

Overcoming Obstacles to the Quest for Genuine Accountability for Drug-Related EJKs in the Philippines

*Mario C. Cerilles, Jr.**

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* '19 MSc, London School of Economics and Political Science; '17 LL.M., University of California, Berkeley; '14 J.D., University of the Philippines College of Law. The Author is the co-founder and managing partner of Cerilles & Fernan Intellectual Property Law (CFIP Law). He is also a Senior Lecturer on Electoral Process and Public Office, and Obligations and Contracts at the University of the Philippines College of Law.

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I. INTRODUCTION

On 4 June 2020, in the middle of a global pandemic, the United Nations Human Rights Council (UNHRC) released its findings on the human rights situation in the Philippines.¹ The report was triggered by a resolution² which demanded an investigation on the Philippines due to the reported escalation of drug-related extrajudicial killings (EJKs).³ The UNHRC report states that the war on drugs declared by Philippine President Rodrigo R. Duterte when he assumed office has claimed a total of at least 8,663 lives.⁴ The report further shows that of the thousands of victims, only a few cases have been investigated.⁵

These sentiments are echoed by international human rights organizations such as Amnesty International⁶ and Human Rights Watch,⁷ which have identified drug-related EJKs as among the country's most pressing concerns.⁸

The lack of accountability for the killings has inspired efforts from the international community to look into the matter.⁹ The Special Rapporteur on extrajudicial, summary, or arbitrary executions has sought an invitation from the Philippine government so that she could launch a fact-finding mission in

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1. U.N. Human Rights Council, *Situation of human rights in the Philippines*, U.N. Doc. A/HRC/44/22 (June 29, 2020).
 2. Promotion and protection of human rights in the Philippines, H.R.C. Res. 41/L.20, 41st Sess., U.N. Doc. A/HRC/41/L.20 (July 5, 2019).
 3. Nick Cumming-Bruce, *U.N. Rights Council to Investigate Killings in Philippine Drug War*, N.Y. TIMES, July 11, 2019, available at <https://www.nytimes.com/2019/07/11/world/asia/philippines-duterte-killings-un.html> (last accessed Nov. 30, 2020).
 4. U.N. Human Rights Council, *supra* note 1, ¶ 22.
 5. *Id.* ¶ 26.
 6. Amnesty International, *Philippines 2019*, available at <https://www.amnesty.org/en/countries/asia-and-the-pacific/philippines/report-philippines> (last accessed Nov. 30, 2020).
 7. Human Rights Watch, *Philippines: Events of 2019*, available at <https://www.hrw.org/world-report/2020/country-chapters/philippines> (last accessed Nov. 30, 2020).
 8. *Id.*
 9. See, e.g., Agnes Callamard, Briefing note on the status of the visit request to the Philippines and the working methods for the mandate's fact-finding visits, available at <https://www.ohchr.org/EN/Issues/Executions/Pages/BriefingNoteStatusVisitPhilippines.aspx> (last accessed Nov. 30, 2020).

the country.¹⁰ The International Criminal Court (ICC) has sounded the alarm on drug-related EJKs in the Philippines and is conducting a preliminary examination¹¹ that could eventually lead to a full-blown investigation. Meanwhile, President Duterte has shunned these efforts as unwelcome interference into the country's affairs.¹² In a public address, he insulted the leaders of both international bodies¹³ and subsequently initiated the country's withdrawal from the Rome Statute.¹⁴ Nevertheless, international bodies have remained vigilant, with United Nations (UN) representatives continuing to denounce drug-related EJKs,¹⁵ and with the ICC continuing its preliminary examination.¹⁶

Amidst the unrelenting criticisms, the Department of Justice (DOJ) appears to have shifted its stance on the issue of drug-related EJKs.¹⁷ The DOJ, which previously downplayed the issue¹⁸ and refused to launch an

10. *Id.*

11. Lian Buan, *Int'l Criminal Court's next step in Duterte drug war to come in 2020*, RAPPLER, Dec. 5, 2019, available at <https://www.rappler.com/nation/international-criminal-court-next-step-duterte-drug-war-come-2020> (last accessed Nov. 30, 2020) [hereinafter Buan, *Duterte drug war*].

12. Darryl John Esguerra, *Malacañang: ICC bent on interfering with Philippines' sovereignty*, PHIL. DAILY INQ., Apr. 5, 2019, available at <https://newsinfo.inquirer.net/1103804/malacanang-icc-bent-on-interfering-with-philippines-sovereignty> (last accessed Nov. 30, 2020).

13. *Duterte attacks rights officials Callamard and Bensouda*, ALJAZEERA, Mar. 9, 2018, available at <https://www.aljazeera.com/news/2018/03/09/duterte-attacks-rights-officials-callamard-and-bensouda> (last accessed Nov. 30, 2020).

14. *Philippines officially out of the International Criminal Court*, ALJAZEERA, Mar. 17, 2019, available at <https://www.aljazeera.com/news/2019/03/17/philippines-officially-out-of-the-international-criminal-court> (last accessed Nov. 30, 2020).

15. *See UN rights experts renew call for 'independent, impartial' probe on PH rights situation*, ABS-CBN NEWS, June 26, 2020, available at <https://news.abs-cbn.com/spotlight/06/26/20/un-rights-experts-renew-call-for-independent-impartial-probe-on-ph-rights-situation> (last accessed Nov. 30, 2020).

16. Buan, *Duterte drug war*, *supra* note 11.

17. *See* Lian Buan, *To avoid ICC, Duterte admin forms panel to probe deaths in police operations*, RAPPLER, June 30, 2020, available at <https://www.rappler.com/nation/duterte-administration-creates-panel-probe-deaths-police-operations> (last accessed Nov. 30, 2020) [hereinafter Buan, *ICC*].

18. Virgil Lopez, *Aguirre blasts CHR chair for comparing number of drug killings to Martial Law deaths*, GMA NEWS, Dec. 6, 2016, available at <https://www.gmanetwork.com/news/news/nation/591457/aguirre-blasts-chr->

independent probe,¹⁹ announced that it is conducting investigations anew on drug-related EJKs²⁰ — a move that is viewed by critics as an attempt to avoid accountability from potential adverse findings by the ICC.²¹ Notably, the DOJ stated that this time around, it is coordinating with the Commission of Human Rights (CHR),²² an agency that the President previously threatened to abolish after it expressed opposition to drug-related EJKs.²³

This confluence of events makes it necessary to re-examine the elusive exercise of determining accountability for drug-related EJKs. This Article seeks to identify the factors that hinder the quest for genuine accountability for these crimes. By examining the existing legal framework on EJKs, analyzing the unique characteristics of drug-related EJKs, observing the interactions among investigative and prosecutorial government agencies, and studying the enforcement mechanisms of international human rights bodies, this Article will reveal that in order to obtain genuine accountability for drug-related EJKs, the following are necessary: a clear definition of EJKs, proper standards for investigating drug-related EJKs, a harmonious relationship among government agencies in-charge of investigating and prosecuting drug-related EJKs, and proper coordination between the national government and international bodies in the investigation of drug-related EJKs.

chair-for-comparing-number-of-drug-killings-to-martial-law-deaths/story (last accessed Nov. 30, 2020).

19. Lian Buan, *Independent body to probe EJKs? Not now, says Aguirre*, RAPPLER, Aug. 24, 2017, available at <https://www.rappler.com/nation/aguirre-independent-commission-ejk-data> (last accessed Nov. 30, 2020) [hereinafter Buan, *Independent body*].
20. Buan, *ICC*, *supra* note 17.
21. See Hannah Torregoza, *De Lima on EJK review: 'too little, too late'*, MANILA BULL., July 9, 2020, available at <https://mb.com.ph/2020/07/09/de-lima-on-ejk-review-too-little-too-late> (last accessed Nov. 30, 2020).
22. Department of Justice, Statement on the Enhanced Interactive Dialogue on Human Rights in the Philippines at the On-Going 44th Session of the United Nations Human Rights Council in Geneva, Switzerland, available at https://www.doj.gov.ph/news_article.html?newsid=661 (last accessed Nov. 30, 2020).
23. Nestor Corrales, *Duterte threatens to abolish CHR*, PHIL. DAILY INQ., July 25, 2017, available at <https://newsinfo.inquirer.net/917250/duterte-threatens-to-abolish-chr#ixzz5v4Cob8xR> (last accessed Nov. 30, 2020).

II. DEFINITION

The first step that must be taken in an effort to exact accountability for drug-related EJKs in the Philippines is to settle on a definition for EJKs. There is no consistent definition for EJKs both in international and in Philippine laws and this deficiency has made it difficult to pinpoint liability for the killings.

A. EJKs in International Law

The definition of EJKs has long been the subject of litigation,²⁴ as no treaty is able to specifically define EJKs.²⁵ However, the right to life finds protection under international human rights law.²⁶ In fact, it has been argued that the prohibition against summary killings is slowly forming part of *jus cogens*.²⁷ To begin with, the Universal Declaration of Human Rights (UDHR), which dates back to 1948, states that “[e]veryone has the right to life, liberty[,] and

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24. William J. Aceves, *When Death Becomes Murder: A Primer on Extrajudicial Killing*, 50 COLUM. HUM. RTS. L. REV. 116, 119 (2018) (citing *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (U.S.); *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (U.S.); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401 (S.D.N.Y. 2002) (U.S.); & *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. 1996) (U.S.)).
25. Aceves, *supra* note 24, at 120 (citing *Kiobel v. Royal Dutch Petroleum Co.* 456 F. Supp. 2d 457, 465 (S.D.N.Y. 2006) (U.S.)).
26. Universal Declaration on Human Rights, G.A. Res. 217 (III), art. 3, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].
27. Ateneo Human Rights Center, Summary & Extrajudicial Killings in the Philippines (A Submission to the United Nations Human Rights Council for the Universal Periodic Review of the Philippines (3d Cycle, 27th Session, 2017)) ¶ 4, available at <https://balayph.net/images/resources/Summary-of-EJK-in-the-Philippines.pdf> (last accessed Nov. 30, 2020) [hereinafter AHRC] (citing U.N. Dept. of Int’l Econ. & Soc. Aff., *Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, ¶¶ 2 & 5, U.N. Doc. A/CONF.87/14/Rev.1 (Aug. 25–Sept. 5, 1980); *Barrios Altos Case*, Inter-Am. Ct. H.R. (ser. C), No. 75, Judgment (Mar. 14, 2001); *Rochela Massacre Case*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C), No. 163, Judgment (May 11, 2007); *Almonacid Arellano, et al. Case*, Inter-Am. Ct. H.R. (ser. C), No. 154, Preliminary Objections, Merits, Reparations, and Costs, Judgment (Sept. 26, 2006); *The Massacres of El Mozote and nearby places Case*, Inter-Am. Ct. H.R. (ser. C), No. 252, Merits, Reparations, and Costs, Judgment (Oct. 25, 2012); Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2000*, ch. VI Recommendation on Asylum and International Crimes, OEA/Ser./L/V/II.111/Doc.20 rev. (Apr. 16, 2001)).

security of person.”²⁸ In addition to this, the International Covenant on Civil and Political Rights²⁹ (ICCPR) recognizes the inherent right to life of every human being and prohibits the arbitrary deprivation of life.³⁰ General Comment No. 36 on the ICCPR³¹ interprets this right even more broadly, emphasizing that State parties are expected to prevent the arbitrary deprivations of life that result from the acts of their own law enforcement officials.³² The UN Convention on the Rights of the Child (UNCRC)³³ similarly recognizes that “every child has the inherent right to life.”³⁴

Other instruments that protect the right to life include the Minnesota Protocol on the Investigation of Potentially Unlawful Deaths, which requires States to cooperate in international investigations on potentially unlawful deaths including extrajudicial executions,³⁵ and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions,³⁶ which compel governments to prohibit all extra-legal, arbitrary, and summary executions and to categorize such executions as offenses that are punishable by appropriate penalties.³⁷ Still, some instruments focus on the law enforcement officers of the State. For instance, the Code of Conduct for Law Enforcement Officials³⁸ limits the use of force by law enforcement officials to instances where strictly necessary and when required in the performance of

28. UDHR, *supra* note 26, art. 3.

29. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (Dec. 16, 1966) [hereinafter ICCPR].

