

INTRODUCTORY NOTE TO SITUATION IN THE REPUBLIC OF THE PHILIPPINES  
(INT’L CRIM. CT. APP. CHAMBER)  
BY PAUL BRADFIELD\*  
[July 18, 2023]

## Introduction

On July 18, 2023, the Appeals Chamber, by a 3–2 majority, rendered its “Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s ‘Authorisation pursuant to article 18(2) of the Statute to resume the investigation.’”<sup>1</sup> The decision upheld the Pre-Trial Chamber’s decision of January 26, 2023, which authorized the Prosecutor to resume investigating crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between November 1, 2011 and March 16, 2019, in the context of a government-led “war on drugs” campaign.

## Background

Following an internal Preliminary Examination, on June 14, 2021, the Prosecutor requested the Pre-Trial Chamber to grant authorization to commence an investigation into the Situation in the Philippines, pursuant to Article 15 of the Statute. The Prosecutor contended that there were reasonable grounds to believe that state actors had committed crimes against humanity, principally the crime of murder, during nationwide anti-drug and law enforcement operations that caused the deaths of thousands of people. On September 15, 2021, the Pre-Trial Chamber authorized the investigation.

However, in November 2021, the Philippines asked the Prosecutor to defer his investigation, pursuant to Article 18 of the Statute, so it may be afforded time to demonstrate that it was, in fact, engaged in domestic investigations regarding the allegations. The Prosecutor acceded to this deferral request and suspended investigations.

In June 2022, the Prosecutor returned to the Pre-Trial Chamber seeking authorization to resume the investigation, as the Philippines had not demonstrated that it was taking tangible, concrete, and progressive investigative steps with a view to conducting criminal proceedings in a way that would sufficiently mirror the Court’s investigation as authorized in the Article 15 decision. Upon the review of the material provided by the Philippines, the Pre-Trial Chamber agreed, issuing a decision authorizing the resumption of the investigation on January 26, 2023. This is the impugned decision that was appealed by the Philippines.

However, a complicating factor in this litigation is that the Philippines’ membership of the Court ended on March 17, 2019—over two years before the Prosecutor’s request was made, thus raising the question of whether the Court could properly exercise jurisdiction over a non-state party. When initially granting the Prosecutor’s Article 15 request, the Pre-Trial Chamber held that the Court retains jurisdiction over crimes committed within the period of Philippines’ membership of the ICC, notwithstanding that authorization to investigate post-dates their effective withdrawal from the Rome Statute treaty. While the issue of jurisdiction was not fully ventilated in submissions before the Pre-Trial Chamber, it would prove to be a point of contention before the Appeals Chamber, and ultimately divided the appellate bench.

## The Appeals Chamber’s Majority Decision

The Philippines raised four separate grounds of appeal.

First, the Philippines submitted that because the Pre-Trial Chamber made a positive finding on jurisdiction in the impugned decision, it was entitled to challenge this finding on appeal, submitting that the Court did not, in fact, have jurisdiction because the Philippines withdrew from the Rome Statute before the investigation was authorized.

A 3–2 majority of the Appeals Chamber disagreed. The majority considered that the true nature of the impugned decision was not one of jurisdiction, but an admissibility assessment made under the complementarity framework

\*Dr. Paul Bradfield is an Irish lawyer who has previously worked in both Prosecution and Defence roles at the International Criminal Court, the International Criminal Tribunals for the former Yugoslavia and Rwanda, and at the Kosovo Specialist Chambers. He teaches International Criminal Procedure at the Irish Centre for Human Rights, University of Galway, Ireland.

contained in Article 17, in circumstances where the Philippines has requested a deferral of the investigation to show domestic activity. This deferral request, the Appeals Chamber held, constituted “implicit acceptance” of the Court’s jurisdiction. That the Pre-Trial Chamber simply restated in the impugned decision that it had jurisdiction did not make it a decision with respect to such.<sup>2</sup> Importantly, because the Philippines did not raise and discuss the effect of its withdrawal from the Statute on the Court’s jurisdiction before the Pre-Trial Chamber, the Appeals Chamber ruled that the issue could not then be properly raised on appeal.<sup>3</sup>

Second, the Philippines argued that the Pre-Trial Chamber “reversed the burden of proof” by placing “the onus” on the Philippines, rather than the Prosecutor, to show that domestic investigations or prosecutions were taking place. The Appeals Chamber rejected this argument, noting that by seeking deferral to demonstrate the existence of domestic investigations pursuant to Article 18(2), the Philippines sought to allege a fact, which must necessarily be supported by evidence. In this sense, the Philippines was obliged to substantiate its assertion regarding domestic investigations.<sup>4</sup>

Third, the Philippines argued that the Pre-Trial Chamber should not have applied the complementarity test applicable to “cases” per Articles 17 and 19, namely whether the state concerned is investigating the “same individuals and substantially the same conduct” that is of investigative interest to the Prosecutor, submitting that the “situation” phase demands a more flexible approach.

