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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

Philippine Government's Reply to "Prosecution's response to the 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. In accordance with the Appeals Chamber's Decision,[1] the Philippine Government hereby submits this reply in relation to the following two issues: (i) whether the Prosecutor's preliminary examination can serve as the trigger for article 127(2) of the Statute and (ii) whether the Appeals Chamber, in its "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan", nullified the application of the two-step assessment of article 17 of the Statute, in the context of article 18 proceedings.

II. SUBMISSIONS

a) The Prosecutor's preliminary examination cannot serve as the trigger for article 127(2)

2. In its Response, the Prosecution asserts that it "is very much part of the Court including for the purpose of article 127(2)" as it: (a) is the organ of the Court to conduct the preliminary examination, (b) devotes resources to the preliminary examination and, (c) may involve other organs of the Court during its examination.[2]

3. The Prosecution's depiction of the preliminary examination overstates the significance of a choice to contemplate an investigation whilst also ignoring the fact that it is a non-transparent process plainly removed from any judicial reach. The manner in which the preliminary examination is now utilised by the Prosecution could not have been intended by the drafters of the Rome Statute to impose perpetual obligations on a withdrawing State for the purposes of article 127(2).

i. The Prosecution ascribes meaning to the 'opening' of a preliminary examination not grounded in the Rome Statute

4. At paragraph 33 of its Response, the Prosecution submits that "[i]t is also accurate that the preliminary examination was a "matter under consideration by the Court prior to the date on which the withdrawal became effective" since it was opened on 8 February

[1] ICC-01/21-72 OA, Decision on the Republic of the Philippines' request for leave to reply to the "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)", 2 May 2023.
[2] 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").

2018". Although it places significance on the timing of the so-called 'opening' of the preliminary examination for the purposes of article 127(2), the Prosecution offers no further detail on the circumstances, reasons or indeed process involved in the 'opening' of a preliminary examination. This information is vital in this context whereby the mere 'opening' of a preliminary examination is being proposed as a means to indefinitely infringe upon the sovereign rights of a State.

5. The terminology employed by the Prosecution in relation to the 'opening' of a preliminary examination is entirely constructed by the Prosecution. More accurately, the terms 'opening' and/or 'commencement' are strictly applied to formal investigations under the Rome Statute.[3] The adoption of similar terminology between the 'opening' of a preliminary examination and the opening of an investigation does not however confer any significance or procedural status to the former.

6. In fact, as noted in the final report of the Independent Expert Review,

> [t]he initial selection of situation occurs before the opening of a [preliminary examination]. This stage of proceedings, referred to by the OTP as 'PE Phase 1', is not mentioned in the OTP legal framework. It is thus entirely governed by the discretion and approach of the Prosecutor.[4]

7. In this regard, according to internal documents created by the Prosecution, 'Phase 1' of a preliminary examination entails an initial assessment to distinguish between communications relating to: (a) matters which are manifestly outside the jurisdiction of the Court, (b) a situation already under preliminary examination, investigation or forming the basis of a prosecution, and (c) matters which do not fall within (a) and (b) and would therefore warrant further examination in accordance with rule 48.[5]

8. Even within the Prosecution's description, the initial assessment conducted in Phase 1 is little more than a management tool to allow the Prosecution to electronically register communications,[6] and process the volume of information received in order to filter out the information on crimes that manifestly fall outside the jurisdiction of the Court and

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[3] E.g. Articles 15(4), 15*bis* (8). See also Pineda, Deterrence or Withdrawals? Consequences of Publicising Preliminary Examination Activities in Bergsmo and Stahn (eds) Quality Control in Preliminary Examinations: Volume 2, 2018 ("Deterrence or Withdrawals?"), p. 343.

[4] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020 ("Independent Expert Review Final Report"), para. 636.

[5] OTP, Policy Paper on Preliminary Examinations, 1 November 2013 ("OTP Policy Paper"), para. 78. See also regulation 27 of the OTP Regulations.

