

Adenauer Young Researcher's Report

# A Probe for Justice: An Analysis of the Implications of the ICC Investigation on the Philippines' War on Drugs through a Transitional Justice Framework

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# A Probe for Justice: An Analysis of the Implications of the ICC Investigation on the Philippines' War on Drugs through a Transitional Justice Framework

**Audrey Ann F. Malapira**

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Since 2016, the legitimacy and necessity of the International Criminal Court's (ICC) investigations and legal proceedings regarding the Duterte administration's war on drugs have been widely disputed. Now, in 2024, almost two years into the administration of President Ferdinand 'Bongbong' Marcos Jr., the debate on whether the Philippine government should cooperate with the ICC on this issue continues.

Currently, President Marcos Jr. and his cabinet maintain that the ICC's role in acquiring justice is not necessary and that rejecting the ICC's efforts has been done to protect the Philippines' jurisdiction and sovereignty.<sup>1</sup> The Marcos Jr. government has also repeatedly expressed its reluctance over the possibility of the Philippines rejoining the ICC after the country withdrew its membership under Duterte in 2019 nor is it optimistic about cooperating with the International Court, making any form of cooperation unlikely.<sup>2</sup>

Regardless of such pronouncements about the Philippines' involvement with the ICC in this case, it must be noted that justice for the victims of the extrajudicial killings (EJKs) is still yet to be seen at the domestic level. With thousands of documented and undocumented victims allegedly killed during the anti-drug operations, only three prosecutions and convictions have been made according to the 2022 Country Reports on Human Rights Practices published by the United States (US) in March 2023 – or eight months after the term of former President Duterte ended.<sup>3</sup> Specifically, this is the case of the Philippine court's verdict against three police officers on the murder of teenager Kian delos Santos, making them the first of the few state agents to have been investigated and convicted.<sup>4</sup> It is in this context that the ICC has found that its intervention may be necessary.

## The International Crime Court (ICC)

Established following the adoption of the Rome Statute on July 17, 1998, the ICC is the first treaty-based international criminal court that shares and legally binds countries to end impunity. With 123 state parties at present, the ICC is the only permanent and independent international court with the authority to prosecute individuals accused of (1) genocide, (2) crimes against humanity, (3) war crimes, and (4) crimes of aggression.<sup>5</sup>

While the categories may seem general, the case considers that crimes against humanity could have been committed through the murder of the drug war victims. Under international law, attacks against a large portion of the civilian population are classified as crimes against humanity.<sup>6</sup>

As a "court of last resort," the ICC can investigate and prosecute individuals accused of the four core crimes under its jurisdiction when governments are either "unable" or "unwilling" to do so. Nevertheless, it must be highlighted that the ICC emphasizes collaboration with domestic courts, complementing, rather than replacing, national judicial systems toward strengthening accountability procedures worldwide. Party states to the Rome Statute commit themselves to the responsibility of prosecuting and investigating these crimes. Should they fail, the ICC must intervene as a last option, notably when local institutions fail to present genuine proceedings for justice.<sup>7</sup> Thus, the ICC has an essential role in safeguarding justice systems.

Within this context of the need for justice and accountability for the victims of the EJKs and the war on drugs under the Duterte administration, the importance of the ICC can be seen in its ability to enable transitional justice mechanisms for the victims and their family members alike, notably as a last resort and when there seems to be minimal effort by the Philippine government to pursue this issue.

Within this context, this article attempts to analyze the implications of the ICC investigation through a transitional justice lens, mainly discussing how transitional justice efforts through the ICC can assist victims of the war on drugs.

## Transitional justice and the ICC

In principle, transitional justice seeks to recognize victims and enhance civic trust in state institutions. It focuses on seeking accountability from the perpetrators and giving redress to the victims. Through transitional justice, the legacies of systematic abuses are acknowledged by gaining justice for the victims and ensuring reconciliation between all actors. This objective is achieved through processes that include criminal, restorative, and social justice.<sup>8</sup>

As transitional justice implores numerous mechanisms that allow societies to move forward from human rights violations and atrocities, the ICC's participation in the investigation and prosecution of crimes can offer the impacted communities a path toward healing, reconciliation, and the pursuit of the truth, while simultaneously helping to create enduring peace and rebuild trust in institutions.

Furthermore, not only does transitional justice protect communities from impunities and atrocities, but it also assists them in moving forward through numerous stages of reparations and rebuilding. Hence, societies need to acknowledge when such crimes happen. Otherwise, it becomes difficult for victims to seek justice.

