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THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

Public

Prosecution's response to the Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-65 OA)

Source: **Office of the Prosecutor**

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Introduction

1. The Government of the Philippines requests the Appeals Chamber to reverse Pre-Trial Chamber I's decision authorising the Prosecution to resume its investigation in this situation.[1] It argues that the Chamber: i) erred in law in finding that the Court has jurisdiction in this situation and that the "ensuing obligations" of the Rome Statute remain applicable to the Philippines; ii) erred in law in finding that the Philippines bore the burden of proof under article 18(2); iii) erred in law and/or fact in assessing the deferral request by reference to standards which were originally derived from admissibility challenges under article 19; and iv) erred in law by failing to consider all the factors in article 17.[2]

2. It is submitted below that the Philippines has failed to show any error in the Decision, let alone identified any error which materially affects the Decision as required by article 83(2). Instead, the Chamber reasonably and correctly considered the materials submitted by the Philippines and correctly applied the law.

3. First, the Court has jurisdiction in this situation because the authorised investigation relates to alleged crimes under the Rome Statute committed on the territory of the Philippines from 1 November 2011 to 16 March 2019. The Philippines' withdrawal became effective only on 17 March 2019. The Philippines therefore was a State Party to the Statute during the temporal scope of the authorised investigation. The Philippines' subsequent withdrawal from the Statute thus has no effect on the previously established jurisdiction of the Court. In any event, the Appeals Chamber does not need to rule on this question since it was not material to the Chamber's complementarity findings under article 18.

4. Second, the Chamber correctly determined that the Philippines, as the State requesting deferral of the Court's investigation, bears the burden of proof with regard to that request. This is not altered by the role of the Prosecutor in triggering the exercise of the Pre-Trial Chamber's jurisdiction to rule on this matter under article 18(2). This is the correct interpretation of article 18(2) of the Statute based on its terms, read in context and in light of the object and purpose of the Statute. Nor in any event does the Philippines show that any error in this regard materially affected the Decision.

[1] ICC-01/21-65 ("Appeal"); ICC-01/21-56-Red ("Decision"). *See also* ICC-01/21-46 ("Prosecution Article 18(2) Request"). This response uses the terms "Court's investigation" and "Prosecution's investigation" interchangeably. It refers to Pre-Trial Chamber I as "the Chamber".
[2] Appeal, para. 5.

5. Third, the Chamber correctly and reasonably assessed the factual basis for the deferral request. In doing so, it applied the proper test to determine questions of complementarity for the purpose of article 18(2). Specifically, the Chamber identified relevant comparators from the State's investigation (based on the materials communicated under rule 54(1) and made available by the Philippines) and considered them in light of the Court's intended investigation (based on the potential cases arising from the situation, as defined by the Chamber's decision under article 15(4) and the Prosecutor's article 18(1) notification). In any event, the Philippines does not show that any error with regard to the Chamber's analysis of specific documents or areas of inquiry materially affected the Decision. The Chamber concluded on the basis of multiple factors that the Philippines' investigation did not sufficiently mirror the Court's intended investigation for the purpose of article 18(2).

6. Fourth, the Philippines alleges that the Chamber erred in failing to consider the factors set out in article 17. It is submitted that the Chamber did consider all the relevant factors in article 17 for the purpose of the article 18(2) assessment. Consistent with the established two-step process developed by the Court, under the guidance of the Appeals Chamber, it correctly determined that it was not necessary to enter into questions of the ability or willingness of the Philippines to carry out investigations since there was not sufficient activity. Nor in the context of article 18(2) was the Chamber obliged to assess the gravity of potential cases arising within the situation. However, even if the Chamber had assessed it, this requirement would have been satisfied. Likewise, the Philippines fails to show that any error in these respects materially affected the Decision.

Submissions

A. First ground of appeal: the Chamber correctly found that the Court has jurisdiction because the Philippines was a State Party "at the time of the alleged crimes", and its "ensuing obligations" remain applicable

7. In dismissing the Philippines' observations responding to the Prosecution's request to resume the investigation under article 18(2), regarding the Court's lack of jurisdiction,[3] the Chamber held:

> 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

[3] ICC-01/21-51 ("Observations of the Government of the Philippines on the Prosecution Article 18(2) Request"), paras. 7-9, 14.

> 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. These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute.[4]

8. In its First Ground, the Philippines challenges this extract. It argues that the Chamber erred in finding that the Court has jurisdiction.[5] It submits that the Chamber failed to conduct a "contemporaneous" assessment of the Philippines' status (as a non-State Party) at the time the Chamber opened the investigation, and instead relied on the Philippines' status (as a State Party) "at the time of the alleged crimes".[6] In addition, the Philippines argues that the Chamber erred in finding that it had an obligation to cooperate with the Court[7] and in noting, in the Article 15 Decision, that the preliminary examination was "a matter under consideration by the Court".[8] Finally, the Philippines submits that the Chamber's jurisdictional findings are not *obiter dicta* but instead are inextricably linked to the Chamber's complementarity ruling.[9]

9. The Prosecution respectfully requests the Appeals Chamber to reject the First Ground. The Chamber correctly recalled that the Court has jurisdiction "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".[10] This interpretation accords with the Statute and the Court's jurisprudence. It is also consistent with the principles and rules of international law pursuant to article 21(1)(b) of the Statute.

10. Nor is State cooperation a legal prerequisite for the exercise of the Court's jurisdiction. Contrary to the Philippines' suggestion, the preliminary examination was already a "matter under consideration of the Court" when the Philippines' withdrawal was effected. In any event, these two latter arguments should be summarily dismissed because the Chamber did not make such findings in the Decision. In fact, the Appeals Chamber need not rule on the First Ground

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[4] Decision, para. 26 (including fn. 85: citing Statute, art. 127(2); ICC-01/21-12 ("Article 15(4) Decision"), paras 110-111).
[5] Appeal, paras. 25-62 (challenging Decision, para. 26, but also Article 15(4) Decision, para. 111).
[6] Appeal, paras. 39, 61. *See also generally* paras. 33-42.
[7] Appeal, paras. 43-49.
[8] *See* Appeal, paras. 50-59, *especially* para. 50 (arguing on the basis of the Chamber's cross-reference to the Article 15(4) Decision, para. 111).
[9] Appeal, paras. 28-32.
[10] Decision, para. 26. *See also* Article 15(4) Decision, para. 111 ("the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party, from 1 November 2011 up to and including 16 March 2019").

at all since the Chamber's jurisdictional remarks in the Decision were unrelated and unnecessary to its complementarity determination under article 18(2) and thus *obiter dicta*.

11. For all these reasons, the First Ground should be dismissed.

A.1. The Chamber correctly relied on the Philippines being a State Party at the time of the alleged crimes (1 November 2011 to 16 March 2019)

A.1.a. The Philippines misinterprets the Court's jurisdictional framework

12. The Chamber's jurisdictional findings in the Decision, and in the Article 15 Decision, are correct. The Chamber did not conflate the preconditions to exercise jurisdiction with the residual obligations of a withdrawing State.[11] Rather, the Philippines conflates these jurisdictional preconditions with the Court's procedure for determining whether to exercise its jurisdiction. While the temporal scope of an investigation may extend to the time when the Court decides to exercise its jurisdiction by opening an investigation, this need not be the case.

13. The Court may only exercise jurisdiction if the relevant jurisdictional preconditions are found to be met at the material time. These are: subject matter (*ratione materiae*),[12] territorial (*ratione loci*), personal (*ratione personae*)[13] and temporal (*ratione temporis*).[14] Absent a UN Security Council ("UNSC") referral or an article 12(3) declaration,[15] these conditions require that Rome Statute crimes are committed on the territory of a State Party or by its nationals during the period when the Statute is in force for that State Party. When the Court decides to exercise jurisdiction and to open an investigation, it will assess these preconditions. This will be done either by: (i) a Chamber acting under article 15(4), at the request of the Prosecution under article 15(3),[16] or; (ii) the Prosecution acting under article 53(1), following a State Party or UNSC referral pursuant to articles 13(a)-(b) and 14.[17]

14. In all cases, the Court's jurisdictional assessment must relate to the period that the Court seeks to investigate, namely, when the alleged crimes were committed. While this period *may*

[11] *Contra* Appeal, para. 35.
[12] Statute, arts. 5-8*bis*.
[13] Statute, art. 12(2). If there is a UNSC referral, article 12(2) does not apply: ICC-01/05-01/08-320 ("*Bemba* Fourth Victims Decision"), para. 59; ICC-02/05-01/07-1-Corr ("*Harun and Abd-Al-Rahman* Article 58 Decision"), para. 16. *See also* Statute, arts. 25(1) (the Court has jurisdiction over natural persons), 26 (the Court does not have jurisdiction over persons under 18 at the time of the alleged crimes).
[14] Statute, arts. 11, 127(1). *But see* art. 11(2) (making exceptions for State declarations under article 12(3)).
[15] For UNSC referrals, art. 12(2) does not apply; for State declarations under art. 12(3), the State would indicate a date from when the Court may exercise its jurisdiction—but this cannot be before the date when the Statute entered into force (1 July 2002) pursuant to article 11(1).
[16] *See also* Statute, art. 13(c).
[17] The Prosecution may request the Court to issue a jurisdictional ruling prior to the opening of the investigation pursuant to article 19(3) of the Statute, for example as it did in the *Palestine* situation: ICC-01/18-12.

extend to the time when the Court decides to open an investigation, it need not. Indeed, the parameters of a situation may sometimes permit the Prosecutor only to investigate crimes committed for a confined period *prior* to the opening of an investigation.[18] In that scenario, and absent a UNSC referral or article 12(3) declaration, while a State must have been a Party to the Statute when the alleged crimes were committed, it need not still be a Party when the investigation is opened. On the other hand, the parameters of a situation may encompass not only past but also contemporaneous or ongoing crimes, as well as crimes post-dating the opening of the investigation which are sufficiently linked.[19] In such a scenario, the State must be a Party when the alleged crimes are committed, thus including when the investigation is opened.

15. In the *Philippines* situation, the Prosecution was authorised to investigate Rome Statute crimes allegedly committed in the Philippines from 1 November 2011 until 16 March 2019—that is, when the Philippines was a State Party.[20] That the Philippines was not a State Party when the investigation was opened (on 15 September 2021) is immaterial and does not the deprive the Court of jurisdiction over crimes allegedly committed during the temporal scope of the investigation.

A.1.b. The Chamber's interpretation is consistent with the established principles of treaty interpretation

16. The Chamber's finding flows from an interpretation and application of the Statute in good faith, and considering its ordinary meaning, purpose and context, as well as its drafting history.[21]

[18] *See e.g.* ICC-01/15-12 ("*Georgia* Article 15(4) Decision"), para. 64 ("events related to the conflict in and around South Ossetia between 1 July and 10 October 2008"); ICC-01/09-19-Corr ("*Kenya* Article 15(4) Decision"), para. 207 ("events that took place as between 1 June 2005 (i.e., the date of the Statute's entry into force for the Republic of Kenya) and 26 November 2009 (i.e., the date of the filing of the Prosecutor's Request)").
[19] *See e.g.* ICC-02/17-138 OA4 ("*Afghanistan* Article 15(4) Appeal Judgment"), para. 79 ("alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002"); ICC-01/19-27 ("*Bangladesh/Myanmar* Article 15(4) Decision"), para. 131 ("crimes allegedly committed on or after 1 June 2010, the date of entry into force of the Statute for Bangladesh" and "crimes allegedly committed at least in part on the territory of other States Parties after the date of entry into force of the Statute for those States Parties, insofar as the alleged crimes are sufficiently linked to the situation as described in this decision").
[20] Article 15(4) Decision, para. 118. *See also* paras. 109-110, 113.
[21] *See Vienna Convention on the Law of Treaties* ("VCLT"), art. 31(1). *See further e.g.* ICC-01/05-01/08-3343 ("*Bemba* Trial Judgment"), para. 77 ("the various elements referred to in this provision—i.e., ordinary meaning, context, object, and purpose—must be applied together and simultaneously"); ICC-01/04-01/07-3436-tENG ("*Katanga* Trial Judgment"), para. 45.

17. This interpretive approach is consistent with the status of the Rome Statute as an international treaty, setting up the first permanent international criminal court.[22] By becoming Parties to the Statute, States accept its terms including not only the complementarity provisions but also—perhaps most fundamentally—the Court's jurisdiction.[23] In this respect, the Statute differs from other treaties or conventions containing conflict resolution clauses for disputes arising from their application.[24] Unlike such instruments, the Court's jurisdiction is not an incidental provision of the Statute. Rather, it is the main objective and consequence of joining it. Indeed, by joining the Statute, States accept that ICC proceedings may be conducted *if* Rome Statute crimes are found to be committed on their territory or by its nationals while they are Parties, *unless* they themselves investigate or prosecute these crimes.[25]

18. While the Court may sometimes react contemporaneously to the commission of alleged crimes, the Court's proceedings may otherwise materialise after the relevant events. This will depend on the circumstances of the situation in question. However, in all scenarios the Court retains jurisdiction over the alleged crimes committed during the period when the Statute is in force for that State. A contrary interpretation would violate the terms of the agreement (the Court's jurisdiction) and would defeat its object and purpose. It would potentially allow States to commit or accept the commission of Rome Statute crimes while the Court had jurisdiction, but then avoid investigation and potentially prosecution of the alleged perpetrators by subsequently withdrawing.[26]

19. That the Court's jurisdiction over alleged crimes committed by State Parties is not subject to time limits does not cause uncertainty or unfairness. Indeed, States agree to these conditions

[22] Statute, art. 1 ("An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute").
[23] Statute, art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5").
[24] Such conflict resolution clauses generally permit litigation for violations predating the termination of the treaty, but may vary as to whether the court's jurisdiction must be triggered before the termination or denunciation (which appears to be the general rule), or may be invoked afterwards: *see* H. Ascensio 'Volume II, Part V Invalidity, Termination and Suspension of the Operation of Treaties, s.5 Consequence of the Invalidity, Termination or Suspension of the Operation of a Treaty, Art.70 1969 Vienna Convention,' in O. Corten and P. Klein (eds.), *The Vienna Convention on the Law of Treaties* (OUP: 2011) ("Ascensio"), pp. 1604-1607. For examples of instruments permitting the triggering of litigation after termination/denunciation: *see e.g.* Washington Convention on Settlement of Investment Disputes, art. 72; ECHR, art. 58(2); ACHR, art. 78(2). *See also Ambatielos Case (Greece v. United Kingdom)*, Preliminary Objection, Judgment of 1 July 1952, ICJ Reports 1952, pp. 45-46. *See below* para. 25.
[25] In this context, the dispute settlement provisions relating to the Court's judicial functions revert back to the Court itself: *see* Statute, art. 119(1).
[26] The exception provided in article 124 of the Statute reinforces this scheme, since any exception to the acceptance to the Court's jurisdiction must be expressed in writing and entered only with respect to war crimes for seven years upon first joining the Statute. Otherwise, article 120 permits no reservations to the Statute.

by ratifying and acceding to the Statute.[27] It should be recalled that States have an obligation *erga omnes* to prevent, investigate and punish crimes within the Court's jurisdiction.[28] Moreover, Rome Statute crimes are not subject to any statute of limitations.[29]

20. The terms of article 127(2) should be read in this context. This provision enshrines the principle of non-retroactivity, which is also envisaged in the termination provisions of other international treaties.[30] It suggests that the legal consequences resulting from acceptance of the Court's jurisdiction, as well as the rights and duties accruing to State Parties, must be respected and cannot be taken away by the State's subsequent withdrawal. That article 127(2) expressly refers to investigations and proceedings which commenced prior to the State's withdrawal does not mean that the Court lacks jurisdiction in proceedings commencing thereafter. The Philippines misconstrues the function of the provision. Article 127(2) seeks to ensure that ongoing proceedings (and related treaty obligations) are not undermined by a State's withdrawal; it does not regulate the Court's jurisdictional requirements.

