

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No. **ICC-01/21**

Date: **26 January 2023**

PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

PUBLIC

**Public Redacted Version of “Authorisation pursuant to article 18(2) of the
Statute to resume the investigation”**

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

The Office of the Prosecutor

Mr Karim A. A. Khan

Mr Colin Black

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representative

Republic of the Philippines

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

PRE-TRIAL CHAMBER I (the ‘Chamber’) of the International Criminal Court (the ‘Court’) issues this decision authorising the Prosecution to resume the investigation into the situation in the Republic of the Philippines (the ‘Philippines Situation’), pursuant to article 18(2) of the Statute.

I. PROCEDURAL HISTORY AND OVERVIEW OF SUBMISSIONS

1. On 15 September 2021, the Chamber authorised the commencement of an investigation into the situation in the in the Republic of the Philippines (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’ (the ‘Article 15 Decision’).¹

2. On 18 November 2021, the Prosecution notified the Chamber that the Philippines had requested a deferral of the investigation of nationals or others within its jurisdiction,² appending the deferral request in an annex (the ‘Deferral Request’).³

3. Between 22 December 2021 and 31 March 2022, the Philippines provided the Prosecution with various documents in support of the Deferral Request pursuant to the Prosecution’s request under rule 53 of the Rules of Procedure and Evidence (the ‘Rules’).⁴

4. On 24 June 2022, the Prosecution requested the Chamber for authorisation to resume its investigation into the Philippines Situation pursuant to article 18(2) of the Statute (the ‘Prosecution’s Request’).⁵ According to the Prosecution, the Philippines’ Deferral Request should be rejected,⁶ and the Prosecution should be authorised to

¹ Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15(3) of the Statute, ICC-01/21-12.

² Notification of the Republic of the Philippines’ deferral request under article 18(2), ICC-01/21-14, with public Annex A.

³ ICC-01/21-14-AnxA.

⁴ Prosecution’s request to resume the investigation into the situation in the Philippines pursuant to article 18(2), ICC-01/21-46, para. 9.

⁵ Prosecution’s request to resume the investigation into the situation in the Philippines pursuant to article 18(2), ICC-01/21-46.

⁶ Prosecution’s Request, para. 70.

resume its investigation into the situation.⁷ In support, the Prosecution provides four sets of overarching submissions, focusing both on the nature and the scope and subject matter of the activities relied upon by the Philippines i) administrative or non-criminal proceedings, as cited in the Deferral Request, are not investigative activities and do not justify deferral;⁸ ii) the Philippines has not identified any investigations into a large set of events, type of crimes covered by the Chamber's authorisation to investigate, in particular alleged events in Davao between 2011 and 2016, crimes other than murder, killings outside official police operations, into the alleged policy element;⁹ iii) the cases referred to the Philippines' National Bureau of Investigation do not support deferral of the Court's investigation;¹⁰ and iv) the cases collated from the dockets of the Philippines' national and regional prosecution offices also do not support deferral of the Court's investigation.¹¹

5. On 14 July 2022, the Chamber invited the Philippines to submit any additional observations arising from the Prosecution's Request and allowed the Prosecution to respond to any factual arguments raised in any such observations. The Chamber further instructed the Victims Participation and Reparations Section (the 'VPRS') to provide a short report summarising any additional views and concerns raised by victims in relation to the Prosecution's Request.¹²

6. On 8 September 2022, the Chamber received the observations from the Philippines (the 'Observations') seeking that the Prosecution's Request be denied.¹³ The Philippines makes several general challenges to the Court's jurisdiction¹⁴ and disputes the gravity of the alleged crimes.¹⁵ Moreover, it submits that there is 'no sufficient basis' for the Prosecution to resume its investigation pursuant to article 18(2) of the Statute.¹⁶ In the Philippines view, 'its national proceedings sufficiently mirror

⁷ Prosecution's Request, para. 135.

⁸ Prosecution's Request, paras 72-93.

⁹ Prosecution's Request, paras 94-103.

¹⁰ Prosecution's Request, paras 104-114.

¹¹ Prosecution's Request, paras 115-132.

¹² Order inviting observations and victims' views and concerns, ICC-01/21-47.

¹³ Philippine Government's Observation on the Office of the Prosecutor's Request, ICC-01/21-51.

¹⁴ Observations, paras 7-23.

¹⁵ Observations, paras 38-48.

¹⁶ Observations, para. 186.

the Court's investigation';¹⁷ it has demonstrated willingness and capability to investigate and prosecute crimes; and has taken 'concrete actions and steps' to this effect.¹⁸ In accordance with the principle of complementarity, the situation would therefore be inadmissible under article 17 of the Statute.¹⁹

7. On 22 September 2022, the Prosecution responded (the 'Response'),²⁰ submitting that: i) the Philippines' general challenges to resume the investigation on the basis of jurisdictional and gravity grounds are not properly before the Court;²¹ ii) the Philippines' contention that there was no widespread or systematic attack, and that the crimes were not committed in furtherance of any state policy, relate to the merits of an eventual prosecution;²² iii) the Philippines' gravity challenge is not supported by the facts or law;²³ and iv) the Philippines has failed to provide material which demonstrates that it has conducted or is conducting national investigations or prosecutions that sufficiently mirror the investigation authorised by the Chamber, despite having been provided with ample opportunity to do so.²⁴ More specifically, the Prosecution submits that the additional material provided by the Philippines in its Observations (whether relating to the administrative and non-penal proceedings, or to criminal investigations) remains incapable of substantiating the existence of national investigations or prosecutions that sufficiently mirror the Court's investigation.²⁵ Furthermore, it avers that the additional material relates to proceedings 'overwhelmingly against low-level and physical perpetrators' and does not address 'possible patterns or policy behind the killings'.²⁶

¹⁷ Observations, para. 188.

¹⁸ Observations, para. 189.

¹⁹ Observations, paras 189-190.

²⁰ Prosecution's Response to the Philippine Government's Observations on the Prosecution's Request to Resume Investigations (ICC-01/21-51, filed 8 September 2022), ICC-01/21-54-Conf-Exp (confidential *ex parte*, only available to the Prosecution and the Republic of the Philippines; public redacted version filed on the same day, ICC-01/21-54-Red).

²¹ Response, paras 2, 7-12.

²² Response, paras 4, 13-21.

²³ Response, paras 22-26.

²⁴ Response, paras 5, 27-74.

²⁵ Response, para. 53.

²⁶ Response, paras 73-74.

8. On 22 September 2022, following the Chamber's instruction to the VPRS to liaise with potential victims²⁷ and their legal representatives to compile a report summarising any additional or different views or concerns than those already expressed in the article 15(3) consultation, the 'Registry Report on Article 18(2) Victim Representations' (the 'Victims Report'),²⁸ as well as the 'Registry Transmission of Victims' Representations' (the 'Victims Representations'),²⁹ were filed.

9. These collective victim representations, eight in total, made on behalf of 293 individuals and 366 families of potential victims,³⁰ all support the Prosecution's request to resume its investigation.³¹ The potential victims indicate that they seek a genuine and impartial investigation into extrajudicial killings in order to bring perpetrators to justice and end impunity.³² They believe that the Deferral Request does not demonstrate a genuine willingness to criminally prosecute those involved in the government's 'war on drugs'.³³ Several victims illustrate this by pointing at the very slow, or non-existent, progress in cases brought to the authorities at the domestic level.³⁴ Only a limited number of potential victims indicate that their cases were investigated by the authorities.³⁵ The representations flag a number of issues affecting initiatives taken at the national level, including the following: a lack of transparency and progress in cases

²⁷ The term 'potential victims' is solely used to distinguish individuals whose applications have not yet gone through the application process pursuant to rule 89 of the Rules, as generally adopted in the context of confirmation of charges proceedings, on the one hand, from those individuals who have been admitted to participate in proceedings as victims through the rule 89 procedure, on the other.

²⁸ ICC-01/21-55 (public, with confidential and public redacted Annex I, ICC-01/21-55-Conf-AnxI and ICC-01/21-55-AnxI-Red; confidential *ex parte* Annex II, only available to the Registry, ICC-01/21-55-Conf-Exp-AnxII; and confidential Annex III, ICC-01/21-55-Conf-AnxIII).

²⁹ ICC-01/21-53 (public, with eight confidential *ex parte* Annexes, only available to the Registry, ICC-01/21-53-Conf-Exp-Anx1, ICC-01/21-53-Conf-Exp-Anx2, ICC-01/21-53-Conf-Exp-Anx3, ICC-01/21-53-Conf-Exp-Anx4, ICC-01/21-53-Conf-Exp-Anx5, ICC-01/21-53-Conf-Exp-Anx6, ICC-01/21-53-Conf-Exp-Anx7, and ICC-01/21-53-Conf-Exp-Anx8); one additional victims representation was submitted via email (email from the VPRS to the Chamber, 22 September 2022, at 15:18).

³⁰ Registry Report on Article 18(2) Victim Representations, confidential *ex parte*, only available to the Registry, Annex II (containing the Registry's assessment of the representations transmitted), and confidential Annex III (containing an explanation of the criteria applied when conducting the assessment of each representation).

³¹ Registry Report on Article 18(2) Victim Representations Annex I, para. 2.

³² Registry Report on Article 18(2) Victim Representations Annex I, para. 25.

³³ Registry Report on Article 18(2) Victim Representations Annex I, para. 2.

³⁴ Registry Report on Article 18(2) Victim Representations Annex I, para. 2.

³⁵ Registry Report on Article 18(2) Victim Representations Annex I, paras. 25 and 26; ICC-01/21-53-Conf-Exp-Anx2, p. 5; ICC-01/21-53-Conf-Exp-Anx3, p. 4; ICC-01/21-53-Conf-Exp-Anx4, p. 3; ICC-01/21-53-Conf-Exp-Anx5.

brought by victims;³⁶ a lack of cooperation from authorities;³⁷ a difficulty in accessing police reports or files;³⁸ alleged forgery of death certificates or other official documents;³⁹ security risks being placed on victims' families or witnesses due to intimidation and/or threats.⁴⁰

II. ANALYSIS

A. Applicable law

10. When making an article 18(2) request, the relevant State must first provide information concerning its investigations.⁴¹ In considering whether to authorise the resumption of an investigation, the Chamber must examine this information, the Prosecution's application, and any observations submitted by the State seeking a deferral. In doing so, the Chamber 'shall consider the factors in article 17 in deciding whether to authorize an investigation'.⁴² These factors are the instances in which a case would be inadmissible at the Court, namely:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

³⁶ Registry Report on Article 18(2) Victim Representations Annex I, para. 26; ICC-01/21-53-Conf-Exp-Anx5; ICC-01/21-53-Conf-Exp-Anx3, p. 3.