However, the Appeals Chamber found no error in the Pre-Trial Chamber’s approach, as the latter correctly assessed whether there was “an advancing process of domestic investigations or prosecutions of the same groups or categories of individuals,” which “sufficiently mirrors the scope of the Prosecutor’s intended investigation.”<sup>5</sup> This is largely “a fact-driven inquiry.” Furthermore, the Pre-Trial Chamber’s detailed review of, and admissibility conclusions in relation to, the supporting material provided by the Philippines, were not the result of “too high a threshold” being applied.<sup>6</sup>

Finally, the Philippines argued that the Pre-Trial Chamber should have assessed the state’s willingness and ability to genuinely carry out investigations, but the Appeals Chamber disagreed, noting that the two-step construction of Article 17 does not strictly require it, since where a finding of inactivity has been made there is no need to then undertake an assessment of ability and willingness.<sup>7</sup>

### **The Minority Dissenting Opinion**

Judge Marc Perrin de Brichambaut and Judge Gocha Lordkipanidze considered admissible the Philippines’ first ground of appeal relating to jurisdiction, and would have granted it on the merits.<sup>8</sup> In stark contrast to the majority, the minority considered that the Pre-Trial Chamber had indeed made a positive finding on jurisdiction and that it “formed the basis” for the impugned decision.<sup>9</sup>

More generally, the Dissent considered that, in line with the principle of *la compétence de la compétence*, the Court is empowered to determine the extent of its own jurisdiction, and should do so at the earliest opportunity.<sup>10</sup> The Dissent opined that it would be counter-productive and a waste of the Court’s resources to allow an investigation to proceed only to later declare that the Court has no jurisdiction.<sup>11</sup>

Crucially, the minority considered that the preconditions to the exercise of the Court’s jurisdiction set forth in Article 12 must exist at the time that jurisdiction is triggered pursuant to Article 13 of the Statute. In other words, the state concerned must be a state party at the time the Pre-Trial Chamber authorizes an investigation pursuant to Article 15.<sup>12</sup> In the view of the minority, if a state party has effectively withdrawn before this point, the Court cannot exercise jurisdiction. To hold otherwise would, the minority opined, permit the Court to trigger jurisdiction “indefinitely.”<sup>13</sup>

As such, the minority would have directed the Pre-Trial Chamber to withdraw its authorization for the Prosecutor’s investigation, and to discontinue all proceedings in the situation.<sup>14</sup>

### **Conclusion**

By procedurally kicking the “jurisdictional can” down the road, the Appeals Chamber has dodged what is an existential question for the Philippines Situation at the ICC. This is the first time the Court has attempted to exercise

jurisdiction where a state party has effectively withdrawn from the Rome Statute. Previously, the Court authorized an investigation in Burundi just before its withdrawal became effective.

The decision prompts numerous questions that the Court will inevitably have to confront, such as issues of legality, the proper construction of treaty interpretation, state consent, whether a departed state party has “ensuing obligations” to cooperate under Article 127, whether the Prosecutor’s Preliminary Examination can be considered “a matter under consideration by the Court” under the same article, thus preserving the ability to trigger jurisdiction, and the ability of former state parties to reassert primary criminal jurisdiction if they choose to do so.

The decision has been met with some skepticism in academic quarters, with Mariam Bezhaniashvili maintaining that it creates legal uncertainty and artificially inflates the scope of the Court’s jurisdiction.<sup>15</sup> However, Manuel Ventura suggests that the Prosecutor could obtain clarity by seeking a definitive ruling on the jurisdictional issue by making a request pursuant to Article 19(3), as done previously in the Situations in Myanmar/Bangladesh and Palestine.<sup>16</sup> Ultimately, the import of the Appeals Chamber’s decision sends the following message to state parties contemplating withdrawal: that ICC jurisdiction will survive your departure and may be triggered at any time thereafter. There is little doubt that this proposition will be stress-tested again in the Philippines Situation, either via an Article 19(3) request or, much later, if and when a renewed jurisdictional challenge is made upon the arrest of a suspect, should that circumstance eventuate.

## ENDNOTES

- |    |  |    |  |
|----|--|----|--|
| 1  | Situation in the Republic of the Philippines, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18(2) of the Statute to resume the investigation”, ICC-01/21-77 (Jul. 5, 2023) (hereinafter, Decision). | 12 | Id. ¶ 26.  |
| 2  | Decision ¶¶ 53–56.   | 13 | Id. ¶ 36.  |
| 3  | Id. ¶ 57.  | 14 | Id. ¶ 37.  |
| 4  | Id. ¶¶ 79–80.  | 15 | Mariam Bezhaniashvili, <i>ICC Appeal Judgment on the Philippines — Keeping the Court’s Post-Withdrawal Jurisdiction on Life Support?</i> OPINIO JURIS (Sep. 28, 2023), <a href="https://opiniojuris.org/2023/09/28/icc-appeal-judgment-on-the-philippines-keeping-the-courts-post-withdrawal-jurisdiction-on-life-support/#:~:text=On%2018%20July%202023%2C%20the,article%2018(2)%20of%20the">https://opiniojuris.org/2023/09/28/icc-appeal-judgment-on-the-philippines-keeping-the-courts-post-withdrawal-jurisdiction-on-life-support/#:~:text=On%2018%20July%202023%2C%20the,article%2018(2)%20of%20the</a>   |
| 5  | Id. ¶ 110.   | 16 | Manuel Ventura, <i>Time for the ICC Office of the Prosecutor to Invoke Article 19(3) of the Rome Statute (1998): The International Criminal Court’s jurisdiction in the Situation in the Philippines</i> , OPINIO JURIS (Jan. 22, 2024), <a href="https://opiniojuris.org/2024/01/22/time-for-the-icc-office-of-the-prosecutor-to-invoke-article-193-of-the-rome-statute-1998-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-philippines">https://opiniojuris.org/2024/01/22/time-for-the-icc-office-of-the-prosecutor-to-invoke-article-193-of-the-rome-statute-1998-the-international-criminal-courts-jurisdiction-in-the-situation-in-the-philippines</a> |
| 6  | Id. ¶ 201.   |    |  |
| 7  | Id. ¶ 223.   |    |  |
| 8  | Situation in the Republic of the Philippines, Dissenting Opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze, ICC-01/21-77-OPI (Jul. 5, 2023) [hereinafter, Dissent]  |    |  |
| 9  | Dissent, ¶ 9.  |    |  |
| 10 | Id. ¶¶ 10–11.  |    |  |
| 11 | Id. ¶ 12.  |    |  |

