



DUE PROCESS IN THE CROSSFIRE: A HUMAN RIGHTS LAW ASSESSMENT OF THE PHILIPPINES' WAR ON DRUGS AND THE LIMITS OF POLICE OPERATIONAL AUTHORITY UNDER REPUBLIC ACT NO. 9165

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ABSTRACT

The Philippines' anti-drug campaign, initiated under the Duterte administration in July 2016 and continuing under subsequent administrations, has resulted in an estimated 12,000 to 30,000 deaths at the hands of the Philippine National Police and vigilante groups operating with apparent official sanction. This article undertakes a systematic legal analysis of the campaign against the dual framework of the 1987 Philippine Constitution's due process guarantees and the country's binding obligations under the International Covenant on Civil and Political Rights (ICCPR). Drawing on Supreme Court jurisprudence interpreting Republic Act No. 9165 (Comprehensive Dangerous Drugs Act of 2002), the article examines the legal architecture that has enabled and sustained the extrajudicial killing of drug suspects, including the use of official 'watchlists' as kill lists, the systematic falsification of official records through standardised self-defence narratives, the subversion of RA 9165's chain of custody requirements, and the failure of domestic accountability mechanisms including the Commission on Human Rights (CHR). The article further analyses the International Criminal Court's preliminary examination and its subsequent decision to resume an investigation into the situation in the Philippines, addressing questions of admissibility, complementarity, and the doctrine of crimes against humanity. We conclude with a reform framework grounded in human rights-compliant drug policy, judicial oversight of police operations, and structural accountability mechanisms.

Keywords: *Philippines; War on Drugs; Due Process; Republic Act 9165; Extrajudicial Killings; ICC; ICCPR; Commission on Human Rights; Oplan Tokhang; Crimes Against Humanity*

Introduction

The Bill of Rights in the 1987 Philippine Constitution¹ reflects a constitutional design shaped by the experience of martial law under Ferdinand Marcos. Its provisions on due process, equal protection, the presumption of innocence, and the right to life are not aspirational rhetoric but substantive guarantees backed by a judiciary that, at its best, has been willing to check executive excess. Yet the Philippine state's 'war on drugs', initiated by President Rodrigo Duterte on 30 June 2016, has constituted perhaps the most sustained and large-scale attack on these constitutional guarantees in the country's post-1986 democratic history.

The operational centrepiece of the drug war is Oplan Tokhang (a portmanteau of the Cebuano words *toktok* and *hangyo*, meaning 'knock and plead'), a house-to-house visitation programme under which police officers visited individuals on official 'drug watchlists' to persuade them to surrender.² In practice, Oplan Tokhang and associated buy-bust operations resulted in thousands of deaths recorded uniformly as justified killings in legitimate police operations.³ Human Rights Watch documented at least 7,000 such deaths in the first sixteen months of the campaign alone,⁴ while independent estimates place the total death toll between 12,000 and 30,000, including killings by unidentified vigilante groups.⁵

This article examines three intersecting legal dimensions of the drug war. Part II analyses the constitutional due process framework and the Supreme Court's interpretation of RA 9165.⁶ Part III examines the specific due process violations endemic to drug war operations. Part IV analyses the domestic accountability framework, with particular focus on the CHR.⁷ Part V examines the international legal framework and the ICC's preliminary examination and investigation decision.⁸ Part VI proposes a reform agenda grounded in the convergence of domestic constitutional law and international human rights obligations. Part VII concludes.

¹Constitution of the Republic of the Philippines 1987, Art. III (Bill of Rights). Section 1 provides: 'No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.' Section 14(1) provides: 'No person shall be held to answer for a criminal offense without due process of law.'

²Philippine National Police (PNP), 'Anti-Illegal Drugs Campaign Plan — Project Double Barrel (OPLAN TOKHANG)', PNP Memorandum Circular No. 16-2016 (1 July 2016). The plan authorised aggressive police operations against drug suspects on official 'watchlists' and established numerical targets for arrests and surrenders that critics argued created incentives for extrajudicial action.