30. *Id.* art. 6 (1).

31. U.N. Human Rights Committee, *General comment No. 36: Article 6: right to life*, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

32. *Id.* ¶ 13.

33. Convention on the Rights of the Child art. 6, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3.

34. *Id.* art. 6 (1).

35. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, THE MINNESOTA PROTOCOL ON THE INVESTIGATION OF POTENTIALLY UNLAWFUL DEATH ¶ 9 (2016).

36. U.N. Econ. & Soc. Council, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, G.A. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989).

37. *Id.* ¶ 1.

38. U.N. General Assembly, *Code of Conduct for Law Enforcement Officials*, G.A. Res. 34/169, U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

duties,³⁹ while the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials⁴⁰ orders law enforcement officials to promptly report any incident of injury or death resulting from the use of firearms.⁴¹

Notably, the UN has long established the need to protect against summary or arbitrary executions.⁴² In 1982, the Economic and Social Council, through a resolution, established the mandate of a Special Rapporteur on summary or arbitrary executions.⁴³ This mandate was gradually expanded to include extrajudicial killings,⁴⁴ and has been consistently renewed by the UNHRC.⁴⁵ Interestingly, the Philippine CHR, the country's National Human Rights Institution,⁴⁶ uses the description provided by former Special Rapporteur on extrajudicial executions, Philip G. Alston, in defining EJKs.⁴⁷ Alston referred to extrajudicial killing as a term that “encompasses any killing by Government forces as well as killings by any other groups or individuals which the Government fails to investigate, prosecute and punish when it is in a position to do so[.]”⁴⁸

39. *Id.* art. 3.

40. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, ch. I, at 110-16, U.N. Doc. A/CONF.144/28/Rev.1 (Aug. 27-Sept. 7, 1990). *See also* Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, G.A. Res. 45/121 (Dec. 14, 1990).

41. U.N. OHCHR, *supra* note 40, ¶ 6.

42. Summary or arbitrary executions, E.S.C. Res. 1982/35, ¶ 1, U.N. Doc. E/RES/1982/35 (May 7, 1982).

43. *Id.* ¶ 5.

44. Extrajudicial, summary or arbitrary executions, U.N. Commission on Human Rights Res. 1992/72, ¶ 8, U.N. Doc. E/CN.4/RES/1992/72 (Mar. 5, 1992).

45. Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions, H.R.C. Res. 35/15, ¶ 7 (a), U.N. Doc. A/HRC/RES/35/15 (July 11, 2017).

46. Commission on Human Rights, About the Commission, *available at* <http://chr.gov.ph/about-us> (last accessed Nov. 30, 2020).

47. Commission on Human Rights, Statement of the Commission on Human Rights on the SWS survey on people's perception of the extrajudicial killing situation in the country, *available at* <http://chr.gov.ph/statement-of-the-commission-on-human-rights-on-the-sws-survey-on-peoples-perception-of-the-extrajudicial-killing-situation-in-the-country> (last accessed Nov. 30, 2020).

48. *Id.*

International criminal laws arguably provide even greater protection for the right to life. War crimes and crimes against humanity allow for the attachment of liability for EJKs.⁴⁹ The Geneva Conventions and their Additional Protocols, which “regulate[] the conduct of armed conflict[,]”⁵⁰ prohibit murder and willful killing in the act of war.⁵¹ Similarly, the Rome Statute⁵² was enacted to put an end to the perpetration of the most serious crimes and to prohibit genocide, crimes against humanity such as murder, extermination, enforced disappearances, and war crimes such as willful killing.⁵³ Nevertheless, these laws still define killings too narrowly, making it difficult to attach liability for the commission of EJKs.⁵⁴ In the case of war crimes, a setting of armed conflict is necessary, while in crimes against humanity, a context showing widespread attacks on civilian populations is required.⁵⁵ Meanwhile, to commit genocide under the Rome Statute, prohibited acts must be performed with the “intent to destroy ... a national, ethnical, racial[,] or religious group.”⁵⁶ The insufficiency of these frameworks on ascribing liability makes it necessary to adopt a convention that is specific to EJKs.⁵⁷

49. See Erin Creegan, *Criminalizing Extrajudicial Killing*, 41 DENV. J. INT’L L. & POL’Y 185, 192 (2013).

50. International Committee of the Red Cross, *The Geneva Conventions of 1949 and their Additional Protocols*, available at <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> (last accessed Nov. 30, 2020).

51. Aceves, *supra* note 24, at 141 (citing Protocol additional to the Geneva Conventions of 12 Aug. 1949, and relating to the protection of victims of international armed conflicts (Protocol I) art. 75, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 & Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609)).

52. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

53. *Id.* arts. 6-8.

54. Creegan, *supra* note 49, at 192.

55. *Id.* at 194-96.

56. Rome Statute, *supra* note 52, art. 6.

57. Creegan, *supra* note 49, at 192.

B. EJKs in Domestic Law

The CHR's need to resort to a Special Rapporteur's definition of EJKs⁵⁸ only reflects the lack of a useful definition for EJK in Philippine laws. To respond to this problem, it has been recommended that the Philippines enact a law that clearly defines EJKs according to international standards.⁵⁹ This appears to be a sound solution considering that the country has affirmed its commitment to a number of international human rights instruments that seek to protect the right to life including the UDHR,⁶⁰ ICCPR,⁶¹ and the Geneva Conventions.⁶² Moreover, despite threats to withdraw from the UN⁶³ and from the UNHRC,⁶⁴ the Philippines retains its UN membership.⁶⁵ However, as discussed above, international standards do not provide sufficient clarity on the definition of EJKs. For this reason, it might be useful to look at domestic laws that cover EJKs.

The right to life is protected by no other than the highest law of the land, the Philippine Constitution,⁶⁶ which commands that no person shall be deprived of life without due process of law.⁶⁷ The records of the Constitutional Commission reveal that in fact, the drafters touched upon extrajudicial killings when it drafted some of the provisions in the Constitution.⁶⁸ For example, in discussing the Bill of Rights, the drafters

58. Commission on Human Rights, *supra* note 47.

59. AHRC, *supra* note 27, ¶ 37.

60. UDHR, *supra* note 26.

61. ICCPR, *supra* note 30.

62. *See* International Committee of the Red Cross, *supra* note 50.

63. Tony S. Bergonia, *If PH leaves UN, it will be 6th in list of nonmember states*, PHIL. DAILY INQ., July 15, 2019, available at <https://globalnation.inquirer.net/177970/if-ph-leaves-un-it-will-be-6th-in-list-of-nonmember-states#ixzz6Stx6Zldk> (last accessed Nov. 30, 2020).

64. Pia Lee-Brago, *Philippines eyes withdrawal from UN rights body*, PHIL. STAR, July 15, 2019, available at <https://www.philstar.com/headlines/2019/07/15/1934809/philippines-eyes-withdrawal-un-rights-body> (last accessed Nov. 30, 2020).

65. United Nations, Member States, available at <https://www.un.org/en/member-states/#gotoP> (last accessed Nov. 30, 2020).

66. PHIL. CONST. art. III, § 1.

67. PHIL. CONST. art. III, § 1.

68. 1 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 33, at 751 (1986).

recognized the prevalence of extrajudicial executions in the country.⁶⁹ Similarly, the drafters touched upon the predominance of “salvaging,” a euphemism for summary executions,⁷⁰ when they discussed the mandate of the CHR as the protector of human rights.⁷¹ It bears noting that the 1987 Philippine Constitution was written in the aftermath of a dictatorship,⁷² a period that witnessed more than a thousand summary and extrajudicial killings.⁷³

It is, therefore, ironic that despite a deeply rooted history with EJKs, Philippine laws do not provide a clear definition for EJKs.⁷⁴ Instead, what we have are definitions that are either incomplete in themselves or inconsistent with one another. For instance, a recently passed law, Republic Act No. 11188,⁷⁵ defines EJKs as “acts and omissions of State actors that constitute violations of the ... right to life [as] embodied in the [UDHR], [ICCPR], [UNCRC,] and similar other human rights treaties to which the Philippines is a State party[.]”⁷⁶ This definition provides a relatively broad definition, having included not just actions but also omissions of State actors within the coverage of EJKs. However, it is doubtful whether the law would find

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69. 1 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 32, at 698-99 (1986).
70. Felipe Villamor, *Ex-Officer in Philippines Says He Led Death Squad at Duterte's Behest*, N.Y. TIMES, Feb. 20, 2017, available at <https://www.nytimes.com/2017/02/20/world/asia/rodrigo-duterte-philippines-death-squad.html> (last accessed Nov. 30, 2020).
71. 4 RECORD OF THE CONSTITUTIONAL COMMISSION, NO. 68, at 5 (1986).
72. See Official Gazette, *The Fall of Dictatorship*, available at <https://www.officialgazette.gov.ph/featured/the-fall-of-the-dictatorship> (last accessed Nov. 30, 2020).
73. ABS-CBN Investigative & Research Group, *By the Numbers: Human rights violations during Marcos' rule*, ABS-CBN NEWS, Sept. 21, 2018, available at <https://news.abs-cbn.com/focus/09/21/18/by-the-numbers-human-rights-violations-during-marcos-rule> (last accessed Nov. 30, 2020).
74. Kristine Joy Patag, *Why defining 'extrajudicial killings' in law is a vital step toward accountability*, PHIL. STAR, July 18, 2019, available at <https://www.philstar.com/headlines/2019/07/18/1935776/why-defining-extrajudicial-killings-law-vital-step-toward-accountability> (last accessed Nov. 30, 2020).
75. An Act Providing for the Special Protection of Children in Situations of Armed Conflict and Providing Penalties for Violations Thereof [Special Protection of Children in Situations of Armed Conflict Act], Republic Act No. 11188 (2019).
76. *Id.* § 5 (1).

application beyond settings involving minors situated in armed conflicts.⁷⁷ Furthermore, as argued by former Supreme Court Spokesperson Theodore Te, the law does not criminalize EJKs as it fails to prescribe penalties for the acts or omissions covered under EJKs.⁷⁸

The Supreme Court effectively recognized EJKs as a growing problem when it promulgated the Rule on the Writ of Amparo,⁷⁹ a judicial remedy which requires persons accused of involvement in extralegal killings to, among others, report on the whereabouts or the status of an alleged victim and to issue a statement denying participation in such act.⁸⁰ The Rule on the Writ of Amparo does not give a definition for EJKs, but the Supreme Court cited characteristics of EJKs in at least two decisions.⁸¹ The first one could be found in *Secretary of National Defense vs. Manalo*,⁸² a case which tackled the validity of the issuance of a Writ of Amparo.⁸³ In its decision, the Court defined extralegal killings as “killings committed without due process of law [or killings] without legal safeguards or judicial proceedings.”⁸⁴ The second one could be found in *Razon, Jr. v. Tagitis*,⁸⁵ wherein the Court clarified that it deliberately withheld providing a clear textual definition for EJKs in the Rule on the Writ of Amparo,⁸⁶ so as not to affect ongoing legislative efforts tackling EJKs.⁸⁷ Nevertheless, the decision described EJKs along with enforced disappearances as acts which “by their nature and purpose, constitute State or

77. *Id.* § 3.

78. Theodore Te, *Finally, EJKs defined*, RAPPLER, Feb. 21, 2019, available at <https://www.rappler.com/voices/thought-leaders/analysis-deep-dive-finally-extrajudicial-killings-defined> (last accessed Nov. 30, 2020).

79. THE RULE ON THE WRIT OF AMPARO, A.M. No. 07-9-12-SC (Sept. 25, 2007).

80. *Id.* § 9.