SITUATION IN THE REPUBLIC OF THE PHILIPPINES (INT’L CRIM. CT. APP. CHAMBER)\*  
[July 18, 2023]

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

**Original: English**

**No. ICC-01/21 OA**

**Date: 18 July 2023**

**THE APPEALS CHAMBER**

**Before:**

**Judge Marc Perrin de Brichambaut,  
Presiding 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**

**Judgment**

**on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18(2) of the Statute to resume the investigation”**

\*This text was reproduced and reformatted from the text available at the International Criminal Court website (visited March 20, 2024), <https://www.icc-cpi.int/court-record/icc-01/21-77>. The dissenting opinion which follows, is available at <https://www.icc-cpi.int/court-record/icc-01/21-77-opi>.

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**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:****The Office of the Prosecutor**

Mr Karim A. A. Khan, Prosecutor

Ms Helen Brady

**States Representatives**

The Republic of the Philippines

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

Ms Ludovica Vetrucchio

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Victims Participation and Reparations Section**

Mr Philipp Ambach

**Other**

Pre-Trial Chamber I

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Republic of the Philippines against the decision of Pre-Trial Chamber I entitled “Authorisation pursuant to article 18(2) of the Statute to resume the investigation” of 26 January 2023 (ICC-01/21-56-Red),

After deliberation,

By majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting,

*Delivers* the following

## J U D G M E N T

The decision of Pre-Trial Chamber I entitled “Authorisation pursuant to article 18(2) of the Statute to resume the investigation” of 26 January 2023 (ICC-01/21-56-Red) is confirmed.

### REASONS

#### I. KEY FINDINGS

1. The burden of providing information relevant to a pre-trial chamber’s determination under article 18(2) of the Statute remains on the State seeking deferral. The State concerned discharges this burden by providing information in support of its initial request for deferral. The Prosecutor’s subsequent duty to communicate that information to the pre-trial chamber does not affect the allocation of the burden of proof, as the information remains that which the State initially provided. Therefore, the fact that it is the Prosecutor who seises a pre-trial chamber with an application under article 18(2) of the Statute does not shift the burden of proof to the Prosecutor. Under article 18(2) of the Statute, a State alleges that it is carrying out or has carried out relevant investigations. It is thus incumbent upon the State to establish the facts supporting this assertion. This is in line with the well-established principle of *onus probandi incumbit actori*.

2. For the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation. The domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor’s intended investigation. A pre-trial chamber’s assessment in this context is a largely fact-driven inquiry.

#### II. INTRODUCTION

3. In this appeal of the Republic of the Philippines (hereinafter: “Philippines”) against Pre-Trial Chamber I’s (hereinafter: “Pre-Trial Chamber”) decision of 26 January 2023, entitled “Authorisation pursuant to article 18(2) of the Statute to resume the investigation” (hereinafter: “Impugned Decision”), the Philippines raises four grounds of appeal. Under the first ground of appeal, the Philippines alleges that the Pre-Trial Chamber erred 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, despite its subsequent withdrawal from the Statute. Under the second ground of appeal, the Philippines alleges that the Pre-Trial Chamber erred in reversing the Prosecutor’s burden of proof in the context of article 18 proceedings. Under the third ground of appeal, the Philippines alleges that the Pre-Trial Chamber committed an error of law in its application of “the legal standard applicable to a case, overstating the degree of overlap required in the article 18 context”, “which invalidated its entire admissibility assessment”. The Philippines also alleges a number of errors in the Pre-Trial Chamber’s findings on specific domestic proceedings and on the degree of overlap with the Court’s investigation. Lastly, under the fourth ground of appeal, the Philippines alleges that the Pre-Trial Chamber’s finding that it was not satisfied that the Philippines is making “a real or genuine effort” to carry out investigations and prosecutions is not based on any actual assessment, and that the Pre-Trial Chamber failed to consider whether the situation is not of sufficient gravity.

4. The Appeals Chamber will address these four grounds of appeal in turn below.<sup>1</sup>



### III. PROCEDURAL HISTORY

#### A. PROCEEDINGS BEFORE PRE-TRIAL CHAMBER I

5. On 24 May 2021, the Prosecutor requested that the Pre-Trial Chamber grant authorisation to commence an investigation into the Situation in the Philippines (hereinafter: “Article 15 Request”).<sup>2</sup>
6. On 15 September 2021, the Pre-Trial Chamber authorised the commencement of the investigation into the Situation in the Philippines (hereinafter: “Philippines Situation”), in relation to “crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the ‘war on drugs’ campaign” (hereinafter: “Article 15 Decision”).<sup>3</sup>
7. On 18 November 2021, the Prosecutor notified the Pre-Trial Chamber that on 10 November 2021 he had received a deferral request from the Philippines, pursuant to article 18(2) of the Statute (hereinafter: “Deferral Request”),<sup>4</sup> and that he had temporarily suspended his investigative activities while he assessed the scope and effect of the request.<sup>5</sup>
8. Between 22 December 2021 and 31 March 2022, the Philippines provided the Prosecutor with various documents in support of the Deferral Request pursuant to the Prosecutor’s request under rule 53 of the Rules of Procedure and Evidence (hereinafter: “Rules”).<sup>6</sup>
9. On 24 June 2022, the Prosecutor requested the Pre-Trial Chamber to authorise the resumption of the investigation into the Philippines Situation, pursuant to article 18(2) of the Statute.<sup>7</sup>
10. On 14 July 2022, the Pre-Trial Chamber issued an order in which it, *inter alia*, invited the Philippines to submit any additional observations arising from the Article 18(2) Request and authorised the Prosecutor to respond to any factual arguments raised in the additional observations.<sup>8</sup>
11. On 8 September 2022, the Philippines filed its observations on the Article 18(2) Request (hereinafter: “Philippines Article 18 Observations”).<sup>9</sup>
12. On 22 September 2022, the Prosecutor filed his response to the Philippines Article 18 Observations.<sup>10</sup>
13. On 26 January 2023, the Pre-Trial Chamber rendered the Impugned Decision, authorising the Prosecutor to resume the investigation into the Philippines Situation, pursuant to article 18(2) of the Statute.<sup>11</sup>
14. On 27 January 2023, the Impugned Decision was notified to the Philippines.