[6] Khojasteh, The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities, in Bergsmo and Stahn (eds) Quality Control in Preliminary Examinations: Volume 1, 2018 ("The Pre-Preliminary Examination Stage"), p. 229.

identify those that 'appear' to fall within the jurisdiction of the Court (i.e. communications classified as warranting further analysis).[7]

9. This is further reflected by the fact that Phase 1, including the identification assessment of information which 'appears' to fall within the jurisdiction of the Court, is conducted by a small team of analysts employed within a sub-section of the JCCD,[8] and exclusively based on a desk review of open-source material.[9] This is not a rigorous activity, with one Prosecution analyst noting that "[a]s the applicable standard at Phase 1 is lower than that used during a preliminary examination, the depth of the research and extent of the information collected by the Office at this stage does not necessarily need to be extensive".[10]

10. In accordance with the Prosecution's internal documents, it is on the basis of this limited exercise within Phase 1 that the Prosecutor is tasked with deciding whether or not to 'open' a preliminary examination. This self-styled decision is entirely discretionary,[11] not subject to any external control,[12] and conducted in the absence of any transparent criteria given that this is not a full assessment of the factors within article 53(1)(a)-(c) which only takes place after the 'opening' of the preliminary examination.[13] Indeed, as described by a Prosecution analyst, it is for this reason that "in general, the Office's policy is to initiate a preliminary examination, and thus proceed to Phase 2, when it 'appears' that crimes within the Court's jurisdiction have been committed".[14]

11. The decision to open a preliminary examination is therefore no more than a transitory step,[15] which is only really given any value by the fact that it is often used as a tool by the Prosecution to advance other policy objectives.[16]

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[7] The Pre-Preliminary Examination Stage, p. 225.
[8] Prior to 2020, this sub-section which was entitled Situation Analysis Section was exclusively composed of analysts. It was subsequently re-named the Preliminary Examination Section and re-organised to include a senior lawyer see e.g. Report on Preliminary Examination Activities 2020, 14 December 2020, para. 17.
[9] The Pre-Preliminary Examination Stage, p. 235.
[10] *Ibid.*
[11] Independent Expert Review Final Report, para. 636. See also The Pre-Preliminary Examination Stage, p. 238.
[12] The Pre-Preliminary Examination Stage, p. 249.
[13] OTP Policy Paper, para. 72.
[14] The Pre-Preliminary Examination Stage, p. 239. See also OTP Policy Paper, para. 80.
[15] Deterrence or Withdrawals?, p. 330.
[16] Lubin, Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations in Bergsmo and Stahn (eds) Quality Control in Preliminary Examinations: Volume 2, 2018 ("Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations"), p. 102. There is also some suggestion that links the announcement of the 'opening' of a preliminary examination with the budgetary needs of the Office of the Prosecutor see e.g. Deterrence or Withdrawals?, p. 393.

12. In this regard, it is noted that during the Court's lifespan thus far, the Prosecution has increasingly used preliminary examinations "for purposes other than the determination of whether to initiate an investigation".[17] This includes for example "(i) to showcase the criminal nature of human rights violations, (ii) to incentivize domestic investigations or prosecutions, (iii) to demonstrate that the ICC remains vigilant despite domestic action, or (iv) to address State inaction in relation to atrocities that fall within ICC jurisdiction".[18] This is consistent with the three policy objectives advanced by the Prosecution in its Policy Paper (namely: (a) transparency, (b) ending impunity through positive complementarity, and (c) prevention),[19] and the Prosecution's emphasis of the fact that "[p]reliminary examinations can also help deter actual or would-be perpetrators of crimes through the threat of international prosecutions".[20] It is also reflected by the protracted length of preliminary examination with one commentator emphasising the fact that:

> [i]n essence, the Policy Paper reaffirms the view that the preliminary examination stage, from the perspective of the OTP, is not centred on the prompt conclusion of the examination as to whether a full investigation should be opened. The OTP has grown to realize that it is in fact most effective when it positions situations in the preliminary examination's figurative parking lot. Once placed there, the OTP is free to actively monitor ongoing political developments, relying on the "shadow of the Court", and the threat of an investigation.[21]

13. Noting that there is no obligation for the Prosecution to announce the 'opening' of a preliminary examination,[22] the announcement of its intention to do so is accurately

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[17] Independent Expert Review Final Report, para. 699.
[18] Stahn et al., On the Magic, Mystery and Mayhem of Preliminary Examinations in Bergsmo and Stahn (eds) Quality Control in Preliminary Examinations: Volume 1, 2018, p.8. See also Grotius Center for International Legal Studies, Report: Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices – Part 1, 26 October 2015, para. 5 – "*[s]everal participants argued that PEs have a certain intrinsic value that goes beyond investigations. The point was made that the OTP may have more leverage over States during PEs than during investigation, due to the scope of choice/discretion involved and the unpredictability of the outcome. OTP action might have most effects on actors on the ground at this stage, since unlike in the context of arrest warrants, the Office was not yet 'locked in'. It was argued that in situations where the context is right, PEs could be used to facilitate choices in relation to peace and justice. PEs could be used to facilitate a number of goals: prevention of atrocity crimes, shape the agenda of peace negotiations, or serve as catalyst for complementarity and/or transitional justice. PEs could also have a certain deterrent effect due to their element of surprise, their 'watchdog function' (i.e. the fact of 'being watched'), and the structural relationship between the OTP and the state concerned (i.e. monitoring, putting pressure, providing reward for behaviour)*".
[19] OTP Policy Paper, section vi.
[20] OTP, Strategic Plan 2016 – 2018, 6 July 2015, para. 54. See further OTP, Prosecutorial Strategy (2009 - 2012), 1 February 2010, para. 39 – "*[t]he Office will, inter alia [...] b) make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed; c) make public the commencement of a preliminary examination at the earliest possible stage through press releases and public statements*".
[21] Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations, p. 103.
[22] Regulations 28(1) and (2) of the OTP Regulations.

