

**Original: English****No. ICC-01/21 OA
Date: 27 March 2023****THE APPEALS CHAMBER**

Before: Judge Marc Perrin de Brichambaut, Presiding
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF THE PHILIPPINES**Public document**

**Decision on request for suspensive effect of Pre-Trial Chamber I's
“Authorisation pursuant to article 18(2) of the Statute to resume the
investigation” of 26 January 2023 (ICC-01/21-56)**

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, Prosecutor
Ms Helen Brady

State Representatives

The Republic of the Philippines

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

REGISTRY

Registrar

Mr Peter Lewis

Victims Participation and Reparations Section

Mr Philipp Ambach

The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" of 26 January 2023 (ICC-01/21-56),

Having before it the "Philippine Government's Notice of Appeal against the Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation' (ICC-01/21-56) with Application for Suspensive Effect" of 6 February 2023 (ICC-01/21-57), and

Having before it the "Philippine Government's Appeal Brief against 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'" of 13 March 2023 (ICC-01/21-65),

Renders the following

DECISION

The Appeals Chamber rejects the request of the Republic of the Philippines for suspensive effect of the aforementioned decision of Pre-Trial Chamber I.

REASONS

I. PROCEDURAL HISTORY

A. Proceedings before Pre-Trial Chamber I

1. On 15 September 2021, Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") authorised the commencement of an investigation into the situation in the Republic of the Philippines (hereinafter: "Philippines Situation") in relation to crimes committed between 1 November 2011 and 16 March 2019 in the context of the "war on drugs" campaign.¹

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. On 18 November 2021, the Prosecutor notified the Pre-Trial Chamber that on 10 November 2021, he had received a deferral request from the Republic of the Philippines (hereinafter: the “Philippines”), pursuant to article 18(2) of the Statute,² and that he had temporarily suspended his investigative activities while he assessed the scope and effect of the request.³

3. On 24 June 2022, the Prosecutor requested that the Pre-Trial Chamber authorise the resumption of the investigation into the Philippines Situation, pursuant to article 18(2) of the Statute.⁴

4. On 26 January 2023, the Pre-Trial Chamber issued its decision authorising the Prosecutor to resume the investigation into the Philippines Situation, pursuant to article 18(2) of the Statute (hereinafter: “Impugned Decision”).⁵

B. Proceedings before the Appeals Chamber

5. On 6 February 2023, the Philippines filed its notice of appeal against the Impugned Decision (hereinafter: “Notice of Appeal”) in which it, *inter alia*, requested “that the implementation of the [Impugned Decision] be suspended pending final resolution of this Appeal” (hereinafter: “Request for Suspensive Effect”).⁶

6. On 16 February 2023, the Prosecutor filed his response to the Philippines’ Request for Suspensive Effect (hereinafter: “Prosecutor’s Response”),⁷ requesting that the Appeals Chamber dismiss the request.⁸

² [Annex A to the Notification of the Republic of the Philippines’ deferral request under article 18\(2\)](#), ICC-01/21-14-AnxA.

³ [Notification of the Republic of the Philippines’ deferral request under article 18\(2\)](#), ICC-01/21-14.

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

⁵ [Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation](#), ICC-01/21-56-Red. A confidential version was notified on the same day, ICC-01/21-56-Conf.

⁶ [Philippine Government’s Notice of Appeal against the Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation” \(ICC-01/21-56\) with Application for Suspensive Effect](#), ICC-01/21-57, dated 3 February 2023 and notified on 6 February 2023, para. 10.

⁷ [Prosecution response to the Philippine Government’s Application for Suspensive Effect of the Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation” \(ICC-01/21-57\)](#), ICC-01/21-60.

⁸ [Prosecutor’s Response](#), para. 1.

7. On 13 March 2023, the Philippines filed its appeal brief against the Impugned Decision (hereinafter: “Appeal Brief”).⁹

II. SUBMISSIONS

8. In the Notice of Appeal, referring to article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence (hereinafter: “Rules”), the Philippines requests suspensive effect of the Impugned Decision pending final resolution of its appeal.¹⁰ No reasons are provided in support of the request.