#### B. PROCEEDINGS BEFORE THE APPEALS CHAMBER

15. On 3 February 2023, the Philippines filed its notice of appeal against the Impugned Decision (hereinafter: “Notice of Appeal”).<sup>12</sup> In its notice, the Philippines requested suspensive effect of the implementation of the Impugned Decision, pending the Appeals Chamber’s final resolution of the appeal (hereinafter: “Request for Suspensive Effect”).<sup>13</sup>
16. On 15 February 2023, the Philippines filed an application for an extension of time to file its appeal brief.<sup>14</sup>
17. On 16 February 2023, the Prosecutor filed his response to the Request for Suspensive Effect, requesting that the request be dismissed.<sup>15</sup>
18. On 17 February 2023, the Appeals Chamber granted the Philippines’ request for an extension of the time limit to file its appeal brief to 13 March 2023.<sup>16</sup>
19. On 24 February 2023, the Registry transmitted to the Appeals Chamber a request from a group of victims to present views and concerns in relation to the Philippines’ appeal brief and its request for suspensive effect (hereinafter: “Victims’ Request”).<sup>17</sup>
20. On the same day, the Office of Public Counsel for Victims (hereinafter: “OPCV”) submitted a request to appear before the Appeals Chamber to represent the general interests of victims in relation to the appeal of the Philippines (hereinafter: “OPCV Request”).<sup>18</sup>



21. On 2 March 2023, the Philippines submitted its response to the Victims' Request and the OPCV Request, requesting that both requests be dismissed. The Philippines also requested that it be notified of all documents registered in these proceedings.<sup>19</sup>
22. On 13 March 2023, the Philippines filed its appeal brief (hereinafter: "Appeal Brief").<sup>20</sup>
23. On 21 March 2023, the Appeals Chamber issued a decision in which it, *inter alia*, instructed the Victims Participation and Reparations Section (hereinafter: "VPRS") to collect and transmit to the Appeals Chamber representations from any interested victims and victim groups and submit a report thereon by 22 May 2023. The Appeals Chamber also authorised the OPCV to submit written observations on the Philippines' Appeal Brief in relation to the general interests of victims by 18 April 2023. In the same decision, the Appeals Chamber directed the Registry to notify the Philippines regarding all public and confidential filings in the present appellate proceedings with the exception of any filings classified as confidential *ex parte* excluding the Philippines.<sup>21</sup>
24. On 27 March 2023, the Appeals Chamber rejected the Request for Suspensive Effect.<sup>22</sup>
25. On 4 April 2023, the Prosecutor filed his response to the Philippines' Appeal Brief (hereinafter: "Prosecutor's Response").<sup>23</sup>
26. On 11 April 2023, the Philippines filed a request for leave to reply to the Prosecutor's Response in respect to five issues.<sup>24</sup> The Philippines also requested to file a consolidated reply to the Prosecutor's Response and the forthcoming OPCV observations should this be necessary.<sup>25</sup>
27. On 14 April 2023, the Prosecutor filed his response to the Philippines' Request for Leave to Reply, deferring to the Appeals Chamber's discretion under regulation 24(5) of the Regulations of the Court (hereinafter: "Regulations") to grant the Philippines' request.<sup>26</sup>
28. On 18 April 2023, the OPCV submitted observations on the general interests of the victims in relation to the appeal brought by the Philippines (hereinafter: "OPCV Observations").<sup>27</sup>
29. On 2 May 2023, the Appeals Chamber issued a decision in which it authorised the Philippines to reply with respect to two issues identified in the Request for Leave to Reply.<sup>28</sup> In the same decision, the Appeals Chamber dismissed the Philippines' request to file a consolidated reply to the Prosecutor's Response and the OPCV Observations.<sup>29</sup>
30. On 16 May 2023, the Philippines submitted its reply to the Prosecutor's Response (hereinafter: "Reply to the Prosecutor's Response").<sup>30</sup>
31. On 22 May 2023, the VPRS transmitted to the Appeals Chamber five representations received from victims<sup>31</sup> and a report on victims' representations, pursuant to the Appeals Chamber's directions.<sup>32</sup>

#### IV. PRELIMINARY ISSUE

32. The Appeals Chamber notes that the Appeal Brief is 51 pages long. The Philippines submits that it filed its appeal "in accordance with regulations 38(2)(b) and 64(2) of the Regulations".<sup>33</sup> The Philippines relies on a ruling in which the Appeals Chamber found that regulation 38(2)(c) of the Regulations, setting a 60-page limit for "[c]hallenges to the admissibility or jurisdiction of the Court under article 19, paragraph 2", applies to the related appeal briefs as well.<sup>34</sup>

33. The Appeals Chamber notes that this ruling only applies to appeals against decisions concerning challenges under article 19(2) of the Statute.<sup>35</sup> The Appeals Chamber is nonetheless satisfied that the Appeal Brief does not exceed the applicable page limit. It is appropriate to apply the specific page limit of 60 pages, set in regulation 38(2)(b) of the Regulations for "[t]he application of the Prosecutor for authorisation of the investigation under article 18, paragraph 2". Indeed, the rationale for a specific page limit for an article 18(2) application equally applies to an appeal brief against a pre-trial chamber's decision on such an application. As an article 18(2) application, such an appeal brief will normally set out complex arguments on complementarity and rely on the information regarding domestic proceedings, previously provided by the State seeking a deferral of the Prosecutor's investigation. Therefore, the Appeals Chamber accepts the Appeal Brief as having been filed in accordance with the applicable page limit.