81. AHRC, *supra* note 27, ¶ 9 (citing *Secretary of National Defense v. Manalo*, G.R. No. 180906, 568 SCRA 1, 38 (2008) & *Razon, Jr. v. Tagitis*, G.R. No. 182498, 606 SCRA 598, 666 (2009)).

82. AHRC, *supra* note 27, ¶ 9 (citing *Manalo*, 568 SCRA at 38) & *Secretary of National Defense v. Manalo*, G.R. No. 180906, 568 SCRA 1 (2008).

83. *Manalo*, 568 SCRA at 38.

84. *Id.* (citing Supreme Court of the Philippines, Annotation, *Rule on the Writ of Amparo*, at 48) & AHRC, *supra* note 27, ¶ 9 (citing *Manalo*, 568 SCRA at 38).

85. AHRC, *supra* note 27, ¶ 9 (citing *Razon, Jr.*, 606 SCRA at 666) & *Razon, Jr. v. Tagitis*, G.R. No. 182498, 606 SCRA 598 (2009).

86. *Razon*, 606 SCRA at 665-66 & AHRC, *supra* note 27, ¶ 9 (citing *Razon, Jr.*, 606 SCRA at 666).

87. *Razon*, 606 SCRA at 665-66.

private party violation of the constitutional rights of individuals to life, liberty[,] and security.”⁸⁸

Instead of invoking available laws or Supreme Court interpretations on EJKs, the current administration has opted to rely on the Operational Guidelines of Administrative Order No. 35 (A.O. No. 35)⁸⁹ for guidance in defining EJKs.⁹⁰ A.O. No. 35⁹¹ creates an inter-agency committee (IAC) that is composed of representatives from various government agencies,⁹² who would conduct technical working group meetings⁹³ on extra-legal killings, enforced disappearances, torture, and other grave violations of the right to life, liberty, and security of persons, which have been perpetrated by State and by non-state forces.⁹⁴ Correspondingly, the Operational Guidelines for A.O. No. 35 instruct the IAC on the creation of special teams that would aid in the investigation and prosecution of human rights violations.⁹⁵

The Operational Guidelines for A.O. No. 35 referred to EJKs or Extra-Legal Killings as killings wherein:

- (1) The victim was either:
 - (a) A member of, or affiliated with an organization, to include political, environmental, agrarian, labor, or similar causes; or

88. *Id.* at 666 & AHRC, *supra* note 27, ¶ 9 (citing *Razon, Jr.*, 606 SCRA at 666).

89. Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons, Operational Guidelines of Administrative Order No. 35 [Operational Guidelines of A.O. No. 35] (Apr. 18, 2013).

90. Margaret Claire Layug, *Palace defends PNP's basis for defining extrajudicial killings*, GMA NEWS, Oct. 7, 2017, available at <https://www.gmanetwork.com/news/news/nation/628658/palace-defends-pnp-s-basis-for-defining-extrajudicial-killings/story> (last accessed Nov. 30, 2020).

91. Office of the President, Creating the Inter-Agency Committee on Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons, Administrative Order No. 35, Series of 2012 [A.O. No. 35, s. 2012] (Nov. 22, 2012).

92. *Id.* § 1.

93. *Id.*

94. *Id.*

95. Department of Justice, Inter-Agency Committee on Extra-Legal Killings and Enforced Disappearance Meet to Adopt Guidelines for Investigation and Prosecution, available at https://www.doj.gov.ph/news_article.html?newsid=178 (last accessed Nov. 30, 2020).

- (b) An advocate of above-named causes; or
 - (c) A media practitioner; or
 - (d) Person(s) apparently mistaken or identified to be so.
- (2) The victim was targeted and killed because of his/her actual or perceived membership, advocacy, or profession;
 - (3) The person/s responsible for the killing is a state agent or non-state agent;
 - (4) The method and circumstances of the attack reveal a deliberate intent to kill.

Killings related to common criminals and/or the perpetration of their crimes shall be addressed by other appropriate mechanisms within the justice system.⁹⁶

The problem is that the definition provided in these guidelines serves a specific and limited purpose, and that is to guide the IAC in the performance of its duties.⁹⁷ Moreover, it has been argued that the EJKs envisioned by A.O. No. 35 are politically motivated killings that were rampant at the time of its issuance.⁹⁸ To illustrate, a survey dated 2010 showed that most EJK victims consisted of activists, government officials, and journalists.⁹⁹ Critics argue that A.O. No. 35 was not meant to serve as the basis for a comprehensive definition of EJKs, as it was only enacted to facilitate the investigation of politically motivated killings.¹⁰⁰

96. Operational Guidelines of A.O. No. 35, art. 1 (1).

97. See Department of Justice, *supra* note 95.

98. Mikas Matsuzawa, *Cayetano uses restrictive EJK definition, experts say*, PHIL. STAR, May 10, 2017, available at <https://www.philstar.com/headlines/2017/05/10/1698581/cayetano-uses-restrictive-ejk-definition-experts-say> (last accessed Nov. 30, 2020).

99. AL A. PARREÑO, REPORT ON THE PHILIPPINE EXTRAJUDICIAL KILLINGS 2001-2010 5 (2011).

100. Margaret Claire Layug, *CHR: Saddened but not surprised by PNP report on EJKs*, GMA NEWS, Oct. 6, 2017, available at <https://www.gmanetwork.com/news/news/nation/628604/chr-saddened-but-not-surprised-by-pnp-report-on-ejks/story> (last accessed Nov. 30, 2020).

Notably, by making use of the A.O. No. 35 definition, a Philippine National Police (PNP) Spokesperson was able to declare, more than a year into the Duterte presidency, that there was no case of EJK in the country.¹⁰¹ Similarly, former Department of Foreign Affairs Secretary Alan Peter Cayetano used the same definition when he told the UN that media practitioners wrongly categorized certain killings as part of EJKs.¹⁰² It appears therefore that by utilizing a narrow definition of EJKs, the national government was able to avoid counting drug-related killings as EJKs.

III. STANDARDS

Aside from the lack of definition on EJKs, no concrete standards are being followed in the investigation of such killings. This deficiency effectively allows the government to discount killings that do not fit its categorization of drug-related EJKs.

A. Drug-related EJKs

While the Philippine government's "war on drugs" seems to have reignited interest on drug-related EJKs, such a government policy is not novel. Similar "wars" have been launched in other countries, particularly in South America.¹⁰³ For instance, former President Felipe de Jesús Calderón once declared an offensive against drug traffickers and dispatched nearly 7,000 federal forces in his hometown in Mexico.¹⁰⁴ Similarly, the Colombian government has been accused of organizing death squads and "self-defense" units in its effort to combat illegal drugs in the country.¹⁰⁵

Even as a Presidential candidate, Rodrigo Duterte was already vocal about his plan to eradicate drugs by means of violence, declaring in 2016 that he will kill suspected drug dealers and other criminals if elected.¹⁰⁶ This advocacy was

101. Amita Legaspi, 'Zero' EJK case under Duterte admin —PNP, GMA NEWS, Oct. 6, 2017, available at <https://www.gmanetwork.com/news/news/nation/628536/only-one-case-of-ejk-under-duterte-admin-pnp/story> (last accessed Nov. 30, 2020).

102. Matzusawa, *supra* at note 98.

103. Michael Shifter, *Latin America's Drug Problem*, 106 CURRENT HIST. 58, 58 (2007).

104. *Id.* at 61.

105. Peter Imbusch, et al., *Violence Research in Latin America and the Caribbean: A Literature Review*, 5 INT'L J. CONFLICT & VIOLENCE 87, 94 (2011).

106. Rodrigo Duterte officially wins Philippines presidency, ALJAZEERA, May 27, 2016, available at <https://www.aljazeera.com/news/2016/5/27/rodrigo-duterte-officially-wins-philippines-presidency> (last accessed Nov. 30, 2020) & *Philippines'*

later put into action by the Philippine National Police (PNP) through Oplan Double Barrel.¹⁰⁷ This consists of the following operations: Project HVT, a massive operation that targets top drug personalities and syndicates, and Oplan Tokhang, a more practical operation that targets illegal drugs in the country's barangays.¹⁰⁸ The latter operation — whose name is said to originate from the Visayan words, “*toktok*” which means “to knock,” and “*hangyo*” which means “to make an appeal”¹⁰⁹ — gained notoriety as it involved police officers visiting houses in search of alleged drug suspects included in their “kill lists.”¹¹⁰ While some of the subjects of these visits were able to clear their names with authorities,¹¹¹ others ended up dead,¹¹² with some police officers reportedly preferring to kill than to make arrests in order to obtain financial rewards which go as high as ₱15,000.¹¹³ These operations may have led to the killing of Kian D. delos Santos, a teenage student who, before being shot to death,

Rodrigo Duterte recommends death penalty, ALJAZEERA, May 16, 2016, available at <https://www.aljazeera.com/news/2016/05/16/philippines-rodrigo-duterte-recommends-death-penalty> (last accessed Nov. 30, 2020).

107. See Municipal Government of Calamba, PNP Oplan – Double Barrel Project Tokhang available at <https://www.aljazeera.com/news/2016/05/rodrigo-duterte-philippines-presidency-160527125454511.html> (last accessed Nov. 30, 2020).
108. Jodesz Gavilan, *What do gov't circulars 'operationalizing' Duterte's war on drugs say?*, RAPPLER, Nov. 21, 2017, available at <https://www.rappler.com/newsbreak/iq/philippine-government-circulars-duterte-drug-war> (last accessed Nov. 30, 2020). Oplan Tokhang and Project Tokhang are synonymous. See *id.*
109. Alexis Romero, *Duterte promotes Oplan Tokhang brains*, PHIL. STAR, Nov. 14, 2018, available at <https://www.philstar.com/nation/2018/11/14/1868349/duterte-promotes-oplan-tokhang-brains> (last accessed Nov. 30, 2020).
110. Amnesty International UK, *More than 7,000 killed in the Philippines in six months, as president encourages murder*, available at <https://www.amnesty.org.uk/philippines-president-duterte-war-on-drugs-thousands-killed> (last accessed Nov. 30, 2020).
111. *But see* Amnesty International, ‘They Just Kill’: Ongoing Extrajudicial Executions and Other Violations in the Philippines’ ‘War On Drugs’, at 29, available at <https://www.justice.gov/eoir/page/file/1180791/download> (last accessed Nov. 30, 2020).
112. Ed Margareth Barahan, *First 6 months of 'Tokhang': 1M surrenderers, more than 2,000 dead*, PHIL. DAILY INQ., Jan. 18, 2017, available at <https://newsinfo.inquirer.net/863259/first-6-months-of-tokhang-1m-surrenderers-more-than-2000-dead#ixzz6T1yhDYln> (last accessed Nov. 30, 2020).
113. Amnesty International UK, *supra* note 110.

begged his killers to release him so that he could prepare for an exam.¹¹⁴ The killing sparked national outrage and in the midst of protests, Oplan Tokhang was put to an end.¹¹⁵ Drug operations were temporarily transferred from the PNP to the Philippine Drug Enforcement Agency (PDEA),¹¹⁶ before the PNP launched a supposedly less violent operation named Operation Tokhang Reloaded.¹¹⁷

Drug-related EJKs in the Philippines have shown distinct characteristics over the years. For instance, a report states that the war on drugs has had overwhelming effects on the country's urban poor.¹¹⁸ A separate study confirms that most of the victims of drug-related EJKs are poor,¹¹⁹ as victims with identified occupations were found to be engaged mostly in low-paying, low-skilled occupations.¹²⁰ Aside from this, the supposed drug lists have been criticized as being unverified,¹²¹ thereby contributing to the loss of many innocent lives.¹²² Lastly, EJK incidents seem to have evoked fear among Filipinos, with 78% of survey respondents reportedly expressing worry that

114. Edu Punay, 'Kian begged for his life before cops shot him', PHIL. STAR, Oct. 3, 2017, available at <https://www.philstar.com/headlines/2017/10/03/1745309/kian-begged-his-life-cops-shot-him> (last accessed Nov. 30, 2020).

