WILLING AND ABLE?
A PRIMER ON THE INTERNATIONAL CRIMINAL COURT'S JURISDICTION OVER THE PHILIPPINE WAR ON DRUGS*

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ABSTRACT

The question that this Article will answer is whether the waging of the Philippine War on Drugs constitutes a case that can be tried by the International Criminal Court (ICC). This demands an examination of both the Court's jurisdiction and the case's admissibility, since having jurisdiction does not automatically entitle the ICC to exercise it—the case must also be admissible. In this Article, the authors will demonstrate the application of the Rome Statute as legal basis for the conclusion that the ICC has jurisdiction over the acts perpetrated before the Philippines' withdrawal, and that the Philippines' case is admissible, despite the government's invocation of complementarity. The Rome Statute is the primary point of reference with regard to discussion of the Court and its jurisdiction, as it is the treaty that established the ICC which sits as the first permanent international criminal court.

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"[T]he most serious crimes of concern to the international community as a whole must not go unpunished[.]"

—Preamble,
Rome Statute of the
International Criminal Court

I. INTRODUCTION

Philippine President Rodrigo Duterte captured the attention of the international community with his *War on Drugs*, the anti-drug project envisioned to eradicate drug operations in the country. The President ran on a platform that pinned much of Philippine society's ills on the drug trade, and he has delivered on his campaign promise to wipe out the local drug trade at all costs through the launch of several police operations that have left thousands dead in their wake.[1] These operations have resulted in the death of at least 4,000, as openly admitted by the Philippine National Police, with several human rights groups reporting the death toll as up to around 12,000 or even beyond 20,000.[2]

In the year-end report released on December 5, 2018, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) stated that it had received a total of 52 communications from different groups on President Duterte's war on drugs.[3] While the preliminary examination has not yet reached conclusive findings, the OTP is continuing its thorough factual and legal assessment of information sourced from the public and other individuals, groups, non-governmental and intergovernmental organizations to ascertain the true nature and status of the Philippine drug war.

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[1] These police operations are named Oplan Double Barrel, Oplan Tokhang 2, Oplan Double Barrel Alpha, and Oplan Double Barrel Reloaded.

[2] Human Rights Watch, World Report 2018, HUMAN RIGHTS WATCH WEBSITE, *at* https://www.hrw.org/world-report/2018/country-chapters/philippines; Sofia Tomacruz, *Duterte gov't tally: 'Drug war' deaths breach 5,000-mark before 2019*, RAPPLER, *available at* https://www.rappler.com/nation/220013-duterte-government-tally-killed-war-on-drugs-november-2018 (last modified Dec. 31, 2018).

[3] Int'l Crim. Ct. [hereinafter "ICC"], Report on Preliminary Examination Activities 2018, at 15–18, (Dec. 5, 2018) *at* https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

Ever since the ICC's involvement in the issue, former Presidential Spokesperson Harry Roque has adamantly defended the President from the scrutiny and potential action of the ICC and has repeatedly invoked the principle of complementarity to support the government's position that any participation by the ICC is unwarranted. While Param-Preet Singh of Human Rights Watch agreed with Roque that the ICC may only step in or act in the stead of the state where there is a demonstrated inability or unwillingness of the state to investigate or prosecute, Singh pointed out that Roque's assertion of the Philippine government's willingness to investigate these deaths rang hollow as such claim is belied by the fact that there had yet been no successful prosecutions or convictions of police officers implicated in summary killings despite compelling evidence.[4]

On November 29, 2018, however, a judgment of conviction was promulgated by a branch of the Philippine Regional Trial Court against police officers for the murder of seventeen-year-old Kian Delos Santos—a case allegedly part of the police operations against drugs.[5] It would seem that the position of the Philippine government is strengthened as the recent conviction appears to demonstrate that the state is indeed able and willing to investigate and prosecute atrocity crimes, to the exclusion of the ICC. This Article tests the veracity of that view by exploring the threshold standards codified in the Rome Statute *vis-à-vis* the Philippine war on drugs, namely, (i) jurisdiction and (ii) admissibility.

Recourse to the ICC has been sought by a large number of victims and their families, together with concerned human rights groups.[6] They contend that the ICC is the institution most capable of providing the justice and accountability that the Philippines as a state has been unable to deliver, because the President is alleged to be thoroughly in support of the war on drugs. This is in line with the intended purpose of the ICC as a court that can deliver justice, even when heads of states, who cannot be tried by domestic courts as set out by national law, are implicated.

The Rome Statute is the primary point of reference with regard to discussion of the International Criminal Court and its jurisdiction, as it is the treaty that established the ICC, which sits as the first permanent international

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[4] Christina Mendez, *Harry Roque faces ICC, defends Duterte government*, PHIL. STAR ONLINE, Dec. 8, 2017, *available at* https://www.philstar.com/headlines/2017/12/08/1766648/harry-roque-faces-icc-defends-duterte-government.

[5] Gabriel Lalu, *FULL TEXT: Court's decision on cops who killed Kian delos Santos*, PHIL. DAILY INQ., Nov. 29, 2018, *at* https://newsinfo.inquirer.net/1058325/full-text-courts-decision-on-cops-who-killed-kian-delos-santos.

[6] Report on Preliminary Examination Activities 2018, *supra* note 3, at 15–18.

criminal court. The ICC began operation when the Rome Statute entered into force on July 1, 2002. The Philippines became a state party and thus a member state on August 30, 2011 through its ratification.

A point worth addressing at the outset is whether the withdrawal of the Philippines from the Rome Statute, which took effect on March 17, 2019, renders this Article moot. The simple answer is that it does not, as the withdrawal does not divest the International Criminal Court of its jurisdiction over acts that occurred while the Philippines was a state party. This issue will be expounded on further in Part II of this Article.

The question that remains to be answered, however, is whether the waging of the Philippine drug war constitutes a case that can be tried by the ICC. This demands an examination of the issues of jurisdiction as well as admissibility. In this Article, the authors will demonstrate the application of the Rome Statute as legal basis for the conclusion that the ICC has jurisdiction over the acts perpetrated before the Philippines' withdrawal, and that the Philippines' case is admissible, despite the government's invocation of complementarity.

To put the questions of jurisdiction and admissibility in simpler and more direct terms, they may be phrased thus: First, on jurisdiction: can the case be tried by the ICC according to the provisions on jurisdiction provided in the Rome Statute? Second, on admissibility: can the case be tried by the ICC with the principle that the Court is meant to have supplementary, and not primary jurisdiction, over cases that can be tried by local courts? These are the questions this Article will seek to answer through a discussion of the interrelated issues of jurisdiction and admissibility as necessary requisites for a case to be tried by the ICC.

The authors submit that the recent conviction of implicated police officers in Delos Santos's murder does not in fact demonstrate the state's willingness to prosecute as would render the case inadmissible with respect to the rule of complementarity and so bar the ICC's involvement.

At the outset, the authors wish to establish that this Article is primarily intended to apply the basic principles of the Rome Statute to the Philippine situation in a straightforward and direct manner. It is written for the benefit of readers who are not well-versed in the workings of International Criminal Law but wish to see the impact and operation of the International Criminal Court in a concrete scenario. Thus, this Article focuses more on practical application rather than academic theory.

In Part II, the Article will discuss the four aspects of jurisdiction, namely, jurisdiction *ratione materiae*, jurisdiction *ratione temporis*, jurisdiction *ratione loci*, and jurisdiction *ratione personae*, and how the specific factual milieu of the Philippine war on drugs satisfies the various jurisdictional requirements.

In Part III, the Article will tackle the issue of admissibility and shall focus on the principle of complementarity in particular. The Article will briefly outline the history and concept of complementarity, vis-à-vis its development in International Criminal Law. It will then survey ICC jurisprudence to determine how the Court has understood and applied the concept. It is also in this portion where the authors will explain the two-step process based on the outline by Paul Seils[7] and with the use of a diagram based on how the Court explained the determination of a case's admissibility in *Prosecutor v. Katanga*.[8]

In addition, the doctrine of immunity from suit observed in various national jurisdictions, which effectively renders the high-ranking members of government untouchable by local courts, will be examined in light of how it may relate to a state's unwillingness or inability to investigate or prosecute.

In Part IV, the Article shall discuss the various modes of criminal responsibility and their bearing on possible culpability for high-ranking members of the Philippine government, in particular the implications for President Duterte and former Philippine National Police Chief Ronald dela Rosa.

Part V shall summarize and integrate the discussion on jurisdiction, admissibility, and complementarity in order to support the contention that the Philippine drug war presents a case that can be tried by the ICC, as the facts at hand clearly lend themselves to the conclusion that all the requirements for jurisdiction and admissibility are satisfied and accounted for.

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[7] PAUL SEILS, ICTJ HANDBOOK ON COMPLEMENTARITY 38 (Int'l Ctr. for Transitional Justice 2016). Seils used the term "two-step process" in discussing complementarity. The authors of this Article adapted a portion of Seils' outline in discussing the two-step process.

[8] Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of June 12, 2009 on the Admissibility of the Case, ¶¶ 1, 75–79, (Sept. 25, 2009).