## V. MERITS

### A. STANDARD OF APPELLATE REVIEW

34. In the present appeal, the Philippines alleges errors of law and fact.

35. Regarding errors of law, the Appeals Chamber has previously held that it:

will not defer to the relevant Chamber's 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.<sup>36</sup>

36. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.<sup>37</sup> 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".<sup>38</sup>

37. As to errors of fact,

the Appeals Chamber will determine whether a chamber's factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will not disturb a trial chamber's factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber's conclusion could have reasonably been reached from the evidence on the record.<sup>39</sup>

38. The appellant is obliged to set out all the alleged errors in the appeal brief and "indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision".<sup>40</sup>

39. The above standard of review will guide the analysis of the Appeals Chamber.

### B. GROUND OF APPEAL 1: WHETHER THE COURT CAN EXERCISE ITS JURISDICTION DESPITE THE PHILIPPINES' WITHDRAWAL FROM THE STATUTE

#### 1. *Relevant part of the Impugned Decision*

40. The Pre-Trial Chamber noted that the Philippines, in its Article 18 Observations, made several general challenges to the Court's jurisdiction, submitting that the Court has no jurisdiction over the Philippines Situation pursuant to the principle of non-intervention and sovereign equality as enshrined in the United Nations Charter.<sup>41</sup>

41. The Pre-Trial Chamber stated at paragraph 26 of the Impugned Decision:

The Philippines' arguments that the Court should not investigate in the Philippines due to the principle of non-intervention are misplaced, as they misappreciate the Court's complementarity system. The Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. By ratifying the Statute, the 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.<sup>42</sup>

#### 2. *Summary of the submissions*

42. Under ground of appeal 1, the Philippines submits that the Pre-Trial Chamber erred 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, despite its subsequent withdrawal from the Statute.<sup>43</sup>

43. More specifically, the Philippines submits that the Pre-Trial Chamber, “in order to make an admissibility determination”, “effectively [...] made a positive finding of jurisdiction based on the [Philippines’] status, as a State Party to the Rome Statute, at the time of the alleged crimes”, and in doing so, “considered the effect of the [Philippines’] withdrawal as a State Party to the Rome Statute and entered further findings concerning the [Philippines’] ‘ensuing obligations’, which “are not *obiter* and are located in section B entitled ‘Determination by the Chamber’”.<sup>44</sup> The Philippines argues that it was, therefore, entitled to raise all errors which were inextricably linked to the admissibility ruling in accordance with articles 18(4) and 82(1)(a) of the Statute.<sup>45</sup>

44. Lastly, the Philippines submits that this ground of appeal 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”.<sup>46</sup> In its view the first ground of appeal, therefore, “does not require an assessment as to whether it qualifies as a jurisdictional challenge under article 82(1)(a)”.<sup>47</sup>

45. In his response to the Appeal Brief, the Prosecutor requests that the Appeals Chamber dismiss the first ground of appeal on the basis that (i) in some aspects, it challenges the Article 15 Decision, rather than the Impugned Decision,<sup>48</sup> (ii) the Pre-Trial Chamber’s restatement of jurisdiction was “unrelated to the Chamber’s complementarity findings”, nor was it an essential component of those findings,<sup>49</sup> and (iii) a State may only challenge the Court’s jurisdiction with respect to a case, under article 19(2) of the Statute.<sup>50</sup> Regarding the merits of ground of appeal 1, the Prosecutor submits that the Pre-Trial Chamber correctly found that the Court can exercise its jurisdiction over the Philippines Situation, as the Philippines was a State Party at the time of the alleged crimes.<sup>51</sup>

46. The OPCV, in its Observations, shares the Prosecutor’s view that the Philippines’ arguments lie outside the scope of article 18(2) proceedings.<sup>52</sup> It also submits that the Pre-Trial Chamber did not err in finding that the Court’s jurisdiction is not affected by the Philippines’ withdrawal from the Statute.<sup>53</sup>

47. The Victims argue that the Philippines already had an opportunity to raise the issue of jurisdiction in its Article 18 Observations and that it may not raise in its appeal arguments against the Article 15 Decision.<sup>54</sup> The Victims submit that the Impugned Decision does not contain a ruling on the Court’s jurisdiction.<sup>55</sup>

### 3. *Determination by the Appeals Chamber*

48. Pursuant to article 18(4) of the Statute, “the State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82” of the Statute. According to article 82(1)(a) of the Statute, either party may appeal a decision with respect to jurisdiction or admissibility.

