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PRE-TRIAL CHAMBER I

Before: **Judge Péter Kovács, Presiding Judge**
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

Public

Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2)

Source: **Office of the Prosecutor**

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor ("Prosecution"), pursuant to article 18(2) of the Rome Statute ("Statute"), requests Pre-Trial Chamber I ("Chamber") to authorise the resumption of the investigation into the situation in the Philippines notwithstanding the Request to defer the investigation submitted by the Government of the Philippines ("GovPH") on 10 November 2021 ("Deferral Request").[1]

2. The Prosecution has carefully analysed the information submitted in support of the Deferral Request, and concluded that the GovPH has not demonstrated that it has investigated or is investigating its nationals or others within its jurisdiction within the meaning of article 18(2).

3. The investigation carried out by the GovPH (as defined by the national proceedings to which they refer) does not sufficiently mirror the investigation to be conducted by the Prosecution. Notably, the GovPH makes no reference at all to any investigation into crimes committed before July 2016, nor to any investigation into crimes other than murder—and, even then, only murders allegedly carried out in police operations, as opposed to murders allegedly carried out in other relevant circumstances. The GovPH does not appear to be investigating any other type of crime alleged in this situation, such as torture and unlawful imprisonment. The GovPH does not appear to be investigating whether any of the alleged crimes were committed pursuant to a policy or occurred systemically, or whether any person in the higher echelons of the police or government may be criminally responsible. For these reasons alone, the Court should not defer to the GovPH's investigation.

4. Furthermore, and in any event, the information presented by the GovPH is also insufficient in other ways. Despite the Prosecution's requests for further substantiation, the documents submitted by the GovPH largely consist of lists of cases, which do not provide evidence of sufficient specificity and probative value to establish concrete and progressive investigative steps to ascertain criminal responsibility within the parameters of the Court's intended investigation. Even then, the cases referenced by the GovPH relate only to a small proportion of the criminal conduct that allegedly took place in the Philippines between 1 November 2011 and 16 March 2019, in the context of the "war on drugs" ("WoD"). In addition,

[1] ICC-01/21-14-AnxA.

the GovPH refers to non-penal initiatives and proceedings, which do not result in criminal prosecutions and are therefore irrelevant to the Chamber's analysis under article 18.

5. The Prosecution notes that the dialogue with the State envisaged by article 18 of the Statute, and any litigation arising from the Deferral Request, should be conducted and resolved expeditiously. A prompt resolution of the Deferral Request is vital to ensuring that there is no impunity for the crimes allegedly committed in the Philippines.

6. The Prosecution also notes that the interests of victims may be affected as a result of this litigation and proposes that the Chamber allow victims to make written submissions on issues arising from this Request through their legal representatives and/or the Office of Public Counsel for Victims.[2] In order that such participation be meaningful, and also compatible with the efficient and orderly conduct of the proceedings, the Prosecution suggests that a reasonable but limited time period, such as two months, be provided for any written submissions.

Background

7. On 15 September 2021, the Chamber authorised an investigation into the situation in the Philippines.[3] The authorisation extended to any crime within the jurisdiction of the Court, committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called WoD campaign.[4]

8. On 10 November 2021, the GovPH informed the Prosecution that "it is investigating or has investigated its nationals or others within its jurisdiction with respect to the alleged crime against humanity of murder under Article 7(1)(a) of the Statute 'committed throughout the Philippines between 1 July 2016 and 16 March 2019 in the context of the so called war on drugs campaign, as well as in the Davao area between 1 November 2011 and 30 June 2016'".[5] Invoking article 18(2) of the Statute, the GovPH requested deferral to its investigations and proceedings. On the same day, the Prosecution temporarily suspended its investigative activities to assess the scope and effect of the Deferral Request. It publicly notified the Chamber of these developments.[6]

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[2] Applying *mutatis mutandis*, rule 59 of the Rules of Procedure and Evidence ("Rules").
[3] ICC-01/21-12 ("*Philippines* Article 15 Decision").
[4] *Ibid.*
[5] ICC-01/21-14-AnxA, p. 2.
[6] ICC-01/21-14.

9. Since the Deferral Request did not contain any supporting material, the Prosecution, in accordance with rule 53 of the Rules, requested the GovPH to provide, within 30 days, substantiating information regarding the investigations and proceedings referenced in the Deferral Request. The Prosecution reminded the GovPH that a State requesting deferral under article 18(2) of the Statute must substantiate the request with tangible evidence of probative value and a sufficient degree of specificity, demonstrating that concrete and progressive investigative steps have been or are being undertaken to ascertain the criminal responsibility of persons for alleged conduct falling within the scope of the authorised ICC investigation. The Prosecution listed in detail the type of information sought, such as a description of investigative steps taken; police reports, blotter entries, incident reports, forensic notes; any charges, complaints, or official allegations made; copies of evidence and information upon which a determination is expected to be made; written findings including judgments, sentences; and referrals.[7] It also emphasised that whilst article 18 envisages a dialogue between the Prosecution and the State requesting the deferral, the provision also makes clear that such dialogue and any litigation arising from the Deferral Request must be conducted and resolved expeditiously.[8]

10. On 22 December 2021, the GovPH provided the Prosecution a letter with seven documents or compilations of documents (labelled annexes A-G), amounting to 1136 pages.[9] The GovPH also requested additional time "of at least three months to furnish [the Prosecution] with additional information".[10] The Prosecution agreed to the extension, welcoming the provision of additional information until 31 March 2022.[11] The Prosecution informed the GovPH that it would aim to promptly conclude its assessment of the Deferral Request after this date and again referenced the examples of materials set out in its previous letter.[12]

11. On 31 March 2022, the GovPH delivered to the Prosecution a letter and 17 further documents or sets of documents (annexes A-Q), amounting to 445 pages.[13]

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[7] PHL-OTP-0017-4764 at 4765.
[8] PHL-OTP-0017-4764 at 4766-4767.
[9] PHL-OTP-0008-0046 (Annex A to GovPH Letter of 22.12.2021); PHL-OTP-0008-0050 (Annex B to GovPH Letter of 22.12.2021); PHL-OTP-0008-0070 (Annex C to GovPH Letter of 22.12.2021); PHL-OTP-0008-0073 (Annex D to GovPH Letter of 22.12.2021); PHL-OTP-0008-0182 (Annex E to GovPH Letter of 22.12.2021); PHL-OTP-0008-0076 (Annex F to GovPH Letter of 22.12.2021); PHL-OTP-0008-0988 (Annex G to GovPH Letter of 22.12.2021). *See also* PHL-OTP-0008-0043 (GovPH Letter of 22.12.2021).
[10] PHL-OTP-0008-0043 at 0043.
[11] PHL-OTP-0017-4768 at 4768.
[12] *Ibid*.
[13] PHL-OTP-0008-1228 (Annex A to GovPH Letter of 31.03.2022); PHL-OTP-0008-1259 (Annex B to GovPH Letter of 31.03.2022); PHL-OTP-0008-1294 (Annex C to GovPH Letter of 31.03.2022); PHL-OTP-0008-1334 (Annex D to GovPH Letter of 31.03.2022); PHL-OTP-0008-1338 (Annex E to GovPH Letter of 31.03.2022);

12. The Prosecution has informed the GovPH of its intention to file this request and provided a summary of its analysis and conclusions, in accordance with rule 54(2).

Submissions

13. The Chamber should order the resumption of the Court's investigation, notwithstanding the Deferral Request, because the GovPH's investigation is not adequately substantiated and, in any event, does not sufficiently mirror the Court's investigation for the purpose of article 18(2).

14. In its submissions, the Prosecution first gives an overview of the information provided by the GovPH in support of the Deferral Request, and sets out its submissions on the law applicable to analysing this information under articles 17(1) and 18(2) of the Statute. The Prosecution then details its analysis of and conclusions about the information provided by the GovPH under the applicable law. In that analysis, the Prosecution focuses on whether the Philippines is conducting or has conducted proceedings relevant to the Prosecution's intended investigation. Because the Philippines has not demonstrated that such proceedings exist, the Prosecution does not address whether the Philippines is willing or able genuinely to proceed, under articles 17(2) and (3) of the Statute.

I. OVERVIEW OF INFORMATION SUBMITTED BY THE GOVPH

15. This section describes the type and content of information submitted by the GovPH to the Prosecution between 10 November 2021 and 31 March 2022 in support of its Deferral Request.[14] The Prosecution makes the totality of the information available to the Chamber in accordance with rule 54(1) of the Rules.

PHL-OTP-0008-1341 (Annex F to GovPH Letter of 31.03.2022); PHL-OTP-0008-1348 (Annex G to GovPH Letter of 31.03.2022); PHL-OTP-0008-1392 (Annex H to GovPH Letter of 31.03.2022); PHL-OTP-0008-1416 (Annex I to GovPH Letter of 31.03.2022); PHL-OTP-0008-1451 (Annex J to GovPH Letter of 31.03.2022); PHL-OTP-0008-1476 (Annex K to GovPH Letter of 31.03.2022); PHL-OTP-0008-1505 (Annex L to GovPH Letter of 31.03.2022); PHL-OTP-0008-1532 (Annex M to GovPH Letter of 31.03.2022); PHL-OTP-0008-1580 (Annex N to GovPH Letter of 31.03.2022); PHL-OTP-0008-1630 (Annex O to GovPH Letter of 31.03.2022); PHL-OTP-0008-1633 (Annex P to GovPH Letter of 31.03.2022); PHL-OTP-0008-1661 (Annex Q to GovPH Letter of 31.03.2022). *See also* PHL-OTP-0008-1222 (GovPH Letter of 31.03.2022).

[14] The overwhelming majority of the information submitted by the GovPH is in the English language. The Prosecution notes that discrete pages of some of the documents submitted by the GovPH are in one of the Philippine languages, however these portions are irrelevant for the Prosecution's assessment of the Deferral Request and the Prosecution does not rely on them.

16. The GovPH has stated that it "has undertaken, and continues to undertake, thorough investigations of all reported deaths during anti-narcotic operations in the country".[15] In support of its Deferral Request, the GovPH has predominantly provided lists of cases purportedly being reviewed or pending before different Philippine institutions. Despite the Prosecution's requests for more detailed information,[16] the GovPH has, with very few exceptions, not provided any underlying files or other materials capable of substantiating its actions.

I.A. Information related to the activities of the Department of Justice (DOJ) Panel

17. The GovPH has referred extensively to the work of the DOJ Panel, stating that it is "undertak[ing] a judicious review of anti-narcotic operations where deaths occurred".[17] However, no specific information regarding the DOJ's current activities or its mandate and powers is provided. Instead, the GovPH has submitted that the DOJ will be reviewing "over 6000 administrative cases in the dockets of [Philippine National Police – Internal affairs Service, PNP-IAS]",[18] and that the DOJ is looking into cases in the dockets of the National Prosecution Service ("NPS") that involve "concluded and ongoing preliminary investigations into deaths".[19] When describing upcoming activities, the GovPH has provided the Prosecution with three lists of cases and a compilation of eight case files, collated from different regional prosecution services, that it says the DOJ Panel will be reviewing next.[20] The Prosecution sets out its analysis and conclusions about the activities of the Panel in section III.A below. It sets out its analysis and conclusions of the lists and case files collated from regional prosecution offices in section III.D, together with information about other cases purportedly pending before courts or dealt with by prosecutors.

I.B. Information about cases referred to the National Bureau of Investigation (NBI) by the DOJ

18. The GovPH informed the Prosecution that the DOJ Panel has reviewed and referred 302 cases to the NBI for "further investigation" and "criminal case build up". It has provided four

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[15] ICC-02/21-14-AnxA, p. 4.
[16] PHL-OTP-0017-4764 and PHL-OTP-0017-4768.
[17] ICC-02/21-14-AnxA, p. 4.
[18] ICC-02/21-14-AnxA, p. 4.
[19] ICC-02/21-14-AnxA, p. 4.
[20] PHL-OTP-0008-1222 at 1223-1224. *See also* PHL-OTP-0008-1334, PHL-OTP-0008-1338, PHL-OTP-0008-1341; PHL-OTP-0008-1348, PHL-OTP-0008-1392, PHL-OTP-0008-1416, PHL-OTP-0008-1451, PHL-OTP-0008-1476, PHL-OTP-0008-1505, PHL-OTP-0008-1532, PHL-OTP-0008-1580.

separate documents listing these cases, which are discussed in section III.C below. The documents are:

- A table titled "Information table on the fifty two (52) cases submitted by the PNP and the PNP-IAS to the Department of Justice".[21] The GovPH stated that these cases were "referred by the DOJ to the National Bureau of Investigation for criminal case build up".[22] The table contains the following information: docket number, name/s of deceased suspect and place and date of incident, PNP-IAS findings/recommendations, and "observations".
- Three lists of cases emanating from three different areas in the Philippines: Angeles City, Pampanga (list of 58 cases),[23] City of San Jose Del Monte, Bulacan (list of 81 cases),[24] and Bulacan Province (list of 111 cases),[25] amounting to 250 cases in total. They are described as "cases initially filed by police officers and personnel who conducted buy-bust and anti-illegal drug operations, and the respondents therein died as result of the operations".[26] The lists record the following information: case number, law enforcement officers involved in the operation, suspect/s (meaning subjects targeted in the operations), place and date of incident, and "remarks". The GovPH submitted that the listed cases "have been given to the National Bureau of Investigation to conduct further investigation and case build-up" and that the latter has been "instructed to conduct further investigation and case build-up for purposes of ascertaining criminal liability".[27]

I.C. Information about cases collated from different prosecution offices

19. The GovPH has provided information and five different sets of documents that relate to cases purportedly listed in the dockets of different prosecution offices in the country. The Prosecution's analysis of and conclusions about these documents is addressed in section III.D below.

20. First, the GovPH has provided a table titled "Partial listing of cases in the dockets of the national prosecution service relating to investigations into deaths during anti-illegal drug operations", listing 13 cases.[28] The table contains the following information for each case listed:

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[21] PHL-OTP-0008-0050.
[22] PHL-OTP-0008-0043 at 0044.
[23] PHL-OTP-0008-1228.
[24] PHL-OTP-0008-1259.
[25] PHL-OTP-0008-1294.
[26] PHL-OTP-0008-1222 at 1222.
[27] PHL-OTP-0008-1222 at 1223.
[28] PHL-OTP-0008-0046.

docket number, investigating office, region, name of deceased persons, law enforcement units/respondents involved, and "status [of the case] (as of May 2021)".