³⁷ Registry Report on Article 18(2) Victim Representations Annex I, para. 26; ICC-01/21-53-Conf-Exp-Anx3, pp 3-4; ICC-01/21-53-Conf-Exp-Anx2, pp 9-10; and ICC-01/21-53-Conf-Exp-Anx4, p. 3.

³⁸ Registry Report on Article 18(2) Victim Representations Annex I, para. 26; ICC-01/21-53-Conf-Exp-Anx2, p. 5; ICC-01/21-53-Conf-Exp-Anx3, p. 9.

³⁹ Registry Report on Article 18(2) Victim Representations Annex I, para. 26; ICC-01/21-53-Conf-Exp-Anx4, p. 20; ICC-01/21-53-Conf-Exp-Anx3, p. 11.

⁴⁰ Registry Report on Article 18(2) Victim Representations Annex I, paras 17 and 26; ICC-01/21-53-Conf-Exp-Anx2, p. 12; ICC-01/21-53-Conf-Exp-Anx3, p. 9; and ICC-01/21-53-Conf-Exp-Anx4, p. 13.

⁴¹ Rule 53 of the Rules.

⁴² Article 18(2) of the Statute and rule 55(2) of the Rules.

(d) The case is not of sufficient gravity to justify further action by the Court.

11. When considering these ‘factors’, for the purposes of article 17(1)(a) and (b), ‘the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned’.⁴³ Only when both questions are answered in the affirmative, should a chamber consider whether a State is unwilling and unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute. Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court.⁴⁴

12. Since article 17 of the Statute not only applies to determinations of the admissibility of a concrete case (as per article 19 of the Statute), but also to preliminary admissibility rulings pursuant to article 18 of the Statute,⁴⁵—as recently considered by Pre-Trial Chamber II when seized of the first request by a State for a deferral pursuant to article 18(2) of the Statute—, the meaning of the words ‘case is being investigated’ found in article 17(1)(a) of the Statute must be understood and construed taking into account the specific context in which the test is applied.⁴⁶ However, at the time a chamber must consider preliminary admissibility challenges under article 18 of the

⁴³ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497 (the ‘[Katanga Admissibility Judgment](#)’), para. 78.

⁴⁴ [Katanga Admissibility Judgment](#), para. 78

⁴⁵ Rule 55(2) of the Rules. Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, 31 October 2022, ICC-02/17-196 (the ‘[Afghanistan Article 18\(2\) Decision](#)’), para. 46, referring to Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-02/11-274 (the ‘[Muthaura et al. Article 19 Judgment](#)’), para 37; and Appeals Chamber, *The Prosecutor v. William Samoei Ruto et al.*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”, 30 August 2011, ICC-01/09-01/11-307 (the ‘[Ruto et al. Article 19 Judgment](#)’), para. 39.

⁴⁶ See similarly [Afghanistan Article 18\(2\) Decision](#), para. 46.

Statute, the contours of ‘likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages’.⁴⁷

13. Nonetheless, if investigations are taking place at the national level, the Chamber is tasked to consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court.⁴⁸ This assessment requires a comparison of two distinct forms of investigations, namely specific domestic proceedings or cases with identified individuals versus a so far general investigation of this Court. Depending on the situation, the latter investigation may look into a large number of crimes, and cover a large geographical area and timeframe. Consequently, what is required by this provision is a comparison of two very different sets of information that cannot easily be compared.⁴⁹

14. To enable it to conduct this potentially challenging assessment, the Chamber requires sufficient information. In this regard, the Chamber recalls that, for the purpose of admissibility challenges pursuant to article 18(2) of the Statute, the onus is on the State to show that investigations or prosecutions are taking place or have taken place.⁵⁰ More specifically, in order to demonstrate activity, merely asserting that investigations are ongoing is not sufficient. The relevant State must ‘provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case’.⁵¹ A State must show that ‘tangible, concrete and

⁴⁷ Compare [Muthaura et al. Article 19 Judgment](#), para. 38; and [Ruto et al. Article 19 Judgment](#), para. 39. See also [Afghanistan Article 18\(2\) Decision](#), para. 46.

⁴⁸ Compare [Muthaura et al. Article 19 Judgment](#), para. 39; and [Ruto et al. Article 19 Judgment](#), para. 40.

⁴⁹ See [Afghanistan Article 18\(2\) Decision](#), para. 46.

⁵⁰ See rule 53 of the Rules. See also [Afghanistan Article 18\(2\) Decision](#), para. 45; [Muthaura et al. Article 19 Judgment](#), para. 61; [Ruto et al. Article 19 Judgment](#), para. 62; and Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”, 27 May 2015, ICC-02/11-01/12-75-Red (the ‘[Simone Gbagbo Admissibility Judgment](#)’), para. 128.

⁵¹ [Afghanistan Article 18\(2\) Decision](#), para. 45. See also [Muthaura et al. Article 19 Judgment](#), paras 2, 61, 68; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the case against Saif Al-Islam Gaddafi](#), 31 May 2013, ICC-01/11-01/11-344-Red, para. 54; Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura et al.*, [Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute](#), 30 May 2011, ICC-01/09-02/11-96, paras 59, 64-65.

progressive investigative steps’ are undertaken.⁵² ‘[S]parse and disparate’ activities do not suffice,⁵³ but rather a State should take proactive investigative steps.⁵⁴ Moreover, such investigations must be carried out with a view to conduct *criminal* prosecutions.⁵⁵

15. Relevant substantiating documentation should include any ‘material capable of proving that an investigation or prosecution is ongoing’ such as ‘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]’.⁵⁶ In the next part of this decision, the Chamber will discuss various types of materials provided to it by the Philippines, in part through the Prosecution. As explained below, not all materials assisted the Chamber in making its assessment. The examples provided to the Philippines in the Prosecution’s letter dated 23 November 2021⁵⁷ are informative of the type of documents that may be capable of substantiating ongoing investigations and prosecutions. Indeed, materials that may enable the Chamber to meaningfully assess what investigative steps and criminal prosecutions are taking place for the purposes of inadmissibility may include, but are not limited to: police reports, charges or other official allegations, copies of evidence, referrals to

⁵² [Afghanistan Article 18\(2\) Decision](#), para. 45. See also Pre-Trial Chamber I, *The Prosecutor v. Simone Gbagbo*, [Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo](#), 11 December 2014, ICC-02/11-01/12-47-Red, paras 30, 65; [Burundi Article 15 Decision](#), para. 148; *Simone Gbagbo* Admissibility Judgment, para. 122; Pre-Trial Chamber I, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest, 4 July 2018, ICC-01/11-01/17-13 (the ‘[Al-Werfalli Second Warrant of Arrest](#)’), paras 27-28; Pre-Trial Chamber III, *The Situation in the Republic of Burundi*, Public Redacted Version of “[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#)”, ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, para.172, 175; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, ICC-01/11-01/11-466-Red (the ‘[Al-Senussi Admissibility Decision](#)’), para. 161; and Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Saif Al-Islam Gaddafi, 31 May 2013, ICC-01/11-01/11-344-Red (the ‘[Gaddafi Admissibility Decision](#)’), para. 55.

⁵³ Pre-Trial Chamber I, *The Prosecutor v. Simone Gbagbo*, [Decision on Cote d’Ivoire’s Challenge to the Admissibility of the case against Simone Gbagbo](#), 11 December 2014, ICC-02/11-01/12-47-Red, para. 65; [Al-Senussi Admissibility Decision](#), para. 161; [Gaddafi Admissibility Decision](#)), para. 55.

⁵⁴ [Afghanistan Article 18\(2\) Decision](#), para. 45. See also [Burundi Article 15 Decision](#), paras 164, 173, 174; and [Al-Werfalli Second Warrant of Arrest](#), para. 28.

⁵⁵ [Afghanistan Article 18\(2\) Decision](#), para. 45 and 79. See also [Burundi Article 15 Decision](#), para. 152; para. 165.

⁵⁶ Pre-Trial Chamber II, [Situation in the Republic of Kenya](#), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para. 49.

⁵⁷ PHL-OTP-0017-4764.

prosecutors or other bodies, as well as relevant court filings and court records, of incidents within the Court’s authorised investigation.

16. In order to satisfy the complementarity principle, a State must show that in addition to being ‘opened’, its investigations and proceedings also sufficiently mirror the content of the article 18(1) notification,⁵⁸ by which the Prosecution notified the concerned State of the opening of an investigation, and its scope. Since, at the article 18 stage, no suspect has yet been the subject of an arrest warrant, and similar to what is done in the context of article 15 proceedings, admissibility can only be assessed against the backdrop of a situation⁵⁹ and the ‘potential cases’ that would arise from this situation.⁶⁰

17. Finally, the Chamber recalls that the admissibility of a case must be determined on the basis of the facts ‘as they exist *at the time* of the proceedings [before the Court]’.⁶¹ When assessing the existence of investigations for the purposes of an article 18(2) request, a chamber must similarly take into account the state of such investigations at the time of its consideration on the merits of the Prosecution’s request to resume its investigation.⁶²

⁵⁸ See also rule 52(1) of the Rules.

⁵⁹ Pre-Trial Chamber I, *Situation in Georgia*, Decision on the Prosecutor’s request for authorization of an investigation, 27 January 2016, ICC-01/15-12 ([‘Georgia Article 15 Decision’](#)), para. 36; and *Kenya Article 15 Decision*, paras 41-48.

⁶⁰ [Muthaura et al. Article 19 Judgment](#), para. 38; [Ruto et al. Article 19 Judgment](#), para. 39; *Georgia Article 15 Decision*, para. 36; and Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, Corrigendum to [“Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire”](#), 15 November 2011, ICC-02/11-14-Corr, para. 190.

⁶¹ [Katanga Admissibility Judgment](#), paras 56 and 80; [Ruto et al. Article 19 Judgment](#), para. 83; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, [Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute](#), 30 May 2011, ICC-01/09-01/11-101, para. 70; Trial Chamber V, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, [Decision on the Yekatom Defence’s Admissibility Challenge](#), 28 April 2020, ICC-01/14-01/18-493, para. 17; Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, [Decision on the admissibility of the case under article 19\(1\) of the Statute](#), 10 March 2009, ICC-02/04-01/05-377, paras 49-51, 52; Pre-Trial Chamber II, *The Prosecutor v. Uhuru Muigai Kenyatta et al.*, [Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute](#), 30 May 2011, ICC-01/09-02/11-96, para. 62.

