippine National Police and its agents have repeatedly carried out extrajudicial killings of drug suspects, and then falsely claimed self-defense.").

136. Rome Statute, *supra* note 46, art. 7, ¶ 2(a).

137. Michelle Xu, *Human Rights and Duterte's War on Drugs*, COUNCIL ON FOREIGN REL. (Dec. 16, 2016), <https://www.cfr.org/interview/human-rights-and-dutertes-war-drugs> ("The drug war is a cornerstone of Duterte's domestic policy and represents the extension of policies he'd implemented earlier in his political career as the mayor of the city of Davao.").

138. *If You Are Poor*, *supra* note 6, at 21.

139. *Id.* at 29.

140. Rome Statute, *supra* note 46, art. 7.

141. Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 83 (June 15, 2009).

142. *If You Are Poor*, *supra* note 6, at 6–7 ("Amnesty International found strong evidence of links between state authorities and some armed persons who carry out drug-related killings. The police officer said officers sometimes disguise themselves as unknown armed persons, particularly

of murders, carried out pursuant to the “war on drugs,” clearly satisfy the systematic requirement that the conduct be organized in nature and not be a random occurrence.<sup>143</sup> Duterte’s campaign of extrajudicial murder under the guise of drug-related law enforcement is part of a widespread and systematic attack and therefore satisfies this element of Article 7.

d. Knowledge of the Attack

Duterte’s own words provide ample evidence to support the conclusion that the knowledge, or *mens rea*, requirement for crimes against humanity is satisfied.<sup>144</sup> On the campaign trail, Duterte warned, “[y]ou drug pushers, hold-up men and do-nothings, you better go out. Because I’d kill you.”<sup>145</sup> President Duterte began his term in June 2016, promising constituents that he would eliminate crime within six months by targeting those using and selling drugs.<sup>146</sup> Duterte’s well-publicized statements on his “war on drugs” provide strong evidence to support a reasonable belief that he knows about the killings being perpetrated by his law enforcement agents. Because Duterte’s “war on drugs” satisfies the four requirements of Article 7, his conduct constitutes a crime against humanity sufficient to satisfy the subject matter jurisdiction requirement of the Rome Statute.

**3. Duterte’s “War on Drugs” Satisfies the Admissibility Requirements of Complementarity and Gravity**

The failure of the Philippines to prosecute the perpetrators of over 7,000 extrajudicial killings meets the complementarity element of admissibility required by the ICC. Additionally, the situation in the Philippines meets the gravity requirement, considering the sitting president is overseeing the horrifying number of extrajudicial killings.<sup>147</sup>

a. The Situation in the Philippines Satisfies the Complementarity Requirement

According to AI, Philippine authorities have claimed to investigate these unlawful killings, despite an utter lack of prosecutions of those evidently responsible.<sup>148</sup> Since Duterte took office, there have been no meaningful investigations of or criminal charges brought against any member of the police for a

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when the target is someone whose family might bring a complaint or whose death might lead to greater suspicion; he mentioned female targets in particular.”).

143. Situation in the Republic of Cote d’Ivoire, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Cote d’Ivoire, ¶ 54 (Oct. 3, 2011).

144. See John Chalmers & Andrew R.C. Marshall, *As Bodies Pile Up in Philippines, Many Fear to Talk About Duterte’s War*, REUTERS (Sept. 4, 2016, 7:31 PM), <https://www.reuters.com/article/us-philippines-drugs/as-bodies-pile-up-in-philippines-many-fear-to-talk-about-dutertes-war-idUSKCN11A15P> (“[H]e told a news conference on Monday that ‘plenty will be killed’ in his campaign.”).

145. *If You Are Poor*, *supra* note 6, at 10.

146. *Id.* at 11.

147. *Id.* at 7.