21. Two other ICC Chambers have endorsed the Chamber's interpretation in other contexts and situations. They have similarly reasoned that "[t]he withdrawal of a State Party from the Statute […] has no effect on the previously established jurisdiction of the Court"[31] and the "acceptance of the jurisdiction remains unaffected by a withdrawal of the State Party from the Statute" since "the exercise of the Court's jurisdiction, i.e. the investigation and prosecution of crimes committed up [one year after the State withdrawal], is, as such, not subject to any time limit".[32]

22. This approach is further consistent with the view expressed by some drafters who recall that "proceedings might be commenced after withdrawal" in accordance with the principles of treaty interpretation in public international law.[33]

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[27] Statute, arts. 125-126.
[28] The Appeals Chamber has confirmed that there is an obligation *erga omnes* to prevent, investigate and punish crimes within the jurisdiction of the Court: ICC-02/05-01/09-397 OA2 ("*Bashir* Jordan Referral Appeal Judgment"), para. 123. *See also* ICC-02/05-01/09-397-AnxI OA2 ("*Bashir* Joint Concurring Opinion of Judges Eboe-Osuji, Morrison, Hofmański and Bossa"), para. 207 ("It has now been authoritatively settled that the proscriptions of genocide, crimes against humanity and war crimes enjoy the status of *jus cogens* norms"). Similarly, the IACtHR has considered as *jus cogens* norms the obligations to investigate, prosecute and punish those responsible for crimes against humanity: *Goiburú v. Paraguay*, Judgment, paras. 84, 131; *La Cantuta v. Perú*, Judgment, para. 157.
[29] Statute, art. 29.
[30] *See below* para. 23.
[31] ICC-02/05-01/20-391 ("*Abd-al-Rahman* Jurisdiction Decision"), para. 33.
[32] ICC-01/17-9-Red ("*Burundi* Article 15(4) Decision"), para. 24.
[33] T. Neroni Slade and R.S. Clark, 'Preamble and Final Clauses,' in R.S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (Martinus Nijhoff Publishers: 1999), p. 447 ("Our recollection is that some

A.1.c. The Chamber's interpretation is consistent with principles and rules of international law pursuant to article 21(1)(b)

23. This interpretation is also consistent with the principles and rules of international law which may be applied by the Court under article 21(1)(b). Relevantly, article 70(1) of the Vienna Convention on the Law of Treaties ("VCLT") ("Consequences of the termination of a treaty") bears similarity with article 127 of the Statute.[34] Its rules are deemed to have acquired a customary character[35] and are considered the fruit of common sense and the result of a general principle of legal security.[36] Article 70(1)(b)—stating that the termination of a treaty "does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination"—means that a State's decision to withdraw from an international agreement does not have retroactive effect.[37] The withdrawing State will still be bound by obligations accrued before the denunciation becomes effective,[38] and a State may be liable for breaches which occurred prior the termination of the treaty.[39]

24. For the Rome Statute, *the Court's jurisdiction* is the "legal situation" to be preserved, in the terms of the VCLT, and the rights and obligations acquired by a State while it is a Party are

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of those who participated in the discussion thought that Article 70 of the Vienna Convention on the Law of Treaties would apply in such situations and mean that proceedings might be commenced after withdrawal"); R.S. Clark and S.M. Meisenberg, 'Article 127: withdrawal,' in K. Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022) ("Clark and Meisenberg"), p. 2925 (mn. 8: "some of the participants saw Article 127 as pre-empting the field, so that there was no longer room for any residual effect for the VCLT provision (the parties were "agreed otherwise"); others thought the two provisions could apply in some situations").

[34] VCLT, art. 70(1) ("Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination").

[35] Ascensio, p. 1590.

[36] Ascensio, pp. 1590-1591 (explaining that the general principle of law of legal security was reflected by the drafters of the VCLT in the establishment of non-retroactivity as a principle for articles 4, 28 and 70).

[37] VCLT, art. 70(1)(b) (emphasis added). *See also* A. Morelli, 'Withdrawal from Multilateral Treaties' in V. Chetail (ed.) *Theory and Practice of Public International Law, Vol. 4* (Brill Nijhoff: 2022) ("Morelli"), p. 175; Ascensio, p. 1589 ("Rules relating to the consequences of termination are based on the principle of non-retroactivity. In this way, they differ from those relating to the consequences of invalidity, which relies on the opposing principle. This is justified by the general idea that invalidity operates *ex tunc*, whereas termination operates *ex nunc*").

[38] Morelli, p. 175.

[39] *Case between New Zealand and France*, RIAA, 30 April 1990, vol. XX, p. 266, paras. 105 ("[]Thus, while France continues to be liable for the breaches which occurred before 22 July 1989, it cannot be said today that France is now in breach of its international obligations"), 106 ("This does not mean that the French Government is exempt from responsibility on account of the previous breaches of its obligations, committed while these obligations were in force […] In this case it is undisputed that the breaches of obligation incurred by the French Government discussed in paragraphs 88 and 101 of the Award—the failure to return Major Mafart and the removal of and failure to return Captain Prieur—were committed at a time when the obligations assumed in the First Agreement were still in force. Consequently, the claims advanced by New Zealand have an existence independent of the expiration of the First Agreement and entitle New Zealand to obtain adequate relief for these breaches"). This case related to the breach of a 9 July 1986 agreement that required two French agents to remain in Hao Atoll until 22 July 1989, when the agreement terminated.

not affected by its withdrawal. As noted, this means that the Court can exercise its jurisdiction *after* a State's withdrawal with regard to Rome Statute crimes allegedly committed when the State *was* still a Party, as long as all the other jurisdictional requirements are met.[40]

25. Termination clauses in conventions such as the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) are also interpreted in this manner.[41] A withdrawing State remains responsible for violations that occurred before or during the withdrawal notice period, as the State was still considered a member of the organisation for that period.[42] For example, when States have denounced the ACHR, the Inter-American Commission has held that it retains jurisdiction over complaints of violations committed by the withdrawing State before the withdrawal became effective, even if the effects of those violations continued or did not manifest until a later date.[43]

A.2. The Philippines must comply with the rules regulating article 18 proceedings

26. To further support its position that a State must be Party to the Statute when the Court's jurisdiction is exercised, the Philippines argues that the Court can only enforce cooperation with respect to investigations, and that States whose withdrawal is effected prior to the opening of an investigation have no obligation to cooperate pursuant to article 127(2).[44] It further

[40] Clark and Meisenberg, p. 2925 (mn. 8). *Contra* R. Kolb, 'Article 127: Retrait,' in J. Fernandez, X. Pacreau et M. Ubéda-Saillard (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article*, 2nd Ed. (Pedone: 2019), pp. 2656-2657 (requiring that at least a preliminary examination is opened prior to the withdrawal being effected). However, as noted above, article 127(2) does not set out the jurisdictional requirements and regulates a particular factual scenario. Moreover, the Rome Statute differs from other treaties since its main objective is the establishment—and acceptance—of the Court's jurisdiction.
[41] *See e.g.* ECHR, art. 58(2) ("Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective"); ACHR, art. 78(2) ("Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation"). *See also* Ascensio, pp. 1606-1607 (referring to these provisions as examples of jurisdiction with prolonged effect); *see above* fn. 24.
[42] Morelli, p. 176.
[43] *Roodal v. Trinidad and Tobago*, Case 12.342, Report No. 89/01, OEA/Ser./L/V/II.114 Doc. 5 rev. at 300 (2001), para. 23 ("By the plain terms of Article 78(2), states parties to the American Convention have agreed that a denunciation taken by any of them will not release the denouncing state from its obligations under the Convention with respect to acts taken by that state prior to the effective date of the denunciation that may constitute a violation of those obligations. A state party's obligations under the Convention encompass not only those provisions of the Convention relating to the substantive rights and freedoms guaranteed thereunder. They also encompass provisions relating to the supervisory mechanisms under the Convention, including those under Chapter VII of the Convention relating to the jurisdiction, functions and powers of the Inter-American Commission on Human Rights. Notwithstanding Trinidad and Tobago's denunciation of the Convention, therefore, the Commission will retain jurisdiction over complaints of violations of the Convention by Trinidad and Tobago in respect of acts taken by that State prior to May 26, 1999. Consistent with established jurisprudence, this includes acts taken by the State prior to May 26, 1999, even if the effects of those acts continue or are not manifested until after that date").
[44] Appeal, para. 46. *See also generally* paras. 43-48.

suggests that the Court erred in finding that the "ensuing obligations" of the Rome Statute remain applicable.[45]

27. The Prosecution respectfully submits that the Philippines misinterprets the Decision. The Chamber did not find that the Philippines has an obligation to cooperate with the Court's investigation. In any event, it is submitted that the Appeals Chamber need not rule on this matter to resolve this appeal.

28. First, although State cooperation is fundamental to the Court's efficient conduct of its proceedings, it is not a jurisdictional precondition that must be met for the Court to exercise its jurisdiction under the Statute. In fact, since article 12(2) is framed in the alternative, the States potentially affected by alleged crimes under the Rome Statute are not always the same, nor is it necessary that they are both State Parties when the crimes are committed and consequently they may not both be obliged to cooperate.[46] Nor has it been uncommon for some States, including Parties to the Statute, to have been found at times not to have afforded the Court the required cooperation.[47] Yet this has not deprived the Court of its jurisdiction in those situations.

29. Second, the Chamber did not find that the Philippines is obliged to cooperate with the Court's investigation.[48] Rather, it held that the provisions related to "the *procedure laid down in article 18(2) of the Statute*" and the "ensuing obligations remain applicable, notwithstanding the Philippines' withdrawal from the Statute".[49] Indeed, as the Chamber set out, "[b]y 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*".[50] As noted above, the Philippines accepted that, if crimes were found to be committed on its territory and if it did not conduct genuine investigations, the Court's jurisdiction could be triggered. Moreover, the Philippines has availed itself of the complementarity provisions in the Statute to request the deferral of the Court's investigation pursuant to article 18(2).

[45] Appeal, para. 61.
[46] Indeed, the Court may investigate crimes committed by nationals of State Parties on the territory of non-State Parties or it may investigate crimes committed by nationals of non-State Parties on the territory of State Parties.
[47] *See e.g.* ICC-01/09-02/11-1037 ("*Kenyatta* Second Article 87(7) Decision"), p. 18; ICC-02/05-01/09-151 ("*Bashir* Chad Article 87(7) Decision"), para. 23.
[48] *Contra* Appeal, para. 61.
[49] Decision, para. 26 (emphasis added).
[50] Decision, para. 26 (emphasis added). *See also* ICC-02/04-01/05-377 ("*Kony et al.* Admissibility Decision"), para. 45.

A.3. The preliminary examination was a matter already under the Court's consideration prior to the Philippines' withdrawal

30. The Philippines further argues that the Chamber erred—in the Article 15(4) Decision—in finding that "[t]he Court's exercise of such jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced prior to the Philippines' withdrawal".[51] It submits that the Prosecution's preliminary examination was not a "matter which was already under consideration by the Court" by the time the Philippines withdrew pursuant to article 127(2).[52] Rather, it argues that this provision refers to an article 15 request being pending at the moment when a State's withdrawal has taken effect.[53]

31. Since the Philippines challenges the Article 15(4) Decision and not the Decision, these submissions fall outside the scope of the Appeal and must be dismissed on this basis alone. Moreover, the Philippines' submissions also fail on their merits.

32. First, the Chamber did not rule in the Decision that the preliminary examination was "a matter under consideration" within the terms of article 127(2) at the time the Philippines' withdrawal was effected. The Chamber did not even mention it in the Decision. Instead, it found that the Court has jurisdiction because the Philippines was a State Party when the alleged crimes for which the investigation was authorised were committed.[54] That the Chamber referred to the Article 15(4) Decision in footnotes, among other sources, to support its reasoning does not permit the Philippines to challenge the Article 15(4) Decision in an appeal against the Decision.

33. Second, and in any event, the Chamber correctly found in the Article 15(4) Decision that: "[t]he Court's exercise of such jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced prior to the Philippines' withdrawal".[55] Indeed, as noted above, the Court retains jurisdiction over Rome Statute crimes committed on the territory of the Philippines when the Philippines was a State Party, that is from 1 November 2011 until 16 March 2019. It is also accurate that the preliminary examination was a "matter which was already under consideration by the Court prior to the date on which the withdrawal became effective" since it was opened on 8 February 2018. However, the Chamber's remark

[51] Appeal, para. 50 (quoting Article 15(4) Decision, para. 111).
[52] Appeal, paras. 50-59.
[53] Appeal, para. 54.
[54] Decision, para. 26.
[55] Article 15(4) Decision, para. 111.

regarding the preliminary examination was not determinative to the Chamber's conclusion that the Court has jurisdiction in the situation.

34. In any event, the Chamber was correct. Contrary to the Philippines' assertion, the Prosecution is very much part of the Court including for the purposes of article 127(2).[56] The Prosecution is the organ of the Court which conducts a full assessment (also known as a preliminary examination) of the factors set out in article 53(1)(a)-(c) in order to decide whether to open an investigation and/or to request authorisation to investigate under article 15(3).[57] If the Prosecution were not to conduct this assessment there would be no investigations or prosecutions by this Court.

35. Further, preliminary examinations have consequences for the Prosecution and the Court as a whole. Not only does the Prosecution devote resources to assess the factors under article 53(1)(a)-(c), but a preliminary examination may also involve other organs of the Court.[58] Affected States are also aware of the Prosecution's preliminary examinations since the Prosecution publicly announces their opening, and periodically reports on their development.[59] It also seeks to engage with the affected States,[60] as it did with the Philippines.

A.4. The Chamber's jurisdictional findings were not material to its complementarity determination

36. Finally, the Prosecution respectfully submits that the Chamber need not entertain the Philippines' First Ground. Although the Chamber restated the Court's jurisdiction in this situation—and the Philippines may have considered it appropriate to appeal it—this restatement was unrelated to the Chamber's complementarity findings pursuant to article 18(2), nor was it an essential or necessary component of those findings. Notwithstanding the importance of jurisdictional matters and that "[t]he Court shall satisfy itself that it has jurisdiction in any case brought before it",[61] article 18 is not the appropriate forum to conduct

[56] Statute, arts. 34, 42(1); *contra* Appeal, para. 55.
[57] ICC RPE, rule 48.
[58] The Prosecution must inform the Presidency of the receipt of a State and Security Council referral so that a Pre-Trial Chamber is assigned to that situation. Likewise, the Prosecution must provide to the Presidency information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber, including, the Prosecution's intention to submit a request under article 15(3): *see* ICC RoC, reg. 45(1). Moreover, in the course of a preliminary examination, the Prosecution may take measures to protect victims and (potential) witnesses under article 68(1), may receive written or oral testimony at the seat of the Court and may request the Pre-Trial Chamber to take measures as may be necessary to ensure the efficiency and integrity of the proceedings, including to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony: *see e.g.* Statute, art. 15(2); ICC RPE, rule 47; *Burundi* Article 15(4) Decision, para. 15.
[59] *See e.g.* Report on Preliminary Examination Activities (2020); Report on Preliminary Examination Activities (2019); Report on Preliminary Examination Activities (2018).
[60] Policy Paper on Preliminary Examinations, para. 13.
[61] Statute, art. 19(1); *see* ICC-02/05-01/20-503 OA8 ("*Abd-al-Rahman* Jurisdiction Appeal Judgment"), para. 45.

a jurisdictional assessment. This bespoke procedure was introduced in the Statute specifically to address complementarity matters,[62] and it relates to the situation as a whole following the opening of an investigation.[63] Accordingly, a decision pursuant to article 18(2) is made on the basis of the factors set out in article 17(1)(a)-(c), and does not relate to jurisdictional questions which may properly arise under article 19.

37. That the Chamber does not assess jurisdiction in the article 18 procedure does not mean that jurisdiction has not been assessed at all. On the contrary. By the time a Chamber is seised with an article 18(2) request, the Court will have already ascertained that it has jurisdiction in the situation, either in the context of a judicial decision pursuant to article 15(4) (for *proprio motu* situations) or by the Prosecutor under article 53(1)(a) (for State and UNSC referrals). It would be inefficient and illogical to immediately repeat this assessment in the context of the article 18 proceedings. Nor does the *ex parte* nature of the article 15 proceedings justify deviating from the text of the Statute, which already contains mechanisms to allow States to raise their jurisdictional concerns. Indeed, article 19(2) of the Statute allows States to challenge the Court's jurisdiction with respect to a "case", that is, after the issuance of an arrest warrant or a summons to appear against an individual for defined acts and crimes.