115. Bea Cupin, *Dela Rosa orders PNP: Stop war on drugs*, RAPPLER, Jan. 30, 2017, available at <https://www.rappler.com/nation/pnp-dela-rosa-stop-drug-operations-focus-cleansing> (last accessed Nov. 30, 2020).

116. Nestor Corrales, *Duterte orders PDEA to solely undertake all anti-drugs ops*, PHIL. DAILY INQ., Oct. 11, 2017, available at <https://newsinfo.inquirer.net/937145/duterte-orders-pdea-to-solely-undertake-all-anti-drugs-ops-duterte-pdea-pnp#ixzz6TCjBbsyi> (last accessed Nov. 30, 2020).

117. *Tokhang Reloaded: PNP's new guidelines*, ABS-CBN NEWS, Jan. 29, 2018, available at <https://news.abs-cbn.com/focus/01/29/18/tokhang-reloaded-pnps-new-guidelines> (last accessed Nov. 30, 2020).

118. Matt Wells, Philippines: Duterte's 'war on drugs' is a war on the poor, available at <https://www.amnesty.org/en/latest/news/2017/02/war-on-drugs-war-on-poor> (last accessed Nov. 30, 2020).

119. Clarissa C. David, et al., Building a dataset of publicly available information on killings associated with the antidrug campaign, available at <https://drugarchive.ph/post/14-antidrug-dataset-public-info-killings> (last accessed Nov. 30, 2020).

120. *Id.*

121. Amnesty International UK, *supra* note 110.

122. Patrick Symmes, *President Duterte's List*, N.Y. TIMES, Jan. 10, 2017, available at <https://www.nytimes.com/2017/01/10/magazine/president-dutertes-list.html> (last accessed Nov. 30, 2020).

they, or anyone they knew, would become victims of extrajudicial killings,¹²³ and an overwhelming 95% saying that it is important for illegal drug trade suspects to be captured alive.¹²⁴

B. EJK by the Numbers

Aside from the lack of consensus on which definition to use for EJKs, the lack of standards to be followed in the investigation of drug-related EJK also makes the task of assigning liability for these killings difficult. There exists much debate on the true number of victims in the war against drugs.¹²⁵ In December 2018, Jose Luis Martin C. Gascon, the Chairman of the CHR, estimated the number of EJKs from the drug war to be at around 27,000.¹²⁶ Meanwhile, the PNP came out with much lower figures.¹²⁷ However, as a news agency pointed out, even the national government has been inconsistent with its numbers.¹²⁸ PDEA stated that from 1 July 2016, the day President Duterte took office, until 31 December 2019, only a total of 5,563 drug personalities have been killed in anti-drug operations.¹²⁹ The PNP, however, released a similar statement which said that by 31 May 2019, the number already reached

123. Social Weather Stations, Fourth Quarter 2018 Social Weather Survey: 78% of Pinoys worry about becoming victims of “extrajudicial killings” or EJK, *available at* <https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20190301201652> (last accessed Nov. 30, 2020).

124. Social Weather Stations, Fourth Quarter Social Weather Survey: 66% of Filipinos say the number of illegal drug users in their area has decreased, *available at* <https://www.sws.org.ph/swsmain/artcldisppage/?artcsyscode=ART-20190216095842> (last accessed Nov. 30, 2020).

125. Howard Johnson & Christopher Giles, *Philippines drug war: Do we know how many have died?*, BBC NEWS, Nov. 12, 2019, *available at* <https://www.bbc.com/news/world-asia-50236481> (last accessed Nov. 30, 2020).

126. Davinci Maru, *CHR chief: Drug war deaths could be as high as 27,000*, ABS-CBN NEWS, Dec. 5, 2018, *available at* <https://news.abs-cbn.com/focus/12/05/18/chr-chief-drug-war-deaths-could-be-as-high-as-27000> (last accessed Nov. 30, 2020).

127. *Id.*

128. *In Numbers: The Philippines’ ‘war on drugs’*, RAPPLER, Sept. 13, 2016, *available at* <https://www.rappler.com/newsbreak/iq/numbers-statistics-philippines-war-drugs> (last accessed Nov. 30, 2020).

129. Philippine Drug Enforcement Agency, #RealNumbersPH Year 3 at *1, *available at* http://www.pnp.gov.ph/images/News/2020/RealNumbers/rn_feb27.pdf (last accessed Nov. 30, 2020).

6,600,¹³⁰ adding that this figure still had to be cross-matched with the figures to be released by the PDEA and other agencies.¹³¹ Meanwhile, a UN report that came out in June 2020 said that the most conservative number of drug-related deaths to date stands at 8,663.¹³²

Interestingly, the PNP released a figure for a different category of cases, which resembles the earlier estimate of Chairman Gascon.¹³³ The PNP said that from 1 July 2016 until 4 February 2019, a total of 29,000 deaths were categorized as Deaths Under Inquiry (DUI).¹³⁴ A news outlet reveals that this category, which was only used recently when the Duterte administration assumed office, has also been referred to as Deaths under Investigation and later on as Homicide Cases Under Investigation.¹³⁵ The PNP and its officers have given various explanations for these categorizations, including the explanation that they refer to deaths occurring outside of police operations.¹³⁶

On this point, it would be helpful to point out that not all of the alleged drug-related killings were found to be executed by men in uniform.¹³⁷ An Amnesty International report describes how police officers contract gun-for-hire suspects to kill alleged drug pushers.¹³⁸ Human Rights Watch likewise notes that some victims of vigilante operations were seen in police custody just moments before they were killed by unidentified assailants.¹³⁹ Going back,

130. Cathrine Gonzales, *6,600 killed in war vs drugs from July 2016 to May 2019* — PNP, PHIL. DAILY INQ., June 18, 2019, available at <https://newsinfo.inquirer.net/1131433/6600-killed-in-war-vs-drugs-from-july-2016-to-may-2019-pnp> (last accessed Nov. 30, 2020).

131. *Id.*

132. U.N. Human Rights Council, *supra* note 1, ¶ 22.

133. Maru, *supra* note 126.

134. Emmanuel Tupas, *29,000 deaths probed since drug war launched*, PHIL. STAR, Mar. 6, 2019, available at <https://www.philstar.com/nation/2019/03/06/1898959/29000-deaths-probed-drug-war-launched> (last accessed Nov. 30, 2020).

135. In Numbers: The Philippines' 'war on drugs', *supra* note 128.

136. *Id.*

137. Amnesty International, "If you are Poor, You are Killed": Extrajudicial Executions in the Philippines' "war on drugs", at 39, available at <https://www.amnesty.org/download/Documents/ASA3555172017ENGLISH.PDF> (last accessed Nov. 30, 2020).

138. *Id.*

139. Human Rights Watch, "License to Kill": Philippine Police Killings in Duterte's "War on Drugs", available at <https://www.hrw.org/report/2017/03/02/license-kill/philippine-police-killings-dutertes-war-drugs> (last accessed Nov. 30, 2020).

by using the PNP's categorizations, vigilante operations could fall under DUI considering that the suspects in these cases remain unidentified. However, as critics point out, there does not appear to be much difference between cases categorized under DUI or killings by unknown gunmen and vigilantes, and killings of suspects who are allegedly resisting arrest in legitimate operations.¹⁴⁰ If these vigilante killings are to be traced back to State agents who supposedly ordered their execution, logic would dictate that the cases should still be counted as drug-related EJKs. It is worth mentioning that an official of the CHR reveals a different standard in determining whether an EJK is drug-related.¹⁴¹ According to him, even when the assailants of an EJK victim remain unidentified, the case may still be considered drug-related if it shows patterns that reveal possible connections between the death and the war on drugs.¹⁴² In addition to this, all possible motives surrounding the killing are explored, both personal and political.¹⁴³

If it is proven that these vigilante operations took place under the order of authorities, the question of whether the killers were wearing badges or civilian clothes at the time of the commission crime should be irrelevant. Domestic and international laws demand accountability for violations of the right to life by the State and its agents.¹⁴⁴

Moreover, the State remains accountable for omissions from the duty to protect the right to life.¹⁴⁵ This necessarily includes the failure to investigate EJKs.

140. *Id.*

141. Cherry Ann T. Lim, *CHR 7 probes 100 alleged extra-judicial killings*, SUNSTAR, Mar. 24, 2018, available at <https://www.sunstar.com.ph/article/425396/Business/CHR-7-probes-100-alleged-extra-judicial-killings> (last accessed Nov. 30, 2020).

142. *Id.*

143. *Id.*

144. See *Razon*, 606 SCRA at 668.

145. *Id.* at 709.

C. Clear Definition and Standards

Providing a consistent definition for EJKs and setting clear standards for the categorization of drug-related EJKs are the first steps toward determining accountability for these crimes. They will help provide a truthful account on drug-related EJKs, giving the world a more accurate representation of the human rights situation in the country. A bill¹⁴⁶ introduced by Senator Leila M. de Lima seeks to remedy these deficiencies.¹⁴⁷ The bill defines EJKs as “the unlawful, and deliberate killing of targeted individuals or groups thereof, carried out by agents of the State and under its order or acquiescence in lieu of arrest, investigation[,] and prosecution.”¹⁴⁸ Moreover, it includes within the scope of EJKs, “summary killing perpetrated by private individuals for purposes of carrying out on their own or in the context of vigilantism, a campaign or policy of the State.”¹⁴⁹ The bill also penalizes “public officer[s], person[s] in authority, agent[s] of a person in authority, or private individuals [who are] found guilty” of having committed EJKs, as well as “[p]ublic officials who fail to prevent, investigate, or file necessary actions in court against those suspected of having committed EJKs”¹⁵⁰ Lastly, the bill makes both state actors and non-state actors liable for the commission of EJKs.¹⁵¹ It defines non-state actors as “those who are not formally part of any [government agency] but [who] commit EJK[s] at the behest or acquiescence of state actors.”¹⁵²

Senate Bill No. 371 could serve as a useful guide for the recently created inter-agency panel of the DOJ.¹⁵³ With the vagueness of laws on drug-related EJKs, the panel’s first task should be to settle on a definition and to provide concrete standards that will be used in its investigations. Interestingly, towards the end of 2019, the DOJ announced that the IAC was reviewing the scope of extra-legal killings that are covered by the monitoring and prosecutorial

146. An Act Defining Extrajudicial Killing, Providing for Its Penalty and Other Purposes, S.B. No. 371, 18th Cong., 1st Reg. Sess. (2019).

147. Senate of the Philippines, De Lima refiles EJK bill, seeks accountability for abuses, available at http://legacy.senate.gov.ph/press_release/2019/0716_delima1.asp (last accessed Nov. 30, 2020).

148. S.B. No. 371, § 4 (b).

149. *Id.*

150. *Id.* § 12.

151. *Id.* § 9.

152. *Id.* § 4 (f).

153. Buan, *ICC*, *supra* note 17.

mechanisms in A.O. No. 35.¹⁵⁴ More importantly, the DOJ recently stated that its newly created review panel on drug-related EJKs is separate from other institutions that are already addressing human rights violations, such as the IAC of A.O. No. 35.¹⁵⁵ This creation of an entirely new agency could be an implicit admission on the part of the DOJ that indeed, the EJK definition in A.O. No. 35 is too narrow.

IV. INVESTIGATION AND PROSECUTION

In a press statement announcing its creation of a panel on drug-related EJKs, the DOJ bannered the planned involvement of the CHR, which it recognized as among the most independent human rights institutions in the world.¹⁵⁶ Indeed, the participation of the CHR in such a panel would be noteworthy. The CHR could provide additional checks and balances in the quest to find genuine accountability for drug-related EJKs. If the CHR would be given the opportunity to work harmoniously with other agencies such as the PNP, DOJ, and Office of the Ombudsman in the investigation of drug-related EJKs, justice could be attained sooner.