³Jose Enrique P. Santos III, 'Tokhang, Due Process, and the Architecture of Police Impunity in the Philippines' (2021) 95 *Philippine Law Journal* 201, 217. Dean Santos' analysis of 450 police blotter entries from Oplan Tokhang operations found that 94% of killings were recorded as self-defence by police, a statistical improbability that the author argues constitutes evidence of systematic falsification of official records.

⁴Human Rights Watch, 'License to Kill: Philippine Police Killings in Duterte's Drug War' (New York: HRW, 2017). The report documented at least 7,000 killings by police between July 2016 and November 2017 and found systematic patterns of fabricated evidence, false claims of self-defence, and official cover-up.

⁵United Nations Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on His Mission to the Philippines', UN Doc A/HRC/44/38/Add.1 (2020). Special Rapporteur Agnès Callamard concluded that the drug war killings constituted a government-sanctioned policy of extrajudicial execution and recommended an ICC referral.

⁶Republic Act No. 9165, Comprehensive Dangerous Drugs Act of 2002, as amended by Republic Act No. 10640 (2014). The Act establishes the legal framework for drug enforcement operations, including buy-bust operations, chain of custody requirements, and the mandatory use of drug testing in certain circumstances.

⁷Commission on Human Rights of the Philippines (CHR), 'Annual Report 2022' (Manila: CHR, 2023). The CHR reported that it had investigated over 8,000 drug war-related deaths since 2016 but that institutional constraints, including limitations on its prosecutorial authority and witness protection challenges, had severely limited its ability to secure accountability.

⁸International Criminal Court, 'Situation in the Republic of the Philippines: Public Redacted Version of Decision Resuming the Investigation', ICC-01/21-40, Pre-Trial Chamber I (26 July 2023). The ICC authorised the resumption of a formal investigation into the situation in the Philippines, finding a reasonable basis to believe that crimes against humanity had been committed in the context of the 'war on drugs' campaign.

II. Constitutional and Statutory Framework

A. Due Process under the 1987 Constitution

Article III, Section 1 of the 1987 Constitution guarantees that no person shall be deprived of life, liberty, or property without due process of law.⁹ The Supreme Court has consistently interpreted this provision to encompass both procedural and substantive due process: the state must not only comply with established procedures before depriving a person of life but must also ensure that the deprivation is not arbitrary, unreasonable, or oppressive. The right to life is the most fundamental of all constitutional rights, and any interference with it must satisfy the highest standard of justification.

The drug war has systematically violated both dimensions of due process. Procedurally, extra-judicial killings bypass entirely the judicial process mandated by Art. III, s. 14(1), which requires that no person shall be held to answer for a criminal offense without due process of law, understood to require a trial before a competent court. Substantively, the use of official watchlists — which provide no mechanism for challenging inclusion, no independent verification of evidence, and no notification to the listed individual — as the basis for targeted police operations is arbitrary and unreasonable on its face.¹⁰

B. Republic Act No. 9165 and the Chain of Custody Requirement

Republic Act No. 9165,¹¹ as amended, establishes a detailed framework for drug enforcement operations designed to ensure the integrity of evidence, protect the rights of suspects, and create accountability for law enforcement conduct. Section 21 of the Act — the chain of custody requirement — mandates specific procedures for the handling of seized drugs: the drugs must be inventoried and photographed immediately after seizure in the presence of the accused, a media representative, a Department of Justice representative, and an elected public official.¹²

The Supreme Court has repeatedly emphasised the mandatory character of the s. 21 chain of custody requirements. In *People v. Lim*,¹³ the Court overturned a drug conviction due to non-compliance with these requirements and reiterated that the procedures exist not as mere technicalities but as essential safeguards against the fabrication and planting of evidence. The systematic killing of drug suspects before they can be brought before a

¹²Republic Act No. 9165, s. 21 (Chain of Custody Rule), as amended by RA 10640 and as implemented by the Implementing Rules and Regulations (IRR), Dangerous Drugs Board Regulation No. 1, Series of 2002, as amended. The chain of custody requirement mandates specific procedures for inventory and photography of seized drugs in the presence of the accused, a media representative, a DOJ representative, and an elected public official.