38. In fact, the Philippines' observations regarding the Court's lack of jurisdiction were improperly before the Chamber.[64] While the Chamber invited the Philippines "to submit any additional observations arising from the Prosecution's Request", these observations had to relate to the article 18 procedure itself and not to other issues arising from the Chamber being seised of the situation.[65] While the Chamber decided to address the Philippines' jurisdictional submissions for the sake of clarity, this was for the purpose of recalling the objectives of the article 18(2) procedure and, in so doing, to recall its prior findings in the Article 15 Decision. This restatement was however unrelated to, and distinguishable from, the Chamber's assessment of whether the deferral request was justified within the terms of article 18(2).

39. This is apparent from the structure of the Decision. The Chamber made its jurisdictional remarks in the section "Preliminary Issues" and not in the section "Issues material to the article

[62] J.T. Holmes, 'The Principle of Complementarity,' in R.S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (Martinus Nijhoff Publishers: 1999) ("Holmes (1999)"), p. 69.
[63] In *Palestine*, the Pre-Trial Chamber noted that the reference to "case" in article 19(1) and (2) restricts the scope of application of these provisions, while article 19(3) does not have such limitation and the Prosecution may seek a ruling from the Court regarding jurisdiction and admissibility before there is a "case": ICC-01/18-143 ("*Palestine* Article 19(3) Decision"), paras. 73-74, 82.
[64] Observations of the Government of the Philippines on the Prosecution Article 18(2) Request, paras. 7-23; *see* Decision, paras. 22-24 (referring to the Prosecution's submissions in response to the Philippines' observations).
[65] ICC-01/21-47 ("Order Inviting Observations"), paras. 12-13.

18(2) proceedings", where it solely addressed complementarity matters. The Chamber did not therefore consider the Philippines' jurisdictional submissions as "material" (or relevant) to its ruling on complementarity, which was the only matter the Chamber was called to resolve under article 18(2). Thus, to the extent the Court's jurisdiction was recalled as a preliminary matter, this did not form the basis of the Chamber's article 18(2) decision, and cannot be appealed as such under article 18(4).[66]

40. For all these reasons, the Prosecution respectfully submits that the Philippines' First Ground should be summarily dismissed.

B. Second ground of appeal: the Chamber correctly applied the burden of proof for the purpose of article 18(2)

41. In the Decision, the Chamber recalled 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".[67] It further recalled that, in order to demonstrate relevant State activity, mere assertions are not sufficient—but rather the State must provide evidence "of a sufficient degree of specificity and probative value" showing that "tangible, concrete and progressive investigative steps" are actually being carried out with a view to conducting "*criminal* prosecutions".[68]

42. The Chamber reached these conclusions on the basis of:

- Rule 53, which requires a State which "requests" a deferral pursuant to article 18(2) to "make this request in writing and provide information concerning its investigation";

[66] ICC-01/11-01/11-695-AnxI OA8 ("*Gaddafi* Second Admissibility Appeal Judgment, Separate and Concurring Opinion of Judge Ibáñez Carranza"), para. 18 (stating that *obiter dicta* are "incidental remarks which are non-essential to the decision. They do not form part of the *ratio decidendi* of the case and therefore create no binding precedent. On the other hand, the ratio decidendi contains the rationale of the decision. It is the principle or principles of law on which the court reaches its decision and it is said to be the statement of law applied to the material facts."); ICC-02/05-01/20-459 OA9 ("*Abd-Al-Rahman* Detention Review Appeal Judgment"), para. 50 (statements which did not form part of a Chamber's reasons for the order it made in its decision were simply *obiter dicta*, and not 'findings' per se, and thus "of no practical consequence"). *See also* ICTY, *Prosecutor v. Šešelj*, IT-03-67-T, Interlocutory Decision Concerning Provisional Release, 10 April 2015, Separate and Concurring Opinion of Judge Antonetti, pp. 12-13; *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise,' 21 May 2003, Separate Opinion of Judge Shahabuddeen, paras. 17 ("the *ratio decidendi* of a case is generally considered to be 'the reason why it was decided as it was'") and 24 ("in this case, the proposition in question was in no sense assumed but, on the contrary, resulted from careful and exhaustive examination by the court of material relevant to a manifestly important point bearing on its jurisdiction […]; it is *ratio decidendi* and exerts the force normally flowing from this").
[67] Decision, para. 14. *See also* Appeal, para. 65.
[68] Decision, para. 14 (emphasis supplied). *See also* para. 17 (recalling that admissibility must be determined "on the basis of the facts 'as they exist *at the time* of the proceedings [before the Court]'").

- The similar approach of Pre-Trial Chamber II in authorising the resumption of the investigation in the *Afghanistan* situation pursuant to article 18(2);[69] and
- The jurisprudence of the Appeals Chamber, in the context of article 19(2) of the Statute, holding that "a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible" and must provide the Court with sufficient evidence for that purpose.[70]

43. In its Appeal, the Philippines claims that the Chamber erred in law by imposing the burden of proof upon it as the State requesting deferral pursuant to article 18(2),[71] by "incorrectly conflat[ing] proceedings under article 18 and those under article 19."[72] In particular, it asserts that the Chamber "ignore[d] the deep-seated rule" that "the moving (or challenging) party […] bears the burden of proof" (*actori incumbit probatio*)[73] because, in its view of article 18(2), it is the Prosecutor who must request the Chamber for an order "to end its continued deferral to the domestic investigation", which is triggered "automatically".[74]

44. The Prosecution respectfully submits that the Philippines misconceives the applicable procedure under article 18(2). As the State requesting deferral, the Philippines was the moving party for the purpose of the article 18(2) proceedings. In any event, the Chamber correctly applied the burden of proof. Specifically, the Philippines disregards that the role of the Prosecutor under article 18(2) is essentially a filter to determine which deferral requests require the Chamber's scrutiny—such that, if the Prosecutor *does* consider that the Chamber's scrutiny is required, it then remains for the State requesting the deferral to satisfy the Chamber that this is justified. This understanding of the procedure is implied not only by rules 53 and 54, but also by the language of articles 18(2), (3), and (5), and the object and purpose of the Statute.

45. Furthermore, and in any event, the Philippines incorrectly asserts that its claim of error "vitiates the entire analysis" in the Decision,[75] such that it was materially affected for the purpose of article 83(2) of the Statute. This cannot be the case. Even if the burden of proof had rested upon the Prosecution, the substantive information presented to the Chamber would have

[69] ICC-02/17-196 ("*Afghanistan* Article 18(2) Decision"), para. 45.
[70] ICC-02/11-01/12-75-Red OA ("*S. Gbagbo* Admissibility Appeal Judgment"), para. 128; ICC-01/09-02/11-274 OA ("*Muthaura et al.* Admissibility Appeal Judgment"), para. 61; ICC-01/09-01/11-307 OA ("*Ruto et al.* Admissibility Appeal Judgment"), para. 62. *See also* ICC-01/11-01/11-565 OA6 ("*Al Senussi* Admissibility Appeal Judgment"), para. 166; ICC-01/11-01/11-344-Red ("*Gaddafi* First Admissibility Decision"), para. 54.
[71] Appeal, para. 64.
[72] Appeal, para. 66.
[73] Appeal, para. 67.
[74] Appeal, paras. 72-74. *See also* para. 69 ("it is not the State which is seeking to change the status quo in article 18 proceedings").
[75] *Contra* Appeal, para. 75.

been precisely the same, because this is already expressly regulated by rule 54(1) (requiring the Prosecution to communicate to the Chamber the information provided by the Philippines). The Chamber's conclusion in these proceedings resulted simply from the application of the substantive law to that information.

46. For all these reasons, the Second Ground should be dismissed.

B.1. As the State requesting deferral, the Philippines bears the burden of proof under article 18(2)

47. In its submissions, the Philippines over-emphasises the principle that "the moving (or challenging) party […] bears the burden of proof",[76] which the authorities it cites show to be much more qualified. For example, while it is true that Fairlie saw no "compelling reason to depart" from this "basic" principle for the purpose of article 18(2),[77] this was in the context of her previous and more general remarks that:

> [A]s Wigmore dictates (and as the U.S. Supreme Court has endorsed), there is not and cannot be a general solvent [of the burden of proof] for all cases. It 'is merely a question of policy and fairness based on experience in the different situations.' Accordingly, numerous rules exist regarding such allocation determinations and are employed in both national and international regimes.
>
> […]
>
> '[T]here are no hard and fast standards governing the burden of proof in every situation.' Among other possibilities, the burden may be apportioned to one asserting an affirmative allegation, one who is to prove a negative assertion, the party to whose case a fact is essential, or one who has a peculiar means of knowledge to prove a fact's falsity. In short, burden allocations may turn upon any one of a number of factors such as policy considerations, convenience, fairness, judicial estimate of the probabilities and the tendency to place the burden on the party desiring change.[78]

48. Consequently, in examining the correct allocation of the burden of proof, it is necessary to look at the functioning of the article 18(2) procedure as a whole, and not merely to look at which party makes a particular filing.[79] As the following paragraphs make clear, since it is the State which requests deferral of the Court's investigation—and rule 53 confirms that it is the State which must provide information supporting that request—it is the State which bears the

[76] Appeal, paras. 67-68.
[77] Appeal, para. 69 (fn. 56: quoting M. Fairlie, 'Establishing admissibility at the International Criminal Court: does the buck stop with the Prosecutor, full stop?' [2005] 39 *The International Lawyer* 817 ("Fairlie"), p. 824).
[78] Fairlie, pp. 822, 824.
[79] *Contra* Appeal, para. 75.

burden if the Pre-Trial Chamber becomes seised of the matter under article 18(2). Of course, this does not relieve the Prosecution of its own duty to substantiate the basis of any concerns it may have in addressing the State's deferral request.[80]

49. Nor indeed has the Appeals Chamber ever held that the State carries the burden of proof for the purpose of article 19(2) simply *because* it is the moving party,[81] including in any of the passages cited in the Decision.[82] Rather, the Appeals Chamber's conclusion that the State carries the burden of proof must follow from interpreting article 19(2) in the context of article 17(1)(a) to (c) of the Statute, as well as the Rules of Procedure and Evidence, and in light of the object and purpose of the Statute. Not only is this the standard approach of the Appeals Chamber, in accordance with the VCLT, but it is also endorsed by the Philippines itself.[83] In determining the correct allocation of the burden of proof for article 18(2), in these proceedings, the Appeals Chamber should do the same.

50. Accordingly, it is necessary first to consider the terms of article 18(2) itself, and then to take into account the context of article 17(1)(a) to (c)—to which both articles 18(2) and 19(2) equally relate. In the Prosecution's submission, nothing in article 18(2) warrants departing from the approach favoured by article 17(1)(a) to (c), which allocates the burden of proof to a State relying on its own domestic proceedings. To the contrary, this approach is further supported by the other sub-paragraphs of article 18, as well as rules 53 to 54. Finally, the object and purpose of the Statute favours a full and proper assessment whether a request for deferral is justified, and this too militates in favour of allocating the burden of proof under article 18(2) to the State requesting deferral.

B.1.a. The terms of article 18(2) do not clearly allocate the burden of proof

51. In the Prosecution's submission, the terms of article 18(2) do not *clearly* allocate the burden of proof,[84] even though they may be strongly suggestive that it should fall upon the State requesting deferral. Yet the terms of article 18(2) should in any event be considered in context—including article 17, the other sub-provisions of article 18, and the applicable rules—and in light of the object and purpose of the Statute.

[80] *See also e.g.* *Al Senussi* Admissibility Appeal Judgment, para. 167; Prosecution Article 18(2) Request, para. 30 (fn. 49).
[81] *Contra* Appeal, para. 68.
[82] *See above* fn. 70.
[83] *See* Appeal, para. 69.
[84] *See also* Fairlie, p. 822.

52. Article 18(2) provides, materially, that:

> At the request of that State, the Prosecutor *shall* defer to the State's investigation of those persons *unless* the Pre-Trial Chamber, *on the application of the Prosecutor*, decides to authorize the investigation. [Emphasis added]

53. The Prosecution acknowledges that this provision ("on the application of the Prosecutor") vests the Prosecutor with the power to decide whether to accept a State's request for deferral or whether it falls to be considered by the Pre-Trial Chamber. In a narrow mechanical sense, therefore, it is the Prosecutor who triggers the exercise of the Pre-Trial Chamber's jurisdiction under article 18(2), and in that sense may be considered the 'moving party'.

54. Yet, on the other hand, it is also clear from the terms of article 18(2) that the Prosecutor's deferral to the State's investigation is *not* "automatic[]".[85] Rather, depending on the assessment of the material submitted, the Prosecutor decides whether to seise the Pre-Trial Chamber of the matter or not ("shall defer […] *unless*"). In doing so, the Prosecutor does not himself make any new request to the Pre-Trial Chamber, but merely transfers the authority provisionally vested in him to assess the State's deferral request, and explains his assessment and the nature of his concerns.

55. From the time at which the deferral request is made, and pending either its acceptance by the Prosecutor or its acceptance or rejection by the Pre-Trial Chamber, the Prosecution reiterates that it *suspends* its investigative activities in good faith so that it does not prejudice the outcome of the assessment of the deferral and the supporting information.[86] However, this does not mean that the deferral request is automatically effective before it is ever assessed. This approach is the only logical interpretation of article 18(2), consistent also with articles 18(3)

[85] *Contra* Appeal, para. 72. *See also* J.T. Holmes, 'Jurisdiction and admissibility,' in R. S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: 2001) ("Holmes (2001)"), p. 340 ("faced with a request by a State, the Prosecutor has several options").

[86] *See e.g.* Prosecution Article 18(2) Request, paras. 8 (recalling that the Prosecution "temporarily suspended its investigative activities" on the day it received the Philippines' request for deferral "to assess the scope and effect" of that request), 31 (fn. 50: speculating whether an invalid request for deferral, which does not comply with rule 54, would require the Prosecution to "suspend" its investigation); ICC-01/21-14 ("Notice of Deferral Request"), para. 3 (stating that the Prosecution had "temporarily suspended its investigative activities while it assesses the scope and effect of the Deferral Request").

and (5),[87] while also preserving the rights of the State requesting deferral.[88] Indeed, it is notable that the wording of article 18(5) and (6) ("[w]hen the Prosecutor has deferred an investigation") tends to imply an active decision by the Prosecutor.

56. In this more substantive sense, therefore, the State requesting deferral remains the 'moving party' since one or more of the legal or factual assertions underlying its deferral request remains to be decided by the Pre-Trial Chamber when it is seised under article 18(2)—and, correspondingly, it is the State which actually seeks "to change the status quo" by its (unresolved) request to defer the investigation which has just been opened by the Court.[89] For its part, the Prosecution assumes the role of a respondent by contesting the accuracy or interpretation of the State's assertions.[90]

57. The delicate balance which was evidently struck in article 18(2) underscores the bespoke nature of the procedure created by the drafters of the Statute,[91] and hence the importance of interpreting this provision correctly in light of its context and the object and purpose of the Statute. While unusual, the initial 'filtering' function bestowed upon the Prosecutor makes practical sense in at least two key ways. First, it recognises that, on the basis of the preliminary examination, the Prosecutor is best placed to appreciate the range of potential cases which fall within the parameters of the situation, and thus to carry out an initial evaluation of a deferral request. Second, it ensures that the Prosecutor has as long as necessary to assess the deferral request and supporting information, so that such matters proceed to adjudication by the Pre-Trial Chamber only where appropriate.[92] Yet neither of these functions pre-supposes that the

[87] In particular, if the State's deferral request under article 18(2) were automatically to become effective the moment it was first received—prior to any assessment by the Prosecution of the supporting information—this would also trigger the six month time period in article 18(3), leading to the implausible conclusion that the Prosecution would potentially be entitled to commence a review of the State's investigation before or very soon after it had completed its assessment of circumstances of the original request, and potentially before the Pre-Trial Chamber has the opportunity to make a ruling if called upon to do so. Likewise, in this scenario, potential conflict or overlap would arise between the powers conferred upon the Prosecutor to request further information from the State under rule 53 and article 18(5). By contrast, these conundrums are solved if the deferral—and hence the application of articles 18(3) and (5)—becomes effective at the time it is accepted either by the Prosecutor or, alternatively, the Pre-Trial Chamber. *See also below* para. 68.
[88] The acceptance by the Prosecution of a duty to suspend its investigative activities in good faith, pending the assessment of the deferral request, also accommodates the absence of any specific time frame in the Court's legal texts for the Prosecutor to carry out that assessment and to decide whether to seise the Pre-Trial Chamber of the matter or not.
[89] *Contra* Appeal, para. 69.
[90] *Contra* Appeal, para. 73. *See also* Prosecution Article 18(2) Request, paras. 39-40.
[91] *See also* D. Nsereko and M. Ventura, 'Article 18: preliminary rulings regarding admissibility,' in K. Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022) ("Nsereko and Ventura"), p. 1017 (mn. 14).
[92] *See above* fn. 88.

