

Forum prorogatum as a ground for jurisdiction: the ICC case of Rodrigo Duterte

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The International Criminal Court (ICC) proceedings in the case of crimes against humanity against former President of the Philippines Rodrigo Duterte (from hereon 'the situation in the Philippines') have recently been the subject of a challenge to the jurisdiction of the ICC by Duterte. Duterte claims that the ICC lost jurisdiction when the Office of the Prosecutor (OTP) was only authorised to conduct an investigation on the situation in the Philippines in 2021 subsequent to the effectivity of the Philippines withdrawal as a State Party from the Rome Statute of the ICC on March 17 2019.

The prosecution and the victims argue that the ICC retains jurisdiction under Article 127 of the Rome Statute which provides that '[A State Party's] withdrawal shall not [...] 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**', considering that the OTP was already conducting a preliminary examination of the case in 2018 before the withdrawal became effective in 2019.

Duterte argues that Article 127 is not applicable as the preliminary examination conducted by the OTP was an internal process within the OTP and was not a 'matter' under 'consideration' by the ICC referred to under Article 127 – practically arguing that the ICC lost jurisdiction over the case after 17 March 2019.

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The Pre-Trial Chamber (PTC) rejected the challenge, ruling that the ‘jurisdictional regime set out in Part 2 of the Statute continues to apply to this case as if the Philippines were still a Party to the Statute, so as to ensure that, pursuant to Article 127(2) of the Statute, the withdrawal of the Philippines from the Statute “shall not [...] 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.’ The challenge is currently pending before the ICC Appeals Chamber.

This paper argues that not only is the jurisdiction of the ICC in the Duterte case valid under Article 127, but it is also valid as a case of *forum prorogatum*, or acceptance of jurisdiction by conduct, a form of ‘subsequent practice’ under international law. A State Party may accept the jurisdiction of the ICC not only by express declaration, but also through successive conduct implying agreement, for example, by filing a written pleading or appearing before the ICC. In such cases, the ICC acquires jurisdiction and may proceed to adjudicate the dispute, meaning a case of *forum prorogatum*.²

Forum prorogatum was discussed by Judge Elihu Lauterpacht in his Separate Opinion in the International Court of Justice (ICJ) case of *Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*³, to wit:

‘The Court can only act in a case if the parties, both applicant and respondent, have conferred jurisdiction upon it by some voluntary act of consent. This can be given in various forms: a treaty undertaking to that effect; a contracting-in to the compulsory jurisdiction of the Court under the so-called “optional clause” (Article 36 (2) of its Statute); **or an acceptance of jurisdiction by a respondent through its conduct following upon a unilateral commencement of proceedings by an applicant - a method known as *forum prorogatum*.**’

In the case of *Djibouti v France* (Case Concerning Certain Questions of Mutual Assistance on Criminal Matters), the ICJ declared that the consent under *forum prorogatum* prescribes no specific form (eg, it could be a letter) and can be deduced from a certain conduct of a party as to imply consent to jurisdiction:

‘The jurisdiction of the Court is based on the consent of States, under the conditions expressed therein. However, neither the Statute of the Court nor its Rules **require that the consent of the parties which thus confers jurisdiction on the Court be expressed in any particular form** (*Corfu Channel (United Kingdom v. Albania), Preliminary Objection, Judgment, 1948, I.C.J. Reports 1947-1948, p. 27*).

The Court has also interpreted Article 36, paragraph 1, of the Statute as enabling consent **to be deduced from certain acts**, thus accepting the possibility of *forum prorogatum*. This modality is applied when Respondent State has, **through its conduct before the**

² Taken from the ‘Handbook on Accepting Jurisdiction of the International Court of Justice’ published by the International Court of Justice.

³ Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia*).

Court or in relation to the applicant party, acted in such a way as to have consented to the jurisdiction of the Court.'

This paper posits that *forum prorogatum* was triggered when the Philippines, through the following acts, challenged the order of the PTC, authorising the Prosecutor to conduct an investigation citing Article 17 of the Rome Statute on complementarity and admissibility:

- a) The Philippines, through an official communication to the ICC dated 10 November 2021 after the effectivity of the Philippine withdrawal, requested the ICC and the Prosecutor to defer its investigation as the Philippines is 'genuinely' investigating and prosecuting the killings related to the war on drugs.
- b) On 8 September 2022, the Philippines filed with the ICC Pre-Trial Chamber its pleading titled 'Philippine Government's Observation on the Office of the Prosecutor's Request' opposing the Prosecutor's request for authorisation to resume the investigation.

