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No.: **ICC-01/21 OA**
Date: **13 March 2023**

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 Document
with Public Annex A

Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation"

Source: **The Republic of the Philippines**

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

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I. INTRODUCTION

1. The Rome Statute is the product of deliberate and protracted negotiations amongst States in the pursuit to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole.

2. In recognising their duty to investigate and prosecute such serious crimes, States were willing to relinquish aspects of their sovereign rights in support of a permanent and unified judicial arrangement- one that complements their own domestic systems, and which operates within a framework that has carefully designed checks and balances.

3. The Court cannot, however, operate outside of this carefully designed system. It cannot overstretch its jurisdiction and it cannot unreasonably and unnecessarily exert its dominance over a State's primary right to investigate and prosecute serious crimes. This neither serves the prosperity of the Court and more fundamentally erodes its contribution to global justice.

4. Regrettably, the decision of Pre-Trial Chamber I (Pre-Trial Chamber) to authorise the resumption of the Prosecution's investigation in the *Situation in the Republic of the Philippines* fails to adhere to these principles.[1] Rather than share the burden of investigating and prosecuting serious crimes – a burden carried by State parties and non-State parties alike - it sought to impose obligations on the Philippine Government outside of its statutory framework.[2] This is despite the fact that the Philippine Government has openly recognised its responsibility to investigate and prosecute crimes which occurred in connection to the anti-illegal drugs campaign and continued to willingly engage with the Court following its withdrawal which took effect on 17 March 2019.

5. In doing so, it is submitted that the Pre-Trial Chamber committed a series of legal errors in its determination to authorise the Prosecution's investigation, and such errors

[1] ICC-01/21-56-Red, Authorisation pursuant to article 18(2) of the Statute to resume the investigation, 26 January 2023 ("Impugned Decision").
[2] Rome Statute, Preamble. See also ICC-01/04-01/07-1015-Anx, Informal Expert Paper: The Principle of Complementarity in Practice, 1 April 2009, fn. 24 - "the reference to a duty also reflects the spirit of the Statute that States are intended to carry the main burden of investigating and prosecuting". See also Stahn, 'Taking Complementarity Seriously', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 264, "[t]he Court is not viewed as an institution that acts *versus* domestic jurisdictions, but as entity that acts in conjunction *with* them".

materially affected the outcome of the Impugned Decision. In support, the Philippine Government raises four grounds of appeal:

- Ground One: The Pre-Trial Chamber erred in law in finding that the Court could exercise its jurisdiction on the basis that the Philippines was a State party "at the time of the alleged crimes" and that the "ensuing obligations" of the Rome Statute remain applicable notwithstanding the Philippines withdrawal from the Statute,
- Ground Two: The Pre-Trial Chamber erred in law by reversing the Prosecution's burden of proof in the context of article 18 proceedings,
- Ground Three: The Pre-Trial Chamber erroneously relied on the admissibility test for a concrete case in the context of an article 18(2) decision, and
- Ground Four: The Pre-Trial Chamber erred in its failure to consider all article 17 factors.

6. The Philippine Government respectfully requests the Appeals Chamber to correct these legal errors and reverse the Impugned Decision.

II. PROCEDURAL HISTORY

7. At issue in this appeal is the core matter as to how this Court should coordinate, communicate and engage with non-State parties in an effort to meet the shared overall goal to put an end to impunity. Article 18 of the Rome Statute serves as the main platform in which such engagement can occur when properly applied.

8. The procedural history as set out below informs the analysis and determination to be made with regard to the erroneous approach in which article 18 was applied as a whole.

9. On 17 March 2018, the Philippine Government deposited its notification of withdrawal from the Rome Statute.[3] This took effect on 17 March 2019.

10. On 15 September 2021, the Pre-Trial Chamber authorised the commencement of the investigation into the *Situation in the Republic of the Philippines* in relation to "crimes within the jurisdiction of the Court allegedly committed on the territory of the

[3] C.N.138.2018.TREATIES-XVIII.10 (Depositary Notification), Rome Statute of the International Criminal Court Rome, 17 July 1998 Philippines: Withdrawal, 17 March 2018.

Philippines between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign".[4]

11. On 10 November 2021, upon receipt of the Prosecution's notification pursuant to article 18(1), the Philippine Government informed the Prosecutor that "it is investigating or has investigated its nationals or others within its jurisdiction with respect to the alleged crimes against humanity of murder under Article 7(1)(a) of the Statute committed throughout the Philippines between 1 July 2016 and 16 March 2019 in the context of the so-called 'war on drugs' campaign, as well as in the Davao area between 1 November 2011 and 30 June 2016".[5]

12. In doing so, the Philippine Government sought a deferral to its investigations pursuant to article 18(2). Further, out of comity, the Philippine Government provided information on, *inter alia*: (i) the fully functioning nature of the domestic institutions in order to address the issues and concerns raised in the Article 18(1) Notification, (ii) the applicable domestic laws and processes concerning accusations relating to the killing of a person in an anti-narcotic operation, (iii) the creation, role and functions of the Internal Affairs Service (IAS) of the Philippine National Police (PNP) in its continuing review of over 6,000 administrative cases; (iv) the Department of Justice (DOJ) referral of fifty-two cases where the PNP-IAS found administrative liability on the part of law enforcement agents, to the Philippine National Bureau of Investigation (NBI) for further investigation and potential criminal charges; (v) evidence of the Philippine Government's commitment and prioritisation of a judicious review of anti-narcotic operations where deaths occurred, (vi) the National Prosecution Service's (NPS) investigation of deaths occurring in anti-narcotic operations with a focus on targeted urban areas, (vii) the Administrative No. 35 Committee's review of cases involving other allegations of grave violations of human rights, (viii) extraordinary remedy avenues, including petition of *writ of amparo* and *writ of habeas* data, available for victims of extrajudicial killings and enforced disappearance, and (ix) ongoing efforts, with the assistance of the United Nations, to support and strengthen the domestic legal

[4] ICC-01/21-12, Decision on the Prosecutor's Request for authorisation of an investigation pursuant to Article 15(3) of the Statute, 15 September 2021 ("Article 15 Decision").
[5] ICC-01/21-14-AnxA, Annex A to Notification of the Republic of the Philippines' deferral request under article 18(2), 18 November 2021.

framework and the human rights dimension in its law enforcement and investigative operations.[6]

13. On 23 November 2021, the Prosecutor sought additional information from the Philippine Government in accordance with rule 53 of the Rules of Procedure and Evidence and provided a list of items which it requested from the Philippine Government.[7] A 30-day deadline was set by the Prosecutor.

14. On 22 December 2021, and "in order to continue the dialogue that the Philippine Government has started with [the Prosecutor's] Office and the International Criminal Court",[8] the Philippine Government provided further information in relation to, *inter alia*, cases in the dockets of the NPS relating to investigations into deaths during anti-illegal drug operations, the PNP-IAS referrals of 52 cases to the NBI for priority review and build-up of cases where criminal charges were recommended, and *writ of amparo* proceedings concerning victims identified in the Article 15 Decision. In addition, the Philippine Government informed the Prosecution that "[c]onsidering the vast number of cases involved in [the] Office's request, the continued challenges posed by the current pandemic, and the intricacies of the relevant investigations and proceedings, collating all pertinent information and records within [the requested] 30 days has proven to be a herculean task".[9] The Philippine Government therefore sought an extension of at least three months to provide additional information.

15. On 20 January 2022, the Prosecutor informed the Philippine Government that additional information could be submitted by 31 March 2022 and that thereafter he would "aim to promptly conclude [the] Office's assessment of the Deferral Request".[10]

16. On 31 March 2022, the Philippine Government provided further material to the Prosecutor including case records and details of cases on the dockets before various regional prosecution offices. It also provided complaints recently filed before the NPS

[6] ICC-01/21-14-AnxA, Annex A to Notification of the Republic of the Philippines' deferral request under article 18(2), 18 November 2021.
[7] ICC-01/21-46, Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2), 24 June 2022 ("Article 18(2) Application"), para. 9 with reference to PHL-OTP-0017-4764. The Philippine Government notes that at the time of filing it does not have access to eCourt.
[8] Article 18(2) Application, para. 10 with reference to PHL-OTP-0008-0043.
[9] Article 18(2) Application, para. 10 with reference to PHL-OTP-0008-0043.
[10] Article 18(2) Application, para. 10 with reference to PHL-OTP-0017-4768.

and explained that these cases were built up by the NBI upon referral from the PNP-IAS.[11]

17. In addition, in the same correspondence, the Philippine Government:

i. Flagged that the DOJ Panel had referred 250 cases to the NBI for case build-up in connection to the 'war on drugs' campaign on 22 February 2022,

ii. Indicated that the DOJ was also evaluating the status of cases before regional prosecution offices which concern complaints against law enforcement officials and that this required cross-checking and coordination,

iii. Explained that it also needed to coordinate and examine information on records of cases and/or complaints pending before the Office of the Ombudsman, the National Police Commission, and before the people's law enforcement boards of the various local government units, and

iv. Expressed its willingness to continue the dialogue with the Office and the International Criminal Court, including furnishing the same with clarificatory information regarding submitted documents, if required.

18. On 23 June 2022, whilst "commend[ing] the Government of the Philippines for its constructive engagement with [the] Office since November 2021", the Prosecutor informed the Philippine Government of his intention to request authorisation to resume the Prosecution's investigation into the *Situation in the Philippines*.[12]

19. The next day, on 24 June 2022, the Prosecutor filed his request to resume the investigation into the *Situation in the Philippines*,[13] and in accordance with the Pre-Trial

[11] Article 18(2) Application, para. 11 with reference to PHL-OTP-0008-1222.
[12] Letter from ICC Prosecutor to Ambassador of the Republic of the Philippines to The Netherlands, 23 June 2022 attached Annex A. The letter is referenced in the Article 18(2) Application at paragraph 12.
[13] Article 18(2) Application.

Chamber's invitation,[14] the Philippine Government filed its observations on the Article 18(2) Application on 8 September 2022.[15]

20. On 26 January 2023, the Pre-Trial Chamber authorised the Prosecution to resume its investigations.[16]

21. On 2 February 2023, the Philippine Government filed its notice to appeal the Impugned Decision in full and sought suspensive effect.[17] The Prosecution opposed the application for suspensive effect on 16 February 2023.[18]

III. GROUNDS OF APPEAL

22. It is submitted that the Pre-Trial Chamber committed several errors of law in its admissibility assessment concerning the *Situation in the Republic of the Philippines*. The errors relate to the Pre-Trial Chamber's incorrect application of article 18 especially following the Philippine Government's withdrawal from the Rome Statute.

23. Regarding errors of law, the Appeals Chamber has repeatedly held that it "will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law".[19]

24. Further, the Appeals Chamber has stated that:[20]

> "[i]f the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.

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[14] ICC-01/21-47, Order inviting observations and victims' views and concerns, 14 July 2022.
[15] ICC-01/21-51, Philippine Government's Observation on the Office of the Prosecutor's Request, 8 September 2022 ("Article 18(2) Observations").
[16] Impugned Decision.
[17] ICC-01/21-57, Philippine Government's Notice of Appeal against the Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01121-56) with Application for Suspensive Effect, 3 February 2023 ("Notice of Appeal"). This appeal is filed in accordance with regulations 38(2)(b) and 64(2) of the Regulations of the Court. See also ICC-01/04-01/06-717, Reasons for the Appeals Chamber's Decision of 16 November 2006 on the "Prosecution's Request for an Extension of the Page Limit", 17 November 2006, para. 9.
[18] ICC-01/21-60, Prosecution response to the Philippine Government's Application for Suspensive Effect of the Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-57), 16 February 2023.
[19] ICC-01/14-01/22-124-Red OA3, Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's Judgment of 19 July 2022", 19 December 2022, para. 19 and cites therein.
[20] ICC-01/14-01/22-124-Red OA3, Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled "Decision on legal representation further to the Appeals Chamber's Judgment of 19 July 2022", 19 December 2022, para. 20 and cites therein.

> A decision is "materially affected by an error of law" if the chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".

25. Guided by this standard review, this appeal demonstrates that the errors identified in the four grounds of appeal, cumulatively or in the alternative, materially affected the Impugned Decision in that, but for those errors, the Pre-Trial Chamber would not have authorised the resumption of the Prosecution's investigation.