In the case of the Philippines, transitional justice would refer to how victims of the Duterte administration's war on drugs would attain justice and truth through mechanisms deployed by the ICC in cooperation with the Philippine government. Furthermore, it will enforce accountability and address the reconciliation of the victims and perpetrators.

Transitional justice has four pillars that complement one another, namely:

1. right to know,
2. right to reparation,
3. right to justice, and
4. guarantees of non-recurrence.

All four pillars must work interconnectedly.

The following section discusses how each pillar can ascertain different aspects of justice for the victims of the war on drugs.

### Right-to-know mechanisms

This fundamental pillar of transitional justice highlights the significance of learning the truth about historical abuses, atrocities, and human rights violations. It deals with people's and communities' rights to know about historical occurrences, the circumstances surrounding violations, and the names of the victims and offenders. These practices and mechanisms embody the principles of transparency, access to information, victim participation, and public engagement.

For the war on drugs case, the ICC's investigation and legal proceedings may contribute to the larger objectives of accountability, truth-seeking, and building trust in the pursuit of justice.

One mechanism under the right to know is the establishment of truth commissions. Truth commissions are essential tools in transitional justice processes because they help recognize and correct past atrocities. Truth commissions conduct thorough investigations into human rights abuses, often gathering evidence, conducting interviews with victims and perpetrators, and collecting testimonies and documentation related to the violations. These efforts aim to establish an accurate historical record of events and provide a comprehensive understanding of the causes, patterns, and consequences of the violations and abuses committed. Such commissions should be nationally owned, wherein local societies can implement and design how the past is understood and how they should move on from the legacies of abuse together.<sup>9</sup> Notably, efforts for truth commissions dedicated to expediting the investigation of the war on drugs have been made in the past. Incumbent Solicitor General of the Philippines Menardo Guevarra has submitted a proposal to President Marcos Jr. to create a commission in 2022.<sup>10</sup> This proposed commission is meant to work separately from the task force headed by the Department of Justice (DOJ). However, no commission exists to this day, and it would seem that the government still lacks truth-seeking initiatives. Other institutions and groups have also voiced out the necessity of truth commissions for EJK victims. In 2023, the *Tindig Pilipinas* coalition, consisting of pro-democracy groups, called for the creation of truth commissions to uncover and recognize the killings done during the anti-drugs operations.<sup>11</sup>

It should be noted that the ICC lacks jurisdiction to establish truth commissions in the Philippines for the alleged extrajudicial killings it is investigating since only the Philippine government can do so. However, if permitted by its rules and regulations, the ICC may reinforce right-to-know mechanisms by providing information obtained from its investigations to truth commissions or national authorities carrying out parallel investigations to aid in their pursuit of the truth. Furthermore, the ICC's work helps the victims uncover the truth about what happened, sheds light on the circumstances surrounding the extrajudicial killings, and supplies vital evidence.

### Right to reparation mechanisms

Reparations discuss the ways institutions can restore the victims after what they have suffered. This mechanism includes restitution, aimed at bringing the victims back to their normal condition before the violation happened (e.g. by restoring their liberty). Furthermore, reparation entails that victims and family

members are well compensated for economic damages, loss of earnings, and moral damages. It is also important to ensure that victims have access to rehabilitation, focusing on social, medical, legal, and psychological care. Reparation also includes acknowledging the truth and how atrocities affected citizens on a personal level.

The Philippines is no stranger to such efforts. One example of an attempt to compensate past human rights victims has been the Human Rights Victims Reparation and Recognition Act of 2013, or Republic Act (RA) 10368, which was signed into law by former President Benigno Aquino III. The policy was meant to recognize victims of the martial law regime under Ferdinand Marcos Sr. and to give ample reparation. Under this law, reparation is introduced as the duty of the State to reinstate the rights and protect the dignity of the victims, both monetarily and non-monetarily.<sup>12</sup> Hence, it recognizes the need for memorialization, recognition, and reparation efforts for victims of human rights.