I. JURISDICTION OF THE COURT

A. Four-Fold Jurisdictional Thresholds

The jurisdiction of the International Criminal Court is primarily based on the following: jurisdictions *ratione materiae*, *ratione temporis*, *ratione loci*, and *ratione personae*.

Jurisdiction *ratione materiae* (by reason of subject-matter), or subject-matter jurisdiction, pertains to the crimes over which the Court has jurisdiction, namely: genocide,[9] crimes against humanity,[10] war crimes,[11] and crimes of aggression.[12]

Jurisdiction *ratione temporis* (by reason of time) refers to the rule that only those crimes committed after the entry into force of the Statute, or after the Statute becomes binding to a state party, are within the jurisdiction of the Court.[13] Jurisdiction *ratione loci* (by reason of place), or territorial jurisdiction, is provided in Article 12(2)(a) of the Rome Statute and establishes that the Court has jurisdiction over conduct which took place in a state party's territory. On the other hand, Article 12(2)(b) pertains to jurisdiction *ratione personae* (by reason of the person of the defendant), which means that the Court has jurisdiction when the conduct in question is committed by a national of a state party.

According to Professor Otto Triffterer, "[t]he jurisdictional nexus is that the territorial state *or* the state of nationality of the accused are states parties. These are the two primary bases of jurisdiction over the offence in international criminal law and are universally accepted."[14] While Triffterer described these as the "two primary bases of jurisdiction," it is clear that these

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[9] Rome Statute of the International Criminal Court [hereinafter, "Rome Statute"] art. 6, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

[10] Rome Statute, art. 7.

[11] Rome Statute, art. 8.

[12] Rome Statute, art. 8 *bis*.

[13] Rome Statute, art. 11. "*Jurisdiction ratione temporis*

(1) The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

(2) If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3."

[14] OTTO TRIFFTERER, ET. AL. [hereinafter "Triffterer"], COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 681 (Triffterer & Ambos eds., 3rd ed., 2016) (1999). (Emphasis supplied.)

are not concurring requirements based on Article 12(2).[15] What is required is either jurisdiction *ratione loci* or jurisdiction *ratione personae.*

In summary, the Court has jurisdiction when the conduct in question satisfies both jurisdiction *ratione materiae* and jurisdiction *ratione temporis*, as well as either jurisdiction *ratione loci* or jurisdiction *ratione personae.* Thus, the conduct must be (1) within the Court's subject-matter jurisdiction, (2) committed after the Statute's entry into force or after it became binding to the state party, and (3) committed either in the territorial jurisdiction of a state party *or* by a national of a state party.

It appears that the Court has jurisdiction over the crimes related to the Philippine drug war as all of the jurisdictional requirements are met. First, the alleged acts of widespread and/or systematic extrajudicial killings amount to crimes against humanity in Article 7—a crime within the subject-matter jurisdiction of the ICC. Second, the acts were committed after the Philippines was bound by the Statute on the first day of November 2011, which is the first day of the month following the 60th day from its deposit of the instrument of ratification on August 30, 2011.[16] Third, both the territorial and nationality jurisdictions are met since all the assailed acts happened in the Philippines and were perpetrated by Filipinos—although as discussed above, satisfying either would have sufficed.

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[15] Rome Statute, art. 12(2). "*Preconditions to the exercise of jurisdiction*

(1) A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

(2) In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(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;

(b) The State of which the person accused of the crime is a national.

(3) If the acceptance of a State which is not a Party to this Statute is required under Paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

[16] Rome Statute, art. 126(2). "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."

While the issues of jurisdiction *ratione personae* and jurisdiction *ratione loci* are clear-cut, the issues of jurisdiction *ratione temporis* and jurisdiction *ratione materiae* are decidedly less so, and thus necessitate a more in-depth discussion.

B. Focus on jurisdiction *ratione temporis*

A pertinent point that should be considered with regard to jurisdiction *ratione temporis* is the effect of the Philippines' withdrawal from the Rome Statute.

It was on February 8, 2018 that the OTP announced that it was opening a preliminary examination of alleged crimes within the jurisdiction of the Court involving the thousands of deaths caused by the war on drugs of President Duterte. Shortly thereafter, in response to what the President believed were "attacks" on his person as well as his administration, the Philippine Government deposited its written notification of withdrawal from the Statute on March 17, 2018, intended to exhibit a strong rejection of the ICC's involvement in its affairs.[17]

This does not, however, entirely prevent the OTP from carrying out a preliminary examination or the ICC from subsequently exercising jurisdiction. According to Article 127(1) of the Rome Statute, the withdrawal does not take effect until after one year from the receipt of the notification. Furthermore, such withdrawal does not deprive the Court of its jurisdiction over crimes committed in its territory or by its nationals while it was a state party. Neither will it prejudice the continued consideration of matters which are already under the consideration of the Court prior to the state's withdrawal.[18]

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[17] *FULL TEXT: Duterte's statement on Int'l Criminal Court withdrawal*, RAPPLER, *at* https://www.rappler.com/nation/198171-full-text-philippines-rodrigo-duterte-statement-international-criminal-court-withdrawal (last modified Mar. 11, 2019). "Given the baseless, unprecedented and outrageous attacks on my person as well as against my administration, engineered by the officials of the United Nations, as well as the attempt by the International Criminal Court special prosecutor to place my person within the jurisdiction of the International Criminal Court, in violation of due process and the presumption of innocence expressly guaranteed by the Philippine Constitution and recognized no less by the Rome Statute, I therefore declare and forthwith give notice, as President of the Republic of the Philippines, that the Philippines is withdrawing its ratification of the Rome Statute effective immediately."

[18] Rome Statute, art. 127(2). "A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in

Thus, the withdrawal of the Philippines as a state party will not have any effect on the Court's jurisdiction should the Court decide to exercise it, except only that any crime perpetrated after the country's withdrawal took effect on March 17, 2019 shall then be outside the jurisdiction of the ICC for failing to satisfy the requirement of jurisdiction *ratione temporis*.

C. Focus on jurisdiction *ratione materiae*

President Duterte has been accused of crimes against humanity of murder, or alternatively, of other inhumane acts.[19] However, a formal charge is yet to be filed.

The statutory text contains two types of elements in a crime against humanity: firstly, the contextual elements, and secondly, the prohibited act. It is the contextual elements of a *widespread or systematic attack* that transform *domestic crimes into a subject of international concern.*[20] Thus, if murder (the prohibited act) is found to have been committed as part of a widespread or systematic attack against a civilian population pursuant to a state or organizational policy (contextual elements), it is then that a national crime which would ordinarily be tried by local courts under domestic law is elevated to an international crime within the contemplation of the Rome Statute and under the jurisdiction of the ICC.

1. Contextual Elements

Crimes against humanity are committed against any civilian population, pursuant to a state or organizational policy[21] of a *widespread or systematic* attack directed against any civilian population.[22]

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relation to which the withdrawing state had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."

[19] *But see* Dahlia Simangan, *Is the Philippine "War on Drugs" an Act of Genocide?,* 20(1) J. GENOCIDE RES. 68 (2017). Simangan's article inquires whether the war on drugs is an act of genocide using Gregory H. Stanton's stages of genocide.

[20] Mohamed Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity,* 5 SAN DIEGO INT'L L.J. 73, 109 (2004).

[21] Rome Statute, art. 7(2)(a); Prosecutor v. Harun, Case No. ICC-02/05-01/07, Pre-Trial Judgment, ¶ 61 (Apr. 27, 2007).

[22] Rome Statute, art. 7(1); Prosecutor v. Harun (Pre-Trial Judgment), ¶ 61; Prosecutor v. Kunarac, Case No. IT-96- 23-T, Trial Judgement, ¶ 96 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Blaškic, Case No. IT-95-14-A, Appeal Judgement, ¶ 101 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

Crimes against humanity encompass inhumane acts of a very serious character involving *widespread or systematic* violations of human rights in whole or in part.[23] The presence of these elements is sufficient to justify international judicial intervention.[24] Further, there is no requirement that these acts be committed in the context of an armed conflict, nor must they be accompanied by discriminatory elements, as would be the case in a war crime or the crime of genocide, respectively.[25]

Widespread is interpreted broadly[26] to consider both the multiplicity of victims and the magnitude of the acts,[27] whether the attack consisted of a series of acts or a single incident.[28] On the other hand, *systematic* refers to the "organised nature of the acts of violence and the improbability of their random occurrence."[29] When the attack is thoroughly organized, following a

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[23] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* U.N. Doc A/51/22 (1996); Gerhard Werle, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 220 (2005).

[24] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* at 23, U.N. Doc. A/51/22 (1996).

[25] U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, at 25–2-6, U.N. Doc. A/CONF.183/2/Add.1 (Apr. 14, 1998); Prosecutor v. Tadić, (Appeals Chamber) Case No. IT-94-1-T, Appeals Chamber, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 1995), ¶ 41. *See also* Prosecutor v. Kaing, (Trial Judgement) Case No. 001/18-07- 2007/ECCC/TC, Trial Judgement, ¶ 2I8 (July 26, 2010) ¶ 2I8.

