POTENTIAL LEGAL CHALLENGES TO PRESIDENT RODRIGO DUTERTE'S DECISION TO WITHDRAW THE PHILIPPINES FROM THE ROME STATUTE*

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In a letter dated March 17, 2018 and signed by its Secretary of Foreign Affairs,[1] the Philippines formally served notice of its withdrawal from the Rome Statute,[2] following the directive of President Rodrigo Duterte.[3] The Philippines' exit from the treaty creating the International Criminal Court (ICC) came in the wake of Prosecutor Fatou Bensouda's decision to open a preliminary examination into President Duterte's "war on drugs," due to "reported incidents involv[ing] extra-judicial killings in the course of police anti-drug operations"[4] which may constitute crimes within the jurisdiction of the ICC.[5]

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* *Cite as* Ryan Hartzell C. Balisacan, *Potential Legal Challenges to President Rodrigo Duterte's Decision to Withdraw the Philippines from the Rome Statute*, 91 PHIL. L.J. 774, (page cited) (2018).

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[1] *See* Depositary Notification (Re: Withdrawal), *available at* https://treaties.un.org/doc/Publication/CN/2018/CN.138.2018-Eng.pdf.

[2] 2187 U.N.T.S. 90 (2002).

[3] *See* Enrico Dela Cruz & Toby Sterling, *Philippines informs U.N. of ICC withdrawal, court regrets move*, REUTERS: WORLD NEWS, Mar. 16, 2018, *available at* https://www.reuters.com/article/us-philippines-duterte-icc-un/philippines-informs-u-n-of-icc-withdrawal-court-regrets-move-idUSKCN1GS0Y5.

[4] International Criminal Court, *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*, Feb. 8, 2018, *available at* https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat.

[5] *See* Agence France-Presse, *Int'l Criminal Court prosecutor 'deeply concerned' about Philippines killings*, GMA NEWS ONLINE, Oct. 14, 2016, *available at* http://www.gmanetwork.com/news/news/nation/584955/int-l-criminal-court-prosecutor-deeply-concerned-about-philippines-killings/story/.

President Duterte did not welcome what he perceived as the ICC Prosecutor's challenge to his campaign against illegal drugs, which was central to his platform as a candidate and his government agenda as chief executive. His decision to withdraw the Philippines from the Rome Statute was, for him, an affirmation of his belief that the chief critics and judges of his "war on drugs" should be his domestic constituency and Philippine legal authorities.

There are many approaches to problematizing the Philippines' withdrawal from the Rome Statute. It can be viewed in the context of the submission, just two years earlier, of similar notices of withdrawal by South Africa, Burundi, and Gambia[6]—a development that fueled still-ongoing debates regarding the ICC's continued legitimacy and viability in the future.[7] It can likewise be analyzed for its domestic impact, particularly on how it can bear on the continuing "war on drugs" in the Philippines, since an ongoing ICC inquiry could have conceivably applied some degree of pressure on the implementation of President Duterte's anti-drug campaign.

But before delving into the impact, consequences, or effects of the Philippines' departure from the ICC regime, one threshold issue needs to be addressed first: whether President Duterte's decision passes legal muster to begin with. If the decision to withdraw the Philippines from the Rome Statute was vitiated by legal defects under international and municipal law, all propositions about how the ICC should henceforth proceed *vis-à-vis* the Philippines could potentially be rendered moot. Before embarking on any further inquiries, therefore, a conversation on this matter should first be had.

To move this conversation forward, it is argued in this Article that there are substantial issues that can be raised concerning President Duterte's decision to withdraw the Philippines from the Rome Statute. Drawing from municipal and international law and jurisprudence, two grounds are raised to support the proposition that President Duterte's decision is open to legal

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[6] *See* Manisuli Ssenyonjo, *State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia*, 29 CRIM. L. FORUM 63, 63–64 (2018).

[7] *See, generally*, David Bosco, *Is the International Criminal Court Crumbling Before Our Eyes*, FOREIGN POLICY, Oct. 26, 2016, *available at* http://foreignpolicy.com/2016/10/26/is-the-international-criminal-court-crumbling-before-our-eyes-burundi-south-africa-gambia/; M. Cherif Bassiouni, et al., *Invited Experts on Withdrawal Question,* ICC FORUM, *available at* http://iccforum.com/withdrawal (last visited May 5, 2018); and Patrick Costello, *International Criminal Court 'crumbling' as defections put legitimacy, viability in doubt*, WASHINGTON TIMES, Dec. 27, 2016, *available at*, https://www.washingtontimes.com/news/2016/dec/27/international-criminal-court-crumbling-as-defectio/.

challenge: *first*, the decision, made unilaterally by President Duterte without securing consent from, or even giving notice to, the Senate (which concurred in the Rome Statute's ratification) indicate a potential violation of the Philippine Constitution; and *second*, the terms of his decision and the stated justifications on which it was predicated indicate potential violations of international treaty law. Either or both of these grounds can possibly render his decision legally defective.

In Part I of this Article is an overview of the factual backdrop against which the Philippines' withdrawal from the Rome Statute was effected. In Part II, two issues are expounded as described above: Section A discusses the "Philippine constitutional law" argument, while Section B elaborates on the "international treaty law" argument. The Article is concluded by proposing concrete agenda that specific institutions may pursue in order to help clarify the legality of President Duterte's decision to withdraw the Philippines from the Rome Statute.

I. BACKGROUND AND CONTEXT

During the campaign for the presidential elections in May 2016, President Duterte engaged in populist rhetoric[8] and endeared himself to the electorate by delivering fiery, often expletive-laden speeches in the vernacular.[9] As a former prosecutor, he focused his campaign platform on law and order. And as a former city mayor, he banked on his reputation as a strict disciplinarian who turned his locality into one of the most progressive metropolises outside the nation's capital region.

Knowing that voters dislike the vacuous rhetoric of "traditional politicians," President Duterte deftly deployed categorical and "quotable" messages during his campaign. He promised that he would solve the problem of heinous crimes and illegal drugs in six months—"if I fail, kill me."[10] Many Filipinos looked past his superlative claim and took his exaggeration as an indicator of political will.[11] His extremely strong stance

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[8] *See, generally*, Nicole Curato, *Flirting with Authoritarian Fantasies? Rodrigo Duterte and the New Terms of Philippine Populism*, 47 J. CONTEMP. ASIA 142 (2016).

[9] *See, e.g.*, *Philippines President Rodrigo Duterte in quotes*, BBC NEWS, Sept. 30, 2016, *available at* http://www.bbc.com/news/world-asia-36251094.

[10] *See* Robertzon Ramirez, *Duterte: Kill me if I don't resolve crimes in 6 months*, PHIL. STAR, Jan. 16, 2016, *available at* https://www.philstar.com/headlines/2016/01/16/1543436/duterte-kill-me-if-i-dont-resolve-crimes-6-months#sAbyO6HFZ5LEFjLg.99.

[11] *See* Ramon C. Casiple, *The Duterte Presidency as Phenomenon,* 38 CONTEMP. S.E. ASIA 179, 182 (2016)

against the problem of illegal drugs resonated with the people because based on an official report in 2015—the year before the presidential elections—26.93% of all *barangays* (villages) in the Philippines were "drug-affected." In the National Capital Region, the rate was at an astounding 99.26%.[12]

A day after President Duterte was sworn into office, the Philippine National Police ("PNP") Chief issued a circular detailing the government's anti-drug campaign.[13] Dubbed "Oplan Double Barrel," the program has two prongs. "Project HVT" is an intensified law enforcement campaign to apprehend "high value targets" like drug lords and members of organized drug syndicates.[14] On the other hand, "Project Tokhang"[15] targets drug crimes at streets and households.[16] It involves identifying suspected drug offenders in a locality based on the information of local police, village officials, and other informants;[17] later on, police officers knock on doors to "persuade suspected illegal drug personalities to stop their illegal activities."[18] "Project Tokhang" is a "community policing" approach to address the drug problem. It is not chiefly focused on prosecution. It merely encourages drug offenders to voluntarily surrender, undergo voluntary rehabilitation, and/or surrender illegal drugs and paraphernalia.[19]

On its surface, the "war on drugs" involved nothing more than an intensification of anti-drug operations already in place, supplemented by the innovative "Project Tokhang" approach which President Duterte pioneered in Davao City when he was mayor. But the formal policy structure of the "war on drugs" could not be divorced from President Duterte's public (and prominently quoted) marching orders. For instance, instead of exhorting the police to adhere to human rights principles, President Duterte ordered them to simply shoot drug suspects—an invitation that he even extended to

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[12] *See* PHILIPPINE DRUG ENFORCEMENT AGENCY, 2015 ANNUAL REPORT 15 (2015), *available at* http://pdea.gov.ph/images/AnnualReport/2015AR/AR2015page1to37.pdf

[13] *See* Phil. Nat'l Police Memo Circ. No. 16-2016, *available at* https://didm.pnp.gov.ph/Command%20Memorandum%20Circulars/CMC%202016-16%20PNP%20ANTI-ILLEGAL%20DRUGS%20CAMPAIGN%20PLAN%20%E2%80%93%20PROJECT%20DOUBLE%20BARREL.pdf.