A. Ground One: The Pre-Trial Chamber erred in law in finding that the Court could exercise its jurisdiction on the basis that the Philippines was a State party "at the time of the alleged crimes" and that the "ensuing obligations" of the Rome Statute remain applicable notwithstanding the Philippines withdrawal from the Statute.

26. This ground concerns the unique situation whereby an admissibility assessment under article 18 is conducted following the withdrawal of a State from the Rome Statute. Although article 18 is accessible or at least applicable to State parties as well as non-State parties which would normally exercise jurisdiction, it is based on a presumption that the Court does in fact exercise jurisdiction at this stage. However, as developed below, this presumption does not exist following the withdrawal of the Philippine Government from the Rome Statute.

i. The Appeals Chamber is appropriately seised of this ground

27. At paragraph 26 of the Impugned Decision, the Pre-Trial Chamber stated:

> "[t]he Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty, and pursuant to how the system of complementarity functions. As part of the procedure laid down in article 18(2) of the Statute, the Chamber may authorise the Prosecution to resume an investigation, notwithstanding a State's request to defer the investigation. These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute (emphasis added)."

28. Effectively, in order to make an admissibility determination, the Pre-Trial Chamber made a positive finding of jurisdiction based on the Philippine Government's status, as a State party to the Rome Statute, at the time of the alleged crimes. In doing so, it

considered the effect of the Philippine Government's withdrawal as a State party to the Rome Statute and entered further findings concerning the Philippine's Government "ensuing obligations". These findings are not *obiter* and are located within section B entitled "Determination by the Chamber".[21]

29. The Philippine Government is therefore entitled, as of right, to raise all errors which are inextricably linked to the admissibility ruling in accordance with article 18(4) and article 82(1)(a).[22]

30. The Philippine Government emphasises that this ground is not raised as a challenge to the jurisdiction of the Court in the context of article 19 proceedings, which explicitly concern the jurisdiction of the Court in relation to a concrete case. As such, this ground does not require an assessment as to whether it qualifies as a jurisdictional challenge under article 82(1)(a), and the Philippine Government reserves its procedural rights under article 19 in full.

31. Whilst the Philippine Government is of course apprised of the Article 15 Decision, such proceedings were conducted entirely in the absence of any input or intervention from the Government. This is the first opportunity that the Philippine Government has to address the consequences of its withdrawal from the Rome Statute and the residual scope of the Court's jurisdiction, or lack thereof.[23]

32. Appellate scrutiny is therefore necessitated at this juncture as it goes to the fundamental and valid question as to whether any proceedings in relation to the *Situation in the*

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[21] Impugned Decision, p. 12.

[22] ICC-01/09-78 OA, Decision on the admissibility of the "Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence", 10 August 2011, para. 16. See also ICC-01/04-01/06-772 OA4, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the "Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, para. 23 in relation to the inextricable link between admissibility and jurisdictional matters.

[23] For completeness, the Philippine Government recalls the decision of the Supreme Court of the Philippines in *Pangilinan v. Cayetano* [G.R. Nos. 238875, 239483, 240954, 16 March 2021] whereby the Supreme Court stated that "[c]onsequently, liability for the alleged summary killings and other atrocities committed in the course of the war on drugs is not nullified or negated here. The Philippines remained covered and bound by the Rome Statute until March 17, 2019". The Philippine Government observes that the decision itself concerned the validity of the executive's unilateral withdrawal from the Rome Statute. Having found that the withdrawal was valid, the referenced comment is *obiter dicta*. It is not binding and does not form part of the legal system of the Philippine pursuant to article 8 of the Civil Code of the Philippines [Republic Act No. 386, 18 June 1949]. Nor is it part of the applicable law of this Court.

Republic of the Philippines can continue in the absence of the Court's jurisdiction following the Philippine Government's withdrawal.

ii. *The Pre-Trial Chamber erred in its admissibility determination because the Court does not have jurisdiction over the Situation in the Republic of the Philippines following the Government's withdrawal*

33. The Pre-Trial Chamber's understanding of the Court's complementarity system is premised on its findings that the Court may exercise its "jurisdiction and mandate in accordance with the provisions of the Statute, an international treaty to which Philippines was a party at the time of the alleged crimes for which the investigation was authorised".[24] The Pre-Trial Chamber subsequently determined that the application of the Statute's provisions and the "ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute".[25]

34. In doing so, Pre-Trial Chamber refers to article 127(2), and the Article 15 Decision whereby the same composition of judges held:[26]

> "[w]hile the Philippines' withdrawal from the Statute took effect on 17 March 2019, 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. This is in line with the law of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination. Moreover, in the Burundi situation, Pre-Trial Chamber III held that a State Party's withdrawal from the Rome Statute does not affect the Court's exercise of jurisdiction over crimes committed prior to the effective date of the withdrawal. This conclusion was recently confirmed by Pre-Trial Chamber II in the Abd-Al-Rahman case. The 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."

35. Essentially, it is the Pre-Trial Chamber's position, as reflected in the Impugned Decision and Article 15 Decision, that the Court may indefinitely exercise its jurisdiction in relation to alleged crimes committed at the time the State was party and that the effective withdrawal of the State cannot alter this position. Such reasoning is inherently flawed

[24] Impugned Decision, para. 26.
[25] Impugned Decision, para. 26.
[26] Article 15 Decision, para. 111 (citations omitted).

and conflates principles concerning preconditions to the exercise of jurisdiction and the residual obligations of a withdrawing State.

iii. The preconditions to the exercise of jurisdiction must be considered at the point in which the exercise of the Court's jurisdiction is triggered

36. The exercise of the Court's jurisdiction is primarily governed by articles 11 to 15. However, for the purposes of this appeal, attention is drawn to the exercise of the Court's jurisdiction pursuant to article 13 and the preconditions to the exercise of that jurisdiction pursuant to article 12.

37. In this regard, the Philippine Government notes that the Court's jurisdiction can only be triggered in accordance with article 13 – namely, by state referral, UNSC referral or where the Prosecutor has *proprio motu* initiated an investigation. The existence of such triggers is evident of the fact that the Court's jurisdiction is not perpetual.

38. Once the exercise of the Court's jurisdiction is indeed triggered, recourse must be made to article 12 as the Court may only exercise its jurisdiction once the preconditions under article 12 are met.[27] Here, state acceptance is necessary.[28]

39. The assessment of the State's acceptance is contemporaneous as reflected in the express language of article 12(2) which provides:

> In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.

[27] See also Schabas/Pecorell, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 12 mn. 1, "Article 12 on preconditions for the actual exercise of jurisdiction is fundamental to an effective ICC". Noting exception of UNSC referrals pursuant to article 13(b) see e.g. Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 12 fn. 84. See further *Situation in the State of Palestine* whereby the Prosecution sought an article 19(3) ruling on the Court's territorial jurisdiction in Palestine for the purposes of article 12(2) *following* Palestine's referral pursuant to articles 13(a) and 14. Further still, the Prosecution conducted an assessment as to the Court's territorial jurisdiction pursuant to article 53(1)(a) again, *following* Palestine's referral in 2018 see ICC-01/18-12, Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine, 22 January 2020, paras. 4, 5 and 34.
[28] Schabas/Pecorell, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 12 mn. 15, "[i]n cases where pursuant to Article 13(a) or (c), a situation is referred to the Prosecutor by a State Party or where the Prosecutor has initiated an investigation *proprio motu*, State acceptance is necessary".

40. Whilst noting that there is a "basic presumption that no words in a treaty should be seen as a surplus",[29] the inclusion of the term "are" is important here and indicates that this is not an assessment of whether the State has ever accepted the jurisdiction of the Court. Rather, it is whether the State accepts the Court's jurisdiction at the point in time in which said jurisdiction is triggered.

41. This contemporaneous assessment was not conducted by the Pre-Trial Chamber in the Impugned Decision.

42. In the *Situation in the Republic of the Philippines*, the Prosecution sought to trigger the exercise of the Court's jurisdiction in accordance with article 13(a), upon filing its Article 15 Request. This took place on 24 May 2021. At this point in time however, the Philippine Government had not accepted the Court's jurisdiction given that its withdrawal took effect on 17 March 2019.

iv. The exercise of the Court's jurisdiction must be read in conjunction with the statutory cooperation framework and article 127(2)

43. The contemporaneous assessment of a State's acceptance of the Court's jurisdiction is also consistent with article 127(2),[30] which governs residual obligations and effects following the withdrawal of a State:

> A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any

[29] Hall/Stahn, in Triffterer and Ambos, The Rome Statute of the International Criminal Court: A Commentary, 3rd ed. 2016, Art. 7, mn. 47. See also Ross, On Law and Justice (Berkeley: University of California Press, 1959), p. 132, "[i]n the drafting of statutes, where greater care is needed, it is usual to endeavour to avoid saying anything more than what is necessary. The presupposition exists that a statute does not contain redundancies, and an apparent coincidence of two norms therefore is an inducement to interpret one of them in such a way that the apparent redundancy disappears".

[30] Noting that the existence of article 127 governs the termination of obligations for parties and as such there is no automatic application of article 70 VCLT see e.g. Clark/Meisenberg, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 127 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" *c/f* Impugned Decision, fn. 85 with reference to Article 15 Decision, para. 111. In any case, even if one were to apply article 70 VCLT, there would be no remaining 'right, obligation or legal situation' by virtue of the need to contemporaneously assess the preconditions to the exercise of jurisdiction.

matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

44. In particular, reference is made to the continuing obligation on a State to cooperate in criminal investigations and proceedings which commenced prior to the date on which the withdrawal became effective. This sub-provision, as with Part 9 of the Rome Statute, reflects the importance of cooperation to the Court's ability to function. Essentially, the exercise of the Court's jurisdiction is premised on its ability to secure cooperation and the two matters are inextricably linked.[31]

45. This is further reinforced with reference to article 86 which governs the statutory obligation to cooperate. This general obligation however is confined to State Parties,[32] and only in relation to "investigations and prosecution of crimes within the jurisdiction of the Court".[33] A systematic interpretation of this article, when read in conjunction with article 13(c) and article 15, indicates that the "obligatory cooperation scheme comes into play only after the Prosecutor's assessment has been confirmed by the [Pre-Trial Chamber]".[34]

46. Put simply, the fact that the Court can only enforce cooperation when it has triggered the exercise of its jurisdiction supports the need and requirement for a contemporaneous assessment of a State's acceptance of jurisdiction and indeed its acceptance of the obligatory cooperation scheme. Indeed, it would be both illogical and contrary to the

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[31] E.g. Kaul/Kreß, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles And Compromises', Yearbook of International Humanitarian Law Volume2-1999-pp. 143-175 at 157, "if these states could refuse to cooperate, the Court must 'turn out to be utterly impotent" citing to A. Cassese, 'Reflections on International Criminal Justice', 61 MLR (1998) pp. 9 *et seq*. See also Kaul/Kreß at 143, "[f]unctionally, the implementation of any set of jurisdictional rules defining the Court's sphere of activity depends on a complementary cooperation regime."

[32] Kreß/Prost, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 86 mn. 2, "[t]he general obligation to cooperate in Article 86 is confined to *States Parties*". See also Kreß/Prost, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 86 mn. 3 for commentary concerning obligation to cooperate in relation to non-State parties subject to a UNSC referral by virtue of the text of the UNSC resolution.

[33] Article 86.

[34] Kreß/Prost, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 86 mn. 11, "in the specific case of proceedings triggered *proprio motu* by the Prosecutor, it makes sense , in light of the sensitivities of a number of States *vis-à-vis* too broad a power of the Prosecutor to assume that the obligatory cooperation scheme comes into play only after the Prosecutor's assessment has been confirmed by the PTC". See also ICC-01/04-01/07-1015-Anx, Informal Expert Paper: The Principle of Complementarity in Practice, 1 April 2009, para. 28, "[h]ence, formal cooperation in accordance with Part 9 would not apply pre-authorisation (*proprio motu* 'triggered') or before the commencement of the investigation (referral 'triggered'). Thus, the better view appears to be that the powers of the Prosecutor to conduct "fact finding" prior to authorisation or upon the referral of a situation, but before the commencement of an investigation of a case, are those set forth in article 15(2) and rule 104. They would therefore have to be carried out in a non-compulsory manner".