148. *Id.*

drug-related killing.<sup>149</sup> Moreover, it would likely prove futile to prosecute Philippine police for killing drug dealers—Duterte has promised to pardon them.<sup>150</sup> Therefore, the Philippines is either unwilling or unable to prosecute the alleged crimes against humanity perpetrated through the “war on drugs.” For these reasons, the admissibility requirement of complementarity is satisfied.<sup>151</sup>

b. The Severity of the “War on Drugs” Satisfies the Gravity Requirement

The Duterte administration’s extrajudicial killing campaign also meets the gravity requirement of the ICC.<sup>152</sup> In *Goudé*, the Pre-Trial Chamber determined that the scale of the crimes was sufficiently large, based on the “murder of at least 184 persons, the rape of at least 38 women and girls, the infliction of serious bodily harm on at least 126 persons, also constituting acts of persecution against at least 348 persons[.]”<sup>153</sup> Additionally, the manner in which the crimes were committed was particularly cruel because they consisted of perpetrators with heavy weaponry attacking unarmed civilians.<sup>154</sup> The Chamber rejected the defense’s argument that the alleged crimes did not meet the gravity threshold because they only occurred within a few districts over a period of several months.<sup>155</sup> Analogous to *Goudé*, Duterte’s “war on drugs,” which led to 12,000 casualties, including children, is grand in scale.<sup>156</sup> Furthermore, the “war on drugs” is geographically and temporally widespread and has been systematically carried out by Philippine law enforcement at the urging of the Duterte administration.<sup>157</sup>

Moreover, there are factors beyond the sheer death toll of Duterte’s “war on drugs” that contribute to the gravity requirement. The Duterte administration tasks police officers with implementing the “war on drugs” on the ground and encourages them to kill alleged drug offenders.<sup>158</sup> Officers are paid by the “encounter,”<sup>159</sup> in amounts ranging from \$161 to \$302 USD.<sup>160</sup> These officers routinely bust down doors in the middle of the night and kill unarmed, suspected drug users or sellers in cold blood.<sup>161</sup>

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149. *Id.*

150. *World Report 2018*, *supra* note 9, at 430.

151. See *supra* Part II.A.5 for a discussion of the admissibility requirement under the Rome Statute.

152. See *supra* Part II.A.5 for a discussion of the gravity requirement under the Rome Statute.

153. Prosecutor v. Goudé, Case No. ICC-02/11-02/11, Decision on the Defence Challenge to the Admissibility of the Case against Charles Blé Goudé for Insufficient Gravity, ¶ 21 (Nov. 12, 2014), [https://www.icc-cpi.int/CourtRecords/CR2015\\_05448.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_05448.PDF).

154. *Id.*

155. *Id.*

156. *World Report 2018*, *supra* note 9, at 429.

157. See, e.g., Xu, *supra* note 137 (discussing the state sanctioned large-scale police and vigilante actions to kill drug addicts across the country).

158. See *If You Are Poor*, *supra* note 6, at 21 (noting that police officers are given incentives to kill drug addicts in the form of under-the-table cash payments and other reinforcements).

159. *Id.* at 29. An “encounter” is defined as a “shootout during a police operation.” *Id.*

160. *Id.*

161. *Id.* at 7.

Further, police officers told AI that “officers sometimes disguise themselves as unknown armed persons, particularly when the target is someone whose family might bring a complaint or whose death might lead to greater suspicion; he mentioned female targets in particular.”<sup>162</sup> In addition, police often pay non-officers to kill alleged drug offenders.<sup>163</sup> “Two individuals paid to kill alleged drug offenders told AI that their boss is an active duty police officer; they reported receiving around 10,000 pesos (\$201 USD) per killing.”<sup>164</sup> Contributing further to the abhorrent nature of the “war on drugs” is the fact that the vast majority of victims live in poverty.<sup>165</sup>

For all the foregoing reasons, the gravity requirement for admissibility is fulfilled. With the jurisdiction and admissibility requirements articulated in the Rome Statute satisfied by Duterte’s “war on drugs,” this Comment will next discuss the policy implications of investigating and potentially prosecuting him for crimes against humanity.

### III. THE BALANCE OF POLICY CONSIDERATIONS WEIGH HEAVILY IN FAVOR OF A FULL ICC INVESTIGATION INTO DUTERTE’S “WAR ON DRUGS”

In evaluating whether the ICC should launch an investigation into Duterte’s “war on drugs” and potentially prosecute him, it is important to consider the variety of implications deciding that question in the affirmative would raise, such as the impact on the Filipino citizenry, the potential that Duterte radicalizes, and potential delegitimization of the ICC.