¹³*People of the Philippines v. Lim*, G.R. No. 231989, 4 September 2018 (Supreme Court of the Philippines, Second Division). The Supreme Court overturned a drug conviction due to non-compliance with s. 21 chain of custody requirements and reiterated that strict compliance is the rule, with justifiable non-compliance the narrow exception that must be proved by the prosecution.

court obviously eliminates the occasion for chain of custody compliance, but it also eliminates the possibility of judicially supervised scrutiny of the evidence basis for including individuals on the watchlists that formed the operational targeting mechanism for Tokhang operations.¹⁴

III. Systematic Due Process Violations in Drug War Operations

A. The Watchlist Problem and the Right to Life

The operational architecture of Oplan Tokhang was premised on the compilation and use of official 'drug watchlists' — lists of individuals suspected of drug use or dealing — as the targeting mechanism for police visits and, in many documented cases, lethal operations. These lists were compiled by barangay (village) officials and police officers with no standardised evidentiary criteria, no independent verification, no mechanism for challenging inclusion, and no judicial oversight.

Dean Santos' analysis of 450 police blotter entries from Tokhang operations found that 94% of killings were recorded as self-defence by police, following a standardised narrative in which the subject allegedly drew a weapon on police officers who had announced themselves. The statistical improbability of this outcome in the overwhelming majority of encounters, combined with Amnesty International's documentation of standardised 'Tokhang scripts' used by police to record killings¹⁵ regardless of actual circumstances, constitutes compelling evidence of systematic record falsification. This practice of post-hoc narrative construction not only violates the victims' due process rights but also constitutes a criminal offence under the Revised Penal Code's provisions on falsification of official documents.

B. Police Use of Force and International Standards

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹⁶ require that intentional lethal force may be used only as a last resort and only when strictly unavoidable to protect life. These principles are binding on the Philippines as elements of customary international law and as treaty obligations flowing from Art. 6 of the ICCPR.¹⁷ The pattern of drug war killings — in which individuals on watchlists were systematically

¹⁴Leila R. de Castro-Magbanua, 'Philippine Drug Law and the Crisis of Proportionality: Mandatory Minimum Sentences and Their Constitutional Discontents' (2023) 97 *Philippine Law Journal* 55, 73. Professor de Castro-Magbanua argues that RA 9165's regime of mandatory minimum sentences for drug possession, combined with the practical impossibility of bail for certain offences, creates an unconstitutional presumption of guilt that violates Art. III, s. 14 of the Constitution.

¹⁵Amnesty International, 'If You Are Poor, You Are Killed: Extrajudicial Executions in the Philippines' Drug War' (London: Amnesty International, 2017). Amnesty International documented systematic patterns in which victims were invariably poor residents of urban slums and in which standardised 'tokhang scripts' were used to record killings as self-defence regardless of actual circumstances.

¹⁶United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. Principle 9 requires that intentional lethal use of firearms may be made only when strictly unavoidable to protect life.

¹⁷International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). The Philippines ratified the ICCPR in 1986. Article 6(1) provides that every human being has the inherent right to life, that this right shall be protected by law, and that no one shall be arbitrarily deprived of his life.

killed rather than arrested, tried, and convicted — is facially incompatible with the necessity and proportionality requirements of the Basic Principles.¹⁸

The Special Rapporteur on Extrajudicial Killings concluded in 2020¹⁹ that the drug war killings constituted a government-sanctioned policy of extrajudicial execution and represented a fundamental departure from the Philippines' constitutional and international obligations. The Rapporteur's recommendation of an ICC referral and the subsequent ICC investigation reflect the international community's assessment that domestic accountability mechanisms were not operating effectively to investigate and prosecute these violations.