characterised as a "performative speech",[23] which is issued as a warning shot as and when the Prosecution deems it appropriate or beneficial to advance its own internal policies.

ii. The drafters of the Rome Statute could not have intended that a preliminary examination would serve as a trigger for article 127(2)

14. The term 'preliminary examination' is only indirectly introduced in the Rome Statute under article 15(6) which refers to the procedural obligations of the Prosecutor when exercising his/her *proprio motu* powers to review a potential situation.[24] The foundation of preliminary examinations has therefore "been mainly determined by non-binding instruments" created by the Prosecution and which have come "out of a magic box".[25] This is compounded by the fact that the Prosecution's assessment and objectives for preliminary examinations have been subject to change,[26] and continue to shift with the appointment of each Prosecutor in office.[27] This is evidently not a process which was, or even could have been, fully considered during the Rome Statute negotiations in the context of article 127(2) or otherwise.[28]

15. There are however several compelling indicators which demonstrate that it was never the intention of the drafters to include preliminary examinations as a means to indefinitely restrict the sovereign rights of a withdrawing State.

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[23] On the Magic, Mystery and Mayhem of Preliminary Examinations, p. 5.
[24] See also article 42(1) which sets out the mandate of the Office of the Prosecutor and refers to its responsibility to examine referrals and any substantiated information on crimes within the jurisdiction of the Court.
[25] On the Magic, Mystery and Mayhem of Preliminary Examinations, p. 10.
[26] For example, the Prosecution initially conducted three phases of analysis upon receipt of a communication see OTP, Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, 1 September 2003. The four phases were subsequently introduced in 2013 see OTP Policy Paper.
[27] For example, all three ICC Prosecutors have adopted different approaches with regard to the degree of transparency connected with preliminary examinations see e.g. Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations, p. 99 – "*early-term Ocampo laid the foundations for prosecutorial decision-making at the ICC, by introducing the 'black box' [...] and providing the general public with a glimpse of the box's contours. It was left for Ocampo at the end of his tenure, and more pressingly for his successor Bensouda, to open this black box, inviting the public to look inside*". Of note, the OTP's annual reporting on its preliminary examination activities has stopped following the appointment of the current Prosecutor in 2021 *contra* Response, para. 35.
[28] Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations, p. 84 – "*[i]t is obvious that the drafters of the Rome Statute "did not anticipate the significance that is now attached to Preliminary Examinations*" citing Schabas, The International Criminal Court: A Commentary on the Rome Statute (OUP 2nd ed.), 2016, p. 45. See also Stahn, Damned If You Do, Damned If You Don't: Challenges and Critiques of ICC Preliminary Examination, 3 April 2017, p. 5 – "*[w]hen the Rome Statute was drafted, hardly anyone contemplated how important preliminary examinations would become in the operation of the ICC*".

16. First, in order to determine whether to initiate an investigation, the Prosecution must only determine whether there is a "reasonable basis" to proceed.[29] On the scale of standard of proofs - this is the lowest threshold to be met under the Rome Statute, falling lower than the standard provided under article 58 of the Statute.[30] Chambers have consistently held that it only requires a "sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'",[31] and that the information provided "certainly need not point towards only one conclusion".[32]

17. The fact that the drafters of the Rome Statute provided such a low threshold is a clear indication that it considered an investigation could be initiated within a year if required i.e., within the timeframe set out in article 127(1),[33] thereby excluding any need to use preliminary examinations as a trigger under article 127(2).