#### A. *Potential Benefits for Filipinos of Prosecuting Duterte*

The codification of crimes against humanity in the Rome Statute signals a recognition of the exceptional danger that governments, charged with protecting the people who live in their territory, “will instead murder them, enslave them, and persecute them, transforming their homeland from a haven into a killing field.”<sup>166</sup> Even early on in Duterte’s presidency, it was readily apparent that his “war on drugs” had effectively engendered a climate of fear in the Philippines.<sup>167</sup> Interviews with Philippine officials reveal that investigating potentially unlawful killings has been nearly impossible because witnesses are too terrified to come forward.<sup>168</sup> “Family members visit morgues to identify their loved one amongst the many other bodies that arrive each night riddled with bullet holes. The sight of bodies on the street has become commonplace; the fear of being or knowing the next victim, pervasive.”<sup>169</sup>

Although a January 2018 HRW report cites signs that there is a rising domestic

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162. *Id.*

163. *Id.*

164. *If You Are Poor*, *supra* note 6, at 7.

165. *Id.*

166. David Luban, *A Theory of Crimes Against Humanity*, 29 *YALE J. INT’L L.* 85, 117 (2004).

167. Chalmers & Marshall, *supra* note 144, at 3.

168. *Id.*

169. *If You Are Poor*, *supra* note 6, at 6.

resistance to Duterte's brutal "war on drugs,"<sup>170</sup> he has not expressed any intention of ceasing his murderous campaign.<sup>171</sup> With that in mind, the ICC has a strong imperative to intervene in President Duterte's "war on drugs" in an attempt to prevent any further bloodshed. Alarming, if the "war on drugs" continues to claim lives at the current rate of 12,000 lives within fourteen months, the overall death toll at the end of Duterte's term in 2022 could exceed 60,000.<sup>172</sup> Equally important, however, is the urgent need to provide an avenue to justice and some semblance of closure for families of the thousands killed in Duterte's drug war. If the ICC is truly committed to putting an "end to impunity for the perpetrators of crimes against humanity,"<sup>173</sup> it must address the 12,000 lives his extrajudicial campaign has claimed under the guise of a "war on drugs."<sup>174</sup>

### ***B. The Possible Alienation or Radicalization of Duterte is Not Determinative***

As described above, President Duterte regularly displays unbridled contempt for the notion that the ICC has the authority to prosecute him for the over 12,000 killings tied to his "war on drugs."<sup>175</sup> Duterte's disposition toward the Court raises the concern that any step taken by the ICC Prosecutor toward his accountability might prompt him to act more radically and slip further into authoritarianism.<sup>176</sup> The combination of Duterte's radical behavior and international prosecution could create a particularly dangerous dynamic in the current Philippine political environment because President Duterte enjoys broad public support from his electorate.<sup>177</sup> The

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170. Marie Wolfrom, *HRW Report Hails Resistance to Trump-style Populism*, MAIL & GUARDIAN (Jan. 18, 2018), <https://mg.co.za/article/2018-01-18-hrw-report-hails-resistance-to-trump-style-populism>.

171. Genalyn Kabling, *Duterte Pledges to Continue War on Illegal Drugs Until End of His Term*, MANILA BULLETIN (Jan. 14, 2018), <https://news.mb.com.ph/2018/01/14/duterte-pledges-to-continue-war-on-illegal-drugs-until-end-of-his-term/> ("President Duterte has pledged to continue war on illegal drugs until end of his term even though attaining a drug-free country might be 'impossible.'").

172. Lindsay Murdoch, *It's Unacceptable Children Are Deemed Collateral Damage in Duterte's War on Drugs*, SYDNEY MORNING HERALD (Aug. 24, 2017), <https://www.smh.com.au/world/its-unacceptable-children-are-deemed-collateral-damage-in-dutertes-war-on-drugs-20170824-gy305e.html>.

173. Rome Statute, *supra* note 46, at Pmb1. ("The States Parties to this Statute . . . [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . [h]ave agreed as follows . . .").

174. See Param-Preet Singh, *Smokescreen Justice for 'Drug War' Deaths in the Philippines*, HUMAN RIGHTS WATCH (Dec. 7, 2017, 4:59 PM), <https://www.hrw.org/news/2017/12/07/smokescreen-justice-drug-war-deaths-philippines> (discussing the ICC's false claims of accountability for the 12,000 deaths in the last sixteen months).

175. See Rauhala, *supra* note 42 (noting that Duterte expresses no fear or concern of the possibility of an ICC investigation).