21. Second, the GovPH has provided a memorandum and accompanying case files about three incidents of killings during police operations, in which criminal complaints were filed by the NBI with the relevant prosecution authorities.[29] The three incidents had been previously included in the list of 52 cases referred by the DOJ Panel to the NBI in October 2021 (referenced above at paragraph 18).[30] In two cases that fall within the temporal scope of the ICC investigation, the NBI concluded that the police narrative of the incident had been fabricated, and recommended charges of murder, planting of evidence, and perjury to be instituted against four police officers in each incident.[31] In both cases, the complaints were filed by the NBI in March 2022.[32] Both cases are awaiting preliminary examination before the Office of the Provincial Prosecutor of Agusan del Sur as of 29 March 2022.[33]

22. Third, the GovPH has provided three lists of cases collated from the dockets of different (regional) prosecution offices (also mentioned above at paragraph 17):[34] a list of four cases from Regional Prosecution Office II;[35] a list with 44 entries, related to over 20 individual incidents, compiled by Regional Prosecution Office V;[36] and a list of 15 cases "from the dockets of the Philippine National Police – Regional Internal Affairs Service (Cordillera) that involve deaths in anti-illegal drug operations in Baguio City and Provinces of Abra, Benguet, and Mountain Province," accompanying a memorandum from Regional Prosecution Office I.[37] All lists cover the period from July 2016 to November 2021.[38]

23. Fourth, the GovPH has provided eight case files, which relate to eight separate incidents in which individuals were killed by the police.[39] The GovPH describes these documents as

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[29] PHL-OTP-0008-1630; PHL-OTP-0008-1633; PHL-OTP-0008-1661.
[30] PHL-OTP-0008-0050 at 0052, 0056, 0058. Two of the three cases fall within the temporal scope of the ICC investigation (killings of Caballes and Albaran), whereas one falls outside of it (killing of Vedaño).
[31] PHL-OTP-0008-1633.
[32] PHL-OTP-0008-1633 at 1636, 1647.
[33] PHL-OTP-0008-1633 at 1633-1634.
[34] PHL-OTP-0008-1222 at 1223. The GovPH referred to these lists in the context of its submissions on the work of the DOJ Panel, stating that these lists "identify cases that will form the next batch of cases that the Department of Justice will evaluate".
[35] PHL-OTP-0008-1338.
[36] PHL-OTP-0008-1341.
[37] PHL-OTP-0008-1222 at 1223; PHL-OTP-0008-1334.
[38] PHL-OTP-0008-1222 at 1223.
[39] PHL-OTP-0008-1222 at 1224; PHL-OTP-0008-1348; PHL-OTP-0008-1392; PHL-OTP-0008-1416; PHL-OTP-0008-1451; PHL-OTP-0008-1476; PHL-OTP-0008-1505; PHL-OTP-0008-1532; PHL-OTP-0008-1580.

"[c]ase folders from Regional Prosecution Office XII that contain forty-two (45) [sic] records of complaints filed by police officers who conducted buy-bust and anti-illegal drug operations".[40] It is, however, unclear what these numbers refer to. Each case file relates to a single incident and each contains a complaint filed by the police against the deceased individual and documents related to the incident.[41]

24. Fifth, the GovPH has provided a summary of and case documents in the criminal proceeding *People of the Philippines v. PO3 Arnel Oares y Gastilo, PO1 Jeremias Pereda y Tolete, and PO1 Jerwin Cruz y Roque*.[42] This criminal proceeding relates to the killing of Kian delos Santos during a "One Time, Big Time Operation" on 16 August 2017 in Caloocan City. The Prosecution acknowledged this proceeding, including the issuance of the judgment, in its Request for authorisation of the investigation into the situation pursuant to article 15(3).[43]

I.D. Information about writ of *amparo* proceedings

25. The GovPH submitted that "aside from […] criminal, civil, and administrative remedies, persons who feel aggrieved by the anti-narcotic operations may file a petition for a writ of *amparo* and/or petition for a writ of *habeas data*".[44] It provided a general informational summary about these proceedings,[45] and case files relating to four concrete *amparo* proceedings, which are discussed below in section III.A.

I.E. Other information submitted by the GovPH

26. The GovPH also provided a general information note about the Philippine procedure for preliminary investigations.[46] Further, it has referred to the procedures before the PNP IAS and the existence of the UN Joint Programme on Human Rights as relevant.[47] The GovPH has also submitted that "it is studying the possibility of further tapping the expertise of the Administrative Order 35 Program".[48] These activities are also addressed below in section III.A.

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[40] PHL-OTP-0008-1222 at 1224.
[41] PHL-OTP-0008-1222 at 1223-1224. The GovPH referred to these files in the context of its submissions on the work of the DOJ Panel, stating that the records of these cases will be used by the DOJ to re-evaluate whether police officers involved in these incidents committed violations and whether they should be held criminally or administratively liable.
[42] PHL-OTP-0008-0988.
[43] ICC-01/21-7-Red, para. 117 ("Article 15 Request").
[44] ICC-01/21-14-AnxA, p. 5.
[45] PHL-OTP-0008-0073.
[46] PHL-OTP-0008-0070.
[47] ICC-01/21-14-AnxA, p. 3, 6-7.
[48] ICC-01/21-14-AnxA, p. 4.

II. APPLICABLE LAW

27. In deciding on the merits of the Deferral Request, the Chamber will need to address three legal issues: (i) the required substantiation and the relevant burden of proof, (ii) the nature of the assessment that it undertakes to determine whether the Deferral Request is adequate to justify a deferral of the Court's investigation, and (iii) the comparators which are analysed in order to carry out that assessment.

28. In the Prosecution's submission, as the following paragraphs explain, the State requesting deferral under article 18 has the burden to satisfy the Prosecution, and, where applicable, the Chamber, that deferral is justified. Since the Chamber must consider the factors in article 17 during these proceedings, the Court's established practice in deciding upon admissibility under article 17 in other procedural contexts provides direct guidance: both in relation to how the Court has resolved admissibility challenges to specific cases under article 19(2), and in assessing admissibility of situations (based on potential cases) when deciding upon requests to authorise investigations under article 15(3). In these contexts, the Court has adopted comparators bearing in mind the procedural stage and the forensic context. Specifically, for the purpose of article 18(2), this means that the information presented by the State must be compared to see if it sufficiently mirrors the scope of the Prosecution's intended investigation as defined by the parameters of the authorised situation.

II.A. The State requesting deferral must substantiate its request and demonstrate that deferral is justified

29. Article 18(2) explicitly provides that the Prosecutor shall defer to a "State's *investigation*", and rule 53 requires that the State requesting deferral must do so in writing and "*provide information* concerning its investigation".

30. Accordingly, the Prosecution submits that the State requesting deferral not only bears the "evidential burden" to substantiate its request with relevant arguments and evidence, but also the "burden of proof"[49]—in the sense that it is for the State to satisfy the Prosecution and,

[49] *See* K. Ambos, Treatise on International Criminal Law (2nd Edition): Vol. I: Foundations and General Part (Oxford, 2021), pp. 414-415; ICC-01/09-01/11-1334-Anx-Corr ("*Ruto and Sang* Conduct Decision, Judge Eboe-Osuji's Separate Opinion"), para. 79-80 (distinguishing between persuasive burden and evidential burden); J. Pauwelyn, *Defences and the Burden of Proof in International* Law in L. Bartels and F. Paddeu (eds.), Exceptions in International Law, 1st Ed. (OUP, 2020), p. 89 (distinguishing between the burden of raising a claim, burden of production of arguments and evidence to substantiate or oppose a claim, and the burden of persuasion or "the real burden of proof" to prove or disprove a claim). The person/entity bearing the "evidential" burden may not coincide with the person/entity bearing the "burden of proof": ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), para. 167.

if applicable, the Chamber of the existence of a national investigation which meets the requirements of articles 17 and 18(2) and thus justifies a deferral. If the State fails to make this showing, then the Chamber must authorise the resumption of the Court's investigation.

II.A.1. The State requesting deferral must substantiate its request

31. A State requesting a deferral must substantiate its request; that is, it must provide *sufficient information* to support the request and to enable a determination that the deferral is justified. This is expressly required by rule 53, which stipulates that "[w]hen a State requests a deferral pursuant to article 18, paragraph 2, that State shall make this request in writing and *provide information concerning its investigation*", and rule 54(1), which requires the Prosecution to transmit such information to the Chamber along with its article 18(2) application.[50] Since the State is in a unique position to provide information about its own proceedings, the express requirement of rule 53 is also consistent with the article 18 procedure, which conditions any deferral upon an assessment of the merits of the deferral request—initially by the Prosecution, and ultimately by the Chamber.

32. Providing evidence to substantiate an allegation is a hallmark of judicial proceedings. Thus, the information provided by the State must be relevant, probative, and sufficiently specific to enable the Prosecution—and the Chamber, if applicable—to ascertain the stage of the domestic proceedings, assess the investigative steps taken, and determine whether deferral is justified considering the State's proceedings as a whole.[51]

33. In other procedural contexts (such as under articles 15 and 19), when carrying out article 17 admissibility assessments, Chambers have required evidence with a "sufficient degree of

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[50] Since the Court's legal framework expressly requires that the State's request is accompanied by "information" (see rule 53), it could be argued that an "empty" request such as, for instance, a letter merely requesting deferral without providing any information or attaching any material regarding the domestic proceedings is not a well-formed "request" within the terms of article 18(2) and does not require the Prosecution to suspend its investigation.
[51] ICC-01/15-12-Anx-Corr ("*Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op."), para. 41 (noting that information regarding the nature of the investigative steps allegedly carried out and its flaws are decisive for an accurate article 17 admissibility determination); J. Stigen, The Relationship between the International Criminal Court and National Jurisdictions - The Principle of Complementarity, (Martinus Nijhoff Publishers, Leiden-Boston, 2008) ("Stigen"), p. 133 (noting that the State must provide sufficient information for the Prosecutor and the Chamber to make their determinations); J. Holmes *Complementarity: National Courts versus the ICC* in Cassesse A., Gaeta P. and Jones J. (ed), The Rome Statute of the International Criminal Court, Vol. I (Oxford, 2002) ("Holmes 2002"), p. 681 ("Article 18 and Rule 53 provide that the information must be sufficiently detailed to demonstrate that the State is investigating or has investigated criminal acts which relate to the information provided by the Prosecutor in the original notification").

specificity and probative value"[52] that establishes "tangible, concrete and progressive investigative steps" seeking to ascertain a person's criminal responsibility,[53] such as "by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[54] Relevant evidence is not confined to "evidence on the merits of the national case that may have been collected as part of the purported investigation to prove the alleged crimes",[55] but also extends to "all material capable of proving that an investigation or prosecution is ongoing".[56] This includes "directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]".[57]

34. By contrast, mere evidence of a State's *preparedness or willingness* to investigate or prosecute is not sufficient in and of itself to establish that it is actually carrying out a relevant investigation or prosecution.[58] Nor is it enough for a State to rely on judicial reform actions and promises for future investigative activities.[59] Likewise, it will never suffice for a State *merely to assert* that investigations are ongoing.[60] These same principles apply, *mutatis mutandis*, to the assessment of State requests for deferral under article 18(2).

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[52] ICC-01/09-01/11-307 ("*Ruto et al.* Admissibility AD"), para. 2, 62-63; ICC-01/09-02/11-274 ("*Muthaura et al.* Admissibility AD"), para. 2, 61-62; ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility AD"), para. 29; ICC-01/11-01/11-662 ("*Gaddafi* Second Admissibility Decision"), para. 32; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 48 (unsigned documents should have been found lacking probative value).
[53] *Simone Gbagbo* Admissibility AD, para. 122, 128; ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), para. 148, 162. *See also* ICC-02/17-33 ("*Afghanistan* Article 15 Decision"), para. 72; ICC-01/11-01/11-344-Red ("*Gaddafi* First Admissibility Decision"), para. 73; ICC-01/11-01/11-239 ("*Gaddafi* Further Submissions Decision"), para. 11.
[54] *Ruto et al.* Admissibility AD, para. 41, 69; *Muthaura et al.* Admissibility AD, para.1, 40; *Burundi* Article 15 Decision, para. 148.
[55] ICC-02/11-01/12-47-Red ("*Simone Gbagbo* Admissibility Decision"), para. 29; *Gaddafi* Further Submissions Decision, para. 10-11. *Contra* D. Nsereko and M. Ventura, *'Article 18'*, in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Nsereko/Ventura"), p. 1025, nm. 42 (suggesting - without any support - that a State should be given the opportunity to request deferral even if it has not started its investigations but is able and willing to do so), *but see* p. 1027, nm. 49 (noting that issues of admissibility of cases under article 17 are similar to those that confront the Pre-Trial Chamber on an application by the Prosecutor under article 18(2)).
[56] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, para. 10-11.
[57] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, para. 10-11. However, mere instructions to investigate were not considered enough: ICC-01/09-01/11-101 ("*Ruto et al.* Admissibility Decision"), para. 68.
[58] *Ruto et al.* Admissibility AD, para. 41; *Muthaura et al.* Admissibility AD, para. 40. Nor can admissibility be assessed with respect to non-existing proceedings: ICC-02/04-01/15-156 ("*Kony et al.* Admissibility Decision"), para. 51-52. Nor can a State expect to be allowed to amend or provide additional information just because it requested the deferral prematurely: *Ruto et al.* Admissibility AD, para. 100; *Muthaura et al.* Admissibility AD, para. 98.
[59] *Ruto et al.* Admissibility Decision, para. 64; *see also Burundi* Article 15 Decision, para. 162.
[60] *Ruto et al.* Admissibility AD, para. 2, 62-63; *Muthaura et al.* Admissibility AD, para. 2, 61-62; *Simone Gbagbo* Admissibility AD, para. 29, 128.

II.A.2. The State requesting deferral bears the burden of proof

35. A State requesting deferral must demonstrate, on the basis of the information provided, the existence of domestic proceedings justifying deferral under article 18(2). In other words, the State concerned must: firstly, satisfy the Prosecution that deferral is consistent with the applicable law and thus warranted; and secondly, if the deferral request is submitted for judicial scrutiny under article 18(2), the State must equally satisfy the relevant Chamber of its claim.

36. This follows in part from the evidentiary burden expressly placed on the State, and its unique appreciation of the investigation that it is actually conducting.[61] After all, it is the State which conducts the relevant investigations, prosecutions, and court proceedings, and therefore has the best access to the records of those efforts, including case files, police reports, court dockets or judicial decisions. If the burden of proof were reversed, the Prosecution would be obliged to demonstrate the *absence* of such activities, and to do so *without* direct access to any of the underlying materials. Instead, the logic of the evidentiary burden is that, since it is the State which is best equipped to show that its proceedings justify the requested deferral, it should be expected to do so. This is also consistent with rule 52(2), which provides that the State "may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2", and by this means ensure that its deferral request is indeed justified.

37. Further, placing the burden of proof on the State requesting deferral is also consistent with the object and purpose of the Statute. Since a successful deferral request may lead to an indefinite suspension of the Court's investigation into a situation—where potential criminality has already been independently established by means of the Prosecutor's determination under article 53(1) (for referred situations) or the Chamber's determination under article 15(4) (for *proprio motu* situations)—it is appropriate to place the onus on the requesting State to demonstrate that its investigation suffices to justify this step, such that deferral does not mean impunity.

38. This approach is also consistent with the burden of proof under article 19(2), by which a State may challenge the admissibility of particular cases.[62] Indeed, article 18(7) may imply

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[61] *See above* para. 31.
[62] *Al-Senussi* Admissibility AD, para. 166; *Ruto et al.* Admissibility AD, para. 62; *Simone Gbagbo* Admissibility AD, para. 128. Trial Chamber III held that the standard to determine admissibility is balance of probabilities: ICC-01/05-01/08-802 ("*Bemba* Admissibility Decision"), para. 203. The Appeals Chamber has not delved on the matter

some parallel between article 18(2) deferral requests—at least if they are appealed[63]—and article 19(2) challenges, insofar as article 18(7) restricts the scope of a State's subsequent challenges under article 19 to those "on the grounds of additional significant facts or significant change of circumstances".[64]

39. The Prosecution recognises that a State's request for deferral under article 18(2) does not automatically trigger a determination by the Chamber, but that this only occurs on application by the Prosecutor—and *if* the Prosecutor has assessed that deferral is not warranted. However, this does not mean that the Prosecution assumes any burden of proof.[65]

40. Rather, the drafters' choice in adopting this bespoke procedural mechanism—in which the Prosecution makes an initial assessment of a request for deferral, and only triggers litigation before the Chamber if considered necessary—responds to the dialogue that article 18 seeks to encourage between the Prosecution and States with jurisdiction over article 5 crimes.[66] It is also consistent with the fact that the Prosecution analysed questions of admissibility during its preliminary examination, and is best placed to appreciate the range of potential cases which fall within the parameters of the situation, and thus define the investigation. But nothing in these considerations implies that, having determined that the State's request for deferral should indeed proceed to adjudication by the Chamber, the Prosecution supplants the State's burden of proof. To the contrary, if the Prosecution seises the Pre-Trial Chamber of an application under article 18(2) the Prosecution's function is not analogous to that of a moving party, but

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and only confirmed that the challenging party must present evidence of "sufficient degree of specificity and probative value" (*see above* fn. 52).