⁶² [Afghanistan Article 18\(2\) Decision](#), para. 47. The Chamber therefore dismisses the Prosecution’s submission that the Chamber ought to consider only concrete investigative steps taken as of 10 November 2021 (i.e., the date of the Deferral Request), or at the latest 31 March 2022 (i.e., the Prosecution’s deadline given to the Philippines to provide information substantiating the Deferral Request; see

B. Determination by the Chamber

1. *Preliminary issues*

18. In its Observations, the Philippines makes several general challenges to the Court's jurisdiction⁶³ and disputes the gravity of the alleged crimes.⁶⁴ As to the former, the Philippines submits that the Court has no jurisdiction over the Philippines Situation pursuant to the principles of non-intervention and sovereign equality as enshrined in the United Nations Charter.⁶⁵

19. According to the Philippines, the alleged crimes do not constitute crimes against humanity.⁶⁶ The Philippines observes that its 'entire national government' is involved in an 'intensified and comprehensive campaign against illegal drugs'.⁶⁷ The Philippines contends that in determining to open an investigation, the Prosecution failed to apply the relevant legal criteria under articles 54(1) and 53(1) of the Statute, misinterpreted available information and failed to evaluate all available information impartially and objectively,⁶⁸ also failing to explain its 'lack of consideration of governmental resources'.⁶⁹

20. The Philippines submits that the situation is not of sufficient gravity to justify further action by the Court.⁷⁰ In particular, the Philippines asserts that the following two principle features that are required to establish gravity are not present: i) the conduct was not part of a systematic attack directed against any civilian population;⁷¹ and, ii) the 'subjective reaction of the international community towards the "war on drugs" campaign of the Philippine Government is not justified, in particular in light of

Response, para. 71), as the Court's complementarity system depends on actual action at the time of a chamber's consideration, not on arbitrarily set dates.

⁶³ Observations, paras 7-23.

⁶⁴ Observations, paras 38-48.

⁶⁵ Observations, paras 7-23.

⁶⁶ Observations, para. 23.

⁶⁷ Observations, paras 149-184.

⁶⁸ Observations, paras 2-6, 24-30.

⁶⁹ Observations, paras 24-25.

⁷⁰ Observations, paras 38-48.

⁷¹ Observations, para. 41.

the fact that the crimes allegedly committed would do not fall under the most serious cases of truly international concern'.⁷²

21. The Philippines further asserts that the Chamber's findings in the Article 15 Decision 'fail to recognise that the Philippine Government fully respects internationally protected human rights in the conduct of its legitimate operations', and that 'isolated instances of criminal activity are now the subject of prosecution before the domestic courts'.⁷³

22. In its Response, the Prosecution submits that the Philippines' general challenges to resume the investigation on the basis of jurisdictional and gravity grounds are not properly before the Court, as neither argument is permitted at this stage of the proceedings.⁷⁴ It avers that the Chamber has already made a determination in relation to the Court's jurisdiction into this situation in the Article 15 Decision and stresses that 'no provision of the Statute authorises a State to challenge gravity' within an article 18(2) deferral request.⁷⁵

23. The Prosecution further asserts that the Philippines' argument that the Court has no jurisdiction over the situation as 'crimes were not perpetrated pursuant to a state policy, nor as part of a widespread or systematic attack against a civilian population' must fail on the basis of being a factual challenge to the substantive merits of a potential case,⁷⁶ and that the Philippines otherwise misstates the requirements for establishing any such state policy.⁷⁷ Additionally, the Philippines has not 'presented any evidence or concrete information undermining the Chamber's findings' in its Article 15 Decision that the alleged crimes took place as part of a widespread and systematic attack on a civilian population and pursuant to or in furtherance of a state policy.⁷⁸

24. As to the Philippines' assertion that the alleged crimes are not of sufficient gravity to justify an investigation by the Court, the Prosecution states that it relies upon 'a broad

⁷² Observations, para. 44.

⁷³ Observations, para. 20.

⁷⁴ Response, paras 2, 7-12.

⁷⁵ Response, para. 12.

⁷⁶ Response, paras 15-16.

⁷⁷ Response, paras 17-18.

⁷⁸ Response, paras 19-20.

foundation of evidence and information’ to ‘objectively establish the requisite gravity of the situation under article 17’ of the Statute.⁷⁹ Further, the Prosecution submits that the Philippines’ observations that the alleged crimes were not part of a widespread or systematic attack are without merit, as is the Philippines’ assertion that the criticism of the ‘war on drugs’ is politically motivated.⁸⁰

25. The Chamber notes that the Philippines extensively outlines the scope of the drug problem within the Philippines without connecting this to an actual legal submission in this regard.⁸¹ In addition, several of the Philippines’ preliminary submissions show its disagreement with the Chamber’s findings in the Article 15 Decision.⁸² Yet, article 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of article 15 proceedings. The Philippines’ submission that the situation is not of sufficient gravity to justify further action by the Court, for example, is merely based on the argument that there would not have been any widespread or systematic attack directed against any civilian population or that the crimes were not committed pursuant to a state policy,⁸³ which the Chamber already considered and rejected for the purposes of the Article 15 Decision. The Chamber therefore rejects those arguments.

26. The Philippines’ arguments that the Court should not investigate in the Philippines due to the principle of non-intervention⁸⁴ are misplaced, as they misappreciate the Court’s complementarity system. The Court’s jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty, and pursuant to how the system of complementarity functions. As part of the procedure laid down in article 18(2) of the Statute, the Chamber may authorise the Prosecution to resume an investigation, notwithstanding a State’s request to defer the investigation.

⁷⁹ Response, para. 23.

⁸⁰ Response, para. 22.

⁸¹ Observations, paras 128-148.

⁸² Observations, paras 11-23, 41-42, 45.

⁸³ Observations, paras 42, 45.

⁸⁴ Observations, paras 7-9, 14.

These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute.⁸⁵

27. As to the Philippines' submissions about the legitimacy of its operations against drug trafficking in the Philippines, the Chamber recalls that the motive of the perpetrators committing the crimes under the Statute, is different from intent, and as such irrelevant in international criminal law.⁸⁶

2. *Issues material to the article 18(2) proceedings*

28. In this section, the Chamber assesses the parties' submissions pertaining to the existence of domestic proceedings that would justify a deferral of the Court's investigation pursuant to article 18(2) of the Statute. Due to the wide range and diversity of the domestic measures discussed in the submissions, the Chamber assesses them separately, mirroring the classification in the Prosecution's Request, for ease of reference. The domestic measures are not analysed in isolation. When appropriate, the Chamber also considers the interaction between different domestic proceedings and their complementarity.

A. Non-criminal proceedings

29. The Prosecution submits that the Deferral Request should be rejected⁸⁷ on the basis that the Philippines has not demonstrated that it has investigated or is investigating its nationals or others within its jurisdiction pursuant to article 18 of the Statute.⁸⁸ In support, the Prosecution argues that certain initiatives relied on by the Philippines are not penal in nature, but merely administrative or non-criminal, and therefore do not constitute relevant investigations or prosecutions for the purpose of articles 17 and 18 of the Statute.⁸⁹ These initiatives are: i) a review conducted by the Department of Justice

⁸⁵ See Article 127(2) of the Statute. See also Article 15 Decision, paras 110-111.

⁸⁶ See, for example, ICTY, Appeals Chamber, *Prosecutor v. Kvočka et al.*, Appeal Judgment, 28 February 2005, IT-98-30-/1-A, para. 106, referring to *Prosecutor v. Jelisić*, Judgement, 5 July 2001, IT-95-10-A, para. 49; *Prosecutor v. Tadić*, Appeal Judgment, 15 July 1999, IT-94-1-A, para. 269; and *Prosecutor v. Krnojelac*, Appeal Judgment, 17 September 2003, IT-97-25-A, para. 102.

⁸⁷ Prosecution's Request, para. 70.

⁸⁸ Prosecution's Request, para. 2.

⁸⁹ Prosecution's Request, para. 72.

Panel;⁹⁰ ii) so-called ‘writ of *amparo* proceedings’;⁹¹ iii) the activities of the Administrative Order no. 35 Committee and the United Nations Joint Programme on Human Rights;⁹² and iv) investigations conducted by the Philippine National Police – Internal Affairs Services.⁹³

i) Department of Justice Panel

30. The Prosecution states that, whilst the Philippines refers to the review by the Department of Justice Panel (the ‘DOJ Panel’) as ‘the most prominent of its efforts to investigate killings arising from the [war on drugs]’⁹⁴ the DOJ Panel appears to be ‘an *ad hoc* group of DOJ members chaired by the Secretary of Justice’ tasked with reviewing administrative and criminal cases against personnel of the Philippine National Police (the ‘PNP’) involved in anti-illegal drugs operations resulting in deaths.⁹⁵ At the time of the Prosecution’s Request, the DOJ Panel had referred 302 cases to the Philippines’ National Bureau of Investigation (the ‘NBI’) for ‘investigation and case build-up’.⁹⁶ The Prosecution submits that: i) the DOJ Panel ‘does not appear to possess powers or authority independent of the DOJ or have any specific investigative function’;⁹⁷ ii) accordingly the DOJ Panel ‘has merely conducted a “desk review” of the 302 cases’,⁹⁸ which does not constitute investigative activity within the framework of article 18(2) of the Statute;⁹⁹ and (iii) any prospective reviews to be carried out by the DOJ Panel do not constitute ongoing or completed investigations or prosecutions as required by articles 17(1)(a) and 18(2) of the Statute.¹⁰⁰

31. The Philippines contests the Prosecution’s allegation that the DOJ Panel conducts a ‘desk review’, averring that the DOJ ‘serves as the Philippine Government’s prosecution arm and administers the government’s criminal justice system by

⁹⁰ Prosecution’s Request, paras 73-78.

⁹¹ Prosecution’s Request, paras 79-88.

⁹² Prosecution’s Request, paras 89-93.

⁹³ Response, paras 39-41.

⁹⁴ Prosecution’s Request, para. 73.

⁹⁵ Prosecution’s Request, para. 74.