9. In the Prosecutor’s Response, the Prosecutor requests that the Appeals Chamber dismiss the Philippines’ application for suspensive effect of the Impugned Decision, arguing that suspensive effect is not necessary in the circumstances of this case.¹¹ In this respect, the Prosecutor submits that the Philippines has not provided any argument in support of its request, nor has it demonstrated that the implementation of the Impugned Decision would create an irreversible situation or one that would be difficult to correct.¹²

10. In the view of the Prosecutor, while the Appeals Chamber decides on the merits of the appeal, the Philippines may continue with its domestic investigations and proceedings, irrespective of the Prosecutor’s ongoing investigation.¹³ Should the Appeals Chamber ultimately reverse the Impugned Decision, the Prosecutor submits that any relevant investigation by the Prosecution would be discontinued.¹⁴ On this basis, the Prosecutor submits that there is no irreversible situation or one that would be very difficult to correct or that could defeat the purpose of the appeal.¹⁵

11. In the Appeal Brief, the Philippines submits that the suspension of the Prosecutor’s investigation into the Philippines Situation is “warranted pending the expeditious resolution of [its] appeal”, as “the resumption of the [Prosecutor’s]

⁹ [Philippine Government’s Appeal Brief against “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), ICC-01/21-65, with public annex A.

¹⁰ [Notice of Appeal](#), para. 10.

¹¹ [Prosecutor’s Response](#), paras 1, 4.

¹² [Prosecutor’s Response](#), para. 4.

¹³ [Prosecutor’s Response](#), para. 4.

¹⁴ [Prosecutor’s Response](#), para. 4.

¹⁵ [Prosecutor’s Response](#), para. 4.

investigation pending resolution of this appeal would [...] defeat its very purpose and create an irreversible situation that could not be corrected”.¹⁶

12. In support, the Philippines argues that the Prosecutor’s activities in furtherance of his investigation into the Philippines Situation “would lack any legal foundation and encroach on the sovereignty of the [Philippines]”.¹⁷ It further contends that “[s]hould the Court proceed in the absence of a jurisdictional basis”, “its mandate would be adversely affected due to the implications such acts would have for those affected by the Court’s operations, in particular suspects, witnesses and victims”.¹⁸ The Philippines lastly notes that “[g]iven the broad scope of investigations at this stage, the resumption of the investigation will necessarily have far-reaching and inimical consequences”.¹⁹

III. DETERMINATION

13. Article 82(3) of the Statute provides that “an appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules”. An application for suspensive effect may be made pursuant to rule 156(5) of the Rules.

14. The Appeals Chamber notes that article 82(3) of the Statute applies with respect to the request at hand as article 18(4) of the Statute explicitly provides that the State may appeal against a ruling of the Pre-Trial Chamber “in accordance with article 82” of the Statute.

15. As regards the suspensive effect of an appeal under article 82(3) of the Statute, the Appeals Chamber has consistently held that “the decision to order that an appeal has suspensive effect is discretionary”,²⁰ and that when examining a request for suspensive effect, “it will consider the specific circumstances of the case and the factors

¹⁶ [Appeal Brief](#), paras 163-165.

¹⁷ [Appeal Brief](#), para. 164.

¹⁸ [Appeal Brief](#), para. 164.

¹⁹ [Appeal Brief](#), para. 164.