Prosecutor must then bear the burden of proof if he decides it is necessary for the State's deferral request to be considered by the Pre-Trial Chamber.

58. This is supported by the drafting history, which sought to allow for the possibility of dialogue between the Prosecution and States with jurisdiction over article 5 crimes, if this was not exhausted in the context of the preliminary examination.[93] Yet this did not necessitate that the State's deferral request must automatically be effective, such that the Prosecution then bears the burden of proof. In this context, the fact that the drafters described the article 18 procedure as a "[p]reliminary ruling" on admissibility is not dispositive; whether or the not the State may be said to have made a "challenge" is immaterial.[94] If anything, the term "preliminary ruling" merely emphasises that the Pre-Trial Chamber's focus at this stage should not be on undue technicalities about the appropriate allocation of the burden of proof, but the substantive question whether the deferral request is justified.[95]

59. Furthermore, the fact that the Prosecutor is vested with a *choice* in determining how to proceed under article 18(2), even if limited in the terms described above, undermines the view of some commentators that the State requesting deferral is entitled to a legal or evidentiary presumption that its exercise of jurisdiction is "regular, genuine, and otherwise effective, until the contrary is proven."[96] This view was expressly based on the incorrect assumption that a "request" from a State seeking deferral is not "really […] a request", but a "demand or an assertion" in as much as "the Prosecutor has no choice but to defer".[97] To the contrary, it is clear from article 18(2) that the Prosecutor need not concur in a State's request for deferral, and that—when seised by the Prosecutor—a Pre-Trial Chamber may in turn authorise the resumption of the Court's investigation notwithstanding that request.

60. In this context, and notwithstanding the respect due to the sovereignty of all States, it is manifestly insufficient for a State merely to "assert[] its superior jurisdiction" and then expect "the Prosecution to make the argument as to why the State is precluded from exercising this right".[98] This rests on two misconceptions.

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[93] *See e.g.* J.T. Holmes, 'Complementarity: national courts versus the ICC,' in A. Cassese *et al.*, (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. I (OUP: 2002) ("Holmes (2002)"), p. 681; C. Stahn, 'Admissibility challenges before the ICC: from quasi-primacy to qualified deference?' in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (OUP: 2015), p. 240.
[94] *Contra* Appeal, paras. 70-71. *Compare* Holmes (2001), p. 338 (describing article 18 in any event as "a form of challenge").
[95] *See further below* paras. 74-77.
[96] *Contra* Appeal, paras. 69, 72 (fns. 56, 59: quoting Nsereko and Ventura, pp. 1026-1027 (mns. 44, 48)).
[97] Nsereko and Ventura, p. 1026 (mn. 44).
[98] *Contra* Appeal, para. 74.

- First, as the Appeals Chamber has previously held, "it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence", which is the very "hallmark of judicial proceedings"[99]—and this applies no less to submissions by States on matters of admissibility arising under article 17(1).[100] Necessarily, in this context, the State must therefore present those facts which it considers to be relevant, in accordance with rules 53 and 54(1).

- Second, even if the Pre-Trial Chamber may ultimately authorise the resumption of the Court's investigation notwithstanding a deferral request, nothing precludes the State in question from continuing to exercise its jurisdiction thereafter. To the contrary, it is implicit in articles 18(7) and 19(2) that the State may continue to exercise its jurisdiction. In doing so, it may well be in a position to mount a successful admissibility challenges to cases subsequently investigated by the Court in which prosecutions are commenced.

B.1.b. The analysis required by article 17(1)(a) to (c) strongly favours the allocation of the burden of proof to the State requesting deferral, and this is consistent with rules 53-54

61. The requirements of article 17(1)(a) to (c) provide essential context for the correct interpretation of article 18(2). The close relationship between article 18(2) and the assessment of complementarity as defined in article 17(1)(a) to (c) is illustrated by the reference in article 18(3) to "a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation",[101] and the express requirement of rule 55(2) that the Pre-Trial Chamber "shall consider the factors in article 17" in deciding whether to authorise the resumption of an investigation. This has previously been confirmed by the Appeals Chamber.[102]

62. As further developed in response to Ground Four, the Philippines is incorrect to assert that the Pre-Trial Chamber was obliged to determine whether "the deferral request was not genuine".[103] Rather, consistent with the guidance of the Appeals Chamber[104] (which the

[99] *See e.g.* *Muthaura et al.* Admissibility Appeal Judgment, para. 61 (quoting ICC-02/04-179 OA ("*Uganda* Victim Participation Appeal Judgment"), para. 36; ICC-02/04-01/05-371 OA2 ("*Kony et al.* Victim Participation Appeal Judgment"), para. 36); *Ruto et al.* Admissibility Appeal Judgment, para. 62.
[100] *See e.g.* *Muthaura et al.* Admissibility Appeal Judgment, paras. 43, 62; *Ruto et al.* Admissibility Appeal Judgment, paras. 44, 63.
[101] *See also* Holmes (2001), p. 343.
[102] *Muthaura et al.* Admissibility Appeal Judgment, para. 37; *Ruto et al.* Admissibility Appeal Judgment, para. 38; *Afghanistan* Article 18(2) Decision, para. 46.
[103] *Contra* Appeal, para. 75.
[104] ICC-01/04-01/07-1497 OA8 ("*Katanga* Admissibility Appeal Judgment"), para. 78.

Philippines elsewhere seems to accept),[105] the Chamber found that it was required to determine "(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", since "[i]naction by the State having jurisdiction means that the question of unwillingness or inability does not arise".[106] Only if the Chamber identified relevant and sufficient national proceedings was it required to "consider whether a State is unwilling and unable to genuinely carry out any such investigation or prosecution".[107]

63. The obligation on the Pre-Trial Chamber, first, to determine the existence and scope of relevant domestic proceedings in order to make its ruling under article 18(2) has important implications for the allocation of the burden of proof. This is because the State is uniquely placed to determine whether and to what extent such information—which may not be publicly known—is made available to the Court. This is recognised by the general requirement in rule 53 for the State requesting deferral of the Court's investigation to "provide information concerning its investigation". Moreover, while the Prosecutor "may request additional information" from that State, the State is under no obligation to provide such information.[108] By requiring the Prosecutor to communicate the information provided under rule 53, rule 54(1) recognises that this information is likely to form the factual context for any determination by the Pre-Trial Chamber under article 18(2).

64. Accordingly, if the burden of proof under article 18(2) were to be allocated to the Prosecution, a State could assert that it was carrying out relevant domestic proceedings for the purpose of requesting deferral of the Court's investigation but provide little or no information to establish their actual existence or scope. The Prosecution's only recourse would be to trigger the exercise of the Pre-Trial Chamber's jurisdiction under article 18(2)—but then it would be faced not only with the inherent difficult of proving an absence of relevant action, but would also have had no effective procedural means to have gathered the requisite information.

65. Conversely, allocating the burden of proof to the State requesting deferral of the Court's investigation strikes a fair balance. The State has free rein to decide the terms in which it will frame a request for deferral, and the information that it will provide in support of that request. The Prosecutor may request additional information, if it will help elaborate that request. But in

[105] Appeal, para. 77.
[106] Decision, para. 11. *See also* *Afghanistan* Article 18(2) Decision, para. 44; Prosecution Article 18(2) Request, paras. 44-49.
[107] Decision, para. 11.
[108] *See* Holmes (2001), p. 341.

the event that the information presented is ultimately insufficient to justify the deferral requested in its own terms, in the assessment of the Pre-Trial Chamber, then it is the State which bears that risk.

66. It is conspicuous that, in this ground of the Appeal, the Philippines neither addresses the significance of the Pre-Trial Chamber's assessment under article 17(1), when it is seised under article 18(2), nor the effect of rules 53 or 54.[109]

B.1.c. The other sub-provisions of article 18 are consistent with the allocation of the burden of proof to the State requesting deferral

67. Nothing in the other sub-provisions of article 18 shows any reason to doubt the principles set out above; to the contrary, they support the allocation of the burden of proof to the State requesting deferral.

68. For example, the Philippines seems to rely on the Prosecutor's power to review any deferral of the Court's investigation, once effective, under article 18(3)—and its associated power to request periodic updates from the State in question under article 18(5)—to support its arguments concerning article 18(2).[110] Yet the two procedures are unrelated: while the Prosecutor's power to trigger the exercise of the Pre-Trial Chamber's jurisdiction under article 18(2) *precedes* any deferral of the Court's investigation, the Prosecutor's powers under article 18(3) and (5) *follow* a deferral of the Court's investigation. Not only is this evident from the plain terms of these provisions, but a comparison of rules 54 and 56 make clear that proceedings under article 18(2) and (3) are wholly distinct. Irrespective of the allocation of the burden of proof for Prosecution applications under article 18(3), nothing in article 18(3) speaks to the correct allocation of the burden of proof for article 18(2).

69. Indeed, article 18(6) further confirms that the Prosecutor's deferral to the State's investigation is *not* "automatic[]", as the Philippines contends, but rather depends on the Prosecutor's assessment of the material submitted and election whether to seise the Pre-Trial Chamber of the matter or not, as stated above.[111] Notably, article 18(6) enables the Prosecutor to seek exceptional authority from the Pre-Trial Chamber to preserve evidence in two distinct

[109] *See* Appeal, paras. 63-75. *Compare* para. 77 (referring to rules 54 and 55 in the context of the third ground of appeal).
[110] *See* Appeal, para. 73.
[111] *See above* para. 54.

situations: "[p]ending a ruling by the Pre-Trial Chamber, *or* at any time when the Prosecutor has deferred an investigation" (emphasis added).

70. As such, this clause expressly recognises that, in the time pending an article 18(2) ruling by the Pre-Trial Chamber (which also includes the period in which the Prosecutor has not yet decided whether to trigger the jurisdiction of the Pre-Trial Chamber), the Prosecutor is *not* yet deemed to have "deferred" their investigation. This is without prejudice to any obligation on the Prosecutor in good faith not to act inconsistently with that request by *suspending* investigative activities until a determination is made whether to accept the deferral request.[112] It is the logical corollary of this fact that the State's deferral request is not yet resolved at this time, but merely transferred to the jurisdiction of the Pre-Trial Chamber—and therefore that the State retains the burden of proof accordingly.

B.1.d. The object and purpose of the Statute favours a full and proper assessment whether a request for deferral is justified, and this is consistent with allocating the burden of proof to the requesting State

71. Finally, while the Philippines is correct that the principle of complementarity is at the heart of the object and purpose of the Statute, it suggests an overly narrow construction of this principle.[113] Complementarity does not mean that the jurisdiction of the Court is always and only subordinate to the jurisdiction of a State. Rather, it means that the Court and States share a common mandate "to put an end to impunity for the perpetrators" of the most serious crimes of concern to the international community, and are resolved jointly "to guarantee lasting respect for and the enforcement of international justice".[114] In executing that mandate, the Court's jurisdiction is complementary to that of States[115]—which means that the Court shall defer its investigation, or render cases inadmissible, in those circumstances set out in article 17.

72. Notably, in the *Venezuela* decision quoted by the Philippines, the Pre-Trial Chamber had expressly framed its assertion that States bear the "primary responsibility" for exercising jurisdiction over article 5 crimes in the context of recalling that, under article 18, States have the opportunity "to advance the arguments and provide the information […] consider[ed] necessary".[116] This further illustrates that the principle of complementarity, and the object and

[112] *See above* para. 55.
[113] *Contra* Appeal, para. 74.
[114] Statute, Preamble.
[115] *See also* *Katanga* Admissibility Appeal Judgment, para. 85 ("the complementarity principle […] strikes a balance between safeguarding the primacy of domestic proceedings vis-à-vis the […] Court on the one hand, and the goal of the Rome Statute to 'put an end to impunity' on the other").
[116] ICC-02/18-9-Red ("*Venezuela* Decision"), para. 15. *Compare* Appeal, para. 74.

purpose of the Statute, does not call for an interpretation of article 18(2) which prioritises a State's assertion of its "superior jurisdiction" over that of the Court, regardless of the facts. To the contrary, as the Appeals Chamber has recalled, the principle of complementarity makes it incumbent upon the Court "to ensure that it will not step in should a case be inadmissible under the relevant criteria"—but it is "not the case that all cases must be resolved in favour of domestic investigation".[117]

73. The object and purpose of the Statute thus favours an interpretation of article 18(2) which will be most effective in enabling a full and proper assessment whether a request for deferral is justified. In particular, it is notable that such determinations will take place relatively soon after one or more organs of the Court, in accordance with articles 15(3) and (4) or 53(1), independently determined that there is a reasonable basis to proceed with an investigation.

B.2. The Decision would not be materially affected even if the Prosecution had borne the burden of proof

74. In any event, and notwithstanding the above, the Philippines also fails to show that the Decision would be materially affected even if the Pre-Trial Chamber had erred in stating that "the onus is on the State to show that investigations or prosecutions are taking place or have taken place".[118] While it generally asserts that any error in this regard "led to a cascade of legal errors" further set out in its third and fourth grounds of appeal, it fails to adequately substantiate this claim.[119]

75. To the contrary, irrespective of whether the Prosecution or the Philippines was subject to the burden of proof, the Chamber ensured that the Philippines had full opportunity to make observations on the law and facts presented to the Chamber by the Prosecutor,[120] and the Philippines availed itself of this opportunity,[121] including by filing "hundreds of pages of associated annexes".[122] Analysis of the Decision further reveals that the Chamber duly applied the law to the information presented to it under rule 54(1), and by the Philippines in the annexes to its observations in response.

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[117] ICC-01/11-01/11-547-Red OA4 ("*Gaddafi* First Admissibility Appeal Judgment"), para. 78. *See also* *Muthaura et al.* Admissibility Appeal Judgment, para. 43; *Ruto et al.* Admissibility Appeal Judgment, para. 44 (recalling that, "[i]f the suspect or conduct have not been investigated by the national jurisdiction, there is no legal basis for the Court to find the case inadmissible").
[118] Decision, para. 14.
[119] *Contra* Appeal, para. 75.
[120] *See e.g.* Order Inviting Observations.
[121] *See* Observations of the Government of the Philippines on the Prosecution Article 18(2) Request.
[122] ICC-01/21-54-Red ("Prosecution Response to Observations of the Government of the Philippines"), para. 5.

76. On the basis of its analysis of that information, the Chamber determined 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(4) Decision."[123] It emphasised that it considered the "various domestic activities in a holistic manner", and that "in some instances investigative steps have been taken or are ongoing, albeit only with regard to low-ranking law enforcement personnel".[124] However it concluded that "the totality of the national investigations and proceedings presented to the Chamber do not sufficiently, or at all, mirror the Court's investigation."[125]

77. The Philippines fails to show how any aspect of this analysis would have been materially affected if the Chamber had reached a different view as to the burden of proof. To the contrary, the same information would have been before it, since this was required by rule 54(1). It would have had the same opportunity to receive the submissions of the Philippines, and additional information. And it would have reached the same conclusions, since these did not result from the burden of proof but from the assessment of the information actually presented in accordance with the applicable substantive law.