[63] *Cf.* W. Schabas, The International Criminal Court: a Commentary on the Rome Statute, 2nd Ed. (Oxford: OUP, 2016) ("W. Schabas 2016"), p. 481 (suggesting that "article 18(7) only applies when a State has appealed a ruling of the Pre-Trial Chamber pursuant to article 18(5)").

[64] Holmes 2002, p. 682 (noting that the legal texts suggest that "this process constitutes a form of challenge, even though the State has only requested a deferral"); W. Schabas 2016, p. 475 (quoting US Ambassador David Scheffer explaining the rationale for this process, and qualifying it a "challenge by a national judicial system").

[65] *Contra* Nsereko/Ventura, p. 1027, nm. 48 (noting that the Prosecutor has both the evidentiary and legal burden to a preponderance of evidence due to the principle "who asserts must prove" but then comparing an article 18(2) application with article 19 admissibility challenges and disregarding that in both instances a State asserts jurisdiction and provides substantiating information); *see also* Stigen, p. 137 (suggesting that the State bears the burden to establish the existence of domestic proceedings, while the Prosecution bears the burden to demonstrate lack of genuineness, unless the State does not provide sufficient information where the State also bears the burden).

[66] *See* Holmes 2002, p. 681 (noting that article 18 and rules 52 and 53 encourage a dialogue between the State and the Prosecutor to ensure that there is no overlap in their respective areas of interest); C. Stahn, *'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?*,' in C. Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford, 2015), p. 240 (noting that the Statute encourages a dialogue between the State and the Prosecutor to ensure that there is no overlap in their respective areas of interest). *See also* Stigen, p. 132. Note however that the Prosecution generally engages with States during preliminary examinations; thus, it may be that exhaustive dialogue has preceded the opening of an investigation.

rather as a *respondent* to the deferral request made by the State.[67] This is implicit, for example, in the duty on the Prosecution under rule 54(1) to forward to the Chamber "[t]he information provided by the State under rule 53"—which then forms the primary context for the Chamber's examination of the relevant issues, together with the submissions of the Prosecution.[68]

II.B. The core principles for assessing admissibility under article 17(1) apply equally to the Chamber's preliminary ruling on admissibility under article 18(2)

41. Notwithstanding the procedural context specific to article 18(2)—assessing whether the Court's investigation should be deferred to a State's investigation before the Prosecution has had an opportunity to investigate—the Prosecution submits that the same core principles for assessing admissibility under article 17 at other procedural stages (such as under articles 15 and 19) remain applicable. Indeed, in making its preliminary ruling on admissibility under article 18(2) of the Statute, rule 55(2) expressly requires the Chamber to "consider the factors in article 17".[69] Accordingly, the Chamber should: (i) assess the State's proceedings based on the facts as they currently exist; (ii) adopt a two-step process for its assessment; and (iii) determine that there is a conflict of jurisdiction for the purposes of its admissibility assessment only if the State's proceedings sufficiently mirror those of the Court.

42. A closely related question is that of *what* the article 17 assessment should be applied *to*. As explained further below,[70] the Prosecution submits that the practice of the Court demonstrates that the appropriate "comparators" for the article 17 assessment are identified in light of the procedural context—and that, consequently, these should be tailored to the procedural context of article 18.

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[67] As a respondent, the Prosecution will substantiate its arguments: *see* ICC-01/11-01/11-466-Red ("*Al-Senussi* Admissibility Decision"), para. 208; *Al-Senussi* Admissibility AD, para. 167.
[68] This follows from rule 55(2), which states that "[t]he Pre-Trial Chamber shall examine the Prosecutor's application and *any* observations submitted by a State that requested a deferral" (emphasis added)—and thus implies that further observations *may* be received from the State requesting a deferral in accordance with the Chamber's power under rule 55(1), but that such observations are not essential.
[69] *Ruto et al.* Admissibility AD, para. 38.
[70] *See below* para. 53-66.

II.B.1. The assessment must be conducted on the basis of the facts as they exist

43. For the purpose of article 17, the Chamber must consider the relevant facts as they exist at the time of the Court's complementarity assessment.[71] In the context of a requested deferral under article 18, this requires that relevant domestic proceedings must already have existed at the time when the State requests the deferral, and that the Chamber should not consider any proceedings that may occur in the future.[72] In other words, in the circumstances of this situation, the Chamber must consider the domestic proceedings that existed as of 10 November 2021, the date of the Deferral Request—or, at the latest 31 March 2022, which was the last deadline for provision of additional substantiating information.[73]

II.B.2. Complementarity assessments entail a two-step process

44. Article 17 entails two inquiries:

- First, whether the State with jurisdiction is conducting—or has conducted—relevant domestic proceedings within the terms of article 17(1)(a) to (c). In effect, the Court must determine whether there is an apparent conflict of jurisdiction between the ICC and the State concerned. This is assessed in accordance with the three-part scheme set out in article 17,[74] namely whether: (i) there are ongoing investigations or prosecutions; (ii) investigations have been completed and the State has decided not to prosecute the person concerned;[75] or (iii) the person has already been tried for the same conduct.[76]

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[71] ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 56; *see also* *Ruto et al.* Admissibility Decision, para. 70; *Ruto et al.* Admissibility AD, para. 83; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 58 ("Article 17 of the Statute is drafted in a manner where the relevant Chamber is duty bound to make a determination on the basis of facts as they exist"). This refers to the proceedings before the first instance chamber and does not include subsequent proceedings on appeal: ICC-01/09-01/11-234 ("*Ruto et al.* Updated Investigation Report AD") para. 10; ICC-01/11-01/11-547-Red ("*Gaddafi* First Admissibility AD"), para. 41-43; *Al-Senussi* Admissibility AD, para. 57-59. *See also* *Kony et al.* Admissibility Decision, para. 51-52 (" On the basis of the above considerations, the Chamber takes the view that it would be premature and therefore inappropriate to assess the features envisaged for the Special Division and its legal framework. […] To go beyond this would be tantamount to engaging in hypothetical judicial determination, which appears per se inappropriate. Pending the adoption of all relevant legal texts and the implementation of all practical steps, the scenario against which the admissibility of the Case has to be determined remains … one of total inaction on the part of the relevant national authorities […]").

[72] Stigen, p. 134 ("In order for a request for deferral under article 18(2) to succeed, the state must have started an investigation when it makes the request, i.e. no later tha[n] one month from the time it was notified or otherwise acquired knowledge of the Prosecutor's intention to investigate.").

[73] PHL – Letter from ICC Prosecutor to GovPH requesting substantiating information, 23 November 2021, PHL-OTP-0017-4764.

[74] *See below* para. 48.

[75] *Katanga* Admissibility AD, para. 78; *Simone Gbagbo* Admissibility AD, para. 27.

[76] With respect to articles 17(1)(c) and 20(3): *Gaddafi* Second Admissibility Decision, para. 36, 79; ICC-01/11-01/11-695 ("*Gaddafi* Second Admissibility AD"), para. 58.

- Second—and only if the first question is answered in the affirmative[77]—whether the domestic proceedings are not, or were not, "genuine". In particular, whether the domestic authorities are unwilling or unable to conduct the relevant proceedings within the meaning of articles 17(2) and (3) of the Statute.[78]

45. Chambers have consistently followed this two-step process in determining admissibility. This was the case not only when considering the admissibility of cases *proprio motu* under article 19(1), but also in resolving article 19(2) challenges by States or suspects and accused persons.[79] Chambers likewise followed this two-step process in assessing the admissibility of situations, when deciding upon the Prosecution's requests to authorise investigations under article 15(3) of the Statute.[80]

46. The Prosecution submits that this same two-step process should be applied when deciding upon a State's deferral request under article 18(2), given that it entails a "[p]reliminary ruling regarding admissibility" and requires consideration of "the factors under article 17".[81] There is no reason to depart from the consistent jurisprudence of the Court in this respect.

- First, this interpretation is consistent with the criteria of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"). It best suits the stated purpose of article 18 (expressly referring, in its title, to "admissibility"), the context provided by the general terms in which article 17 is expressed (applying to "[i]ssues of admissibility" without further specification), and the object and purpose of the Statute, namely, to end

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[77] *Katanga* Admissibility AD, para. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27. *See also* W. Schabas and M. El Zeidy, '*Article 17*', in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Schabas/El Zeidy"), p. 963, nm. 30.
[78] Statute, article 17(2)-(3); *see also* article 20(3) (if there has been a final decision).
[79] *See e.g. Katanga* Admissibility AD, para. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27.
[80] ICC-01/09-19-Corr ("*Kenya* Article 15 Decision"), para. 53-54; ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15 Decision"), para. 192-193; *Burundi* Article 15 Decision, para. 145-146; ICC-01/15-12 ("*Georgia* Article 15 Decision"), para. 36-50. Although the Appeals Chamber has since clarified that this assessment is not required by article 15(4), and that such matters should be left to any proceedings under article 18, it did not question the manner in which Chambers have conducted the assessments. The Appeals Chamber only opined on the procedural stage in relation to when this assessment should be undertaken by the Chamber: ICC-02/17-138 ("*Afghanistan* Article 15 AD"), para. 35-45; *see also* ICC-01/19-27 ("*Bangladesh/Myanmar* Article 15 Decision"), para. 115-116. The Pre-Trial Chamber may still be potentially called upon to apply this two-step process in reviewing the Prosecution's own assessment of the admissibility of potential cases within referred situations under articles 53(1)(b) and 53(3)(a): ICC-01/13-34 ("*Comoros* First Review Decision"), para. 8-12.
[81] Rules, rule 55(2).

impunity while respecting States' primary responsibility to investigate and prosecute crimes under the Statute.[82]

- Second, neither the drafting history of article 18 nor any other provision of the Statute suggests that article 17 should be interpreted differently for the purpose of deferral requests. To the contrary, the drafting history shows that the belated proposal to create article 18 was not intended to reopen the compromise reached on complementarity.[83] Rather, article 18 was intended to be consistent both with the framework of complementarity in article 17 and (what is now contained in) article 19(1) and (4) of the Statute—whereby a State or person concerned may challenge the admissibility of a concrete case within the framework of article 17.[84]

47. For the reasons explained below, the Prosecution submits that in this situation the Chamber's assessment under article 17(1) may be appropriately halted at the first step, since it has not been shown that relevant domestic proceedings actually exist. However, it notes that factors which are relevant to determine inaction under article 17(1) may also be relevant for determination of unwillingness or inability under article 17(2).[85]

48. Further, articles 17(1)(a) to (c) describe three different stages of domestic proceedings which might be relevant:

- Article 17(1)(a) is concerned with ongoing domestic investigations or prosecutions. Since the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary "to national criminal jurisdictions",[86] this provision relates to domestic proceedings seeking to determine

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[82] *Katanga* Admissibility AD, para. 79 (referring to the aim of the Rome Statute to put an end to impunity and to ensure that the most serious crimes of concern to the international community as a whole must not go unpunished); *see also* ICC-01/14-01/18-678-Red ("*Yekatom Admissibility AD*"), para. 42 (referring to the States' primary duty to exercise criminal jurisdiction); *Gaddafi* Second Admissibility AD, para. 58; *see also Ruto et al.* Admissibility AD, para. 44 (finding that article 17(1)(a)-(c) "favour national jurisdictions, […] to the extent that there actually are, or have been, investigations and/or prosecutions at the national level").
[83] J. Holmes in R. Lee (ed.), The International Criminal Court: the making of the Rome Statute, *The Principle of Complementarity* (Martinus Nijhoff Publishers, 1999) ("Holmes 1999") p. 69.
[84] D. Nsereko and M. Ventura, 'Article 18', in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Nsereko/Ventura"), p. 1012, nm. 4.
[85] *Al-Senussi* Admissibility Decision, para. 210; *Al-Senussi* Admissibility AD, para. 231 (confirming the PTC's approach of considering investigative steps and the progression of domestic proceedings to determine unwillingness). For example, lack of proceedings on the most responsible (and focus on low level perpetrators) may indicate, along with other factors, an intent to shield under article 17(2)(a): Informal expert paper - *The principle of complementarity in practice*, annex 4, p. 30.
[86] Statute, Preamble, para. 10.

criminal responsibility as opposed to alternative mechanisms of justice.[87] Hence, "national investigations that are not designed to result in criminal prosecutions"[88] or "national proceedings designed to result in non-judicial and administrative measures rather than criminal prosecutions" do not meet the admissibility requirements.[89] Likewise, a "national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court".[90] This determination may require an assessment of the mandate, functions, and powers, as well as the operation and processes, of the relevant domestic bodies.[91]

- Article 17(1)(b) relates to final decisions on the merits terminating an investigation and preventing a prosecution against a suspect or accused person before a domestic court.[92]

- Article 17(1)(c) relates to a full domestic trial which has been completed, resulting in a final acquittal or conviction.[93] As such, a first-instance decision which has not become final,[94] or the termination of proceedings without prejudice due to lack of evidence or technical reasons, does not render a case inadmissible.[95] Nor do domestic proceedings undertaken *in absentia* where there is a possibility to institute proceedings once the person appears voluntarily or is apprehended.[96]

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[87] Schabas/El Zeidy, p. 975 at nm. 51 (noting that "article 17(1) is concerned with 'judicial proceedings' as opposed to alternative mechanisms of justice", but also opining that there is some room for accepting a "preliminary investigation" by a truth commission so far as it is empowered to recommend a criminal prosecution).
[88] *Burundi* Article 15 Decision, para. 152.
[89] *Burundi* Article 15 Decision, para. 152; *Afghanistan* Article 15 Decision, para. 79.
[90] *Burundi* Article 15 Decision, para. 152. In Burundi, Pre-Trial Chamber III assessed the investigations conducted by commissions of inquiry which had certain judicial and investigative powers, were tasked to investigate certain events and establish those responsible and to refer persons to the competent authorities. The Chamber did not find the potential cases to be inadmissible since the commissions did not focus on the same groups of persons who were likely to be the focus of the Prosecution's investigation, did not take tangible concrete and progressive investigative steps or the steps were clearly insufficient: *see* para. 153-175.
[91] *See e.g.* *Burundi* Article 15 Decision, para. 153, 154, 158, 166 (noting the mandate and functions of the commissions including judicial and investigative functions); *see also* para. 159 ("The Commission heard several witnesses"), 168 (noting that "four criminal files had been open against 87 persons"); *compare with* ICC-01/19-7 ("*Bangladesh/Myanmar* Prosecution Request"), para. 248-253.
[92] Schabas/El Zeidy, p. 973 at nm. 48. This however does not include decisions closing domestic proceedings in order to surrender a given person to the ICC for prosecution: *Katanga* Admissibility AD, para. 82-83; ICC-01/05-01/08-962-Corr ("*Bemba* Admissibility AD"), para. 74; Schabas/El Zeidy', pp. 973-974 at nm. 48-49 (noting that this may result from a judicial decision or a political decision from the executive).
[93] *Gaddafi* Second Admissibility AD, para. 63.
[94] Schabas/El Zeidy, p. 979 at nm. 57; *Gaddafi* Second Admissibility Decision, para. 36; *Gaddafi* Second Admissibility AD, para. 58.
[95] Schabas/El Zeidy, p. 979 at nm. 57, p. 980 at nm. 58; *Bemba* Admissibility Decision, para. 248.
[96] Schabas/El Zeidy, p. 980 at nm. 58; *cf.* *Gaddafi* Second Admissibility Decision, para. 61-79. In *Gaddafi*, Pre-Trial Chamber I noted, *obiter*, that amnesties and pardons impeding or interrupting judicial proceedings and punishment would in principle mean that a case remains admissible before the Court: *Gaddafi* Second Admissibility Decision, para. 77-78. In a separate opinion, also in *Gaddafi*, two judges of the Appeals Chamber

49. Finally, although domestic law need not label the criminal conduct as an international crime, the underlying conduct that is investigated domestically must substantially correspond to, and adequately capture, the relevant Rome Statute crime.[97]

II.B.3. There is an apparent conflict of jurisdiction between the State and the Court if the State's relevant national proceedings sufficiently mirror those of the Court

50. To establish the potential inadmissibility of proceedings before the Court on the basis of complementarity, it is not required that the overlap between the domestic proceedings and the case before the Court be absolute. Rather, what is required is a "judicial assessment of whether the case that the State is investigating *sufficiently mirrors* the one that the Prosecutor is investigating".[98] Again, in the Prosecution's submission, this same principle applies equally to article 17(1) assessments at all procedural stages, including under article 18(2).