⁹⁶ Prosecution’s Request, para. 76.

⁹⁷ Prosecution’s Request, para. 75.

⁹⁸ Prosecution’s Request, para. 76.

⁹⁹ Prosecution’s Request, paras 75-77.

¹⁰⁰ Prosecution’s Request, para. 78.

investigating crimes and prosecuting offenders’¹⁰¹ through the NBI, an attached agency, and the National Prosecution Service (the ‘NPS’), a DOJ office. The Philippines further submits that the ‘DOJ panel reviews may result in the filing of cases’ and that the result of the review ‘is supposed to ferret out which cases warrant a preliminary investigation that may lead to the filing of a complaint or information, and which ones do not’.¹⁰²

32. Responding to the Philippines, the Prosecution reiterates that the Panel’s review falls short of comprising tangible, concrete, and progressive investigative steps.¹⁰³ As regards the proposition that the DOJ Panel review may result in the filing of cases, the Prosecution submits that ‘mere speculation as to one possible outcome of a Panel review does not render the process a concrete investigative step’.¹⁰⁴

33. The Chamber observes that, at the time of the Prosecution’s Request, the DOJ Panel had referred to the NBI, for investigation and case build-up,¹⁰⁵ 302 cases consisting of 52 PNP-IAS cases (the ‘*nanlaban*’ cases)¹⁰⁶ and 250 NPS cases.¹⁰⁷

34. The 52 *nanlaban* (‘resisting arrest’) cases concern deaths occurred in the context of anti-narcotic operations in which the PNP-IAS found administrative liability on the part of its law enforcement agents.¹⁰⁸ The Philippines expressed that such cases signalled ‘the start of the DOJ review of over 6,000 administrative cases in the dockets of the PNP-IAS’.¹⁰⁹ As regards the 250 NPS cases, the Philippines submitted charts

¹⁰¹ Observations, para. 75.

¹⁰² Observations, para. 77.

¹⁰³ Response, para. 31.

¹⁰⁴ Response, para. 31.

¹⁰⁵ Prosecution’s Request, para. 76. The Philippines provides four charts listing proceedings reviewed by the DOJ Panel. In what appears to be a column indicating the Panel’s 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.

¹⁰⁶ PHL-OTP-0008-0050, ‘Information table 52 cases’. *Nanlaban* seems to mean “resisting arrest”. See Observations, para. 78.

¹⁰⁷ PHL-OTP-0008-1228, PHL-OTP-0008-1259 and PHL-OTP-0008-1294.

¹⁰⁸ The information provided by the Philippines consists of a chart containing limited information of the 52 *nanlaban* cases and what seems to be the observations of the DOJ Panel as well as approximately 12 memorandums (from NBI, DOJ and the Office of the Prosecution General) reporting on the status of some investigations.

¹⁰⁹ ICC-01/21-14-AnxA, p. 3.

containing limited information of anti-narcotic cases resulting in the death of the respective suspects. The charts include a ‘remarks’ column indicating lapses in police and forensic procedures.¹¹⁰ However, the charts do not provide information as to whether criminal investigations and prosecutions were initiated against the police officers involved in the killings.

35. Furthermore, the Philippines does not explain how the DOJ Panel conducts its review and there is no indication in the material provided to the Chamber suggesting that the DOJ Panel conducts investigative activity by itself before deciding to refer cases to the NBI for further investigation. From the information before the Chamber, it therefore appears that the DOJ Panel review does not amount to relevant investigations within the meaning of article 17 and 18 of the Statute. Moreover, the number of cases reviewed by the DOJ Panel (namely, 302) is very low when compared with the estimated number of killings that allegedly occurred in the context of ‘war on drugs’ operations.¹¹¹

ii) Amparo proceedings

36. According to the Philippines ‘the petition for a 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 by a public official or employee, or a private individual or entity’.¹¹² The petition is subject to a summary hearing’.¹¹³

37. The Prosecution argues that *amparo* proceedings do not seek to determine criminal responsibility and therefore do not establish any investigative steps relevant to the Deferral Request.¹¹⁴ The Prosecution states that, although domestic courts ‘can compel law enforcement officers to conduct investigations where they did not exercise extraordinary diligence in the performance of their duties, *amparo* proceedings by

¹¹⁰ The Philippines provided the Prosecution with 3 charts summarising details of the anti-drug cases and what seems to be the DOJ Panel’s remarks indicating lapses in police and forensic procedures.

¹¹¹ The Article 15 Decision refers to a range from 12,000 to 30,000 (Article 15 Decision, para. 67).

¹¹² Deferral Request, p. 4.

¹¹³ Deferral Request, p. 5.

¹¹⁴ Prosecution’s Request, para. 88.

themselves do not seek to determine criminal liability'.¹¹⁵ The Prosecution claims that the material provided by the Philippines concerning four writs of *amparo* on anti-narcotic operations does not substantiate the existence of 'concrete investigative steps to ascertain the criminal responsibility of any of the alleged police perpetrators'.¹¹⁶

38. The Philippines argues that writ of *amparo* proceedings may lead to criminal investigations as evidenced by the case of *Christina Macandog Gonzales v President Duterte, et al*, where the Court of Appeals recommended the filing of appropriate civil, criminal, and administrative cases against certain respondents.¹¹⁷

39. The Chamber notes that the Philippines provided copies of case files related to four writs of *amparo*¹¹⁸ concerning killings committed in the conduct of anti-narcotic police operations. The domestic courts granted these writs of *amparo*. In one of them the court additionally ordered that the petitioners receive a copy of 'the results of the incident which resulted in the death of four persons and the frustrated killing of another person'.¹¹⁹ In the case of *Gonzales v. Duterte, et al*, the court recommended the filing of appropriate criminal and administrative cases against the respondents. However, no information is provided showing that criminal investigations into the alleged killings were actually initiated following the conclusion of the *amparo* proceedings.

40. The Philippines does not claim that *amparo* proceedings aim to establish criminal responsibility. Instead, it submits that such proceedings *may* lead to the initiation of criminal investigations. However, when considering the existence of investigations in the context of an article 18(2) request, the Chamber can only take into account the state of relevant domestic investigations as it appears from the information provided to it at the time of its consideration of the article 18(2) request.¹²⁰ The mere possibility of that criminal investigations may be conducted as a result of successful writ of *amparo* proceedings therefore cannot justify a deferral under article 18(2) of the Statute.

¹¹⁵ Prosecution's Request, para. 88.

¹¹⁶ Prosecution's Request, paras 80-87.

¹¹⁷ Observations, paras 96-98.

¹¹⁸ 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.

¹¹⁹ PHL-OTP-0008-0182, at 0985.

¹²⁰ See the Applicable law section above, para. 17.

iii) Administrative Order no. 35 Committee and United Nations Joint Programme on Human Rights

41. The Prosecution submits that the activities of both the Administrative Order no. 35 and United Nations Joint Programme on Human Rights (the ‘UNJPHR’) are irrelevant for the Chamber’s determination, as they are ‘[r]egulatory and institutional reforms which have purportedly been adopted to strengthen national capacity’, and because the Philippines has not provided ‘concrete information about relevant investigations and/or prosecutions actually instituted pursuant to such reforms’.¹²¹

42. Conversely, the Philippines asserts that the Administrative Order No. 35 Committee (the ‘Committee’) complements the DOJ’s investigations, as it was created to assist in the investigation and prosecution of ‘political violence in the form of extra-legal killings, enforced disappearances, torture, and other grave violations of the right to life, liberty, and security of persons’.¹²² The Committee’s mandate is to classify and prioritise cases for action and assign special investigation teams to conduct further investigation.¹²³ The UNJPHR, on the other hand, is a three-year capacity-building and technical cooperation programme between the Philippines and the United Nations created to, among others, strengthen domestic investigation and accountability mechanisms and gather data on alleged police violations.¹²⁴

43. In relation to the activities of the Committee, the Chamber notes that the Philippines provided two lists of cases named *Data on Killings*¹²⁵ and *Data on Willful Killings CY 2010-2021*.¹²⁶ These lists contain limited information concerning 295 and 317 murder related cases respectively, such as the name of the victims and perpetrators, time of the incident and case status. It can neither be discerned on the basis of these lists whether these cases relate to killings in the context of the ‘war on drugs’ nor do the lists indicate any concrete investigative activity taken by the Committee itself,

¹²¹ Prosecution’s Request, paras 89-93.

¹²² Observations, para. 81.

¹²³ Observations, paras 81-83.

¹²⁴ Deferral Request, p. 6.

¹²⁵ *Data on Killings* (Observations, Annex I) and *Data on Willful Killings CY 2010-2021* (Observations, Annex I-1).

¹²⁶ Observations, Annex I-1.

whose intervention appears limited to monitoring and evaluating their status. Moreover, several of the cases appear to fall outside the temporal scope of the authorised investigation.¹²⁷ Based on the information available, the Chamber does not consider the activities of the Committee to amount to concrete investigative steps relevant for a determination under articles 17 and 18 of the Statute.

44. Likewise, there is no information before the Chamber suggesting that the activities of the UNJPHR, a capacity-building programme, have resulted in concrete investigations and prosecutions related to the events subject to the authorised investigation.

iv) *Philippine National Police – Internal Affairs Services investigations*

45. The Philippines submits that internal disciplinary proceedings conducted by the Philippine National Police – Internal Affairs Services (the ‘PNP-IAS’) against PNP personnel involved in illegal activities ‘can ripen to criminal investigations’.¹²⁸ It avers that verified complaints relative to the illegal activities of the PNP personnel ‘shall be referred to the proper disciplinary authorities and investigation units for purposes of filing appropriate criminal investigations and filing of charges’.¹²⁹ It adds that a PNP-NBI joint investigation team may recommend the filing of criminal cases separated from the administrative cases pursued by the IAS. According to the Philippines, it was under the auspices of the PNP-IAS that the 52 *nanlaban* cases were investigated by the NBI.¹³⁰

46. In its Response, the Prosecution argues that regardless of what administrative and non-penal proceedings may or could lead to, PNP investigations are not aimed at determining criminal responsibility. It further submits that the Philippines has not

¹²⁷ Among the cases listed in Data on killings, only 54 of the 295 cases, and in *Data on Willful Killings CY 2010-2021*, only 151 of the 317 cases appear to fall within the temporal scope of the authorised investigation.

¹²⁸ Observations, p. 36.

¹²⁹ Observations, para. 85.