Court's functioning, if the Court could indefinitely exercise jurisdiction pursuant to article 13(c) in relation to a former State party and in the absence of any legal basis for continued cooperation under article 86 and in accordance with article 127(2).[35]

47. In this regard, the Philippine Government further flags the distinction between the *Philippine Situation* and the *Situation in the Republic of Burundi*. Notably, in the latter situation, Pre-Trial Chamber III considered the Court's jurisdiction prior to the entry into effect of a withdrawal as well as the obligations arising from the Statute subsequent to the entry into effect of the withdrawal.[36] In doing so, it determined:[37]

> "by ratifying the Statute, a State Party accepts, in accordance with article 12(1) and (2) of the Statute, the jurisdiction of the Court over all article 5 crimes committed either by its nationals or on its territory for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute.[32] This acceptance of the *jurisdiction* of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the *exercise* of the Court's jurisdiction, *i.e.*, the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit."

48. The determination must be taken in context and in consideration of the fact that Burundi's withdrawal took effect only after the commencement of the investigation. It was on this basis that the Court considered that it could exercise its jurisdiction from the date of entry of the Rome Statute for Burundi to the date in which the withdrawal took effect. There was no cut off point in Burundi's acceptance of the Court's jurisdiction and more pertinently, at the point in which jurisdiction was triggered, Burundi was still a State party (albeit in the process of withdrawing).

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[35] With reference to principle of effectiveness, see e.g. ICC-01/05-01/08-388, Decision Adjourning the Hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, para. 36, "a teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be 'interpreted so as to give it its full meaning and to enable the system [...] to attain its appropriate effects', while preventing any restrictions of interpretation that would render the provisions of the treaty 'inoperative'".

[36] ICC-01/17-9-Red, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, 9 November 2017 ("Burundi Article 15 Decision"), para. 23

[37] Burundi Article 15 Decision, para. 24.

49. In contrast, and as stated above, the investigation in the *Philippine Situation* commenced on 15 September 2021 following the Article 15 Decision. By this point, the Philippine Government's withdrawal had already taken effect and it was not therefore subject to any cooperation obligation. Accordingly, there are no grounds to extend the Court's jurisdiction in a manner akin to the *Situation in Burundi*.

v. The preliminary examination is not a 'matter which was already under consideration by the Court'

50. In making its admissibility assessment, the Impugned Decision refers to article 127(2) in support of its determination that the provisions of the Rome Statute and "the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute".[38] In doing so, the Pre-Trial Chamber also cross-referenced its Article 15 Decision whereby it asserted 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".[39]

51. However, there is no basis to use the preliminary examination as a means to protract any residual obligations on a State which has withdrawn – particularly in order to trigger the exercise of the Court's jurisdiction which is dependent on State's acceptance.

52. A plain reading of article 127(2) establishes that the 'preliminary examination' stage is not expressly referenced in the provision. It is also evidently not a criminal investigation or prosecution.

53. Nor can it be determined that a preliminary examination is a "matter which was already under consideration by the Court".[40] The scope of this language must be read in the context of the full sentence in article 127(2) i.e.

> Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

[38] Impugned Decision, para. 26.
[39] Impugned Decision, fn. 85 citing to Article 15 Decision, para. 111.
[40] Article 127(2).

54. The emphasised text establishes an overlap and connection to the reference concerning "criminal investigations and proceedings" in the same sentence. An ordinary-meaning interpretation of this text supports the premise that it is in reference to circumstances whereby an article 15 request is pending at the moment when a State's withdrawal has taken effect.[41]

55. Further still, there is nothing in the plain language of article 127(2) which would suggest a broader interpretation of the term 'Court' to include the Prosecution, or more specifically, preliminary examinations. Nor can it be argued that this phase was included in order to cover preliminary examinations given that the Court at large (i.e., including the judiciary) is not involved at this stage.

56. Indeed, the entire preliminary examination process has been solely developed by the Prosecution in order to determine whether to initiate an investigation and its assessment of the factors enumerated in article 53(1)(a) to (c).[42] The Prosecution does not have any meaningful investigative powers during the preliminary examination phase,[43] and it cannot invoke the forms of cooperation specified in Part 9 of the Statute from States.[44] Moreover, there is no judicial oversight of the Prosecution's assessment at the preliminary examination phase – either at the time it is conducted or indeed for the purposes of article 15(4).[45] Nor is there any explicit reference to the 'preliminary examination' phase in the Rome Statute, and the Prosecution has no obligation to notify a State party of its commencement of the preliminary examination or of its intention to

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[41] Clark/Meisenberg, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 127 mn. 7, "[t]he scope of the last part of the second sentence overlaps considerably with that of the first part. Perhaps the most important point it makes is that a State whose nationals have been the subject of a referral to the Prosecutor by another State Party or by the Prosecutor acting *proprio motu* is probably not able to terminate such proceedings by withdrawing. This is the most likely meaning of the words 'nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court'". See also ICC-01/11-01/11-387 OA4, Decision on the request for suspensive effect and related issues, 18 July 2013, para. 27 in relation to the meaning of "under consideration" in the context of the non-application of article 95 at the appellate stage i.e. "[i]n addition, in the view of the Appeals Chamber, once the Pre-Trial or Trial Chamber has ruled on an admissibility challenge, it is no longer "under consideration by the Court", as referred to in article 95 of the Statute."

[42] Policy Paper on Preliminary Examinations, 1 November 2013 ("Policy Paper Preliminary Examinations"), paras. 19-20.

[43] Policy Paper on Preliminary Examinations, para. 85.

[44] Policy Paper on Preliminary Examinations, para. 85.

[45] ICC-02/17-138, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, 5 March 2020 ("Afghanistan Article 15 Judgment"), para. 40.

seek authorisation for an investigation upon conclusion of the preliminary examination.[46]

57. The Philippine Government further notes that at the time that its withdrawal took effect in March 2019, the Prosecution's preliminary examination of the situation was still declared to be at Phase 2.[47] Notably, it is at this phase that the Prosecution is considering "whether the preconditions to the exercise of jurisdiction under article 12 are satisfied".[48] As such, by March 2019, the Prosecution had not yet made a final determination as whether the Court even had jurisdiction over the *Philippine Situation*.

58. Further still, according to the Prosecution, "Phase 2-analysis is conducted in respect of all article 15 communications that were not rejected in Phase 1, as well as of information arising from referrals by a State Party or the Security Council, declarations lodged pursuant to article 12(3), open source information, and testimony received at the seat of the Court".[49] As such, Phase 2 encapsulates a broad range of activities with the only cap being that the situation was not deemed to fall manifestly outside the Court's jurisdiction during Phase 1. The matter is compounded by the fact that there is no time limit on the Prosecution to conclude its preliminary examination.[50]

59. In this context, there is no reasonable basis to determine that preliminary examinations, which are potentially indefinite and encompass a broad range of activities undertaken by the Prosecution, can be considered as a "matter which was already under consideration by the Court".

vi. Concluding Remarks – Ground One

60. The Pre-Trial Chamber made a positive determination regarding the exercise of the Court's jurisdiction in the *Philippine Situation* as part of its admissibility assessment under article 18(2).

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[46] Afghanistan Article 15 Judgment, para. 40.
[47] Report on Preliminary Examination Activities 2018, 5 December 2018, Situations Under Phase 2 (Subject-Matter Jurisdiction), pp. 15-18. The Prosecution declared that the situation had moved to phase 3 in December 2019 see Report on Preliminary Examination Activities 2019, 5 December 2019, pp. 60-65.
[48] Policy Paper on Preliminary Examinations, para. 80.
[49] Policy Paper on Preliminary Examinations, para. 80.
[50] Policy Paper on Preliminary Examinations, para. 89.

61. In doing so however, it erroneously determined that the Court could exercise its jurisdiction on the basis that the Philippines was a State party "at the time of the alleged crimes" and that the "ensuing obligations" of the Rome Statute remain applicable notwithstanding the Philippine Government's withdrawal from the Statute. However, it is evident that as of 17 March 2019, there was no obligation on the Philippine Government to cooperate and as such, it would be impossible for the Court to exercise its jurisdiction over the *Philippine Situation*.

62. This error of law materially affected the Impugned Decision and the Pre-Trial Chamber's final determination to authorise the resumption of the Prosecution's investigations in the *Philippine Situation*.

B. Ground Two: The Pre-Trial Chamber erred in law by reversing the Prosecution's burden of proof in the context of article 18 proceedings

63. Assuming *arguendo*, that the Court does have jurisdiction, the Pre-Trial Chamber committed a series of legal errors in its assessment of admissibility under article 18. Grounds Two, Three and Four all relate to the Pre-Trial Chamber's imposition of legal standards and thresholds that are strictly applicable to article 19 proceedings.

64. Ground Two concerns the Pre-Trial Chamber's error in reversing the Prosecution's burden of proof in the context of article 18 proceedings.

65. In setting out the applicable law, the Pre-Trial Chamber determined 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".[51]

66. Although no further reasoning is provided as to how this determination was reached, the Pre-Trial Chamber cites, in support, the Afghanistan Article 18(2) Decision which itself relies on jurisprudence developed exclusively in the context of a state challenging the admissibility of a case before the court.[52] This approach is legally flawed and incorrectly conflates proceedings under article 18 and those under article 19.

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[51] Impugned Decision, para. 14.

[52] See Impugned Decision, fn. 50 which cites, to ICC-02/17-196, Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, 31 October 2022, ("Afghanistan Article 18(2) Decision"), para. 45. Both the Impugned Decision and the Afghanistan Article 18(2) Decision rely on ICC-01/09-02/11-274 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May

i. The moving party bears the burden of proof

67. The Pre-Trial Chamber's reversal of the burden of proof ignores the deep-seated rule of *actori incumbit probation* i.e., it is the moving (or challenging) party that bears the burden of proof.[53] This includes both the burden of production and the burden of persuasion – that is the obligation of a party to convince the fact finder of a specific fact in issue in order to change the status quo.[54]

68. This rule lies at the heart of the cited article 19(2) jurisprudence which has consistently established that "a State challenging the admissibility of a case 'bears the burden of proof to show that the case is inadmissible".[55] Put simply, in article 19(2) proceedings, it is the State which is the moving party seeking to persuade the Chamber to change the status quo and stop the Court's exercise of jurisdiction over the case at hand.

69. However, it is not the State which is seeking to change the status quo in article 18 proceedings.[56] This is evident when interpretating article 18 within its ordinary meaning in context and light of the object and purpose of the treaty.[57]

2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011 ("Muthuara Article 19 Judgment"), para. 61; ICC-01/09-01/11-307 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011 ("Ruto Article 19 Judgment"), para. 62; ICC-02/11-01/12-75-Red OA, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015 ("Simone Gbagbo Admissibility Judgment"), para. 128.

[53] Tapper, C., Cross and Taper on Evidence, 12th ed. 2010 (OUP), Chapter III.

[54] *Ibid*.

[55] Simone Gbagbo Admissibility Judgment, para. 29 and cites therein; ICC-01/11-01/11-565 OA6, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014 ("Al Senussi Admissibility Judgment"), para. 166 and cites therein.

[56] Nsereko/Ventura, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 18, mn. 48, "In accord with the principle that he who asserts must prove, the Prosecutor bears the evidentiary and legal burden to prove by a preponderance of evidence or on a balance of probabilities that valid grounds exist to justify the PTC granting him/her authority to carry out the investigation. This is predicated on complementarity, a fundamental principle of the ICC regime, which gives primacy to State jurisdiction. That primacy should not be overridden save on cogent grounds". See also Fairlie M., Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop, 39 INT'L L. 817 (2005), p. 824, "[r]egarding article 18(2) applications, there does not appear to be any compelling reason to depart from this broad basic rule [*actori incumbit probatio*]. In addition to the argument that the doctrine of assigning the burden of proof to the party with unique knowledge should not be overemphasized, "the end result of applying the basic rule in this case comports with the Rome statute's suggestion in favor of inadmissibility. Thus, applying the rule here denotes a prosecutorial burden of persuasion." Simply put, in order to succeed in its request of the Court, the prosecution must substantiate the assertions that form the basis of its application".