78. For all these reasons, the Prosecution respectfully submits that the Philippines' Second Ground should be dismissed.

C. Third ground of appeal: the Chamber correctly assessed, for the purpose of article 18(2), whether the Philippines' investigation sufficiently mirrored the Court's investigation

79. In the Decision, the Chamber directed itself that it must examine the information presented to it, and consider the factors in article 17 as required by rule 55(2).[126] Accordingly, in its view, "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".[127] For the purpose of proceedings under article 18, it recalled the dictum of

[123] Decision, para. 96.
[124] Decision, paras. 97-98.
[125] Decision, para. 98.
[126] Decision, para. 10. *See also above* para. 61.
[127] Decision, para. 12. *See also Afghanistan* Article 18(2) Decision, para. 46.

the Appeals Chamber that "the contours of 'likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages'."[128] It continued:

> 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. 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.[129]

80. The Chamber then concluded that:

> 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, 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 situation and the 'potential cases' that would arise from this situation.[130]

81. In its Appeal, the Philippines now claims that the Chamber erred in this analysis.[131] While the Philippines agrees that the Chamber was obliged to assess the factors in article 17,[132] it asserts that the Chamber erred in applying the "same person/same conduct test"—which it considers only to be applicable to proceedings under article 19 concerning concrete cases.[133] In the Philippines' view, while the Decision "correctly recognises that the degree of overlap with the Prosecution's investigations varies depending on whether it is at the article 18 or article 19 stage", in practice it "appl[ied] the legal standard applicable to a case, overstating the degree of overlap required in the article 18 context".[134] Consequently, the Chamber not only

[128] Decision, para. 12 (quoting *Muthaura et al.* Admissibility Appeal Judgment, para. 38; *Ruto et al.* Admissibility Appeal Judgment, para. 39). *See also* *Afghanistan* Article 18(2) Decision, para. 46.
[129] Decision, para. 13. *See also* *Afghanistan* Article 18(2) Decision, para. 46.
[130] Decision, para. 16.
[131] Appeal, paras. 76, 83.
[132] Appeal, para. 77.
[133] Appeal, paras. 78-81 (asserting, for example, that "[t]he Pre-Trial Chamber's reliance on this assessment is taken out of context"). *See also* para. 138.
[134] Appeal, para. 83.

"require[ed] types of materials above and beyond what is required for article 18" but "also a degree of mirroring with the Prosecution's investigations which cannot reasonably exist at this point in the proceedings."[135]

82. The Philippines argues that this error materially affected the Decision because its "entire approach" was "invalid".[136] Although apparently presented as the consequence of an alleged error of law, many of the issues appear in fact to raise alleged factual errors, or a more general—and unsubstantiated—disagreement with the Appeals Chamber's well established requirement for a showing of "evidence of a sufficient degree of specificity and probative value" in order to establish relevant domestic proceedings for the purpose of complementarity.[137] According to the Philippines, the Chamber "reject[ed] swathes of information submitted to substantiate" its request for deferral on the basis that it did not constitute evidence of a sufficient degree of specificity and probative value,[138] or otherwise "failed to assess the material presented in the context of article 18".[139] In this guise, it rehearses various purported subsidiary errors relating to the Chamber's analysis of the information before it.

83. The Prosecution respectfully submits that the Philippines' claims are incorrect. In particular, the Philippines seems to accept—as it must—that the overall objective of the Pre-Trial Chamber's analysis under article 18(2) is to determine whether the domestic investigation sufficiently mirrors the Court's investigation. Yet it overlooks that the 'same person/same conduct' test has been consistently used not only in the context of concrete cases, under article 19, but also before concrete cases have materialised, such as under article 15 (by reference to potential cases). This approach is necessary in order to ensure that the article 17 assessment is carried out objectively, on the basis of identifiable allegations and persons or groups of persons, and thus on the basis of evidence rather than vague assertions or intentions. Indeed, as held in the *Kenya* situation, "the admissibility assessment, whether of actual or potential cases, cannot be conducted in the abstract. Rather, it must be carried out within the framework of certain parameters."[140]

84. Nor is this approach incompatible with article 18(2). Indeed, one of the principal *strengths* of the established test is its flexibility. It can be appropriately adjusted to the particular features

[135] Appeal, paras. 112. *See also* paras. 113-117.
[136] Appeal, paras. 137, 140.
[137] *See e.g.* *Muthaura et al.* Admissibility Appeal Judgment, para. 61; *Ruto et al.* Admissibility Appeal Judgment, para. 62.
[138] Appeal, para. 84.
[139] Appeal, para. 118.
[140] *Kenya* Article 15(4) Decision, para. 49.

of the relevant procedural stage, as demonstrated by the Court's practice under article 15. Significantly, the Philippines does not present any viable alternative interpretation of article 18(2) that the Chamber could have taken.

85. Furthermore, and in any event, the Philippines' criticism of the reasoning adopted by the Chamber on specific issues is unfounded, and shows no error. It disregards the Chamber's holistic assessment of the materials submitted.

86. For all these reasons, the Third Ground should be dismissed.

C.1. The Chamber correctly determined whether the Philippines' investigation sufficiently mirrored the Court's investigation

87. The Chamber adopted the correct approach in determining whether the domestic investigation of the Philippines sufficiently mirrored the Court's investigation so as to establish an objective foundation for the request for deferral. While the Appeal is not entirely clear on this point, the Philippines seems to argue that the 'same person/same conduct' test cannot be applied for the purpose of article 18(2) because (i) it was derived from article 19 litigation;[141] (ii) the Court's investigation is insufficiently defined at the article 18 stage to allow relevant comparators with domestic proceedings to be adequately identified;[142] and (iii) States cannot be expected to meet the requirements of the 'same person/same conduct' test at the article 18 stage.[143] Notably, however, while criticising the approach of the Chamber, the Philippines fails to articulate any alternative interpretation to assess complementarity in the context of article 18.

C.1.a. The 'same person/same conduct' test has not been reserved for challenges to concrete cases under article 19

88. The Philippines correctly recalls that it was in the context of article 19 proceedings, relating to a concrete case already being prosecuted at the Court, that the Appeals Chamber first held that an inadmissibility challenge would only succeed if the national investigation covered "the same person and substantially the same conduct as alleged in the proceedings before the Court."[144] Yet it misapplies the notion that "the admissibility assessment is on a scale

[141] *Contra* Appeal, paras. 76-83.
[142] *Contra* Appeal, paras. 112-118.
[143] *Contra* Appeal, paras. 76-140.
[144] *Muthaura et al.* Admissibility Appeal Judgment, para. 39; *Ruto et al.* Admissibility Appeal Judgment, para. 40. *See* Appeal, paras. 80-81.

of sorts", and wrongly asserts that the 'same person/same conduct' test is reserved for article 19 proceedings.[145]

89. To the contrary, while the Appeals Chamber did contrast the relative specificity of concrete cases subject to article 19 challenges with 'potential cases' relevant to articles 15 and 18,[146] it did not dispense with the need for objective parameters—which can only be based on the persons or groups of persons under investigation and their alleged conduct, or the "same person/same conduct" test as described by the Philippines. Furthermore, since the complementarity assessment by definition entails resolving an asserted conflict of jurisdiction, it must always entail a comparison of State activities with the Court's activities. As well established in the practice of the Court, these core principles can and must apply equally before concrete cases have been identified at the Court. Indeed, it is clear from the express terms of article 18(2) that the State requesting deferral is invited to inform the Court of the specific persons and crimes under investigation, as the basis for its request.[147]

90. While the Appeals Chamber has since clarified the narrower scope of the Pre-Trial Chamber's duty under article 15(4),[148] its prior consistent practice amply illustrates this approach in assessing complementarity for the purpose of articles 53(1)(b) and 15(4), and not only for the purpose of article 19. This seems to be overlooked by the Philippines. For example:

- In the *Kenya* situation, the Pre-Trial Chamber reviewed whether any domestic proceedings existed "in relation to these elements which are likely to constitute the Court's future case(s)", defined by reference to "the groups of persons involved" and "the crimes within the jurisdiction of the Court allegedly committed.[149]

[145] *Contra* Appeal, para. 82.
[146] *Muthaura et al.* Admissibility Appeal Judgment, paras. 39-40; *Ruto et al.* Admissibility Appeal Judgment, paras. 40-41.
[147] Statute, art. 18(2) ("a State may inform the Court that it is investigating or has investigated *its nationals or others within its jurisdiction* with respect *to criminal acts which may constitute crimes referred to in article 5* and which relate to the information provided in the notification to States", emphasis added). *See also* ICC RPE, rule 53 ("that State shall […] provide information concerning its investigation").
[148] *See e.g. Afghanistan* Article 15(4) Appeal Judgment, paras. 34-35, 37. The Appeals Chamber's clarification has not invalidated the Pre-Trial Chamber's previous approach to assessing admissibility at the preliminary examination stage, but merely clarified that it is an obligation of the Prosecutor rather than the Pre-Trial Chamber: s*ee e.g.* Article 15(4) Decision, paras. 14-16 (noting expressly that, "in determining whether to make a request under Article 15(3), the Prosecutor remains obliged under Rule 48 of the Rules to consider all the conditions under Articles 53(1)(a) to (c)").
[149] *See Kenya* Article 15(4) Decision, para. 182. *See further* paras. 183-187.

- In the *Côte d'Ivoire* situation, the Pre-Trial Chamber reviewed whether any domestic proceedings existed "in relation to the individuals and crimes that are likely to constitute the Court's future case(s)".[150]

- In the *Georgia* situation, the Pre-Trial Chamber directed itself to consider whether any domestic proceedings existed "in relation to the persons or groups of persons as well as the crimes which appear to have been committed on the basis of the information available at this stage, which together would be the subject of investigations and likely to form the potential case(s) before the Court."[151]

- In the *Burundi* situation, the Pre-Trial Chamber sought to ascertain whether any domestic proceedings covered the same individuals and substantially the same conduct as the potential cases arising from the situation before the Court.[152]

91. The consistency of resort to this approach also illustrates the difficulty in identifying any practicable alternative. Without some appropriate degree of reference to (i) the persons or groups of categories of persons who are the object of any investigation(s) and (ii) the crimes which they are alleged to have considered, it is hard to imagine how any meaningful comparators could be identified. Nor does the Appeal concretely suggest any comparators it considers would have been more appropriate.[153] While the Philippines seems to suggest that it is merely "the *prima facie* existence" of a State's investigation which must be assessed for the purpose of article 18(2),[154] this does not answer the question.

92. To the contrary, attempting to make an assessment under article 18(2) *without* the use of relevant comparators would be incompatible with the requirement for article 17 assessments to be objective and fact-driven, and would undermine the core purpose of article 18—which is to resolve a conflict of jurisdiction *if and when* it objectively exists. Given the potential breadth of the Court's investigation at the article 18 stage, this may be exceptional—but this does not limit the significance of the complementarity principle. To the contrary, after the article 18 stage, the State remains fully able to challenge the admissibility of each and every case which may come to be prosecuted at the Court pursuant to article 19 of the Statute.

[150] ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15(4) Decision"), para. 194. *See further* paras. 195-200, 206.
[151] *Georgia* Article 15(4) Decision, para. 39. *See further* paras. 40-50.
[152] *See Burundi* Article 15(4) Decision, paras. 147, 181. *See further* paras. 148-180, 182.
[153] *See* Appeal, paras. 76-83.
[154] *See e.g.* Appeal, para. 131.

C.1.b. The scope of the Court's intended investigation is sufficiently defined at the article 18(2) stage to enable a proper comparison with the activities of the State seeking deferral

93. The Philippines further argues that the Chamber's approach is inapposite "at the article 18 stage whereby the contours of the Prosecution's investigations concerning a specific case are undefined and unclear."[155] However, this is incorrect. To the contrary, as again illustrated by the Court's practice under articles 53(1)(b) and 15, the concept of the 'potential case' enables a meaningful comparison to be carried out.

94. Since the Prosecution is highly unlikely to have yet identified concrete cases in the limited period in which a State is permitted to request deferral under article 18(2), the Statute necessarily presupposes the comparison of that State's investigative activities against the broader framework of the Court's investigation at that point. As the Chamber stated, the starting point for the article 18(2) analysis are the general parameters of the situation—which were defined here by the Chamber's decision under article 15(4) and the Prosecutor's notification to States under article 18(1).[156] The Philippines does not clearly challenge this finding.

95. Within the limits of those parameters, it follows then that the Prosecutor may potentially investigate *any* person suspected of relevant criminal conduct. Necessarily, at the article 18 stage, the Prosecution's investigation will not be sufficiently advanced to identify the concrete cases to be pursued. Accordingly, the investigative activities of the State requesting deferral must be compared with the sum of "potential cases"[157]—a notion which, again, is well established in the practice of the Court when considering complementarity for the purpose of preliminary examinations. For example, in the *Kenya* situation, the potential cases in the situation were defined by reference to "(i) the groups of persons […] that are likely to be the object of an investigation for the purpose of shaping the future case(s)" before the Court and "(ii) the crimes within the jurisdiction of the Court allegedly committed […] that are likely to be the focus of an investigation for the purpose of shaping the future case(s)."[158]

96. For the purpose of article 18(2), furthermore, it cannot be known how many concrete cases will be pursued at the Court, since this is a matter within the Prosecutor's independent discretion. Consequently, the article 18(2) assessment cannot require the State to have initiated proceedings in *every* case which might conceivably be prosecuted before the Court, but nor can

[155] Appeal, para. 116. *See also* paras. 112-113, 115.
[156] Decision, para. 16.
[157] Decision, para. 16 (referring to "the backdrop of a situation and the 'potential cases' that would arise from this situation").
[158] *Kenya* Article 15(4) Decision, para. 182. *See also* *Côte d'Ivoire* Article 15(4) Decision, para. 191.

it be sufficient for the Court's investigation to be deferred when significant numbers and types of potential cases are not addressed in the State's investigation. Accordingly, it is necessary for the Pre-Trial Chamber to be satisfied that the State's investigation *sufficiently mirrors* the full potential of the Court's investigation.[159] In practice, this means that the State's investigation must be measured against the variety of potential cases which are disclosed by the parameters of the situation, having regard to factors including the variety of alleged crimes and types of victimisation, the variety of persons or groups of persons allegedly involved, and the variety of means by which those crimes may allegedly have been carried out (including potentially differentiated responsibilities between perpetrators, accessories, and so on).

97. Any asymmetry in detail between the cases identified by the State and the potential cases provisionally identified within the situation before the Court does not preclude a proper assessment under article 18(2). Necessarily, the Statute contemplates that the Court's investigation is at an early stage—and while it may be expected that the State's investigation is relatively more advanced, this is not necessarily required, as explained further below.

C.1.c. Comparing the State's investigation with the Court's intended investigation is not incompatible with the stage at which article 18 is applicable

98. More generally, the Philippines' argument seems to reflect concerns that the Chamber's approach is in some way incompatible with the stage at which article 18 applies. However, any such concerns are misconceived, and do not identify any error in the Chamber's approach.

99. First, the Philippines asserts that the drafters of the Statute did not intend to place States "in competition" with the Court, but rather that article 18 was designed to promote dialogue.[160] Yet nothing in the Chamber's approach suggests the contrary. If anything, meaningful dialogue is facilitated by a clear understanding of the scope of the State's and the Court's investigations, and the 'same person/same conduct' test promotes precisely that.

100. Second, the Philippines states that "article 18 was never intended to preclude [S]tates from commencing investigations upon receipt of an article 18(1) notification", and asserts that this is "rendered impossible" if the State is then expected to sufficiently mirror the Court's investigation, which may be broad in scope.[161] However, again, nothing in the Decision suggests the contrary. While the dictum from the *Afghanistan* judgment is inapposite in this

[159] *See above* para. 80. *See further* Prosecution Article 18(2) Request, paras. 54-57.
[160] Appeal, para. 116.
[161] Appeal, para. 116.

situation (insofar as it concerns the possibility of a State expressly requesting a partial deferral of the Court's investigation, whereas in this situation the Philippines requested a full deferral),[162] the analysis adopted by the Chamber did not require domestic proceedings to have reached any particular procedural stage.[163] Instead, it merely required the Philippines to provide sufficient information permitting the Chamber to identify the scope and focus of the domestic proceedings so that they might meaningfully be compared against the scope of the authorised investigation.

101. In particular, nothing in the Decision excludes the possibility that domestic proceedings remain "in progress" when they are analysed for the purpose of article 18(2).[164] To the contrary, as the Chamber emphasised, it was specifically looking for investigative steps which were tangible, concrete, and "*progressive*". This last condition does not mean that domestic proceedings must have reached a certain procedural stage, but merely that evidence was presented that they were not vague, interrupted or suspended, or inactive. Nor did the Chamber's efforts to identify relevant comparators in domestic proceedings for the purpose of its article 18(2) analysis mean that it was blind to proceedings at their earlier stages—provided they were sufficiently tangible and concrete that they could meaningfully be compared with the Court's investigation. Indeed, as the Appeals Chamber recalled, "any investigation, irrespective of its stage, will have defining parameters", even if it may be that the specific "contours" will "develop as time goes on".[165]

102. In a related argument, the Philippines fails to identify any passage of the Decision which supports its claim that the Chamber required any showing that trials had actually taken place or were imminent.[166] Rather, it seems to take out of context the Chamber's factual observation that, in circumstances pertaining to alleged criminal prosecutions, there was insufficient information concerning the progression of the proceedings in question. This did not mean, for example, that evidence of tangible, concrete, and progressive investigations at the pre-charge stage would not have been taken into consideration by the Chamber—to the contrary, the Decision shows that it sought in detail to identify such evidence.