49. The Appeals Chamber recalls that the proceedings on appeal “are corrective in nature, conducted with the purpose of reviewing the proceedings before the [first instance] [c]hamber”.<sup>56</sup> Therefore, “[a]s a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before [that] [c]hamber”.<sup>57</sup>

50. The first ground of the Philippines’ appeal is directed against paragraph 26 of the Impugned Decision, which addresses the “Philippines’ arguments that the Court should not investigate in the Philippines due to the principle of non-intervention” and notes that

[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. [...] These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute.<sup>58</sup>

51. The Appeals Chamber first notes the manner in which the Philippines has raised the alleged errors in the Impugned Decision. In particular, the Philippines submits that the first ground of appeal is raised “in accordance with article 18(4) and article 82(1)(a) of the Statute” as a challenge to errors in the Pre-Trial Chamber’s findings concerning the effect of the Philippines’ withdrawal on the Court’s jurisdiction, which are “inextricably linked” to the Pre-Trial Chamber’s admissibility ruling.<sup>59</sup> At the same time, the Philippines submits that this ground of appeal, which “is not raised as a challenge to the jurisdiction of the Court in the context of article 19 proceedings”, “does not require an assessment as to whether it qualifies as a jurisdictional challenge under article 82(1)(a)”.<sup>60</sup>

52. The Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, finds that the Philippines sets out the alleged errors in a manner that renders unclear both the precise nature of its challenge as well as the legal basis pursuant to which the challenge is made. The Appeals Chamber recalls in this context that, in accordance with regulation 64(1)(d) of the Regulations, an appellant is required to state “[t]he specific provision of the Statute pursuant to which the appeal is filed”.

53. This notwithstanding, the Appeals Chamber understands that, in essence, the Philippines’ submissions under ground of appeal 1 constitute a challenge to the jurisdiction of the Court.

54. At the outset, the Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, observes that the Impugned Decision does not constitute a “decision with respect to jurisdiction” within the meaning of article 82(1)(a) of the Statute. Contrary to the Philippines’ assertions, the findings of the Pre-Trial Chamber, in particular those concerning the Court’s jurisdiction over the present situation and the effects of the Philippines’ withdrawal on the Court’s jurisdiction,<sup>61</sup> are not “a positive finding of jurisdiction” that is “inextricably linked”<sup>62</sup> to its admissibility ruling. Rather, the findings the Pre-Trial Chamber made in the Impugned Decision were meant to clarify the procedure to be followed under article 18(2) of the Statute and, crucially, they simply recalled those the Pre-Trial Chamber had previously made in its decision pursuant to article 15(4) of the Statute.<sup>63</sup> In other words, in the Impugned Decision, the Pre-Trial Chamber simply reaffirmed that it had jurisdiction, as it had established in its Article 15 Decision.<sup>64</sup> In this regard, the Appeals Chamber considers it indeed important to note the context in which the findings of the Pre-Trial Chamber, which the Philippines appears to challenge now, were made.

55. Thus, while the Pre-Trial Chamber addressed the issue of jurisdiction in general terms, the Impugned Decision is not a decision on jurisdiction. Furthermore, while the Philippines raised general submissions on the Court’s jurisdiction in its Article 18 Observations – in relation to the alleged lack of subject-matter jurisdiction of the Court, the lack of gravity of constituent crimes, or a general argument on the sovereignty of States<sup>1</sup> – it failed to raise submissions on the effect of its withdrawal from the Statute on the jurisdiction of the Court. Indeed, the issue of the impact of the Philippines’ withdrawal from the Statute on the Court’s jurisdiction was neither properly raised nor adequately ventilated before the Pre-Trial Chamber. Also, as noted above, the issue was not suitably raised on appeal. The Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, considers that, without prejudice to the manner in which such a challenge might have been raised, the Philippines should have raised the question of the effect of its withdrawal on the Court’s jurisdiction before the Pre-Trial Chamber in order for all parties and participants to make observations on the issue, and for the Pre-Trial Chamber to make a fully informed decision thereon.

56. Furthermore, the Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, is of the view that, by requesting deferral and by making submissions in the context of article 18 proceedings, the Philippines implicitly accepted the Court’s jurisdiction. In the same vein, the Pre-Trial Chamber proceeded to address the question of admissibility on the basis that it had jurisdiction, as it had established in its Article 15 Decision.<sup>65</sup>

57. In conclusion, since the Impugned Decision does not constitute a decision with respect to jurisdiction and in light of the fact that the issue of the effect of the Philippines’ withdrawal from the Statute on the Court’s jurisdiction was neither properly raised and discussed before the Pre-Trial Chamber nor adequately raised on appeal, the Appeals Chamber cannot entertain the Philippines’ appeal on this point.

58. The Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, therefore dismisses the first ground of the Philippines’ appeal.

59. For reasons set out in their dissenting opinion, Judge Perrin de Brichambaut and Judge Lordkipanidze are of the view that the Appeals Chamber should consider the merits of ground of appeal 1. In their view, the Philippines properly raised jurisdictional issues on appeal, because: (i) a finding on jurisdiction is in fact made in the Impugned Decision; (ii) the Philippines alleges an error in relation to that finding; and (iii) this is the first opportunity for the Philippines to raise the issue of jurisdiction, as until recently, the proceedings were conducted in the absence of any input from the Philippines.

60. As will be set out in more detail in their dissenting opinion, Judge Perrin de Brichambaut and Judge Lordkipanidze would have found that the Court cannot exercise its jurisdiction with respect to the Philippines Situation. In their view, the fact that the Philippines' withdrawal from the Statute became effective before the Prosecutor requested authorisation to commence his investigation is critical. Judge Perrin de Brichambaut and Judge Lordkipanidze consider that an investigation "has [been] initiated" within the meaning of article 13(c) of the Statute only once the Prosecutor has requested, and a pre-trial chamber has granted, authorisation to commence an investigation.

61. As a consequence of their finding on the Court's jurisdiction, Judge Perrin de Brichambaut and Judge Lordkipanidze do not find it appropriate to examine grounds of appeal 2 to 4, which raise arguments concerning complementarity. Indeed, if the Court cannot exercise its jurisdiction over a situation, matters of complementarity become moot. Judge Perrin de Brichambaut and Judge Lordkipanidze will therefore not join the majority of the Appeals Chamber in their discussion of grounds of appeal 2 to 4.