[14] *Id.*, at 6–7.

[15] "Tokhang" is a portmanteau of local words "*toktok*" (knock on the door) and "*hangyo*" (plea or persuasion).

[16] Phil. Nat'l Police Memo. Circ. No. 16-2016, at 3–6.

[17] *Id.*, at 3–4.

[18] *Id.*, at 3.

[19] *Id.*, at 5.

ordinary citizens who "know any addicts."[20] Eschewing due process, he started publicizing names of government officials supposedly involved in the illegal drug trade even before any formal investigation.[21] He even said that police officers should shoot drug suspects who resist arrests; and if they do not resist, police officers should "give them a gun" and goad them into resisting (to furnish the police grounds to use lethal force).[22]

President Duterte's "informal" marching orders appeared to provide a more efficacious framework for his "war on drugs" than his formal policies. Police officers reportedly used "Project Tokhang" not to engage in persuasion but to terrorize villages by breaking doors open and shooting citizens in cold blood.[23] Police operations almost always ended in killing rather than apprehending drug suspects. In just the first 100 days of the Duterte presidency, deaths related to illegal drugs reportedly reached 3,600;[24] the figure doubled in one year,[25] and jumped to more than 12,000 as of the start of 2018 based on independent monitoring by Human Rights Watch ("HRW").[26] But police officials insisted that deaths in the hands of law enforcers were fewer, and that these resulted from legitimate police operations. According to them, killings by unidentified assailants are "under investigation"[27] and should not be included in the tally.

"Deaths under investigation" became short hand for killings by unknown assailants whom the police usually cast as vigilantes, co-

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[20] *See Philippines president Rodrigo Duterte urges people to kill drug addicts*, THE GUARDIAN, June 30, 2016, *available at* https://www.theguardian.com/world/2016/jul/01/philippines-president-rodrigo-duterte-urges-people-to-kill-drug-addicts.

[21] *See Rodrigo Duterte: 'I don't care about human rights'*, AL JAZEERA, Aug. 8, 2016, *available at* https://www.aljazeera.com/news/2016/08/rodrigo-duterte-human-rights-160806211448623.html

[22] *See* Christina Mendez, *'Suspect unarmed? Give him a gun'*, PHIL. STAR, Dec. 20, 2016, *available at* https://www.philstar.com/headlines/2016/12/20/1655205/suspect-unarmed-give-him-gun.

[23] *See* Dahlia Simangan, *Is the Philippine "War on Drugs" an Act of Genocide?*, 20 J. GENOCIDE RES. 68, 73 (2018).

[24] Samuel Osborne, *'At least 3,600 slaughtered' in Philippines President Rodrigo Duterte's first 100 days in office*, THE INDEPENDENT, Oct. 9, 2016, *available at* https://www.independent.co.uk/news/world/asia/rodrigo-duterte-philippines-president-slaughtered-war-on-drugs-100-days-in-office-a7352651.html.

[25] Eleanor Ross, *Philippines President Duterte's Drug War One Year On: At Least 7,000 Are Dead, But It's Been 'Successful'*, NEWSWEEK, June 30, 2017, *available at* http://www.newsweek.com/dutertes-drug-war-7000-success-630392.

[26] *Philippines: Duterte's 'Drug War' Claims 12,000+ Lives*, HUMAN RTS. WATCH, Jan. 18, 2018, *available at* https://www.hrw.org/news/2018/01/18/philippines-dutertes-drug-war-claims-12000-lives.

[27] *See* Simangan, *supra* note 23, at 69.

conspirators, or members of rival drug syndicates. But based on interviews on the ground, HRW concluded that many of these "unknown assailants" are police officers or police agents who conduct extra-judicial killings and make them look like the handiwork of vigilantes or other criminals.[28] On the other hand, investigation by Amnesty International ("AI") revealed systematic house raids, killings while in police custody, staged "buy-bust" operations, planting of evidence by the police, and killings by assailants with direct links to the police.[29] These findings furnish strong evidence that the "war on drugs" is a mixture of legitimate police operations, police operations that violate due process and rules of engagement, and illegal executions–all being conducted with official sanction of the state.

Despite sporadic public outcry when children and innocent civilians were caught in the crossfire,[30] the "war on drugs" continued unabated, apparently with strong popular support.[31] President Duterte likewise systematically silenced dissent from the critical media,[32] political opposition,[33] and independent government monitors,[34] even as he acknowledged that he cannot meet his own six-month deadline for eradicating illegal drugs.[35] In the context of this dire situation, a semblance of resistance emerged in various fronts. Aside from individual criminal and

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[28] *See* HUMAN RIGHTS WATCH, "LICENSE TO KILL": PHILIPPINE POLICE KILLINGS IN DUTERTE'S "WAR ON DRUGS" 8–15 (2017), *available at* https://www.hrw.org/sites/default/files/report_pdf/philippines0317_insert.pdf.

[29] *See* AMNESTY INTERNATIONAL, "IF YOU ARE POOR, YOU ARE KILLED": EXTRAJUDICIAL EXECUTIONS IN THE PHILIPPINES' "WAR ON DRUGS" 22-29, 33-39 (2017), *available at* https://www.amnestyusa.org/files/philippines_ejk_report_v19_final_0.pdf.

[30] *See, e.g.*, Emily Rauhala, *Rodrigo Duterte's next target: 9-year-old children*, WASHINGTON POST, Feb. 26, 2017, *available at* https://www.washingtonpost.com/world/asia_pacific/rodrigo-dutertes-next-target-9-year-old-children/2017/02/25/c02f6e6c-f863-11e6-aa1e-5f735ee31334_story.html?utm_term=.98b04846374f.

[31] *See* Norman P. Aquino, *Broad Support for Duterte's Drug War in Philippines, Pew Finds*, BLOOMBERG: POLITICS, Sept. 21, 2017, *available at* https://www.bloomberg.com/news/articles/2017-09-21/duterte-approval-ratings-stands-at-86-pew-research-center-poll.

[32] *See, e.g.*, Purple Chrystyl Romero, *Philippines' Duterte: From War on Drugs to War on Media*, SOUTH CHINA MORNING POST, Jan. 20, 2018, *available at* http://www.scmp.com/week-asia/politics/article/2129536/philippines-duterte-war-drugs-war-media.

[33] *See, e.g.*, Anne Marie Goetz, *The silencing of Leila de Lima – Duterte's "first political prisoner"*, OPEN DEMOCRACY, July 7, 2017, *available at* https://www.opendemocracy.net/5050/anne-marie-goetz/silencing-leila-de-lima-philippines.

[34] *See, e.g.*, *Duterte drug war: Philippines cuts rights body's budget to $20*, BBC: NEWS, Sept. 12, 2017, *available at* http://www.bbc.com/news/world-asia-41244704.

[35] *See* Agence France-Presse, *Philippine president Rodrigo Duterte to extend drug war as 'cannot kill them all'*, THE GUARDIAN, Sept. 19, 2016, *available at* https://www.theguardian.com/world/2016/sep/19/philippine-president-rodrigo-duterte-extend-drug-war-kill-them-all.

administrative cases against police officers involved in suspected unlawful drug killings, two petitions have also been filed (and are currently pending) before the Philippine Supreme Court to assail the legality of the "war on drugs" as a policy.[36]

Concerned parties also turned increasingly to the international community. The United Nations ("U.N.") High Commissioner for Human Rights has condemned President Duterte's attacks against Agnes Callamard, the U.N. Special Rapporteur who had been openly critical of his "war on drugs."[37] Concern had also been expressed in the U.N. Human Rights Council[38] and the European Union.[39] In the meantime, calls for the ICC to get involved have been made by AI as early as 2017[40] and has steadily gained ground. Communications, drawing mainly from confessions of an alleged member of President Duterte's "death squad," were submitted to the ICC by a Filipino lawyer[41] and two opposition legislators.[42] They allege that the use of incognito "death squads" (who kill drug suspects in the background while legitimate police operations are being conducted) is President Duterte's *modus*, dating back to when he was a mayor.

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[36] *See* Supreme Court of the Philippines, *War on Drugs Oral Arguments*, SUPREME COURT WEBSITE, *at* http://sc.judiciary.gov.ph/microsite/war-on-drugs/index.html.

[37] *See* UN Office of the High Commissioner for Human Rights, *Press briefing note on Attacks/threats by States against UN human rights experts*, Nov. 21, 2017, UN OHCHR WEBSITE, *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22421&LangID=E.