[26] Rodney Dixon, *Article 7: Crimes against humanity, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 178 (Otto Triffterer ed., 2008); Prosecutor v. Muvunyi, Case No. ICTR-00-55A, Trial Chamber Judgement, ¶ 512 (Sept. 12, 2006); Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Trial Chamber Judgement, ¶ 527 (Apr. 28, 2005) ; Prosecutor v. Kajelijeli, Case No. ICTR-98-44A-T, Trial Chamber Judgment, ¶ 871 (Dec. 1, 2003); Prosecutor v. Semanza, Case No. ICTR-97-20-T, Trial Chamber Judgment, ¶ 329 (May 15, 2003); Prosecutor v. Musema, Case No. ICTR-96-13-A, Trial Chamber Judgment, ¶¶ 203–04 (Jan. 27, 2000).

[27] Rome Statute, art. 7(2)(a); Prosecutor v. Bemba, ICC-01/05-01/08-424, Pre-Trial Chamber, ¶ 83 (June 15, 2009); Prosecutor v. Akayesu, Case No. ICTR-96-4, Trial Judgement, ¶ 580 (Sept. 2, 1998); Prosecutor v. Musema, Case No. ICTR-96-13-A, Appeal Judgement, ¶ 204 (Nov. 16, 2001); Prosecutor v. Kunarac (Trial Judgement), ¶ 415; Proseuctor v. Krnojelac, Case No. IT-97-25-T, Trial Judgement, ¶ 54 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002); Prosecutor v. Kordic (Appeal Judgement), ¶ 94; Prosecutor v. Blaškic, IT-95-14-T, Trial Chamber, ¶ 101(Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

[28] Prosecutor v. Blagojevic (Trial Judgement) Case No. IT-02-60-T (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005), ¶ 545; Prosecutor v. Blaškic (Trial Chamber), ¶ 94.

[29] Prosecutor v. Tadić (Trial Judgement), ¶ 101; Prosecutor v. Blaškic, Case No. IT-95-14-A, Appeal Judgement, ¶ 106 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

regular pattern, based on a common policy and involving substantial resources,[30] it is considered systematic.

The elements of widespread and systematic are alternative; therefore satisfying either element will suffice.[31] Lastly, an *attack* is an operation carried out against the civilian population, which need not involve military or violent force.[32]

2. Prohibited Act

The Rome Statute provides ten specific prohibited acts that constitute crimes against humanity in Article 7(1)[33] paragraphs (a) through (j), and in addition, includes a catch-all provision found in paragraph (k) which embraces acts that cause great suffering to one's mental or physical health of a similar character to those listed.[34] This last paragraph was included due to the

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[30] Prosecutor v. Akayesu (Trial Judgement), ¶ 580; Prosecutor v. Blaškic (Trial Chamber), ¶ 203.

[31] Dixon, *supra* note 26, at 169, 177 *citing* Prosecutor v. Tadić (Trial Judgment), ¶ 646.

[32] Assembly of States Parties to the Rome Statute of the ICC, *Elements of Crimes of the International Criminal Court* [hereinafter "Elements of Crimes"], ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2 (Sept. 9, 2000), as amended in *Official Records of the Kampala Review Conference of the Rome Statute of the International Criminal Court*, RC/9/11, at 65 (May 31 - June 11, 2010), Introduction to Art. 7.

[33] Rome Statute, art. 7(1). "*Crimes against humanity*

(1) For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
   (a) Murder;
   (b) Extermination;
   (c) Enslavement;
   (d) Deportation or forcible transfer of population;
   (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
   (f) Torture;
   (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
   (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
   (i) Enforced disappearance of persons;
   (j) The crime of apartheid;
   (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."

[34] Elements of Crimes, *supra* note 32, art. 7(1)(k), ¶ 1-2; Prosecutor v. Stakić, IT-97-

impossibility of providing an exhaustive list of prohibited acts,[35] and pursuant to Article 21, the Court is empowered to exercise discretion in interpreting Article 7(1)(k) and considering the particular circumstances of each case.[36]

D. As Applied to the Philippine War on Drugs

1. Widespread and Systematic

The Philippine war on drugs clearly satisfies both the widespread and systematic contextual requirements.

The widespread nature of the war on drugs is evidenced by the scope of its operations, whether it is measured in terms of the geographical area over which it has been waged, the length of time through which it has persisted, or most glaringly in the number of lives it has taken.

The police operations resulting to deaths were executed all over the country, with 10 out of the 18 regions having reported deaths within only the first two weeks of President Duterte's term.[37]

These anti-drug operations have continued unabated from the day after President Duterte assumed office on June 30, 2016, until the writing of this article. The figures provided by the Philippine Drug Enforcement Agency (PDEA) through its "Real Numbers" campaign, which the government has set up with the goal of providing an accurate number of drug busts and deaths from the war on drugs,[38] show that from July 31, 2016 until February 28, 2019,

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24-A, Appeal Judgement), ¶¶ 315–16 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); Prosecutor v. Brima, Case No. SCSL-04-16-A, Appeal Judgement, ¶ 183 (Feb. 22, 2008).

[35] OTTO TRIFFTERER, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003); Doudou Thiam, Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind ILC Special Rapporteur Report, at 19, U.N. Doc. A/CN.4/466 (Mar. 24, 1995).

[36] GERALD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 265 (2005); Prosecutor v. Kayishema, Case No. ICTR-95-1, Trial Chamber Judgement, ¶ 151 (May 21, 1999); Prosecutor v. Kordic, IT-95-14/2-T, Trial Chamber, ¶ 271 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Bagilishema, ICTR-95-1A-T, Trial Chamber, ¶ 32 (June 7, 2001); Prosecutor v. Kvočka, IT-98-30/1-T, Trial Chamber, ¶ 328 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

[37] Philippine Center for Investigative Journalism, *PNP stats: 135 killed, 1,844 arrested in 2 weeks of Duterte war on drugs*, PHIL. CTR. FOR INVESTIGATIVE JOURNALISM, *at* https://pcij.org/blog/2016/07/14/pnp-stats-135-killed-1844-arrested-in-2-weeks-of-duterte-war-on-drugs (last visited on Aug. 26, 2018).

[38] *PH gov't moves to counter 'false' narrative on drug war*, RAPPLER, May 4, 2017, *at*https://www.rappler.com/newsbreak/inside-track/168681-realnumbersph-war-on-drugs.

123,441 drug operations were conducted, 176,021 drug personalities were arrested, and the number of "drug personalities who died in anti-drug operations" stood at 5,281.[39]

With regard to its systematic nature, the methodical and well-orchestrated operations are plain to see from the government's own reports that 123,441 drug operations were conducted as of February 28, 2019. These operations are certainly not random occurrences but are in furtherance of an avowed state policy to stamp out drug use in the country by any and all means.

2. Civilian Population

A crime against humanity is made against a *civilian population.*[40] It is not required that the entire population of a state must be targeted.[41] The requisite is broadly interpreted to encompass different categories of civilians.[42] By *civilian population*, the people targeted must not be members of armed forces or other legitimate combatants.[43] The term *population* highlights the collective nature of the victims.[44] Here, it would suffice that a number of individuals were purposely targeted, rather than randomly selected.[45] It is also worth noting that the punishable act may constitute an attack itself.[46]

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[39] Philippine Drug Enforcement Agency, *#RealNumbersPH Year 2: Towards A Drug-Cleared Philippines*, *available at* http://pdea.gov.ph/2-uncategorised/279-realnumbersph (last visited Mar. 1, 2019).

[40] Situation in the Republic of Kenya, ICC-01/09, Decision Pursuant to Article 15, ¶ 80 (Mar. 31, 2010).

[41] Triffterer, *supra* note 14, at 172.

[42] Guénaël Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 257 (2002); Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 109 (2004); Prosecutor v. Mrkšic, Case No. IT-95-13-R 61, Indictment, ¶ 29 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 1996).

[43] Situation in the Republic of Kenya (Decision), ¶ 82 *citing* Prosecutor v. Bemba (Pre-Trial Chamber), ¶ 78; Prosecutor v. Kunarac (Trial Judgement), ¶ 425; Prosecutor v. Stakić (Trial Judgement), ¶ 624; Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Judgement, ¶ 33 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002); Geneva Conventions common art. 3, Aug. 12, 1949; Geneva Conventions Additional Protocol I art. 43, 50, June 8, 1977; Prosecutor v. Mrkšic, Case No. IT-95-13/1-A, Appeal Judgement, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009).

[44] Prosecutor v. Tadić (Trial Judgement), ¶ 644.

[45] Prosecutor v. Kunarac (Appeal Judgement), ¶ 90; Prosecutor v. Galić, Case No. IT-98-29-T, Trial Judgement, ¶ 143 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003).

[46] Dixon, *supra* note 26, at 174; Prosecutor v. Akayesu (Trial Chamber), ¶ 581.

The orchestrated eradication of alleged drug users and pushers, or "drug personalities"[47] satisfies this requirement.

The statistics provided by the PDEA in fact highlights the civilian nature of the casualties of the war on drugs, as it differentiates between the reported deaths of civilians as well as that of members of the police or the military. Those killed in the operations are decidedly civilian in character as they are not combatants and are not engaged in any armed hostilities or armed conflict as defined under international law.