As a point for comparison, first, reparation can be done through financial assistance as stated in RA 10368, which the government may award to the victims in proportion to the gravity of the violations they faced.<sup>13</sup> Furthermore, the government may provide non-monetary reparation through interagency efforts with assistance from the Department of Health, Department of Education, Commission on Higher Education, and other concerned organizations. Such efforts institutionalize recognition and memorialization of the injustices through different sectors of society. Groups have called for a similar approach for victims and their families concerning the extrajudicial killings under Duterte.<sup>14</sup> Additionally, it is strongly urged that the memories and honor of victims be protected through memorials, libraries, and museums. There should be memorialization efforts that preserve the public memory of the victims so that society can learn and take better measures to ensure that such violations do not happen again.

While the ICC cannot directly deal with reparations through local policies, it can still utilize its role in assisting victims. The international court allows victims to participate throughout its proceedings. Hence, their views on reparations may be considered.<sup>15</sup> Should any convictions be done, the ICC can also issue reparation orders against those found guilty. Such reparation orders can span from community-based measures to monetary aid. With the help of the ICC, ensuring that victims and their families receive just compensation becomes a collaborative effort with other concerned institutions.

Accountability and justice do not end with the courts, and it is equally pertinent to give redress to the victims and their relatives. However, with the denial of EJKs occurring, it becomes more difficult for them to receive monetary and non-monetary assistance for reparation.

### Right to justice mechanisms

One of the ICC's most prominent roles is ensuring justice when domestic governments fail to do so. The right to justice is more than the ability to undergo due process. It also accounts for the accessibility and quality of its delivery in a non-discriminatory and impartial manner.<sup>16</sup> In the case of the Philippines, there should be processes in place that allow accessible legal counsel, legal representation, and judicial practices, those of which can be supported and complemented by the legal aid provided by the International Criminal Court.

As discussed earlier in this report, the DOJ manages the investigations into the supposed EJKs. While there appears to be no notable progress, different sectors of Philippine society remain vocal in their support for justice for the victims. Without acknowledgment of these atrocities, legal aid is inaccessible, and going to court against perpetrators who may be members of the State becomes intimidating and overwhelming. Within this prevailing context, the possibility of trials at the current state of the Philippines' progress is unlikely, further highlighting the lack and need for justice.

The role of the ICC in upholding the right to justice is shown by its mechanisms as a trial court. From its investigative role, it is evident that the ICC tries to bring reconciliation to victims by delicately reviewing impunities at an international level, free from politicking and, possibly, coercion and intimidation from local

authorities. The data found through the ICC's investigation is also meant to assist local efforts. Prosecution of criminals is also integral to the Court's role in ensuring justice. If, in the future, the Philippine government chooses to cooperate with the international body, hybrid courts can expedite the judicial process.

### **Guarantee of non-recurrence mechanisms**

In the aftermath of conflict, guarantees of non-recurrence are essential in preventing future human rights violations. For this pillar, there are different levels in which initiatives can be implemented, namely, through state institutions, society, and individuals.<sup>17</sup>

For state institutions, policies must be implemented for legal and constitutional reform to ensure that atrocities do not happen again. Social intervention should strengthen civil society and empower it to move forward collectively from conflict. In the individual sphere, all four pillars work together to ensure non-recurrence.

For the Philippines, these efforts are minimal as reforms to remedy the war on drugs are next to none, at least in the public eye. It should also be noted that the war on drugs continues under President Ferdinand Marcos Jr., who has since shifted the focus toward rehabilitation programs as a part of reform.<sup>18</sup> Nevertheless, we have yet to see how his administration handles the investigation independently from Duterte's government.

### **Conclusion**

Transitional justice deals with the past, assessing how government institutions move forward from atrocities and repression. Examining the case of the Philippines through a transitional justice framework, one can say that the Philippine government still lacks both accountability and redress initiatives for the victims of the drug war. Although dealing with the past is not a fast and immediate process, there seem to be minimal efforts made to reconcile injustices within the domestic setting vis-à-vis the government's relative denial of the alleged human rights violations under the drug war.

As we proudly live as a democracy, it is essential that we protect the democratic processes that define our truth, justice, and freedom. While it is beneficial that international tribunals such as the ICC exist to assist societies that cannot achieve any form of justice, it is just as important for Filipinos to continue holding the national government accountable to, at the very least, investigate alleged human rights violations that people have been voicing out against for nearly a decade.

As part of the youth, safeguarding democratic practices can never be done too early. As a democracy, our leaders and public institutions should reflect our democratic ideals rooted in the rule of law. With our collective voice, we can participate in efforts to correct historical injustices and support the incorporation of transitional justice mechanisms through the ICC and in other ways that can allow the victims, their family members, and our society a better chance in the search for justice.

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