62. As a result, the following grounds of appeal are only considered by Judge Hofmański, Judge Ibáñez Carranza and Judge Balungi Bossa (hereinafter: "Majority").

### C. GROUND OF APPEAL 2: ALLEGED ERROR OF REVERSING THE BURDEN OF PROOF

63. Under ground of appeal 2, the Philippines alleges that the Pre-Trial Chamber erred in reversing the Prosecutor's burden of proof in the context of article 18 proceedings.<sup>66</sup>

#### 1. *Relevant part of the Impugned Decision*

64. The Pre-Trial Chamber, in the Impugned Decision, recalled that "for the purpose of admissibility challenges pursuant to article 18(2) of the Statute, the onus is on the State to show that investigations or prosecutions are taking place or have taken place".<sup>67</sup>

#### 2. *Summary of the submissions*

65. The Philippines submits that the Pre-Trial Chamber erred in reversing the Prosecutor's burden of proof in the context of article 18 proceedings.<sup>68</sup> First, the Philippines argues that the moving party bears the burden of proof, and in the context of article 18 proceedings, the State is not the party seeking to change the *status quo*;<sup>69</sup> rather, the Prosecutor is seeking a preliminary ruling regarding admissibility to end his continued deferral, after having received a deferral request from a State.<sup>70</sup> Secondly, while there is jurisprudence pursuant to article 19(2) of the Statute indicating that the State challenging admissibility bears the burden of proof, the Philippines argues that it is incorrect to compare proceedings under article 18 with those under article 19 of the Statute.<sup>71</sup>

66. In his response to the Appeal Brief, the Prosecutor submits that, as the State requesting deferral, the Philippines bears the burden of proof under article 18(2) of the Statute. He argues that the State remains the moving party in article 18 proceedings, as the Prosecutor's deferral to the State's investigation is not automatic.<sup>72</sup> The Prosecutor contends that he decides whether to seise the Pre-Trial Chamber of the matter and, when he does, he "merely transfers the authority provisionally vested in him to assess the State's deferral request".<sup>73</sup> The Prosecutor avers that it then "remains for the State requesting the deferral to satisfy the Chamber that this is justified".<sup>74</sup> The Prosecutor further submits that, in any event, the Impugned Decision would not have been materially affected even if the Prosecutor had borne the burden of proof.<sup>75</sup>

67. In particular, the Prosecutor argues that (i) the terms of article 18(2) of the Statute are strongly suggestive that the burden of proof should fall on the State;<sup>76</sup> (ii) the analysis required by article 17(1)(a) to (c) of the Statute strongly favours the allocation of the burden of proof to the State requesting deferral, which is consistent with rules 53 and 54 of the Rules;<sup>77</sup> and (iii) the other sub-provisions of article 18 of the Statute are consistent with the allocation of the burden of proof to the State requesting a deferral.<sup>78</sup>

68. The OPCV submits that "the State bears the burden of proof to show that it is conducting genuine investigations or prosecutions, mirroring the ones conducted by the Prosecutor".<sup>79</sup>

69. The Victims submit that a proper application of the principle of *actori incumbit probatio* must take into account which party is raising a particular issue, and in the instant situation, the burden of proving the existence



of an investigation is on the Philippines, being the State that requested the deferral under article 18(2) of the Statute on the basis of its claim that it is investigating the alleged crimes within the Court's jurisdiction.<sup>80</sup>

### 3. *Determination by the Appeals Chamber*

70. The Philippines argues that the moving party, who seeks a change to the *status quo*, bears the burden of proof.<sup>81</sup>

71. Article 18(2) of the Statute provides that a State may inform the Court that "it is investigating or has investigated" the relevant persons and request a deferral. At that State's request, "the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation". Article 18(2) thus sets out the general parameters of a procedure whereby, first, a State makes a request for deferral and, second, the Prosecutor makes an application to the Pre-Trial Chamber for a ruling on the State's request.

72. In a judgment concerning the admissibility of a case, the Appeals Chamber held that a State that challenges the admissibility of a case bears the burden of proof to show that the case is inadmissible. To discharge that burden, the State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case. It is not sufficient merely to assert that investigations are ongoing.<sup>82</sup>

73. More broadly, the Appeals Chamber has held that "it is an essential tenet of the rule of law that judicial decisions must be based on facts established by evidence" and, crucially, that "[p]roviding evidence to substantiate an allegation is a hallmark of judicial proceedings".<sup>83</sup>

74. The Majority notes that by "inform[ing] the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States" and requesting deferral pursuant to article 18(2) of the Statute, the State concerned is alleging a fact. In this regard, rule 53 of the Rules requires the State seeking a deferral to "provide information concerning its investigation". These provisions thus make clear that the State concerned is expected to provide information in support of its allegation of fact. The Majority is of the view that the Court's legal texts thus place the burden of proof in article 18 proceedings on the party which seeks to establish the existence of a fact.<sup>84</sup>

75. Upon receipt of such a request for deferral, the Prosecutor "may request additional information from that State", pursuant to rule 53 of the Rules. This lends further support to the view that at this stage, the burden is on that State to substantiate the allegation that "it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States".

76. When the Prosecutor seizes a pre-trial chamber with an application for a ruling under article 18(2) of the Statute, rule 54(1) of the Rules requires that he or she provide "the basis for the application". In addition, rule 54(1) stipulates that "[t]he information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber". As correctly acknowledged by the Pre-Trial Chamber,<sup>85</sup> in its determination of the Prosecutor's application, a pre-trial chamber thus relies on the information which the State initially provided to the Prosecutor.