176. See Vergel O. Santos, *Duterte's Descent into Authoritarianism*, N.Y. TIMES (Nov. 15, 2016), <https://www.nytimes.com/2016/11/16/opinion/dutertes-descent-into-authoritarianism.html> (outlining Duterte's tendency to react to measures against his "war on drugs" with abuses of power).

177. *Rodrigo Duterte and His War on Drugs Receive Positive Reviews from Filipinos*, PEW

Pew Research Center published data revealing that 86% of Filipinos hold a favorable view of President Duterte.<sup>178</sup>

In addition to broad general support for his administration, President Duterte enjoys substantial support among Filipinos for his administration's "war on drugs."<sup>179</sup> The Pew Research data referenced above publicized that 78% of Filipinos approve of his handling of illegal drugs, and 62% believe the Philippine government is making progress in its campaign against illegal drugs.<sup>180</sup> President Duterte's popularity among Filipinos is likely attributable to the fact that high levels of crime—which arise, in part, from persistent poverty and corruption—remain a concern for many citizens.<sup>181</sup> An abundance of scandal and crime around law enforcement institutions have eroded the Filipino population's confidence in the same institutions.<sup>182</sup> This attitude among the electorate led to Duterte's popularity among the many voters who are "tired of the political establishment and its failure to tackle crime, poverty, and corruption."<sup>183</sup> Duterte's brazen disregard for the ICC's legitimacy, combined with his strong support among Filipinos, could trigger him to act more radically if he were prosecuted by the ICC.

Duterte's position as head of state also contributes to the likelihood that the ICC's actions would radicalize him.<sup>184</sup> The ICC's prosecutorial decisions have political consequences, and therefore must be taken with care.<sup>185</sup> Notably, the political impact of the decision to prosecute is "exacerbated when the defendant is a very senior government . . . official."<sup>186</sup> If Duterte were prosecuted, he could very well react with a harsher brand of authoritarianism, given his widespread support in the Philippines and his status as a sitting head of state.<sup>187</sup>

A survey released in October 2017, however, revealed that President Duterte's net satisfaction rating slid to 48%, the first major decline since he took office.<sup>188</sup> A

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RES. CTR. (Sep. 20, 2017), [http://www.pewglobal.org/2017/09/21/people-in-the-philippines-still-favor-u-s-over-china-but-gap-is-narrowing/pg\\_2017-09-21\\_philippines\\_03/](http://www.pewglobal.org/2017/09/21/people-in-the-philippines-still-favor-u-s-over-china-but-gap-is-narrowing/pg_2017-09-21_philippines_03/).

178. *Id.*

179. See Samantha Raphelson, *Philippines' Rodrigo Duterte Sustain Support for Deadly War on Drugs*, NPR (Nov. 13, 2017 4:22 PM), <https://www.npr.org/2017/11/13/563841402/philippines-rodrido-duterte-sustains-support-for-deadly-war-on-drugs> (noting that 78 out of 10 Filipinos still support Duterte's "war on drugs").

180. PEW RES. CTR., *supra* note 177.

181. *If You Are Poor*, *supra* note 6, at 10–11.

182. *Id.* As AI notes, the scandals surrounding law enforcement include leaks of the luxurious conditions that drug lords enjoy while in prison. *Id.*

183. *Id.* at 11.

184. See, e.g., NOVAK, *supra* note 45, at 27 (noting the exponential political impact when the target of an ICC prosecution is a head of state or government official).

185. See *id.* (discussing how any ICC decision to prosecute is an innately political act with unknown and potentially compounding consequences).

186. *Id.*

187. See Santos, *supra* note 176 ("Authoritarianism may not be Mr. Duterte's political goal, but it defines his manner and his temperament. And with no institution or political force strong enough to counter him, authoritarianism is where the Philippines seems to be heading.").