[38] *See* Patricia Ann V. Roxas, *UN rights chief 'gravely concerned' by Duterte's support for 'shoot-to-kill policy'*, PHIL. DAILY INQUIRER, Sept. 12, 2017, *available at* http://newsinfo.inquirer.net/930063/un-human-rights-zeid-raad-al-hussein-president-duterte-philippines-drug-war#ixzz5Ejn6wU5V.

[39] *See EU: Human rights worsened with Duterte's drug war*, AL JAZEERA: NEWS/ASIA PACIFIC, Oct. 24, 2017, *available at* https://www.aljazeera.com/news/2017/10/eu-human-rights-worsened-duterte-drug-war-171024064212027.html.

[40] *See* Luke Hunt, *Are Duterte's Drug War Killings Crimes Against Humanity*, THE DIPLOMAT, Feb. 1, 2017, *available at* https://thediplomat.com/2017/02/are-dutertes-drug-war-killings-crimes-against-humanity/.

[41] *See* Paterno Esmaquel, *Complaint vs Duterte filed before Int'l Criminal Court*, RAPPLER, Apr. 25, 2017, *available at* https://www.rappler.com/nation/167818-complaint-duterte-international-criminal-court.

[42] *See Alejano, Trillanes file supplemental complaint vs Duterte at ICC,* ABS-CBN NEWS, Jun. 6, 2017, *available at* http://news.abs-cbn.com/news/06/06/17/alejano-trillanes-file-supplemental-complaint-vs-duterte-at-icc. *See also FULL TEXT: Supplemental 'communication' filed vs Duterte in int'l court*, PHIL. STAR, June 6, 2017, *available at* https://www.philstar.com/headlines/2017/06/06/1707301/full-text-supplemental-communication-filed-vs-duterte-intl-court.

The ICC Prosecutor finally decided to open a preliminary examination into the Philippine situation in early 2018.[43] President Duterte welcomed the ICC probe at first;[44] but walked back on his earlier statements and later on insisted that the ICC could not interfere with the Philippines' legal system, and could not acquire jurisdiction over him—"not in a million years."[45] After his turnabout, he formally announced his decision to withdraw the Philippines from the Rome Statute. This is where things now stand.

II. DISCUSSION AND ANALYSIS

Before analyzing the terms, timing, and rationale of President Duterte's decision to withdraw the Philippines from the Rome Statute, it is important to first resolve the issue of whether the *mechanism* by which he effected such decision is valid under the Philippine Constitution. In the following section, it is argued that a unilateral action to withdraw from the Rome Statute, without consent from or even notice to the Senate that concurred to it, is potentially unconstitutional.

A. Potential Violations of Philippine Constitutional Law

The Philippine Constitution provides that "[n]o treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."[46] While the President wields the authority to conduct foreign relations, treaty making is a power shared with the Senate.[47] The concurrence of the Senate is not a mere

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[43] *See* International Criminal Court, *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*, INTERNATIONAL CRIMINAL COURT WEBSITE, Feb. 8, 2018, *available at* https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat.

[44] *See* Nestor Corrales, *Duterte to ICC probers: I welcome you*, PHIL. DAILY INQUIRER, Feb. 9, 2018, *available at* http://globalnation.inquirer.net/164005/duterte-icc-probers-welcome-duterte-icc-preliminary-investigation-ejks-drug-war.

[45] *See* Reuters, *Duterte says International Criminal Court has no jurisdiction to indict him over killings in drug war*, JAPAN TIMES, Mar. 7, 2018, *available at* https://www.japantimes.co.jp/news/2018/03/07/asia-pacific/crime-legal-asia-pacific/duterte-says-international-criminal-court-no-jurisdiction-indict-killings-drug-war/#.Wu3L8ZcpA2w.

[46] CONST. art. VII, § 21.

[47] It should be noted that the Philippine Congress is composed of two chambers—a House of Representatives composed of members elected from legislative districts, and a Senate whose members are elected at-large. *See* CONST. art. VI, § 1. As a general rule, the two chambers are co-equal, and the legislative process is bicameral (*i.e.*, bills must be passed by both chambers regardless of where it originated). Concurrence in a treaty is one of the few

formality; according to the Supreme Court, the Senate's intervention is "essential to provide a check on the executive in the field of foreign relations."[48] When deciding whether to concur in a treaty, "the Senate partakes a principal, yet delicate, role in keeping the principles of separation of powers, and of checks and balances, alive and vigilantly ensures that these cherished rudiments remain true to their form in a democratic government such as ours. The Constitution thus animates, through this treaty-concurring power of the Senate, a healthy system of checks and balances indispensable toward our nations pursuit of political maturity and growth."[49]

As far as treaty making is concerned, therefore, the participation of the Senate is clearly nothing short of indispensable—it goes into the very principles of "checks and balances" and "separation of powers" that inhere to the Philippines' republican system of government. It is unclear, however, whether the same theory holds for the termination of treaties. The Philippine Constitution, the proceedings of the framers thereof, and judicial precedents provide neither categorical answer nor even tentative guidance. And this is unfortunate because this issue is dispositive of whether President Duterte was acting in accordance with the Constitution when he unilaterally withdrew the Philippines from the Rome Statute.

While President Duterte's act did not patently violate the Philippine Constitution, it is submitted that it potentially subverted the constitutional order and undermined a core constitutional prerogative specifically reserved to the Senate. It is argued that the shared treaty-making power ordained by the Constitution *necessarily* includes the power of treaty termination, and it is submitted that the Supreme Court should rule in this wise. While there is no precedent to support this position (because the issue is *primae impressionis*), the following legal authorities are offered as support:

1. The necessary legal implication of the doctrine of transformation

The Philippine Constitution provides two mechanisms by which international law becomes part of municipal law:[50] the doctrine of

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legislative powers that the Constitution expressly reserves only to the Senate, without the participation of the House of Representatives.

[48] Pimentel v. Executive Secretary, G.R. No. 158088, 462 SCRA 622, 633, July 6, 2005.

[49] Bayan v. Zamora, G.R. No. 138570, 342 SCRA 449, Oct. 10, 2000.

[50] Pharmaceutical & Health Care Ass'n of the Phils. v. Duque III, G.R. No. 173034, 535 SCRA 265, Oct. 9, 2007.

incorporation, as to "generally accepted principles of international law,"[51] and the doctrine of *transformation*, as to treaty law.[52]

Under the doctrine of transformation, when the Senate decides whether to concur in a treaty, its deliberative process assumes the functional equivalent of the legislative process for municipal laws; and when it votes to concur in the treaty, it constitutes legislative fiat that integrates the treaty into the domestic legal firmament. Otherwise stated, the treaty, as concurred in by the Senate, is accorded the status of a statute. Consistent with its character as municipal law, as the Supreme Court confirmed, said treaty "may amend or repeal a prior law and vice-versa;" it may likewise "change state policy embodied in a prior law."[53]

The doctrine of transformation implies that a treaty in which the Senate had concurred in becomes a creature of legislation. After a treaty enters into force in the Philippines, senators are bound to consider its strictures when proposing new bills. When a legislative proposal conflicts with the provisions of a treaty in force, senators have the duty to weigh the merits of the pending measure closely. If the subsequent bill is passed, it would trigger the application of the rule of *lex posterior derogat priori*[54]—since the treaty, for legislative purposes, is a prior law amendable or repealable by a more recent law.

If a treaty in force has the status of municipal law, does it not follow that the Senate, as part of the *legislative* branch, should have a say in its fate? Giving the President the unfettered discretion to terminate treaties vests him with *legislative* power that he could not otherwise exercise *vis-à-vis* ordinary municipal laws. While considerations of foreign policy and matters of state, which are within the province of the executive, might urge this deferential treatment for treaties, it is submitted that the solution most consistent with the constitutional order is for the President and the Senate to *share* treaty-termination powers, as they do treaty making.

2. The sense of the majority of the incumbent Senate

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[51] CONST. art. II, § 2.

[52] CONST. art. VII, § 21. *See also* JOAQUIN G. BERNAS, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 57 (2002).

[53] Suplico v. Nat'l Econ. & Dev't Authority, G.R. No. 178830, 558 SCRA 329, July 14, 2008.

[54] *See* Secretary of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, Jan. 18, 2000.

The position proposed above finds support with the majority of sitting senators in the Philippines. On February 13, 2017, Senator Franklin Drilon introduced Senate Resolution No. 289,[55] "expressing the sense of the Senate that termination of, or withdrawal from, treaties and international agreements concurred in by the Senate shall be valid and effective only upon concurrence by the Senate." The measure was signed by fourteen Senators, or a majority of the twenty four-member chamber. In his sponsorship speech, Senator Drilon noted that since the power to bind the Philippines by treaty is shared by the President and the Senate, a treaty ratified and concurred in "may not be undone without the shared power that put it into effect."[56]

During interpellation by Senator Emmanuel Pacquiao, Senator Drilon clarified that Senate Resolution No. 289 was not meant to give the Senate the power to terminate treaties by itself; but if the President seeks to do so, he must secure the Senate's concurrence, as he would when ratifying treaties.[57] Nonetheless, Senator Pacquiao raised the important point, which scholars would consider as proceeding from a "textualist" approach to constitutional construction, that since Article VII, Section 21 of the Constitution is silent on the Senate's role in treaty termination, Senate Resolution No. 289 would appear to be unduly amending it.[58] This point by Senator Pacquiao would turn out to be the decisive intervention that would hold in abeyance the voting on the Resolution.