¹³⁰ Observations, para. 86. The Philippines’ submission that the PNP-IAS investigations were instrumental to the NBI investigations of the 52 *nanlaban* cases is analysed in a separate section below.

indicated any concrete instances in which such proceedings have resulted in a criminal investigation or a determination of criminal responsibility.¹³¹

47. The Chamber emphasises that for domestic proceedings to be relevant, they must be carried out ‘with a view to conduct criminal prosecutions’.¹³² Whereas it is not entirely clear whether the PNP-IAS disciplinary proceedings were conducted with the aim to further criminal proceedings, the information provided suggests that this was not the aim, or at least not the primary aim. Moreover, at present it is unknown whether the PNP-IAS internal disciplinary proceedings will lead to criminal investigations in the future. The Philippines’ assertion that the PNP-IAS investigations were instrumental to the NBI investigations of the 52 *nanlaban* cases is analysed in a separate section below.

48. For the reasons outlined above, the Chamber concludes that the initiatives relied on by the Philippines and assessed in this section do not amount to tangible, concrete and progressive investigative steps carried out with a view to conducting criminal proceedings; therefore, they do not justify a deferral of the Court’s investigation pursuant to article 18(2) of the Statute.

B. Criminal proceedings (or a lack thereof)

49. In support of its argument that the cases and activities referenced by the Philippines do not sufficiently mirror the Prosecution’s investigation, the Prosecution points out that the Philippines has not identified ‘any national proceedings which would address a significant number and variety of potential cases within the parameters of the authorised situation’.¹³³ Specifically, the Prosecution argues that the Philippines has not provided any information regarding past or ongoing criminal investigations or prosecutions relating to: i) alleged crimes committed in the Davao region between 2011 and 2016 which bear a resemblance to the later nationwide [‘war on drugs’] killings from 1 July 2016 onward;¹³⁴ ii) conduct other than murder which may amount to article 5 crimes;¹³⁵ iii) alleged killings outside of official police operations, including those by

¹³¹ Response, para. 41.

¹³² See the Applicable law section above, para. 14.

¹³³ Prosecution’s Request, para. 94.

¹³⁴ Prosecution’s Request, para. 96.

¹³⁵ Prosecution’s Request, paras 97-99.

‘vigilantes’;¹³⁶ and iv) any alleged State or organisational policy material to article 5 crimes or their systemic nature.¹³⁷

i) *Crimes in Davao region*

50. In its Request, the Prosecution argues that the Philippines failed to identify any investigative steps or prosecutions with regard to the hundreds of alleged killings committed during 2011-2016 in the city and region of Davao and that this failure alone justifies the resumption of the Court’s investigation.¹³⁸

51. The Philippines rejects the Prosecution’s allegations, submitting that it has investigated the killings in the Davao Region between 2011 and 2016.¹³⁹ In support, it provides a list of 176 instances of murder compiled by the Davao City Police Office.¹⁴⁰ Resulting in 168 cases being filed before domestic courts, of which 51 have been solved and eight remain under investigation.¹⁴¹ The Philippines asserts that, despite not having submitted any documentation pertaining to these investigations, publicly available information shows that they did occur.¹⁴² It further refers to a number of additional initiatives and mechanisms, including a 2009 Committee on Human Rights (‘CHR’) investigation; an Ombudsman’s disciplinary decision against 21 PNP officers; the Field Investigation Office (‘FIO’) Fact Finding Report; a DOJ decision of 2016; and two Senate inquiries into the ‘rampant killings in Davao’ and the so-called ‘Davao Death Squad’.

52. In its Response, the Prosecution maintains that the Philippines fails to substantiate any relevant criminal investigation into the killings in Davao. It observes that the list of 176 killings¹⁴³ seems to merely show all murders recorded in Davao between 2011 and 2016, without indicating which cases are ‘war on drugs’-related. In addition, the list does not reveal the alleged perpetrators’ identity, rank or alleged role in the crime,

¹³⁶ Prosecution’s Request, para. 100.

¹³⁷ Prosecution’s Request, paras 101-103.

¹³⁸ Prosecution’s Request, para. 96.

¹³⁹ Observations, paras 99-119.

¹⁴⁰ Observations, Annex K.

¹⁴¹ Observations, para. 99.

¹⁴² Observations, paras 100-119.

¹⁴³ Observations, Annex K (*‘Davao City Police Office-Murder Cases between 2011 June 30, 2011’*).

precluding an assessment of whether domestic proceedings are conducted against those who would most likely be the subject of the Prosecution's investigation.¹⁴⁴

53. As regards other mechanisms relied on by the Philippines, the Prosecution submits that: i) the 2009 CHR investigation and its 2012 resolution concern events in 2005-2009, thus they fall outside the temporal scope of the authorised investigation;¹⁴⁵ ii) the Ombudsman's finding in 2012 that 21 PNP officials were guilty of neglect of duty for failing to resolve rising levels of extrajudicial killings in Davao City pertains to events that pre-date the temporal period of the Court's investigation, besides appearing to be purely administrative;¹⁴⁶ iii) the Ombudsman's dismissal of the CHR's recommendation to investigate Rodrigo Duterte for killings in Davao City, and the DOJ's apparent shelving of its investigation into the Davao Death Squad fail to demonstrate that concrete and progressive investigative steps have been taken; and iv) the Senate Committee inquiries into extrajudicial killings were not designed to – and did not in fact – result in criminal prosecutions.

54. With regard to the alleged killings in the Davao area before 1 July 2016, the Chamber recalls its Article 15 Decision, noting 'in particular the information to the effect that a so-called "Davao death squad" operated, and that local law enforcement units were heavily involved in its operation' and indicating that '[t]here is information that in 2011-2015 there were around 385 victims of extrajudicial killings in Davao.'¹⁴⁷

55. The Chamber notes that, according to the list of 176 murder incidents recorded by the Davao City Police Office in the period 2011-2016,¹⁴⁸ and the explanation provided in the Observations, 168 of those incidents did give rise to a case before a court, among those, 51 have been solved and eight are under investigation.¹⁴⁹ However, the list does not contain any information that allows the Chamber to identify whether any of the 176 incidents listed correspond to the killings referred to in the Article 15

¹⁴⁴ Response, para. 43.

¹⁴⁵ Response, para. 44.

¹⁴⁶ Response, para. 44.

¹⁴⁷ Article 15 Decision, para. 69.

¹⁴⁸ Observations, Annex K (*Davao City Police Office-Murder Cases between 2011 June 30, 2011*).

¹⁴⁹ Observations, para. 99.

Decision. Furthermore, the list does not provide information about the status of the 109 cases that are not identified as resolved or under investigation.¹⁵⁰

56. When seeking a deferral pursuant to article 18(2), a State ought to ‘provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case’.¹⁵¹ Yet, the material submitted by the Philippines concerning the alleged 168 murder cases in Davao filed before courts falls short of this standard. The Philippines’ authorities have access to official documents and are in a position to provide detailed information on their domestic proceedings, as such they are expected to transmit documents, along with pertinent information necessary to understand their relevance, that show that the State has conducted or is conducting relevant investigations and prosecutions.

57. As regards the other mechanisms relied on by the Philippines (i.e., the 2009 CHR investigation into vigilante killings in Davao City, the Ombudsman disciplinary process against 21 PNP officers for failure to resolve the killings in Davao City, the 2012 CHR Resolution entitled ‘Extra-Judicial Killings Attributed or Attributable to the so-called Davao Death Squad’, and the FIO’s Fact Finding Report¹⁵²), the Chamber notes that most of them concern events that occurred in Davao prior to 2011 and, as such, fall outside of the temporal scope of the investigation as authorised in the Article 15 Decision. It is thus not necessary to consider whether those mechanisms can show the existence of investigations.

58. In addition, as regards the material provided by the Philippines in support of its submissions, the Chamber notes that several media articles are relied on to substantiate the existence of investigative mechanisms. Yet, a State ought to be in a position to present material with a higher probative value to substantiate its actions.

59. Finally, as to the Senate inquiries, the Chamber observes that inquiries carried out by political bodies may be relevant to assess investigative activity, but only if they are carried out with a view to conducting criminal (investigations and) prosecutions; a

¹⁵⁰ Observations, Annex K (*‘Davao City Police Office-Murder Cases between 2011 June 30, 2011’*).

¹⁵¹ See the Applicable law section above, para. 14.

¹⁵² See Observations, paras 101-105.

¹⁵² Observations, para. 113.

typical example would be the one of investigations relating to members of parliament. However, it is not clear what investigative measures were undertaken for the two Senate inquiries into the killings in Davao that resulted in the Joint Committee Report No. 18 which concluded that there was no proof of either ‘a state-sponsored policy to commit killings to eradicate illegal drugs in the Philippines’ or the existence of the Davao Death Squad.¹⁵³ The Philippines does not suggest that the inquiries considered the criminal responsibility of individuals, or were conducted in support of criminal prosecutions.

60. In these circumstances, the Chamber concludes that for the alleged crimes committed in Davao area from 2011 to 2016, the Philippines has not demonstrated the existence of national proceedings that sufficiently mirror the investigation as authorised by the Article 15 Decision.

ii) Crimes other than murder

61. The Prosecution submits that whilst the Article 15 Decision did not limit the investigation to the alleged extrajudicial killings and authorised the investigation of ‘any crimes’ within the jurisdiction of the Court,¹⁵⁴ the Philippines has not addressed any crimes other than murder.¹⁵⁵ The Philippines responded that it is investigating crimes other than murder which appear to have been committed in connection with anti-drug operations. It states that it has prosecuted police officers as a result.¹⁵⁶ The alleged crimes include rape, grave misconduct, lasciviousness, sexual assault, unlawful arrest, and giving false testimony.¹⁵⁷ In support, the Philippines refers to four specific cases,¹⁵⁸

¹⁵³ Observations, para. 113.

¹⁵⁴ In its Article 15 Request, the Prosecution had noted allegations of acts that may constitute torture or other inhumane acts under article 7(1)(f) and (k) of the Statute, imprisonment or other severe deprivation of liberty under article 7(1)(e) of the Statute; enforced disappearance under article 7(1)(i) of the Statute; and SGBC under article 7(1)(g) of the Statute. See Article 15 Request, para. 129.

¹⁵⁵ Prosecution’s Request, para. 97.

¹⁵⁶ Observations, paras 120-127.

¹⁵⁷ Observations, paras 121-124.