188. Nyshka Chandran, *One of the World's Most Controversial Strongmen is Losing His Popularity at Home*, CNBC (Oct. 10, 2017), <https://www.cnbc.com/2017/10/10/philippines-drug->

woman whose husband was one of the thousands killed in the “war on drugs” told AI, “I was in favour of [Duterte’s] slogan ‘Change’. All Filipinos want change. But no Filipino wants dead bodies all over the streets, and for the police killing people to become the norm.”<sup>189</sup>

President Duterte consistently objects to the international criticism he has received for conducting an extrajudicial killing campaign, branded as a “war on drugs.”<sup>190</sup> Early on in his presidency, in November 2016, Duterte referred to the ICC as “useless.”<sup>191</sup> Specifically, Duterte asserted that Western threats to seek his indictment by the ICC are “bullshit.”<sup>192</sup> He further criticized the U.S. for what he called “hypocritical threats to try him in the ICC, to which [the U.S.] itself is not a signatory.”<sup>193</sup> President Duterte believes that the U.S., and the West in general, have failed to understand the seriousness of the Philippines’ methamphetamine problem, and has gone so far as to say that “he was ready to ‘rot in jail’ to achieve his goals.”<sup>194</sup> In November 2016, Duterte stated that “I will never allow my country to be thrown to the dogs[.]”<sup>195</sup> He continued, “I said, when I was a mayor, ‘If you destroy my city with drugs I will kill you.’”<sup>196</sup>

Following the launch of a preliminary examination by the ICC Prosecutor, President Duterte insisted that the ICC does not have jurisdiction over him, “not in a million years.”<sup>197</sup> Duterte has displayed deep contempt for the ICC and the theory that it has the authority to hold him accountable for the thousands of lives his “war on drugs” has claimed.<sup>198</sup> On March 14, 2018, Duterte announced that the Philippines was withdrawing from the Rome Statute, accusing the ICC of unfairly

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war-hits-president-rodrigo-duterte-popularity-ratings.html.

189. *If You Are Poor*, *supra* note 6, at 6.

190. *See Duterte Says May Follow Russia’s Withdrawal from ‘Useless’ International Criminal Court*, CNBC (Nov. 17, 2016), <https://www.cnn.com/2016/11/17/philippines-duterte-says-may-follow-russias-withdrawal-from-useless-icc.html> (discussing how Duterte feels that nobody listens to his justifications for the crackdown on drugs, in particular, long-time Philippine ally, the U.S.).

191. *See id.* (“They are useless, those in the international criminal (court). They (Russia) withdrew. I might follow. Why? Only the small ones like us are battered.”).

192. *Philippines’ Duterte Calls Western Threats of ICC Indictment Hypocritical*, REUTERS (Nov. 28, 2016, 8:13 AM) <http://www.reuters.com/article/us-philippines-duterte/philippines-duterte-calls-western-threats-of-icc-indictment-hypocritical-idUSKBN13N19P> (“‘You scare me that you will jail me? [sic] International Criminal Court? Bullshit,’ Duterte said during a speech.”) [hereinafter *Duterte Calls Western Threats of ICC Indictment Hypocritical*].

193. *Id.* (“‘America itself is threatening to jail me in the International Criminal Court,’ Duterte said. ‘It is not a signatory of that body. Why? Because at that time, they were afraid Bush would face it.’”).

194. *Id.*

195. *Id.*

196. *Id.*

197. Petty, *supra* note 43.

198. *See id.* (describing Duterte’s public criticisms of the ICC and refusal to cooperate with its investigation); *see Duterte Calls Western Threats of ICC Indictment Hypocritical*, *supra* note 192 (listing many of the insults Duterte has levelled at the court and other nations, as well as his belief that the violence committed as part of his “war on drugs” is justified).

portraying him as having violated human rights.<sup>199</sup> Despite this decision, the Court will not lose temporal jurisdiction over the Philippines until one year after the U.N. Secretary-General receives formal notification of the Philippines' intention to withdraw.<sup>200</sup>

It would be wise for Duterte to heed the warnings the Head of State of Burundi received when he made similar threats to withdraw from the Rome Statute.<sup>201</sup> James Goldston, a former attorney in the ICC Prosecutor's Office, made it clear in the Burundi context, "[i]f the effort is to secure impunity for crimes that have taken place until now, it won't be effective."<sup>202</sup> He further noted that it "may be a helpful wakeup call to any other governments that are thinking about withdrawing from the statute for the purposes of removing legal accountability from the table."<sup>203</sup> High government officials in Burundi received notice of their error on November 8, 2017, when the ICC's Pre-Trial Chamber authorized Prosecutor Bensouda to investigate Burundi for crimes committed both while it was a member state and after its withdrawal, the latter dependent on certain legal requirements.<sup>204</sup>