103. Finally, the Philippines also generally argues that the existence of article 18(5)—which allows for the Prosecutor to seek "periodic updates on the progress of national investigations"

[162] *Contra* Appeal, para. 117.
[163] *See also below* para. 111.
[164] *Contra* Appeal, paras. 118, 139.
[165] *Gaddafi* First Admissibility Appeal Judgment, para. 84.
[166] *Contra* Appeal, para. 93.

once the Court's investigation has been deferred—must imply a more relaxed approach to assessing whether a deferral request has an objective foundation in the first place.[167] However, this logic is untenable. Article 18(5) enables the Prosecutor—and, ultimately, the Court through the mechanism of article 18(3)—to verify that a deferral does not permit the State in question merely to 'shelve' its domestic proceedings once the Prosecutor has deferred their investigation. Yet this power says nothing about the precise standard to be applied to article 18(2) assessments in the first place. Indeed, however that assessment is calibrated, article 18(5) would remain equally available to allow the Prosecutor to monitor State activity where deferrals are accepted.

C.2. The Chamber did not err in assessing the information presented under rule 53(4) and by the Philippines

104. The Philippines fails to show that the Chamber was either incorrect or unreasonable in its analysis of any of the specific issues which it highlights in attempting to show the impact of any error. Specifically, as the following paragraphs demonstrate, the Chamber did not err in assessing: the lists of cases concerning the NBI and NPS;[168] certain NBI investigative materials;[169] or information concerning PNP-IAS disciplinary proceedings.[170] Nor did the Chamber err in considering that the Philippines' investigation does not presently extend to other notable features of the Court's own intended investigation, such as the alleged conduct of high-ranking officials,[171] alleged killings by private individuals outside police operations,[172] alleged killings in Davao,[173] and crimes other than alleged killings.[174]

105. Since the Philippines articulates no concrete basis for its claim that the Chamber in some way failed to have due "regard to the engagement of the Philippine Government" with these proceedings, or how this related to any error, this last argument should be summarily dismissed.[175] It will not be addressed further.

106. In any event, even if it were shown that the Chamber had erred in some of these specific issues, this would not necessarily establish that the Decision was materially affected.

[167] *See e.g.* Appeal, paras. 93, 123. *See also* para. 120 (fn. 119).
[168] *Contra* Appeal, paras. 87-93.
[169] *Contra* Appeal, paras. 94-99.
[170] *Contra* Appeal, paras. 100-111.
[171] *Contra* Appeal, paras. 119-123.
[172] *Contra* Appeal, paras. 124-128.
[173] *Contra* Appeal, paras. 129-131.
[174] *Contra* Appeal, paras. 132-136.
[175] *Contra* Appeal, para. 139.

Individually, none of these issues is critical to the ultimate conclusion that the Philippines' investigation did not sufficiently mirror the Court's investigation.

C.2.a. The Chamber did not err in assessing the lists of cases concerning the NBI and NPS

107. In support of its deferral request, among other material, the Philippines presented the Court with various lists which on appeal it refers to as the 'matrix of cases' (a term not used in the Decision). In particular, these related to the activities of the National Bureau of Investigation (NBI) and the National Prosecution Service (NPS).

108. As the Chamber recalled, the Philippines presented "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 asserted that three of these lists involved "law enforcement personnel, who conducted buy-bust and anti-illegal drug operations where the suspects had died," and which were "forwarded to the NBI for investigation."[176] The Chamber observed 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 suspects, locations and dates of the incidents and 'remarks'", but that "this information is limited".[177] Ultimately, the Chamber found that these lists "are not, by themselves, sufficient to substantiate concrete or ongoing investigative steps to support the deferral of the Court's investigation" because they lacked sufficient specificity and did not 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."[178]

109. Likewise, the Chamber later recalled that the Philippines had presented "one list of cases from 'the dockets of the National Prosecution Service'" and "three lists of cases collated from the dockets of three Regional Prosecution Offices",[179] along with other materials relevant to different matters, in support of its claim that "'the partial listing of cases in the dockets of the NPS, relating to investigations into deaths during anti-narcotic operations' clearly shows that investigations have been conducted against police officers with respect to their conduct during anti-illegal drug operations."[180] Again, the Chamber observed that these lists "do provide some information on the cases referred to therein".[181] Specifically, the list from the NPS dockets "includes limited details of the investigating office, region, name of the deceased, law

[176] Decision, para. 72. *See also* Appeal, paras. 88-89.
[177] Decision, para. 74.
[178] Decision, para. 79. *See also* Appeal, para. 90.
[179] Decision, para. 87. *See also* Appeal, para. 91.
[180] Decision, para. 86.
[181] Decision, para. 88.

enforcement unit, respondents, and the status of each case as of May 2021", while the three regional dockets "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."[182] Again, the Chamber found that, "[w]ithout more, it is unclear how and whether the information in these lists relate to trials that actually took place, or are taking place."[183]

110. On appeal, the Philippines claims that the Chamber's approach to these lists was erroneous, insofar as it shows that the Chamber applied a standard that "goes well beyond the scope of article 18 whereby the existence of the investigation is sufficient."[184] Moreover, it suggests that the Chamber incorrectly required a showing that a trial "itself must have taken place or [be] about to take place".[185]

111. For the reasons stated above, the Philippines' general argument concerning the assessment required and the evidence to be submitted for the purpose of article 18(2) is incorrect. Consequently, it shows no error for the Chamber to have applied this approach in the context of the lists at issue here.[186] The Chamber's passing reference to uncertainty whether "trials" were or were not taking place did not reflect any kind of legal requirement for proceedings to have reached the trial stage, but rather the factual context of the documents in question—which concerned the prosecutorial activities of the NPS. Notably, it made no such reference to "trials" when considering the investigative activities of the NBI, which were potentially of equal relevant to its assessment under article 18(2).[187]

112. In any event, and more specifically, the Philippines also fails to address other salient reasons why the Chamber concluded that the lists were of themselves insufficient for the purpose of article 18(2). For example, not only did just under 10% of the cases in the NBI lists fall outside the temporal scope of the authorised investigation, but the Philippines had generally provided no supporting documentation concerning any of the listed cases. In other words, the Chamber was concerned that the Philippines had not provided information "outlining *concrete* investigative activities" even though "the Philippines asserts that these cases have been referred to the NBI for investigation and case build-up".[188] Of the 266 cases described in the four NBI

[182] Decision, para. 88. *See also* Appeal, para. 91.
[183] Decision, para. 88. *See also* Appeal, para. 92.
[184] Appeal, para. 93.
[185] Appeal, para. 93.
[186] *See above* paras. 87-103.
[187] *Compare e.g.* Decision, para. 79 ("investigative steps"), *with* Decision, para. 88 ("trials"). *See also above* paras. 108-109.
[188] Decision, para. 74 (emphasis added).

case lists, within the temporal scope of the Court's investigation, the Chamber found that the Philippines "provided support for *four* cases that appear to have resulted in some form of investigation or prosecution before having been dismissed by domestic institutions", and "partial support" for two further cases that were also ultimately dismissed.[189] Likewise, with regard to the NPS and regional dockets, that only one case mentioned therein was supported by "corresponding or underlying prosecutorial documentation".[190] In these circumstances, since the Philippines may reasonably be expected to have access to all such information, as recalled elsewhere in the Decision,[191] the Chamber was reasonable in approaching the lists with caution.

113. As such, the Chamber was neither incorrect nor unreasonable in its approach to the information contained in the NBI lists and the NPS and regional dockets.

C.2.b. The Chamber did not err in assessing certain NBI investigative materials

114. Consistent with the preceding analysis, the Philippines recalls that it also presented "other types of documentation" for the purpose of the deferral request, which it considered to give "an overall description of investigative steps taken and case status", including "NBI investigative reports and notes and underlying municipal police reports."[192] While generally asserting that the Chamber "demanded a level of interrogation and verification of official reports which is not warranted in the article 18 context", the Philippines gives just two examples.[193]

- First, the Philippines asserts that the Chamber erred in paragraph 89 of the Decision when it dismissed "material which demonstrated that indictments had been recommended by the NBI were now before regional courts" due to the "absence of actual copies of the underlying indictments."[194]

- Second, the Philippines asserts that the Chamber erred in paragraph 81 of the Decision when it rejected "two detailed preliminary investigation reports conducted by NBI and submitted before the Provincial Prosecutor" on the basis that that the "referenced attachments which were apparently used to support each recommendation" were not provided to the Court.[195]

[189] Decision, para. 83 (emphasis added). *See also* paras. 80-82.
[190] Decision, para. 88.
[191] Decision, para. 56.
[192] Appeal, para. 95.
[193] Appeal, paras. 96-98.
[194] Appeal, para. 97.
[195] Appeal, para. 97.

115. In the first respect, the Philippines fails to address the precise reasoning of the Chamber concerning the significance of the missing indictments, and consequently fails to show any error. In particular, the Chamber had noted information provided by the Philippines concerning "recommended indictments against police officers", including "brief summaries of the recommended indictments and […] 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".[196] However, of the incidents to which this material pertained, some incidents "are outside the temporal scope" of the Court's investigation "and therefore irrelevant", and other incidents were only said "to have forthcoming criminal complaints to be filed."[197] Of the remaining incidents, the Chamber did not insist that "the indictments themselves" were provided, but noted more generally that "no further documentation" *at all* had been provided (of which the indictments themselves were an example).[198] Furthermore, in a footnote, the Chamber noted that with regard to at least some of these incidents "there is inconsistent documentation to suggest that the NBI has in fact dismissed or terminated these cases for lack of evidence."[199] In these circumstances, there was nothing unreasonable in the Chamber's approach.

116. In the second respect, the Chamber did indeed consider that documentation concerning two cases alleged investigated by the NBI was "incomprehensible without further explanation and […] incomplete, as it references attachments which were apparently used to support each recommendation but were not provided to the Court."[200] The Prosecution recalls that in its own submissions it had taken the view that these cases were adequately substantiated.[201] Yet this does not necessarily mean that the Chamber was unreasonable in concluding that it was consequently "difficult to assess whether these cases show tangible investigative activity."[202] Moreover, the Chamber further noted that even if those cases were considered to show such activity, "the two cases appear to have been dismissed by the NBI, but no information is provided about the reasons for the dismissals."[203] Finally, in any event, these two cases remain a tiny fraction of the claims made by the Philippines concerning the activities of the NBI, and consequently any error made by the Chamber in this respect, for the sake of argument, would be harmless and could not materially affect its overall conclusions concerning the sufficiency

[196] Decision, para. 89.
[197] Decision, para. 89.
[198] Decision, para. 89.
[199] Decision, para. 89 (fn. 228).
[200] Decision, para. 81.
[201] Prosecution Article 18(2) Request, paras. 106 (fns.192-194), 116 (fns. 213-214).
[202] Decision, para. 81.
[203] Decision, para. 81.

of the information presented with regard to NBI activities, let alone the sufficiency of the information presented in support of the deferral request as a whole.

117. For these reasons, the Philippines fails to show that either of these examples demonstrate that the Chamber applied an overly strict standard for the purpose of article 18(2).[204] To the contrary, as explained above, the Chamber applied the correct standard.[205] If the Chamber erred harmlessly in the second respect, this appears to have resulted only from an isolated misinterpretation of the relevant documentation relating to only a tiny portion of the overall conduct.

118. Furthermore, the Philippines' complaint that the Chamber "ignore[d] the reality of State processes to coordinate official responses within the regulated timeframes before the Court" is beside the point[206]—the gravamen of the Chamber's concerns seems to lie in the more general absence of information which could reasonably be expected to have been readily available to the Philippines, not the fact that particular files may in some cases be incomplete, or that the overall picture may be uneven. As noted, the Chamber conducted a holistic assessment of the various domestic activities.[207] Likewise, the Philippines' implication that it did not know what information to present to the Court because the information in the article 15 litigation and the article 18(1) notification was "limited" is misconceived.[208] To the contrary, the parameters of the Court's investigation were and are entirely clear. With regard to the particular NBI investigative materials at issue here, it is apparent that the Philippines well understood the relevance of the case to which these materials related. However, the Chamber's concern in practice was that the information actually provided was generally insufficient to adequately substantiate the Philippines' claims for the purpose of article 18(2).

C.2.c. The Chamber did not err in assessing information concerning PNP-IAS disciplinary activities

119. The Chamber recalled that the Philippines had presented information concerning "internal disciplinary proceedings conducted by the Philippines National Police – Internal Affairs Service (the 'PNP-IAS') against PNP personnel", which it averred "'can ripen to criminal investigations'."[209] It further noted the Philippines' submission that "it was under the auspices

[204] *Contra* Appeal, para. 99.
[205] *See above* paras. 87-103.
[206] *Contra* Appeal, para. 98.
[207] Decision, para. 97.
[208] *Contra* Appeal, para. 99.
[209] Decision, para. 45. *See also* Appeal, para. 100.

of the PNP-IAS that the 52 *nanlaban* cases were investigated by the NBI."[210] However, the Chamber recalled that, for domestic proceedings to be relevant for the purpose of articles 17(1) and 18(2), "they must be carried out 'with a view to conduct[ing] criminal prosecutions'". In the Chamber's view, "it is not entirely clear whether the PNP-IAS disciplinary proceedings were conducted with the aim to further criminal proceedings", and that in any event "at present it is unknown whether the PNP-IAS internal disciplinary proceedings will lead to criminal investigations in the future".[211] Consequently, excepting the NBI investigations of the 52 *nanlaban* cases which it addressed separately,[212] the Chamber determined that the information provided about PNP-IAS proceedings did not adequately show "tangible, concrete and progressive investigative steps carried out with a view to conducting criminal proceedings" and therefore did not of itself justify deferral under article 18(2).[213]

120. The Philippines now contends that the PNP-IAS material was presented to demonstrate "the overall and general arc of the investigative processes connected to the anti-illegal drug operations",[214] and describes what it terms an "investigative cycle—which demonstrably resulted in prosecutions and convictions in connection to the anti-illegal drugs campaign".[215] It criticises the Chamber for "review[ing] each stage in isolation", demanding "information concerning criminal prosecutions of specific cases […] beyond what is required", and "fail[ing] to conduct an assessment of the domestic processes available in the Philippines as a whole" which it asserts to be "crucial […] given that it uniquely combines common law and civil law features", as well as facing "geographic and technological barriers".[216] Overall, it asserts that the Chamber "ignore[d] vital differences in legal cultures, traditions and systems" such that "the type of information or processes available to a State will differ", and that consequently the Chamber erred by failing to "apply an article 18 admissibility assessment which should be accepting of diverse domestic investigative practices."[217]

121. The Philippines fails to show any error. Concerning the PNP-IAS proceedings of themselves, it does not assert that the Chamber was incorrect or unreasonable in its particular conclusions in that respect.

[210] Decision, para. 45.
[211] Decision, para. 47.
[212] Decision, para. 47. *See further* paras. 75-78.
[213] Decision, para. 48. *See also* Appeal, para. 101.
[214] Appeal, para. 102.
[215] Appeal, para. 108. *See* paras. 103-107.
[216] Appeal, paras. 108-109.
[217] Appeal, paras. 110-111.