[57] Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 18232.

70. The plain language of article 18 further demonstrates that such proceedings do not concern admissibility challenges akin to the procedure under article 19. The title of article 18 clearly refers to '*preliminary rulings*' regarding admissibility and not '*challenges*' to admissibility.

71. Moreover, article 18(7) concerns the ability of a state "which has challenged a ruling of the Pre-Trial Chamber under this article" to "challenge the admissibility of a case under article 19". A State however can only challenge a ruling of the Pre-Trial Chamber once that ruling has been issued upon application of the Prosecution in accordance with article 18(4).[58] Prior to that point, there is no challenge to be made by a State.

ii. The burden is on the Prosecution to rescind the deferral of its investigations

72. The framework established under article 18(2) creates a process whereby the Prosecution must automatically defer its investigation upon receipt of information from a State which asserts that is investigating or has investigated its nationals, or others within its jurisdiction, in relation to the crimes which are the subject of an investigation by the Court. This is reflected in the language of article 18(2), with reference to "the Prosecution shall defer to the State's investigation (emphasis added)".[59]

73. It is also consistent with the supervisory role of the Prosecution established in articles 18(3) and 18(5). It is for the Prosecution to review its deferral to a State's investigation (article 18(3)) and to periodically request the State concerned to provide information as the progress of its investigation and any subsequent prosecutions (article 18(5)). As discussed in more detail in Ground Four below, once the Prosecution determines that a State is unwilling or unable to genuinely carry out the investigation, it may then seize

[58] See also Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 530, "[t]he term 'challenge' as used in Article 19 corresponds to the first meaning i.e. 'dispute'; it is here the admissibility itself which is challenged and not a decision on the admissibility. The fact that the state under Article 18(2) only 'requests' the Prosecutor to defer to the state's investigations supports the first understanding. The state does not seek a ruling […]".

[59] Nsereko/Ventura, in Ambos, Rome Statute of the ICC, 4th ed. 2022, Art. 18, mn. 44, "[i]n as much as the Prosecutor has no choice but to defer, the 'request' is really not a request. It is a demand or an assertion by the State of its right to primacy. This demand is predicated on the presumption that the State's assertion and exercise of its jurisdiction is regular, genuine and otherwise effective, until the contrary is proven". See also Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 518, "[t]he term 'request' does not really mean that the state requests the ICC Prosecutor to defer. It is 'a demand or an assertion by the State of its right to primacy" noting that Stigen further states that "[i]f the request is not substantiated at all, the Pre-Trial Chamber will be able to authorize an investigation quickly" i.e. where no material is given but this does not equate to a reversal of burden of proof where material has been provided.

the Pre-Trial Chamber for a decision to authorise the Prosecution's investigation ("on the application of the Prosecution"). In its article 18(2) application, the Prosecution is therefore seeking a ruling regarding admissibility in order for it to end its continued deferral to the domestic investigation.[60]

74. This interpretation reflects the very purpose of article 18 in order to "ensure the sovereign right to 'prosecute and punish a crime that take place in their own territory or otherwise fall within their jurisdiction'".[61] This is the very essence of the principle of complementarity before this Court whereby the "[p]rimary responsibility enforcing criminal liability for violations within the subject-matter jurisdiction of the Court rests on the State Parties".[62] When a State asserts its superior jurisdiction, it is for the Prosecution to make the argument as to why the State is precluded from exercising this right.

iii. Concluding remarks – Ground Two

75. As the moving party, the Prosecution bore the burden of proof to establish that the deferral request was not genuine in order for it to resume its investigations. The failure to apply the burden of proof on the proper party vitiates the entire analysis in the Impugned Decision. As further set out in Grounds Three and Four, the Pre-Trial Chamber's reversal of the burden of proof led to a cascade of legal errors which individually and cumulatively materially affected the Impugned Decision as a whole.

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[60] The Prosecution is not therefore merely a respondent to the deferral 'request' see also Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 520, "[a]lthough a state invokes Article 18, the burden of proof as to a proceeding's genuineness is on the Prosecutor. This follows from the fact that the case is inadmissible 'unless' the state is or was unwilling or unable to proceed genuinely". Stigen further asserts that it is only where there is a "gross failure of the state to produce any information on its proceeding apart from the unsubstantiated claim that it is genuine should lead to a reversal of the burden".

[61] ICC-02/18-9-Red, Public Redacted Version of 'Decision on the "Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court"', 2 March 2022, para.15.

[62] ICC-02/18-9-Red, Public Redacted Version of 'Decision on the "Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court"', 2 March 2022, para. 15.

C. Ground Three: The Pre-Trial Chamber erroneously relied on the admissibility test for a concrete case in the context of an article 18(2) decision

i. The Pre-Trial Chamber legally erred in its overall approach to the admissibility assessment

76. This ground concerns the Pre-Trial Chamber's erroneous approach to the 'inactivity test', in its admissibility assessment of an application under article 18(2) as set out at paragraphs 10 to 16 of the Impugned Decision.

77. Subject to the arguments under Ground One above, the Philippine Government concurs with the Pre-Trial Chamber's consideration that information concerning its investigation is subject to review by the Pre-Trial Chamber in accordance with article 18(2) of the Statute and rules 54 and 55 of the Rules of Procedure and Evidence. Further, and notwithstanding the submissions in Ground Four below, it is accepted that the Pre-Trial Chamber must consider "(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".[63] This assessment is consistent with the factors in article 17 which must be considered by the Pre-Trial Chamber when seised with an article 18(2) application in accordance with rule 55(2).

78. The language in article 17(a) refers to the determination of admissibility of a concrete case in the context of article 19 proceedings and therefore, adjustment must be made when considering article 17 factors in the context of an article 18(2) application. In this regard, the Impugned Decision notes that "the meaning of the words 'case is being investigated' found in article 17(a) of the Statute must be understood and construed into account the specific context in which the test is applied".[64]

79. Notably, the Pre-Trial Chamber then goes on to state that "[n]onetheless, if investigations are taking place at the national level, the Chamber is tasked to consider

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[63] Impugned Decision, para. 11 citing ICC-01/04-01/07-1497 OA8, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case OA8, 25 September 2009 ("Katanga Admissibility Judgment"), para. 78. This step is often referred to as the 'inactivity test' see e.g. ICC-01/14-01/18-493, Decision on the Yekatom Defence's Admissibility Challenge, 28 April 2020, para. 17.

[64] Impugned Decision, para.12 citing to Afghanistan Article 18(2) Decision, para. 46.

whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court (emphasis added)".[65]

80. The Philippine Government notes that the so-called same person/ same conduct test is not expressly provided for in article 17.[66] Rather, it was developed in the context of article 19 caselaw, which concerns concrete cases.[67] Indeed, the language used in the Impugned Decision is lifted directly from paragraph 39 of the Muthaura Article 19 Judgment and paragraph 40 of the Ruto et al., Article 19 Judgment.

81. However, The Pre-Trial Chamber's reliance on this assessment is taken out of context and ignores the fact that in both cases, the Appeals Chamber had identified distinguishable factors which are strictly applicable to article 19 proceedings. In particular, the Appeals Chamber noted that in article 19 proceedings:[68]

> "[t[he cases are defined by the warrant of arrest or summons to appear issued under article 58, or the charges brought by the Prosecutor and confirmed by the Pre-Trial Chamber under article 61. Article 58 requires that for a warrant of arrest or a summons to appear to be issued, there must be reasonable grounds to believe that the person named therein has committed a crime within the jurisdiction of the Court. Similarly, under regulation 52 of the Regulations of the Court, the document containing the charges must identify the person against whom confirmation of the charges is sought and the allegations against him or her. Articles 17 (1) (c) and 20 (3) of the Statute, state that the Court cannot try a person tried by a national court for the same conduct unless the requirements of article 20 (3) (a) or (b) of the Statute are met. Thus, the defining elements of a concrete case before the Court are the individual and the alleged conduct. It follows that for such a case to be inadmissible under article 17(1)(a) of the Statute, the national investigation must cover the same individual and substantially the same conduct as the investigations before the Court (emphasis added)."

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[65] Impugned Decision, para. 13 citing to Muthaura Article 19 Judgment, para. 39; Ruto Article 19 Judgment, para. 40.

[66] Noting that article 90 refers to the extradition of the "same person for the same conduct" whilst article 20(3) refers to the fact that 'no person' shall be tried by the Court with respect to the same conduct in accordance with the principle *ne bis in idem*, although there is no reference to the 'substantial' threshold in either provision see Schabas/El Zeidy, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 17 mn. 35, "the AC surprisingly deviated from the language of the Statute by adding the word 'substantially', without providing any explanation regarding the legal basis or the rationale for this addition".

[67] Ruto Article 19 Judgment, para. 40; see also ICC-01/11-01/11-547-Red, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", 21 May 2014 ("Gaddafi Admissibility Judgment"), paras. 62 and 70; Al Senussi Admissibility Judgment, paras. 99 to 100 ; and ICC-02/11-01/12-47-Red, Public redacted version of Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014 ("Simone Gbagbo Admissibility Decision"), para. 33.

[68] Muthaura Article 19 Judgment, para. 39.

82. Essentially, the Appeals Chamber in both *Muthuara et al.* and *Ruto et al.*, recognised that the admissibility assessment is on a scale of sorts, and that at the top end of this scale sits article 19 proceedings. A higher degree of overlap is required at this stage as national investigations must cover the same person and substantially same conduct. This overlap has been adopted and applied in all other article 19 context including, *inter alia*, the *Gaddafi* Admissibility Judgment, *Al-Senussi* Admissibility Judgment and the *Simone Gbagbo* Admissibility Decision – all of which are cited to in the applicable law section of the Impugned Decision.[69]

83. As such, whilst the Impugned 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 goes on to apply the legal standard applicable to a case, overstating the degree of overlap required in the article 18 context. In doing so, the Pre-Trial Chamber committed an error of law which invalidated its entire admissibility assessment.

ii. The Pre-Trial Chamber erred in its assessment of the deferral material

84. As a result of the legal error, the Impugned Decision imposed procedural requirements, namely that the Philippine Government had to have provided "'evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case'",[70] and that it must have shown that "'tangible, concrete and progressive steps'" are undertaken".[71] This high threshold, developed in the article 19 context,[72] was used by the Pre-Trial Chamber to reject swathes of information submitted by the Philippine Government to substantiate its investigations.

85. In this regard, the Philippine Government recalls that the Prosecution had requested it to provide substantiating information regarding the investigations and prosecutions

[69] Impugned Decision, paras. 10 – 17.
[70] Impugned Decision, paras. 14, 56 and 79.
[71] Impugned Decision, para. 14.
[72] Impugned Decision, fns. 51 and 52 noting further that the Pre-Trial Chamber also refers to 'Al Werfalli Second Arrest Warrant' which determines the concrete case itself see ICC-01/11-01/17-13, Second Arrest Warrant, 4 July 2018. With respect to the Pre-Trial Chamber's reliance on the Burundi Article 15 Decision, the Philippine Government notes that this decision pre-dates the Appeals Chamber's recent judgment in which it determined that the admissibility assessment was wrongly applied at the pre-trial stage in relation to article 15 proceedings see in this regard Afghanistan Article 15 Judgment, para. 40. Finally, with respect to the Pre-Trial Chamber's reference to the Afghanistan Article 18(2) Decision, as noted above, this decision suffers from the same mistakes in that it also applies the article 19 threshold to article 18 proceedings and was not challenged by the State.

previously referenced by the Philippine Government in its deferral request.[73] In doing so, the Prosecution provided a list of the type of information to be included.[74] Given the stage of proceedings and the limited information available to it, the Philippine Government could only be guided by this list and sought to provide information in relation to each category within the eventual four-month period provided by the Prosecution (23 November 2021 to 31 March 2022). This approach accords with the purpose of article 18 proceedings which was established to generate dialogue and cooperation between a deferring State and the Prosecution.[75]

86. However, whilst the Pre-Trial Chamber considered the Prosecution's list to be "informative of the type of documents that may be capable of substantiating ongoing investigations and prosecutions",[76] the Impugned Decision rejected the material provided under the very same list. The only way to explain this divergence is that the materials provided by the Philippine Government were held to a much higher standard in practice.

