

**INTERNATIONAL CRIMINAL COURT OFFICE OF THE
PROSECUTOR’S REPORT ON PRELIMINARY EXAMINATION
ACTIVITIES – PHILIPPINES (SOUTH CHINA SEA)***

In early 2019, the Office received a communication alleging that Chinese officials have committed crimes against humanity within the Court’s jurisdiction in connection with certain activities committed in particular areas of the South China Sea. The communication alleged that China has (i) intentionally and forcibly excluded Philippine nationals from making use of the resources in certain relevant areas of the sea (such as blocking Filipino fishermen’s access to traditional fishing grounds at Scarborough Shoal); (ii) engaged in massive illegal reclamation and artificial island-building in the Spratly Islands, causing significant damage to the marine life in the area; and (iii) tolerated and actively supported illegal and harmful fishing practices by Chinese nationals, which likewise has caused serious environmental damage. The communication alleged that such conduct not only violates the law of sea but gives rise to crimes against humanity, namely other inhumane acts and persecution under articles 7(1)(k) and 7(1)(h) of the Statute. The communication alleged that the crimes fall within the Court’s territorial jurisdiction as they occurred in particular within Philippines’ exclusive economic zone (“EEZ”) and continental shelf, including in Scarborough Shoal and the Kalayaan Island Group, and that the acts occurred within the period when the Philippines was a State Party to the Statute.

With respect to these allegations, the focus of the Office’s analysis primarily turned on an initial threshold issue of whether the preconditions to the exercise of the Court’s jurisdiction are met: i.e. whether a State’s EEZ falls within the scope of its territory under article 12(2)(a) of the Statute.

The crimes referred to in the communication were allegedly committed by Chinese nationals in the territory of the Philippines. China is not a State Party to the Rome Statute. Accordingly, the Court lacks personal jurisdiction. However, the Court may exercise territorial jurisdiction over the alleged crimes to the extent that they may have been committed in Philippine territory during the period when the Philippines was a State Party, namely 1 November 2011 until 16 March 2019. The information available confirms that the alleged conduct in question occurred in

* December 5, 2019, Pages 14-16, Paragraphs 44-51.

areas that are outside of the Philippines' territorial sea (i.e., in areas farther than 12 nautical miles from its coast), but nonetheless within areas that may be considered to fall within its declared EEZ. In this context, the Office's analysis has been conducted *ad arguendo* without taking a position on the different disputed claims with respect to these areas. However, the Office has concluded that a State's EEZ (and continental shelf) cannot be considered to comprise part of its 'territory' for the purpose of article 12(2)(a) of the Statute.

Article 12(2)(a) of the Statute provides that the Court may exercise its jurisdiction in two circumstances: (i) if the "State on the territory of which the conduct in question occurred" is a State Party to the Statute, or (ii) if the "crime was committed" on board a vessel or aircraft registered in a State Party. In the present situation, only the first scenario is potentially applicable. While the Statute does not provide a definition of the term, it can be concluded that the 'territory' of a State, as used in article 12(2)(a), includes those areas under the sovereignty of the State, namely its land mass, internal waters, territorial sea, and the airspace above such areas. Such interpretation of the notion of territory is consistent with the meaning of the term under international law.

Notably, maritime zones beyond the territorial sea, such as the EEZ and continental shelf, are not considered to comprise part of a State's territory under international law. This follows from the consideration that under international law, State territory refers to geographic areas under the sovereign power of a State – i.e., the areas over which a State exercises exclusive and complete authority. As expressed in the *Island of Palmas* case, "sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state."¹¹ Coastal States, however, do not have sovereignty over maritime zones beyond the territorial sea, which essentially marks the seaward frontier of States. Instead, Coastal States may possess only a more limited set of 'sovereign rights' in respect of certain maritime areas beyond the territorial sea, such as the EEZ and continental shelf.

Under the law of the sea, a distinction is made in this regard between 'sovereignty' and 'sovereign rights', in terms of what powers a State may exercise in a particular maritime zone. In the context of the law of the sea, the sovereignty of a State implies its exclusive legal authority over all its internal waters and territorial sea (and where applicable, the archipelagic waters). By contrast, in maritime zones beyond the territorial sea (areas sometimes referred to as 'international waters'), international law confers certain prerogatives on a Coastal

State (and to the exclusion of others), such as fiscal, immigration, sanitary and customs enforcement rights in the contiguous zone and natural resource-related rights in the EEZ and the continental shelf. Such 'sovereign rights' are limited to specific purposes, as enumerated in UN Convention on the Law of the Sea ("UNCLOS"), but do not permit the State to exercise full powers over such areas, as sovereignty might allow.

Overall, in the Office's view, the EEZ (and continental shelf) cannot be equated to territory of a State within the meaning of article 12 of the Statute, given that the term 'territory' of a State in this provision should be interpreted as being limited to the geographical space over which a State enjoys territorial sovereignty (i.e., its landmass, internal waters, territorial sea and the airspace above such areas). Criminal conduct which takes place in the EEZ and continental shelf is thus in principle outside of the territory of a Coastal State and as such, is not encompassed under article 12(2)(a) of the Statute (unless such conduct otherwise was committed on board a vessel registered in a State Party). This circumstance is not altered by the fact that certain rights of the Coastal State are recognised in these areas. While UNCLOS confers functional jurisdiction to the State for particular purposes in such areas, this conferral does not have the effect of extending the scope of the relevant State's territory but instead only enables the State to exercise its authority outside its territory (i.e., extraterritorially) in certain defined circumstances.

In the present situation, the conduct alleged in the communication received did not occur in the territory of the Philippines, but rather in areas outside its territory, purportedly in its EEZ and continental shelf. Further, while article 12(2)(a) also extends the Court's jurisdiction to crimes committed on board vessels registered in a State Party, this condition likewise is not met, given that the alleged crimes were purportedly committed on board Chinese registered vessels. Finally, as previously highlighted, the remaining basis for the exercise jurisdiction (active personality) under article 12(2)(b) is also not met, given the Chinese nationality of the alleged perpetrators in question. Accordingly, the Office concluded that the crimes allegedly committed do not fall within the territorial or otherwise personal jurisdiction of the Court