18. Second, and relatedly, the fact that drafters of the Rome Statute excluded preliminary examinations from the scope of the general obligation to cooperate under article 86 demonstrates that preliminary examinations were reasonably assumed to be a "far weaker process with a much shorter leash".[34] As set out above, the popularity and protracted nature of preliminary examinations are only as a result of the fact that it is a convenient discretionary tool for the Prosecution to monitor or threaten the prosecution of a situation in a manner which is "less legalized than investigations, pre-trial or trial proceedings".[35]

19. Third, the drafters use of the term 'Court' in the Rome Statute does not automatically include activities undertaken by the Prosecution despite the fact that it is an organ of the Court and there are numerous examples whereby the Rome Statute employs the term "in a more restrictive fashion – to refer specifically to the judiciary, excluding the

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[29] Articles 15(3) and 53(1).
[30] ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 34.
[31] ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, paras. 35.
[32] ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para. 34.
[33] Further support is found in the Prosecution's 2016 Preliminary Examination Report whereby, following the withdrawal of Burundi from the Rome Statute, the Prosecution stated that "[a]ccording to its legal assessment, the Office could also initiate investigations at least during this one-year period" i.e. in accordance with article 127(1) see OTP, Report on Preliminary Examination Activities (2016),14 November 2016, para. 60.
[34] Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations, p. 84.
[35] On the Magic, Mystery and Mayhem of Preliminary Examinations, p. 5.

OTP".[36] Moreover, the language "under consideration of the Court" as referenced in article 127(2) is mirrored by the drafters in article 95 which plainly refers to the judiciary and not the Prosecution.[37]

20. Fourth, there is no logical explanation as to why negotiating parties would have agreed to eschew sovereign rights in favour of a process which is "clouded in mystery",[38] is not properly governed or regulated within the Rome Statute, and for which the State has no proper recourse to seek judicial intervention or control. This is most effectively demonstrated in the *Situation in the Central African Republic* and more recently the *Situation in the Bolivarian Republic of Venezuela I*,[39] whereby the respective States had no effective judicial recourse to seek a review of the Prosecution's decision to open a preliminary examination, seek a judicial order for the closure of a protracted preliminary examination, seek a status update, or obtain an order for the disclosure of information or engagement from the Prosecution.

21. Contrary to the Prosecution's assertions, the preliminary examination process itself does not have "consequences" for the Court *per se*.[40] In the context of *proprio motu* investigations which are not the subject of a referral, such consequences arise only upon the Prosecution's request to initiate an investigation before the Court in accordance with article 15(3).[41] The examples cited by the Prosecution are either purely administrative

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[36] Heller, A Dissenting Opinion on the ICC and Burundi, 29 October 2017. See also, *inter alia*, articles 19(3), 19(4), 19(7), 19(8), 19(9), 19(10), 20(2), 21(2), 23, 38(3)(a), 39, 60(4), 65(5), 66(3), 67(1)(d), 67(2), 68(2), 68(3), 68(4), 69(2), 69(3), 69(4), 69(6), 69(8), 70(3), 71(1), 72(6), 72(7), 74(2), 75(1), 75(2), 75(3), 75(4), 77(1), 77(2), 78(1), 78(2), 78(3), 79(2), 81(2)(b), 81(2)(c), 85(3), 87(7), 90(2)(a), 90(2)(b), 90(3), 90(4), 90(5), 90(8), 93(5), 93(6), 93(10)(b)(i)(b), 95, 103(1)(a), 103(1)(b), 103(1)(c), 103(2)(a), 103(2)(b), 103(3), 104(1), 104(2), 105(2), 106(1), 108(1), 108(2), 108(3), 109(1), 109(2), 109(3), 110(1), 110(2), 110(3), 110(4)(a), 110(4)(b), 110(5) and 119(1).

[37] 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*."

[38] On the Magic, Mystery and Mayhem of Preliminary Examinations, p. 13.

[39] ICC-01/05-7, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006 ("CAR OTP Report") and 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 ("Venezuela Decision").

[40] *Contra*, Response, para. 34.

[41] See also 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"), paras 30 and 32 – "*under the procedure set out in article 15 of the Statute, the pre-trial chamber has a role in respect of the Prosecutor's exercise of discretionary power only if she determines that there is a basis to initiate an investigation*".

steps which do not give rise to any substantive rights,[42] and/or exist independently of the preliminary examination process.[43] These examples cannot therefore be used in a dispositive manner to curtail a withdrawing State's rights under the terms of the Rome Statute. This is further compounded by the fact that there is no notification obligation and that therefore, a State (as well as the judiciary and ASP [Assembly of States Parties]) may not even be aware of the existence of any preliminary examination.[44] Binding statutory obligations cannot be created in the shadows.

b) The Appeals Chamber has nullified the application of the two-step assessment of article 17 of the Statute, in the context of article 18 proceedings

22. At paragraph 152 of its Response, the Prosecution asserts that the Pre-Trial Chamber correctly endorsed the two-step process in its admissibility assessment in the article 18 context. In doing so, the Prosecution states that the two-step process was "consistently adopted" by other Chambers in determining the admissibility of situations in the article 15 context,[45] and that whilst the Appeals Chamber "has since clarified that this assessment is not required under article 15(4) [...] it did not question the manner in which Chambers have conducted the assessments".[46] This is an oversimplified position which regrettably overlooks the significance of the Appeals Chamber's findings.