3. State or Organizational Policy

The phrase *policy to commit such an attack* requires that the state or an organization actively encourages the conduct of the attack.[48] The policy need not be formalized and is evidenced by a regular pattern[49] as opposed to spontaneous acts of violence.[50] The *widespread or systematic* nature of the attack demonstrates the existence of the organizational policy.[51]

Though an explicit state policy is not required, one can be definitively established from the involvement of the Philippine National Police as the main actor in the Philippine anti-drug operations coupled with the open exhortations of support by President Duterte.

President Duterte has openly supported and called for the Philippine war on drugs both during his campaign, where the eradication of drug use formed the cornerstone of his election promises, as well as during his presidency.[52] The Philippine National Police has in turn swiftly and brutally carried out the directive set for it by the President.

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[47] Philippine Drug Enforcement Agency, *#RealNumbersPH Year 2: Towards A Drug-Cleared Philippines*, *available at* http://pdea.gov.ph/2-uncategorised/279-realnumbersph (last visited Mar. 1, 2019).

[48] Elements of Crimes, *supra* note 32, art. 7(3).

[49] Prosecutor v. Katanga (Pre-Trial Chamber), ¶ 396; Prosecutor v. Bemba (Pre-Trial Chamber), ¶ 81; Prosecutor v. Tadić (Trial Judgement) Case No. IT-94-1-T (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), ¶ 653.

[50] *Id.; See also* Prosecutor v. Blaškic (Appeals Judgement), ¶ 204.

[51] Dixon, *supra* note 26, at 180.

[52] Presidential Communications Operations Office, *State of the Nation Address of Rodrigo Roa Duterte,* July 23, 2018 *available at* https://pcoo.gov.ph/wp-content/uploads/2018/07/2018-State-of-the-Nation-Address-of-Duterte.pdf; Agence France-Presse, *Kill the criminals! Duterte's vote-winning vow,* PHIL. DAILY INQ., Mar. 16, 2016, *available at* http://newsinfo.inquirer.net/774225/kill-the-criminals-dutertes-vote-winning-vow.

4. Prohibited Act

It would appear that the state-sponsored killings of alleged drug users and pushers constitute prohibited acts that may fall under Article 7(1)(a) of the Rome Statute as murder, Article 7(1)(b) as extermination, or Article 7(1)(k) as other inhumane acts.

i. Murder – Article 7(1)(a)

The specific element of murder, aside from the common contextual elements, is that the perpetrator killed one or more persons.[53]

According to Professor Triffterer's book, it is stated that:

> [T]here is general agreement, starting with the September 1998 Trial Chamber Judgment in *Prosecutor v. Akayesu*, that (apart from the common contextual elements for crimes against humanity) the actus reus for murder as a crime against humanity requires that "the victim is dead" and that "the death resulted from an unlawful act or omission of the accused or a subordinate."[54]

Thus, if the deaths of the alleged drug users and pushers are not shown to be warranted or justified by law, then such killings coupled with the requisite contextual elements would amount to the crime against humanity of murder.

ii. Extermination – Article 7(1)(b)

The specific elements of extermination are (i) that the perpetrator killed one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population; and (ii) that the conduct constituted, or took place as part of a mass killing of members of a civilian population.[55]

The distinguishing factor between murder and extermination as crimes against humanity lies primarily in the recognition of extermination as murder on a large scale or a mass killing of members of a civilian population.[56]

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[53] Elements of Crimes, *supra* note 32, art. 7(1)(a).
[54] Triffterer, *supra* note 14, at 180.
[55] Elements of Crimes, *supra* note 32, art. 7(1)(b).
[56] Triffterer, *supra* note 14, at 188.

As there is no inherent numerical standard set for what would constitute murder on a large scale, it would depend on the ICC whether the number of deaths resulting from the Philippine war on drugs are numerous enough to be considered extermination as opposed to murder.

iii. Other Inhumane Acts – Article 7(1)(k)

With regard to the specific elements of other inhumane acts, it is required (i) that the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (ii) that such act was of a character similar to any other act referred to in Article 7(1) of the Statute; and (iii) that the perpetrator was aware of the factual circumstances that established the character of the act.[57]

The deaths that have resulted from the anti-drug operations appear to be of a similar character at least to the specific prohibited acts in Article 7. However, should the Court find that the present situation is not only similar to but in fact constitutes a crime against humanity of murder or extermination, then there would be no need to resort to this provision as the prohibited act would fall neatly under either Article 7(1)(a) or 7(1)(b).

E. Conclusion

The Philippine war on drugs would appear to satisfy all four jurisdictional requirements of the Rome Statute. However, the fact that the Court has jurisdiction does not necessarily mean that it can exercise the same, as the issue of whether the case is admissible or not constitutes an entirely separate question.

III. ADMISSIBILITY: CAN A CASE AGAINST PRESIDENT DUTERTE PROSPER DESPITE THE INVOCATION OF COMPLEMENTARITY?

The Rome Statute concepts of jurisdiction and admissibility are often conflated. While they are both requirements that have to be met before the Court can exercise its jurisdiction, these concepts are distinct. Indeed, there are cases where the Court technically has jurisdiction over the case but is nevertheless barred from exercising its jurisdiction due to the case's inadmissibility. The Court's exercise of jurisdiction is not the rule, but rather the exception.[58]

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[57] Elements of Crimes, *supra* note 32, art. 7(1)(k).

[58] Triffterer, *supra* note 14, at 793 & n.77.

The issue of admissibility is larger in scope than the principle of complementarity, as it embodies several tests which may form the basis of whether or not the Court can exercise its jurisdiction over the case. While it refers in the first place to complementarity in Article 17(1)(a) and (b), it is also concerned with *ne bis in idem* in Articles 17(1)(c) and 20, and the gravity of the offence or the "gravity test" in Article 17(1)(d).[59] But for the purposes of this Article, the authors shall focus on complementarity in particular as it is the principle most often cited by the Philippine government as basis for the claim that the ICC lacks jurisdiction over the Philippine war on drugs.

A. On Complementarity

1. Development and History

The concept of admissibility in Article 17 of the Statute is a "mechanism [...] to regulate which [of the two] jurisdiction[s] proceeds and under what conditions."[60] It is concerned with "the forum allocation of cases between national and international criminal jurisdictions."[61] Such mechanism is not only born out of convenience, but is also necessary to resolve the possible conflict between two co-existing legal forum—the international and local courts—each with competence to exercise jurisdiction over the same case.[62]

The principle of complementarity in Article 17(1)(a)–(c), which deals with admissibility issues, is said to be the cornerstone of the Rome Statute and was essential for the Statute's marketability in the negotiations in Rome.[63]

It was made clear during the negotiations of the Statute that, unlike the situation with the *ad hoc* tribunals, the ICC shall not have primacy over national courts; but rather, it would complement them.[64] The idea was that state parties "would remain master over their own judicial proceedings"[65] subject to the Court's duty to take over when the conditions in Article 17 are

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[59] Situation in the Democratic Republic of the Congo, ICC-01/04-520-Anx2, Decision on the Prosecutor's Application for Warrants of Arrest, ¶ 29 (Feb. 10, 2006).

[60] Triffterer, *supra* note 14, at 784.

[61] *Id.* at 783–84.

[62] *Id.*

[63] *Id.* at 786.

[64] *Id.*

[65] Adriaan Bos, *Foreword* in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT xvii (Carsten Stahn & Göran Sluiter, eds., 2009); *See also*, Triffterer, *supra* note 14, at 793.

present. This is further supported by paragraph 6 of the Statute's Preamble which provides that "it is the duty of every [s]tate to exercise its criminal jurisdiction over those responsible for international crimes."[66] It is only when the state fails to fulfill this duty that the ICC steps in to ensure "that the most serious crimes of concern to the international community as a whole [do] not go unpunished."[67]

The principle of complementarity was integral to gaining state acceptance of the Rome Statute during its drafting, as it underscores both the primacy of national courts with regard to dealing with criminal cases brought before it, while at the same time providing safeguards against potential failings of a state to adequately investigate and prosecute by allowing the ICC to step in, thereby cementing the complementary character of the ICC's jurisdiction. It thus manages to uphold state sovereignty while providing for a permanent, global institution that is able to ensure that any impunity gap that may exist at the national level is not left unplugged.[68]

Thus, the principle of complementarity dictates that the Court may not proceed with the case when the state is investigating, has investigated, prosecuting, or has already decided the case. However, if the state is unwilling or unable to genuinely carry out the investigation or prosecution, then the case is deemed to be admissible by the Court.[69]

2. Inability and Unwillingness; Complementarity Simplified: The Two-Step Process

The common misconception of complementarity lies in the perception that the International Criminal Court will only act if the state with jurisdiction is unwilling or unable to do so. This is what commentators refer to as "the slogan version of complementarity."[70]

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[66] Triffterer, *supra* note 14, at 786; *See* Rome Statute pmbl., ¶ 6; *See also* Tuiloma Neroni Slade & Roger Clark, *Preamble and Final Clause, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 421 (Lee ed., 1999).

[67] Triffterer, *supra* note 14, at 786; *See* Rome Statute pmbl., ¶ 4.

[68] *Id.*

[69] Rome Statute, art. 17(1)(a). "*Issues of admissibility*

(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution[.]"

[70] Darryl Robinson, *The Mysterious Mysteriousness of Complementarity,* 21 CRIM. L. FORUM 67 (2010).