For his part, Senator Francis Escudero suggested that a Joint Resolution of both chambers of Congress would be more persuasive on the President than a lone resolution by the Senate, but Senator Drilon reiterated the basis of the measure—since it was only with the Senate that the President shares treaty-making powers, Senate Resolution No. 289 was meant to affirm that chamber's constitutionally-mandated role in foreign relations.[59] On the other hand, Senator Richard Gordon observed that if the Philippines abrogates a treaty, it might be perceived as "not being good on its word." Senator Drilon replied that the objective of the Resolution was precisely to induce the government to "exercise extra care in withdrawing from international obligations such as a treaty."[60]

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[55] S. Res. 389, 17th Cong., 1st Sess. (Feb. 13, 2017), *available at* http://senate.gov.ph/lisdata/2537421876!.pdf.

[56] *See* S. Journal 63, 17th Cong., 1st Sess. (Feb. 17, 2017), *at* 1009–1010, *available at* http://senate.gov.ph/lisdata/2540121914!.pdf.

[57] *Id.* at 1011.

[58] *Id.* at 1012.

[59] *Id.* at 1013.

[60] *Id.* at 1015.

Senator Ralph Recto delved into the pragmatic effect of passing Senate Resolution No. 289, and observed that with or without it, "it is possible that the President could suddenly decide to have the Philippines withdraw from an existing treaty." To this, Senator Drilon replied that, at least, "[Senate Resolution No. 289] gives the leadership of the Senate the basis to go to court and express its position that the concurrence of the institution ought to have been secured." Senator Recto agreed, adding that "something as important as a treaty could not be decided by only one person."[61]

The foregoing discussion on a very important measure, one that would have possibly born on President Duterte's decision, a year later, to withdraw the Philippines from the Rome Statute, is particularly enlightening. It highlighted a crucial *lacuna* in the Constitution which, as pointed out by Senator Drilon, has not been resolved by the Supreme Court, and has likewise not been settled yet in the United States, which is the jurisdiction from where the Philippines' "shared treaty powers" model was adopted.[62] Deliberations on Senate Resolution No. 289 also provide a clue as to where a majority of the incumbent Senate likely fall on this open question. That fourteen Senators endorsed the measure may indicate the persuasiveness of the argument in favor of a "shared power" approach to treaty termination, which this Article also advocates for.

While Senate Resolution No. 289 was not approved, *it had not been defeated and voted down*. Deliberations were merely suspended because Senator Pacquiao, by agreement with Senator Drilon, asked for more time to study the issue.[63] Hence, it remains to be seen whether, in the face of recent developments concerning the Rome Statute, the Senators who supported the Resolution would affirm their position.

Interestingly, while the Philippine Senate was deliberating on S.Res. No. 289 in February 2017, the High Court of South Africa was also hearing a case involving the same issues about the proper roles of the executive and legislative branches in treaty termination. This case concerns South Africa's withdrawal from the Rome Statute–the same development that would arise half a world away in the Philippines just a year after. As will be expounded on below, the Philippines can learn much from the case of South Africa.

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[61] *Id.* at 1016.

[62] *Id.* at 1010.

[63] *See* S. Journal 64, 17th Cong., 1st Sess. (Feb. 20, 2017), *at* 1032, *available at* http://senate.gov.ph/lisdata/2540221927!.pdf.

3. The decision of the High Court of South Africa

On October 19, 2016, South Africa notified the U.N. Secretary General of its withdrawal from the Rome Statute. The withdrawal was the culmination of a dispute that South Africa had with the ICC concerning the latter's order to arrest President Omar al-Bashir.[64] The dispute was just one of many triggers of a long-brewing discontent with the ICC by members of the African Union, which also precipitated the withdrawal in 2016 of Burundi and Gambia.[65]

South Africa's withdrawal from the Rome Statute was done unilaterally by the executive. Like in the case of the Philippines, the South African Constitution provides that "[t]he negotiating and signing of all international agreements is the responsibility of the national executive," but "[a]n international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces."[66] As in the Philippines, there is no direct provision in the South African Constitution clarifying whether the power to terminate treaties is also shared between Parliament and the national executive.

The Democratic Alliance, the largest minority party in the South African Parliament, filed a petition with the High Court of South Africa challenging the national executive's unilateral decision to withdraw South Africa from the Rome Statute. In a Judgment rendered in *Democratic Alliance v. Minister of International Relations and Cooperation* on February 22, 2017,[67] the High Court of South Africa held that the unilateral withdrawal violates the constitution. As a result, South Africa withdrew its notice of withdrawal,[68] but later expressed its intent to reinstate the same, after complying with the requirement of Parliamentary approval.[69]

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[64] *See, generally*, Max Du Plessis & Guenael Mettraux, *South Africa's Failed Withdrawal from the Rome Statute*, 15 J. INT'L CRIM. JUST. 361, 362–363 (2017); Hannah Woolaver, *Domestic and International Limitations on Treaty Withdrawal: Lessons from South Africa's Attempted Departure from the International Criminal Court*, 111 AM. J. INT'L L. UNBOUND 450, 450–451 (2018).

[65] *See, generally,* Ssenyonjo, *supra* note 6, at 68–103.

[66] *See* SOUTH AFRICAN CONST. § 231, ¶ ¶ 1-2.

[67] Democratic Alliance v. Minister of International Relations and Cooperation, 2017 (3) SA 212 (G.P) (S. Afr.).

[68] *See* Norimitsu Onishi, *South Africa Reverses Withdrawal From International Criminal Court*, NEW YORK TIMES Mar. 8, 2017, *available at* https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html.

[69] *See* Peter Fabricius, *South Africa confirms withdrawal from ICC*, DAILY MAVERIC, Dec. 7, 2017, *available at* https://www.dailymaverick.co.za/article/2017-12-07-south-africa-confirms-withdrawal-from-icc/#.WvIseZcpA2w

Due to the similarities in the situations of South Africa and the Philippines concerning their withdrawal from the Rome Statute, it would undoubtedly be helpful to learn how the High Court of South Africa resolved the issue surrounding the South African national executive's unilateral act. The following points of the Judgment are particularly relevant:

First, and perhaps most importantly, the High Court decisively filled the *lacuna* in Section 231 of the South African Constitution. It observed that if Parliament's assent needs to be secured before the Rome Statute's instrument of ratification can be deposited with the U.N. Secretary General, "there is a glaring difficulty in accepting that the reverse process of withdrawal should not be subject to the same parliamentary process."[70] For the High Court, since Section 231 ordains a "separation of powers" scheme in treaty making, then by *necessary inference*, Parliament should also "[retain] the power to determine whether to remain bound to an international treaty."[71] Given the similarities in the constitutional setup of the Philippines and South Africa—both in their "separation of powers" doctrine in general, and in their "shared" treaty-making scheme in particular—it stands to reason that the "necessary inference" drawn by the High Court as to Section 231 can likewise apply to the Philippine Constitution's Article VII, Section 21.

Second, the High Court held that a treaty is a "social contract" that gives rise to rights and obligations that affect the people of South Africa, and the people act through their elected representatives in the national executive *and in the legislature*. Hence, the High Court concludes, "[t]he anomaly that the national executive can, without first seeking the approval of the people of South Africa, terminate those rights and obligations, is self-evident and manifest."[72] That entering into a treaty is an exercise of popular sovereignty is a truism that applies with equal force to the Philippines. Since the Filipino people also act through their President and legislators, it is arguable that those same elected representatives (and not just the President) should also engage in the termination of treaties on the people's behalf.

