



Original: English

No.: ICC-01/21  
Date: 14 April 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**

**Prosecution's Response to the Philippines Government's "Request for Leave to Reply" (ICC-01/21-69 OA)**

**Source: Office of the Prosecutor**

**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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The Republic of the Philippines

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**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations  
Section****Other**

## Submissions

1. On 13 March 2023, the Government of the Philippines appealed Pre-Trial Chamber I’s decision authorising the Prosecution to resume its investigation in this situation,<sup>1</sup> to which the Prosecution responded on 4 April 2023.<sup>2</sup>

2. On 11 April 2023, pursuant to regulation 24(5) of the Regulations of the Court, the Philippines sought leave from the Appeals Chamber to reply to the Prosecution’s Response with respect to five issues.<sup>3</sup> The Philippines proposes a “focused reply” at a date to be determined by the Appeals Chamber which could also address possible issues raised by the OPCV in its forthcoming observations of 18 April 2023.<sup>4</sup>

3. The Prosecution observes that leave to reply has generally been granted to only address new issues that could not reasonably have been anticipated, or that the Chamber considered otherwise beneficial for the adjudication of the matter before it.<sup>5</sup> A reply should not be used to strengthen arguments previously advanced.<sup>6</sup>

4. The Prosecution respectfully notes that the five issues identified in the Request for Leave to Reply are not new and that the Philippines could reasonably have anticipated them. In particular:

- Issue 1: whether “[t]he Prosecution’s preliminary examination cannot be the trigger for article 127(2)”.<sup>7</sup> The Philippines raised this issue in its first ground of Appeal,<sup>8</sup> to which the Prosecution responded.<sup>9</sup> Accordingly, Issue 1 is not a new issue.
- Issue 2: whether “[t]he correct allocation of the burden of proof is a requisite component of article 18(2) applications and is necessary to determine the validity of the Prosecution’s claim that the deferral process must end”.<sup>10</sup> The Philippines addressed the allocation of the burden of proof under article 18(2) in its second ground of Appeal,<sup>11</sup> to which the Prosecution responded consistently with its position before the

<sup>1</sup> [ICC-01/21-65](#) OA (“Appeal”); [ICC-01/21-56-Red](#) (“Decision”).

<sup>2</sup> [ICC-01/21-68](#) OA (“Prosecution Response” or “Prosecution Response to Appeal”).

<sup>3</sup> [ICC-01/21-69](#) OA (“Request for Leave to Reply”).

<sup>4</sup> [Request for Leave to Reply](#), para. 4, fn. 15.

<sup>5</sup> See e.g. [ICC-01/05-01/08-3165-Red](#), para. 5; [ICC-02/18-37](#), paras. 11-12; [ICC-02/11-01/15-284](#), para. 11; see also [ICC-01/05-01/13-893](#), para. 10; [ICC-02/04-01/05-462](#), para. 8.

<sup>6</sup> [ICC-01/04-02/12-296-tENG](#), para. 7.

<sup>7</sup> [Request for Leave to Reply](#), para. 2(a), referring to [Prosecution Response](#) paras. 34-35.

<sup>8</sup> [Appeal](#), paras. 50-59.

<sup>9</sup> [Prosecution Response](#), paras. 30-35.

<sup>10</sup> [Request for Leave to Reply](#), para. 2(b), referring to [Prosecution Response](#) paras. 58, 75.

<sup>11</sup> [Appeal](#), paras. 63-75.

Pre-Trial Chamber, namely, by arguing that the State requesting the deferral bears the burden of proof under article 18(2).<sup>12</sup> Accordingly, Issue 2 is not a new issue.

- Issue 3: whether “[t]he Philippine Government did [or did] not raise ‘novel arguments concerning domestic processes’ for the first time on appeal”.<sup>13</sup> The Philippines could have reasonably anticipated Issue 3. Moreover, to the extent that the Philippines and the Prosecution disagree, the Appeals Chamber has all the information before it to decide.
- Issue 4: whether “[t]he 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>14</sup> The Prosecution had argued in its Article 18(2) Request that the *Afghanistan* Appeal Judgment did not question the manner in which pre-trial chambers assessed complementarity in the article 15(4) decisions; instead, the Appeals Chamber found that pre-trial chambers need not rule on admissibility (or interests of justice) in the article 15(4) decisions.<sup>15</sup> Issue 4 is thus not new and the Philippines could have reasonably anticipated that the Prosecution would repeat this argument in response to the Philippines’ challenge to the two-step assessment.<sup>16</sup>
- Issue 5: whether “[t]he Prosecution’s reading of article 19(2)(b) is illogical and does not exclude the gravity component from an article 18(2) assessment”.<sup>17</sup> The Prosecution made the same remark in response to the Philippines’ observations regarding gravity before the Pre-Trial Chamber.<sup>18</sup> Issue 5 is thus not new and the Philippines could have reasonably anticipated that the Prosecution would repeat this argument in response to the Philippine’s Appeal raising the very same issue.<sup>19</sup>

5. In sum, the Prosecution notes that none of the five issues raised are new and that the Philippines could have reasonably anticipated them. However, noting that this is the first time that the procedure under article 18 is assessed on appeal, the Prosecution defers to the Appeals Chamber’s discretion under regulation 24(5) to grant the Request for Leave to Reply so that all

<sup>12</sup> [Prosecution Response](#), paras. 41-73 and [ICC-01/21-46](#) (“Prosecution Article 18(2) Request”), paras. 35-40.

<sup>13</sup> [Request for Leave to Reply](#), para. 2(c), referring to [Prosecution Response](#), para. 122.

<sup>14</sup> [Request for Leave to Reply](#), para. 2(d), referring to [Prosecution Response](#), para. 152.

<sup>15</sup> [Prosecution Article 18\(2\) Request](#), fn. 80 (noting that: “[a]lthough the Appeals Chamber has since clarified that this assessment is not required by article 15(4), and that such matters should be left to any proceedings under article 18, it did not question the manner in which Chambers have conducted the assessments. The Appeals Chamber only opined on the procedural stage in relation to when this assessment should be undertaken by the Chamber”); [Prosecution Response](#), para. 90 and fn. 148.

<sup>16</sup> See [Appeal](#), paras. 145-147; [Prosecution Response](#), para. 152.

<sup>17</sup> [Request for Leave to Reply](#), para. 2(e), referring to [Prosecution Response](#), para. 159.

<sup>18</sup> ICC-01/21-54-Red (“Prosecution’s Response to the Philippines’ Observations”), para. 11 in response to [ICC-01/21-51](#) (“The Philippines’ Observations”), paras. 2-6, 38-45.

<sup>19</sup> [Appeal](#), paras. 154-161.

relevant and necessary issues are adequately canvassed for the proper adjudication of the Appeal.

A handwritten signature in black ink, consisting of a stylized initial 'K' followed by a horizontal line and a small dot.

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**Karim A.A. Khan KC, Prosecutor**

Dated this 14<sup>th</sup> day of April, 2023  
At The Hague, The Netherlands