51. In *Gaddafi*, the Appeals Chamber further explained:

> The real issue is, therefore, the degree of overlap required […] between the incidents being investigated by the Prosecutor and those being investigated by a State—with the focus being upon whether the conduct is substantially the same. Again, this will depend upon the facts of the individual case. If there is a large overlap between the incidents under investigation, it may be clear that the State is investigating substantially the same conduct; if the overlap is smaller, depending upon the precise facts, it may be that the State is still investigating substantially the same conduct or that it is investigating only a very small part of the Prosecutor's case. For example, the incidents that it is investigating may, in fact, form the crux of the Prosecutor's case and/or represent the most serious aspects of the case. Alternatively, they may be very minor when compared with the case as a whole.[99]

52. While this case-specific and fact-dependent assessment allows for some flexibility, it still requires a considerable overlap between the incidents investigated by the national authorities and those investigated by the Prosecution.[100]

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noted that a sentence which is not proportionate to the gravity of the crime and the person's responsibility is not consistent with the complementarity regime to ensure that the most serious crimes do not go unpunished. Hence, a case would be admissible where a final decision is reached but the sentence imposed is pardoned shortly after the end of the trial, where the sentence effectively served is deemed disproportionate to the harm and the criminal conduct: ICC-01/11-01/11-695-Anx ("Concurring Separate Opinion Judges Eboe-Osuji and Bossa"), para. 8-9.

[97] *Al-Senussi* Admissibility AD, para. 119-122; *Gaddafi* First Admissibility Decision, para. 108.

[98] *Gaddafi* First Admissibility AD, para. 73 (emphasis added).

[99] *Gaddafi* First Admissibility AD, para. 72.

[100] Schabas/ El Zeidy, p. 968, nm. 36-37.

II.C. The procedural context defines the appropriate comparators for the article 17(1) determination

53. To date, the Court has considered the threshold question under article 17(1) —whether there are (or have been) relevant domestic proceedings triggering a conflict of jurisdiction between the Court and the State concerned—in two distinct procedural contexts: *either* for the purpose of assessing cases under article 19 *or* for the purpose of assessing situations under article 15.

54. While Chambers have consistently required appropriate "comparators" in order to carry out this analysis, the nature and specificity of the comparators used have been adapted to reflect the procedural stage—especially having regard to the degree to which the Court's investigation can reasonably be expected to have advanced at that time. As the Appeals Chamber has stated: "[t]he meaning of the words 'case is being investigated' in article 17(1)(a) of the Statute" must "be understood in the context to which it is applied".[101]

55. Therefore:

- Under article 19, the admissibility assessment is more concrete, due to the more advanced stage of the proceedings, and entails comparing the domestic proceedings with the particular *case before the Court*—in which an alleged perpetrator, the alleged crimes, modes of liability, and underlying facts have at least been specified in the request and ensuing decision pursuant to article 58,[102] or even in a document containing the charges or confirmation decision.[103] Specifically, the Appeals Chamber has held that the domestic proceedings must "cover the same individual and substantially the same conduct as alleged in the proceedings before the Court".[104]

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[101] *Ruto et al.* Admissibility AD, para. 39; *see also Kenya* Article 15 Decision, para. 48 ("the reference to a 'case' in article 53(l)(b) of the Statute does not mean that the text is mistaken but rather that the Chamber is called upon to construe the term 'case' in the context in which it is applied. […]").
[102] Statute, article 58(1) (setting out the content of applications for arrest warrants and summons to appear).
[103] Regulations of the Court, regulation 52 (setting out the content of documents containing the charges).
[104] *Ruto et al.* Admissibility AD, para. 40. The relevant conduct encompasses the personal conduct of the suspect and conduct "which is imputed to the suspect", and to carry out this assessment, it has been considered "necessary to use as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents": *Gaddafi* First Admissibility AD, para. 62, 70, 73. "Incidents" have been defined as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators": *Gaddafi* First Admissibility AD, para. 62.

- Under article 15, by contrast, the admissibility assessment is more preliminary in nature, consistent with the fact that the Prosecution has not yet had any opportunity to investigate.[105] Consequently, the domestic proceedings have been compared with *potential cases*,[106] identified provisionally by the Prosecution based on the limited information available during the preliminary examination, and characterised by criteria or parameters such as: (i) the groups of persons involved, and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping future case(s).[107] For example, as noted in the context of article 17(1)(d), Chambers have stressed that "[i]n considering the groups of persons likely to be the object of the investigation, the […] assessment 'should be general in nature and compatible with the pre-investigative stage'".[108]

56. Importantly, Chambers have also cautioned that potential cases provisionally identified by the Prosecution for the purpose of the preliminary examination are for the narrow purpose of ascertaining whether the legal conditions for opening an investigation under article 53(1) are met[109]—and, consequently, are merely *illustrative* of the criminality in the situation. Indeed, considering its limited powers[110] and low evidentiary threshold at this very early stage,[111] the

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[105] *See e.g.* Schabas/ El Zeidy, p. 966, nm. 34; *Ruto et al.* Admissibility AD, para. 39 ("the contours of the likely cases will often be relatively vague […]. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52(1) […], which speaks of 'information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2' that the Prosecutor's notification to States should contain").

[106] *Kenya* Article 15 Decision, para. 48 ("since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation"); *Côte d'Ivoire* Article 15 Decision, para. 190; *Georgia* Article 15 Decision, para. 36 (*see also* *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 37, 44, 47, Judge Kovacs agreed with the Majority on the test but he disagreed with its application to the facts); *Burundi* Article 15 Decision, para. 144; *see also* *Bangladesh/Myanmar* Prosecution Request, para. 228; Schabas/ El Zeidy in, p. 966, nm. 34. This is further consistent with the requirements of regulation 49(2) of the Regulations of the Court.

[107] *See generally* *Kenya* Article 15 Decision, para. 49-50; *Côte d'Ivoire* Article 15 Decision, para. 191, 204-205; *Georgia* Article 15 Decision, para. 37, 39; *Burundi* Article 15 Decision, para. 143; *see also* *Bangladesh/Myanmar* Prosecution Request, para. 224-225.

[108] *See e.g.* ICC-01/13-111 ("*Comoros* Third Review Decision"), para. 19; *see also* para. 41.

[109] *See e.g.* Statute, article 53(1)(b). This factors is applicable to the Prosecutor's assessment under article 15 pursuant to rule 48: *see* *Georgia* Article 15 Decision, para. 46.

[110] *See* Statute, article 15(2) and Rules, rule 47. States have no obligation to cooperate during the preliminary examinations: *see* article 86 (referring to the State's obligation to cooperate during investigations and prosecutions). *See* *Kenya* Article 15 Decision, para. 27.

[111] The standard of proof to open an investigation is "reasonable basis to believe" that a crime within the jurisdiction of the Court has been or is being committed. This standard has been interpreted to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'." (*Kenya* Article 15 Decision, para. 35; *Côte d'Ivoire* Article 15 Decision, para. 24; *Georgia* Article 15 Decision, para. 25; *Burundi* Article 15 Decision, para. 30. OTP Policy Paper on Preliminary

Prosecution cannot be expected to have conducted an exhaustive assessment of all the possible crimes, actors, and incidents.[112] Accordingly, once the investigation is authorised, Chambers have recalled that the Prosecution is neither limited, nor obliged, to investigate the potential cases provisionally identified for the purpose of opening an investigation.[113] To do otherwise would be to pre-determine the direction of the investigation and improperly narrow its scope based on the limited information available at the preliminary examination. As the Appeals Chamber has observed, any other approach would also be inconsistent with the Prosecution's duty to carry out independent and objective investigations and prosecutions, as set out in articles 42, 54, and 58 of the Statute[114], and would inhibit the Prosecution's truth-seeking function.[115]

57. In this context, the Appeals Chamber has emphasised that in order to obtain a full picture of the relevant facts, their potential legal characterisation as specific crimes under the Court's jurisdiction, and the responsibility of the various actors who may be involved, the Prosecution must carry out an investigation into the situation *as a whole*.[116] With this in mind, Pre-Trial Chambers have authorised investigations into whole situations where one or more potential cases have been deemed admissible, even if one or more other potential cases were deemed to be inadmissible.[117]

Examinations, para. 34) The information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'" and need not necessarily "point towards only one conclusion." (*Kenya* Article 15 Decision, para. 27, 34; *Georgia* Article 15 Decision, para. 25; *Burundi* Article 15 Decision, para. 30) This reflects the fact that the standard under article 53(1)(a) "has a different object, a more limited scope, and serves a different purpose" than other higher evidentiary standards provided for in the Statute, which is "to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations": (*Kenya* Article 15 Decision, para. 32).

[112] *Côte d'Ivoire* Article 15 Decision, para. 24; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Kenya* Article 15 Decision, para. 27; *Georgia* Article 15 Decision, para. 3, 63; *see also Afghanistan* Article 15 AD, para. 39.

[113] *Kenya* Article 15 Decision, para. 50; *Georgia* Article 15 Decision, para. 37; *Burundi* Article 15 Decision, para. 143; *Bangladesh/Myanmar* Article 15 Decision, para. 126; *Philippines* Article 15 Decision, para. 113-118.

[114] *Afghanistan* Article 15 AD, para. 61; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Georgia* Article 15 Decision, para. 63-64; *see also Kenya* Article 15 Decision, para. 74-75, 205.

[115] *Afghanistan* Article 15 AD, para. 60; *Philippines* Article 15 Decision, para. 117.

[116] The Appeals Chamber has stressed the Prosecutor's duty, pursuant to article 54(1) of the Statute, "to establish the truth", "to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally" and "to [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court": *Afghanistan* Article 15 AD, para. 60; *see also Philippines* Article 15 Decision, para. 117. The Prosecutor can investigate allegations that fall within the parameters of the situation or are sufficiently linked to the situation and were committed on the territory of a State Party: *Afghanistan* Article 15 AD, para. 79; *Georgia* Article 15 Decision, para. 64.

[117] *Georgia* Article 15 Decision, para. 39; *see also* para. 50 and 57.

II.D. Article 18(2) requires determining whether the State's investigation sufficiently mirrors the Court's intended investigation

58. Applying all the principles above, the Prosecution submits that the Chamber must make its preliminary ruling on admissibility on the basis of an assessment of whether the State's investigation sufficiently mirrors the Court's intended investigation. If it does not, then the Chamber should authorise the resumption of the Court's investigation, without prejudice to any further challenges to admissibility which may be made under article 19(2) in due course.

59. In assessing this question, as a comparator for the State's proceedings, the Chamber should consider the Court's intended investigation as defined by the parameters of the authorised situation as a whole. Only this comparator is appropriate to the procedural context of article 18.

II.D.1. The Court's intended investigation is defined by the parameters of the situation that the Prosecution may investigate

60. Consistent with the Court's established approach to identifying appropriate comparators for the purpose of admissibility assessments under article 17(1), taking account of the procedural context, the Prosecution submits that the Chamber should be guided by the plain terms of article 18(2), and take account of the particular framing of the State's deferral request.

61. Specifically, article 18(2) refers to "the *State's investigation*" relating to the alleged acts material to the "information provided in the notification" by the Prosecutor under article 18(1)—and, in this instance, the GovPH has requested deferral of the *entirety* of the Court's investigation. Accordingly, the Chamber in resolving this specific deferral request is required to make a preliminary ruling on the admissibility of the Court's investigation *as a whole* in light of the State's investigation as it exists at the material time.

62. In defining the Court's investigation for this purpose, the Prosecution submits that the Chamber should take into account the procedural context of the Statute. In particular, and significantly, Chambers have already observed that the approach to admissibility for the purpose of article 15 (and/or article 53) may be a sound starting point in considering article 18 of the Statute.[118] It follows that the Chamber should compare the domestic proceedings with

[118] *Kenya* Article 15 Decision, para. 51; *see cf. Ruto et al.* Admissibility AD, para. 39; *Muthaura et al.* Admissibility AD, para. 38; *see also* H. Olásolo and E. Carnero-Rojo, *The admissibility of 'situations'*, in C. Stahn

the scope of the *Prosecution's intended investigation*, as defined by the sum of potential cases within the parameters of the authorised situation which could be pursued by the Prosecutor in the exercise of his broad discretion under articles 53, 54, and 58.

63. Importantly, the definition of the investigation for the purpose of article 18(2) should not be limited to those potential cases which were already *expressly* identified by the Prosecutor for the purpose of the preliminary examination. This follows not least from the fact that, if the Court's exercise of jurisdiction was triggered by the Prosecutor *proprio motu* for example, the Prosecutor is not obliged to have publicly referenced any potential case he identified for the purpose of his initial assessment of admissibility under article 15 and rule 48 (applying the factor listed in article 53(1)(b)).

64. More broadly, while the admissibility assessments for the purpose of opening an investigation under article 15 and for deferring an investigation under article 18(2) are both addressed to the situation, rather than a particular concrete case, they materially differ in the nature and scope of the analysis required. Rule 48 and article 53(1)(b) require that the Prosecutor identify at least one potential case which is admissible to justify opening an investigation as a threshold requirement. But it would clearly be contrary to the object and purpose of the Statute if that entire investigation could then be deferred by a State demonstrating merely that one such potential case was subject to national proceedings. Accordingly, for the purpose of article 18(2), the scope of the Prosecutor's intended investigation must be defined not just by reference to provisionally identified potential cases, but rather by reference to the parameters of the situation that the Prosecutor may investigate as a whole, as it was authorised by the Chamber and notified to States under article 18(1). The potential cases that the Prosecution may subsequently identify and investigate may go beyond those identified during the preliminary examination. This is the logical corollary of the Prosecutor's duty not to pre-emptively limit his intended investigation to certain potential cases before his investigation has even begun, but rather, to investigate the situation as a whole.[119]

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and M. El Zeidy (ed.), The International Criminal Court and Complementarity, From Theory to Practice, Vol.I, (Cambridge UP, 2011), pp. 414-415 (arguing that "the level of scrutiny of national proceedings needs to be lower when ascertaining the admissibility of a situation than when ascertaining the admissibility of a case", but that it still requires to define criteria according to which cases are selected for examination, and referring to the (i) "types of crimes that, committed in a widespread or systematic manner, are at the core of the criminal activities which occurred in the situation at hand", and (ii) "group of persons that fall within the category of persons ultimately responsible").

[119] *Cf.* *Comoros* Third Review Decision, para. 42 ("[t]he Prosecutor has an obligation to extend the investigation to cover all possible categories of perpetrators and may not *a priori* exclude any of them."). These may refer to allegations and related lines of enquiry which have not been analysed during the preliminary examination, or that postdate the analysis.

65. This approach is consistent with the text, context, and purpose of article 18 as well as broader aspects of this procedural stage.