Third, the High Court held that the foregoing principles are not barred by the fact that the text of the South African Constitution explicitly spells out Parliament's role only as to treaty making. This holding was in response to the South African government's "textualist" argument;

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[70] *Democratic Alliance*, 2017 (3) SA 212 (G.P) (S. Afr.), at 23–24, ¶ 51.
[71] *Id.*, at 24, ¶ 51
[72] *Id.*, at 24, ¶ 52

incidentally, this was the same concern raised by Senator Pacquiao against Senate Resolution No. 289, as noted in the preceding discussion. The High Court cited the canon of construction that "where a constitutional or statutory provision confers a power to do something, that provision necessarily confers the power to undo it as well."[73] Also, the High Court held that the absence of explicit reference to treaty termination should be interpreted *in favor of*, rather than *against* Parliament. The High Court's pronouncement in this regard is worth quoting, and it appears particularly persuasive when applied to the Philippine case:

> [I]t appears to us that *there is probably a good reason why the Constitution provides for the power of the executive to negotiate and conclude international agreements but is silent on the power to terminate them*. The reason is this: [a]s the executing arm of the state, the national executive needs authority to act. That authority will flow from the Constitution or from an act of parliament. The national executive can exercise only those powers and perform those functions conferred upon it by the Constitution, or by law which is consistent with the Constitution. This is a basic requirement of the principle of legality and the rule of law. *The absence of a provision in the Constitution or any other legislation of a power for the executive to terminate international agreements is therefore confirmation of the fact that such power does not exist unless and until parliament legislates for it*. It is not a lacuna or omission.[74]

The Philippine Supreme Court had, on many occasions, conceded that while foreign jurisprudence is not binding on it, they are nonetheless persuasive.[75] In several cases, American jurisprudence strongly bore on the Philippine Supreme Court's analysis, but only because the Philippines, as a former territorial possession of the United States, had adopted much of the *corpus* of American constitutional law and jurisprudence.[76]

Admittedly, therefore, the Philippine Supreme Court, in ruling over a petition challenging President Duterte's decision to withdraw the Philippines from the Rome Statute, would be blazing a new trail by taking judicial notice of South African jurisprudence, or at least invoking the

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[73] *Id.* at 24, ¶ 53 *citing* Masetlha v. President of the Republic of South Africa and Another, 2008 (1) SA 566 (CC), ¶ 68

[74] *Id.* at 25, ¶ 54 (Emphasis supplied.)

[75] *See, e.g.*, Ang Ladlad LGBT Party v. Comm'n on Elections, G.R. No. 190582, 618 SCRA 32, Apr. 8, 2010.

[76] *See, e.g.*, Sec. of Justice v. Lantion, G.R. No. 139465, 322 SCRA 160, Jan. 18, 2000. *See also* Philippine Journalists, Inc. v. Thoenen, G.R. No. 143372, 477 SCRA 482, Dec. 13, 2005, *with* Chavez v. Romulo, G.R. No. 157036, 431 SCRA 534, June 9, 2004.

principles embodied in said court decision. Nonetheless, *Democratic Alliance* would be instructive because the facts, context, and legal issues in that case are almost perfectly identical. It is submitted that, guided by the *Democratic Alliance* decision, and taking into account the other arguments discussed herein, President Duterte's unilateral decision to withdraw the Philippines from the Rome Statute is open to legal challenge for potentially violating the Philippine Constitution.

B. Potential Violations of International Treaty Law

Assuming that the unilateral nature of the decision of President Duterte to withdraw the Philippines from the Rome Statute is constitutionally valid, it remains to be seen whether the decision itself would pass legal muster. In this section, it is argued that President Duterte's decision potentially violates international treaty law by focusing on two aspects: first, its *timing*, and his assertion that it is *immediately effective*; and second, his insistence that the Rome Statute was never enforceable in the Philippines because it was *not locally published*.

The official notification of withdrawal submitted to the U.N. Secretary General by the Philippine Ambassador to the U.N. does not expressly state reasons for the withdrawal, except for an oblique reference to the "politiciz[ation] and weaponiz[ation] [of] human rights," as well as an assertion that "complaints, issues, problems and concerns" are being capably handled by "independent and well-functioning organs and agencies" of the Philippine government.[77] The reasons behind President Duterte's decision to withdraw the Philippines from the Rome Statute were explicated in two documents: a fifteen-page full statement[78] and a summative three-page press release.[79] Neither document has been made available in the online Official Gazette, the official government website, and usual repository of the President's issuances. As it articulates his most comprehensive stance, the full statement of President Duterte will be considered for purposes of this Article.

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[77] *See* Depositary Notification (Re: Withdrawal), *supra* note 1.

[78] *See* Rappler, *Full Text: Duterte's statement on Int'l Criminal Court withdrawal*, RAPPLER, Mar. 20, 2018, *available at* https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal.

[79] Photographic images of the press release are available at http://globalnation.inquirer.net/164980/statement-announcing-philippines-withdrawal-from-icc-treaty-rome-statute-international-criminal-court-rodrigo-duterte.

The justifications provided by President Duterte for his decision to withdraw the Philippines from the Rome Statute can be categorized into several themes:

First, he asserts that the mere public announcement by the ICC Prosecutor of the opening of a preliminary examination already gave "the false impression that the [ICC] has already acquired jurisdiction–or that the [ICC] will be acquiring jurisdiction" over his "war on drugs." He invokes arguments based on complementarity, insisting that concerns about anti-drug operations cannot be interfered with by the ICC unless Philippine authorities are unwilling or unable to handle them.[80]

Second, he argues that the ICC cannot acquire jurisdiction over his "war on drugs" because the latter does not implicate the international crimes covered by the Rome Statute.[81]

Third, he asserts that the Rome Statute has never been in force in the Philippines because it was not locally published—a requirement for Philippine laws to become effective. Thus, he cannot be held liable for a crime under the said treaty on due process grounds.[82]

Fourth, he invokes his constitutionally-recognized immunity from suit, which he claims he enjoys until the expiration of his term of office. Hence, to the extent that the Rome Statute would allow criminal proceedings against him while he sits as President, he insists that the said treaty is ineffective for contravening Philippine constitutional law.[83]

Fifth, as to the Philippines' withdrawal from the Rome Statute, he insists that it is "effective immediately." He eschews the one-year transition period provided in Article 127 (1) because "there appears to be fraud in entering into" the treaty.[84]

At the outset, President Duterte's argument about the complementarity requirement, his assertion that the Philippine case cannot fall under any of the four ICC crimes, and his claim of immunity, are all premature. The preliminary examination stage of ICC proceedings is merely

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[80] *See* Rappler, *supra* note 78.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*

a "sort of pre-investigation."[85] This phase is aimed at determining whether, based on available information, there is "reasonable basis" to proceed to a formal "investigation."[86] The preliminary examination inquires into whether a situation can engage the jurisdiction of the ICC (including its jurisdiction *ratione materiae*),[87] whether a case, if pursued, would be admissible (taking into account the requirements of "gravity" and "complementarity"),[88] and whether it will serve the "interest of justice" for the ICC to take cognizance of it.[89]

Hence, the ICC Prosecutor can conceivably conclude, after preliminary examination, that the conduct of the "war on drugs" does not fall under any of the ICC crimes; or that even if it does, complaints arising therefrom are being handled by Philippine authorities; or that at all events, the ICC cannot step in because President Duterte is immune. And so, repudiating the preliminary examination at this juncture is premature and misplaced, because what it seeks to address are precisely the same issues that President Duterte raises.

With the foregoing objections addressed, there is a need to address the other grounds that President Duterte invoked in withdrawing the Philippines from the Rome Statute, which implicate international treaty law and may amount to violations thereunder.

The incidents of the Rome Statute are governed by the Vienna Convention on the Law of Treaties ("Vienna Convention"),[90] recognized as the definitive codification of international treaty law. The legality of the Philippines' acts under the Rome Statute can be measured against the Vienna Convention both because the Philippines is a party to the Vienna Convention,[91] and because many of its provisions have been held to embody

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[85] *See* Carsten Stahn, *Damned If You Do, Damned If You Don't: Challenges and Critiques of ICC Preliminary Examinations*, 15 J. INT'L CRIM. JUST. 413 (2017), *available at* https://ssrn.com/abstract=2945466. *See also* Rome Statute, art. 42.

[86] *See* Rome Statute, art. 53 (1). *See also* Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), at ¶ 5.

[87] *See* OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS 9–10 (2013), *available at* https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

[88] *Id.* at 10–16.

[89] *Id.* at 16–17.

[90] 1155 U.N.T.S. 331, entered into force Jan. 27, 1980.

[91] The Philippines signed the Vienna Convention on May 23, 1969 and deposited the instrument of ratification on Nov. 15, 1972. *See* United Nations Treaty Collection, *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION WEBSITE, *at*

custom;[92] moreover, Philippine law *ipso jure* incorporates "generally accepted principles of international law."[93] Using the Vienna Convention as a yardstick, it is argued that President Duterte's decision potentially fails on at least two counts:

1. The timing of President Duterte's decision, and its asserted "immediate" effectivity, are questionable and may indicate bad faith that breaches international treaty law.

President Duterte's public statement announcing the withdrawal of the Philippines from the Rome Statute came just a few weeks after the ICC Prosecutor's opening of a preliminary examination into his "war on drugs" on February 8, 2018. Further, he asserted that such withdrawal takes effect immediately, despite the clear terms of the Rome Statute that withdrawals therefrom become effective only one year after service of notice.[94] While the Rome Statute[95] and the Vienna Convention[96] recognize the prerogative of states parties to withdraw, international treaty law mandates that the same nonetheless be done in good faith; and President Duterte's actions do not appear to pass this standard.