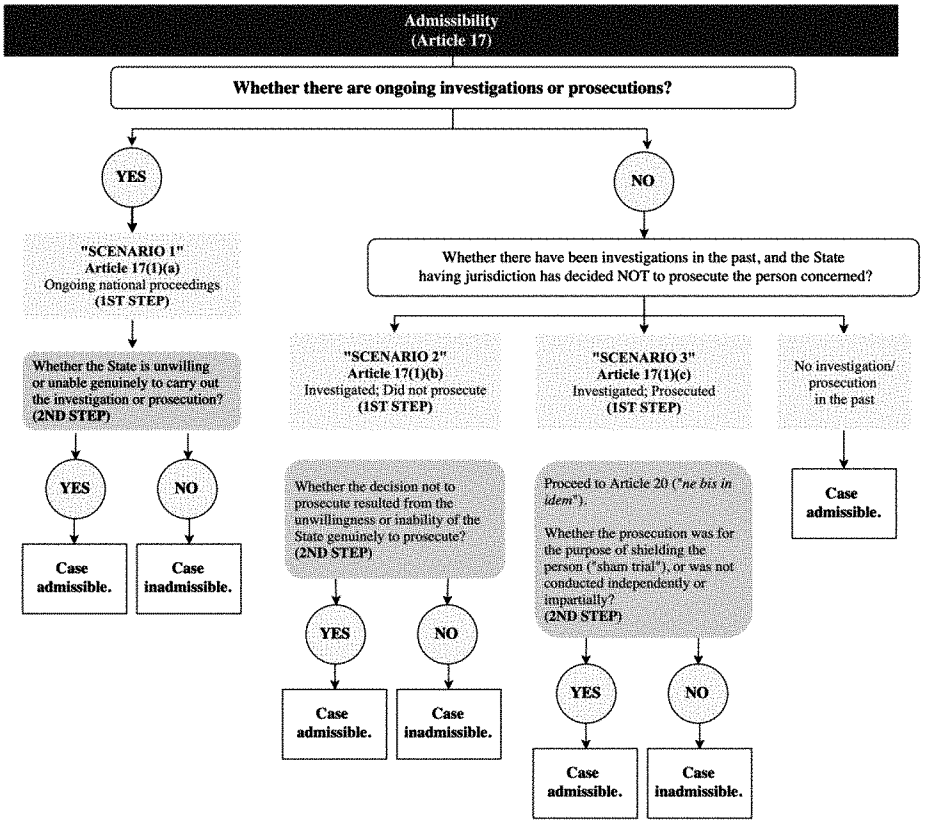

FIGURE 1. Admissibility Diagram.[71]

As the authors will be discussing in this portion, this is not completely accurate. To properly determine the case's admissibility, the *Two-Step Process*[72] must be resorted to.

The illustrative application of the *Two-Step Process* in Article 17 is seen in the case of *Prosecutor v. Katanga.*[73] In this case, the Appeals Chamber corrected the Trial Chamber's misinterpretation of Article 17(1).

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[71] Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶¶ 1, 75–79, (Sept. 25, 2009). The diagram is made by the authors based on their understanding of the Court's ruling in the cited case.

[72] Seils, *supra* note 7, at 38.

[73] Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of June 12, 2009 on the Admissibility of the Case (Sept. 25, 2009).

Germain Katanga, the commander of the *Front de Resistance Patriotique en Ituri* ("FRPI") in the Democratic Republic of Congo ("DRC"), was charged by the ICC Prosecutor with murder, use of child soldiers, rape, sexual slavery, the intentional targeting of the civilian population, and pillaging. It was under his command that his troops attacked the village of Bogoro in Ituri.

In the case before the Appeals Chamber, Katanga assailed the ICC Trial Chamber's decision on admissibility. One of the major issues was whether the state authorities had already investigated or were currently investigating the Bogoro attack. However, the state authorities themselves claimed that they were not investigating the matter.

The Trial Chamber's error arose when, upon examining the case's admissibility, it invoked the "slogan" version of admissibility: "[A]ccording to [Article 17] of the Statute, the Court may only exercise its jurisdiction when a [s]tate which has jurisdiction over an international crime is either unwilling or unable to complete an investigation, and if warranted, to prosecute its perpetrators."

Thus, without regard to the fact of the absence of an investigation or prosecution, the Trial Chamber went on to consider the DRC's unwillingness to conduct proceedings on the Bogoro incident, based on the DRC's statement that it had no intention to investigate the incident. Therefore, according to the Trial Chamber, the state's unwillingness led to the case's admissibility before the ICC.

When the case was brought to the Appeals Chamber, it noted that the Trial Chamber had misinterpreted Article 17(1)—the Appeals Chamber stated that to examine unwillingness and inability before determining the presence of past or present investigation/prosecutions would be to put the cart before the horse:

> Therefore, in considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness

> and inability. To do otherwise would be to put the cart before the horse.[74]

The main takeaway from the ruling of the Court in *Katanga* is that the proper method in determining a case's admissibility is composed of two steps. The *first step* is to determine whether the same case has already been dealt with at the national level (which the Trial Chamber failed to do); and if answered in the affirmative, the *second step* is to determine the state's genuineness or ability in doing so.

Therefore, in determining the merits of an invocation of inadmissibility of a case pursuant to either Article 17(1)(a) or Article 17(1)(b), two sequential questions must first be addressed. The first is whether there is already an ongoing investigation or prosecution of the case at the national level, or whether the case has been investigated by the state but decided not to prosecute the person concerned, in the case of Article 17(1)(b).[75] If the answer to the first question is in the affirmative, the second question would be whether the state is "unwilling" or "unable"[76] to genuinely carry out such investigation or prosecution (or the decision not to prosecute after investigation resulted from the unwillingness or inability of the state genuinely to prosecute).[77]

Accordingly, if it is established that the state is not investigating or prosecuting currently, or has not done so previously, this fact in and of itself

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[74] *Id.* at 29, ¶ 78.

[75] *Id.* at 3, ¶ 1 & 28-30, ¶¶ 75–79.

[76] Rome Statute, art. 17(2). "In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable.

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."; Rome Statute, art. 17(3). "In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

[77] Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶¶ 1, 75–79, (Sept. 25, 2009).

renders the case admissible before the International Criminal Court. But if the state is investigating or prosecuting, or has already done so but decided not to prosecute, then this would lead to the case's inadmissibility, *unless* the state is unwilling or unable to genuinely carry out such prosecution or investigation, or when the decision not to prosecute results from the state's unwillingness or inability to genuinely prosecute, as the case may be.

i. Three Scenarios

There are three possible starting points of the two-step process, drawn from Article 17, subparagraphs (a) to (c).[78] First is when the case is being investigated or prosecuted by the state having jurisdiction over the crime.[79] Second is when the state has investigated the same case as the ICC but decided not to prosecute.[80] Third is where the same case has been prosecuted at the national level.[81]

a. There is an ongoing national proceeding as to the same case

The first step to determine in this scenario is whether the case is being investigated or prosecuted by a state which has jurisdiction over it, pursuant to Article 17(1)(a). Only if this question is answered in the affirmative should the Court proceed to the second step—an inquiry into the state's willingness or ability—to determine the case's admissibility.

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[78] Seils, *supra* note 7, at 38.

[79] Rome Statute, art. 17(1)(a). "*Issues of admissibility*
(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution[.]"

[80] Rome Statute, art. 17(1)(b). "(1) [...]
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute[.]"

[81] Rome Statute, art. 17(1)(c). "(1) [...]
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3[.]"

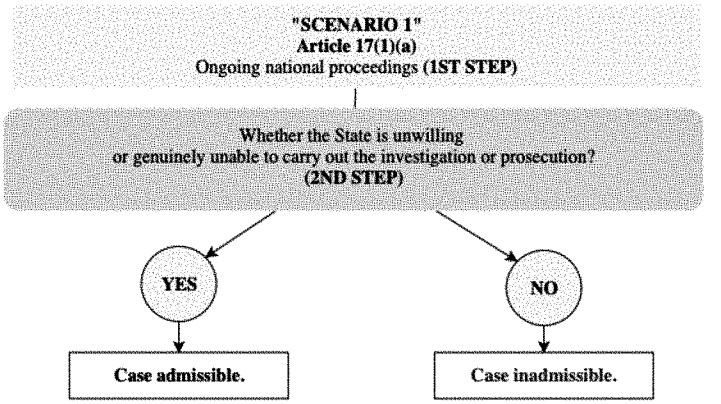

FIGURE. 1.1. Scenario 1

In the previously discussed case of *Katanga*,[82] the Appeals Chamber ruled that the case was admissible because there were no national proceedings involving the same case. It noted that in the absence of a local proceeding, there was no need to look into the state's willingness and ability to prosecute, contrary to the interpretation of the Trial Chamber.

b. The state has investigated the same case as the ICC but decided not to prosecute

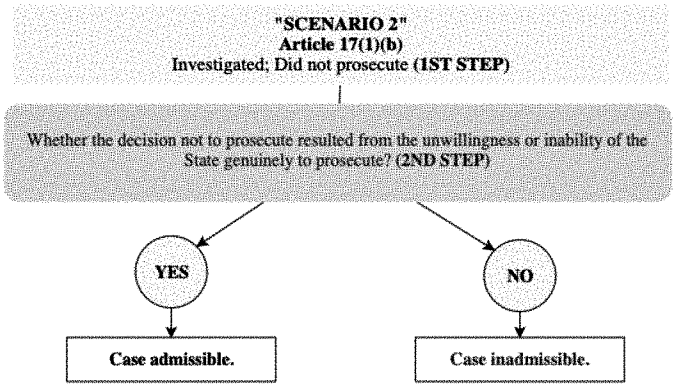

FIG. 1.2. Scenario 2.