¹⁵⁸ Observations, paras 121-124

a ‘partial listing’ of cases on the NPS’s docket,¹⁵⁹ and a resolution dated 27 November 2020.¹⁶⁰

62. In its Response, the Prosecution argues that one of the two sexual or gender based crimes cases identified in the Observations involves an event that falls outside the temporal scope of the Court’s investigation,¹⁶¹ and that the material provided for the second case, i.e. the alleged rape of a 15-year-old girl, does not show concrete investigative measures. In any event, the Prosecution submits, even if substantiated, this material would merely show domestic investigative activity for one case against one low-level police officer.¹⁶² The Prosecution further argues that the Philippines only refers to an investigation into a secret detention cell, without substantiating that concrete and progressive investigative steps have been taken.¹⁶³ The Prosecution concedes that one case (namely, concerning the arrest of Jomer Dela Cruz) in which charges of unlawful detention were filed may be relevant, but it stresses that these charges were only brought against physical perpetrators.¹⁶⁴

63. The Chamber recalls that it authorised the investigation ‘to extend to any crime within the jurisdiction of the Court, limited by the temporal, territorial and factual parameters of the situation as defined in the Article 15(3) Request’.¹⁶⁵ One of the cases relied on by the Philippines,¹⁶⁶ and the events covered by the NPS Consolidated Resolution of November 2020,¹⁶⁷ concern events that fall outside of the temporal scope of the authorised investigation. Even if the Chamber ignores the deficient support

¹⁵⁹ Observations, para. 125, citing ‘Partial List of cases in the Dockets of the National Prosecution Service Relating to Investigations into Deaths during Anti-illegal Drug Operations’, PHL-OTP-0008-0046 (Annex A to the Philippines Letter of 22 December 2021).

¹⁶⁰ Observations, para. 125 citing Annex M to the Observations (‘CONSOLIDATED RESOLUTION in NPS Docket Nos. XVI·INV·20H-00127 XVI·JNV·20H-00128 and XV/.JNV-20H-00129’).

¹⁶¹ Response, para. 48, addressing para. 122 of the Observations.

¹⁶² Response, para. 48, addressing para. 121 of the Observations.

¹⁶³ Response, para. 49.

¹⁶⁴ Response, para. 50.

¹⁶⁵ Article 15 Decision, para. 118.

¹⁶⁶ Dismissal of Chief of the PNP Custodial Services, Police Lt. Col. Jigger Noceda after he was found guilty of two counts of grave misconduct, acts of lasciviousness, and sexual assault. The only supportive material is an online press article that suggests that the assault occurred in June 2020.

¹⁶⁷ The NPS Consolidated Resolution of November 2020 indicates that the totality of the events covered therein occurred in February 2020. See Annex M to the Observations (‘CONSOLIDATED RESOLUTION in NPS Docket Nos. XVI·INV·20H-00127 XVI·JNV·20H-00128 and XV/.JNV-20H-00129’).

provided by the Philippines for its contentions, it appears that in only two occasions a crime other than murder was pursued, and in only one case actual charges for a crime other than murder were brought.¹⁶⁸ The limited number of cases mentioned by the Philippines, and the type of persons charged, means that these cases cannot represent the range and scope of crimes of the Court's investigation.

iii) Killings outside police operations

64. The Prosecution submits that the Philippines has not provided information about past or ongoing investigations or prosecutions relating to alleged murders outside the context of official police operations, including by the so-called 'vigilantes'. As emphasised in the Prosecution's Article 15 Request, there appeared to be thousands of alleged killings committed under such circumstances.¹⁶⁹ The Philippines's failure to identify any investigative steps or prosecutions into these events is, in the view of the Prosecution, an additional reason to authorise the resumption of the Court's investigation.¹⁷⁰

65. The Chamber recalls that the Article 15 Decision extended the authorisation to also cover killings by private individuals outside law enforcement operations.¹⁷¹ Yet, the Philippines does not address this issue in its Observations and has not provided any material that would suggest it has investigated alleged killings related to the 'war on drugs' that did not take place as part of police operations.¹⁷² Therefore, the part of the authorised investigation concerning private individuals does not appear to be covered by any domestic investigations.

iv) Policy element and systematic nature of the alleged crimes

¹⁶⁸ Docket No. XVI-INV-171-00240, victim [redacted]. In the field 'status' it is noted that the trial is ongoing and one of the charges is torture. *See* Partial Listing of cases in the Dockets of the National Prosecution Service Relating to Investigations into Deaths during Anti-illegal Drug Operations', PHL-OTP-0008-0046 (Annex "A" to the Philippine Government's Letter dated 22 December 2021), entry No. 10.

¹⁶⁹ Article 15 Request, para. 65 and further.

¹⁷⁰ Prosecution's Request, para. 100.

¹⁷¹ Article Decision 15, para. 66.

¹⁷² Beside the investigations concerning the existence of the Davao Death Squad analysed above.

66. The Prosecution submits that the Philippines has not investigated any alleged State or organisational policy material to alleged article 5 crimes or their systemic nature. Despite indications in the lists of cases referred to the NBI that concealment practices were identified, the Philippines has provided no information 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.¹⁷³ The Prosecution therefore submits that ‘it cannot be concluded that the [Philippines] 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’.¹⁷⁴

67. In response, the Philippines submits that the ‘lowly officers’ identified as the actual perpetrators in alleged killings during anti-drug operations ‘are vital leads that may link higher-ranking officials as part of the chain of command in the commission of the crimes’.¹⁷⁵ It adds that the Prosecution will have no firm basis to investigate high-ranking officials until such links are discovered.¹⁷⁶ The Philippines claims that the ‘war on drugs’ is an ‘intensified and comprehensive campaign against illegal drugs and it is not a State or organizational policy of sanctioning crimes penalized under article 5 of the Statute’.¹⁷⁷

68. The Chamber observes that the Philippines does not contest the Prosecution’s suggestion that it has failed to inquire into any pattern of criminality or the systematic nature of crimes, or investigated individuals who would appear to be most responsible. Indeed, most of the cases relied on by the Philippines appear to concern the responsibility of low-ranking police officers. When assessing the merits of an article 18(2) request, the Chamber must consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court. Whereas the Court’s investigations concern international crimes, with certain contextual elements, domestic investigations may follow different approaches and a

¹⁷³ Prosecution’s Request, para. 102.

¹⁷⁴ Prosecution’s Request, para. 103.

¹⁷⁵ Observations, para. 127.

¹⁷⁶ Observations, para. 127.

¹⁷⁷ Observations, p. 50.

State need not investigate conduct as crimes against humanity, for example, or allege the same modes of liability found in the Rome Statute to still investigate the persons and conduct. Notwithstanding the challenges in making such a comparison between an ICC investigation and domestic investigations, especially in the absence, at this stage, of any identified individuals by the Prosecution, the Chamber observes that given the Court's role and purpose, and the fact that the authorised investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the investigation's focus. The domestic proceedings in the Philippines thus do not sufficiently mirror the expected scope of the Court's investigation, since they only address the physical, low-ranking perpetrators and at present do not extend to any high-ranking officials.

69. For the reasons outlined above, the Chamber finds that the Philippines has failed to demonstrate that it has conducted relevant investigations and prosecutions with regard to the four issues discussed in the present section, namely: i) the alleged killings in Davao from 2011-2016; ii) crimes other than murder committed in connection with the 'war on drugs'; iii) killings outside official police operations; and iv) the responsibility of individuals beyond the physical perpetrators of the alleged crimes.

3. *Cases referred to the National Bureau of Investigation*

70. In assessing the activity of a State and reviewing the evidence submitted, the nature and power of the institutions in charge of the proceedings may be considered, including whether the said nature and power would allow, or result in, referring persons to the competent authorities and conducting inquiries leading to the arrest and prosecutions of persons.¹⁷⁸

71. The Philippines contends that its domestic institutions, including the NBI, are fully functional and 'more than adequate to address the issues and concerns raised' by the Prosecution,¹⁷⁹ and asserts that there are ongoing investigations being conducted by

¹⁷⁸ Pre-Trial Chamber III, *Situation in the Republic of Burundi*, 'Public Redacted Version of "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#)", ICC-01/17-X-9-US-Exp, 25 October 2017,' 9 November 2017, ICC-01/17-9-Red, para. 153.

¹⁷⁹ Deferral Request, p. 1.

the NBI.¹⁸⁰ The Chamber accepts that the NBI, in accordance with relevant national law,¹⁸¹ is an agency capable of undertaking, *inter alia*, criminal investigations of crimes within its jurisdiction. The NBI's activities are therefore relevant for the consideration whether investigative steps have taken place.¹⁸²

72. The Philippines presents four lists in support of its claim that cases related to the 'war on drugs' have been referred to the NBI for investigation and case build-up and asserts that three lists of cases involving law enforcement personnel, who conducted buy-bust and anti-illegal drug operations where the suspects had died, have been forwarded to the NBI for investigation.¹⁸³

73. According to the Prosecution, the '[t]ables and lists of alleged investigations' provided by the Philippines are insufficient to 'substantiate the existence of the claimed investigative steps'.¹⁸⁴ It submits this is so because the material provided by the Philippines does not illustrate 'concrete investigative steps taken by the NBI in the vast majority of referred cases', since only three out of a total of 302 referred cases (266 of which fall within the Court's temporal jurisdiction) are substantiated with documentation outlining investigative activities.¹⁸⁵ The Prosecution argues that 'the mere referral for investigation, without more, is insufficient to establish inadmissibility'.¹⁸⁶

74. The Chamber observes that these lists do include some information of each case, such as the case number, the names of law enforcement officers involved, the names of

¹⁸⁰ Observations, paras 37 and 75.

¹⁸¹ The Republic Act no. 10867, PHL-OTP-0009-0169.

¹⁸² Pre-Trial Chamber III, *Situation in the Republic of Burundi*, 'Public Redacted Version of "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#)", ICC-01/17-X-9-US-Exp, 25 October 2017', 9 November 2017, ICC-01/17-9-Red, para. 153.

¹⁸³ These lists are: PHL-OTP-0008-1228, Table of 58 cases in Angeles City, Pampanga; PHL-OTP-0008-1259, Table of 81 cases in San Jose Monte City, Province of Bulacan; PHL-OTP-0008-1294, Table of 111 cases in Bulacan Province. The Chamber notes that there is an inconsistency between the Philippines' Observations concerning these lists (at paragraph 26, the Philippines states that these cases 'are pending before different prosecution offices of the Department of Justice'), and evidence provided (at PHL-OTP-0008-1222, the Philippines state that the 'Department of Justice referred [these cases] to the National Bureau of Investigation').