Article 127(2) of the Rome Statute governs the legal implications of State Parties' withdrawal and dictates that a state's withdrawal shall not prejudice a matter that was under consideration before the effective withdrawal.<sup>205</sup> There is an active debate among international criminal lawyers regarding whether the launch of a preliminary examination by the ICC Prosecutor in the context of Article 127 negates the attempted withdrawal of the Heads of State of Burundi and the Philippines.<sup>206</sup> Goldston accurately asserts that if a head of state, such as Duterte, attempts to withdraw from the ICC, he would likely not succeed in his goal of acquiring

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199. Felipe Villamor, *Philippines Plans to Withdraw from International Criminal Court*, N.Y. TIMES (Mar. 14, 2018), <https://www.nytimes.com/2018/03/14/world/asia/rodrigo-duterte-philippines-icc.html>.

200. See e.g., Alexandra Zavis & Robyn Dixon, *Only Africans Have Been Tried at the Court for the Worst Crimes on Earth*, L.A. TIMES (Oct. 23, 2016), <http://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html> (illustrating how the ICC's jurisdiction continues to apply in the similar case of Burundi's withdraw from the Rome Statute).

201. See Jina Moore, *Burundi Quits International Criminal Court*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2018/03/14/world/asia/rodrigo-duterte-philippines-icc.html> (explaining that Burundi became the first state to withdraw from the ICC after the Court launched a preliminary examination into the alleged extrajudicial killings, disappearances, arbitrary arrests and detentions, torture, and sexual violence).

202. Zavis & Dixon, *supra* note 200.

203. *Id.*

204. Rick Gladstone & Marlise Simmons, *We're Not Done Yet, Hague Court Tells Burundi Leaders*, N.Y. TIMES (Nov. 9, 2017), <https://www.nytimes.com/2017/11/09/world/africa/icc-burundi-nkurunziza.html>.

205. Rome Statute, *supra* note 46, art. 127(2).

206. See Tom Nachtigal, *Burundi's Withdrawal from the International Criminal Court: Can it Still Exercise Jurisdiction over Crimes Committed Prior to Withdrawal? An Academic Discourse*, COLUM. J. OF TRANSNAT'L L., BULL., <http://jtl.columbia.edu/burundis-withdrawal-from-the-international-criminal-court-can-it-still-exercise-jurisdiction-over-crimes-committed-prior-to-withdrawal-an-academic-discourse/> (describing how commentators are divided over whether the Preliminary Examination qualifies as "continued consideration" under Article 127(2) of the Rome Statute governing withdrawal, and therefore how the ICC's jurisdiction over the matter is affected).



impunity for their potential international crimes.<sup>207</sup> The Court would still have jurisdiction for one year over crimes that had already occurred, and could potentially retain jurisdiction after a preliminary examination was launched.<sup>208</sup> Duterte's withdrawal from the ICC could potentially backfire on his administration and result in international humiliation because it may not protect him from prosecution.<sup>209</sup> Consequently, despite Duterte's potential for further radicalization, Prosecutor Bensouda should confidently proceed in requesting authorization to launch a full investigation into Duterte for crimes against humanity.

### ***C. Prosecuting Duterte Would Grant Greater Legitimacy to the ICC***

A successful case brought against Duterte for crimes against humanity could be a step in the right direction for the ICC in establishing greater legitimacy. The Rome Statute avows that those who commit genocide, crimes against humanity, and war crimes will no longer be immune from prosecution.<sup>210</sup> According to the Rome Statute Preamble, these are "the most serious crimes of concern to the international community," and thus, "must not go unpunished[.]"<sup>211</sup> The parties to the Rome Statute, by signing on, showed their support for preventing these crimes and ensuring that they will no longer be committed with impunity.<sup>212</sup> However, the ICC has yet to become a "silver bullet for bringing an end to impunity for crimes against humanity."<sup>213</sup> Launching a full investigation into President Duterte for crimes against humanity would be an important step for the ICC towards bolstering its reputation and acquiring greater legitimacy.

#### **1. The ICC Must Overcome the Pressures of Political Pragmatism in Favor of Justice in the Duterte Case**

The decision whether to initiate prosecution at the ICC against a domestically popular head of state, like Duterte, poses a challenge and rests on the tension between political pragmatism and a desire to end senseless murder. Mahmoud Cherif Bassiouni, an eminent figure in the foundation of modern international criminal law,<sup>214</sup> determined that domestic and international impunity results from conflict

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207. See Zavis & Dixon, *supra* note 200; see also Gladstone & Simmons, *supra* note 204 (explaining how the ICC and the international community have pushed back against Burundi's attempts to avoid responsibility through withdrawal).