1. Matrix of cases

87. The Prosecution requested the Philippine Government to provide "[i]nformation identifying the specific cases and incidents at issue, including the dates and locations of the incidents, the names of victims, and the names and ranks of law enforcement officers and others involved or under investigation".[77]

88. In response, the Philippine Government directed a number of relevant governmental agencies to provide an "inventory of their dockets relative to all pending and resolved cases involving complaints filed against law enforcement personnel for deaths of suspects in anti-illegal drug operations".[78] In doing so, the Philippine Government

[73] Article 18(2) Application, para. 9 with reference to PHL-OTP-0017-4764.
[74] Article 18(2) Application, para. 9 with reference to PHL-OTP-0017-4764.
[75] ICC-02/17-165, Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute', 8 October 2021, para. 16. See also Stahn 'Taking Complementarity Seriously', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, pp. 248 and 249 specifically, "[o]ne of the most striking features of the Statute is that dialogue is not confined to State Parties, but encompasses the interests of third states. Non-states parties are not only alerted to ICC activities, and given an opportunity to exercise jurisdiction (Article 18) [...]".
[76] Impugned Decision, para. 15.
[77] Article 18(2) Application, para. 9 with reference to PHL-OTP-0017-4764.
[78] Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1338 (Annex E to GovPH Letter of 31.03.2022). See also Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1334 (Annex D to GovPH Letter of 31.03.2022) and PHL-OTP-0008-1341 (Annex F to GovPH Letter of 31.03.2022).

sought to comply with the Prosecution's request, whilst further flagging that the DOJ was "undertaking an evaluation of all information and case records culled from the dockets of the National Prosecution Service" and that this was an on-going "coordinated effort to cross-check and cross-reference administrative cases pending before the respective regional internal affairs service units of the Philippine National Police regional commands".[79]

89. As an example, the Philippine Government provided four charts listing 302 cases,[80] which had been referred to the National Bureau of Investigation– a body which the Impugned Decision accepts is "capable of undertaking, inter alia, criminal investigations of crimes" and whose "activities are therefore relevant for the consideration whether investigative steps have taken place".[81] As set out by the Philippine Government, the cases were subject to investigation and further case build up.[82] Each chart detailed the identifying information requested of it by the Prosecution i.e. the case number, the names of law enforcement officials involved, names of deceased suspects, location and dates of incident and additional remarks and observations as appropriate. From the date of the transmission letters, it was apparent that the generation of such data in this form was an on-going process which was being organised in a manner to respond to the Prosecution i.e., the investigations were undertaken at a regional level and the Philippine Government sought to expeditiously gather the case lists with the identifying detail as per the Prosecution's request.[83]

90. However, the Impugned Decision considered that the "case lists are not, by themselves, sufficient to substantiate concrete or ongoing investigate steps".[84] This is despite the fact that the lists provided *prima facie* evidence of the existence of the investigations and proceedings before the NBI and were supplied in a format requested by the Prosecution. The Pre-Trial Chamber's contrary finding therefore is indicative of the

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[79] Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1222 (GovPH Letter of 31.03.2022).
[80] Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1228 (Annex A to GovPH Letter of 31.03.2022); PHL-OTP-0008-1259 (Annex B to GovPH Letter of 31.03.2022); PHL-OTP-0008-1294 (Annex C to GovPH Letter of 31.03.2022) and Article 18(2) Application, fn. 9 with reference to PHL-OTP-0008-0050 (Annex B to GovPH Letter of 22.12.2021).
[81] Impugned Decision, para. 71.
[82] Article 18(2) Observations, paras. 91 and 92. See also Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1222 (GovPH Letter of 31.03.2022) and Article 18(2) Application, fn. 9 with reference to PHL-OTP-0008-0043 (GovPH Letter of 22.12.2021).
[83] *Supra.*, fn. 81.
[84] Impugned Decision, para. 79.

application of the higher threshold applied in article 19 proceedings whereby a State is expected to substantiate the existence of proceedings to such a high degree in connection to a single concrete case.

91. The same approach was adopted by the Pre-Trial Chamber in relation to material which listed cases before the National Prosecution Services and concerned investigations into deaths which occurred during anti-narcotic operations.[85] The Philippine Government provided what the Prosecution requested, namely lists providing information identifying, *inter alia*, the investigating office, docket number, name of the deceased victim, law enforcement unit involved, names of suspected law enforcement officials, and charged offences.

92. These lists were again rejected by the Pre-Trial Chamber on the basis that "[w]ithout more, it is unclear how and whether the information in these lists relates to trials that actually took place, or are taking place (emphasis added)".[86]

93. In doing so, the Pre-Trial Chamber again scrutinized the material through an article 19 lens in its demand for material to show that the actual individual trials took place. Not only is this more scrutiny than was applied at the article 15 stage, but it goes well beyond the scope of article 18 whereby the existence of the investigation is sufficient. It also ignores the framework under article 18(5) whereby the progress of investigations is subject to periodic updates – as such, there is no requirement that at the article 18 stage, the trial itself must have taken place or about to take place.[87]

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[85] Article 18(2) Application, fn. 9 with reference to PHL-OTP-0008-0046 (Annex A to GovPH Letter of 22.12.2021); Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1338 (Annex E to GovPH Letter of 31.03.2022); PHL-OTP-0008-1341 (Annex F to GovPH Letter of 31.03.2022); and PHL-OTP-0008-1334 (Annex D to GovPH Letter of 31.03.2022). A similar approach was undertaken by the Pre-Trial Chamber with respect to identifying information related to killings in Davao City between 2011, and the lists of cases investigated by the Administrative Order No. 35 Committee see Impugned Decision, para. 55 in reference to Article 18(2) Observations, Annex K and Impugned Decision, para. 43 in reference to Article 18(2) Observations, Annex I and Annex I-1.

[86] Impugned Decision, para. 88.

[87] See also ICC-01/09-02/11-342 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, para. 28, "[s]pecifically, the Pre-Trial Chamber did not take into account that complementarity implies that during the admissibility proceedings Kenya could start with taking investigative steps or prosecuting a case and that the Pre-Trial Chamber has the power to adapt the admissibility proceedings to such changing circumstances". Judge Ušacka made these comments in relation to article 19 proceedings, where there is a need for a higher threshold than that which is applicable to article 18 proceedings.

2. Investigative Files/Materials

94. In addition to rejecting the identifying information, the Impugned Decision further dismissed supporting material which was provided to address the Prosecution's request for "a description of investigation steps taken", "[p]olice reports, spot reports, blotter entries, incident reports, investigation notes or reports, autopsy notes or reports, other forensic notes or reports, or other documentation related to the case, incident, or investigation", "charges, complaints, or official allegations made", "written findings, including judgments, sentences, or administrative decisions" and "current status of each investigation and proceeding".[88]

95. In support, the Philippine Government provided various types of documentation giving an overall description of investigative steps taken and case status. This included, *inter alia*, NBI investigative reports and notes and underlying municipal police reports.

96. However, the Impugned Decision demanded a level of interrogation and verification of official reports which is not warranted in the article 18 context.

97. For example, despite the provision of material which demonstrated that indictments that had been recommended by the NBI were now before regional courts,[89] this information was dismissed by the Pre-Trial Chamber in the absence of actual copies of the underlying indictments.[90] Similarly, the Pre-Trial Chamber rejected two detailed preliminary investigation reports conducted by NBI and submitted before the Provincial Prosecutor,[91] as the "referenced attachments which were apparently used to support each recommendation" were not provided to the Court.[92] This is despite the fact that the preliminary investigation reports included, *inter alia*, detailed summaries of the alleged criminal conduct, investigative findings, summaries of forensic and testimonial evidence, case analysis including inconsistency accounts and a description of the charges.

98. Requiring this degree of information is unwarranted in the article 18 context. Not only does it ignore the reality of State processes to coordinate official responses within the

[88] Article 18(2) Application, para. 9 with reference to PHL-OTP-0017-4764.
[89] Article 18(2) Observations, para. 78.
[90] Impugned Decision, para. 89.
[91] Article 18(2) Application, para. 13 with reference to PHL-OTP-0008-1633 (Annex P to GovPH Letter of 31.03.2022).
[92] Impugned Decision, para. 81.

regulated timeframes before this Court,[93] but more pertinently it demands a State to provide a wealth of in-depth information as well as supporting and corroborating material in relation to the entirety of the Prosecution's broad investigation. This is again in stark comparison to the article 19 proceedings where a State is expected to meet a higher evidential burden on the basis that it bears the burden of proof,[94] and further that the facts at hand are defined in scope by named person(s) and conduct.

99. In this regard, the Pre-Trial Chamber entirely ignored the fact that within an article 18 context, a State can only be guided by the limited information provided to it in the article 18(1) notice and the article 15 litigation. For example, where cases were named in the Article 15 Request, the Philippine Government sought to provide fuller case records which consisted of court filings and records, interlocutory and final decisions of the trial court, underlying evidence used by the domestic prosecution services and rulings and orders.[95] The Pre-Trial Chamber's failure to adapt the threshold to an article 18 context resulted in it incorrectly finding the case files to be insufficient.

3. Criminal Referrals and disciplinary proceedings

100. The Philippine Government provided material in response to the Prosecution's request for "[a]ny referrals to prosecutorial or other bodies for criminal investigations or proceedings" and "[a]ny disciplinary measures, punishments, penalties, or other sanctions imposed against individuals".[96] In particular, the Philippine Government was seised of the Prosecution's specific request for information concerning "[a]ny cases related to the 'war on drugs' among the 'over 6,000 administrative cases' in the dockets of the Philippine National Police's Internal Affairs Service", and "[a]ny cases related to "war on drugs" among the "nearly 300 alleged extrajudicial killings". Accordingly, the Philippine Government provided material concerning the steps undertaken by the

[93] *C/f* article 19 proceedings whereby a State can determine when to trigger the admissibility challenge and therefore in a position to coordinate and collate material at its own pace provided that the challenge is raised "at the earliest opportunity" and, bar exceptional circumstances, "prior to or at the commencement of the trial" in accordance with articles 19(5) and 19(4) respectively.
[94] *Supra*., paras. 63-74.
[95] See Impugned Decision, fn. 234 with reference to PHL-OTP -0008-0988 and Article 18(2) Observations, Annex B, p.17. Both cases were publicly referred to by the Prosecution see Article 15 Request, paras. 15 (Phases 3 and 4), 36, 55, 59 and 117 and cites therein.
[96] Article 18(2) Application, para. 9 with reference to PHL-OTP-0017-4764.

Administrative Order No. 35 Committee, the Department of Justice Panel and the Philippine National Police – Internal Affairs Service (PNP-IAS).[97]

101. Such material was rejected on the basis that the proceedings were deemed to be non-criminal in nature and in doing so, the Pre-Trial Chamber undertook a referendum on the Philippine's national legal processes in an isolated and piecemeal manner.

102. The Philippine Government had presented material which demonstrated the overall and general arc of the investigative processes connected to the anti-illegal drug operations.

103. At the first stage of this cycle, the PNP-IAS is required to conduct *proprio motu* investigations in all instances which involve: a) incidents where a police personnel discharges a firearm; b) incidents where death, serious physical injury, or any violation of human rights occurred in the conduct of a police operation; c) incidents where evidence was compromised, tampered with, obliterated, or lost while in the custody of police personnel; d) incidents where a suspect in the custody of the police was seriously injured; and e) incidents where the established rules of engagement have been violated.[98] Further, the PNP-IAS is also tasked with reviewing all complaints concerning illegal activities of PNP personnel.[99] In both instances the PNP-IAS must determine whether a referral is appropriate to the "proper disciplinary authorities and investigating units for purposes of filing appropriate criminal investigations and filing of charges".[100] Accordingly, the PNP-IAS' *proprio motu* investigations and review of complaints served a wider aim to conduct criminal proceedings.[101]

104. The second stage concerns further reviews of the PNP-IAS cases as conducted by the DOJ Panel which is mandated to investigate the commission of crimes and prosecute offenders through the NBI and NPS.[102]

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[97] The Philippine Government also provided material concerning *writ of amparo* proceedings in December 2021 but was subsequently informed by the Prosecution that further material was not required in this regard see Article 18(2) Application, para. 10 with reference to PHL-OTP-0017-4768 and as such no further updates provided in relation to *writ of amparo* proceedings.
[98] See Article 18(2) Application, fn. 9 with reference to PHL-OTP-0008-0182 (Annex E to GovPH Letter of 22.12.2021) at p. 392 which cites to Section 39 of Republic Act 8551 ('Philippine National Police Reform and Reorganization Act of 1998').
[99] Article 18(2) Observations, para. 85.
[100] Article 18(2) Observations, para. 85.
[101] *Cf* Impugned Decision, para. 47.
[102] Article 18(2) Observations, fn. 89.