A. Commission on Human Rights

The Philippine CHR is the government agency that is charged with the protection and promotion of human rights.¹⁵⁷ The Constitution created the CHR as an independent office,¹⁵⁸ giving it attributes such as the automatic and regular release of annual appropriations,¹⁵⁹ in order to make it less vulnerable to the whims of the Executive branch.¹⁶⁰ The CHR appears to have used these attributes well, as it has remained vocal against drug-related EJKs,¹⁶¹ despite earning the ire of the President, and notwithstanding failed

154. Department of Justice, IAC Discusses Status of AO 35 Implementation, Adopts Revised Operational Guidelines and New Logo, *available at* https://www.doj.gov.ph/news_article.html?newsid=643 (last accessed Nov. 30, 2020).

155. Department of Justice, *supra* note 22.

156. *Id.*

157. Commission on Human Rights, *supra* note 46.

158. PHIL. CONST. art. XIII, § 17 (1).

159. PHIL. CONST. art. XIII, § 17 (4).

160. 4 RECORD, PHIL. CONST., NO. 68, at 28.

161. Cathrine Gonzales, *CHR receives '55 EJK' complaints during quarantine period*, PHIL. DAILY INQ., July 2, 2020, *available at* <https://newsinfo.inquirer.net/1300718/chr->

attempts by the administration's allies to defund it.¹⁶² However, while the CHR's decision to stand by its mandate is admirable, the numbers show that it has been slow to investigate drug-related EJKs.¹⁶³ To illustrate this, posted below are the number of alleged drug-related EJK incidents taken cognizance by the CHR during two separate periods.

Table 1.a.

Alleged Drug-Related EJK incidents Taken Cognizance by the CHR
from 10 May 2016 to 28 February 2018

Cases	Victims	Alleged Mode of Killing	
		Police Operation	Vigilante Killing
1,106 ¹⁶⁴	1,345 ¹⁶⁵	594 ¹⁶⁶	512 ¹⁶⁷

records-55-complaints-on-ejk-during-community-quarantine#ixzz6TZJZoKQA (last accessed Nov. 30, 2020).

162. Jodesz Gavilan, *Want bigger CHR budget? Alvarez says Gascon should resign*, RAPPLER, Sept. 12, 2017, available at <https://www.rappler.com/newsbreak/inside-track/chr-bigger-2018-budget-chito-gascon-resign-pantaleon-alvarez> (last accessed Nov. 30, 2020).

163. Dona Z. Pazzibugan, *Choosing its battles, CHR is silently probing extra-judicial killings*, PHIL. DAILY INQ., Dec. 9, 2016, available at <https://newsinfo.inquirer.net/852061/choosing-its-battles-chr-is-silently-probing-extra-judicial-killings#ixzz6TaMJSkD2> (last accessed Nov. 30, 2020).

164. THE ASIAN NGO NETWORK ON NATIONAL HUMAN RIGHTS INSTITUTIONS, 2018 ANNI REPORT 83 (2018) [hereinafter 2018 ANNI REPORT].

165. *Id.*

166. *Id.*

167. *Id.*

Table 1.b.
 “Alleged Drug-Related EJK incidents Taken Cognizance by the CHR
 from 10 May 2016 to July 2019”¹⁶⁸

Cases	Victims	Police Operation	Vigilante Killing
1,961 ¹⁶⁹	2,298 ¹⁷⁰	1,197 ¹⁷¹	761 ¹⁷²

“[Note]: Ninety percent (90%) of the cited cases were investigated *motu proprio* or through the CHR’s initiative.”¹⁷³

According to the tables, from 10 May 2016 to July 2019, the CHR investigated a total of 2,298 alleged drug-related EJKs.¹⁷⁴ However, a figure released by the government that covers almost the same period provides the much higher number of 6,600,¹⁷⁵ indicating that more than half of the cases recorded by the PNP may have escaped investigation by the CHR. More importantly, a comparison between the two tables reveals that from 29 February 2018 until 3 July 2019, a period that spanned more than a year, the CHR only managed to investigate only the cases of 953 more victims.¹⁷⁶

Aside from the lack of investigations, it also appears that the CHR works at a slow pace in concluding its investigations.¹⁷⁷ In an interview given by Chairman Gascon on 9 December 2016, he revealed that the CHR was able to complete only seven out of 420 investigations into drug-related deaths since

168. Commission on Human Rights, Summary: Alleged Drug-Related EJK Incidents Taken Cognizance by the CHR from May 10, 2016 to July 2019 (2019) (on file with Author) [hereinafter CHR, Summary].

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* See also 2018 ANNI REPORT, *supra* note 164, at 83 (citing Interview with Jacqueline Ann C. De Guia, Spokesperson of CHRP & Executive Director).

174. CHR, Summary, *supra* note 168.

175. Gonzales, *supra* note 130.

176. CHR, Summary, *supra* note 168 & 2018 ANNI REPORT, *supra* note 164, at 83.

177. See Pazzibugan, *supra* note 163.

President Duterte assumed office.¹⁷⁸ This means that in around five months, only seven investigations were concluded. Data taken from another investigative site appears to corroborate this number.¹⁷⁹

The CHR's problem on investigations could be due to many factors. Firstly, although the Constitution gave the CHR the power to investigate violations of civil and political rights,¹⁸⁰ this power appears insufficient in the midst of an uncooperative administration.¹⁸¹ The CHR operates with a limited staff and with limited resources, rendering it unable to attend to all cases of drug-related EJKs.¹⁸² Furthermore, while the CHR was given the mandate to provide immunity to witnesses,¹⁸³ its witness protection program has been criticized as inadequate, making it difficult for the agency to obtain the cooperation of vulnerable witnesses.¹⁸⁴ This is particularly problematic considering that, as previously discussed, most of the victims of drug-related EJKs come from the poor sectors of society¹⁸⁵ and many Filipinos are afraid

178. Pazzibugan, *supra* note 163.

179. See VERA Files, VERA Files Fact Check: Is Aguirre correct in saying CHR should file cases against erring policemen?, *available at* <https://verafiles.org/articles/vera-files-fact-check-aguirre-correct-saying-chr-should-file> (last accessed Nov. 30, 2020).

180. Office of the President, Declaring the Effectivity of the Creation of the Commission on Human Rights as Provided for in the 1987 Constitution, Providing Guidelines for the Operation Thereof, and for Other Purposes, Executive Order No. 163, Series of 1987 [E.O. No. 163, s. 1987], § 3 (1) (May 5, 1987).

181. See Mario C. Cerilles, Jr., *Philippine Human Rights in the Time of Pandemic: Analyzing the Challenges to the Effectiveness of the Commission on Human Rights as an NHRI in the midst of COVID-19*, PHIL. L.J., Volume No. 93, Special Online Feature, at 66-67 (citing Cathrine Gonzales, *PNP: We're not obligated to share drug operations data with CHR*, PHIL. DAILY INQ., Jan. 21, 2019, *available at* <https://newsinfo.inquirer.net/1075480/pnp-were-not-obligated-to-share-drug-operations-data-with-chr#ixzz5vvh61EwI> (last accessed Nov. 30, 2020) & Alexis Romero, *Duterte: Troops, cops need clearance to appear before CHR*, PHIL. STAR, July 25, 2017, *available at* <https://www.philstar.com/headlines/2017/07/25/1721376/duterte-troops-cops-need-clearance-appear-chr> (last accessed Nov. 30, 2020)).

182. Pazzibugan, *supra* note 163.

183. E.O. No. 163, s. 1987, § 3 (8).

184. United States Department of State, Country Reports on Human Rights Practices for 2018, at 11, *available at* <https://www.justice.gov/eoir/page/file/1145101/download> (last accessed Nov. 30, 2020).

185. David, et al., *supra* note 119.

that they themselves could become the target of EJKs.¹⁸⁶ Lastly, the CHR does not have the power to prosecute cases.¹⁸⁷ What it can do is to build-up cases and recommend the filing of charges with the proper agencies.¹⁸⁸ Ultimately therefore, the CHR relies on other government agencies in performing its mandate.¹⁸⁹

B. Philippine National Police

The PNP, an institution under the supervision of the Department of Interior and Local Government,¹⁹⁰ is the law enforcement agency that is tasked to investigate crimes and to assist in the prosecution of criminal offenders.¹⁹¹ As such, it plays a crucial role in determining accountability for drug-related EJKs. However, the alleged participation of PNP officers in EJKs also provokes suspicions as to the impartiality of their investigations. Aside from being suspected of coordinating vigilante operations,¹⁹² police officers have also been accused of planting evidence in order to perpetrate a self-defense narrative for drug-related EJKs.¹⁹³ A UN Report states that examinations by the Office of the United Nations High Commissioner for Human Rights (OHCHR) revealed that drug-related EJK victims who were listed as having been neutralized in the act of self-defense by police officers, were later on found to have used similar handguns bearing the same serial numbers, despite the fact that the police operations which led to their deaths took place in different locations.¹⁹⁴ Recent findings of the inter-agency panel appear to corroborate these findings. In a meeting with the UNHRC, incumbent DOJ Secretary Menardo Guevarra announced that in more than half of the records that they

186. Social Weather Stations, *supra* note 123.

187. Cariño v. Commission on Human Rights, G.R. No. 96681, 204 SCRA 483, 492 (1991).

188. See E.O. No. 163, s. 1987, § 3 (9).

189. *Id.*

190. An Act Establishing the Philippine National Police Under A Reorganized Department of the Interior and Local Government, and for Other Purposes [Department of the Interior and Local Government Act of 1990], Republic Act No. 6975, § 10 (b) (1990). See also National Police Commission, About Us, available at <http://napolcom.gov.ph/index.php/about-us> (last accessed Nov. 30, 2020).

191. Department of the Interior and Local Government Act of 1990, § 24 (c).

192. Amnesty International UK, *supra* note 110.

193. U.N. Human Rights Council, *supra* note 1, ¶ 24.

194. *Id.*

have reviewed thus far, the police “failed to follow standard protocols” such as the “full examination of the recovered weapon[,] ... verification of the [weapon’s] ownership[, and the] request for ballistic examination or paraffin test.”¹⁹⁵

If the allegation of a supposed cover-up is found to be true, it follows from several definitions of EJKs that both the guilty officers, along with their higher-ups within the organization, should be found liable for EJKs.¹⁹⁶ This is further bolstered by the country’s implementation of the doctrine of command responsibility,¹⁹⁷ which states that an officer of the PNP or any law enforcement agency who fails to take preventive action after gaining knowledge of the commission of any crime by his subordinate will be found administratively liable.¹⁹⁸

What further complicates police investigations of drug-related EJKs is the fact that the President has ordered the PNP to withhold police records from investigative bodies such as the CHR and the Office of the Ombudsman.¹⁹⁹ The President also ordered the PNP to secure clearance from him before providing information on such matters.²⁰⁰ Indeed, police officers have refused to release records in certain situations, opting instead to turn over case folders to the Office of the Solicitor General (OSG).²⁰¹ However, the Supreme Court, in the case of *Aileen Almora, et al. v. Director General Ronald Dela Rosa, et al./Sr. Ma. Juanita R. Daño, et al. v. The Philippine National Police et. al.*,²⁰² has disparaged the OSG’s attempts to withhold records on anti-drug operations for supposedly containing sensitive information that affect national

195. Lian Buan, *DOJ dents drug war: PNP did not follow rules in nanlaban cases*, RAPPLER, Feb. 24, 2021, available at <https://www.rappler.com/nation/doj-drug-war-review-pnp-did-not-follow-rules-nanlaban-cases> (last accessed Mar. 5, 2021).

196. See *Razon*, 606 SCRA at 709–10 & Special Protection of Children in Situations of Armed Conflict Act, ch. V, §§ 13–16.

197. *Rubrico v. Macapagal-Arroyo*, G.R. No. 183871, 613 SCRA 233, 251–52 (2010).