122. Rather, for the first time on appeal, the Philippines raises novel arguments concerning domestic processes. It has never previously articulated a formal mandatory progression from the PNP-IAS to review by the Department of Justice panel to case build-up by the NBI, nor in any event does it now cite any clear basis under the law of the Philippines requiring that this sequence is followed. In the understanding of the Prosecution, PNP-IAS investigations and/or reviews by the Department of Justice panel are not legal prerequisites to the criminal investigation or prosecution of a police officer. Furthermore, the Philippines presents no authority to support its claim that domestic "procedural rules demand a lengthier investigation phase while in turn, the commencement of court proceedings following investigation are usually immediate."[218]

123. Nor does the Philippines point to any concrete further action resulting from the PNP-IAS proceedings which should have been taken into account by the Chamber, based on the information presented. As the Appeals Chamber has previously stressed, a complementarity assessment must be conducted based on the concrete facts as they exist at the material time, and not based on speculation or future intentions.[219]

124. Further, the Philippines provides no support for its claim that the Chamber—whose judges are nationals of three continents, reflecting diverse legal traditions—was in any way blind to differences in legal culture or tradition, much less adopted an interpretation of the law applying to article 18(2) which was inconsistent with the similarly diverse legal heritage of the drafters of the Statute and the States Parties. To the contrary, as previously stated, the Chamber's application of the law was correct.[220] This aspect of the Philippines' appeal warrants summary dismissal.

C.2.d. The Chamber did not err in considering that the Philippines' investigation does not presently extend to any high-ranking official

125. The Chamber found that "the domestic proceedings in the Philippines […] 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

[218] Appeal, para. 109.
[219] *See e.g.* *Muthaura et al.* Admissibility Appeal Judgment, para. 30; *Ruto et al.* Admissibility Appeal Judgment, para. 41 (recalling that "mere preparedness to take such [investigative] steps or the investigation of *other* suspects is not sufficient", and that it cannot be said there is a conflict of jurisdiction leading to potential inadmissibility "unless investigative steps are actually taken in relation to the suspects who are the subject of the proceedings before the Court").
[220] *See above* paras. 87-103.

officials."[221] In its Appeal, the Philippines now asserts that the Chamber "ignored the fact that the Philippine Government was investigating its nationals or others within its jurisdiction in relation to the anti-illegal drug campaign" and simply "expected the current status of domestic investigations to match future investigations of the Prosecution."[222] It considers that this is "unreasonable" and incorrect in light of article 18(2), and "does not allow for progress within domestic investigations".[223]

126. For the reasons stated above, the Chamber was correct to determine that the Philippines was not conducting proceedings relevant for the purpose of article 18(2) against high-ranking officials since no sufficiently specific evidence of such proceedings was presented.[224] The Philippines' further observations in this respect are also misconceived.

127. The Philippines repeats its view that "the only way to establish the culpability of senior officials is through the identification of leads between the direct perpetrator on the one hand and the senior officials on the other",[225] which it had also submitted to the Chamber and which was duly recorded in the Decision.[226] Yet this overlooks that this issue was not salient merely because of the seniority of the suspects as such—but rather as an indication whether the Philippines' investigation was directed to the conduct which could be charged at the Court as crimes against humanity.[227] In this regard, notably, the Prosecution had asserted that "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."[228]

128. Accordingly, within this context and for this purpose, the Chamber was neither incorrect nor unreasonable in concluding that the investigations of low-ranking individuals did not constitute sufficient tangible, concrete, and progressive steps towards this goal. In particular, by focusing on low-ranking individuals, it was not clear how the Philippines was investigating the question of the potential links between criminal incidents, which may be significant to the contextual element of crimes against humanity. This conclusion is not altered by the Philippines' reiteration of its view that "the on-going investigations in the Philippines are […]

[221] Decision, para. 68. *See also* Appeal, para. 119.
[222] Appeal, para. 120.
[223] Appeal, para. 120.
[224] *See above* paras. 87-103.
[225] Appeal, para. 121.
[226] Decision, para. 67. *See also* para. 93.
[227] Decision, para. 68.
[228] Decision, para. 66. *See also* immediately preceding sub-title ("Policy element and systematic nature of the alleged crimes").

focused on the most responsible perpetrators", which "may very well be a low or mid-ranking official."[229]

C.2.e. The Chamber did not err in considering that the Philippines' investigation does not presently extend to alleged killings by private individuals outside police operations

129. The Chamber found that the Philippines "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", and that consequently "the part of the authorised investigation concerning private individuals does not appear to be covered by any domestic investigations."[230]

130. Yet relying on the Prosecution submissions when requesting the opening of the investigation, the Philippines now asserts—for the first time, expressly[231]—that even alleged "killings outside of police operations still had some link to law enforcement", and therefore that the investigation of law enforcement officials is "also a means to identify leads in relation to the role of law enforcement in killings conducted outside of police operations."[232] Specifically, it also asserts that the Chamber overlooked material related to the so-called "Davao Death Squad".[233]

131. The Philippines is incorrect to assert that the Chamber's alleged "failure to take into account the material connected to the Davao Death Squad can only be explained by virtue of its application" of an overly strict standard for the purpose of article 18(2). This is inaccurate, for the reasons explained above.[234] Furthermore, and in any event, it is the Philippines which overlooks that the Chamber did not ignore domestic proceedings concerning the alleged Davao Death Squad killings—which it expressly recalled[235]—but expressed concerns about the specificity and probative value of the material provided.[236] It further noted that the Ombudsman's investigation highlighted by the Philippines in the Appeal relates to alleged

[229] *Contra* Appeal, para. 122. *See* Decision, para. 68 ("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"). *See also* para. 93.
[230] Decision, para. 65. *See also* Appeal, para. 124; Decision, para. 64 (recalling that this issues concerns "alleged murders outside the context of *official* police operations, including by the so-called 'vigilantes').
[231] *See* Decision, para. 65 (recalling that "the Philippines does not address this issue in its Observations").
[232] Appeal, para. 125.
[233] Appeal, paras. 126-127.
[234] *See above* paras. 87-103.
[235] Decision, para. 54.
[236] Decision, para. 56.

killings which fall outside the temporal scope of the investigation,[237] and in any event appears to be of an administrative rather than criminal nature.[238]

132. Within this context, the Chamber was neither incorrect nor unreasonable in concluding that the Philippines has not taken sufficient tangible, concrete and progressive steps towards the investigation of killings by private individuals outside law enforcement operations, notwithstanding the Philippines' view that its investigation of law enforcement personnel may potentially identify leads for this purpose. In the circumstances, this remains primarily a matter of speculation, which is insufficient.

C.2.f. The Chamber did not err in considering that the Philippines' investigation does not presently extend to alleged killings in Davao

133. Relatedly, the Chamber also found 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."[239]

134. In particular, and notwithstanding "the explanation provided in the Observations" by the Philippines, the Chamber considered that a "list of 176 murder incidents recorded by the Davao City Police Office in the period 2011-2016" did not constitute evidence of "a sufficient degree of specificity and probative values" for the purpose of article 18(2).[240] In this regard, the Chamber noted that "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 Decision" and "does not provide information about the status of the 109 cases that are not identified as resolved or under investigation".[241] To this end, it recalled that the Philippines was "in a position to provide detailed information on their domestic proceedings" and as such could be "expected to transmit documents, along with pertinent information necessary to understand their relevance".[242]

135. The Philippines again asserts incorrectly that the Chamber's approach to this issue showed that it erroneously applied a stricter standard than permitted under article 18(2).[243] In claiming that "the information relied upon by the Philippine Government showed that aspects

[237] Decision, para. 57.
[238] *See* Decision, para. 53.
[239] Decision, para. 60. *See also* para. 54.
[240] Decision, paras. 55-56. *See also* Appeal, paras. 129-130.
[241] Decision, para. 55.
[242] Decision, para. 56.
[243] *Contra* Appeal, para. 131. *See above* paras. 87-103.

of its investigation did overlap with the broad nature of the Prosecution's investigations concerning alleged killings in Davao", "[r]egardless of the source of material at this stage", the Philippines essentially argues that the Court must accept the Philippines' word and not require evidence.[244] This is inconsistent with the evidence-driven, objective approach which is fundamental to any kind of analysis under article 17. Furthermore, the Philippines' additional reliance on several media articles was reasonably rejected by the Chamber,[245] and it shows no error to point to the fact that the Prosecution had relied on media articles for a different purpose as part of its original request to the Chamber under article 15(3).[246]

136. The Chamber was, therefore, neither incorrect nor unreasonable in finding that the Philippines has not taken sufficient tangible, concrete and progressive steps towards investigating alleged crimes in Davao.

C.2.g The Chamber did not err in considering that the Philippines' investigation did not represent the range and scope of crimes in the Court's investigation

137. The Chamber recalled that the Court's investigation is authorised "'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'", and that "[t]he limited number of cases mentioned by the Philippines" addressing crimes other than murder "means that these cases cannot represent the range and scope of crimes of the Court's investigation."[247] Notably, the Chamber observed that, "[e]ven if the Chamber ignores the deficient support 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."[248] The Chamber further noted that it had "consider[ed] 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".[249]

138. On appeal, the Philippines argues that "there is no specific detail concerning the commission of 'other crimes' in either the Article 15 Request or the Article 15 Decision",[250] and that consequently the Chamber's conclusion was "erroneous" "when there is very little

[244] Appeal, para. 131.
[245] *Contra* Appeal, paras. 129-130. *See* Decision, para. 58.
[246] *Contra* Appeal, para. 130.
[247] Decision, para. 63. *See also* Appeal, para. 133.
[248] Decision, para. 63.
[249] Decision, para. 97.
[250] Appeal, para. 134.

detail as to what this range and scope [of crimes in the Court's investigation] encompasses in real terms."[251] In its view, "[i]n the absence of detail regarding the commission of 'other crimes', it is almost impossible for the Philippine Government to be able to meet the Pre-Trial Chamber's erroneous demands that it substantially mirrors a hypothetical investigation concerning such crimes."[252]

139. The Philippines fails to show any error in this respect and again evinces a misunderstanding of the analysis required by article 18. First, as made clear from the Decision, the standard applied by the Chamber was that the Philippines' investigation *sufficiently* rather than "substantially" mirrored the Court's investigation. Second, the Philippines fails to address the fact that—as expressly recalled by the Chamber in the Decision—the Prosecution's request under article 15(3) "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."[253] In the circumstances, this was adequate notice of the range and scope of additional crimes which may form part of the Court's investigation. On this basis, the Philippines was in a position to provide information of criminal proceedings with respect to Rome Statute crimes allegedly committed on their territory from 1 November 2011 until 16 March 2019.

140. The Philippines further asserts that the Chamber's approach to the information actually presented by the Philippines demonstrates its erroneous application of the standard under article 18(2).[254] This is incorrect, for the reasons stated above.[255] Indeed, while the Philippines asserts that it had "enumerated instances where it has investigated its own law enforcement authorities for crimes, other than murder, allegedly committed in connection to the 'war on drugs'"—including "the crimes of rape, acts of lasciviousness, sexual assault, arbitrary detention delay in the delivery of detained persons to the proper judicial authority, unlawful arrest, false testimony, and violation of Section 29 of R.A. 9165, amongst others"—it again fails to address the relevant findings of the Chamber.[256]

141. The Chamber expressly recalled that the Philippines referred in its observations only to "four specific cases", as well as "a 'partial listing' of cases on the NPS's docket, and a

[251] Appeal, para. 135.
[252] Appeal, para. 136 (also referring to a "substantial overlap").
[253] Decision, para. 61 (fn. 154, citing ICC-01/21-7-Red ("Article 15(3) Request"), para. 129).
[254] Appeal, para. 136.
[255] *See above* paras. 87-103.
[256] *Contra* Appeal, para. 132.

resolution dated 27 November 2020."[257] It also recalled that the Prosecution conceded that one case "may be relevant", although featuring charges only against physical perpetrators.[258] Otherwise, however, the Chamber determined that '[o]ne of the cases relied on by the Philippines, and the events covered by the NPS Consolidated Resolution of November 2020, concern events that fall outside of the temporal scope of the authorised investigation."[259] Given the nature and scale of the alleged events forming the context for the Court's investigation, the Chamber's conclusion that the remaining domestic proceedings were insufficient for the purpose of article 18(2)—even if they were accepted as adequately established—was entirely reasonable.

142. Accordingly, in these circumstances, the Chamber was neither incorrect nor unreasonable to conclude that the Philippines has not taken sufficient tangible, concrete and progressive steps towards investigating crimes other than murder relevant to the scope of the Court's investigation.

143. For all these reasons, the Prosecution respectfully submits that the Philippines' Third Ground should be dismissed.

D. Fourth ground of appeal: the Chamber correctly applied the relevant factors in article 17

144. In its Fourth Ground, the Philippines argues that the Chamber erred in failing to consider all factors under article 17, namely, the State's (un)willingness and (in)ability to genuinely carry out the proceedings under article 17(2) and (3),[260] and gravity of potential cases under article 17(1)(d).[261]

145. However, since the Chamber had found the Philippines to be "inactive" for the purpose of article 17(1)—because its domestic proceedings did not sufficiently mirror the scope of the Court's authorised investigation—it correctly did not assess the Philippines' (un)willingness or (in)ability under article 17(2) and (3). Moreover, an interpretation of article 18 in accordance with its text, context and object, as well as considering the drafting history, shows that article 18 proceedings relate to complementarity matters. Accordingly, the Chamber correctly did not assess "gravity", which is not a matter of complementarity.

[257] Decision, para. 61.
[258] Decision, para. 62.
[259] Decision, para. 63.
[260] Appeal, paras. 143-153.
[261] Appeal, paras. 154-160.

146. For all these reasons, the Fourth Ground should be dismissed.

D.1. The Chamber correctly applied the two-step assessment of article 17

147. The Philippines erroneously suggests that the Chamber deemed the domestic proceedings to lack genuineness without however having conducted a full assessment under article 17(2) and (3).[262] Yet the Philippines misinterprets the Decision and takes the Chamber's incidental use of the term "genuine" out of context.[263] Based on the materials provided by the Philippines, the Chamber concluded that the very few domestic initiatives which were substantiated did not sufficiently, or at all, mirror, the Court's intended investigation.[264] Since it found that the Philippines' authorities were "inactive" under article 17(1), the Chamber needed not assess their unwillingness or inability pursuant to article 17(2) and (3). The Chamber's approach accords with the Statute and consistent jurisprudence.[265]

D.1.a. The Chamber deemed the Philippines' authorities to be inactive under article 17(1) and did not assess their unwillingness or inability under article 17(2) and (3)

148. In the Decision, the Chamber set out the legal framework relevant to article 18(2) determinations,[266] and provided its interpretation of these provisions in accordance with well-established jurisprudence on complementarity.[267] In this context, the Chamber endorsed the two-step approach of article 17 and referred to relevant case-law, mostly related to a State's inaction under article 17(1).[268] The Chamber did not expand on the limited ICC case-law on article 17(2) and (3).[269]

149. In light of the jurisprudence and based on the materials provided by the Philippines (assessed holistically), the Chamber concluded that the very few substantiated domestic proceedings (relating only to low-ranking law enforcement personnel and not including patterns of criminality) did not sufficiently, or at all, mirror, the Court's intended investigation.[270] The Chamber was thus not satisfied that the Philippines was undertaking

[262] Appeal, paras. 143-145 (referring to Decision, para. 98); *see also* paras. 152-153.
[263] See Decision, paras. 94, 98.
[264] Decision, para. 96.
[265] *See below* paras. 152-153 and fn. 276.
[266] Decision, para. 10.
[267] Decision, paras. 10-17.
[268] Decision, paras. 10-17. Some of the case-law would also be relevant for article 17(2) and (3), such as regarding the burden of proof, relevant substantiation information and timing of the assessment.
[269] *See e.g.* *Gaddafi* First Admissibility Decision, paras. 138-218; ICC-01/11-01/11-466-Red ("*Al Senussi* Admissibility Decision"), paras. 199-310. *See also* *Al Senussi* Admissibility Appeal Judgment, paras. 124-298.
[270] Decision, paras. 96-98.

relevant investigations that would warrant a deferral of the Court's investigation under article 18(2) of the Statute. On this basis, it authorised the Prosecution to resume its investigation.[271]

150. In conducting this assessment, the Chamber noted a significant disparity in numbers between the victimisation identified in the Article 15(4) Decision and the number of domestic proceedings.[272] It found that this difference showed that the domestic proceedings "cannot be considered as being similar in scope or sufficiently mirroring the Prosecution's intended investigation".[273] It also noted that such a limited number of investigations and prosecutions "is insufficient to show the existence of a genuine prosecutorial intention to respond to crimes committed against such a large potential victim base".[274] Yet this remark does not mean that the Chamber found the Philippines' proceedings to lack genuineness under article 17(2) and (3). It simply suggested that this disproportionality in scale and scope buttressed its assessment on inaction.[275] To the extent that this factual assessment may also be relevant to genuineness, this is consistent with case-law stating that the same evidence may be relevant to both inaction under article 17(1) and genuineness under article 17(2) and (3).[276]

D.1.b. The two-step approach has been consistently endorsed by the Court's jurisprudence

151. Further, the Philippines erroneously suggests that the Chamber should have applied article 17(2) and (3), and found the deferral request to be genuine due to their cooperation and engagement.[277] Yet the Chamber correctly did not apply article 17(2) and (3) because the Philippines was found to be "inactive" pursuant to article 17(1).[278] Nor does State cooperation entails a finding of genuineness regarding the relevant domestic proceedings. A State may genuinely cooperate in furnishing information to the Court, while yet being found unwilling or unable genuinely to conduct proceedings within the meaning of article 17(2) and (3).