105. At the third stage and upon referral by the DOJ Panel, a case is subject to further investigation and build up by the NBI and NPS.[103]

106. Alongside the DOJ Panel's efforts, the Philippine Government provided information concerning the Administrative Order No. 35 Committee which is mandated to resolve unsolved cases of political violence in the form of extra-legal killings (ELK), enforced disappearances (ED), torture and other grave violations of the right to life, liberty and security of persons and includes a special team of investigators and prosecutors.[104]

107. These steps reflected the nature of investigations against law enforcement officials under domestic laws and systems. Whilst not all cases involving police officers are subject to each of these stages,[105] the information provided by the Philippine Government demonstrates how the administrative procedures fit into the broader criminal justice process.

108. However, rather than undertake a holistic assessment of this investigative cycle – which demonstrably resulted in prosecutions and convictions in connection to the anti-illegal drug campaign - the Pre-Trial Chamber reviewed each stage in isolation and demanded information confirming criminal prosecutions of specific cases above and beyond what is required.[106]

109. The Pre-Trial Chamber also failed to conduct an assessment of the domestic processes available in the Philippines as a whole which was a crucial step given that it uniquely combines common law and civil law features having been founded on and influenced by laws from the United States of America, Spain and France.[107] The Philippine

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[103] Article 18(2) Observations, paras. 91-92, see also paragraph 78.
[104] Article 18(2) Observations, paras. 79-84.
[105] I.e. not all cases against law enforcement officials have to start at the PNP-IAS stage see e.g. *Supra*., fn. 96.
[106] *Contra* Impugned Decision, para. 97. See also ICC-01/11-01/11-547-Anx2 OA4, Dissenting Opinion of Judge Anita Ušacka, 21 May 2014, para. 62, "[f[urthermore, the Court's rules of evidence should not be routinely applied to materials provided by a State in admissibility proceedings that are *sui generis*. Evaluating materials provided by a State according to the rules of evidence may lead, as it apparently did in the case at hand, to the result that documents submitted by governments in transition might be considered as lacking "probative value" or being not sufficiently 'specific'. Rather, to my mind, the materials provided should be taken at their face value, especially if the State, as in the case of Libya, has clearly expressed its intent to investigate the case before the Court and has taken action in this regard". As noted above, these comments were made in relation to article 19 proceedings and whilst the majority in the Appeals Chamber did not consider this to be the standard in relation to article 19 proceedings it serves as a useful indicator in relation to article 18 proceedings i.e., scaling down threshold in the article 18 context.
[107] While Philippine laws are consistent with the general principles of international law and custom, its Constitution is unique in that it is based on the Constitution of the United States, but "Filipinized" by the 1986 People Power Revolution. The country's criminal laws are founded on the Spanish Penal Code. Commercial laws are American

procedural rules demand a lengthier investigation phase whilst in turn, the commencement of court proceedings following investigation are usually immediate. Further, investigations may also be extended by virtue of the geographic and technological barriers present in the Philippine archipelago i.e., in order to identify and collect evidence or witness testimonials, in particular when considering the complexity of the alleged crimes associated with the anti-illegal drugs campaign.

110. The Pre-Trial Chamber's approach ignores vital differences in legal cultures, traditions and systems whereby at earlier stages of investigations, the type of information or processes available to a State will differ.[108] It also ignores the fact that investigations will necessarily develop at different stages and at different rates across national jurisdictions.

111. This was recognised by negotiating parties to the Rome Statute and the article 18 framework creates space for such differences to exist at early stages of investigation - this is of course in contrast to article 19 proceedings which concern concrete criminal conduct.[109] As such, the Pre-Trial Chamber's rejection of the material concerning referrals and disciplinary proceedings demonstrates that in practice it did not apply an article 18 admissibility assessment which should be accepting of diverse domestic investigative practices.

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and modernized by the Filipino experience post-World War II. The civil laws are Spanish, French and, again, American-influenced. Political institutions are also the products of American influence.

[108] See e.g. Rastan, 'Situation and Case: Defining the Parameters' in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 445, noting that '[n]ational systems characterize the sequence of activities in an investigative process differently".

[109] Noting further the possibility of also accepting non-criminal investigations in relation to article 19 proceedings see Schabas/El Zeidy, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 17 mn. 51, in relation to the possibility of accepting a 'preliminary investigation' carried out by a truth commission "in so far as it is empowered to recommend a criminal prosecution". See further Gordon, in 'Complementarity and Alternative Forms of Justice', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol II. 2011, pp 802, in relation to the need to objectively assess domestic restorative mechanisms rather than adopt a 'knee-jerk' determination and in particular, noting that "local restorative justice does often incorporate certain penal characteristics , including investigations, subpoena and search powers, public hearings with fixed procedural rules and due process rights, criminal referral and limited forms of incarceration [...] and a plethora of non-incarcerative sanctions including restitution/reparations, community service, reintegrative shaming, and the stripping of various civic privileges [...]".

iii. The Pre-Trial Chamber erred in its assessment concerning the contours of the investigation

112. In addition to requiring types of materials above and beyond what is required for article 18, the Pre-Trial Chamber also required a degree of mirroring with the Prosecution's investigations which cannot reasonably exist at this point in the proceedings.

113. This is evident at paragraph 64 of the Impugned Decision whereby the Pre-Trial Chamber erroneously relied on the 'same person/same conduct' test finding that "[w]hen assessing the merits of an article 18(2) request, the Chamber must consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court".[110]

114. Relying on this test, the Pre-Trial Chamber determined that "the Philippines failed to demonstrate that it has conducted relevant investigations and prosecutions with regard to the four issues [...] namely: i) the alleged killings in Davao from 2011 to 2016; ii) crimes other than murder committed in connection with the 'war on drugs'; iii) killings outside official police operations; and iv) the responsibility of individuals beyond the physical perpetrators of the alleged crimes".[111]

115. However, as mentioned above, the same person/same conduct test was developed in the article 19 context whereby a Chamber must conduct a judicial assessment as to whether a specific case which is investigated by a State sufficiently mirrors the concrete case presented by the Prosecution.[112] In doing so, the Chamber must "use, as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents".[113]

116. Such an exercise cannot be imposed at the article 18 stage whereby the contours of the Prosecution's investigations concerning a specific case are undefined and unclear.[114]

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[110] Impugned Decision, para. 68.
[111] Impugned Decision, para. 69.
[112] *Supra*., paras. 81-82.
[113] Gaddafi Admissibility Judgment, para. 73.
[114] Gaddafi Admissibility Judgment, para. 83, "it must be possible for a Chamber to compare what is being investigated domestically against what is being investigated by the Prosecutor in order for it to assess whether the same case (substantially the same conduct) is being investigated. To make this assessment, the contours of the case being investigated domestically (and indeed by the Prosecutor) must be clear".

Nor was it intended by the drafters of the Rome Statute to place the investigation of a State in competition with the Court – rather, article 18 was designed to ensure that a State could exercise its primary right to investigate and prosecute serious crimes in close cooperation and dialogue with the Prosecution and the Court.[115] Moreover, and with reference to rule 52(2), article 18 was also never intended to preclude states from commencing investigations upon receipt of an article 18(1) notification.[116] However, this is rendered impossible if a State is expected to substantially mirror a nascent Prosecution investigation within the short timeframe set out in articles 18(2) and 18(3) of the Statute.

117. These principles were recognised in the *Situation in the Islamic Republic of Afghanistan,* whereby Pre-Trial Chamber I held that "article 18(2) of the Statute suggest that a request for deferral need not necessarily cover the entire scope of an investigation (as authorised by the relevant Chamber), but may concern 'the State's investigation of those persons' only, namely 'its nationals or others within its jurisdiction'".[117]

118. However, the Impugned Decision failed to assess the material presented in the context of article 18 and subsequently dismissed clear evidence of the Philippine Government's actions - and indeed intention - to continue to investigate and prosecute its nationals or

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[115] See ICC-01/11-01/11-547-Anx2 OA4, Dissenting Opinion of Judge Anita Ušacka, 21 May 2014, para. 52, "[e]stablishing such a rigid requirement would oblige domestic authorities to investigate or prosecute exactly or nearly exactly the conduct that forms the basis for the "case before the Court" at the time of the admissibility proceedings, thereby being obliged to "copy" the case before the Court. Instead of complementing each other, the relationship between the Court and the State would be competitive, requiring the State to do its utmost to fulfil the requirements set by the Court" with reference to D. Robinson, "The Mysterious Mysteriousness of Complementarity", 21 Criminal Law Forum (2010), p. 67, at pp. 100-101 and M. A. Newton, "The Complementarity Conundrum: Are We Watching Evolution or Evisceration?", 8 Santa Clara Journal of International Law (2010), p. 115, at 163, stating that "[c]omplementarity was never intended to institute a system of competition in which the domestic authorities face a hostile supranational forum intent on preserving its own prestige and power at the expense of endangering lasting peace and stability in countries already ravaged by mass atrocity" – noting that this dissent was rendered in the context of article 19 proceedings. See also ICC-01/04-01/07-1015-Anx, Informal Expert Paper: The Principle of Complementarity in Practice, 1 April 2009, p. 3, "the Prosecutor's objective is not to "compete" with States for jurisdiction, but to help ensure that the most serious international crimes do not go unpunished and thereby to put an end to impunity".

[116] Nsereko/Ventura, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 18 mn. 42, "[t]he spirit and general tenor of the Rome Statute is to give due deference to State jurisdiction. Thus, a State that has not yet started investigations but is otherwise able and willing to do so must be given a chance to do so under Article 18(2). It is in this spirit that it may request, and the Prosecutor should furnish it with, additional information to enable such investigations".

[117] Afghanistan Article 18(2) Decision, para. 40. See also Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 517, "[a]t this stage, the ICC Prosecutor will not have singled out a suspect, and it will suffice that the state is or has been investigating the crime in question genuinely".

others within its jurisdiction for crimes and crimes committed in the context of the anti-illegal drug campaign.

1. Investigation of senior officials

119. The Impugned Decision concluded that the "domestic proceedings in the Philippines did 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 official".[118]

120. In doing so, the Pre-Trial Chamber ignored the fact that the Philippine Government was investigating its nationals or others within its jurisdiction in relation to the anti-illegal drugs campaign. Instead, it expected the current status of domestic investigations to match future investigations of the Prosecution. This is an unreasonable assessment at the article 18 phase and does not allow for progress within domestic investigations which in itself is contrary to the spirit and purpose of article 18 and the principle of complementarity.[119]

121. In particular, the Pre-Trial Chamber's approach fails to consider the very nature of the alleged crimes and the alleged involvement of law enforcement which requires investigations into direct perpetrators to be conducted as part of the wider investigation into senior ranking officials. Indeed, 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. These investigations are not stalled and nor is this determined to be the case by the Pre-Trial Chamber. As such, any attempt to disassociate investigations of direct perpetrators from the investigations of senior officials is misguided and ignores the various stages of development of investigations and proceedings.[120]

122. It also ignores the fact that the on-going investigations in the Philippines are also focused on the prosecution of the most responsible perpetrators. As acknowledged by

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[118] Impugned Decision, para. 68

[119] Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 526, "[t]he possibility of requesting periodic information enables the Prosecutor to give the state the 'benefit of the doubt' and await the progress of the national proceedings, instead of disqualifying the proceeding forthwith. Such flexibility promotes the purpose behind the complementarity principle".

[120] *Supra.*, fn. 88.

this Court, at the end of the investigation, the most responsible perpetrator may very well be a low or mid-ranking official.[121]

123. The Pre-Trial Chamber's premature assessment of the investigations conducted by the Philippine Government contravenes the framework of article 18, with particular reference to article 18(5) which allows for periodic updates on the progress of national investigations. The fact that the Pre-Trial Chamber therefore determined that the domestic proceedings "do not sufficiently mirror the expected scope of the Court's investigation",[122] is evident of the fact that it was still applying the article 19 threshold with respect to the same person/same conduct test.