- First, States which receive notification under article 18(1) will be aware of the limited purpose and scope of the preliminary examination, compared to the Prosecutor's duty under article 54 to establish the truth once an investigation is opened. Typically, as here, this will be mentioned in the relevant article 15 decision and/or article 18 notification letter.[120]
- Second, the Statute expressly foresees that the information provided to States in the Prosecution's notification under article 18(1) may be limited in certain circumstances, such as to ensure the protection of persons and preservation of evidence or avoid the absconding of persons, without this necessarily impacting on the ability of a State to request deferral.[121]
- Third, article 18 is not conclusive of admissibility and only seeks to provide a preliminary ruling for a specific purpose. While article 19 is the appropriate proceeding in the statutory framework to hear an admissibility challenge to a concrete case, article 18 proceedings are designed to determine whether the Prosecution's investigation into a broadly defined and still open set of inquiries in a situation should be allowed to proceed. Where an investigation is authorised notwithstanding a deferral request, the admissibility of any concrete case that may arise from the investigation remains open to challenge under article 19, subject to the requirements in article 18(7) of the Statute.[122]

66. Conversely, to limit the Chamber's assessment under article 18(2) to potential cases specifically identified during the preliminary examination and/or article 15 request would be inconsistent with the above principles.

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[120] *See e.g.* *Philippines* Article 15 Decision, para. 116-118 and p. 41 (authorising an "investigation into the Situation in the Philippines, in relation to crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign"); Philippines Article 18(1) Notification (OTP/PHL/PHL-l/Notif/JCCD-abrnpt), para. 2; *see similarly* *Georgia* Article 15 Decision, para. 63-64; *Bangladesh/Myanmar* Article 15 Decision, para. 126-130. *See also* Rules, rule 52(1) (article 18(1) notification must inform States of the parameters of the investigation, and provide information on "acts that may constitute crimes referred to in article 5 […].").

[121] Statute, article 18(1): ("The Prosecution may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons"); *see also* Rules, rule 52(1) ("Subject to the limitations provided for in article 18, paragraph 1, the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2").

[122] Hence, the State is not precluded from continuing its proceedings and from challenging the admissibility of a case under article 19(2), if applicable.

- First, it would artificially limit the scope of the Prosecution's future investigations on the basis of provisional and untested information which may not necessarily reflect the full scale of criminality within a given situation. The very purpose of an investigation is that "the Prosecutor investigates in order to be able to properly assess the relevant facts", which may previously have been unclear or difficult to establish on the basis of the information available.[123]

- Second, such an approach would likely incentivise the Prosecution to conduct more protracted preliminary examinations in an attempt to exhaustively capture and map all relevant potential cases to a high degree of specificity. This would not only risk the loss of evidence due to the passage of time, but the assessment would be limited due to the Prosecution's constrained investigative powers at this stage. It would also misapply the threshold setting nature of this assessment. The Prosecution is conscious that Pre-Trial Chambers have urged the opposite—a faster, more streamlined approach to preliminary examinations.[124]

- Third, States seeking deferral would not be able to rely on genuine domestic proceedings regarding other crimes, persons, and incidents in the situation which have not been identified by the Prosecution during the preliminary examination.

II.D.2. The Court's investigation should be deferred if sufficiently mirrored by the State's investigation

67. Consistent with the general approach to article 17(1), the degree of overlap required between domestic proceedings and the Prosecution's intended investigation in order to defer a situation should not be determined purely in the abstract. In this respect, the Prosecution submits that the approach adopted by the Appeals Chamber in the *Gaddafi* case provides guidance.

68. Accordingly, the Pre-Trial Chamber should assess whether the domestic proceedings "sufficiently mirror" the Prosecution's intended investigation, defined by the parameters of the authorised situation or the sum of potential cases within it.[125] This comparison is fact-specific

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[123] *Comoros* First Review Decision, para. 13; *Georgia* Article 15 Decision, para. 63; *Bangladesh/Myanmar* Article 15 Decision, para. 128.
[124] *See* ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* article 19(3) Decision"), para. 88; *Bangladesh/Myanmar* Article 15 Decision, para. 130.
[125] *Gaddafi* First Admissibility AD, para. 72-73.

and case-dependent and involves both a quantitative and qualitative assessment.[126] It allows for a pragmatic degree of flexibility and strikes a balance between the competing interests involved, namely, the State's prerogative to assert its primary responsibility, while also ensuring that there are no impunity gaps in a situation and that the Prosecution is able to fulfil its statutory mandate expeditiously.[127]

69. The Prosecution stresses that this does not necessarily mean that domestic investigations must be finalised and suspects identified in order to warrant deferral. Yet, domestic proceedings must genuinely address criminal conduct which substantially mirrors the scope of the Prosecution's intended investigation with respect to both criminal incidents and categories of potential perpetrators.[128]

III. ANALYSIS

70. The Prosecution submits, applying the above legal framework, that the GovPH's Deferral Request should be rejected.

71. Section III.A first explains why a significant part of the materials provided by the GovPH is irrelevant for the analysis under article 18(2), because it relates to domestic proceedings and initiatives that do not result in criminal prosecutions. The remaining three sections explain how the cases and activities referenced by the GovPH do not sufficiently mirror the Prosecution's investigation. In particular, the GovPH makes no reference at all to any

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[126] *Cf.* *Côte d'Ivoire* Article 15 Decision, para. 203; *see e.g.* Stigen, 131-132 ("the pertinent question will rather be whether the ICC should deal with a given situation at all, i.e. *whether there appear to be (sufficiently many) cases within a given situation that the ICC may and should handle*. If very few cases appear to be admissible, it might not serve 'the interests of justice' to interfere in the situation at all, unless these are particularly important cases, e.g. against the most responsible"), 135 ("If, however, the Prosecutor finds that a *sufficient number of admissible cases within the situation remain*, he or she shall seek an authorisation") (emphasis added).

[127] Holmes 2002, p. 681; Holmes 1999, p. 70 (noting the need to strike a balance between the complementarity principle and the danger of creating a regime which would inadvertently allow States to protect perpetrators by frustrating and delaying the Prosecutor's investigations).

[128] This is also a fact-dependant and case-specific assessment. *See e.g.* *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 47 (noting that Georgian proceedings focused on the lowest rank perpetrators and least meaningful incidents, and it was not apparent whether those low level perpetrators belong to those most responsible). In order to determine whether domestic authorities focus (or not) on the same category of perpetrators as the ICC, the Court may consider the type of allegations being investigated, including patterns or policy aspects that could involve the most responsible. It is not necessary that domestic proceedings have identified a concrete suspect. This approach is consistent with the drafting history: *contra* Stigen, p. 133 (incorrectly citing Holmes to suggest that it suffices that the State investigates only the crime in question genuinely), *but see* J. Holmes, *Jurisdiction and Admissibility*, in R. Lee (ed.), The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers, Inc., 2001), p. 340 (only noting that a State may not know all suspects until the end of the investigation, and that this does not automatically give rise to an application from the Prosecutor under article 18(2)).

investigation into crimes committed before July 2016, into killings committed outside police operations, and into crimes other than murder (such as torture and unlawful imprisonment). Further, the GovPH does not appear to be investigating whether any of the alleged crimes were committed pursuant to a policy or occurred systemically, or whether any person in the higher echelons of the police or government may potentially be criminally responsible. For these reasons alone, the Court should not defer to the GovPH investigation. Section III.B explains this general discordance, whilst sections III.C and III.D address in detail the additional shortcomings related to the materials referenced by the GovPH, namely cases referred to the NBI by the DOJ Panel and cases collated from the dockets of different prosecution offices.

III.A. Administrative or non-criminal proceedings are not investigative activity and do not justify deferral under articles 17(1) and 18(2)

72. Four of the initiatives cited by the GovPH are not penal in nature, but merely administrative or similar proceedings, and therefore do not constitute relevant investigations or prosecutions for the purpose of articles 17 and 18 of the Statute, as explained above.[129] As the following paragraphs elaborate, these are: the desk review conducted by the DOJ Panel, the special remedy of the writ of *amparo*, and the activities associated with the Administrative Order no. 35 Committee and the UN Joint Programme on Human Rights ("UNJPHR").

III.A.1. The desk review by the DOJ Panel is merely administrative

73. The GovPH highlights the DOJ Panel, created in June 2020, as the most prominent of its efforts to investigate killings arising from the WoD.[130]

74. Based on the information provided by the GovPH, the Panel appears to be an *ad hoc* group of DOJ members, chaired by the Secretary of Justice.[131] They are tasked with the following responsibilities:

a. Reviewing PNP-IAS cases addressing administrative liability of PNP personnel who conducted anti-illegal drugs operations resulting in deaths;[132]

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[129] *See above* para. 48.
[130] ICC/01/21/14-AnxA, p. 4-5. *See also* PHL-OTP-0001-3886 at 3888 (24 February 2021 statement of DOJ Secretary Menardo Guevarra to UN Human Rights Council); PHL-OTP-0001-3886 at 3891, 3892 (30 June 2020 statement of DOJ Secretary Menardo Guevarra to UN Human Rights Council); PHL-OTP-0009-0086 (11 June 2021 statement statement of DOJ Secretary Menardo Guevarra to UNHRC).
[131] PHL-OTP-0001-3886 at 3891 (30 June 2020 statement of DOJ Secretary Menardo Guevarra to UN Human Rights Council).
[132] ICC-01/21-14-AnxA, p. 3-4. The GovPH does not appear to suggest that these PNP-IAS cases by themselves constitute investigative steps that would warrant deferral. In any event, the Prosecution considers that these PNP-

b. Reviewing criminal cases filed against PNP personnel for deaths of suspects in anti-narcotics operations these agents conducted;[133]
c. Reviewing criminal cases filed against deceased individuals suspected of violations of anti-illegal drugs and prohibited firearms laws;[134]
d. Reviewing case files from the Philippine Drug Enforcement Agency ("PDEA");[135]
e. Upon further coordination with the relevant government agencies, potentially reviewing records of cases and/or complaints pending before the Office of the Ombudsman, National Police Commission, and people's law enforcement boards of the various local government units;[136]
f. Referring selected case files from the above sources to the NBI for further investigation and criminal case build-up;[137] and
g. Monitoring ongoing preliminary investigations and trials that involve anti-illegal drugs operations involving deaths.[138]

75. The Panel does not appear to possess powers or authority independent of the DOJ or have any specific investigative function. The GovPH has not provided any information on the scope of the Panel's mandate and authority, and the Prosecution has not come across any information in open source materials indicating that the Panel was endowed with any powers independent of its constituent DOJ members and chairperson, the Secretary of Justice. Accordingly, when the Panel refers cases to the NBI for "case investigation and build-up", the Panel appears to, at most, be exercising the authority of the Secretary of Justice under Philippine law to direct the NBI to undertake the investigation of any crime when the public interest so requires.[139] The GovPH in fact refers to the DOJ and the Panel interchangeably.[140]

IAS cases cannot constitute investigative or prosecutorial steps in the context of articles 17 and 18 of the ICC Statute as they merely addressed the administrative liability of PNP personnel for lapses in the conduct of anti-narcotics operations, and not their criminal responsibility for deaths which occurred during these operations.
[133] PHL-OTP-0008-1222 at 1223-1224.
[134] PHL-OTP-0008-1222 at 1222-1223.
[135] PHL-OTP-0009-0086 (11 June 2021 statement of DOJ Secretary Menardo Guevarra to UN Human Rights Council). The GovPH did not refer to these PDEA case files in its Deferral Request, but the Prosecution includes them here for completeness.
[136] PHL-OTP-0008-1222 at 1224.
[137] ICC-01/21-14-AnxA, p. 4; PHL-OTP-0008-1222 at 1223.
[138] ICC-01/21-14-AnxA, p. 5.
[139] PHL-OTP-0009-0169 at 0171-0172 (Republic Act no. 10867, sections 4(o) and 5).
[140] ICC-01/21-14-AnxA, p. 4. The GovPH recalled its Press Statement of 19 October 2021 on the latest developments of its review panel, then going on to state that "the DOJ has referred to the [NBI] its review of 52 cases where the PNP-IAS found administrative liability on the part of its law enforcement agents." The GovPH goes on to refer to "[t]he DOJ's work" and how "[t]he 52 cases signal the start of the DOJ's review of over 6,000 administrative cases in the dockets of the PNP-IAS". The GovPH points out further that in addition to these 52

76. According to the information provided by the GovPH, the Panel has so far referred to the NBI 302 cases, consisting of 52 PNP-IAS cases and 250 NPS cases, for investigation and case build-up.[141] The GovPH has not provided any documentation explaining *how* the Panel conducted its review. The information table (relating to the 52 PNP-IAS cases) contains a column summarising the PNP-IAS findings and recommendations, and another column entitled "Observations", which the Prosecution understands has been populated by the Panel in the course of its review.[142] The remaining lists of cases (from NPS dockets) contain a column entitled "Remarks", which the Prosecution similarly understands to have been written by the Panel.[143] In these observations and remarks, the Panel takes note of the manner in which victims died in anti-narcotics operations and apparent lapses in forensic procedures, such as the lack of ballistics and paraffin tests, lack of identification of firearms allegedly used by the victims to fire back at PNP personnel, and lack of chain of custody records. However, there is no indication in these observations and remarks of any concrete investigative steps taken *by the Panel* in relation to any of the cases. Consequently, and in light of the observations and remarks provided, it appears that the Panel merely conducted a "desk review" of these 302 cases, followed by a request or recommendation that an actual investigation be commenced by the NBI. The Panel's "desk review" by itself thus does not constitute investigative activity within the framework of article 18(2) of the Statute and cannot justify deferral of the Court's investigation.

77. Further, the status of the Panel's review of cases which have not been referred to the NBI is also unclear. The GovPH does not provide any information about the cases it may have reviewed but not transferred to the NBI. With regard to *prospective* review, the GovPH submitted several documents that it says will "form the next batch of [reviewed] cases",[144] but again with no further description. These cases were apparently collated from the dockets of

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PNP-IAS cases "reviewed by the DOJ", "the DOJ" is also looking into more than 300 cases in the NPS dockets. *See also* PHL-OTP-0001-3886 at 3888 (24 February 2021 statement of DOJ Secretary Menardo Guevarra to UN Human Rights Council): After discussing the creation in June 2020 of "an Inter-Agency Review Panel that would re-examine cases of anti-illegal drugs operations where deaths occurred", Mr. Guevarra went on to note that "[i]n the last few months of 2020, a contingent from our [DOJ] examined available records in certain key areas and cities where most of these deaths during illegal drug operations occurred."4.

[141] The activities of the NBI are discussed separately below in Section III.C.

[142] PHL-OTP-0008-0050.

[143] PHL-OTP-0008-1228, PHL-OTP-0008-1259 and PHL-OTP-0008-1294 (Annexes A, B and C to PHL-OTP-0008-1222, respectively).

[144] PHL-OTP-0008-1222 at 1223.

different prosecution offices, and are for this reason discussed below together with other cases purportedly pending with prosecutors.[145]

78. The GovPH has also asserted that the Panel will eventually review more than 6,000 cases from the PNP-IAS and other sources.[146] However, these prospective reviews by definition do not constitute *ongoing* or *completed* investigations or prosecutions as required by the clear wording of articles 17(1)(a) and 18(2) of the Statute. Any such future activities of the Panel are thus not relevant to the Deferral Request.

III.A.2. Proceedings seeking a writ of amparo may lead to investigative activity, but are not themselves investigative activity

79. The GovPH has provided 911 pages of material on four writ of *amparo*[147] proceedings related to drugs operations,[148] in an attempt to "show that Philippine courts have in fact been able to respond to pleas for relief from qualified persons and/or their families."[149] These materials however do not demonstrate the existence of any investigations conducted to establish criminal responsibility of any of the persons mentioned in the petitions.