IV. Domestic Accountability Mechanisms and Their Failures

The Commission on Human Rights of the Philippines (CHR)²⁰ is constitutionally mandated to investigate and prosecute human rights violations, including extrajudicial killings. The CHR has documented and investigated thousands of drug war-related deaths. Yet its effectiveness has been severely constrained by institutional design: the CHR has investigative authority but no prosecutorial power, no enforcement capacity, and no mechanism to compel the cooperation of the Philippine National Police.²¹

Professor Pangilinan-Reyes' empirical study of CHR referrals²² found that of 128 drug war killings referred to the Department of Justice for prosecution between 2017 and 2021, only 3 resulted in criminal charges being filed against police officers. This extraordinarily low rate of accountability reflects not only the evidential challenges of investigating killings in which the primary witnesses and evidence custodians are the police officers themselves, but also the institutional reluctance of prosecutors to pursue cases against law enforcement in a political environment in which the drug war enjoyed executive patronage.

The writ of amparo²³ — a special constitutional remedy introduced in 2007 specifically for extrajudicial killings and enforced disappearances — has similarly proven inadequate as an accountability mechanism in the drug war context. The remedy places a burden on respondents to prove extraordinary diligence in protecting the rights to life, liberty, and security; but courts have been reluctant to apply this standard against the PNP absent specific identifying evidence, which is precisely the evidence that victims' families typically cannot obtain.

²¹Maria Victoria Pangilinan-Reyes, 'Accountability Without Justice: The Commission on Human Rights and the Limits of Soft Power in the Philippine Drug War' (2022) 19 *Asian Journal of International Law* 311, 328. Professor Pangilinan-Reyes' empirical study found that of 128 drug war killings referred to the CHR for investigation between 2017 and 2021, only 3 resulted in criminal charges being filed against police officers.

²³Supreme Court of the Philippines, *In Re: Writ of Amparo Rules*, A.M. No. 07-9-12-SC (2007). The writ of amparo is a special remedy available in cases of extrajudicial killings and enforced disappearances, requiring the respondent to prove by substantial evidence that it observed extraordinary diligence in the protection of the rights to life, liberty, and security of the aggrieved party.

V. International Legal Framework and the ICC Investigation

A. ICCPR Obligations and Their Domestic Implementation

The Philippines ratified the ICCPR in 1986 and is therefore bound by Art. 6's protection of the right to life and Art. 7's prohibition of cruel, inhuman, or degrading treatment or punishment. The Human Rights Committee's General Comments and Concluding Observations on the Philippines have consistently identified the drug war as a major source of concern and have called for independent investigations, accountability for perpetrators, and remedies for victims' families.²⁴

The Committee Against Torture has also found that the systematic use of lethal force against drug suspects who posed no immediate threat to life, combined with the documented falsification of official records to justify killings as self-defence, may constitute a violation of the prohibition on torture and other ill-treatment. The convergence of multiple international human rights bodies in their assessment of the drug war's incompatibility with binding treaty obligations creates a compelling case for fundamental reform of drug enforcement policy and practice.

B. The ICC Investigation and the Complementarity Question

The ICC authorised the resumption of a formal investigation into the situation in the Philippines in July 2023,²⁵ following the Philippines' withdrawal from the Rome Statute in 2019. The Pre-Trial Chamber found a reasonable basis to believe that crimes against humanity — specifically, murder and other inhumane acts as part of a widespread or systematic attack against the civilian population — had been committed in the context of the anti-drug campaign.

The complementarity question — whether the ICC may exercise jurisdiction notwithstanding a state's claim to be investigating and prosecuting the relevant conduct domestically — is central to the Philippines' defence against the investigation. Attorney del Rosario has persuasively argued²⁶ that the Philippine government's formation of inter-agency review boards to investigate drug war killings does not satisfy the complementarity standard under Art. 17 of the Rome Statute, because the investigations are not 'genuine' within the meaning of that provision: they are designed not to bring perpetrators to justice but to shield them from ICC accountability.²⁷

The ICC investigation creates both a direct accountability mechanism and a significant structural incentive for domestic reform. Philippine officials responsible for drug war operations who have not yet been the subject of domestic accountability proceedings face the prospect of international criminal prosecution if the ICC proceeds to

²⁶Marco Antonio R. del Rosario, 'ICC Jurisdiction and the Philippine Drug War: Complementarity, Admissibility, and the State's Duty to Investigate' (2023) 21 *Journal of International Criminal Justice* 873, 891. Attorney del Rosario argues that the Philippine government's formation of inter-agency review boards to investigate drug war killings does not satisfy the complementarity standard under Art. 17 of the Rome Statute because the investigations are not genuine within the meaning of that provision.

charges. This incentive structure, while imperfect, may provide the external pressure necessary to overcome the institutional resistance to accountability that has characterised the domestic response to date.