2. Investigations of vigilantes

124. A similar error was undertaken by the Pre-Trial Chamber in relation to 'killings outside of police operations'. The Impugned Decision recalled the fact that the "Article 15 Decision extended the authorisation to also cover killings by private individuals outside law enforcement operations" but that the Philippine Government "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".[123]

125. However, it is evident from the Article 15 Request that killings outside of police operations still had some link to law enforcement. Indeed, it is alleged that the perpetrators included "law enforcement officers who sought to conceal their true identity, private actors who coordinated with and were paid by the police, and in some cases other private individuals or groups instigated to act by the governments WOD campaign".[124] The investigation of law enforcement officials by the Philippine Government is therefore also a means to identify leads in relation to the role of law enforcement in killings conducted outside of police operations.[125] The fact that the

[121] ICC-01/12-01/18-459-tENG, Decision on the Admissibility Challenge raised by the Defence for Insufficient Gravity of the Case, 27 September 2019, para. 50.
[122] Impugned Decision, para. 68.
[123] Impugned Decision, para. 65.
[124] Article 15 Request, para. 65. See also Article 15 Decision, para. 24.
[125] See also Article 18(2) Observations, Annex O, p. 7 with reference to "the arrest and prosecution of PNP personnel, through the conduct of counter-intelligence operations, who are engaged in unlawful activities such as, but not limited to, illegal arrest, illegal detention, hulidap [a kidnap-extortion scheme conducted by plain clothed officers], 'abangketa/areglo' or case fixing, recycling of confiscated drugs, and planting of evidence, bungling of drug cases, or acting as protectors, coddlers, and financiers of drug personalities".

conduct or categories of perpetrators are not yet clearly defined is again reflective of the stage of the investigation.

126. For example, the Article 15 Request includes an allegation that law enforcement officials either secured the perimeter in the lead up to attacks, delayed their arrival to the crime scene and/or falsely took responsibility for the killing.[126] The Philippine Government had provided material in relation to investigations by the OMB of 21 PNP officials who were penalized in 2012 "in connection to unabated extrajudicial killings in the city attributed to the so-called Davao Death Squad".[127]

127. Moreover, the Philippine Government had provided further material concerning the Davao Death Squad which is an alleged vigilante group that has been connected to extrajudicial killings in Davao.[128] The Davao Death Squad has been investigated by various branches and agencies of the Philippine Government including the Commission on Human Rights,[129] investigations from the Office of the Ombudsman's (OMB) Field Investigation Office (FIO),[130] the DOJ and subject to a series of high-level Senate hearings. This material is overlooked by the Pre-Trial Chamber in the context of 'killings outside police operations'.

128. The fact that materials submitted on domestic investigations concerning the illegal conduct of law enforcement officers has been highlighted does not equate to the absence of on-going investigations concerning alleged vigilante groups. The Pre-Trial Chamber's failure to take in to account the material connected to the Davao Death Squad can only be explained by virtue of its application of a much higher standard to assess the degree of overlap between the domestic and Prosecution investigations than is warranted in an article 18 context.

3. Davao Killings

129. Relatedly, the Pre-Trial Chamber also disregarded material submitted by the Philippine Government in relation to its investigations of killings in Davao in the period 2011 to 2016. In particular, the Philippine Government provided a list of 176 murder incidents

[126] Article 15 Request, para. 69.
[127] Article 18(2) Observations, fn. 121.
[128] Article 15 Request, para. 11 and Article 15 Decision, para. 36.
[129] Article 18(2) Observations, para. 103.
[130] Article 18(2) Observations, para. 104.

recorded by the Davao City Police Office in the period 2011-2016 which resulted in 168 prosecutions before the courts.[131] The information was submitted alongside publicly available material which demonstrated, *inter alia*, that investigations had been conducted by the CHR Task Force in relation to extrajudicial killings including in the Davao region.[132]

130. Much of this material was dismissed by the Pre-Trial Chamber on the basis that it could not ascertain whether the list of 176 murder incidents "correspond to the killings referred to in the Article 15 Decision",[133] and further, criticising the use of media articles.[134] This is of course despite the fact that the sources demonstrated the existence of on-going investigations and prosecutions and further, similar media sources were relied on by the Prosecution in its Article 15 Request.

131. Regardless of the source of material at this stage, the information relied upon by the Philippine Government showed that aspects of its investigations did overlap with the broad nature of the Prosecution's investigations concerning alleged killings in Davao. It is the *prima facie* existence of the investigation which must be assessed at this stage. The Pre-Trial Chamber's dismissal of material concerning the Davao killings reflects the application of a higher standard than is warranted when determining an article 18(2) application.

4. Other crimes

132. The Philippine Government 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'. These investigations include 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.[135]

133. However, at paragraph 63 of the Impugned Decision, the Pre-Trial Chamber found that "it appears that in only two occasions a crime other than murder was pursued, and in

[131] Article 18(2) Observations, Annex K.
[132] Article 18(2) Observations, paras. 103-104 and cites therein.
[133] Impugned Decision, para. 55.
[134] Impugned Decision, para. 58.
[135] Article 18(2) Observations, paras. 121-122, 124.

only one case actual charges for a crime other than murder were brought" and that therefore "[t]he limited number of cases mentioned by the Philippines, and the type of persons charged, means that these cases cannot represent the range and scope of crimes of the Court's investigation".[136]

134. The Philippine Government notes there is no specific detail concerning the commission of 'other crimes' in either the Article 15 Request or the Article 15 Decision. It is understood that the Prosecution's authority to investigate other alleged crimes is "in order to obtain a full picture of the relevant facts, their potential legal characterization as specific crimes under the jurisdiction of the Court, and the responsibility of the various actors that may be involved".[137]

135. It is therefore erroneous to state that the Philippine's investigation does not "represent the range and scope of crimes of the Court's investigations" when there is very little detail as to what this range and scope encompasses in real terms.

136. Further still, a State is reliant on information made available from the Prosecution within the article 18 context. This is evident from the notification processes as set out in article 18(1) and rules 52(1) and (3). In 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. Yet again, in practice the Pre-Trial Chamber relied on a higher standard applicable to concrete cases whereby there is sufficient and specific information available and which would ordinarily allow for the substantial overlap required by the Pre-Trial Chamber.

iv. Concluding remarks – Ground Three

137. The Pre-Trial Chamber's entire approach to the admissibility assessment in the context of article 18 proceedings was invalid. Despite its recognition of the need to adapt its assessment of article 17 factors, in practice it did not do so.

138. This is evident from the Pre-Trial Chamber's repeated reliance on caselaw and thresholds developed in article 19 proceedings and which were cited out of context from

[136] Impugned Decision, para. 63.
[137] Article 15 Decision, para. 117.

the facts at hand. It is also evident from higher thresholds imposed to dismiss material before it and its requirement for domestic investigations to mirror the entire scope of the Prosecution's nascent investigations.

139. In doing so, the Pre-Trial Chamber gave little consideration to the realities surrounding the article 18(2) application and in particular, no regard was made to the engagement of the Philippine Government to provide the material requested of it and in light of the information made available to it. Nor did the Pre-Trial Chamber give any consideration to the fact that domestic investigations are necessarily in progress in the article 18 context when considering that there are no specific or concrete cases for it to address.

140. The Pre-Trial Chamber's erroneous reliance on the admissibility test for a concrete case in the context of an article 18(2) decision materially affects the Impugned Decision and had the correct standard been applied, the Pre-Trial Chamber would not have authorised the resumption of the Prosecution's investigation.

D. Ground Four: The Pre-Trial Chamber erred in its failure to consider all article 17 factors

141. This ground concerns the Pre-Trial Chamber's failure to consider all factors in article 17 in accordance with rule 55(2). Namely, this includes the Pre-Trial Chamber's failure to consider the willingness and ability to genuinely carry out the investigations as well as its failure to consider whether the situation is not of sufficient gravity to justify further action by the Court.

142. The errors concerning each factor are dealt with separately below.

i. Failure to consider the Philippine Government's willingness and ability to carry out the investigation

143. At paragraph 98 of the Impugned Decision, the Pre-Trial Chamber reached a final determination that it was "not satisfied that the Philippines is undertaking relevant investigations, or is making a real or genuine effort to carry out such investigations and any subsequent prosecutions, that would warrant a deferral of the Court's investigations

as per article 18(2) of the Statute (emphasis added)".[138] However, this finding was not based on any actual assessment.

144. This is evidenced by the two-pronged approach adopted by the Pre-Trial Chamber at paragraph 11 of the Impugned Decision whereby it stated:[139]

> "the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned'. Only when both questions are answered in the affirmative, should a Chamber consider whether a State is unwilling or unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute (emphasis added)."

145. The so-called second prong was never undertaken by the Pre-Trial Chamber as it had determined that the Philippine Government had failed the first 'inactivity' step i.e., that the "domestic initiatives and proceedings relied upon by the Philippines do not amount to tangible, concrete and progressive investigative steps [...]".[140]

146. As evidenced by the Pre-Trial Chamber's reliance on the Katanga Admissibility Judgment, the two-pronged approach to the consideration of article 17 stems primarily from article 19 caselaw. However, even in the context of article 19 proceedings, the two-pronged approach in relation to the inactivity limb and unwillingness/inability limb is not clearly delineated. As held in the Senussi Admissibility Decision:[141]

> "the two limbs of the admissibility test, while distinct, are nonetheless intimately and inextricably linked. Therefore, evidence put forward to substantiate the assertion of ongoing proceedings covering the same case that is before the Court may also be relevant to demonstrate their genuineness. Indeed, evidence related, inter alia, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of "inactivity" at the national level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings."

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[138] Impugned Decision, para. 98.
[139] Impugned Decision, para. 11 (citations omitted).
[140] Impugned Decision, para. 96 see also paras. 43, 44, 48, 74, 79, 84, 90 and 97.
[141] ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, 11 October 2013, para. 210. See also Simone Gbagbo Admissibility Decision, para. 30.

147. The Pre-Trial Chamber's flawed approach to its consideration of the article 17 factors is further compounded when applied to the framework of article 18 as opposed to article 19.

148. Here, the Philippine Government notes that article 18(3) provides that the Prosecution can review its deferral to a State's investigation "six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's willingness or inability genuinely to carry out the investigation (emphasis added)". This effectively creates two options as to when the Prosecution can conduct its review of the referral i.e., either at the six-month mark after the deferral or at any time before /after this six-month mark where there has been a significant change of circumstances.

149. At either stage however, an assessment as to the genuineness of the deferral request must be conducted in the context of an article 18(2) application which seeks to end the deferral status.[142] That is to say, the willingness and ability of a State to genuinely carry out the investigations must always be considered.[143]

150. This is reflected in the very text of article 18(3) and is consistent with rule 55(2), which requires the Pre-Trial Chamber to "consider the factors in article 17 in deciding whether to authorise an investigation". Moreover, it accords with article 18(5), whereby the Prosecutor may request periodic updates from a State in relation to the progress of the investigation, and more pertinently, the obligation on a State to "respond without undue delay". As such, "[a]rticle 18(3) insists, in effect, that a State must not only be willing and able to investigate at the time of the article 18(2) deferral, but must continue to do so even after the deferral has been accorded".[144]

151. In this regard, the Philippine Government recalls the recent Afghanistan Article 18(2) Decision, in which the Pre-Trial Chamber II conducted an assessment of the underlying

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[142] *Supra*., paras. 72-74. See also Stigen, 'The Admissibility Procedures', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 520, "[w]hat the Prosecutor must demonstrate is a mere probability that the national proceeding is non-genuine".

[143] Nsereko/Ventura, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 18 mn. 49, "the Rules specifically require the PTC to consider, to the extent possible, 'the factors in Article 17 in deciding whether to authorize and investigation'. These factors include the State's unwillingness or inability genuinely to investigate. The Prosecutor should also rely on these factors, particularly as they are amplified under Article 17(2)-(3), in his/her application before the PTC".