152. As developed above in response to the Second and Third Grounds, notwithstanding the procedural context specific to article 18(2) the Chamber correctly considered that the same core

[271] Decision, p. 42.
[272] Decision, para. 94.
[273] Decision, para. 94; *see also* paras. 63, 83.
[274] Decision, para. 94; *see also* para. 98 ("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)").
[275] Decision, para. 94; *see also* para. 98.
[276] *Al Senussi* Admissibility Decision, para. 210; *Al Senussi* Admissibility Appeal Judgment, para. 231 (confirming the Pre-Trial Chamber's approach of considering investigative steps and the progression of domestic proceedings to determine unwillingness). For example, lack of proceedings on the most responsible (and focus on low level perpetrators) may indicate, along with other factors, an intent to shield under article 17(2)(a): Informal expert paper, *The principle of complementarity in practice*, annex 4, p. 30.
[277] Appeal, paras. 145-153.
[278] Decision, paras 96-98.

principles for assessing complementarity under article 17 at other procedural stages (such as under articles 15 and 19) remain applicable.[279] In this context the Chamber correctly endorsed the two-step process,[280] which has been consistently adopted by other Chambers in determining admissibility of a "case" [281] but also of situations.[282] This means that article 17 entails two inquiries:

- First, whether the State with jurisdiction is conducting—or has conducted—relevant domestic proceedings within the terms of article 17(1)(a) to (c). In effect, the Court must determine whether there is an apparent conflict of jurisdiction between the ICC and the State concerned. This is assessed in accordance with the three-part scheme set out in article 17, namely whether: (i) there are ongoing investigations or prosecutions; (ii) investigations have been completed and the State has decided not to prosecute the person concerned;[283] or (iii) the person has already been tried for the same conduct.[284]

- Second—and only if the first question is answered in the affirmative[285]—whether the domestic proceedings are not, or were not, "genuine". In particular, whether the domestic authorities are unwilling or unable to conduct the relevant proceedings within the meaning of articles 17(2) and (3) of the Statute.[286]

153. Because the Philippines' proceedings did not sufficiently mirror the Court's authorised investigation within the terms of article 17(1), the Chamber halted its assessment. It was correct not to proceed further to assess the criteria under article 17(2) and (3), since these were rendered

[279] *See* Decision, paras. 11-17; *Ruto et al.* Admissibility Appeal Judgment, para. 38.
[280] Decision, para. 11.
[281] This was the case not only when considering the admissibility of cases *proprio motu* under article 19(1), but also in resolving article 19(2) challenges by States or suspects and accused persons. *See e.g.* *Katanga* Admissibility Appeal Judgment, paras. 75, 78; *S. Gbagbo* Admissibility Appeal Judgment, para. 27.
[282] Chambers likewise followed this two-step process in assessing complementarity when deciding upon the Prosecution's requests to authorise investigations under article 15(3) of the Statute: *Kenya* Article 15 Decision, paras. 53-54; *Côte d'Ivoire* Article 15 Decision, paras. 192-193; *Burundi* Article 15 Decision, paras. 145-146; *Georgia* Article 15 Decision, paras. 36-50. Although the Appeals Chamber has since clarified that this assessment is not required by article 15(4), and that such matters should be left to any proceedings under article 18, it did not question the manner in which Chambers have conducted the assessments: *see above* fn. 148. The Pre-Trial Chamber may still be potentially called upon to apply this two-step process in reviewing the Prosecution's own assessment of the admissibility of potential cases within referred situations under articles 53(1)(b) and 53(3)(a): ICC-01/13-34 ("*Comoros* First Review Decision"), paras. 8-12.
[283] *Katanga* Admissibility AD, para. 78; *Simone Gbagbo* Admissibility AD, para. 27.
[284] With respect to articles 17(1)(c) and 20(3): *see* ICC-01/11-01/11-662 ("*Gaddafi* Second Admissibility Decision"), para. 36, 79; ICC-01/11-01/11-695 OA8 ("*Gaddafi* Second Admissibility Appeal Judgment"), para. 58.
[285] *Katanga* Admissibility Appeal Judgment, paras. 75, 78; *S. Gbagbo* Admissibility Appeal Judgment, para. 27. *See also* W. Schabas and M. El Zeidy, 'Article 17: issues of admissibility', in K. Ambos (ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (C.H. Beck/Hart/Nomos: 2022), p. 963 (mn. 30).
[286] Statute, art. 17(2), (3). *See also* art. 20(3) (if there has been a final decision).

moot in light of its conclusion on the first question. This is in line with the recognised principles of judicial efficiency. The Chamber's approach accords with the Statute and the Court's jurisprudence. The Prosecution notes that the same issue now raised by the Philippines was resolved in the *Katanga* case,[287] whereby the Appeals Chamber held that an argument akin to that of the Philippines was "not only irreconcilable with the wording of the provision, but […] also in conflict with a purposive interpretation of the Statute".[288] This finding has been consistently endorsed. The Philippines provides no reason—let alone any convincing reason—to depart from this authority.[289]

154. First, this interpretation is consistent with the VCLT criteria of treaty interpretation. It best suits the stated purpose of article 18 (expressly referring, in its title, to "admissibility"), the context provided by the general terms in which article 17 is expressed (applying to "[i]ssues of admissibility" without further specification), and the object and purpose of the Statute, namely, to end impunity while respecting States' primary responsibility to investigate and prosecute crimes under the Statute.[290]

155. Second, neither the drafting history of article 18 nor any other provision of the Statute suggests that article 17 should be interpreted differently for the purpose of deferral requests. To the contrary, the drafting history shows that the belated proposal to create article 18 was not intended to reopen the compromise reached on complementarity.[291] Rather, article 18 was intended to be consistent both with the framework of complementarity in article 17 and (what

[287] *Katanga* Admissibility Appeal Judgment, paras. 78-79.
[288] *Katanga* Admissibility Appeal Judgment, para. 79 (noting that this interpretation "would result in a situation where, despite the inaction of a State, a case would be inadmissible before the Court, unless the State is unwilling or unable to open investigations. The Court would be unable to exercise its jurisdiction over a case as long as the State is theoretically willing and able to investigate and to prosecute the case, even though that State has no intention of doing so").
[289] Although the Appeals Chamber is not bound by its prior decisions, pursuant to article 21(2), it has indicated that it does not change its jurisprudence lightly and would not depart from it "absent convincing reasons". *See* *Gbagbo* Victims Participation Decision, para. 14. This approach has been adopted in all international tribunals due to, among other reasons, the need for predictability and legal certainty. *See* ICTY, *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgment, 24 March 2000, paras. 107-109; IRMCT, *Prosecutor v. Karadžić*, MICT-13-55-A, Judgment, 20 March 2019, para. 13; *Prosecutor v. Šešelj*, MICT-16-99-A, Judgment, 11 April 2018, para. 11; ICTR, *Rutaganda v. the Prosecutor*, ICTR-96-3-A, Judgment, 26 May 2003, para. 26; STL, *Case against Akhbar Beirut S.A.L. and Ali Al Amin*, STL-14-06/PT/AP/AR126.1, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, 23 January 2015, para. 71.
[290] *Katanga* Admissibility Appeal Judgment, para. 79 (referring to the aim of the Rome Statute to put an end to impunity and to ensure that the most serious crimes of concern to the international community as a whole must not go unpunished); *see also* ICC-01/14-01/18-678-Red OA ("*Yekatom* Admissibility Appeal Judgment"), para. 42 (referring to the States' primary duty to exercise criminal jurisdiction); *Gaddafi* Second Admissibility Appeal Judgment, para. 58; *Ruto et al.* Admissibility Appeal Judgment, para. 44 (finding that article 17(1)(a)-(c) "favour national jurisdictions, […] to the extent that there actually are, or have been, investigations and/or prosecutions at the national level").
[291] Holmes (1999), p. 69.

is now contained in) article 19(1) and (4) of the Statute—whereby a State or person concerned may challenge the admissibility of a concrete case within the framework of article 17.[292]

156. Further, that factors which are relevant to determine inaction under article 17(1) may also be relevant for determining unwillingness or inability under article 17(2) and (3) does not mean that the Chamber needs to always assess the latter when it has found the former.[293] It simply means that the same type of information may be helpful to both assessments, should the Chamber decide to conduct them. However, as noted, unwillingness and inability of domestic authorities should only be assessed if there are domestic proceedings sufficiently mirroring the ICC case or proceedings. In *Al Senussi*, the Pre-Trial Chamber assessed the unwillingness and inability of the Libyan authorities because it had found that they were taking concrete and progressive steps directed at ascertaining the criminal responsibility of Mr Al Senussi for substantially the same conduct as before the ICC.[294]

157. Moreover, while article 18(3) provides that the Prosecution *can* review its deferral to a State's investigation on the basis of a "significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigations", this does not require the Chamber *always* to assess unwillingness and inability in any ruling under article 18(2) in the first place.[295]

D.2. The article 18 procedure does not entail a gravity assessment

158. The Philippines further argues that the Chamber erred by not considering the gravity of the situation pursuant to article 17(1)(d).[296] It suggests that rule 55(2) requires the Chamber to "consider the factors in article 17", including gravity.[297] Yet, to the contrary, an interpretation of the statutory provisions in accordance to the VCLT suggests that a determination under article 18 is limited to complementarity matters, and does not extend to gravity.

159. Indeed, article 18 provides a narrowly tailored mechanism for States to bring a preliminary admissibility challenge on complementarity grounds. Article 18(2) permits States to request the deferral of the Court's investigation on the ground that the State "is investigating or has investigated its nationals and others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5" and which relate to the authorised

[292] Nsereko and Ventura, p. 1012, nm. 4.
[293] *Contra* Appeal, para. 153 (quoting *Al Senussi* Admissibility Decision, para. 210).
[294] *Al Senussi* Admissibility Decision, paras. 167-168.
[295] *Contra* Appeal, paras. 148-150.
[296] Appeal, paras. 154-161.
[297] Appeal, para. 155.

investigation.[298] This is therefore limited to complementarity matters under article 17(1)(a)–(c), not to the issue of gravity under article 17(1)(d). It should also be noted that even article 19(2)(b), which provides for challenges to the admissibility of a "case" (by implication, not a situation),[299] limits the basis for a State to challenge admissibility to "the ground that it is investigating or prosecuting the case or has investigated or prosecuted" a case.[300]

160. This approach is consistent with the drafting history of article 18 which sought to ensure that the Prosecutor "defer investigations where the same matter was being investigated by a State, unless the case would be admissible under the *complementarity provisions* of the Statute".[301] The fact that rule 55(2) cross-refers to article 17 as a whole should be read in this context—and suggests that article 18 is "an integral part of the *complementarity* regime", thus also encompassing "the unwillingness and inability factors which are included in the article 17".[302] Moreover, the Rules of Procedure and Evidence "are an instrument for the application of the Rome Statute […], to which they are subordinate in all cases" and "should be read in conjunction with and subject to the provisions of the Statute".[303]

161. However, this does not mean that gravity has not been considered before the opening of an investigation. To the contrary, the Prosecution is always required to assess gravity prior to the opening of an investigation (for State or UNSC referrals) and prior to making a request under article 15(3) (for *proprio motu* situations).[304] Moreover, Chambers may assess the admissibility of a case (and thus including gravity) in different contexts, such as in deciding on an application under article 58.[305] In addition, a suspect or accused can challenge admissibility under all grounds (including gravity) pursuant to article 19(2)(a).

162. Finally, in the Article 15(4) Decision, the Chamber did not review the Prosecution's gravity assessment, in contradiction to the *Afghanistan* Appeal Judgment.[306] Instead, the Chamber appropriately limited its assessment to the jurisdictional conditions under article

[298] Statute, art. 18(2).
[299] *Cf.* ICC-02/04-01/15-156 ("*Ongwen* Admissibility Decision"), para. 14.
[300] *Compare* Statute, art. 19(2)(a) (without this limitation when the accused challenges admissibility).
[301] Holmes (1999), p. 69 (emphasis added).
[302] Holmes (2001), p. 343 (emphasis added).
[303] ICC RPE, Explanatory note.
[304] Statute, art. 53(1)(b); ICC RPE, rule 48.
[305] Statute, art. 19(1). *See also* ICC-01/04-169 ("*DRC* Arrest Warrants Appeal Judgment"), paras. 1, 52 (finding that a Chamber is not required to determine admissibility before the issuance of a warrant of arrest pursuant to art. 58(1) but may nevertheless exercise its discretion and address admissibility at this stage *proprio motu*, "when it is appropriate in the circumstances of the case, bearing in mind the interests of the suspect," including, "instances where a case is based on the established jurisprudence of the Court, uncontested facts that render a case clearly inadmissible or an ostensible cause impelling the exercise of *proprio motu* review.").
[306] *Contra* Appeal, para. 161.

15(4).[307] In this respect, the Philippines takes paragraph 25 of the Decision out of context. In its Observations, the Philippines had argued that the situation lacked gravity because there was not a widespread or systematic attack against a civilian population or that the crimes were not committed pursuant to a State policy.[308] In the Decision, the Chamber rejected these arguments by referring to the Article 15(4) Decision, whereby it had found that there was such an attack committed pursuant to or in furtherance of a State policy.[309] The Chamber made such finding in the context of its jurisdictional analysis under article 15(4), and not in the context of article 17(1)(d).

163. In any event, the potential cases within the situation are sufficiently grave and go way beyond "those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only".[310] In the present situation, the available information demonstrates that at least more than 5,000 and possibly as many as 30,000 civilians (including children) have been killed by police or by "unidentified" perpetrators apparently acting in coordination with police.[311] In many instances, the police allegedly staged self-defence scenarios, planted evidence, or otherwise obstructed justice in an effort to justify the premeditated and deliberate murder of civilians.[312] Beyond the alleged killings, the Chamber has also authorised the investigation of any article 5 crime within the geographical and temporal parameters of the situation,[313] and the available information indicates that torture, other inhumane acts, and other crimes were also committed in connection with the "war on drugs" campaign.[314]

164. Nothing about these crimes, committed in large part by law enforcement personnel entrusted with protecting citizens from violence, suggests that the potential cases before the Court are of marginal gravity. To the contrary, they are extremely serious, and appear to have been at the very least encouraged and condoned by high-level government officials, up to and including the former President.

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[307] Article 15(4) Decision, paras. 9-16.
[308] Observations of the Government of the Philippines on the Prosecution Article 18(2) Request, paras. 42, 45.
[309] Decision, para. 25; *see* Article 15(4) Decision, paras. 93-102.
[310] ICC-01/12-01/18-601-Red OA ("*Al Hassan* Gravity Appeal Judgment"), para. 53. In other words, crimes within the jurisdiction of the Court are presumptively of sufficient gravity to warrant further action, and should be excluded on the basis of gravity only when an assessment of quantitative and qualitative criteria shows that the case is of marginal gravity: *see* paras. 55, 89-94.
[311] Article 15(4) Decision, para. 67.
[312] *See e.g.* Article 15(4) Decision, para. 40-53, 57-58.
[313] Article 15(4) Decision, p. 41.
[314] Article 15(4) Decision, para. 71; Article 15(3) Request, para. 129.

165. For all these reasons, the Prosecution submits that the Philippines' Fourth Ground should be dismissed.

Conclusion

166. For all the reasons set out above, the Prosecution respectfully requests the Appeals Chamber to reject the Appeal and confirm the Pre-Trial Chamber's authorisation of the resumption of the Prosecution's investigation in the *Situation in the Philippines* pursuant to article 18(2) of the Statute.

Karim A.A. Khan KC, Prosecutor

Dated this 4th day of April, 2023
At The Hague, The Netherlands