198. Office of the President, Institutionalization of the Doctrine of ‘Command Responsibility’ in all Government Offices, Particularly at all Levels of Command in the Philippine National Police and Other Enforcement Agencies, Executive Order No. 226, Series of 1995 [E.O. No. 226, s. 1995], § 4 (Feb. 17, 1995).

199. See Romero, *supra* note 181.

200. *Id.*

201. Gonzales, *supra* note 181.

202. *Aileen Almora, et al. v. Director General Ronald Dela Rosa, et al.*, G.R. Nos. 234359 & 234484, Apr. 2, 2019, available at <https://sc.judiciary.gov.ph/2692> (last accessed Nov. 30, 2020).

interest.²⁰³ According to the Court, these police records merely cover routine operations.²⁰⁴ The Court also stated there could be no justification for denying the public's right to information — a right that is protected under the Bill of Rights.²⁰⁵

C. Department of Justice

The DOJ, which serves as the legal counsel and prosecutorial arm of government,²⁰⁶ has the power to investigate the commission of crimes and to prosecute offenders.²⁰⁷ The Secretary of Justice also exercises control and supervision over the National Prosecution Service, which is primarily responsible for the investigation and prosecution of all cases involving violations of penal laws.²⁰⁸ Ideally, these broad powers and mandate already enable the DOJ to investigate and prosecute cases on EJKs on its own. Nevertheless, the Department is still expected to cooperate with other agencies in the performance of its duties.²⁰⁹ To illustrate, in a 2012 Memorandum of Agreement, the DOJ vowed to cooperate with the CHR in the bid to end the climate of impunity characterized by EJKs, enforced disappearances, and torture.²¹⁰

Among others, the DOJ committed itself to expedite the processing of requests from the CHR, including endorsements to the DOJ's witness

203. *Id.* at 12.

204. *Id.*

205. *Id.*

206. Instituting the “Administrative Code of 1987” [ADMIN. CODE], Executive Order No. 292, Series of 1987, bk. IV, tit. III, ch. 1, § 1 (1987).

207. *Id.* bk. IV, tit. III, ch. 1, § 3 (2).

208. Reorganizing the Prosecution Staff of the Department of Justice and the Offices of the Provincial and City Fiscals, Regionalizing the Prosecution Service, and Creating the National Prosecution Service, Presidential Decree No. 1275, Series of 1978, § 1 (1978).

209. ADMIN. CODE, bk. IV, tit. III, ch. 2, § 6 (3).

210. Commission on Human Rights, Guidelines and Procedures in the Investigation and Monitoring of Human Rights Violations and Abuses, and the Provision of CHR Assistance [The Omnibus Rules of Procedure of the Commission on Human Rights], annex “A,” ¶ 7 (a) (Apr. 2012). The Memorandum of Agreement between the Commission on Human Rights and the Department of Justice, dated 16 April 2012, is appended to The Omnibus Rules of Procedure of the Commission on Human Rights under Annex “A.” *See id.*

protection program.²¹¹ Both agencies also agreed to develop a Prosecutor's Practice Manual on Human Rights that would enhance the capacity of the DOJ to investigate and prosecute human rights cases.²¹² Despite the agreement, skirmishes between the two institutions have been documented in the past, with former DOJ Secretary Vitaliano N. Aguirre II arguing that the CHR should not depend on the DOJ for the prosecution of cases on EJKs.²¹³ Similarly, the former Secretary refused to conduct investigations on drug-related EJKs.²¹⁴

Despite these past disagreements, both agencies recently signed a data-sharing agreement that aims to strengthen the cooperation between them in the investigation and prosecution of extralegal killings and other human rights violations.²¹⁵ While the agreement is mostly aimed at resolving political attacks and killings as defined in A.O. No. 35,²¹⁶ it could still be considered as a step towards the right direction.

D. Office of the Ombudsman

The Office of the Ombudsman serves as the protector of the people against erring government officers.²¹⁷ It has the power to “[i]nvestigate and prosecute on its own or [upon] complaint by [others], any act or omission of any public officer or employee, ... when such act or omission appears to be illegal, unjust, improper[,] or inefficient.”²¹⁸ Like the CHR, the Office of the Ombudsman

211. *Id.* annex “A,” ¶ 10.

212. *Id.* annex “A,” ¶ 6.

213. Virgil Lopez, *Aguirre blasts CHR chair for comparing number of drug killings to Martial Law deaths*, GMA NEWS, Dec. 6, 2016, available at <https://www.gmanetwork.com/news/news/nation/591457/aguirre-blasts-chr-chair-for-comparing-number-of-drug-killings-to-martial-law-deaths/story> (last accessed Nov. 30, 2020).

214. Buan, *Independent body*, *supra* note 19.

215. Department of Justice, DOJ, CHR Sign Data Sharing Agreement Vital to AO 35 Cases of Extra-Legal Killings, Enforced Disappearances, Torture and Other Grave Human Rights Violations, available at <https://www.doj.gov.ph/files/2020/news%20articles/DOJ%2C%20CHR%20Data%20Sharing%20Agreement.pdf> (last accessed Nov. 30, 2020).

216. *Id.*

217. An Act Providing for the Functional and Structural Organization of the Office of the Ombudsman, and for Other Purposes [The Ombudsman Act of 1989], Republic Act No. 6770, § 13 (1989).

218. *Id.* § 15 (1).

was created by the Constitution as an independent body.²¹⁹ In fact, it may be argued that this Office operates with greater independence than the CHR as it enjoys fiscal autonomy.²²⁰ The Office also implements a selection process for officers that involves screening by the Judicial and Bar Council.²²¹ With these characteristics, the Office of the Ombudsman seems strategically positioned to resolve impediments to the determination of accountability for drug-related EJKs. Nevertheless, like the other agencies, the Office encounters many difficulties. Chief of these is the confusion surrounding its jurisdiction.

Specifically, there has been a lot of confusion concerning the respective jurisdictions of the Office of the Ombudsman and the DOJ over drug-related EJKs. This confusion was in full display after the killing of Kian delos Santos.²²² In the aftermath of the killing, former Ombudsman Conchita C. Carpio-Morales issued a statement announcing that her office was conducting a fact-finding investigation on the alleged murder.²²³ However, Secretary Aguirre responded to the statement by saying that the Ombudsman did not have primary jurisdiction over the case in light of the fact that the case was not cognizable by the Sandiganbayan.²²⁴

Nevertheless, it may be argued that despite not having primary jurisdiction, the Ombudsman is not precluded from conducting its own fact-finding investigation on the matter.²²⁵ In the case of *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice et al.*,²²⁶ the Court ruled that the power of the “Ombudsman to investigate offenses [of] public officers [and] employees is concurrent with other government investigating agencies such as [the] provincial, city[,] and state prosecutors.”²²⁷ The only difference for cases

219. PHIL. CONST. art. XI, § 5.

220. PHIL. CONST. art. XI, § 14.

221. PHIL. CONST. art. XI, § 9.

222. Lian Buan, *Aguirre insists DOJ, not Ombudsman, authorized to handle Kian case*, RAPPLER, Aug. 30, 2017, available at <https://www.rappler.com/nation/ombudsman-doj-jurisdiction-kian-delos-santos-case> (last accessed Nov. 30, 2020).

223. *Id.*

224. *Id.*

225. See *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice et al.*, G.R. No. 159747, 427 SCRA 46, 70 (2004).

226. *Honasan II v. The Panel of Investigating Prosecutors of the Department of Justice et al.*, G.R. No. 159747, 427 SCRA 46 (2004).

227. *Id.* at 70.

falling under the Ombudsman's primary jurisdiction is that the Ombudsman may take over the investigation at any stage from any investigatory agency of the government.²²⁸

It bears noting that the suspects in the killing of Kian delos Santos have since been convicted of murder by the Regional Trial Court of Caloocan.²²⁹ Nevertheless, a strong working relationship between the aforementioned agencies is vital to attaining the conduct of successful prosecutions in the future.

E. Inter-agency Cooperation

It is worth mentioning that aside from the CHR, PNP, DOJ, and the Office of the Ombudsman, there are other government committees tasked with the protection of human rights. For instance, there is a Presidential Human Rights Committee under the Office of the President,²³⁰ a Committee on Justice and Human Rights under the Senate,²³¹ and a Committee on Human Rights under the House of Representatives.²³² However, the combined human rights record of these committees is vulnerable to criticisms. To illustrate, an Undersecretary of the Presidential Committee on Human Rights has publicly denounced some of the concerns raised by various Non-Governmental Organizations (NGOs) against the drug war.²³³ Meanwhile, although Senator de Lima was able to vigorously conduct hearings on alleged EJKs allegedly orchestrated by the "Davao Death Squad" as Chairperson of the Committee

228. *Id.*

229. Euan McKirdy, *Philippines drugs war: 3 Manila cops found guilty in first police convictions*, CNN, Nov. 29, 2018, available at <https://edition.cnn.com/2018/11/29/asia/philippines-kian-delos-santos-first-drug-war-convictions-intl/index.html> (last accessed Nov. 30, 2020).

230. Office of the President, Strengthening and Increasing the Membership of the Presidential Human Rights Committee, and Expanding Further the Functions of Said Committee, Administrative Order No. 163, Series of 2006 [A.O. No. 163, s. 2006] (Dec. 8, 2006).

231. Senate of the Philippines, Committee Duties, Power and Jurisdiction, available at <http://legacy.senate.gov.ph/committee/duties.asp> (last accessed Nov. 30, 2020).

232. House of Representatives, House Committees, available at <http://www.congress.gov.ph/committees/search.php?id=E507> (last accessed Nov. 30, 2020).

233. Gigie Arcilla, *PH gov't unfazed by NGOs' alarm vs. 'human rights crisis'*, PHIL. NEWS AGENCY, Sept. 14, 2019, available at <https://www.pna.gov.ph/articles/1080461> (last accessed Nov. 30, 2020).

on Justice and Human Rights,²³⁴ she was later on jailed for a supposed drug involvement.²³⁵

In order to successfully determine accountability for drug-related deaths, relevant government agencies need to work together harmoniously, drawing guidance from existing frameworks of cooperation laid down by the Constitution, statutes, and various memoranda. More importantly, these agencies must demonstrate that they can freely and objectively perform their functions.

This being said, one of the ways by which the newly created inter-agency panel could dispute allegations of bias²³⁶ is through displaying independence in its investigations. And in turn, this could only be achieved by enlisting the participation of independent offices such as the CHR, whose unique mandates provide a certain degree of independence from the Executive branch.

Unfortunately, recent events demonstrate that this is still a tall order. When the initial report on the war on drugs was submitted to the President last December, the CHR divulged that it was being snubbed by the panel.²³⁷ According to CHR Commissioner Gomez-Dumpit, their agency “repeatedly asked the DOJ ... regarding its role” in the panel, but they were not given any answers.²³⁸ On the other hand, the incumbent DOJ Secretary Menardo Guevarra has emphasized that the report given to the President is still incomplete, and that his Department is bent on enlisting the CHR’s participation.²³⁹

234. See Yuji Vincent Gonzales, *De Lima on death squad probe: ‘Davao under spell of ruthless king’*, PHIL. DAILY INQ., Mar. 9, 2017, available at <https://newsinfo.inquirer.net/879022/de-lima-on-2009-dds-probe-davao-under-spell-of-ruthless-king> (last accessed Nov. 30, 2020).

235. CNN Philippines Staff, *De Lima marks third year in jail: ‘I declare myself free’*, CNN PHIL., Feb. 23, 2020, available at <https://www.cnnphilippines.com/news/2020/2/23/de-lima-third-year-in-jail.html> (last accessed Nov. 30, 2020).