208. See Gladstone & Simmons, *supra* note 204 (describing how the ICC may still have jurisdiction over matters beginning before a state withdraws from the Rome Statute).

209. *Id.*

210. Rome Statute, *supra* note 46, at Pmbl.; see also M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 421.

211. Rome Statute, *supra* note 46, at Pmbl.

212. *Id.*

213. Russell, *supra* note 56, at 27.

214. Marlise Simons, *M. Cherif Bassiouni, War-Crimes Jurist and Human Rights Champion, is Dead at 79*, N.Y. TIMES (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/obituaries/m-cherif-bassiouni-war-crimes-jurist-and-human-rights-champion-is-dead-at-79.html>.

between goals of *realpolitik* and justice.<sup>215</sup> “*Realpolitik* reflects the pursuit of political settlements for conflicts through a compromise that is unencumbered by moral and ethical limitations.” These settlements are characterized by a focus on political expediency, which comes at the cost of gaining justice for victims.<sup>216</sup> Bassiouni predicts that politicians will try to manipulate the ICC by limiting its administrative effectiveness and enforcement power, as well as implementing financial constraints.<sup>217</sup> As he explained in his speech at the signing ceremony of the Treaty in Rome, the Rome Statute is intended to remind governments that political pragmatism that sacrifices justice is no longer tolerated.<sup>218</sup> However, politics still loom large in determining which ICC cases ultimately lead to indictments.<sup>219</sup> In order to protect the role of the ICC as a strong deterrent and prevent the institution from compromising under the pressures of political expediency, the ICC should not shy away from prosecuting heads of state. President Duterte is no exception.

## **2. Prosecuting Duterte Would Reinforce the Deterrent Strength of ICC Prosecutions and Help to Alleviate the Perception that the Court is Biased Against Africans**

The Rome Statute contains a progressive definition of crimes against humanity.<sup>220</sup> The definition’s flexibility allows it to serve as an effective deterrence tool.<sup>221</sup> Deterrence has both a prosecutorial and a social dimension.<sup>222</sup> Prosecutorial deterrence encompasses the avoidance of illegal activity which results directly from fear of legal punishment.<sup>223</sup> Social deterrence occurs when potential wrongdoers choose not to break the law for fear of less direct, mainly social consequences.<sup>224</sup> A judicial institution is at its strongest when both prosecutorial and social deterrence work together,<sup>225</sup> and the ICC has the capacity to accommodate that arrangement.<sup>226</sup> In general, the ICC has a stronger deterrent effect on state actors than on non-state organizations such as rebel groups.<sup>227</sup> This deterrent effect has been shown to motivate state actors towards implementing domestic reforms.<sup>228</sup> In light of the fact that Duterte appears to be influencing other heads of state,<sup>229</sup> the ICC must utilize

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215. Bassiouni, *supra* note 210, at 409.

216. *Id.*

217. *Id.* at 421.

218. *Id.*

219. Russell, *supra* note 56, at 27.

220. Bassiouni, *supra* note 210, at 414.

221. See NOVAK, *supra* note 45, at 45 (explaining the Rome Statute’s definition of crimes against humanity and evaluating the definition’s practical effects on framing decisions at the ICC).

222. Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443, 444 (2016).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Jo & Simmons, *supra* note 222, at 444.

229. See *Indonesia Drug Chief Calls for Philippine-Style Crackdown*, BBC (Sep. 7, 2016),

this opportunity to prosecute him for the strong deterrent value it could afford the Court.

Additionally, if Duterte were to be brought to trial, he would be the first person outside of Africa to be tried before the Court.<sup>230</sup> The ICC's seeming focus on Africa, as well as its indictments of sitting heads of African states, have led some of that continent's leaders to withdraw their support for the Court.<sup>231</sup> The Court has even earned itself a reputation among some as an "instrument of neocolonialism."<sup>232</sup> However, Kofi Annan, a Ghanaian diplomat and former U.N. Secretary-General, expressed concern with the "notion that Africa has been singled out," pointing out that special tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), convicted several non-African heads of state of war crimes before the ICC was created to try such cases.<sup>233</sup> Regardless of whether the critiques of the ICC as biased against Africa have merit, the fact that the Court has faced this criticism<sup>234</sup> should further motivate ICC prosecutors to begin proceedings against President Duterte—who is not African.