80. The GovPH has explained that "[t]he writ of *amparo* is a remedy available to any person whose right to life, liberty and security is violated or threatened with violation by an unlawful act or omission of a public official or employee, or of a private individual or entity."[150] Courts hearing *amparo* petitions may provide interim relief, such as a Temporary Protection Order,[151]

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[145] *See below* section III.D.
[146] ICC-01/21-14-AnxA, p. 4. For instance, the GovPH indicated that the Panel will look into more than 300 cases in NPS dockets and will review more than 6,000 PNP-IAS cases. In its 31 March 2022 letter, the GovPH identified the following as comprising the next batch of the cases to be evaluated by the Panel: 15 PNP-IAS cases and 36 NPS cases (PHL-OTP-0008-1222 at 1223-1224). While the GovPH refers to "forty-two (45) (sic) records of complaints filed by police officers who conducted buy-bust and anti-illegal drug operations and the respondents therein died as a result of said operations", the cited annexes relate to eight cases (PHL-OTP-0008-1222 at 1224). The Prosecution further came across the GovPH's 11 June 2021 statement to the UN Human Rights Council among open source materials, wherein the Panel allegedly received 107 case files from the PDEA (PHL-OTP-0009-0086).
[147] While the GovPH refers to the writ of *habeas data* in addition to the writ of *amparo* in its Deferral Request [ICC-01/21-14-AnxA, p. 5-6; PHL-OTP-0008-0043 at 0044; PHL-OTP-0008-0073], all four individual proceedings referenced by the GovPH sought the issuance of a writ of *amparo* but not of a writ of *habeas data* [*See* PHL-OTP-0008-0182 at 0186 (*Almora* petition), 0301 (*Daño* petition), 0980-0981 (*Morillo* petition) and PHL-OTP-0008-0076 at 0145 (*Gonzales* petition).]. There is therefore no need to discuss the relevance of the writ of habeas data to the Deferral Request.
[148] PHL-OTP-0008-0182 relating to *Almora, Soriano and Aparri v. Dela Rosa, et al.*, G.R. no. 234359 consolidated with *Daño, et al. v. PNP, et al.*, G.R. no. 234484, and *Morillo, et al. v. PNP, et al.*, CA-G.R. SP no. 00063, and PHL-OTP-0008-0076 relating to *Gonzales v. Duterte, et al.*, G.R. no. 247211.
[149] PHL-OTP-0008-0073 at 0074.
[150] PHL-OTP-0008-0073 at 0073.
[151] PHL-OTP-0009-0087 at 0092 (The Rule on the Writ of *Amparo*, section 14(a)): "The court, justice or judge…may order that the petitioner or the aggrieved party and any member of the immediate family be protected

Inspection Order,[152] Production Order[153] or Witness Protection Order,[154] as well as any other appropriate relief upon judgment.[155] The GovPH points out that "the filing of these petitions does not preclude the filing of separate criminal, civil, or administrative sanctions against the erring officers."[156]

81. The Philippine Supreme Court has explained that an *amparo* proceeding does not seek to establish individual liability, as it is not a criminal, civil, or even an administrative proceeding.[157] While Philippine courts, when issuing a writ of *amparo*, can compel law enforcement officers to conduct investigations where they did not exercise extraordinary diligence in the performance of their duties,[158] *amparo* proceedings by themselves do not seek to determine criminal liability.

82. The writ of *amparo* is instead intended to be a rapid judicial remedy serving both preventive and curative roles in addressing extra-legal killings (killings committed without due process of law, *i.e.*, without legal safeguards or judicial proceedings[159]) and extrajudicial disappearances.[160] It is preventive in that it "breaks the expectation of impunity on the commission of these offences" and curative in that it "facilitates the subsequent punishment of perpetrators", envisioning subsequent investigation and action.[161]

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in a government agency or by an accredited person or private institution capable of keeping and securing their safety. If the petitioner is an organization, association or institution…the protection may be extended to the officers involved."

[152] PHL-OTP-0009-0087 at 0092 (The Rule on the Writ of *Amparo*, section 14(b)): "The court, justice or judge…may order any person in possession or control of a designated land or other property, to permit entry for the purpose of inspecting, measuring, surveying, or photographing the property or any relevant object or operation thereon."

[153] PHL-OTP-0009-0087 at 0093 (The Rule on the Writ of *Amparo*, section 14(c)): "The court, justice or judge…may order any person in possession, custody or control of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things, or objects in digitized or electronic form, which constitute or contain evidence relevant to the petition or the return, to produce and permit their inspection, copying or photographing by or on behalf of the movant."

[154] PHL-OTP-0009-0087 at 0093 (The Rule on the Writ of *Amparo*, section 14(d)): "The court, justice or judge…may refer the witnesses to the Department of Justice for admission to the Witness Protection, Security and Benefit Program, pursuant to Republic Act No. 6981. The court, justice or judge may also refer the witnesses to other government agencies, or to accredited persons or private institutions capable of keeping and securing their safety."

[155] PHL-OTP-0009-0087 at 0094 (The Rule on the Writ of *Amparo*, section 18): "If the allegations in the petition are proven by substantial evidence, the court shall grant the privilege of the writ and such reliefs as may be proper and appropriate; otherwise, the privilege shall be denied."

[156] PHL-OTP-0008-0073 at 0073.

[157] Supreme Court of The Philippines, *Secretary of Defense v. Manalo, et al.*, G.R. No. 180906, 7 October 2008. *See also* Supreme Court of The Philippines, *Roxas v. Macapagal-Arroyo*, G.R. No. 189155, 7 September 2010.

[158] PHL-OTP-0008-0073 at 0073-0074; PHL-OTP-0009-0087 (The Rule on the Writ of *Amparo*) at 0093, sec. 17.

[159] Supreme Court of The Philippines, *Secretary of Defense v. Manalo, et al.*, G.R. No. 180906, 7 October 2008.

[160] Supreme Court of The Philippines, *Secretary of Defense v. Manalo, et al.*, G.R. No. 180906, 7 October 2008.

[161] Supreme Court of The Philippines, *Secretary of Defense v. Manalo, et al.*, G.R. No. 180906, 7 October 2008.

83. None of the four *amparo* proceedings referenced by the GovPH have led to criminal investigations. The Prosecution has nevertheless considered whether any of the materials provided by the GovPH in relation to these *amparo* proceedings are relevant to the Deferral Request.

84. The case of *Efren Morillo v. PNP et al.* was filed with respect to the deaths of Raffy Gabo, Anthony Comendo, Marcelo Daa, Jr, and Jessie Cule, and injuries sustained by Efren Morillo, who survived a gunshot wound to the chest, during an *Oplan Tokhang* operation conducted on 21 August 2016 at the house of Marcelo Daa, Jr in Quezon City.[162] The Supreme Court issued a writ of *amparo* entailing, among others, the issuance of a Temporary Protection Order, the suspension of the implementation of *Oplan Tokhang* with respect to the petitioners, and a directive to the PNP's Directorate for Investigation and Detective Management ("DIDM") to furnish petitioners with the results of its investigation of the incident which resulted in the aforementioned deaths and injuries.[163] The Supreme Court referred the petition to the Court of Appeals and ordered respondents to make a verified return of the writ before the Court of Appeals. The Court of Appeals resolved the petition on 10 February 2017, essentially affirming the earlier Supreme Court resolution and making the Temporary Protection Order permanent.[164] The Court of Appeals' decision was not appealed and became final and executory on 1 March 2017.[165]

85. In *Christina Macandog Gonzales v. Duterte et al.*, the Court of Appeals declared respondents Valfrie G. Tabian, Adrian T. Enong, and Simnar Semacio Gran and their successors in office responsible for the extralegal killing of Joselito P. Gonzales in a buy-bust operation on 5 July 2016 in Antipolo City, but merely recommended, without ordering, the filing of appropriate criminal, civil, and administrative cases against respondents.[166] This petition was appealed to the Supreme Court, where it was still pending as of 22 December 2021.[167]

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[162] PHL-OTP-0008-0182 at 0183.
[163] PHL-OTP-0008-0182 at 0184, 0907-0911.
[164] PHL-OTP-0008-0182 at 0185, 0979-0983.
[165] PHL-OTP-0008-0182 at 0185, 0979-0987.
[166] PHL-OTP-0008-0076 at 0076-0077. The Court of Appeals decision itself was not among the materials furnished by The GovPH. An appeal remains pending with the SC.
[167] PHL-OTP-0008-0076 at 0077.

86. The *Aileen Almora, Jefferson Soriano, and Rowena Aparri v. Dela Rosa et al.* petition was filed in relation to the killing of Rex Aparri during an *Oplan Tokhang* operation in Manila on 13 September 2016; and of Ryan Dave Almora during a buy-bust operation in Baguio City on 28 July 2016; as well as to the injuries sustained by Jefferson Soriano, who was allegedly shot three times in Quezon City on 17 June 2017.[168] The *Sr. Ma. Juanita R. Daño, RGS, RSW et al. v. PNP et al.* petition was filed on behalf of individual victims and all residents of 28 barangays in San Andres Bukid, Manila for 35 deaths resulting from *Oplan Tokhang* and "One Time Big Time" anti-narcotics operations conducted in this area between July 2016 and August 2017.[169] These two petitions (*Almora* and *Daño*) were consolidated and remain pending before the Supreme Court as of 22 December 2021.[170]

87. Despite the considerable volume of material provided in relation to these *amparo* proceedings, the GovPH has provided no substantiation of concrete investigative steps to ascertain the criminal responsibility of any of the alleged police perpetrators. For example, while the GovPH has listed numerous PNP case folders relating to the killings of the victims in the *Almora* and *Daño* proceedings,[171] it has not provided the contents of those folders. Consequently, it is impossible to tell what steps, if any, may have been taken to determine the criminal responsibility of the police, as opposed to the victims. As such, these lists cannot establish concrete investigative steps for the purposes of articles 17(1) and 18(2) of the Statute.

88. In summary, *amparo* proceedings in themselves do not determine criminal liability, and although courts issuing writs of *amparo* may be able to order criminal investigations, the GovPH has not shown that any criminal investigations have actually resulted from the referenced *amparo* proceedings. Consequently, the Prosecution submits that the materials provided by the GovPH about the above *amparo* proceedings do not establish any investigative steps relevant to the Deferral Request, and should be disregarded by the Chamber.

III.A.3. The activities of other non-penal initiatives referenced by the GovPH do not appear to be relevant

89. The GovPH has also briefly referred to the Administrative Order no. 35 (series of 2012) ("AO 35") Committee and the UNJPHR in support of its Deferral Request. Neither is relevant to this Chamber's determination under articles 17(1) and 18(2) of the Statute.

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[168] PHL-OTP-0008-0182 at 0182-0183.
[169] PHL-OTP-0008-0182 at 0183, 0301 et seq.
[170] PHL-OTP-0008-0182 at 0183.
[171] PHL-OTP-0008-0182 at 0637-0645.

90. The Prosecution observes that any roles which may be played by the AO 35 Committee and/or UNJPHR in the investigation of WoD killings are prospective and speculative. Regulatory and institutional reforms that have purportedly been adopted to strengthen national capacity are by themselves irrelevant for assessment under articles 17(1) and 18(2) of the Statute, without concrete information about relevant investigations and/or prosecutions actually instituted pursuant to such reforms.[172]

III.A.3.a. AO 35 Committee

91. AO 35 was issued on 22 November 2012, creating the Inter-Agency Committee on Extralegal Killings, Enforced Disappearances, Torture and Other Grave Violations of the Right to Life, Liberty and Security of Persons ("AO 35 Committee").[173] The AO 35 Committee is tasked with, among others, the inventory of all cases of extra-legal killings, and to designate prosecutors and investigators to monitor ongoing cases and to investigate and prosecute new cases.[174]

92. Other than referring to the DOJ "studying" the "possibility" of tapping the expertise of the AO 35 Committee,[175] the GovPH does not provide any information on how the AO 35 Committee is engaged in any meaningful investigation of killings arising from anti-narcotics operations, let alone identifying any investigative steps undertaken.

III.A.3.b. UNJPHR

93. The UNJPHR is a three-year capacity-building and technical cooperation programme between the GovPH and the United Nations to be implemented from 2021 to 2024.[176] It aims to strengthen, among others, domestic investigation and accountability mechanisms, a national mechanism for reporting and follow-up, and data gathering on alleged police violations.[177] Again, the GovPH has not provided any information on how the UNJPHR may be relevant to the alleged investigations into killings relevant to the ICC investigation.

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[172] *See above* para. 34.
[173] PHL-OTP-0009-0178.
[174] PHL-OTP-0009-0178 at 0179-0181, section 2(a), (c) and (d).
[175] ICC-01/21-14-AnxA, p. 4-5.
[176] ICC-01/21-14-AnxA, p. 6; PHL-OTP-0001-3886 at 3897.
[177] ICC-01/21-14-AnxA, p. 6.

III.B. The GovPH has not identified any investigations into events in Davao 2011-2016, crimes other than murder, killings outside official police operations, and/or the alleged policy element

94. Consistent with the Chamber's authorisation under article 15(4), and the scope of its own request to the Chamber under article 15(3), the parameters of this situation are defined as "crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign."[178] However, the material submitted by the GovPH does not identify any national proceedings addressing a significant number and variety of potential cases within the parameters of the situation.

95. Specifically, the GovPH has provided no information whatsoever about past or ongoing criminal investigations or prosecutions relating to: 1) alleged crimes committed in Davao between 2011 and 2016; 2) conduct that may amount to article 5 crimes allegedly committed within the parameters of the situation other than murder—such as torture, imprisonment, enforced disappearance, or sexual and gender-based crimes such as rape and other forms of sexual violence; 3) alleged murders outside the context of official police operations, including by so-called "vigilantes"; and 4) any alleged State or organisational policy material to alleged article 5 crimes or their systemic nature.[179]

III.B.1. No national proceedings have been identified concerning alleged crimes in the Davao region in 2011-2016

96. None of the material provided by the GovPH deals with WoD-related killings or other relevant conduct prior to 2016. The Prosecution's article 15(3) request emphasised that hundreds of killings committed during 2011-2016 in the city and region of Davao bore a striking resemblance to the later WoD killings nationwide from 1 July 2016 onward,[180] and these allegations were included within the parameters of the Chamber's Decision.[181] The GovPH's failure to identify any investigative steps or prosecutions whatsoever with regard to these allegations alone justifies authorising the resumption of the Court's investigation.

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[178] *Philippines* Article 15 Decision, p. 41.
[179] *See e.g.* *Al-Senussi* Admissibility Decision, para. 162(i) (where the Pre-Trial Chamber assessed whether the Libyan national proceedings sought to ascertain the existence of a policy conceived at the highest level of the State government). Mr Al-Senussi was subject to an ICC arrest warrant for crimes against humanity of murder and persecution.
[180] Article 15 Request, para. 123-128.
[181] *Philippines* Article 15 Decision, para. 107.

III.B.2. No national proceedings have been identified concerning article 5 crimes other than murder

97. But for a single reference in one document,[182] the material submitted by the GovPH is limited to killings (or attempted killings) which may constitute murder (or attempted murder). However, in its article 15 request, the Prosecution observed that several other crimes appear to have been committed in connection with the WoD, thus falling within the parameters of the situation that the Prosecution intends to investigate.[183] As noted by the Chamber, the Prosecution specifically requested authorisation to investigate crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the WoD campaign, as well as any other crimes sufficiently linked to these events. The Chamber's authorisation decision was similarly not limited to murder, but encompassed "any crime" within the jurisdiction of the Court, subject to the parameters of the authorised situation.[184] These are not addressed by the GovPH.