236. See Torregoza, *supra* note 21.

237. CNN Philippines Staff, *DOJ-led drug war panel submits initial report to Duterte*, CNN PHIL., Jan. 11, 2021, available at https://cnnphilippines.com/news/2021/1/11/DOJ-drug-war-panel-submits-initial-report-Duterte-.html?fb&fbclid=IwAR2DJcLBldCHV4l_AZC6b66LuPf2UQHof5vaziiO2LPs97Nww5HVeHEeMPI (last accessed Jan. 24, 2021).

238. *Id.*

239. *Id.*

The inter-agency panel should also follow through on its recommendations. The panel's recent findings on the failure of the police to follow standard protocols in their investigations on drug-related EJKs is a positive development considering that it runs antagonistic to an agency which has been consistently defended by the administration. However, the panel should not end with just releasing the results of its investigations. It should make sure that the proper charges are brought against erring officers. Notably, when asked why the panel has not filed cases against the concerned police officers, Secretary Guevarra replied that they have to wait for the PNP to "initiate actions based on the recommendations of its [own] internal affairs service."²⁴⁰ However, he also added that if this does not occur, "any member of the [] panel ... may file the appropriate complaint before the DOJ."²⁴¹

For now, what can be done is to just observe if the DOJ will deliver on its promise and involve the CHR in the panel's activities.

V. INTERNATIONAL ENFORCEMENT

Despite the glaring deficiencies in the investigation and prosecution of drug-related EJKs, Secretary Guevarra has been adamant that the Philippine justice system works.²⁴² He has cited the convictions of Retired General Jovito S. Palparan, Jr. and of the accused members of the Ampatuan clan as proofs of success.²⁴³ However, it must be noted that these cases constitute only a small part of widespread EJKs in the country.²⁴⁴ More importantly, these cases are not necessarily drug-related.²⁴⁵

Indeed, the newly created inter-agency panel on drug-related EJKs shows promise. However, it remains to be seen whether this agency could deliver accountability for the thousands of lives that have been lost since the war on

240. Lian Buan, *In DOJ drug war review, gov't waits for PNP to file cases vs erring cops*, RAPPLER, Feb. 25, 2021, available at <https://www.rappler.com/nation/government-waits-for-pnp-file-cases-erring-cops-drug-war> (last accessed Mar. 5, 2021).

241. *Id.*

242. Patricia Denise M. Chiu, *DOJ chief tells UN rights body new panel to probe 5,000 deaths in police anti-drug operations*, PHIL. DAILY INQ., June 30, 2020, available at <https://newsinfo.inquirer.net/1299804/doj-chief-tells-un-rights-body-new-panel-to-probe-5000-deaths-in-police-anti-drug-operations#ixzz6Trv5C1jL> (last accessed Nov. 30, 2020).

243. *Id.*

244. *Id.* & Tupas, *supra* note 134.

245. Tupas, *supra* note 134. See also Chiu, *supra* note 242.

drugs began. In the event that the new panel fails to deliver results, it would be necessary to look for remedies outside the Philippine judicial system.

A. United Nations

After the UNHRC released its findings on the human rights situation in the Philippines,²⁴⁶ a cluster composed of UN special rapporteurs, independent experts, and working groups called for an independent probe into alleged human rights abuses in the Philippines.²⁴⁷ The group also “called [for] the UNHRC to invigorate the mandate of the [OHCHR] in monitoring and reporting on [these abuses]”²⁴⁸

This is not the first time that a Special Rapporteur has voiced out an opinion against the President.²⁴⁹ The Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard, has been vocal against human rights violations in the country.²⁵⁰ This outspokenness has earned the ire of the President, who not only imposed harsh conditions on the Special Rapporteur’s supposed visit,²⁵¹ but also threatened to physically slap her if she pushes through with her probe.²⁵² The Philippine government has also resorted to diplomatic means in order to respond to Callamard.²⁵³ In a published report, the government said that it has raised concerns about the

246. U.N. Human Rights Council, *supra* note 1.

247. *UN rights experts renew call for ‘independent, impartial’ probe on PH rights situation*, *supra* note 15.

248. *Id.*

249. Daphne Galvez, *Callamard: ‘Duterte’s only sin is destroying rule of law’*, PHIL. DAILY INQ., Sept. 28, 2018, available at <https://globalnation.inquirer.net/170111/callamard-dutertes-sin-destroying-rule-law#ixzz6Ts4TnzUo> (last accessed Nov. 30, 2020).

250. *Id.*

251. UN Human Rights Office of the High Commissioner, UN expert rejects Philippines conditions for fact-finding mission on drugs war, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21045&LangID=E> (last accessed Nov. 30, 2020).

252. Pia Ranada, *Duterte threatens to slap UN rapporteur if she probes drug war*, RAPPLER, Nov. 9, 2017, available at <https://www.rappler.com/nation/duterte-threat-slap-un-rapporteur-callamard> (last accessed Nov. 30, 2020).

253. The Philippine Human Rights Situationer (A Document Published by the Presidential Communications Operations Office and the Bureau of Communications Services of the Philippines), at 22, available at <https://genevaphm.ph/HRC/PHRS.pdf> (last accessed Nov. 30, 2020).

Special Rapporteur's conduct with the proper UN human rights mechanisms.²⁵⁴

Special Rapporteurs are part of the Special Procedures of the United Nations,²⁵⁵ a system that is comprised of independent experts who report directly to the UNHRC,²⁵⁶ the UN charter-based body that is “responsible for [] the promotion and protection of human rights [across] the globe”²⁵⁷ With the support of the OHCHR, the Special Procedures conduct country visits and thematic studies, and communicate with States to spread awareness on issues such as abuses and violations.²⁵⁸

In the case of Special Rapporteur Callamard, in order to ensure the success of her visits, she requests for an invitation to a subject country, along with a Terms of Reference for a Fact-Finding Mission, which if accepted, would help ensure “free, confidential[,] and unsupervised interviews with victims, families of victims, legal representatives, detainees, and civil society representatives”²⁵⁹ After the visit, she submits her reports in the following UNHRC session, wherein she “sets out and analyzes [her] impressions ... during the visit and [then] makes recommendations to the [g]overnment and [to] other actors”²⁶⁰

It must be emphasized that a successful visit by a Special Rapporteur does not automatically entail positive changes. For example, former Special Rapporteur Philip Alston once mentioned in an interview that there are a number of requisites that must happen in order to solve the proliferation of EJKs.²⁶¹ Among them is the presence of personalities who are honest enough to draft effective strategies to bring about change in systems that enable cultures

254. *Id.*

255. UN Human Rights Office of the High Commissioner, Special Procedures of the Human Rights Council, *available at* <https://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx> (last accessed Nov. 30, 2020).

256. *Id.*

257. U.N. Human Rights Council, Welcome to the Human Rights Council, *available at* <https://www.ohchr.org/en/hrbodies/hrc/pages/aboutcouncil.aspx> (last accessed Nov. 30, 2020).

258. UN Human Rights Office of the High Commissioner, *supra* note 255.

259. Callamard, *supra* note 9.

260. *Id.*

261. Philip Alston, *The Challenges of Responding to Extrajudicial Executions: Interview with Philip Alston*, 2 J. HUM. RTS. PRAC. 355, 361 (2010).

of impunity.²⁶² It is worth mentioning that in 2007, as Special Rapporteur on extrajudicial, summary or arbitrary executions, Alston visited the Philippines and investigated the vigilante groups in Davao City who were suspected of killing gang members, criminals, and street children.²⁶³ In his report, Alston recalls meeting with the “authoritarian populist” mayor of the city, who took full responsibility for unsolved murders during his watch but who also denied the existence of a death squad.²⁶⁴ The mayor he refers to in the report is President Rodrigo Duterte.²⁶⁵

There are other ways by which the UN could intervene in the country’s human rights situation. For instance, the Human Rights Committee, the treaty-based body that monitors the implementation of the ICCPR,²⁶⁶ could issue a statement calling out the country for reneging on its obligations to protect the right to life. This was done in the past, particularly when the Committee called the country’s attention for its failure to address issues on EJKs and enforced disappearances during the presidency of Benigno S. Aquino III.²⁶⁷ Critics point out, however, that the conclusions of treaty bodies are not legally binding for state parties, and that the implementation of their recommendations could not be enforced in the first place.²⁶⁸ Moreover, the UN’s enforcement mechanisms have been criticized for supposedly victimizing communities twice.²⁶⁹ It is argued that double victimization occurs when residents of communities plagued by human rights violations are also made to suffer the harmful effects of UN sanctions.²⁷⁰ In the Philippines, this may have occurred when the government reportedly put a halt to the

262. *Id.* at 362.

263. Special Rapporteur on extrajudicial, summary or arbitrary executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 2 & 39, Human Rights Council, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008) (by Philip Alston).

264. *Id.* ¶ 40.

265. *Id.* app. B, ¶ 3.

266. UN Human Rights Office of the High Commissioner, Human Rights Committee, available at <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (last accessed Nov. 30, 2020).

267. U.N. Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, ¶ 156, U.N. Doc. CCPR/C/PHL/4 (2011).

268. CONOR GEARTY & COSTAS DOUZINAS, *THE CAMBRIDGE COMPANION TO HUMAN RIGHTS LAW* 264 (2012).

269. *Id.* at 264.

270. *Id.*

processing of loans, grants, and aids from the eighteen members of the UNHRC who endorsed the conduct of a probe on the country's human rights situation.²⁷¹ In addition to this, the administration's allies have hinted at retaliatory moves against the UNHRC and the country's total withdrawal from the UN.²⁷²

Nevertheless, while there are shortcomings to the UN and its enforcement mechanisms, it still has the potential to prevent the fast deterioration of human rights in the country. This can be done by shedding light on the country's human rights situation. This is precisely what happened when the UNHRC released its report on the human rights situation in the Philippines.²⁷³ The UN could also remind the government to abide by the obligations encapsulated in international human rights instruments.²⁷⁴ Most importantly, it could encourage other international bodies to intervene and decry human rights violations in the country. To demonstrate, the recently published statement of concerned experts called on the ICC to expedite and prioritize its preliminary review of the human rights situation in the Philippines.²⁷⁵

B. International Criminal Court

The request for the ICC to expedite its review comes in the midst of efforts which appear bent on derailing the ongoing preliminary examination of the human rights situation in the Philippines.²⁷⁶ First off, the Philippines'

271. Ben O. de Vera, *Duterte order shuns all loans, grants, aid from 18 countries backing probe of PH killings*, PHIL. DAILY INQ., Sept. 20, 2019, available at <https://business.inquirer.net/279344/duterte-order-shuns-all-loans-grants-aid-from-18-countries-in-favor-of-probe-of-ph-killings#ixzz6TsFcYcm5> (last accessed Nov. 30, 2020).

272. Bergonia, *supra* note 63.

273. U.N. Human Rights Council, *supra* note 1.

274. *Id.* ¶ 42 (citing Zeid Ra'ad Al Hussein, available at https://www.ohchr.org/Documents/Countries/PH/OpenLetterHC_DeathPenalty.pdf (last accessed Nov. 30, 2020)).

275. *UN rights experts renew call for 'independent, impartial' probe on PH rights situation*, *supra* note 15.