#### **IV. PROSECUTOR BENSOUA SHOULD REQUEST AUTHORIZATION FROM THE PRE-TRIAL CHAMBER TO INITIATE AN INVESTIGATION INTO DUTERTE'S "WAR ON DRUGS"**

In February 2018, ICC Prosecutor Bensouda opened a preliminary examination of the alleged thousands of extrajudicial killings perpetrated in the course of police anti-drug operations in the Philippines.<sup>235</sup> Prosecutor Bensouda emphasized that a preliminary examination is not an investigation, "but a process of examining 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."<sup>236</sup>

Article 15(3) dictates that "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation[.]"<sup>237</sup> As described in Part II, there is undoubtedly a reasonable basis for the Prosecutor to conclude that both the jurisdictional and admissibility requirements of the ICC are satisfied. Furthermore, Part III articulates the strong policy arguments in support of a

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<http://www.bbc.com/news/world-asia-37295787> (describing how Indonesia's law enforcement agencies have begun imitating the drug policies enacted by Duterte).

230. See Zavis & Dixon, *supra* note 200 (describing how, thus far, only Africans have been brought to trial at the ICC).

231. *Id.*

232. *Id.*

233. *Id.*

234. See Rauhala, *supra* note 42 (describing how prosecuting Duterte could help the ICC in its efforts to remain relevant in light of its criticisms).

235. Office of the Prosecutor, *supra* note 43.

236. *Id.*

237. Rome Statute, *supra* note 46, art. 15, ¶ 3.

prosecutorial decision to pursue an investigation into Duterte for crimes against humanity. This Comment therefore strongly recommends that Prosecutor Bensouda request authority from the Pre-Trial Chamber to launch a full investigation into Duterte for crimes against humanity through the exercise of her Article 15 *proprio motu* authority.<sup>238</sup> Since ICC Prosecutor Bensouda and her predecessor, Prosecutor Ocampo, enjoy some degree of discretion, both have relied on the concept of “gravity” in selecting cases.<sup>239</sup> It is the policy of the Office to choose those crimes which it perceives as the most egregious.<sup>240</sup> Indeed, the factual circumstances of Duterte’s “war on drugs” are of such a heinous nature, particularly due to the scale of atrocities and the brazen abuse of power being perpetrated on the Filipino citizenry, that this is precisely the type of case that the ICC Prosecutor should request pre-trial authorization to pursue.<sup>241</sup>

## V. CONCLUSION

With the current death toll approaching 13,000,<sup>242</sup> and a projected body count of 60,000 or more at the close of the Duterte administration in 2022,<sup>243</sup> preventing future bloodshed must be of paramount concern to the international legal community. The ICC Prosecutor should, to fulfill the Court’s mandate against impunity, request authority from the Pre-Trial Chamber to launch a full-scale investigation into the strong case against President Duterte for his crimes against humanity and thereby hopefully end his senseless campaign of violence.

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238. See *supra* Part II for a discussion establishing the ICC’s authority to investigate and prosecute Duterte for crimes against humanity.

239. See Margaret M. deGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475, 477 (2013) (describing how the concept of gravity, or the seriousness of the offense, acts as an important factor in which cases the ICC Prosecutor decides to pursue).

240. See NOVAK, *supra* note 45, at 53 (explaining how the Rome Statute requires only that cases be serious enough to warrant prosecution by the ICC).

241. See *supra* Part II.A.1 for a discussion of the ICC’s subject matter jurisdiction, describing which types of cases the Court ought to pursue.

242. *Thousands Demand End to Killings in Duterte’s Drug War*, AL JAZEERA (Aug. 21, 2017), <http://www.aljazeera.com/news/2017/08/thousands-demand-killings-duterte-drug-war-170821124440845.html>.

243. Lindsay Murdoch, *It’s Unacceptable Children are Deemed Collateral Damage in Duterte’s War on Drugs*, SYDNEY MORNING HERALD (Aug. 24, 2017), <https://www.smh.com.au/world/its-unacceptable-children-are-deemed-collateral-damage-in-dutertes-war-on-drugs-20170824-gy305e.html>.