

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/21 OA  
Date: 11 April 2023

**THE APPEALS CHAMBER**

**Before:** Judge Marc Perrin de Brichambaut  
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**

**Request for Leave to Reply**

**Source:** The Republic of the Philippines

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

**The Office of the Prosecutor**

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**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

The Republic of the Philippines

Ms Sarah Bafadhel

**Amicus Curiae**

**REGISTRY**

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**Registrar**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

1. Pursuant to regulation 24(5) of the Regulations of the Court, the Government of the Republic of the Philippines (Philippine Government) seeks leave to file a brief reply to the Prosecution's Response.<sup>1</sup>
2. The Philippine Government has identified five discrete issues which would warrant a reply as they either concern new issues which could not have been reasonably anticipated by the Philippine Government, and/or require a limited reply which is necessary for the adjudication of the appeal.<sup>2</sup> These issues are:
  - a. The Prosecution's preliminary examination cannot be the trigger for article 127(2) as claimed in the Response.<sup>3</sup> This procedure has no judicial oversight and is nothing more than a decision made in the Prosecution's collective mind. It cannot create binding statutory obligations under article 127(2) (Issue 1).
  - b. The correct allocation of the burden of proof is a requisite component in respect of article 18(2) applications and is necessary to determine the validity of the Prosecution's claim that the deferral process must end. It is not merely a 'technicality' as advanced by the Prosecution,<sup>4</sup> and the Pre-Trial Chamber did make a positive determination as to the bearer of the burden of proof (albeit incorrectly) (Issue 2).
  - c. The Philippine Government did not raise "novel arguments concerning domestic processes" for the first time on appeal.<sup>5</sup> The example provided by the Prosecution with respect to the progression of cases from the PNP-IAS onwards was set out in the deferral material,<sup>6</sup> and the Philippine Government's Observations.<sup>7</sup> Similarly, the Philippine Government had previously expressly stated that its investigation of law enforcement officials was also a means to identify leads in relation to the role of law enforcement in killings conducted outside of police operations".<sup>8</sup> The Prosecution's overall "understanding" of domestic processes is emblematic of its unwillingness to properly assess the deferral material (Issue 3).

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<sup>1</sup> ICC-01/21-68, Prosecution's response to the Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-65 OA), 4 April 2023 (Response).

<sup>2</sup> ICC-01/17-206 OA5, Decision on the Prosecutor's request for leave to reply, 23 December 2022, paras 7-8 and cites therein.

<sup>3</sup> Response, paras 34-35 and footnotes therein.

<sup>4</sup> Response, paras 58 and 75.

<sup>5</sup> Response, para. 122.

<sup>6</sup> 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'). This is also set out in ICC-01/21-65 OA, Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation, 13 March 2023 (Appeal Brief), fn. 98.

<sup>7</sup> ICC-01/21-51, Philippine Government's Observation on the Office of the Prosecutor's Request, 8 September 2022 ("Article 18(2) Observations"), para. 85. See also Appeal Brief, fns 99-100.

<sup>8</sup> Article 18(2) Observations, Annex O, p. 7.

- d. The Afghanistan Article 15(4) Appeal Judgment did nullify the application of the two-step assessment of article 17 in the context of article 18 proceedings.<sup>9</sup> The Appeals Chamber expressly noted that there was to be no judicial scrutiny in respect of the Prosecution's admissibility assessment in the article 15 context,<sup>10</sup> as this could be conducted pursuant to article 18.<sup>11</sup> The two-step test cannot be imported into the article 18 procedure and override rule 55(2) (Issue 4).
  - e. The Prosecution's reading of article 19(2)(b) is illogical and does not exclude the gravity component from an article 18(2) assessment.<sup>12</sup> If the Prosecution were correct, this would essentially mean that whilst both an accused and a referral State could both challenge gravity in accordance with articles 19(2)(a) and 19(2)(c), a State Party could not under article 19(2)(b). There is no reasonable explanation for this divergence and the Prosecution itself assesses complementarity and gravity at the preliminary examination stage, noting that "it must be satisfied as to admissibility on both aspects before proceedings (emphasis added)" (Issue 5, collectively Five Issues).<sup>13</sup>
3. Throughout these proceedings, the Philippine Government has not been afforded the same opportunities made available to other States at either the article 15 or article 18 stage.<sup>14</sup> As a result, the material and submissions it has provided have often been overlooked or misrepresented despite the fact that this litigation goes towards preserving its sovereignty rights. The issues identified would provide necessary clarification of the legal and factual arguments put forward by the Prosecution and would allow for the proper adjudication of each of the four grounds of appeal.

<sup>9</sup> Response, para. 152 in reference to ICC-01/17-138 OA4, 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(4) Appeal Judgment).

<sup>10</sup> Afghanistan Article 15(4) Appeal Judgment, para. 39 "the Prosecutor is not required to present evidence to support her request and is not required to present information regarding her assessment of complementarity with respect to the cases or potential cases".

<sup>11</sup> Afghanistan Article 15(4) Appeal Judgment, para. 42.

<sup>12</sup> Response, para. 159.

<sup>13</sup> Policy Paper on Preliminary Examinations, 1 November 2013, para. 42.

<sup>14</sup> The article 15 procedure was conducted entirely *ex parte* and the opportunity to file any leave to reply during the article 18 procedure was foreclosed see e.g. ICC-01/21-47, Order inviting observations and victims' views and concerns, 14 July 2022, para. 13 ("[h]owever, the Chamber does not require a reply to any observations by the Philippines to the Prosecutor's submissions on the applicable legal framework under article 18(2) of the Statute") and para. 16 ("[t]he Chamber does not deem it necessary to hold a hearing in addition to receiving further written observations from the Philippines, any reply from the Prosecutor, and the views and concerns of the victims"). Compare this to recent examples concerning: (i) *Situation in the Bolivarian Republic of Venezuela I* e.g. ICC-02/18-37, Decision on Venezuela's request for leave to reply, 3 April 2023 (granting Venezuela's request for leave to reply during article 18 procedure); and (ii) *Situation in the Islamic Republic of Afghanistan* e.g. ICC-02/17-121 OA OA2 OA3 OA4, Decision on request for extension of time, 26 November 2019 (allowing Afghanistan to provide written and oral submissions during the appeal of article 15 procedure).

4. The Philippine Government proposes to file a focused reply at a date to be determined by the Appeals Chamber.<sup>15</sup>
5. For the foregoing reasons, the Philippine Government respectfully requests the Appeals Chamber to grant the request for leave to reply in respect of the Five Issues.

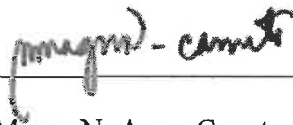
**RESPECTFULLY SUBMITTED,**



Menardo I. Guevarra



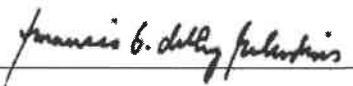
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**Counsel for the Republic of the Philippines**

Dated this 11<sup>th</sup> of April 2023  
At The Hague, The Netherlands

<sup>15</sup> In this regard, the Philippine Government notes that the observations of the OPCV are due to be filed on 18 April 2023 and that this is of course the very first time that the OPCV will have intervened in these proceedings and that there may therefore be issues raised which could not have reasonably been anticipated by the Philippine Government (see ICC-01/21-66, Decision on requests for victims' involvement and access to filings, 21 March 2023). Whilst at this juncture, it is premature for the Philippine Government to indicate whether it intends to address any points raised by the OPCV, the Philippine Government proposes that it may be efficient for it to make a consolidated reply should this be necessary.