98. For example, as noted in the Prosecution's article 15(3) request,[185] many incidents appear to have included severe beatings and other mistreatment of victims prior to their deaths (or in some cases, before they managed to escape), as well as instances in which victims' family members were forced to witness killings. Such conduct may constitute torture or other inhumane acts under articles 7(1)(f) and (k).

99. Likewise, the Prosecution has also obtained information about other potential crimes. For example, some victims allegedly were detained by police for hours or days and held in official or unofficial prisons without charges, without access to counsel, etc. Some such victims were later taken out of detention and killed, including as part of so-called "One Time Big Time" operations. Their detention may constitute the crime of imprisonment or other severe deprivation of liberty under article 7(1)(e). On some occasions, the arrest or abduction of victims was accompanied or followed by refusals by the police to acknowledge the arrest or abduction or to provide information regarding the fate or whereabouts of the victims. Such conduct may constitute the crime of enforced disappearance under article 7(1)(i). Finally, the Prosecution will also investigate accounts of rape of women and girls prior to their murder, and

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[182] *See* PHL-OTP-0008-0046 at 0048 (containing a single reference to the charge of torture in relation to one of the cases collated from the NPS).
[183] The Prosecution has informed the GovPH of its investigation into all of the crimes mentioned below in its request for additional information pursuant to rule 53. *See* PHL-OTP-0017-4764 at 4766.
[184] *Philippines* Article 15 Decision, para. 118.
[185] Article 15 Request, para. 129.

allegations that some female family members of potential victims were forced to perform sexual acts in exchange for promises that their loved ones would be spared. Such conduct may constitute the crimes of rape or other sexual violence under article 7(1)(g).

III.B.3. The national proceedings identified concerning murder do not address all the material circumstances in which murder was allegedly committed

100. Not only does the material provided by the GovPH focus exclusively on killings, but only killings allegedly committed in the context of certain conduct: specifically, those attributed to police, and committed during official police operations. However, the Prosecution's article 15(3) request emphasised that thousands of alleged killings outside official police operations also appear to be connected to the WoD campaign, including killings by so-called "vigilantes".[186] Consequently, these killings also fall within the parameters of the authorised investigation, and the GovPH's failure to identify any investigative steps or prosecutions with regard to these allegations is another reason to authorise the resumption of the Court's investigation.

III.B.4. No national proceedings have been identified concerning the alleged State or organisational policy material to the alleged crimes, or their systemic nature

101. The Prosecution reiterates the Chamber's preliminary finding, when authorising the investigation, that there was a reasonable basis to believe that alleged extrajudicial killings by the police took place pursuant to or in furtherance of a State policy to kill suspected drug users and sellers.[187] The Prosecution's article 15 request identified numerous indicia of such a policy, including the involvement of senior police and government officials, and also "a clear pattern of violence directed at the targeted population, with a general *modus operandi* and an apparent pattern of seeking to conceal the unlawful nature of the killing (for example, by planting evidence and falsifying reports)".[188]

102. The Prosecution does acknowledge that the "remarks" and "observations" in the four lists of cases referred to the NBI, addressed further below, make note of some of these same concealment practices. Yet the GovPH has provided no indication that it has investigated any pattern of criminality or systematicity, including by those who would appear to be most responsible for conceiving or implementing a policy. Similarly, the GovPH has also provided

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[186] Article 15 Request, para. 65 *et seq.*
[187] Article 15 Request, para. 94; *Philippines* Article 15 Decision, para. 93-101.
[188] Article 15 Request, para. 100.

no indication that the national authorities are engaged in a process of "investigation upwards", using investigations and prosecutions of lower-level perpetrators to build cases against the higher-level architects of any plan or policy.

103. Since the existence of a relevant State or organisational policy is a legally required element to prove *any* crime against humanity within the parameters of the situation, it follows that this issue will form part of *all* potential cases which can presently be identified as part of the Court's investigation. To the extent that the GovPH has not identified any national proceedings examining this question—and whilst acknowledging that the GovPH need not necessarily prosecute relevant conduct as crimes against humanity—it cannot be concluded that GovPH's investigation sufficiently mirrors the Court's investigation if it fails to inquire into the alleged State or organisational policy material to the alleged crimes, or the factors which suggest that such crimes were not committed spontaneously, randomly, or in arbitrary fashion. Accordingly, on this basis too, the Chamber should order the resumption of the Court's investigation.

III.C. Cases referred to the NBI do not support deferral of the ICC investigation

104. The Prosecution turns next to an assessment of the cases purportedly referred by the DOJ Panel to the NBI. The NBI is a sub-agency of the Department of Justice. It has primary jurisdiction to investigate a number of specifically enumerated offences, and may also investigate any crime when deemed by the President or Secretary of Justice to be in the public interest. Its director is appointed by the President.[189] The Prosecution accepts that the NBI is capable of conducting criminal investigations of the kind contemplated in articles 17 and 18 of the Statute.

III.C.1. The GovPH does not show concrete investigative steps taken by the NBI in the vast majority of referred cases

105. The GovPH has provided the Prosecution with four lists of cases which it says have been forwarded by the DOJ Panel to the NBI for investigation and case build-up.[190] It appears

[189] PHL-OTP-0009-0169 at 0171-0172.
[190] *See* PHL-OTP-0008-0043 at 0044; PHL-OTP-0008-1222; PHL-OTP-0008-0050; PHL-OTP-0008-1228; PHL-OTP-0008-1259; PHL-OTP-0008-1294.

that the NBI has undertaken concrete investigative steps in just three of those cases, two of which fall within the temporal jurisdiction of the Court.[191]

106. These two cases relate to the killing of Kent Lee Caballes on 16 August 2017, and the killing of Jessica Albaran and the wounding of Rolando Antigo and Marvin Supertran on 13 November 2016.[192] In each of these cases, the NBI has taken investigative steps to inquire into the facts of the killings, including witness interviews and review of relevant photographic, documentary, and other evidence, and ultimately recommended the filing of criminal charges.[193] Steps such as these, assuming they proceed progressively and genuinely towards a determination of criminal responsibility, could render cases inadmissible before the ICC, for example in the context of article 19, insofar as such cases relate to the incidents and perpetrators identified therein.[194]

107. In striking contrast, apart from those three cases (two of which are relevant), the GovPH has provided no comparable substantiation for any of the remaining cases purportedly referred to the NBI, despite the Prosecution's express request. For example, on 23 November 2021, following the Deferral Request, the Prosecution requested that the GovPH provide "tangible evidence, of probative value and a sufficient degree of specificity, demonstrating that concrete and progressive investigative steps have been or are currently being undertaken to ascertain the responsibility of persons for alleged conduct falling within the scope of the authorised ICC investigation."[195] The Prosecution's letter gave several examples of the kinds of substantiating information that would be useful, including police reports and related documentation, charges or other official allegations, copies of evidence, referrals to prosecutors or other bodies, etc.[196]

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[191] The third case relates to the killing of Crispin Vedano on 23 January 2020, after the end of the Court's temporal jurisdiction. *See* PHL-OTP-0008-1661.
[192] *See* PHL-OTP-0008-1633. Since the two cases are pending with the prosecutorial authorities, they are are addressed (and acknowledged as adequately substantiated) below in Section III.D.
[193] *See, e.g.*, PHL-OTP-0008-1633 at 1640 (although the document is partially illegible, it appears to refer to review of forensic, documentary, and testimonial evidence by the NBI), 1652-1653 (same).
[194] *See* above para. 32. Although not directly relevant to the admissibility of these two cases, the Prosecution notes that in both cases, the NBI concluded that the self-defence scenario alleged by the participating police officers was falsified, and recommended the prosecution of named individual police officers for murder (and attempted murder), planting of evidence, and perjury. *See* PHL-OTP-0008-1633 at 1636, 1641-1643, 1647-1648, 1653-1656. Those findings highlight the need for a thorough investigation of WoD-related killings by police during the time period at issue in this situation.
[195] PHL-OTP-0017-4764 at 4764.
[196] PHL-OTP-0017-4764 at 4765.

108. Notwithstanding this clear and detailed request, the GovPH has provided only lists of cases purportedly referred to the NBI, with no substantiating documentation whatsoever with respect to activities, if any, of the NBI with regard to those cases. Three of the four lists include only case numbers, the names of law enforcement officers involved, the names of "suspects" (*i.e.*, the victims), locations and dates of the incidents, and "remarks" by an unspecified author (presumably the Panel).[197] Although the "remarks" identify weaknesses or gaps in the underlying case documentation, these three lists do not specify any actual investigative steps taken by the Panel or by the NBI in the listed cases.

109. The fourth list includes only docket numbers, names of "deceased suspects", places and dates of incidents, a short summary of PNP-IAS findings and recommendations, and "observations".[198] The PNP-IAS findings and recommendations include only administrative findings and sanctions. A single "recommendation for the filing of the appropriate criminal complaint" in the second entry is the sole reference to any possible penal process, and the list provides no indication of whether such a criminal complaint was ever filed.[199] The "observations" column, meanwhile, again refers primarily to gaps and weaknesses in the existing documentation, rather than to any concrete steps taken by the DOJ Panel, the NBI, or any other authority, even though some entries call into question the narrative of the police officers involved.[200]

110. In summary, apart from three cases (two within the temporal jurisdiction of the Court, which are discussed further in section III.D below), the Prosecution has received no indication that the NBI has taken any concrete investigative steps in the other cases referred to it by the Panel. A mere referral for investigation, without more, is insufficient to establish inadmissibility.[201] Because no concrete investigative steps have been substantiated for the vast majority of the cases purportedly referred to the NBI, this material cannot justify deferral of the investigation.

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[197] PHL-OTP-0008-1228; PHL-OTP-0008-1259; PHL-OTP-0008-1294.
[198] PHL-OTP-0008-0050.
[199] PHL-OTP-0008-0050 at 0050.
[200] *See, e.g.*, PHL-OTP-0008-0050 at 0050 ("There is nothing in the records that would support the police operatives' claim that the suspect fired at them."), 0051 ("… IAS expressed doubt with regard to the police operative's claim of self-defense" and "IAS refused to give credence to the police operatives' claim of self-defense"), 0053 ("IAS expressed doubt with regard to the police operatives' claim that the deceased suspect had attempted to escape.").
[201] *See* *Ruto et al.* Admissibility Decision, para. 68.

III.C.2. The referred cases represent only a small fraction of the alleged criminal conduct and concern only low-level perpetrators

111. In addition to the lack of substantiation, the Prosecution notes that the four lists together include a total of 302 referred cases, 266 of which fall within the Court's temporal jurisdiction.[202]

112. To justify the requested deferral, the GovPH's investigation must sufficiently "mirror" the Court's investigation.[203] Even if, *arguendo*, the NBI is taking concrete investigative steps in all of the cases referred to it, the resulting investigations—in their number, but also particularly in their scope—would still fall far short of seeking accountability for the thousands of killings attributable to police (and other groups) in the WoD context.[204] Such a limited fraction of cases would not adequately address the quantity, scope, and gravity of potential cases within the parameters of the Court's investigation into the situation. On that basis also, the resumption of the Court's investigation should be authorised.

113. In particular, the Prosecution emphasises that the 266 cases purportedly referred to the NBI (which fall within the temporal scope of the situation) target only low-level perpetrators—primarily the direct physical perpetrators involved in the killing or operation at issue and for some incidents their immediate superiors. Only a handful of the listed cases include an officer with the rank of Police Superintendent (PSUPT). No more senior or highly ranked members of the PNP command structure are listed; and the vast majority of those listed held ranks of Police Officer (PO1, PO2, or PO3) and sometimes Senior Police Officer (SPO1, SPO2, SPO3, or SPO4).[205]

114. The referred cases therefore fail—pointedly, it seems—to consider the criminal responsibility of perpetrators senior in rank and area of responsibility who would most likely be the focus of the Court's investigation vis-à-vis one or more potential cases within the parameters of the situation.[206] Indeed, there are specific indications that members of the PNP

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[202] Annex B to GovPH's December 2021 letter contains 36 cases within, and 16 cases outside, the Court's temporal jurisdiction. *See* PHL-OTP-0008-0050. Annexes A, B, and C to the GovPH's March 2022 letter together include 230 cases which appear to be within the Court's temporal jurisdiction and 20 cases which appear to fall outside it. *See* PHL-OTP-0008-1228; PHL-OTP-0008-1259; PHL-OTP-0008-1294.
[203] *See* sec. I.C above.
[204] Article 15 Request, para. 21.
[205] *See* PHL-OTP-0008-1228; PHL-OTP-0008-1259; PHL-OTP-0008-1294. The list of 52 cases provided in December 2021 does not name the officers involved nor provide their ranks. *See* PHL-OTP-0008-0050.
[206] Office of the Prosecutor, Policy paper on case selection and prioritisation (15 September 2016), para. 42-43.

command structure had a role in planning, coordinating, and implementing WoD operations, and individuals at the highest levels of police command were responsible for ordering and directing WoD operations in which many killings occurred.[207] President Duterte and other high-level government officials also reportedly encouraged, supported, enabled, and excused the killing of drug users and drug dealers.[208] These allegations underline the importance of an investigation that goes beyond direct perpetrators on the ground to explore the possible roles of more senior perpetrators.

III.D. Cases collated from the dockets of national and regional prosecution offices do not support deferral of the Court's investigation

115. The information about cases collated from the dockets of national and regional prosecution offices in the Philippines likewise does not demonstrate that concrete and progressive investigative steps have been or are being taken by the competent national authorities. What is more, even if, *arguendo*, progressive investigative steps are being or have been taken in the referenced cases, this would not change the Prosecution's assessment with regard to the Deferral Request. Similar to the cases referred to the NBI, they too reflect only a fraction of incidents and mention only low-level perpetrators. They fail to reflect the scope, breadth, and gravity of the potential cases within the parameters of the Court's investigation into the situation.

III.D.1. Concrete investigative steps have been substantiated in only three relevant cases

116. Insofar as cases collated from the dockets of the NPS and regional prosecution offices, the GovPH has provided concrete information about investigative steps taken and underlying case documents only in relation to four proceedings, three of which relate to incidents within the temporal scope of the Court's investigation.[209] They are:

- First, the prosecution of three police officers for the killing of Kian delos Santos during a "One Time, Big Time Operation" on 16 August 2017 in Caloocan City. [210] Police officers PO3 Arnel Oares, PO1 Jeremias Pereda, and PO1 Jerwin Cruz, and one Renato Loveras,

[207] Article 15 Request, para. 84.
[208] Article 15 Request, para. 101 *et seq*.
[209] The case related to the killing of Crispin Vedaño on 28 January 2020 falls outside the temporal scope of the authorised investigation and is therefore irrelevant for the purposes of this litigation. *See* PHL-OTP-0008-1630 at 1631; PHL-OTP-0008-1661 at 1662.
[210] PHL-OTP-0008-0988 at 0988-0989.

were charged with murder, planting firearms, and planting prohibited drugs. On 29 November 2018, the three police officers were convicted of murder and sentenced to "reclusion perpetua".[211] The convicted police officers appealed, and their appeal is pending before the Court of Appeals. The fourth suspect charged remains at large. The Prosecution recalls that it considered and acknowledged the existence of this case in its article 15(3) request.[212]

- Second, the filing of a criminal complaint against four police officers for the killing of Kent Lee Caballes on 16 August 2017 in Trento, Agusan Del Sur. This case was originally referred to the NBI by the DOJ Panel, and the NBI subsequently filed the criminal complaint against four police officers in March 2022.[213]
- Third, the filing of a criminal complaint against four police officers in relation to the killing of Jessica Albaran and wounding of Rolando Antiga and Marvin Supetran on 30 November 2016 in Trento, Agusan Del Sur. This case was originally referred to the NBI by the DOJ Panel, and the NBI subsequently filed the criminal complaint against four police officers in March 2022.[214]

117. The Prosecution considers that the GovPH's references to these three proceedings are substantiated and concludes that the GovPH has demonstrated concrete and progressive investigative steps have been taken with regard to the *alleged direct perpetrators* concerned. Steps such as filing of criminal complaints and ongoing court proceedings, assuming they proceed progressively and genuinely towards a determination of the criminal responsibility of the suspects, could result in the inadmissibility before the Court of cases concerning the same perpetrators in relation to the same incidents.