23. In the Afghanistan Article 15(4) Appeal Judgment, the Appeals Chamber held that it was "sufficient for the purposes of the article 15 procedure that the Prosecutor considers the admissibility of potential cases in determining whether she should request authorisation for an investigation under article 15(3) of the Statute; there is no basis for the pre-trial chamber to consider that question as well".[47] This finding was rooted in the reality that it would not be feasible for the Chamber to resolve admissibility issues at

[42] Response, fn. 58. The notification of the Presidency of the receipt of a State and/or Security Council referral and the notification of the Presidency of information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber pursuant to regulation 45(1) of the Regulations of the Court are purely administrative processes which do not confer any judicial powers to the assigned chamber pending a decision in accordance with article 53(1). Similarly, see also Venezuela Decision, para. 10 and CAR OTP Report, fn. 8 in relation to corresponding regulation 46 of the Regulations of the Court.
[43] Response, fn. 58. The protection of persons at risk as a result of their engagement with the Court is safeguarded across, and in some cases beyond, the lifespan of active proceedings in accordance with article 68 and is "not confined to the investigation and prosecution stages" see 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, para. 15.
[44] *Supra.*, fn. 23.
[45] Response, para. 152.
[46] Response, fn. 282.
[47] Afghanistan Article 15(4) Appeal Judgment, para. 40.

such an early stage of proceedings given that "in the context of article 15 proceedings, there is no obligation for the Prosecutor to notify States of her intention to seek authorisation for an investigation and the participation of States is not provided for in the applicable procedural framework".[48] The Appeals Chamber found considerable support in the drafting history of the Rome Statute for this position.[49]

24. It was on this basis that the Appeals Chamber determined that "specific procedural mechanisms based on the full participation of relevant parties, participants and States are provided for elsewhere in the legal framework" with reference made to the very existence of article 18 which "allows the pre-trial chamber to consider admissibility at a stage designed specifically for that purpose" as further support of the Appeals Chamber's interpretation of article 15(4).[50]

25. The Afghanistan Article 15(4) Appeal Judgment unequivocally demonstrates that the specific procedural mechanisms in relation to admissibility assessments have been designed for distinct purposes and stages. As such, the procedural approach with regards to admissibility assessments cannot be automatically imported from other procedural contexts by mere virtue of the fact that it has been previously applied by chambers albeit at a distinct stage and for a different purpose.

26. Therefore, whilst the two-step process has a specific contextual purpose in article 19 proceedings,[51] it is evidentially not applicable or available in the context of article 15 proceedings following the Appeal Chamber's findings.

27. For the same reasons, the two-step process as applied in article 19 proceedings is also inapplicable in the context of article 18 proceedings when considering the specific procedural mechanism available at that stage – namely, rule 55 requires the consideration of <u>all</u> factors within article 17. This negates the sequencing of article 17 factors set out in the two-step process. Further support for this position is also found in the drafting of the Rome Statute and Rules of Procedure of Evidence whereby "[i]t was clear from the negotiations that many delegations see article 18 as an integral part of the complementarity regime. For that reason, delegations wished to include clear guidance

[48] Afghanistan Article 15(4) Appeal Judgment, para. 40.
[49] Afghanistan Article 15(4) Appeal Judgment, para. 41.
[50] Afghanistan Article 15(4) Appeal Judgment, para. 42.
[51] *C/f* 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 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, para. 39.

to the Court on the factors on which the preliminary ruling should be based. Article 18, paragraph 3, refers to the unwillingness and inability factors which are included in article 17. However, article 18, paragraph 2, did not specifically allude to the factors to be used by the Pre-Trial Chamber in authorizing an investigation. Rule 55 makes it clear that the factors to be considered are those included in article 17, that is, unwillingness and inability (emphasis added)".[52]

RESPECTFULLY SUBMITTED,

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Dated this 16th of May 2023

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[52] Holmes, Jurisdiction and Admissibility in Lee (ed), The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence, 2001, p. 343.