Both these acts, by conduct under the principles of *forum prorogatum* and by subsequent practice under Article 31 (3) (b) of the Vienna Convention on the Law of Treaties, constitute a continued recognition of the ICC's jurisdiction over the situation in the Philippines in reference to the charges against Duterte for crimes against humanity.

Looking at point a, the aforementioned communication informed the ICC that the Philippines 'is investigating or has investigated' alleged crimes against humanity⁴ during the 'war on drugs' launched by then Duterte. It asked that the investigation, previously authorised by the ICC, be deferred, citing Article 18 (2) of the Rome Statute. At the time the communication was lodged in 2021, the Philippines was no longer a State Party to the Rome Statute, but it did not oppose the investigation of the Prosecutor on the ground of jurisdiction under Articles 12 and 13 of the Rome Statute, but only requested its deferral pursuant to the complementarity and admissibility provisions under Article 17.

The acceptance of jurisdiction was clear when the Philippine communication was actually addressed to the ICC itself, not just the Prosecutor, and cited the Rome Statute to ground its request for remedy from the ICC to wit:

'The Philippine Government hereby informs the International Criminal Court ("**the Court**") that it is investigating or has investigated its nationals or others within its jurisdiction with respect to the alleged crimes against humanity of murder under Article 7(1)(a) of the Statute "committed throughout the Philippines between 1 July 2016 and 16 March 2019 in the context of the so-called 'war on drugs' campaign, as well as in the Davao area between 1 November 2011 and 30 June 2016."

On this basis, **pursuant to Article 18 (2) of the Statute**, the Philippine Government hereby requests that the Prosecutor defer to the Philippine Government's investigations

⁴ Duterte's lawyer says he maintains his innocence.

and proceedings. **In accordance with the principle of complementarity** under which the Court operates, the Philippine Government has the **first responsibility** and right to prosecute international crimes. *The Court may only exercise jurisdiction where national legal systems fail to do so*, which is certainly not the case in the Philippines. As will be demonstrated below, the domestic institutions in the Philippines are fully functional and more than adequate to address the issues and concerns raised in the Notification [...]

The Embassy of the Republic of the Philippines in The Hague avails itself of this opportunity to renew to the Court the assurances of its highest consideration.’ (emphasis supplied)

The fact that the Philippines admitted that it has the ‘first responsibility’ to prosecute international crimes, necessarily conveys that the ICC (and the prosecutor) has jurisdiction to pursue the investigation should the Philippines fail in that responsibility.

The Philippines founded its request for deferral under Article 18 (2) which provides that: ‘a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in Article 5 [...] At the request of that State, the Prosecutor shall defer to the State’s investigation of those persons **unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.**’ (emphasis supplied)

In fact, the Appeals Chamber considered this deferral request as an acceptance of the ICC’s jurisdiction in its Decision⁵ of 18 July 2023 (paragraph 56) rejecting the admissibility challenge of the Philippines:

‘Furthermore, the Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, is of the view that, **by requesting deferral and by making submissions in the context of Article 18 proceedings, the Philippines implicitly accepted the Court’s jurisdiction.**’ (emphasis supplied)

The Philippine request for the ICC to defer the investigation, therefore, carries with it the admission that the ICC has jurisdiction to grant the remedy or a provisional measure, even if the Philippines did not expressly mention the word ‘jurisdiction’. In the case of *Bosnia and Herzegovina v Yugoslavia*, the letter of Yugoslavia proposing and requesting the ICJ to order certain measures is a recognition that the ICJ has jurisdiction over the case, as explained by Lauterpacht:

‘The Court is bound to ask itself, what could be the jurisdictional basis for such proposals by the Respondent? The Respondent did not, in its letter of 1 April 1993, make any reference to the question of jurisdiction. **Yet, if the proposals were seriously meant, they can only have been put forward on the basis of some supposed ground of jurisdiction.**’

⁵ No. ICC-01/21 OA (July 18, 2023).

The Philippines only resorted to challenging the jurisdiction of the ICC in 2023 after it failed to convince the prosecutor and the ICC that the case is inadmissible under the complementarity provisions in Article 17.