[82] Prosecutor v. Katanga, ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶¶ 1, 75–79, (Sept. 25, 2009).

In the scenario contemplated in Article 17(1)(b), the first step is to answer the composite question of whether the *state already investigated the case* and whether the state *decided not to prosecute*.[83] If both parts are answered in the affirmative, the case would be "generally inadmissible," unless if in the second step, it was determined that the decision not to prosecute resulted from the state's unwillingness or inability to genuinely prosecute. If it has not investigated or prosecuted the same case in the past, the case is admissible. If it has investigated and decided to prosecute, refer to Scenario 3.

It is "generally inadmissible," since the case of *Prosecutor v. Bemba*[84] presents a unique situation.

In the case of *Bemba*, Jean-Pierre Bemba Gombo was the leader of an armed political movement in the Democratic Republic of Congo ("DRC") conflict and was, at one point, appointed as DRC Vice President while in the process of securing a peace deal. It is in 2003 when Bemba sent his forces to support President Ange-Felix Patassé of the Central African Republic ("CAR") who was then facing a coup. Patassé was eventually overthrown.

The new administration prosecuted Patassé and his accomplices for various crimes. Among his accomplices was Bemba, who himself and through his men allegedly murdered and raped in the CAR capital, Bangui. After investigating, CAR decided not to prosecute and referred the case to the ICC. Bemba at the beginning of his ICC trial challenged the admissibility of the case, arguing that the case is inadmissible (due to Scenario 2). In upholding its admissibility, the Trial Chamber ruled that:

> Neither of these decisions by the national courts and the [s]tate (*viz.* to refer the case to the ICC) were decisions "not to prosecute". They were, instead, decisions closing the proceedings in the CAR—there was an order for severance that approximately coincided with the referral to the ICC (they were two days apart). It follows that the first element of Article 17(l)(b) is not met: in the sense described by the Appeals Chamber, there has not been a decision not to prosecute the accused. To the contrary, the CAR seeks his prosecution at this Court.[85]

Now, let us include the case of *Katanga* in the discussion. Compared to the case of *Bemba*, in *Katanga* there was no past or present investigation at

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[83] Seils, *supra* note 7.

[84] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, Trial Chamber III, ¶ 403 (June 24, 2010).

[85] *Id.* at 90-91 ¶ 242.

the national level. This means that, as discussed in Scenario 1, the case is already admissible without the need to refer to the second step—the determination of the state's willingness or ability to investigate or prosecute.

In *Bemba*, there was an investigation in CAR, which means that the examination will be through the lenses of Scenario 2. The first step of the two-step process then asks the composite question. While it initially seemed that the answers to the Scenario 2 composite question were both in the affirmative which generally leads to the case's inadmissibility, the Court in *Bemba* pointed out that the decision not to prosecute and instead refer the case to the ICC is not the "decision not to prosecute" as contemplated in Article 17(1)(b) of the Rome Statute; the envisioned "decision not to prosecute" is one that allows the suspect/s to evade trial and perhaps justice entirely.

The *Bemba* case also illustrates the result if the answer to the composite question is in the negative. If the state is not investigating, in effect, the state is inactive. The case is admissible without the need to go through the second step of the two-step process. But even if there is an ongoing investigation or prosecution that is stopped in order to refer the case to the ICC, it will also be deemed as inactivity. Thus, the case is admissible.

c. The same case has been prosecuted at the national level

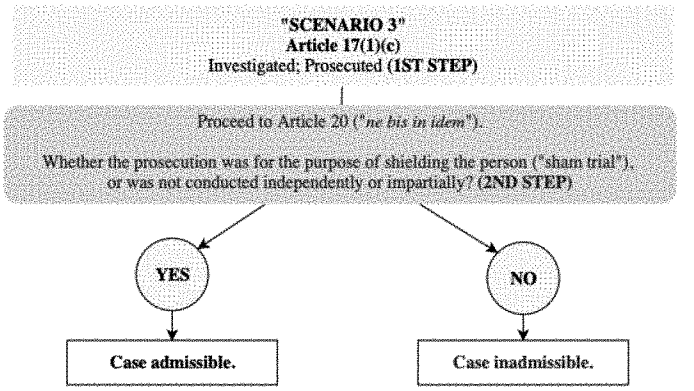

FIGURE 1.3. Scenario 3

Pursuant to Article 17(1)(c), Scenario 3 also seeks an answer to the composite question. But this time, the second query asks whether the state *decided to prosecute*.

If both are answered in the affirmative, the case is inadmissible, unless it is found that the prosecution was for the purpose of shielding the accused or was not conducted independently or impartially.

3. Ne Bis In Idem

The principle of *ne bis in idem* is embodied in Article 20 of the Rome Statute.[86] It is an important provision to consider in terms of the jurisdiction and admissibility of a case before the International Criminal Court. It is similar to the rules on double jeopardy and *res judicata* that exists in both civil and common law traditions and codified in the national law of most states.[87] It exists to protect two main interests: firstly, that of the suspect, so as to ensure he or she is not subjected to undue harassment and an unfair increase in the possibility of conviction, and secondly that of judicial economy, so that time and other resources are not put to waste.

It is important to note, however, that from the point of view of the International Criminal Court, only its own decisions trigger *ne bis in idem* absolutely.[88] Thus, the exceptions provided in Article 20 allow for situations wherein prior proceedings at the national level will not bar a subsequent case brought before the Court, and as such serve as a check on the genuineness of these proceedings in the interest of justice. Such exceptions then, are of vital importance to a better understanding of the principle of complementarity.

Paragraph 3 of Article 20[89] lists two exceptions where proceedings of another court do not fall within the *ne bis in idem* principle, and both pertain

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[86] Rome Statute, art. 20. "*Ne bis in idem*
(1) Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
(2) No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
(3) No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

[87] Triffterer, *supra* note 14, at 904.

[88] Triffterer, *supra* note 14, at 903.

[89] Rome Statute, art. 20(3). "*Ne bis in idem* [...]

to situations where the proceedings are considered not genuine, and instead may be viewed as a sham or a farce. The first is where the proceedings were for the purpose of shielding the person from criminal responsibility, and the second is where the proceedings were not conducted independently or impartially and in a manner inconsistent with an intent to bring the person to justice.

These exceptions in Article 20 tie directly into Article 17, as their wording is exactly the same as that used in Article 17(2)(a) and Article 17(2)(c), which are among the scenarios the Court uses to evaluate the unwillingness of a state to prosecute from the perspective of complementarity. Thus, this highlights the interrelatedness of the various aspects of admissibility.

Notice that Scenario 3 above triggers the consideration of *ne bis in idem* to the effect that a case which was investigated and prosecuted by state authorities is inadmissible (imagine double jeopardy in Philippine law), unless the prosecution was for the purpose of shielding the accused or was not conducted independently or impartially—the exceptions found in Article 20(3), subparagraphs (a) and (b).

4. Same Case Test (Same Suspect, Same Conduct)

It is the party arguing for a case's inadmissibility who bears the burden of proving such claim. When Article 17 refers to a *case*, it means the *same case.* Thus, for a successful invocation of complementarity, the national authorities have to prove that it is dealing with or has dealt with a case that "sufficiently mirrors" the ICC case in both *suspect* and *conduct*—that it involves the same suspect and substantially the same conduct as in the ICC case.[90]

The *Same Suspect Test* requires that the local proceedings deal with the same suspect identified in the ICC case. This is in line with the goal of the Court to ensure that only persons who are most responsible for the crimes

(3) No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 bis shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
   (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
   (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

[90] Seils, *supra* note 7, at 46.

are held responsible. Otherwise, it would be easy for those persons who are most responsible to avoid liability through the prosecution of scapegoats in the local courts.

In the *Same Conduct Test* what is required is that the local proceedings deal with the same acts. In the case of *Prosecutor v. Simone Gbagbo*,[91] the Court used the *Same Case Test* to rule that there was no conflict of jurisdictions between the domestic court and the ICC, because Simone Gbagbo's case before the ICC does not cover the same conduct. Thus, it failed the *Same Conduct Test.*

B. Is the Philippine Government unable or unwilling?

The principle of complementarity has been repeatedly invoked by the Philippine government to forestall the ICC's involvement in the conduct of the Philippine war on drugs. It contends that as the state is not in fact unwilling and unable to genuinely carry out investigations or prosecutions related to the anti-drug operations, then any case before the ICC should be deemed inadmissible under its own rules. The recently decided case of Kian Delos Santos lends what would appear to be a strong support to this contention.