¹⁸⁴ Response, para. 70; Prosecution's Request, para. 104.

¹⁸⁵ Prosecution's Request, paras 105-109, 111.

¹⁸⁶ Prosecution's Request, para. 110.

suspects, locations and dates of the incidents and ‘remarks’.¹⁸⁷ However, this information is limited. Furthermore, out of 250 cases referred to the NBI within these three case lists, 20 cases fall outside the temporal scope of the authorised investigation. The ‘remarks’ column within each list appears to reflect general observations relating to the circumstances of death for each victim. Despite the fact that the Philippines asserts that these cases have been referred to the NBI for investigation and case build-up, no documentation outlining concrete investigative activities has been provided for any of them.

75. The fourth list is entitled ‘Information table on the fifty-two (52) cases submitted by the PNP and PNP-IAS to the Department of Justice’. Notwithstanding this title, it appears that these cases were in fact referred to the NBI.¹⁸⁸ Like the three aforementioned, the fourth list only includes limited information for each case, such as the ‘docket number’, names of deceased suspects, places and dates of incidents, IAS recommendations, and observations.¹⁸⁹

76. The Philippines states that 19 of these cases were ‘resolved’ by having been terminated or dismissed on the basis of ‘a lack of evidence, witness [*sic*], or documents establishing any form of irregularity on the part of the police operatives’.¹⁹⁰ In addition, the Philippines points to nine cases from this list for which the NBI had ‘found enough evidence to recommend an indictment’.¹⁹¹

77. The Prosecution responds that the Philippines has provided updates on 17 of the 52 *nanlaban* cases in its Observations, some of which have been closed or terminated, but it has otherwise not provided sufficient information showing concrete investigative steps of how they reached these conclusions.¹⁹²

78. The Chamber notes that the IAS recommendations contained in the fourth list appear to consist of administrative findings and sanctions against the relevant law

¹⁸⁷ PHL-OTP-0008-1228; PHL-OTP-0008-1259; PHL-OTP-0008-1294.

¹⁸⁸ See the Deferral Request, p. 3.

¹⁸⁹ PHL-OTP-0008-0050.

¹⁹⁰ Observations, para. 78.

¹⁹¹ Observations, para. 78.

¹⁹² Response, para. 68.

enforcement personnel involved in each case, with the ‘observations’ similarly outlining general statements on the circumstances of death for each victim. The sole reference in the list to any possible criminal process to be taken against a law enforcement officer is a single recommendation that an appropriate criminal complaint be filed.¹⁹³

79. The Chamber finds that these case lists are not, by themselves, sufficient to substantiate concrete or ongoing investigative steps to support the deferral of the Court’s investigation. The State is expected to provide evidence of a ‘sufficient degree of specificity and probative value’,¹⁹⁴ so as to allow the Chamber to meaningfully assess whether the State is indeed investigating potential cases relevant to the situation.¹⁹⁵ The four case lists neither provide any such specificity, nor do they contain information enabling the Chamber to analyse whether investigative steps into the conduct of the relevant law enforcement agents have in fact occurred or are occurring.

80. Furthermore, of the cases referred to in these four lists, only for eight corresponding documentation was submitted that illustrates possible investigative activities being taken in respect of that case, charges having been recommended, or prosecutions having commenced against the relevant law enforcement agents involved.¹⁹⁶ However, two of these cases appear to be outside of the temporal scope of

¹⁹³ See [redacted]. Observations, Annex C-1, p. 4.

¹⁹⁴ [Muthaura et al. Article 19 Judgment](#), paras 2, 61; Appeals Chamber, *The Prosecutor v. Simone Gbagbo*, Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “[Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo](#)”, 27 May 2015, ICC-02/11-01/12-75-Red, para. 128.

¹⁹⁵ Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), 31 March 2010, ICC-01/09-19-Corr, paras 41-48; Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, Corrigendum to “[Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#)”, 15 November 2011, ICC-02/11-14-Corr, para. 190.

¹⁹⁶ These include: [redacted], [redacted] (along with [redacted] and [redacted]), [redacted] (PHL-OTP-0008-1633, p. 1); [redacted] (Observations, Annex G, p. 2); [redacted] (Observations, Annex C-1 p. 4); [redacted] (Observations Annex C-2 p. 9); [redacted] (Annex C-3 p. 13); and [redacted], [redacted], [redacted], [redacted] and [redacted] (Observations Annex C-4, p. 17). The Chamber notes that the five names mentioned on p. 17 of Annex C-4 appear to make up one case for which one final NBI report was provided.

the authorised investigation,¹⁹⁷ and therefore need not be considered as part of the present analysis. That leaves six cases relevant to the Chamber's analysis.

81. With respect to two of these six cases, the documentation consists of a cover letter entitled 'transmittal letter' from the NBI to the Provincial Prosecutor.¹⁹⁸ The transmittal letter includes the official report from the municipal police station of the incident where the suspect died, the NBI's investigation and analysis, and the scope of the NBI's recommended charges.¹⁹⁹ Yet, part of this documentation is incomprehensible without further explanation and the material is incomplete, as it references attachments which were apparently used to support each recommendation but were not provided to the Court. It is therefore difficult to assess whether these two cases show tangible investigative activity. Moreover, even assuming they do, the two cases appear to have been dismissed by the NBI,²⁰⁰ but no information is provided about the reasons for the dismissals.

82. With respect to the four other cases (of the six relevant ones),²⁰¹ the Philippines relies upon 'final reports' from the NBI which are said to reflect certain investigative steps. The Philippines states that these cases have been 'resolved',²⁰² with each report concluding that the case has been closed²⁰³ or terminated²⁰⁴ by the NBI due to, *inter alia*, a lack of evidence. Investigative steps taken in these four cases include interviewing (or attempting to interview) the victim's family members and witnesses,²⁰⁵ the taking of statements,²⁰⁶ inspection of crime scenes,²⁰⁷ and the issuance of subpoenas

¹⁹⁷ These are: [redacted] (PHL-OTP-0008-1661, p. 1) and [redacted] (Observations, Annex G, p. 2).

¹⁹⁸ PHL-OTP-0008-1633.

¹⁹⁹ PHL-OTP-0008-1633.

²⁰⁰ See Observations, Annex C.

²⁰¹ Observations, Annex C-1 to C-4. These cases are: [redacted] (Observations, Annex C-1 p. 4); [redacted] (Observations, Annex C-2 p. 9); [redacted] (Observations, Annex C-3 p. 13); and [redacted], [redacted], [redacted], [redacted] (Observations, Annex C-4, p. 17).

²⁰² Observations, para. 78. The 'resolved cases' are: [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted] (see Observations, Annex C).

²⁰³ These are: [redacted] ('temporarily closed') (Observations, Annex C-2 p. 9), [redacted] ('provisionally closed'), (Observations, Annex C-3 p. 13), [redacted], [redacted], [redacted], [redacted], [redacted] (all 'closed') (Observations, Annex C-4, p. 17).

²⁰⁴ [redacted], (Observations, Annex C-1 p. 4).

²⁰⁵ Observations, Annex C-1, C-2 and C-4.

²⁰⁶ Observations, Annex C-2.

²⁰⁷ Observations, Annex C-1, C-2.

for the relevant police officers.²⁰⁸ These are steps that – if shown to have taken place – may be considered as tangible, concrete investigative steps. However, with only four such cases, the number of cases investigated in this manner by the NBI appears to remain very limited in number and scope.²⁰⁹

83. Consequently, of a total of 266 cases contained across all four case lists and within the temporal scope of the authorised investigation, the Philippines has provided support for four cases that appear to have resulted in some form of investigation or prosecution before having been dismissed by domestic institutions. For two cases that were ultimately dismissed, it provided partial support. Given this limited number of substantiated cases, the Chamber is not satisfied that the Philippines, on the basis of the NBI's activities, has shown that it has investigated or is investigating in such a manner that the domestic investigations can be seen as sufficiently mirroring the authorised investigation.

84. The Chamber notes that the Philippines indicates that an 'additional 250 incidents' have been referred to the NBI by the Department of Justice for review and that this could result in further prosecutions.²¹⁰ However, no material was provided to demonstrate that the State is indeed investigating or prosecuting these 250 cases. The Chamber is not satisfied that this in and of itself amounts to a concrete investigative step.

4. National and regional prosecution offices cases

85. The Prosecution submits that the cases collated from the dockets of national and regional prosecution offices do not support the deferral of the Court's investigation.²¹¹ The Prosecution asserts that, besides four criminal proceedings (three of which relate to incidents within the temporal scope of the Court's investigation),²¹² the Philippines

²⁰⁸ Observations, Annex C-2.

²⁰⁹ Compare Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "[Decision on the admissibility of the case against Saif Al-Islam Gaddafi](#)", 21 May 2014, ICC-01/11-01/11-547-Red, para. 73.

²¹⁰ Observations, para. 126.

²¹¹ Prosecution's Request, paras 115-132.

²¹² Prosecution's Request, paras 116-117.

has not substantiated other identified cases as referred to in its material, despite the Prosecution's requests to do so.²¹³

86. The Philippines submits that there are ongoing investigations and prosecutions, including 'national inquiries, investigations and proceedings' which are being heard by 'duly authorised Prosecutorial and judicial bodies',²¹⁴ and that these proceedings are 'being conducted independently and impartially'.²¹⁵ According to the Philippines, 'the partial listing of cases in the dockets of the NPS, relating to investigations into deaths during anti-narcotic operations'²¹⁶ clearly shows that investigations have been conducted against police officers with respect to their conduct during anti-illegal drug operations.²¹⁷ Furthermore, additional cases were filed against police officers who were involved in the deaths occurring during anti-illegal drug operations or the so-called *nanlaban* cases.²¹⁸

87. The information before the Chamber consists of one list of cases from 'the dockets of the National Prosecution Service',²¹⁹ three lists of cases collated from the dockets of three Regional Prosecution Offices,²²⁰ as well as eight NPS case files.²²¹ The Philippines also points to various indictments that have been recommended against police officers who were involved in deaths during anti-illegal drug operations.²²²

88. The aforementioned case lists do provide some information on the cases referred to therein. However, this information is of limited use to the Chamber's assessment. The list from 'the dockets of the National Prosecution Service' includes limited details of the investigating office, region, name of the deceased, law enforcement unit,

²¹³ Prosecution's Request, paras 119-127.