VI. Toward a Human Rights-Compliant Reform Framework

Professors Santos, de Leon, and Tobias have proposed a comprehensive drug policy reform framework drawing on the Portuguese decriminalisation model and Colombian harm reduction experience.²⁸ This article endorses the broad outlines of their framework and supplements it with specific proposals directed at the three structural failings identified in the preceding analysis: the absence of due process in drug enforcement operations, the inadequacy of domestic accountability mechanisms, and the failure to operationalise ICCPR obligations in domestic law and practice.

A. Statutory Reform of RA 9165

Republic Act No. 9165²⁹ should be amended to prohibit the use of administrative watchlists as the basis for targeted police operations without prior judicial authorisation. A dedicated drug court system, empowered to review watchlist inclusions and issue narrowly scoped operational authorisations, would bring drug enforcement within the constitutional due process framework and create a judicial record that enables post-hoc accountability. The mandatory minimum sentence regime,³⁰ which Professor de Castro-Magbanua has identified as constitutionally infirm, should be replaced with a discretionary sentencing framework that enables courts to distinguish between users, small-scale dealers, and major traffickers.

B. Strengthening the CHR and Domestic Accountability

The CHR should be granted independent prosecutorial authority for human rights violations by state actors, removing the current dependence on DOJ prosecutorial discretion that has enabled systematic non-prosecution of drug war killings.³¹ An independent oversight body for PNP operations — separate from the existing PNP Internal Affairs Service, which has demonstrated institutional capture — should be established with powers of mandatory

²⁸Ana Clarissa Buenaventura Santos, Renato Cruz de Leon and Patrick Louis Tobias, 'Toward a Human Rights-Compliant Drug Policy in the Philippines: Lessons from Portugal, Colombia, and the Harm Reduction Movement' (2023) 18 *Asian Journal of Comparative Law* 199, 224. The authors propose a comprehensive drug policy reform framework grounded in public health principles and human rights obligations, drawing on successful decriminalisation models from Portugal and harm reduction programmes from Colombia.

investigation, disciplinary action, and criminal referral. The writ of amparo mechanism³² should be strengthened by establishing a rebuttable presumption that any killing of a person on an official watchlist in the course of a police operation constitutes a violation of the right to life absent compelling affirmative evidence of genuine self-defence.³³

C. ICCPR Implementation and International Engagement

The Philippines should enact a comprehensive Human Rights Act incorporating ICCPR obligations into domestic law and establishing a cause of action for violations by state actors. Engagement with the ICC investigation should be reframed as an opportunity for institutional learning rather than a threat to national sovereignty: the complementarity framework, properly understood, incentivises genuine domestic accountability rather than penalising it.³⁴

VII. Conclusion

The Philippines' drug war has produced one of the most severe human rights crises in the country's post-authoritarian democratic history. The systematic killing of drug suspects without judicial process, the falsification of official records, and the failure of domestic accountability mechanisms constitute not merely violations of individual rights but a fundamental attack on the constitutional order established in 1987 as a response to the abuses of the Marcos era.³⁵

The convergence of domestic constitutional law,³⁶ binding ICCPR obligations,³⁷ and the ICC's exercise of jurisdiction³⁸ creates both a legal imperative and a political opportunity for comprehensive reform. The reform framework proposed in this article — statutory reform of RA 9165, strengthened domestic accountability mechanisms, and full implementation of international obligations — provides a pathway towards a drug enforcement system that is simultaneously effective and rights-compliant. The experience of Portugal and Colombia demonstrates that such a system is not merely achievable in theory but has been achieved in practice.³⁹ The question for the

Philippines is not whether reform is possible but whether the political will to pursue it can be mobilised in the face of entrenched institutional interests and persistent impunity.

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