However, an application of the tests outlined above would show that this is in fact not the case. The recent conviction of police officers implicated in the murder of Kian Delos Santos is not a bar to an ICC case since it fails the *Same Case Test* for failing both the tests which comprise it, namely the *Same Suspect* and *Same Conduct* tests. The case prosecuted low-ranked police officers, not President Duterte nor former PNP Chief Ronald dela Rosa—the persons who may be considered most responsible for the acts—not the same suspects. There was a conviction for murder, but not for the widespread and systematic acts that may constitute crimes against humanity under the Rome Statute—not the same conduct.

By applying the two-step process, it can immediately be determined that the case is admissible since there have been no investigations nor any prosecution, past or present—the Kian Delos Santos case not being an effective bar for failing to satisfy the *Same Case Test.*

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[91] Prosecutor v. Gbagbo, ICC-02/11-01/12-47-Red, Decision on Côte d'Ivoire's Challenge to the Admissibility of the Case Against Simone Gbagbo, Pre-Trial Chamber I (Dec. 11, 2014).

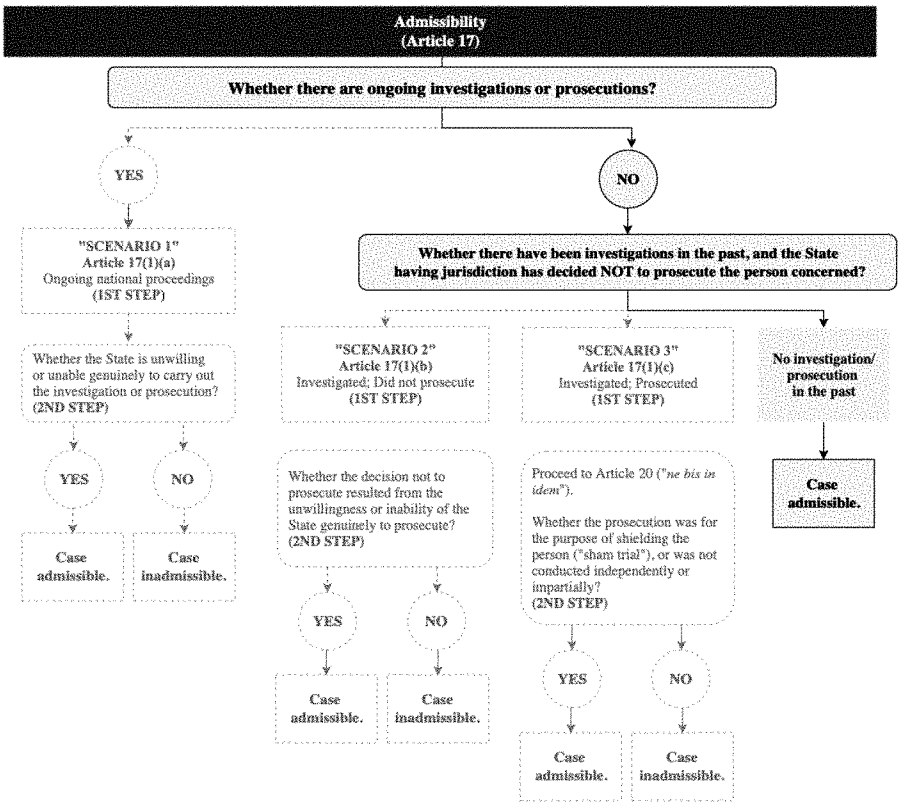

FIGURE 2. The two-step process *vis-à-vis* the Philippine War on Drugs

C. Immunity from Suit

An interesting question arises as to how the failure of a state to prosecute a government official by reason of his or her immunity from suit is to be evaluated in the context of complementarity.

Well-settled is the doctrine in Philippine law that "the President, during his tenure of office or actual incumbency, may not be sued in any civil or criminal case[.]"[92] This presidential immunity is even codified in the domestic law on crimes of international character, Republic Act No. 9851 or "The Philippine Act on Crimes Against International Humanitarian Law,

[92] David v. Arroyo, G.R. No. 171396, 489 SCRA 160, 224 (2006). (Emphasis omitted.)

Genocide, and Other Crimes Against Humanity of 2009."[93] Would such immunity from suit render the state unable to prosecute genuinely from the perspective of complementarity?

In the *Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo*, the Court's Pre-Trial Chamber ruled that the case is *admissible* since there is no indication of local efforts to prosecute, and on the contrary, it appears that domestic judicial authorities abandoned any attempt to prosecute Bemba by reason of the immunity he enjoyed as Vice President of Congo. [94]

While the Court also stated that its ruling does not in any way prejudge any decision that it may subsequently render regarding admissibility, the Court's reasoning is clear; it deemed the case admissible by the fact that Bemba is not being prosecuted at the national level due to his immunity from suit. Therefore, this shows that the Court has previously decided that failure by a state to prosecute an official due to immunity from suit is admissible due to the state's inactivity. The application of the two-step process will lead to the same conclusion.

Indeed, in such a case, it is the ICC alone that can bring the local official to justice. Recognition of the jurisdiction of the ICC in such a situation is found in Article 27 of the Rome Statute, as the Court has the power to exercise its jurisdiction over government officials without distinction and regardless of the immunity they enjoy.[95]

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[93] Rep. Act. No. 9851 (2009), § 9. Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity. *"Irrelevance of Official Capacity.* - This Act shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a head of state or government, a member of a government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Act, nor shall it, in and of itself, constitute a ground for reduction of sentence. However:

(a) Immunities or special procedural rules that may be attached to the official capacity of a person under Philippine law *other than the established constitutional immunity from suit of the Philippine President during his/her tenure*, shall not bar the court from exercising jurisdiction over such a person[.]" (Emphasis supplied.)

[94] Prosecutor v. Bemba, Case No. ICC- 01/05-01/08, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, ¶¶ 21-22 (June 10, 2008). (Emphasis supplied.)

[95] Rome Statute, art. 27. "*Irrelevance of official capacity*

(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from

To hold otherwise would deprive the victims and the international community of their only penal remedy and impliedly condone impunity for as long as the perpetrator enjoys his immunity. This allows the continuous perpetration of the crimes against the helpless victims while the world is forced to watch with their hands bound. It flies in the face of the mandate of the ICC that crimes of international concern must not go unpunished.[96] The Court was never envisioned to be powerless.

IV. MODES OF PERPETRATION, COMMAND RESPONSIBILITY, AND THE EMPLOYMENT OF CUMULATIVE CHARGING & ALTERNATIVE ALLEGATIONS

The Statute recognizes several modes of perpetration as embodied in Article 25(3)(a): direct perpetration, co-perpetration, and indirect perpetration ("individual, jointly with another or through another person").[97]

The distinction between direct and indirect perpetration is, in the former, the "perpetrator acts on his or her own without relying on or using another person;"[98] the accused "commits [the crime] as an individual." In the case of *Prosecutor v. Tadić*, the word "committed" used in Article 7(1) of International Criminal Tribunal for the former Yugoslavia's Statute was interpreted to mean "first and foremost the physical perpetration [...] by the

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criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

[96] Rome Statute, pmbl. ¶ 4. "*Affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation[.]"

[97] Rome Statute, art. 25(3)(a). "*Individual criminal responsibility* [...]

(3) In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible[.]"

[98] Triffterer, *supra* note 14, at 987; *See also* MODEL PENAL CODE § 2.06(1) (AM. LAW INST., 1985): 'committed by his own conduct'.

offender himself."[99] While in indirect perpetration, the overt acts are committed by others under the direction of the indirect perpetrator.

On the other hand, a different form of criminal responsibility than that under Article 25(3)(a) can be found in Article 28 of the Statute. Notably, this is a mode of omission liability, as a commander or superior is sought to be responsible for the prohibited conduct of his subordinates based on the former's omission in his duty to prevent, suppress, or submit the matter to competent authorities,[100] unlike in Article 25(3)(a) where the perpetrator himself is held liable for the overt acts.

Article 28[101] imputes liability for an omission, unlike Article 25(3)(a) which pertains to a positive act. Corollary to this, the *mens rea* requirement is

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[99] Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶ 188 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[100] Rome Statute art. 28 ¶¶ (a)–(b). Both paragraphs (a) and (b) of Article 28 holds the commander or superior, respectively, liable for his "[failure] to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[101] Rome Statute, art. 28. "*Responsibility of commanders and other superiors*
In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
   (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
   (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
   (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
   (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
   (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

different. This is a relevant matter to consider in prosecuting someone who also acts through persons under his chain of command, like President Duterte. According to Professor Triffterer:

> *[In] article 25 para. 3, principal perpetrators and accomplices can only be held accountable when acting intentionally.* The intent of the accomplice shall moreover encompass the *mens rea* of the principal perpetrator. *[While in] article 28 [of the] Rome Statute, negligence shall lead to liability.* It shall apply as a *lex specialis* in relation to article 30.
>
> Unlike the principal perpetrator or the accomplice, the superior does not have to know all the details of the crimes planned to be committed. It is sufficient that he believed that one or more of his subordinates may commit one or more crimes encompassed by the ICC Statute. If command responsibility, under article 28 [of the] Statute, is to be understood as a separate offence punishing the author's disregard of his or her duties as commander, it follows that a detailed knowledge of the crimes planned by the subordinates on his part is unnecessary.
>
> The "knew" or "should have known" element is particular in that it requires only one of the two component elements of the *mens rea*, i.e. the intentional and knowledge sides, as known to civil law systems. It is not necessary that the superior shared the intent of the principal perpetrator. *Mere knowledge, or failure to acquire knowledge where this would have been required by the circumstances, is per se enough.* This kind of failure to acquire knowledge may constitute either unconscious negligence or conscious negligence[.][102]

Depending on the availability of evidence, an omission may be easier to prove than a positive act. This is one reason why prosecutors employ cumulative charging in crimes, and in addition, alternatively allege both the various modes of perpetration as well as the applicability of command responsibility in a given case.