The principle of good faith "pervades the entire legal order"[97] of international treaty law. It finds expression in the rule of *pacta sunt servanda*,[98] and encompasses "the narrower doctrine of the abuse of rights according to which parties shall abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty."[99] By withdrawing the Philippines from the Rome Statute when he did, and asserting that the withdrawal is effective immediately, President Duterte arguably acted in bad faith because he took the country out of the aegis of the ICC just when its Prosecutor was about to inquire into his government's

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https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf.

[92] *See, e.g.*, Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Rep. 1999 (Dec. 13), at 1045, ¶¶ 18, 48; KARL ZEMANEK, VIENNA CONVENTION ON THE LAW OF TREATIES 1 (2009), *available at* http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf; Makane Moïse Mbengue, *Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)*, 31 ICSID REV. 388, n.2 (2016).

[93] CONST. art. II, §2.

[94] Rome Statute, art. 127 (1).

[95] *Id.*

[96] *See* relevant provisions of Part V of the Vienna Convention concerning treaty termination.

[97] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 365 (2009).

[98] Vienna Convention, art. 26.

[99] VILLIGER, *supra* note 97, at 367.

possible commissions of international crimes—the very purpose for which the ICC regime was established.

President Duterte's act *vis-à-vis* the ICC Prosecutor bears striking similarities with that of U.S. President Ronald Reagan's act *vis-à-vis* the International Court of Justice ("ICJ") during the 1980s. It would be helpful to discuss the incidents and outcome of that case to see how President Duterte's own action would possibly fare under international law.

Since the late 1970s, the United States had been supporting efforts to overthrow the ruling Sandinista regime in Nicaragua.[100] This was part of the efforts of the United States to contain the spread of socialism in its neighboring Central American region. In the early 1980s, operatives of the U.S. Central Intelligence Agency supervised the planting of land mines in the ports of Nicaragua, resulting in damage to ships and the obstruction of the country's sea lanes.[101]

The United States anticipated that Nicaragua will file suit in the ICJ,[102] and the United States knew that if that happens, it would be forced to litigate. In 1964, the United States had consented *in advance* to submit any dispute between it and another state party to the compulsory jurisdiction of the ICJ, provided the dispute concerns "the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; or the nature or extent of the reparation to be made for the breach of an international obligation."[103] The dispute with Nicaragua satisfies these conditions.

In its 1964 declaration recognizing the compulsory jurisdiction of the ICJ, the United States reserved the right to terminate said declaration, but stipulated that termination will only take effect six months from notice

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[100] *See* Farooq Hassan, *A Legal Analysis of the United States' Attempted Withdrawal from the Jurisdiction of the World Court in the Proceedings Initiated by Nicaragua*, 10 U. DAYTON L. REV. 295, 296 (1985).

[101] *Id.*, at 297.

[102] *See* Ilene R. Cohn, *Nicaragua v. United States: Pre-Seisin Reciprocity and the Race to The Hague*, 46 OHIO ST. L. J. 699, 700 (1985).

[103] Under art. 36 (2) of the ICJ Statute, states parties "may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: (a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of the reparation to be made for the breach of an international obligation."

thereof.[104] Hence, even if the United States terminated its declaration and refused to submit to the ICJ's jurisdiction, Nicaragua could still file a case within the six-month transition period. What the United States did, therefore, was *amend* its 1964 declaration so that, effective *immediately* and for two years thereafter, ICJ jurisdiction would be precluded as to all cases brought against the United States arising out of, or related to, events in Central America.[105] The United States filed the amendment on April 6, 1984, after it got wind of Nicaragua's plans, and *three days before* Nicaragua commenced ICJ proceedings.[106]

The timing of the United States' amendment, its asserted immediate effectivity, and its specific reference to "Central America" appeared to betray the United States' intention to use it for the specific purpose of shielding itself from the impending suit to be filed before the ICJ.[107] This was the threshold issue litigated in *Nicaragua.*[108] While the United States insisted that its 1964 declaration can be modified any time before a case is filed with the ICJ,[109] Nicaragua countered that the United States did not reserve an absolute right of modification (and in fact stipulated that modifications take effect six months from notice).[110] Moreover, quoting the record of proceedings of the U.S. Senate Foreign Relations Committee that recommended the approval of the 1964 declaration, Nicaragua argued that the United States' intent is clear and therefore binding: "The provision for 6 months' notice of termination after the 5-year period has the effect of *renunciation of any intention to withdraw our obligation in the face of a threatened legal proceeding.*"[111]

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[104] *See* Hassan, *supra* note 100, at 301.

[105] *Id.* at 297. For a full text of the amendment, *see* Cohn, *supra* note 102, at 700 n.7.

[106] *See* Cohn, *id.* at 700.

[107] *See* Hassan, *supra* note 100, at 297 (describing the United States' action as "an admitted attempt to thwart the impending Nicaraguan action.")

[108] *See, generally*, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 392 (Nov. 26).

[109] *See* Counter-Memorial of the United States (Nicaragua v. United States) (Aug. 17, 1984), from Section III (A), at 101.

[110] *See* Memorial of Nicaragua (Nicaragua v. United States) (June 30, 1984), ¶ 122 at 393 ("The declaration of the United States makes no provision for variation but does provide in clear terms for termination on expiration of six months' notice of termination. If a power of modification had been sought it would have been expressly provided for and the normal principle of interpretation is applicable: *expressio unius est exclusio alterius.*").

[111] *See id.*, ¶ 125 at 393, *citing* Report of the Committee on Foreign Relations of the U.S. Senate, 79th Cong., 2d Sess., S. Doc. No. 259 (1946), at 7. (Italics in the original.)

The ICJ sustained Nicaragua's position.[112] It emphasized good faith in modifying pre-existing treaty obligations.[113] The court rejected the United States' claim that it can immediately terminate its 1964 declaration, holding that good faith demands the lapse of "reasonable time" following withdrawal from or termination of treaties–and the three days between the United States' amended declaration and Nicaragua's filing of a suit does not pass this standard.[114] Its jurisdictional maneuver rebuffed, the United States ultimately lost the case on the merits.[115]

Proceeding from *Nicaragua*, one can question the legality of President Duterte's decision to withdraw the Philippines from the Rome Statute *immediately*, and a few weeks after, the opening of the ICC Prosecutor's preliminary examination. His apparent intent to evade the ICC Prosecutor's scrutiny is parallel to President Reagan's intent to take the Nicaragua affair out of the ICJ's purview. President Duterte's intent to bypass the one-year transition rule in Article 127 (1) of the Rome Statute is similar to President Reagan's attempt to set aside the six-month transition period in the United States' 1964 declaration and reservation.

The basis of President Duterte's argument that the one-year rule in Article 127 (1) is inapplicable—*i.e.*, the "fraud" that allegedly attended the Philippines' signing of the Rome Statute[116]—lacks merit. The Philippines actively participated in the Rome Conference that drafted the Rome Statute. It sent a full delegation of career foreign service officials and international law experts, one of whom, Raul C. Pangalangan, is now an ICC judge.[117] Thus, to say that the Philippines had been misled or defrauded as to the true import of the Rome Statute strains credulity.

In any event, President Duterte's reference to "fraud" is misplaced. While the Vienna Convention recognizes fraud as a vice of consent, such

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[112] *See* Cohn, *supra* note 102, at 700.

[113] *See* Judgment, *supra* note 108, ¶ 60 at 418.

[114] *See id.*, ¶ 63 at 420. ("[T]he right of immediate termination of declarations with indefinite duration is far from established. *It appears from the requirements of good faith* that they should be treated, by analogy, according to the law of treaties, which *requires a reasonable time for withdrawal from or termination* of treaties that contain no provision regarding the duration of their validity.") (Emphasis supplied.)

[115] *See, generally*, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Rep. 1986 (June 27), p. 14.

[116] *See* Rappler, *supra* note 78.

[117] For a list of Philippine delegates to the Rome Conference, *see* II UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS (Rome, June 15-July 17, 1998), at 30.

fraud in international treaty law has a specific signification. Article 49 of the Vienna Convention reads:

> If a State has been induced to conclude a treaty by the fraudulent conduct of another negotiating State, the State may invoke the fraud as invalidating its consent to be bound by the treaty.[118]

Mark E. Villiger, in his commentary of the Vienna Convention, clarifies what Article 49 covers:

> Article 49 assumes *fraudulent conduct of another negotiating State*. Fraud can only relate to conduct in the making of a treaty during its *negotiation* and up to its conclusion, not in its subsequent performance. *Fraudulent conduct* includes individual fraudulent acts committed by any of the authorities of another negotiating State.[119]

Hence, the fraud contemplated in Article 49 is one foisted by another state during negotiations, and not the "fraud" being alleged by President Duterte,[120] which at best goes into treaty *performance*. It was also disingenuous to claim that the Philippines was defrauded when it "was made to believe [...] that the legal requirement of publication to make the Rome Statute enforceable shall be maintained."[121] As will be discussed, no Philippine authority before him had considered local publication to be a *conditio sine qua non* for the treaty's enforceability.