[144] Nsereko/Ventura, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 18 mn. 55.

material submitted by the Afghani authorities, as well the genuineness of the deferral request. In doing so, Pre-Trial Chamber II ultimately concluded:[145]

> "In light of the foregoing, the Chamber considers that Afghanistan is not presently carrying out genuine investigations and that it has not acted in a manner that shows an interest in pursuing the Deferral Request. The limited number of cases and individuals prosecuted by Afghanistan, as shown by the materials submitted and assessable by the Chamber, cannot lead to a finding that the ICC investigation must be deferred."

152. In contrast, the Impugned Decision did not conduct any proper assessment of the Philippine Government's willingness and ability to genuinely carry out the investigation. In particular, it ignored the fact that the Philippine Government has, *inter alia*, a functioning and independent criminal justice system, has incorporated article 5 crimes in its domestic laws, and safeguards fair trials rights.[146]

153. Moreover, no reference was made of the fact that - despite the lack of obligation to do so - the Philippine Government had readily cooperated and engaged with the Prosecution and that the deferral request was therefore genuine.[147] The Philippine Government provided the material as directed by the Prosecution on each occasion that it was requested to do so,[148] and its engagement was commended by the Prosecutor.[149] This engagement serves the very purpose of article 18 and yet was entirely ignored in practice. The Philippine Government had expected the dialogue to continue but was duly informed by the Prosecution of its intention to end the article 18 dialogue the day before it filed the Article 18(2) Application.[150]

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[145] Afghanistan Article 18(2) Decision, para. 58.
[146] Article 18(2) Observations, paras. 49 to 70. See also Article 18(2) Application, fn. 9 with reference to PHL-OTP-0008-0043 (GovPH Letter of 22.12.2021).
[147] *Supra*., paras. 43-49.
[148] I.e. 10 November 2021, 22 December 2021 and 31 March 2022 see procedural history above.
[149] Letter from ICC Prosecutor to Ambassador of the Republic of the Philippines to The Netherlands, 23 June 2022 attached Annex A.
[150] *Ibid. c/f* ICC-02/18-9-Red, Public Redacted Version of 'Decision on the "Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court"', 2 March 2022, paras. 19 and 20.

ii. Failure to consider whether the situation is not of sufficient gravity

154. At paragraph 25 of the Impugned Decision, the Pre-Trial Chamber made a clear finding that it would not consider the potential gravity of the *Philippine Situation* at this point in the proceedings. In doing so, the Pre-Trial Chamber committed a clear error of law.

155. As cited above, rule 55(2) expressly states that the Chamber shall consider the criteria set out in article 17 of the Statute in the context of article 18(2) applications. Accordingly, article 17(1)(d), governing gravity had to be considered by the Pre-Trial Chamber.

156. Further still, according to the structure of article 17(1), gravity is considered to be an "essential component for the Court's admissibility determination",[151] and as such is always a factor to be considered. The Philippine Government notes that even where a State is deemed to have been inactive "the Court may still determine that the case is inadmissible because it 'is not of sufficient gravity to justify further action by the Court'".[152]

157. The requirement to consider the gravity factor is reinforced with reference to its application at earlier stages of proceedings. For example, in its article 53(1) review of the *Situation on Registered Vessels of Comoros, Greece and Cambodia*, the Prosecutor considered the gravity component as an initial step and determined on this basis that it was unnecessary to reach a conclusion on the issue of complementarity.[153]

158. Moreover, in the Court's earlier article 15 jurisprudence, the gravity of potential cases was considered precisely because it was one of the admissibility criteria in article 17.[154]

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[151] Schabas/Al Zeidy, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 17 mn. 62.
[152] Schabas/Al Zeidy, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 17 mn. 62. The Philippine Government further notes that when admissibility challenges against a case are brought in the article 19 context, the challenger must specify the part of article 17(1) where admissibility is being challenged. Admissibility challenges pursuant to Article 17(1)(a), for instance, are routinely considered only on activity/willingness/ability grounds without consideration of gravity. This is distinct however from what is required by rule 55, which is a consideration of the 'factors in article 17' for purposes of an article 18 decision. Accordingly, all criteria – including gravity – had to be considered in the Impugned Decision. See further, Rastan, 'Situation and Case: Defining the Parameters', in Stahn and El Zeidy (eds), The International Criminal Court and Complementarity – From Theory to Practice, Vol I. 2011, p. 458, "[g]ravity is distinguished from the other limbs of admissibility dealing with complementarity. While the latter arises from contested jurisdiction, gravity is applied independently, regardless of any concurrent action".
[153] See e.g. Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia, 6 November 2014, para. 27, "[i]n light of the conclusion reached in respect of the gravity assessment, it is unnecessary to consider to reach a conclusion on the issue of complementarity".
[154] E.g. Burundi Article 15 Decision, paras. 183-184.

Whilst such analysis has since fallen out of favour following the Appeals Chamber's determination that article 17 criteria should not be assessed in the article 15 context,[155] it demonstrated that it was possible to assess gravity in admissibility assessments conducted at an early stage of proceedings.

159. Gravity is a fundamental check in distinguishing whether the Court's scarce resources are deployed to prosecute the crimes of the greatest concern to the international community. The allegations made by the Prosecution would involve crimes committed outside an armed conflict, and entirely within a modern democracy with a fully functioning judicial system. An assessment of the gravity of the contemplated investigation was of particular importance and yet is simply ignored by the Pre-Trial Chamber in contravention of the statutory framework adopted by the Assembly of States Parties.

160. The failure to consider gravity in any way vitiates the entire reasoning of the Pre-Trial Chamber. None of the other findings in the Impugned Decision – even if upheld on appeal – could allow the Prosecution to continue its investigation unless and until gravity is considered. As it stands, the Pre-Trial Chamber's reasoning is simply incomplete.

iii. Concluding remarks – Ground Four

161. The Impugned Decision effectively ignores the strict requirement under rule 55(2) for the consideration of the factors in article 17 in the context of an article 18(2) application. The Pre-Trial Chamber provides no reason or justification as to why it omitted to conduct any proper assessment of the genuineness of the deferral request. Nor does the Pre-Trial Chamber sufficiently explain its finding that it would not consider the gravity of the *Philippine Situation* – indeed its reference to the fact that the Pre-Trial Chamber had already considered and rejected gravity arguments for the purposes of the Article 15 Decision contradicts the Appeals Chamber recent ruling that any such consideration goes beyond the scope of article 15.[156]

[155] Afghanistan Article 15 Judgment, para. 40.
[156] Afghanistan Article 15 Judgment, para. 40.

162. The Pre-Trial Chamber's failure to consider these factors results in an incomplete admissibility assessment for the purposes of article 18 and invalidates the Impugned Decision as a whole.

IV. REQUEST FOR SUSPENSIVE EFFECT

163. The Philippine Government reiterates its request for suspensive effect and provides its reasons herewith in compliance with rule 156(5).[157]

164. The Appeals Chamber is requested to exercise its discretion to suspend the decision authorising the Prosecution to resume its investigations.[158] The Prosecution's activities in furtherance of its investigations would lack any legal foundation and encroach on the sovereignty of the Republic of the Philippines. Should the Court proceed in the absence of a jurisdictional basis "its mandate would be adversely affected due to the implications such acts would have for those affected by the Court's operations, in particular suspects, witnesses and victims".[159] Given the broad scope of investigations at this stage, the resumption of the investigation will necessarily have far-reaching and inimical consequences.

165. The resumption of the Prosecution's investigation pending resolution of this appeal would therefore defeat its very purpose and create an irreversible situation that could not be corrected.[160] The suspension of the Prosecution's investigation into the *Situation in the Republic of the Philippines* is therefore warranted pending the expeditious resolution of this appeal.

V. CONCLUSION AND RELIEF SOUGHT

166. The Court's existence is premised on its ability to share the burden in the quest to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community. It can do so with State Parties and non-State Parties alike.

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[157] Notice of Appeal, para. 10. See also ICC-01/11-01/11-387, Decision on the request for suspensive effect and related issues, 18 July 2013, paras. 13 and 14.
[158] ICC-01/04-01/06-1347 OA9/OA10, Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victim's Participation of 18 January 2008, 22 May 2008, para. 10.
[159] ICC-01/18-143, Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', 5 February 2021, para. 84.
[160] ICC-02/05-01/20-134 OA, Decision on request for suspensive effect, 25 August 2020, para. 6.

167. The reality is, the Philippine Government has withdrawn from the Rome Statute and the Court does not have jurisdiction over the situation. However, even with this in mind, the Philippine Government remains committed to the goals of the Court and actively engaged with the Prosecution and the Court in the context of article 18 on this basis.

168. Despite this, and even assuming that the Court had jurisdiction, its efforts were not fully credited and its offer to maintain cooperation was unreasonably cut short.[161]

169. By applying a higher threshold or a greater degree of overlap, the Impugned Decision effectively defeated the purpose of article 18 and its central role within the complementarity regime.[162] This is a regime which epitomises the character of the Court itself and conveys a framework whereby the Court and State work in unison whilst preserving a State's primary right,[163] and indeed responsibility, to investigate and prosecute crimes within the Court's jurisdiction.[164] As advanced above, article 18 was intended to create space for dialogue between a State and the Prosecution as a means to achieve the overall goal of the Court to end impunity,[165] with both the State and Prosecution permitted to request additional information in the context of article 18.[166]

170. The imposition of a higher threshold at this stage however cuts this dialogue off and establishes a rigid requirement which obliges domestic authorities to copy exactly the Prosecution's investigation despite the fact that the contours of Prosecution's

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[161] Article 18(2) Application, fn. 13 with reference to PHL-OTP-0008-1222 (GovPH Letter of 31.03.2022), "[f]inally, the Philippine Government expresses its willingness to continue this dialogue with your Office and the International Criminal Court, including furnishing the same with clarificatory information regarding submitted documents, if required".

[162] ICC-02/17-165, Decision setting the procedure pursuant to rule 55(1) of the Rules of Procedure and Evidence following the Prosecutor's 'Request to authorise resumption of investigation under article 18(2) of the Statute', 8 October 2021, para. 16.

[163] ICC-01/09-01/11-76, Decision under Regulation 24(5) of the Regulations of the Court on Submitted on Behalf of the Government of Kenya the Motion of Kenya, 2 May 2011, para. 15.

[164] Nsereko/Ventura, in: Ambos, Rome Statute of the ICC, 4th ed. 2022, Art 18 mn. 10 - with reference to the purpose of article 18, "it underscores the primary responsibility and right of State Parties – and indeed all States – to investigate and prosecute crimes within the Court's jurisdiction. As members of the family of nations they have a duty to repress those crimes by investigating and prosecuting their perpetrators […]".

[165] Afghanistan Article 18(2) Decision, para. 16. See also ICC-01/09-01/11-336 OA, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" - Dissenting Opinion of Judge Anita Ušacka, 20 September 2011, para. 19, "[t]his means that both the Court and States strive to achieve the goals of the Statute, as reflected in its Preamble, especially that of putting an "end to impunity for the perpetrators" of "the most serious crimes of concern to the international community as 'a whole'. This also means that there must be, to the extent possible, close cooperation and communication between the Court, especially the Office of the Prosecutor, and the State in question" and cites therein.

[166] See rule 52(2) and rule 53.

investigation are yet to be formalised.[167] Most concerning, it also places the Court in a position which judges national systems and seeks to scrutinize substantive and procedural processes of a State at a very early stage in the investigation.[168]

171. This situation disadvantages both the Court and States alike and regrettably was applied in practice in the Impugned Decision.

172. For the foregoing reasons, the Philippine Government respectfully requests that the Appeals Chamber:

i. **GRANT** suspensive effect pending resolution of this appeal,

ii. **REVERSE** the "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", and

iii. **DETERMINE** that the Prosecution is not authorised to resume its investigations in the Situation in the Republic of the Philippines,

RESPECTFULLY SUBMITTED,

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Henry S. Angeles

[167] *Supra.*, fn. 116.
[168] Holmes, 'The Principle of Complementarity' in Lee (ed) The International Criminal Court – The Making of the Rome Statute, 1999, p. 49 "[m]any delegations were sensitive to the potential for the Court to function as a kind of court of appeal, passing judgments on the decisions and proceedings of national judicial systems".

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Dated this 13th of March 2023
At The Hague, The Netherlands