However, should a non-state party or a state from which acceptance of jurisdiction is required be the subject of a case in the ICC, Article 19 of the Rome Statute provides that the same ‘shall make a challenge at the earliest opportunity’. The Philippines did not challenge the ICC’s jurisdiction at the earliest opportunity. Asking the ICC in 2021 to declare a case ‘inadmissible’ on the ground of complementarity, is an admission by the Philippines that the ICC continues to have the jurisdiction to decide on the issue even if the Philippines is no longer a State Party. The Philippines and Duterte, who was then its president, cannot ask the ICC to decide on the issue of admissibility if they believe the ICC had no jurisdiction to begin with.

Had the ICC granted the Philippine assertion that the case is inadmissible, that would certainly be detrimental, not only to the case of the Prosecutor, but also to that of the victims, who have long searched for accountability for the killing of their loved ones. The investigation was in fact deferred for nearly two years. When the Philippines attempted to have the case declared inadmissible, the victims’ case was already subjected to jeopardy should the case be dismissed. Having lost in that attempt, Duterte cannot now subject the case of the victims to another jeopardy by questioning the ICC’s jurisdiction. To allow this is to even violate the principles of equity or fairness and unjustly load the dice in favour of Duterte and against the victims.

Even Philippine jurisprudence recognised this conduct, not only as an acceptance of jurisdiction, but also an assault on public policy and fairness in the landmark case of *Tijam v Sibonghanoy* (April 15, 1968 G.R. No. L-21450) where the Supreme Court declared:

‘It has been held that a party cannot invoke the jurisdiction of a court to secure affirmative relief against his opponent and, **after obtaining or failing to obtain such relief, repudiate or question that same jurisdiction** (*Dean v Dean*, 136 Or. 694, 86 A.L.R. 79) [...]

Furthermore, it has also been held that after voluntarily submitting a cause and encountering an adverse decision on the merits, **it is too late for the loser to question the jurisdiction or power of the court** (*Pease v Rathbun-Jones etc.*, 243 U.S. 273, 61 L. Ed. 715, 37 S. Ct. 283; and *St. Louis etc. v McBride*, 141 U.S. 127, 35 L. Ed. 659). And in *Littleton v Burgess*, 16 Wyo. 58, the Court said that **it is not right for a party who has affirmed and invoked the jurisdiction of a court in a particular matter to secure an affirmative relief, to afterwards deny that same jurisdiction to escape a penalty.**’

The fact that the Philippines and Duterte, who was still the Philippine President at the time the communication was transmitted in 2021, asked the ICC to defer the investigation is a recognition of the ICC’s jurisdiction – after all, the ICC has no power to order the deferral of the investigation on the situation in the Philippines if it did not have jurisdiction in the first place. Additionally, by citing Article 18 (2) which provides that at ‘the request of that State, the Prosecutor shall defer to the State’s investigation of those persons **unless the Pre-Trial Chamber, on the application of the**

Prosecutor, decides to authorize the investigation, the Philippines admitted that even if the Prosecutor initially defers the investigation, the PTC retains the jurisdiction to lift the deferral.

Looking at point b from earlier, the OTP informed the ICC PTC I of the Philippines' Deferral Request⁶ and temporarily suspended its investigative activities of the Situation in the Republic of the Philippines. During the deferral of the investigation for nearly two years, the Philippines submitted various reports to the ICC showing government's actions in investigating and prosecuting cases related to the war on drugs, a further admission of the Philippine acceptance of the ICC's jurisdiction. The Prosecutor, after initially heeding the deferral request, however, found that the alleged investigation did not conform with the identity requirements under the Rome Statute and its procedure and evidence. The Prosecutor then filed with the PTC I for authorisation to resume investigation.

In response, the Philippines filed with the PTC I on 8 September 2022 its opposition⁷ to the OTP request to resume investigation. In that pleading, the Philippines asserted that the case is not admissible under Article 17 mainly arguing, *inter alia*, that the Philippines is investigating and prosecuting alleged crimes against humanity during the war on drugs, that the Philippine justice system is functioning effectively and is 'clearly able and willing to genuinely investigate and prosecute crimes committed in the war on drugs'. It also claimed that the 'Philippine government has investigated the alleged killings in Davao region'. The Philippines further argued that the 'Situation is not of sufficient gravity to justify further action by the Court' and posited that the 'OTP did not evaluate all information available impartially and objectively'.