Cumulative charging is a practice employed by prosecutors wherein "an accused is charged simultaneously with more than one crime on the basis of the same set of factual allegations."[103] For instance, President Duterte may be charged with crimes against humanity of murder in Article 7(1)(a), and alternatively with other inhumane acts in Article 7(1)(k). The charge may also

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[102] Triffterer, *supra* note 14, at 1098—99. (Emphasis supplied.)

[103] Jocelyn Courtney & Christodoulos Kaoutzanis, *Proactive Gatekeepers: The Jurisprudence of the ICC's Pre-Trial Chambers*, 15 CHI. J. INT'L L. 526–27 (2015).

allege criminal responsibility through direct or indirect perpetration and as a commander or superior.

The successful employment of this strategy can be seen in numerous ICC cases such as in the case of *Bemba*, where the Court held that the case against Bemba fell short in establishing his criminal responsibility under Article 25(3)(a), but went on to consider the alternative allegation and subsequently found him liable under Article 28.[104]

Another distinction that is pertinent to a possible conviction of President Duterte is the lower threshold employed for *mens rea* in Article 28(a).

Superior-subordinate responsibility requires that the superior "knew or consciously disregarded information" while command responsibility in Article 28(a) only requires that the commander at least "should have known." The latter threshold was intentionally set lower since it is more likely for military commanders to receive information and thus be aware of the conduct of their subordinates due to their positions at the top of the hierarchical structure of military operations.[105]

A. As Applied to the Philippine Situation

The main focus of the victims and human rights groups is to see President Duterte prosecuted for acting as both the instigator as well as the enabler of the Philippine war on drugs. This is also primarily the reason why the ICC's intervention has been sought, as he is immune from all suits brought in local courts. However, the question remains as to how liability may be imputed to President Duterte for his role in the alleged crimes against humanity committed in the course of the Philippine war on drugs.

One of the ways by which President Duterte may potentially be implicated would be through an application of command responsibility. It is not immediately apparent, however, that command responsibility would apply to President Duterte. While it is clear that the Philippine President is the Commander-in-Chief of the Armed Forces of the Philippines (AFP),[106] the acts here were perpetrated by the PNP and not by the AFP.

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[104] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, Confirmation Decision, Pre-Trial Chamber, ¶ 403 (June 15, 2009).

[105] Triffterer, *supra* note 14, at 1102.

[106] CONST. art. VII, § 18.

There is precedent, however, for the assertion that President Duterte has command responsibility over the acts of the police as well. Also in *Bemba*, the Pre-trial Chamber held that while the concept of command responsibility originally pertained to *de jure* military commanders, the term also contemplates a broader category of commanders—those who perform the role *de facto* by exercising effective control over a group of persons through a chain of command despite not being a *de jure* commander.[107] The *de facto* commander may be commanding regular government units such as *armed police.*[108]

An examination of potential liability of other actors is warranted, because from the perspective of the prosecutor, this would not only serve to increase the likelihood of achieving a successful prosecution but would also help to ensure that all those guilty of crimes against humanity are brought to justice. One such actor whose potential prosecution may prove more probable than President Duterte's, is former PNP Chief Ronald dela Rosa, who would be directly accountable for the actions of the police officers under his command. Command responsibility may be applied as per the *Bemba* Pre-trial Chamber Decision, and superior-subordinate responsibility would as well be in play. In addition, even indirect perpetration may also find application.

One may wonder as to the necessity of going through the trouble of arguing for the applicability of command responsibility rather than superior responsibility, given that President Duterte has been vocal regarding the results of the anti-drug operations and thus would seem to have obvious knowledge of the acts of his subordinates. This apparent awareness would obviate the need to clearly delineate the *should have known* versus the *consciously disregarded information* thresholds.

One main issue informs such an approach, and it is an evidentiary concern. Given the existing challenge regarding state cooperation on the part of the Philippine government, there will be difficulty in ascertaining if the evidence that can be gathered is sufficient only to prove omission. With the withdrawal of the Philippines from the Rome Statute, the difficulty is only heightened further.[109] Worse still, if the evidence would only suffice to surmount the lower threshold found in Article 28(a).

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[107] Prosecutor v. Bemba, Case No. ICC-01/05-01/08-424, ¶ 409 (June 15, 2009).

[108] *Id.* at ¶ 410, *citing* William Fenrick, *Article 28: Responsibility of commanders and other superiors in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 517–18 (Otto Triffterer ed., 1999).

[109] Lian Buan, *Withdrawal will make ICC investigation of Philippines difficult – expert*, RAPPLER, Mar. 14, 2014, *at* https://www.rappler.com/newsbreak/inside-track/168681-realnumbersph-war-on-drugs.

Thus, alternative allegations may very well prove to be of crucial importance considering the varying thresholds in establishing the burden of proof necessary for a successful prosecution.

V. CONCLUSION

At the outset of the Article, two primary questions were formulated to pose the issues of jurisdiction and admissibility in a simple and straightforward manner. Both questions may be answered in the affirmative: yes, the case is within the jurisdiction of the ICC, and yes, the case is admissible especially with regard to the principle of complementarity.

On the issue of jurisdiction, the case of the Philippine war on drugs meets all four grounds of jurisdiction.

Jurisdiction *ratione loci* is clearly satisfied as all conduct of the Philippine war on drugs occurred within the Philippines at the time it was a state party to the Rome Statute. The satisfaction of jurisdiction *ratione personae* is also not in contention, as all acts were carried out by Philippine nationals, also at the time the Philippines was still a state party. Although these two aspects of jurisdiction need only be satisfied in the alternative, both are accounted for in this situation.

With regard to jurisdiction *ratione materiae*, there is ample ground to assert that the anti-drug operations may amount to a crime against humanity, as both the contextual elements and the prohibited act are present in this situation.

The conduct of the war on drugs satisfies the contextual requirements needed to elevate common crimes to the level of a crime against humanity. The operations themselves constitute a widespread and systematic attack carried out against a civilian population according to a state or organizational policy. The orchestrated anti-drug operations have gone on for years all over the Philippines in accordance with an avowed state policy repeatedly condoned and applauded in public by no less than President Duterte himself, and it has been directed against alleged drug users and pushers who are not combatants nor engaged in hostilities as defined under international law.

The deaths that have occurred as a result of the war on drugs may fall under the prohibited acts of murder, extermination, or other inhumane acts, as enumerated in the Statute. Murder may be alleged if the deaths are found to be wrongful, and as the murders may be considered to be on a large-scale,

extermination is another possible finding. Additionally, the deaths from these operations if not considered murder or extermination, may at least be considered of a similar character to the specific prohibited acts, and there is sufficient basis to allege that these inhumane acts were intended to cause great suffering or serious injury to body or to mental or physical health.

Regarding jurisdiction *ratione temporis*, the Philippines became bound by the Rome Statute on November 1, 2011, and its withdrawal from the Statute took effect on March 17, 2019. The Philippine war on drugs commenced on July 1, 2016 and continues to the time of the writing of this Article. Thus, the conduct of the war on drugs that may amount to crimes against humanity from the period of July 1, 2016 until March 17, 2019, is within the jurisdiction of the Court and may be the subject of a case before it.

On the issue of admissibility, specifically with regard to the principle of complementarity, the case appears to be admissible as there have been no investigations nor any prosecution, past or present—the Kian Delos Santos case failing to satisfy the *Same Case Test*. Moreover, President Duterte's immunity from suit under national law is tantamount to the state's "inactivity" in light of it being effectively unable to prosecute the sitting President.

On the issue of modes of perpetration, superior responsibility, and command responsibility, President Duterte may potentially be liable through the latter two. In addition, former Philippine National Police Chief Ronald dela Rosa may be found liable in the same ways, with the inclusion of his possible liability through indirect perpetration.

The Court has previously held that command responsibility may apply to *de facto* commanders of a police force, and so liability through command responsibility may apply to President Duterte should he be characterized as a *de facto* leader of the Philippine National Police.

In closing, there is ample basis to propose that the conduct of the Philippine war on drugs may in fact be the proper subject of a case before the International Criminal Court, as it is both within its jurisdiction, and is admissible under the rules provided by the Statute.

If ultimately found guilty of crimes against humanity by the International Criminal Court, this will not only be a resounding victory for all who have suffered and who have grieved, but will also validate the role of the ICC in serving universal justice—a testament to the ICC's role in ensuring that those who trample on the rights of their fellow women and men, must

be held firmly to account. As pledged by the state parties to the ICC, the most serious crimes of international concern must not go unpunished.

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