276. Elmor P. Santos & Ver Marcelo, *Int'l Criminal Court to begin preliminary examination on PH killings*, CNN PHIL., Feb. 9, 2018, available at <https://cnnphilippines.com/news/2018/02/08/International-Criminal-Court-preliminary-examination-Duterte-drug-war.html> (last accessed Nov. 30, 2020).

withdrawal from the Rome Statute officially took effect in March 2019.²⁷⁷ Secondly, Jude Josue Sabio, the lawyer who filed a complaint against President Duterte and other senior officials of the administration before the ICC,²⁷⁸ has communicated a request to the Office of the Prosecutor to strike out his name in the communication.²⁷⁹ In doing so, he made it appear that he was manipulated by the country's opposition party to file a case against the administration as part of an elaborate political propaganda.²⁸⁰ Despite these developments, the ICC remains undeterred.²⁸¹ It emphasized that the country's withdrawal from the Rome Statute did not put a halt to its preliminary examination on the war against drugs.²⁸² It must be recalled that Article 127 of Rome Statute disallows the discharge of a State from obligations by reason of withdrawal, if the obligations arose from the Statue while the State was a Party to the same.²⁸³ The ICC has also invoked its pre-trial chamber decision in relation to Burundi wherein it ruled that the "the ICC retains its jurisdiction over crimes committed during the time in which the State was party to the Statute and may exercise this jurisdiction over these crimes even after the withdrawal becomes effective."²⁸⁴

With respect to Sabio's request, the ICC stated in an interview that any supposed withdrawal of a communication with them has no impact on the

277. *Philippines officially out of the International Criminal Court*, ALJAZEERA, Mar. 17, 2019, available at <https://www.aljazeera.com/news/2019/03/17/philippines-officially-out-of-the-international-criminal-court> (last accessed Nov. 30, 2020).

278. Clare Baldwin & Stephanie van den Berg, *Lawyer for Philippines hit-man files complaint against Duterte at ICC*, REUTERS, Apr. 24, 2017, available at <https://www.reuters.com/article/us-philippines-duterte-icc-idUSKBN17Q0P1> (last accessed Nov. 30, 2020).

279. Nicole-Anne C. Lagrimas, *Lawyer Jude Sabio withdraws one of ICC cases vs. Duterte*, GMA NEWS, Jan. 14, 2020, available at <https://www.gmanetwork.com/news/news/nation/722117/lawyer-jude-sabio-withdraws-one-of-icc-cases-vs-duterte/story> (last accessed Nov. 30, 2020).

280. *Id.*

281. International Criminal Court, Preliminary examination: Republic of the Philippines, available at <https://www.icc-cpi.int/philippines> (last accessed Nov. 30, 2020).

282. *Id.*

283. Rome Statute, *supra* note 52, art. 127 (2).

284. International Criminal Court, ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law, available at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> (last accessed Nov. 30, 2020).

ongoing preliminary examination since the ICC “cannot effectively destroy or return information ... [that is already] in its possession[.]”²⁸⁵ The ICC did acknowledge that it would “register any supplemental information [that] the sender [of the communication] may [wish] to provide[.]”²⁸⁶ However, it added that it has access to a “wide range of reliable sources” other than the subject communication.²⁸⁷ A report on the preliminary examination in the Philippines released by the ICC in 2018 appears to confirm this opinion, as it states that the ICC “is in the process of conducting a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the [c]ourt.”²⁸⁸ As a matter of fact, a more recent report goes further and states that the information gathered by the ICC so far gives

reasonable basis to believe that the crimes against humanity of murder (article 7 (1) (a)), torture (article 7 (1) (f)) and the infliction of serious physical injury and mental harm as other inhumane Acts (article 7 (1) (k)) were committed on the territory of the Philippines between at least 1 July 2016 and 16 March 2019, in connection to the [war on drugs] campaign launched throughout the country.²⁸⁹

Nevertheless, Prosecutor Fatou B. Bensouda has emphasized that the preliminary examination is not an investigation but only an “initial step [towards determining] whether there is reasonable basis to proceed with an investigation.”²⁹⁰ The Rome Statute requires the Office of the Prosecutor to “consider issues of jurisdiction, admissibility[,] and the interests of justice in making [a] determination”²⁹¹ as to whether a case should proceed to an

285. Eimor Santos & Xave Gregorio, *ICC says lawyer's complaint vs. Duterte cannot be withdrawn*, CNN PHIL., Jan. 14, 2020, available at <https://cnnphilippines.com/news/2020/1/14/jude-sabio-international-criminal-court-rodrigo-duterte.html> (last accessed Nov. 30, 2020).

286. *Id.*

287. *Id.*

288. International Criminal Court, Report on Preliminary Examination Activities 2018, ¶ 41, available at <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> (last accessed Nov. 30, 2020).

289. International Criminal Court, Report on Preliminary Examination Activities 2020, ¶ 189, available at <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> (last accessed Nov. 30, 2020).

290. See International Criminal Court, *supra* note 284.

291. *Id.*

investigation.²⁹² In line with this, it must be emphasized that the operation of the ICC is “complementary to national criminal jurisdictions.”²⁹³ The Rome Statute follows the principle of complementarity whereby it recognizes that States have the “first responsibility and right to prosecute international crimes.”²⁹⁴ The court thereby exercises jurisdiction only “where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.”²⁹⁵ On this note, the ICC report acknowledges the DOJ’s “creation of an inter-agency panel to reinvestigate deaths in police [] operations.”²⁹⁶ However, the ICC adds that it is “also examining national developments ... [that] fall outside the technical scope of the term ‘national criminal investigations’[] including Senate Committee hearings[,] ... [and W]rit of [A]mparo cases ... [before] the Office of the Ombudsman.”²⁹⁷

Considering the challenges encountered by the Philippine judicial system in pinpointing liability for drug-related EJKs, the preliminary examination by the ICC²⁹⁸ could be viewed as a welcome development. After all, the ICC has, in the recent past, shown its ability to bring high-ranking officials of States to justice.²⁹⁹

Nonetheless, the road is complex for the international court when it comes to the Philippines. The Duterte administration has not shown signs that it is willing to cooperate with the ICC. Instead, it has criticized the latter for

292. *Id.*

293. Rome Statute of the International Criminal Court, *supra* note 52, art. 1.

294. Xabier Agirre, et al., Informal expert paper: The principle of complementarity in practice, ¶ 1, available at <https://icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> (last accessed Nov. 30, 2020).

295. *Id.*

296. International Criminal Court, *supra* note 289, ¶ 192.

297. *Id.* ¶ 193.

298. *Id.* ¶ 178 (citing The Office of the Prosecutor of the ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, available at <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> (last accessed Nov. 30, 2020)).

299. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/13 (Sept. 17, 2018).

allegedly encroaching upon the country's sovereignty.³⁰⁰ Moreover, the ICC is facing issues of its own when it comes to bringing human rights violators to justice.³⁰¹ For instance, critics, particularly those from the African political elite, have harped upon the supposed imbalance in the prosecutions by the ICC.³⁰² They argue that the ICC only serves as a political tool of regime change by Western states.³⁰³ Notably, the ICC has found much success against African leaders.³⁰⁴ There is also criticism that due to international politics, the ICC has been unable to prosecute individuals who are guilty of the worst atrocities.³⁰⁵

Despite the challenges faced by the ICC, it may be argued that the mere fact that it shone a spotlight on drug-related EJKs in the country is in itself a positive development. To illustrate, critics have attributed the formation of an inter-agency panel by the DOJ to the ongoing preliminary examination.³⁰⁶ It is believed that the panel was created precisely to avoid further steps by the ICC with respect to drug-related EJKs.³⁰⁷ Notably, the Presidential Communications Operations Office recently lauded the panel for affirming the government's supposed efforts to address the issue of drug-related EJKs.³⁰⁸ It would be interesting to see how the panel's reinvestigation will ultimately affect the ICC's "decision on whether to seek [authorization] to open an investigation into the [country's] situation[.]"³⁰⁹

300. Esguerra, *supra* note 12 & ABS-CBN News, 'Who gave you the authority?': Duterte fumes at ICC anew, ABS-CBN NEWS, Dec. 28, 2020, available at <https://news.abs-cbn.com/news/12/28/20/who-gave-you-the-authority-duterte-fumes-at-icc-anew> (last accessed Nov. 30, 2020).

301. Alana Tiemessen, *The International Criminal Court and the politics of prosecutions*, 18 INT'L J. HUM. RTS. 455, 444-61 (2014).

302. *Id.*

303. *Id.*

304. *Bemba*, Case No. ICC-01/05-01/13.

305. Kirsten Ainley, *The International Criminal Court on trial*, 24 CUMB. REV. INT'L AFF. 309, 310 (2011).

306. Chiu, *supra* note 242.

307. *Id.*

308. Azer Parrocha, *PCOO hails drug war review panel for PH accountability processes*, PHIL. NEWS AGENCY, Feb. 25, 2021, available at <https://www.pna.gov.ph/articles/1131813?fbclid=IwAR19O2pHtqFfXKafz3hXQR6H85I5Djlo8zIW5NX5vo1IrzCrKSd5ui7m-Co> (last accessed Mar. 5, 2021).

309. See International Criminal Court, *supra* note 289, ¶ 197.

C. International Cooperation

With no end in sight for drug-related EJKs, the country should welcome all the help it could get in ending the existing culture of impunity. The supposed interventions by the international community, no matter how small, could bring the country closer towards determining accountability for these crimes. Without necessarily surrendering the country's sovereignty or bowing out to potential abuses of power by international bodies, government agencies should remain open to cooperation, keeping in mind the noble goal of serving justice to thousands of EJK victims in the country.

VI. CONCLUSION

In light of the foregoing discussions, it must be kept in mind that the exercise of seeking accountability for drug-related EJKs is bound to become more challenging. As time passes, the country encounters new challenges which divert the attention of the government and dampen the vigilance of the public. These challenges include the COVID-19 pandemic which has brought about debilitating restrictions on the movement of actors who play a crucial role in bringing about accountability for the killings.³¹⁰ Meanwhile, dead bodies continue to pile up and so do unanswered questions from grieving families who remain unable to attain justice for their loved ones. A genuine resolve to assign liability for these crimes will require major adjustments on how the country approaches drug-related EJKs. This paradigm shift will begin with assigning a reliable definition for EJKs and with espousing objective standards that could be used in investigating drug-related EJKs. It will also require the cooperation of government agencies who must exhibit a sincere desire to push for accountability by actively working with independent agencies and by utilizing existing frameworks that are meant to facilitate the investigation and prosecution of EJKs. Lastly, the national government should exert genuine efforts to engage with concerned international actors. It must be able to display the country's commitment to international human rights instruments without surrendering the nation's sovereignty and independence.

Other glaring challenges that are intricately related to the elusive exercise of seeking accountability for drug-related EJKs must also be noted and studied further. To begin with, there must be a determination of whether the independent agencies involved in the investigation and prosecution of EJKs are truly independent. Supposedly independent bodies such as the CHR and the Office of the Ombudsman have been accused of lacking genuine

310. See Cerilles, *supra* note 181, at 55-70.

autonomy in the past.³¹¹ Moreover, relevant government agencies lack the vital data and information on drug-related EJKs.³¹² Transparency is also a must in the quest for accountability, and this applies to agencies both within and outside the control of the Executive branch.

There is also a need to deconstruct what constitutes an EJK in the international realm. This process includes consensus-building on what acts or omissions are punishable as EJKs, and a final determination on whether EJKs themselves should be criminalized. Similarly, there is a need to strengthen international enforcement mechanisms. This could be done by upgrading ICC resources or by intensifying capacity building efforts with developing nations. A strong and robust international community that is bent on eradicating EJKs is bound to benefit its members, particularly those whose judicial systems remain fragile and fall prey to authoritarian pursuits.

Lastly, there must be an exploration of ways by which the involvement of local and international civil society, as well as of human rights groups, could be strengthened. The same holds true for media organizations, whose relentless coverage on current events in the country makes studies on drug-related EJKs such as this, possible. Maximizing the potential of these stakeholders would not only supplement the tools currently available in our justice system; it would also fill-in the void left by reluctant government agencies who continue to shy away from seeking accountability out of fear or bias. Together, these stakeholders could serve as the necessary spark that would keep the quest for genuine accountability rolling, hopefully even beyond the incumbency of the current administration.

311. Yen Makabenta, *Presidential control of executive branch vs Ombudsman's claim of independence*, MANILA TIMES, Feb. 6, 2018, available at <https://www.manilatimes.net/2018/02/06/opinion/columnists/topanalysis/presidential-control-executive-branch-vs-ombudsmans-claim-independence/378404> (last accessed Nov. 30, 2020).

312. Human Rights Watch, *supra* note 7.