There was no mention of the word 'jurisdiction' at all, except when the Philippines argued that the ICC has no jurisdiction 'as the alleged crimes do not constitute Crimes against Humanity' under Article 7 (a). This was not a challenge to jurisdiction or the exercise of jurisdiction under Articles 12 and 13 on the ground of Philippine withdrawal from the Statute but, that the offense being investigated does not constitute crimes against humanity under Article 7. Clearly, the Philippines recognised the jurisdiction of the ICC when it argued that the ICC should not allow the resumption of investigation 'pursuant' to Article 17 on admissibility and complementarity.

More damaging to Duterte is the fact that the Philippines implored the ICC for relief calling the ICC as the Court 'of last resort' in the portion titled 'Conclusion and Relief Sought' and committed to 'share with the OTP and this Court any new information it may receive' after its submission to wit:

'This Court, **as the court of last resort**, is the tribune of the "victims of unimaginable atrocities." [...] The Philippine Government submits that there is no sufficient basis for the OTP to resume its investigation into the Situation in the Philippines **pursuant**

⁶ 'Notification of the Republic of the Philippines' deferral request under article 18(2)', No. ICC-01/21. 18 November 2021.

⁷ "Philippine Government's Observation on the Office of the Prosecutor's Request", No. ICC-01/21, 08 September 2022.

to Article 18(2) of the Statute.

The Philippine Government has demonstrated that the Court has no jurisdiction over the Philippine situation, considering that the crimes allegedly committed within the Philippine territory were not part of a “widespread and systematic attack directed against any civilian population, with knowledge of the attack”. **Consequently, the crimes the OTP intends to investigate are ordinary crimes, not crimes against humanity. Thus, they are beyond the ambit of the Court.**

The Philippine Government has likewise established that the national proceedings referenced above sufficiently mirror the Court's investigation [...] The Philippines [...] has demonstrated its willingness and capability to investigate or prosecute crimes and has taken concrete actions and steps to conduct the investigation, prosecution and conviction of the identified perpetrators. **Consequently, the Philippine situation is inadmissible pursuant to Article 17 of the Statute.**

Under the principle of complementarity, the jurisdiction of the Court is complementary to the national criminal jurisdiction of the Philippine Government, which has the primary competence and authority to investigate and prosecute the crimes committed within its own territory. Further, the Philippine Government urges the Court to find that an investigation into the Philippine situation would not serve the better interests of justice. [...] **The Philippine Government is willing to share with the OTP and this Court any new information it may receive after this submission.**

WHEREFORE, the Philippine Government respectfully prays that OTP's request to resume investigation regarding the *Situation in the Philippines* be **DENIED.** (emphasis supplied)

The PTC denied the Philippine opposition to the request for authorisation to investigate on January 26 2023. However, the fact remains that the Philippines, by its conduct of using all the rights and prerogatives of a state party under the Rome Statute, as well as its procedures, citing provisions of the Statute to ground its procedural recourse, continued to recognise the jurisdiction of the ICC. It even asked the ICC for relief and denied the prosecutor's request for investigation.

Duterte cannot argue that those were not his personal acts but acts of the Philippine state. Duterte cannot employ the official act of the Philippine state in withdrawing from the Rome Statute as his defence to claim lack of jurisdiction, but ignore the subsequent official act of the Philippines accepting ICC's jurisdiction through a deferral request in 2021 when Duterte was still president, and a similar official act of the Philippines again admitting jurisdiction by filing with the PTC on 8 September 2022 an opposition to the OTP request for investigation, this time under Duterte's successor President Ferdinand Marcos Jr.

Having recognised the ICC's jurisdiction in his failed attempt to question the admissibility of the case under Article 17, Duterte cannot now revert to challenging the ICC's jurisdiction under Articles 12 and 13.

This paper asserts that the ICC has jurisdiction over the case of crimes against humanity against Duterte in the situation in the Philippines under Article 127. Assuming that the claim of Duterte as to the inapplicability of Article 127 is correct, the ICC still retains jurisdiction since the Philippines and Duterte, by their conduct, accepted the jurisdiction of the ICC, when the Philippines pleaded before the Prosecutor and the ICC to defer its investigation on the ground of complementarity as required by Article 17, citing Article 18 as the basis of its right to move for deferral.

Forum prorogatum, the acceptance of jurisdiction by conduct and subsequent practice, is clearly an additional basis for the ICC's continuing jurisdiction over the case of crimes against humanity against Duterte. Considering that the Court has jurisdiction over the case, the ICC can rightly order the conduct of the trial should the PTC confirm the charges.