²¹⁴ Observations, para. 37.1.2.

²¹⁵ Observations, para. 37.1.3.

²¹⁶ PHL-OTP-0008-0046 (Annex 'A' to the Philippine Government's Letter dated 22 December 2021).

²¹⁷ Observations, para. 125.

²¹⁸ Observations, paras 78, 126.

²¹⁹ PHL-OTP-0008-0046.

²²⁰ PHL-OTP -0008-1338; PHL-OTP -0008-1341; PHL-OTP -0008-1334.

²²¹ 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.

²²² The cases referred to are : [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted], [redacted] and [redacted] (Observations, para. 78). Save for [redacted] and [redacted] (who were victims ultimately found alive and so irrelevant for the purposes of analysis) (Observations, para. 78). The balance of the cases have been analysed in Issue 3.

respondents, and the status of each case as of May 2021.²²³ The three lists from the Regional Prosecution Offices include varying levels of information, but mainly contain particulars of an administrative nature, such as the NPS Docket Number, the name of the victim or complainant, and the offences charged.²²⁴ The Chamber notes that, apart from one case,²²⁵ no corresponding or underlying prosecutorial documentation has been provided to substantiate the information contained in these lists. Without more, it is unclear how and whether the information in these lists relate to trials that actually took place, or are taking place.

89. With respect to the recommended indictments against police officers, the Philippines relies on various types of documentation, differing in detail and scope.²²⁶ Some items contain brief summaries of the recommended indictments and include limited details of the result of the NBI's investigation, the charges recommended by the NBI and the status of each case, such as whether they are at trial or remain at an investigative stage.²²⁷ However, no further documentation, or the indictments themselves, have been provided.²²⁸ Some incidents for which indictments have been recommended and corresponding investigation files provided are outside the temporal scope of the authorised investigation, and therefore irrelevant for the Chamber's analysis.²²⁹ Other incidents are said to have forthcoming criminal complaints to be filed.²³⁰

90. The Chamber finds that the mere reference to the existence of cases, in the absence of underlying supporting documentation, does not allow for an assessment as

²²³ These stages include: Prosecution ongoing; dismissed; trial ongoing; pending for petition for review with DOJ; convicted and pending preliminary investigation.

²²⁴ PHL-OTP -0008-1338; PHL-OTP -0008-1341; PHL-OTP -0008-1334.

²²⁵ This is: [redacted] (PHL-OTP-0008-0988).

²²⁶ Observations, Annexes C, D, E, F, G, H.

²²⁷ Observations, Annex D.

²²⁸ These include: [redacted] (Observations, Annex D, p. 1); [redacted] (Observations, Annex D, p. 2); and [redacted] (Observations, Annex D, p. 2). The Chamber notes that in the cases of [redacted], [redacted], [redacted], [redacted] and [redacted] (Annex D, p. 1 and p. 2), there is inconsistent documentation to suggest that the NBI has in fact dismissed or terminated these cases for lack of evidence. See the analysis at paragraph 88 above.

²²⁹ These include [redacted] (Observations, Annex H, p. 2); [redacted] (Observations, Annex G, p. 2) and [redacted] (Observations, Annex C, p. 2).

²³⁰ This includes [redacted] (Observations, Annex C, p. 3).

to whether any concrete and progressive investigatory steps are being taken,²³¹ or to determine whether prosecutions are actually being undertaken by competent national authorities in respect of these cases.

91. With respect to the eight NPS case files,²³² the Chamber observes that these case files appear to be the NBI's investigation into drug offences committed by each respondent (i.e. those who were killed as part of anti-drugs operations), and each of these cases appears to have been closed based on the respondent's death. The case files relate to potential victims rather than perpetrators, and as such do not relate to the conduct of the law enforcement agents involved. These files thus do not relate to the authorised investigation. Moreover, on the basis of these case files it does not appear that investigations into the circumstances of death of those killed are anticipated. Notwithstanding the Philippines' assertion that these case files will be referred to the NBI to re-evaluate whether the police officers involved in these incidents should be held criminally or administratively liable,²³³ these case files – in their current form – are not relevant to the Chamber's consideration of whether investigations or prosecutions are ongoing.

92. The Philippines has also provided material to support ongoing prosecutions in two proceedings which relate to incidents within the temporal scope of the Court's investigation.²³⁴ This material consists of Court filings and records from the regional trial courts where these cases were progressing and include interlocutory and final decisions of the trial court, evidence used by domestic prosecution services, rulings, and orders.²³⁵ Although it is unclear whether these are the complete court records, it appears from the information provided that one case is ongoing,²³⁶ and the other one is

²³¹ Compare Pre-Trial Chamber III, *Situation in the Republic of Burundi*, Public Redacted Version of "[Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#)", ICC-01/17-X-9-US-Exp, 25 October 2017, 25 October 2017, ICC-01/17-9-Red, para. 181.

²³² 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.

²³³ PHL-OTP-0008-1222 at 1224.

²³⁴ These are the cases of : [redacted] (PHL-OTP -0008-0988) and [redacted] (Observations, Annex B, p. 17).

²³⁵ PHL-OTP -0008-0988, at PHL-OTP -0008-1023.

²³⁶ Observations, Annex B.

pending before the Court of Appeals in Manila, as the convicted police officers appealed the first instance decision which had found them guilty of murder.²³⁷ The Chamber is satisfied that this documentation substantiates the ongoing prosecutions of these cases. However, these two cases relate to the prosecution of the direct perpetrators of the crimes committed, whilst the Prosecution submits that more senior perpetrators would ‘most likely be the focus of the Court’s investigation’.²³⁸ The Prosecution further asserts that the few arguably substantiated investigations and prosecutions are directed at ‘low-level and physical perpetrators, relate only to killings during official police operations, and fail to investigate patterns of conduct or any policy underlying the killings’.²³⁹

93. Even if the Philippines contends that the cases representing the low-level perpetrators are ‘vital leads that may link higher-ranking officials as part of the chains of command in the commission of the crimes’,²⁴⁰ and additional cases ‘may hereafter be investigated or prosecuted in relation to alleged crimes against humanity committed throughout the Philippines’,²⁴¹ the Chamber considers that it is evident that, at present, no investigations or prosecutions covering patterns of criminality²⁴² or the responsibility of individuals beyond the physical perpetrators of the alleged crimes are taking place.

94. Moreover, since the Article 15 Decision estimates that 12,000 to 30,000 victims are connected to the ‘war on drugs’,²⁴³ providing information that only substantiates two separate incidents of prosecutions and a limited number of investigations is insufficient to show the existence of a genuine prosecutorial intention to respond to crimes committed against such a large potential victim base. Indeed, given the difference in numbers, and the Philippines’ current investigations and prosecutions

²³⁷ PHL-OTP-0008-0988.

²³⁸ Prosecution’s Request, para. 114.

²³⁹ Response, para. 27.

²⁴⁰ Observations, para. 127.

²⁴¹ Observations, para. 194.

²⁴² See, e.g., Article 15 Decision, paras 93-96, and 105

²⁴³ Article 15 Decision, para. 67.

cannot be considered as being similar in scope or sufficiently mirroring the Prosecution's intended investigation.

95. Finally, the Prosecution submits that it has independently identified, via various media reports, a handful of further criminal prosecutions that appear to have been initiated and relate to the 'war on drugs' operations, yet were not referenced in any information provided by the Philippines.²⁴⁴ The Chamber does not consider that the mere reference of ongoing prosecutions in the media can substantiate prosecutorial activities, without any corresponding underlying documentation being provided by the relevant State. Clearly, it would have been for the Philippines, which ought to have easy access to the material, to provide relevant documentation to confirm or corroborate the media reports referenced by the Prosecution, to show that these cases are indeed progressing in domestic courts.

C. Final determination

96. For the reasons detailed above, the Chamber has concluded that the various domestic initiatives and proceedings relied on by the Philippines do not amount to tangible, concrete and progressive investigative steps being carried out with a view to conducting criminal proceedings, in a way that would sufficiently mirror the Court's investigation as authorised in the Article 15 Decision. These findings were made on the basis of the information presented for each set or type of domestic initiatives and proceedings.

97. Naturally, the Chamber also considers the various domestic activities in a holistic manner, taking together the entirety of domestic initiatives and proceedings discussed above, to determine whether their ensemble would result in a finding that the State is actively investigating the same conduct that forms part of the Court's investigation. In this regard, the Chamber also notes the Philippines' submissions that some of its government agencies rely on each other for the purpose of advancing investigations.²⁴⁵ Yet, also when taking into account the possible interaction between government agencies, and assessing the various domestic initiatives and proceedings collectively,

²⁴⁴ Prosecution's Request, paras 128-132.

²⁴⁵ Observations, paras 79-83.

as assessed above, these steps do not, at present and based on the material before the Chamber, amount to tangible, concrete and progressive investigative steps.

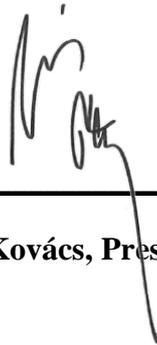
98. Indeed, whilst the Chamber found that in some instances investigative steps have been taken or are ongoing, albeit only with regard to low-ranking law enforcement personnel, it remains that the totality of the national investigations and proceedings presented to the Chamber do not sufficiently, or at all, mirror, the Court's investigation. The Chamber is therefore not satisfied that the Philippines is undertaking relevant investigations, or is making a real or genuine effort to carry out such investigations and any subsequent criminal prosecutions, that would warrant a deferral of the Court's investigations as per article 18(2) of the Statute.

99. This conclusion does not preclude the Philippines from providing material in the future in order for the Prosecution, or the Chamber, to determine inadmissibility on the basis of complementarity, if and when needed. Moreover, when any actual case is brought by the Prosecution, a further admissibility assessment may take place. Assessing the state of domestic proceedings is an ongoing process and requires continued dialogue between the State and the Court, to ensure that the principle of complementarity is upheld with respect to the Court's authorised investigations and prosecutions.

FOR THESE REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to resume its investigation.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Péter Kovács, Presiding Judge



Judge Reine Adélaïde Sophie

Alapini-Gansou



Judge María del Socorro

Flores Liera

Dated this Thursday, 26 January 2023

At The Hague, The Netherlands