The evasive intent apparent from the timing of President Duterte's decision casts serious doubts on its *bona fides*. The "fraud" he invokes in order to circumvent the one-year transition rule in Article 127 (1) of the Rome Statute is so dubious that it may amount to a mere subterfuge, of the kind that commonly indicates bad faith. As in *Nicaragua*, bad faith of this nature can be found to be in breach of international treaty law; if this finding holds, President Duterte's decision to withdraw the Philippines from the Rome Statute can be deemed legally inoperable.

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[118] Vienna Convention, art. 49.

[119] *See* Villiger, *supra* note 97, at 618. (Emphasis supplied.)

[120] *See* Rappler, *supra* note 78 ("The Philippines in ratifying the Rome Statute was made to believe that the principle of complementarity shall be observed; that the principle of due process and the presumption of innocence as mandated by our Constitution and the Rome Statute shall prevail [...]")

[121] *Id.*

2. President Duterte's assertion that the Rome Statute never became enforceable due to non-publication arguably has no basis in law. In any event, invoking the provisions of municipal law to deny the enforceability of the Rome Statute potentially violates the Vienna Convention.

In his statement, President Duterte asserts that "the Rome Statute cannot be enforceable in the Philippines"[122] because it was not published in the Official Gazette or in a newspaper of general circulation in the Philippines. To support his assertion, he cites the Civil Code which provides: "Laws shall take effect after fifteen days following the completion of their publication either on the Official Gazette or in a newspaper of general circulation in the Philippines."[123] He further cites the case of *Tañada v. Tuvera*,[124] where the Supreme Court held that publication of laws is mandatory for their effectivity.

The problem with this line of reasoning is that it assumes that municipal laws and treaties are *pari passu*, such that the former's preconditions for effectivity necessarily applies on all points to the latter. Arguably, this assumption lacks legal basis. The provisions of the Civil Code, Revised Administrative Code,[125] and the statute establishing the Official Gazette[126] have, for their subject matter, municipal legislation. In none of them can be found any reference to a treaty insofar as any publication requirement is concerned.

Indeed, in the *Tañada* excerpt that President Duterte himself quotes,[127] the Supreme Court pronounced: "We hold therefore that all *statutes, including those of local application and private laws,* shall be published as a condition for their effectivity, which shall begin fifteen days after publication

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[122] *See* Rappler, *supra* note 78.

[123] CIVIL CODE, art. 2.

[124] Hereinafter "*Tañada*", G.R. No. L-63915, 146 SCRA 446, Dec. 29, 1986.

[125] A provision regarding publication of laws identical to the one in the Civil Code can be found in the Revised Administrative Code. *See* REV. ADM. CODE, book 1, chap. 5, §18.

[126] Com. Act No. 638 (1949), §1 ("There shall be published in the Official Gazette (1) all important legislative acts and resolutions of a public nature of the Congress of the Philippines; (2) all executive and administrative orders and proclamations, except such as have no general applicability; (3) decisions or abstracts of decisions of the Supreme Court and the Court of Appeals as may be deemed by said courts of sufficient importance to be so published; (4) such documents or classes of documents as may be required so to be published by law; and (5) such documents or classes of documents as the President of the Philippines shall determine from time to time to have general applicability and legal effect, or which he may authorize so to be published.")

[127] *See* Rappler, *supra* note 78.

unless different effective date is fixed by the legislature."[128] It is arguably a stretch to suppose that the *Tañada* prescription of a mandatory publication requirement for "statutes," including statutes "of local application" and "private laws" also extends to treaties, which are clearly of a different class of laws from "statutes."

Thus, publication in the Official Gazette or a Philippine newspaper of general circulation is arguably not required for treaties; the law requires a different procedure for them to be effective. *First*, the President, as the "chief architect of the nation's foreign policy," negotiates a treaty.[129] Once negotiated and signed by the President, it is concurred in by the Senate, through an affirmative vote of at least two-thirds of the members thereof.[130] After this, treaty parties exchange instruments of ratification, or deposit them to a designated authority. These are the "usual steps in the treaty-making process,"*i.e.*, "negotiation, signature, ratification, and exchange of the instruments of ratification," that the Supreme Court in *Pimentel v. Executive Secretary*[131] alluded to. Needless to state, local publication is not included in the process.

Further guidance can be found in Executive Order No. 459 or the "Guidelines in the Negotiation of International Agreements and Its Ratification."[132] This presidential issuance provides for the final step before a treaty becomes effective: "Upon receipt of the concurrence by the Senate, the Department of Foreign Affairs shall comply *with the provision of the treaties* in effecting their entry into force."[133] Clearly, the ultimate step is not the local publication of the treaty in accordance with the Civil Code, but the execution of whatever act is indicated in "the provision of the treaties" concerning their entry into force.

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[128] *Tañada*, 146 SCRA at 453-54. (Emphasis supplied.)

[129] *See* Akbayan Citizen's Action Party v. Aquino, G.R. No. 170516, 558 SCRA 486, July 16, 2008, *citing* BAYAN v. Zamora, G.R. No. 138570, 342 SCRA 449, 494, Oct. 10, 2000. ("By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy.") *and* Pimentel v. Office of the Exec. Sec. [hereinafter *"Pimentel"*], G.R. No. 158088, 462 SCRA 622, 632–33, July 6, 2005. ("[T]he President is vested with the authority to deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, enter into treaties, and otherwise transact the business of foreign relations. In the realm of treaty-making, the President has the sole authority to negotiate with other states.")

[130] CONST. art. VII, § 21.

[131] 462 SCRA at 634, *citing* ISAGANI CRUZ, INTERNATIONAL LAW 172–74 (1998).

[132] Exec. Order No. 459 (1997).

[133] § 7(B)(ii). (Italics supplied.)

In the case of the Rome Statute, all the "usual steps in the treaty-making process" as the Supreme Court explicated in *Pimentel* have been complied with. It was signed on December 28, 2000 by President Joseph Estrada, ratified by President Benigno S. Aquino on May 6, 2011, transmitted to the Senate thereafter, and concurred in (with one dissenting vote) on August 24, 2011. On August 30, 2011, the instrument of ratification was deposited with the U.N. Secretary General who acknowledged the same, and who stated that "[t]he Statute will enter into force for the Philippines on 1 November 2011 in accordance with its article 126 (2)."[134] Since then, the enforceability and validity of the Rome Statute, despite lack of publication, has never been put to question. On the contrary, the Philippine government engaged actively in the ICC's work, even twice successfully nominating two of its international law experts: Miriam Defensor-Santiago[135] and Raul C. Pangalangan[136] to ICC judgeships. President Duterte's government itself participated in the 16th Assembly of States Parties in 2017, during which it "reaffirm[ed] [the Philippines'] commitment to the Rome Statute and the [ICC]."[137]

Given these actuations,[138] asserting that the Rome Statute has *never* been enforceable due to non-publication in the Official Gazette or a Philippine newspaper of general circulation is arguably untenable. It can be argued that compliance with Articles 125 (2)[139] and 126 (2)[140] of the Rome Statute was the operative act that gave it force and effect in the Philippines.

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[134] *See* Depositary Notification (Re: Ratification), *available at* https://treaties.un.org/doc/Publication/CN/2011/CN.530.2011-Eng.pdf.

[135] *See* Note Verbale (Re: Miriam Defensor-Santiago), *available at* https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2011/ICC-ASP-EJ2011-PH-NV-ENG.pdf.

[136] *See* Note Verbale (Re: Raul C. Pangalangan), https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2015/ICC-ASP-EJ2015-PHI-NV-ENG.pdf.

[137] *See* Statement of the Philippines Delivered by His Excellency Mr. Harry Roque, Presidential Spokesperson, Office of the President (Dec. 7, 2017), *available at* https://asp.icc-cpi.int/iccdocs/asp_docs/ASP16/ASP-16-PHI.pdf.

[138] One can even go further and argue that the Philippine government's historical conduct *vis-à-vis* the Rome Statute and the ICC could possibly engage the principle of estoppel, which "precludes a state from asserting the 'true' state of affairs where that state has represented 'the existence of a different state of things' and where the 'establishment of the truth would injure' the other party." *See* Jack Wass, *Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals*, 86 B.Y. INT'L L. 155, 158 (2017). Once triggered, estoppel can be invoked to prevent a state from repudiating the jurisdiction of an international tribunal. *See id.* at 162–63 (giving an overview of some cases where a state, on the basis of its past representations, was not allowed to deny an international tribunal's jurisdiction.)