118. The Prosecution notes, however, that the GovPH provided no information indicating that any individual has been investigated for ordering, planning, or instigating any of these killings, nor is there any indication that the domestic authorities are investigating the alleged systemic nature of these and other killings.

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[211] Reclusion perpetua" is the maximum penalty of imprisonment under article 27 of the Philippine Revised Penal Code, with a period of at least 20 years and one day to 40 years.
[212] Article 15 Request, para. 117.
[213] PHL-OTP-0008-1630 at 1630; PHL-OTP-0008-1633 at 1633 and 1635-1645. *See also* para. 106 above.
[214] PHL-OTP-0008-1630 at 1631; PHL-OTP-0008-1633 at 1633 and 1646-1660. *See also* para. 106 above.

III.D.2. The GovPH does not substantiate other identified cases

119. The information provided by the GovPH in relation to cases collated from the dockets of prosecution offices also includes a list of 13 cases from "the dockets of the National Prosecution Service".[215] According to the GovPH, they relate to "investigations into deaths during anti-narcotic operations".[216] The list only includes limited information, namely: case number, investigating office, region, name of deceased person(s), law enforcement unit/respondents involved, and case status. The list does not include the date of the incident, precluding a determination of whether the incidents fall within the temporal scope of the Court's investigation.

120. From the limited analysis it was able to perform based on the information in the list, the Prosecution observes that, in addition to listing the delos Santos proceeding, two of the cases referenced are also included in the list of 52 cases referred to the NBI by the DOJ Panel in October 2021 (cases related to the Arnaiz and Lafuente incidents). The 13 cases listed are indicated as being at different stages of proceedings, for example on-going in court, forwarded to the Ombudsman, pending preliminary investigation, dismissed, etc. The status of cases is recorded as of May 2021, although the list was submitted to the Prosecution in December 2021.

121. With one exception (the delos Santos case, discussed above at paragraph 116), the GovPH does not provide any underlying documentation related to the cases in the list, despite the Prosecution having specifically indicated the type of documents and information required for its analysis.[217] The Prosecution even reiterated the need for such documentation after receiving the said list,[218] but the GovPH failed to provide any further information.

122. Similarly unsubstantiated are two lists of cases, provided by the GovPH, that were collated from the dockets of two regional prosecution offices "involving complaints filed against law enforcement officers and personnel for deaths of suspects in anti-illegal drug operations covering the period July 2016 to November 2021".[219]

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[215] PHL-OTP-0008-0046.
[216] PHL-OTP-0008-0043 at 0043.
[217] PHL-OTP-0017-4764 at 4765-4766.
[218] PHL-OTP-0017-4768.
[219] PHL-OTP-0008-1222 at 1223. The GovPH referred to these lists in the context of its submissions on the work of the DOJ Panel, stating that these lists "identify cases that will form the next batch of cases that the DOJ will evaluate.

123. The first list was compiled by the Regional Prosecution Office for Region II, and is described as an "inventory of all pending and resolved complaints filed against law enforcement personnel".[220] It records four cases related to four buy-bust operations in which individuals were killed by the police. All four incidents fall within the temporal scope of the ICC investigation. In two cases, charges were filed in court on 23 July 2017 and the defendants subsequently acquitted on 17 June 2021.[221] One case is recorded as "pending" with no court proceedings initiated.[222] In one case, court proceedings are marked as being initiated on 14 October 2021, and the case is pending for arraignment.[223] The list records the names of "respondents", namely the police officers suspected and the "offenses charged".[224] All four cases include the charge of murder. Significantly, however, no underlying files or any other additional information about investigative or other steps taken has been provided by the GovPH.

124. The second list was compiled by the Regional Prosecution Office for Region V and is described as a "[c]onsolidated inventory of cases involving Killings/Deaths Allegedly Related to the Government's Campaign Against Illegal Drugs Filed before the DOJ Prosecution Offices Since 1 July 2016 to Present"[225] The GovPH describes the document as a "list of 24 cases"[226] but it is unclear what this number refers to. The list itself includes 44 rows with docket numbers, where some of the latter are then grouped towards a single entry recording their "status". The table contains a total of 27 such status entries, however three of them are repeated twice,[227] and further three appear to describe the same incident.[228]

125. The list compiled by Regional Prosecution Office V contains less information about the cases than the similar list from Regional Prosecution Office II. It records only the docket

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[220] PHL-OTP-0008-1338.
[221] PHL-OTP-0008-1338 at 1339-1340 (docket numbers OMB-P-C-16-0586 and OMB-P-C-16-0587).
[222] PHL-OTP-0008-1338 at 1338 (docket number IC-OP-20-0078).
[223] PHL-OTP-0008-1338 at 1340 (docket number Omb-P-A-18-0038).
[224] PHL-OTP-0008-1338 at 1338.
[225] PHL-OTP-0008-1341 at 1341, 1342.
[226] PHL-OTP-0008-1222 at 1223.
[227] Docket number V-09-INV-17B-05686 is listed twice. *See* PHL-OTP-0008-1341 at 1342, 1343. The proceeding is listed as pending in court on both occasions, albeit with different levels of detail and somewhat different information. Docket numbers V-09-INV-17C-05730, V-09-INV-17C-05731, and V-09-INV-17C-05732, grouped together towards a single status entry are also listed twice. *See* PHL-OTP-0008-1341 at 1342, 1344. Docket number V-09-INV-17A-05602 is also listed twice. *See* PHL-OTP-0008-1341 at 1342, 1344.
[228] PHL-OTP-0008-1341 at 1345. *See* docket numbers INV-17A-02249, INV-17A-02250, and INV-17A-02251: case dockets INV-17A-02249 and INV-17A-02250 list information that is then repeated in docket number INV-17A-02251. It appears that the killing of the two victims is recorded separately in the first two entries, and then again combined in the third entry; thus seemingly relating to one incident.

number, name of complainant, name(s) of respondents, offences charged,[229] and status.[230] Significantly, the list does not record the date and location of the incident concerned,[231] precluding verification of whether it falls within the temporal scope of the Court's investigation. The list also does not include, as a category, information about the name of the killed person.[232] Moreover, considering the information provided on offences charged (offences related to possession and distribution of drugs), and the reported status of 19 of the cases ("resolved dismissed due to the death of the respondent/victim"), the Prosecution infers that the majority of the listed proceedings were not concerned with investigating or prosecuting the conduct of police who killed alleged suspects (*i.e.*, victims) during operations, but rather with investigating the victims' alleged drug offenses. Only in one proceeding do charges for murder appear to have been filed in court against at least some of the police officers involved.[233] For one docket number, no status is provided, and a factual narrative about the event is included instead.[234] Again, the GovPH does not provide any case files for the listed cases or any other underlying documentation.

126. The GovPH has also submitted a memorandum from Regional Prosecution Office I with a table of 15 PNP-IAS cases (12 falling within the temporal scope of the investigation).[235] This table merely specifies case numbers, date, time, and location of incidents, and states that all cases were dismissed for lack of substantial evidence and forwarded to disciplinary authorities on various dates.[236] No further information is provided. Like the two lists discussed above, this table was apparently submitted to demonstrate *future* activities of the DOJ Panel. As discussed above, the Panel's review does not itself constitute an investigative step and, since no further information about these cases is provided, they likewise cannot support deferral of the investigation.

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[229] In some instances the crimes is listed with a reference to the relevant criminal code, specifically: Republic Act 9165 (Dangerous Drugs Act of 2002), PHL-OTP-0017-4870; Republic Act 10591 (Comprehensive Firearms and Ammunition Regulation Act of 2013) PHL-OTP-0017-4852. One reference is to RA 9164, but this appears to be a typographical error.
[230] PHL-OTP-0008-1341 at 1342.
[231] *Ibid*.
[232] In two instances the names of deceased victims are recorded as part of the status entry. *See* PHL-OTP-0008-1341 at 1345 (cases number V-05-INQ-17H-0492 and case numbers grouped towards a single status entry V-05-INQ-17H-0495 to 0497).
[233] PHL-OTP-0008-1341 at 1342, 1343 (case number V-09-INV-178-05686). This is one of the cases which appears twice in the table.
[234] PHL-OTP-0008-1341 at 1344 (docket numbers P-5479 and P-5480).
[235] PHL-OTP-0008-1222 at 1223 and PHL-OTP-0008-1334.
[236] PHL-OTP-0008-1334 at 1336-1337.

127. With regard to the eight case folders provided by the GovPH,[237] the Prosecution notes that whilst these case files contain relevant documentation for potential investigation of the eight relevant incidents, they do not in themselves demonstrate any investigative (or prosecutorial) action that would support deferral of the investigation. These proceedings also appear to have been initiated against the victims of killings, since in all cases the preliminary investigation was terminated because "Respondent died in police operation".[238] In any event, the GovPH does not assert that it has or is currently investigating the conduct of police officers involved in the incidents covered by these case files. Instead, these files are referred to by the GovPH in the context of prospective review by the DOJ Panel.[239]

III.D.3. Additional national proceedings not apparently referenced by the GovPH

128. The Prosecution has also independently identified a handful of criminal prosecutions that appear to have been initiated and relate to the WoD operations, but were not referenced in the information provided by the GovPH. The Prosecution has collected this information from publicly available sources, predominantly media outlets, in the process of its ongoing complementarity assessment. The Prosecution refers to its findings in the interest of completeness.

129. The Prosecution has identified a handful of cases where charges were reportedly brought against police officers in relation to their conduct during WoD-related police operations where individuals were killed. For example, proceedings relating to the incidents of killings of Jaypee and Renato Bertes[240] and Jee Ick Joo.[241] Both proceedings were referenced in the Prosecution's article 15 request.[242]

130. The Prosecution has also identified the trial related to the high-profile killing of Rolando (or Ronaldo) Espinosa, former Mayor of Leyte, as potentially relevant for its complementarity assessment. Despite an internal investigation reportedly finding that members of the PNP, under

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[237] PHL-OTP-0008-1348, PHL-OTP-0008-1392, PHL-OTP-0008-1416, PHL-OTP-0008-1451, PHL-OTP-0008-1476, PHL-OTP-0008-1505, PHL-OTP-0008-1532, PHL-OTP-0008-1580.
[238] *See* e.g. PHL-OTP-0008-1580 at 1580.
[239] PHL-OTP-0008-1222 at 1224.
[240] GMA, Pasay City prosecutor finds cause to charge cops in Berteses' killings, 25 April 2017, PHL-OTP-0003-2218.
[241] ABS-CBN News, Pampanga court grants bail to cop tagged as mastermind in Jee Ick Joo kidnap-slay, 7 May 2019, PHL-OTP-0003-2177.
[242] Article 15 Request, para. 117 ft. 307.

the direction of the then-CIDG 8 Chief, Supt. Marvin Marcos, planned the killing of Espinosa and another person, and "craftily executed the killings under the pretense of implementing a search warrant",[243] the Quezon City Regional Trial Court acquitted 19 police officers in October 2021 due to lack of evidence.[244] Before the acquittal, President Duterte made public statements that he would pardon and promote the policemen if they were convicted of the murder.[245] The Prosecution also made reference to these proceedings in its article 15 request.[246]

131. Finally, the Prosecution observed the Philippine media reporting in January 2022 on the statements of Justice Secretary Guevarra that four out of the 52 cases previously reviewed by the DOJ Panel were "pending before trial courts".[247]

III.D.4. The cases represent only a small fraction of the alleged criminal conduct and concern only low-level perpetrators

132. Similar to the cases referred to the NBI, discussed above, the cases referenced by the GovPH as collated from prosecutorial dockets and the additional cases which the Prosecution has identified from media reports, appear to be concerned only with the responsibility of low-level (mainly direct) perpetrators. Again, there is no indication whatsoever that the GovPH has investigated or is investigating the conduct of police and government leadership. Even if such cases were substantiated, they would only purport to address a small fraction of all reported killings and relate to low-level (mainly direct) perpetrators. As such, they likewise fail to reflect the scope, breadth, and gravity of the potential cases within the parameters of the Court's investigation into the situation.

Conclusion and Relief Sought

133. In conclusion, the Deferral Request of the GovPH is not substantiated and, in any event, the national proceedings referenced do not sufficiently mirror the Court's investigation. Consequently, the investigation should be reauthorised and resumed.

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[243] ABS-CBN News, DOJ: Supt. Marcos, other cops conspired to kill Espinosa, 20 March 2017, PHL-OTP-0001-4071.
[244] Inquirer, QC court acquits 19 cops tagged in ex-Albuera mayor Rolando Espinosa slay, 6 October 2021, PHL-OTP-0009-0032.
[245] Rappler, Where the drug war began, 24 April 2017, PHL-OTP-0003-2049 at 2080.
[246] Article 15 Request, para. 47 and 117, ft. 307.
[247] Philstar, DOJ: Four of 52 deadly PNP 'drug war' cases reviewed now in courts, 25 January 2022, PHL-OTP-0009-0037. One of the cases – Arnaiz – has been pending in court since 2018 and thus the progress of this case appears unrelated to DOJ's review. *See* the reference in Article 15 Request, para. 47 and 117, ft. 307.

134. Publicly available information and communications submitted to the Prosecution by civil society organisations also underline the need for an ICC investigation. For example, the Philippine Commission on Human Rights recently released a report on its investigation into drug-related killings across all administrative regions from 2016 through 2021, finding that the government "failed in its obligation to respect and protect the human rights of every citizen, in particular, victims of drug-related killings" and "has encouraged a culture of impunity that shields perpetrators from being held to account."[248] Similar views and concerns have been communicated to the Prosecution by non-governmental organisations and groups representing victims, all supporting the resumption of the Court's investigation. Without such an investigation, the Prosecution submits that there is a real risk that Rome Statute crimes committed in the Philippines will go un-investigated and unpunished.

135. For the reasons set out above, the Prosecution requests the Chamber to:

(i) issue an order, on an expedited basis, setting out the procedure to be followed in deciding this request, in accordance with rule 55(1) of the Rules;

(ii) receive any further observations it considers appropriate from victims and the Government of the Philippines, according to an expedited schedule; and

(iii) authorise the resumption of the Court's investigation in the *Situation in the Philippines*, notwithstanding the Deferral Request.

Karim A.A. Khan QC, Prosecutor

Dated this 24th day of June, 2022
At The Hague, The Netherlands

[248] PHL-OTP-0017-4787 at 4790 and 4791. The Commission analysed a representative sample of 882 case dockets out of its concluded 2,305 investigations. These 882 case dockets concern 872 incidents with 1,139 victims. It found a pattern in deaths which arose in the context of operations by law enforcement agents who claim to have acted in self-defence against victims, whereby intent to kill and disproportionality of force to repel aggression were evident. It observed that killings were carried out with impunity, with perpetrators seldom brought to justice. It considered that internal investigations by the PNP have been inaccessible and opaque, with precinct-level investigations conducted by members of the same station or unit. It also found that police investigations of drug-related killings committed by unidentified and other perpetrators have been inadequate, despite the PNP's significant resources and capabilities. It deplored how it was prevented access to numerous PNP case files on the basis of presidential directive and other issuances. The investigation reports that it was able to access rarely questioned the legitimacy of the operations, the use of firearms and the self-defence narrative.