²⁰ See, for example, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Mr William Samoei Ruto’s request for suspensive effect](#), 17 June 2014, ICC-01/09-01/11-1370 (OA7 OA8) (hereinafter: “*Ruto and Sang* OA7 OA8 Decision”), para. 6; *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the “Decision on the Admissibility and Abuse of Process Challenges”](#), 9 July 2010, ICC-01/05-01/08-817 (OA3) (hereinafter: “*Bemba* OA3 Decision”), para. 6.

it considers relevant for the exercise of its discretion under these circumstances”.²¹ In this regard, the Appeals Chamber, in past decisions, has considered whether the implementation of the decision under appeal (i) would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to eventually find in favour of the appellant, (ii) would lead to consequences that “would be very difficult to correct and may be irreversible”, or (iii) could potentially defeat the purpose of the appeal.²²

16. At the outset, the Appeals Chamber observes that the Philippines did not include any reasons and arguments in support of the Request for Suspensive Effect in its Notice of Appeal. It did so only in the Appeal Brief. The Appeals Chamber notes that it would have been preferable for the Philippines to have included its supporting arguments for the Request in the Notice of Appeal.²³ However, it nonetheless complied with rule 156(5) of the Rules and the Appeals Chamber will, therefore, consider the merits of the Request.²⁴

17. Turning to the merits of the Request for Suspensive Effect, the Appeals Chamber firstly notes the Philippines’ claim concerning “the absence of a jurisdictional basis” for the Prosecutor’s activities in furtherance of his investigation and the alleged encroachment on the sovereignty of the Philippines.²⁵ The Appeals Chamber notes that while the Philippines provides its supporting arguments with respect to the absence of the Court’s jurisdiction in the Philippines Situation under the first ground of appeal,²⁶ it fails to explain how the alleged absence of jurisdictional or legal basis for the

²¹ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir*, [Decision on Jordan’s request for suspensive effect of its appeal against the decision on the non-compliance by Jordan with the request for the arrest and surrender of Mr Omar Al-Bashir](#), 6 April 2018, ICC-02/05-01/09-333 (OA2), para. 8, referring to *Situation on registered vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia*, [Decision on suspensive effect](#), 6 August 2015, ICC-01/13-43 (OA), para. 7; *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on the Prosecutor’s urgent request for suspensive effect of the “Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido” of 21 October 2014](#), 22 October 2014, ICC-01/05-01/13-718 (OA9), para. 5.

²² See, for example, [Ruto and Sang OA7 OA8 Decision](#), para. 6; [Bemba OA3 Decision](#), para. 11.

²³ [Bemba OA3 Decision](#), para. 8.

²⁴ See *The Prosecutor v. Saif Al-Islam Gaddafi et al.*, [Decision on the request for suspensive effect and related issues](#), 18 July 2013, ICC-01/11-01/11-387 (OA4) (hereinafter: “*Gaddafi et al.* OA4 Decision”), para. 14.

²⁵ [Appeal Brief](#), para. 164.

²⁶ [Appeal Brief](#), paras 26-62.

resumption of the Prosecutor's activities pending the resolution of the appeal would "defeat its very purpose and create an irreversible situation that could not be corrected".

18. Secondly, the Appeals Chamber observes that apart from merely referring to "far-reaching and inimical consequences" or implications of the Prosecutor's activities on suspects, witnesses and victims,²⁷ the Philippines fails to provide any explanation as to what those implications may be and how the broad scope of the Prosecutor's investigation at this stage of the proceedings would lead to consequences that "would be very difficult to correct and may be irreversible".

19. Lastly, the Appeals Chamber notes that as far as national investigations are concerned, the Philippines is in a position to continue its investigations irrespective of the ongoing proceedings before the Court.²⁸

20. For the foregoing reasons, the Appeals Chamber is not persuaded that the implementation of the Impugned Decision would cause consequences that "would be very difficult to correct" or that "may be irreversible", or "could potentially defeat the purpose of the appeal".

21. In the absence of persuasive reasons in support of ordering suspensive effect, the Appeals Chamber rejects the request. This is without prejudice to its eventual decision on the merits of the Philippines' appeal against the Impugned Decision.

Done in both English and French, the English version being authoritative.



Judge Marc Perrin de Brichambaut

Presiding

Dated this 27th of March 2023

At The Hague, The Netherlands

²⁷ [Appeal Brief](#), para. 164.

²⁸ See [Gaddafi et al. OA4 Decision](#), para. 26.