[139] The provision reads: "This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations."

But even assuming *ex hypothesi* that Philippine municipal law does require treaties to be published, it is arguable that such law cannot be used to repudiate the Rome Statute or deny its enforceability. Doing so would run the risk of violating international treaty law. Per the Vienna Convention, a state cannot invoke its municipal law to justify its failure to perform a treaty.[141] Nor can it claim that its consent to be bound by a treaty is invalid because it was "expressed in violation of a provision of its internal law regarding competence to conclude treaties," unless that violation was "manifest and concerned a rule of its internal law of fundamental importance."[142]

These provisions of the Vienna Convention arguably preclude President Duterte from invoking the Civil Code's publication requirement to deny the Rome Statute's enforceability and to refuse compliance with his administration's obligations thereunder. After openly binding itself to the Rome Statute, the Philippines cannot deny the treaty's enforceability *ex post facto* based on municipal law. This contravenes Article 27 and the *pacta sunt servanda* rule on which it is predicated.[143]

Also, in relation to Article 46 of the Vienna Convention, even assuming that Philippine municipal law requires the local publication of treaties, and even assuming further that such municipal law implicates "the competence to conclude treaties," it would still arguably not satisfy the "fundamental importance" criterion. The intention of this specific requirement in Article 42 is to "exclude minor legal or even administrative

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[140] The provision reads: "For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession."

[141] *See* Vienna Convention, art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.")

[142] *See* Vienna Convention, art. 46 ("(1) A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. (2) A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.")

[143] *See* VILLIGER, *supra* note 97, at 375.

provisions and to restrict the relevant internal law to fundamental constitutional rules."[144]

The publication requirement being adverted to by President Duterte is derived from civil and administrative statutes, and not one of them specifically refers to "treaties." The *Tañada* decision may have implicated constitutional due process norms, but as its text demonstrates, the Supreme Court's ruling regarding the indispensability of publication refers to statutes and not treaties. Further, the Supreme Court, in expounding on the treaty-making process in *Pimentel*, did not mention publication as a significant, let alone a fundamental, step. Finally, Executive Order No. 459,[145] the prevailing guidelines that treat treaty matters comprehensively and specifically, does not refer to publication altogether. These demonstrate that publication, as far as treaties are concerned, is not "fundamental" under Philippine constitutional law or elsewhere.

Arguably, an internal law concerning publication in the Official Gazette or a Philippine newspaper of general circulation is outside the contemplation of Article 42 of the Vienna Convention. Invoking a rule of this nature to abrogate the Rome Statute and nullify the Philippines' consent to be bound by it, as expressed by two Presidents, the Philippine Senate, and the Philippine Department of Foreign Affairs, is the kind of conduct that Article 42 proscribes. Insisting that failure to comply with a municipal publication requirement renders the Rome Statute unenforceable would potentially be a violation of the Vienna Convention.

CONCLUSION

In sum, there is ample ground to argue that President Duterte's decision to withdraw the Philippines from the Rome Statute potentially violates the Philippine Constitution, because it entirely left out the Senate which concurred in the ratification of that treaty. And even if President Duterte can act unilaterally as regards this decision to withdraw, it can be argued that international treaty law nonetheless precludes him from asserting that the withdrawal can take effect immediately.

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[144] Thilo Rensmann, *Article 46: Provisions of Internal Law Regarding Competence to Conclude Treaties*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 851 (Oliver Dorr & Kirsten Schmalenbach eds., 2nd ed. 2018).

[145] Exec. Order No. 459 (1997). Providing for the Guidelines in the Negotiation of International Agreements and its Ratification.

The resolution of these threshold issues is of paramount importance. If the withdrawal of the Philippines from the Rome Statute would be held unconstitutional along the lines of the High Court of South Africa's judgment in *Democratic Alliance*, then President Duterte's decision would be legally inoperative for all intents and purposes, and the Philippines would continue to be under the ICC regime. If the withdrawal is subjected to the one-year transition rule and not made immediately effective as President Duterte asserts, then the notation of the U.N. Secretary General in the notice of withdrawal[146] would take precedence: "The action shall take effect for the Philippines on 17 March 2019 in accordance with article 127 (1)."

The implications of these issues cannot be overstated. If the Philippines remains bound to the Rome Statute until March 17, 2019, then until that period, the ICC Prosecutor could conduct the preliminary examination with the knowledge that she could enforce the Philippine government's duty to cooperate[147] under the treaty. Corollary, President Duterte's public statements directing Philippine authorities not to cooperate with the ICC[148] would amount to an international treaty violation. Moreover, his threats to arrest the ICC Prosecutor if she conducts investigative activities in the Philippines[149] would expose him to international criminal liability for an "offence against the administration of justice" under the Rome Statute.[150]

Moving forward, therefore, it is argued that the Senate of the Philippines (and the Supreme Court), as well as the ICC, have pivotal roles to play in helping bring legal clarity to these threshold issues. On the part of the Senate and the Supreme Court, the constitutional challenge brought by

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[146] *See supra* note 1, at 2.

[147] Rome Statute, art. 86.

[148] *See* Dharel Placido, *Palace: PH won't cooperate in ICC proceedings vs Duterte*, ABS-CBN NEWS, Mar. 22, 2018, *available at* http://news.abs-cbn.com/news/03/22/18/palace-ph-wont-cooperate-in-icc-proceedings-vs-duterte; Virgil Lopez, *ICC wants PHL cooperation? Good luck with that, says Roque*, GMA NEWS, Mar. 19, 2018, *available at* http://www.gmanetwork.com/news/news/nation/647136/icc-wants-phl-cooperation-good-luck-with-that-says-roque/story/.

[149] *See I will arrest you': Duterte warns ICC lawyer to steer clear of Philippines*, REUTERS Apr. 13, 2018, *available at* https://www.reuters.com/article/us-philippines-duterte-icc/i-will-arrest-you-duterte-warns-icc-lawyer-to-steer-clear-of-philippines-idUSKBN1HK0DS.

[150] Rome Statute, art. 70, *specifically*, § 1 (d). ("The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: [...] Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties[.]")

the former before the latter is an important step.[151] The *lacuna* in Article VII, Section 21 of the Philippine Constitution is ripe for resolution, and the Supreme Court's holding on the pending cases would redefine an important aspect of the Philippines' constitutional order for the foreseeable future. It is submitted that the *Democratic Alliance* case, and the spirit and intent of Senate Resolution No. 289, can provide useful frameworks within which the Supreme Court can scrutinize the constitutional challenge brought by the Senate. While it is true that the March 17, 2019 deadline has lapsed and the Supreme Court has yet to act on the case[152] (raising the chance that the case be decided on the ground of mootness), a clear, decisive, and definitive resolution of this issue is nonetheless much-needed.

On the part of the ICC, it is proposed that there be two items in its agenda. First, it must make its stand clear as to whether it acknowledges the validity of President Duterte's assertion about the Philippine withdrawal's immediate effectivity. If the ICC disagrees, then it is incumbent upon it to categorically state so. It must continue dealing with President Duterte in a manner that reflects the fact that until March 17, 2019, he was bound to comply with the Rome Statute as a matter of legal obligation. If the ICC equivocates in this regard, President Duterte's actions might set a precedent for other states parties in the future to also withdraw from the Rome Statute without observing the one-year transition rule.

Second, it is proposed that the ICC conclude its preliminary examination into the Philippine situation at the soonest possible time. If there is merit in the contention that killings during President Duterte's "war on drugs" amount to international crimes, then it is imperative for it to graduate the proceedings to the investigation phase urgently (as the "war on drugs" of the Philippine government continues unabated until today). If allegations of state-sanctioned extrajudicial killings are true, the ICC, as the chief exponent of international criminal justice in the community of nations, should exert all efforts to bring perpetrators to justice without much delay. It should send a strong message that the still-ongoing project to forge a regime of international criminal justice will not be undermined by evasive

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[151] *See* Pangilinan v. Cayetano, G.R. No. 238875, and Philippine Coalition for the International Criminal Court v. Office of the Executive Secretary, G.R. No. 239483. Both cases are pending decision by the Supreme Court.

[152] Kristine Joy Patag, *ICC exit to take effect sans Supreme Court ruling on petitions*, PHIL. STAR, Mar. 12, 2019, available at https://www.philstar.com/headlines/2019/03/12/1900855/icc-exit-take-effect-sans-supreme-court-ruling-petitions.

tactics and maneuvers, for which the ICC Prosecutor has vowed to continue to probe the situation in the country.[153]

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[153] Paterno Esmaquel II, *Int'l Criminal Court vows probe despite PH withdrawal*, Rappler, Mar. 19, 2019, *available at* https://www.rappler.com/nation/226084-international-criminal-court-vows-probe-despite-philippines-withdrawal.