77. As a result, the burden of providing information relevant to the pre-trial chamber's determination under article 18(2) of the Statute remains on the State seeking deferral. The State concerned discharges this burden by providing information in support of its initial request for deferral. The Prosecutor's subsequent duty to communicate that information to the pre-trial chamber does not affect the allocation of the burden of proof, as the information remains that which the State initially provided. Therefore, contrary to the Philippines' argument,<sup>86</sup> the fact that it is the Prosecutor who seizes a pre-trial chamber with an application under article 18(2) of the Statute does not shift the burden of proof to the Prosecutor.

78. Indeed, under article 18(2) of the Statute, a State alleges that it is carrying out or has carried out relevant investigations. It is thus incumbent upon the State to establish the facts supporting this assertion.<sup>87</sup> This is in line with the well-established principle of *onus probandi incumbit actori*.

79. Furthermore, it is self-evident that the State seeking deferral has an interest in persuading the Prosecutor and, if necessary, the pre-trial chamber, that it is investigating or has investigated the “criminal acts which may constitute crimes referred to in article 5”. It does so by providing supporting information. As correctly noted by the Prosecutor in this regard, the State is “uniquely placed” to determine the existence and scope of domestic proceedings, information which may not be publicly known.<sup>88</sup>

80. For the foregoing reasons, the Majority finds that the Philippines has failed to demonstrate that the Pre-Trial Chamber erred in placing the onus on the Philippines “to show that investigations or prosecutions are taking place or have taken place”.<sup>89</sup> Therefore, the Majority rejects this ground of appeal.

#### **D. GROUND OF APPEAL 3: THE APPLICATION OF THE ALLEGED ERRONEOUS ADMISSIBILITY TEST**

81. Under ground of appeal 3, the Philippines submits that the Pre-Trial Chamber erred in applying the “same person/same conduct test” and the high standard of assessment of the degree of mirroring with the Prosecutor’s investigations, both tests being, in its view, applicable to cases, rather than situations.<sup>90</sup> The Philippines provides a number of examples of domestic proceedings which, it submits, were erroneously assessed.<sup>91</sup>

##### **1. Relevant parts of the Impugned Decision**

82. The Pre-Trial Chamber stated that “in considering whether to authorise the resumption of an investigation”, a pre-trial chamber must examine “information concerning its investigations” provided by the relevant State, the Prosecutor’s application, and “any observations submitted by the State seeking a deferral”.<sup>92</sup> In doing so, the chamber “shall consider the factors in article 17 in deciding whether to authorize an investigation”.<sup>93</sup>

83. The Pre-Trial Chamber noted that “article 17 of the Statute not only applies to determinations of the admissibility in a *concrete case* (as per article 19 of the Statute), but also to preliminary admissibility rulings pursuant to article 18 of the Statute”, and that “the meaning of the words ‘case is being investigated’ found in article 17(1)(a) of the Statute must be understood and construed taking into account the specific context in which the test is applied”.<sup>94</sup>

84. While the Pre-Trial Chamber acknowledged that “at the time a chamber must consider preliminary admissibility challenges under article 18 of the Statute, the contours of ‘likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages’”,<sup>95</sup> it stated that “[n]onetheless, if investigations are taking place at the national level, the Chamber is tasked to consider whether the domestic investigations cover the *same individuals* and *substantially the same conduct* as the investigations before the Court”.<sup>96</sup> More specifically, the Pre-Trial Chamber explained that “what is required by this provision is a comparison of two very different sets of information that cannot easily be compared”,<sup>97</sup> as “[t]his assessment requires a comparison of *two distinct forms of investigations*, namely specific domestic proceedings or cases with identified individuals versus a so far general investigation of this Court”, and “[d]epending on the situation, the latter investigation may look into a large number of crimes, and cover a large geographical area and timeframe”.<sup>98</sup>

85. The Pre-Trial Chamber recalled that in order for the State to demonstrate activity, “merely asserting that investigations are ongoing is not sufficient”, and the “relevant State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”.<sup>99</sup> In this respect, the Pre-Trial Chamber noted that

[a] State must show that ‘tangible, concrete, progressive investigative steps’ are undertaken. ‘[S]parse and disparate’ activities do not suffice, but rather a State should take proactive investigative steps. Moreover, such investigations must be carried out with a view to conduct *criminal* prosecutions.<sup>100</sup>

86. The Pre-Trial Chamber further noted that “[r]elevant substantiating documentation should include any ‘material capable of proving that an investigation or prosecution is ongoing’ such as ‘directions, orders and decisions issued by authorities in charge [ . . . ] as well as internal reports, updates, notifications or submissions contained in



the file [related to the domestic proceedings]”.<sup>101</sup> In the view of the Pre-Trial Chamber, “[i]n order to satisfy the complementarity principle, a State must show that in addition to being ‘opened’, its investigations and proceedings also sufficiently *mirror* the content of the article 18(1) notification, by which the Prosecution notified the concerned State of the opening of an investigation, and its scope”.<sup>102</sup>

87. Concerning the stage of the proceedings in the present situation, the Pre-Trial Chamber noted that “[s]ince, at the article 18 stage, no suspect has yet been the subject of an arrest warrant, and similar to what is done in the context of article 15 proceedings, *admissibility can only be assessed against the backdrop of a situation and the ‘potential cases’ that arise from this situation*”.<sup>103</sup> Recalling that “the admissibility of a case must be determined on the basis of the facts ‘as they exist at the time of the proceedings [before the Court]’”,<sup>104</sup> the Pre-Trial Chamber stated that “[w]hen assessing the existence of investigations for the purposes of an article 18(2) request, a chamber must *similarly* take into account the state of such investigations at the time of its consideration on the merits of the Prosecution’s request to resume its investigation”.<sup>105</sup>

88. In this context, the Pre-Trial Chamber assessed the parties’ submissions pertaining to the existence of domestic proceedings as follows:

- 1) Non-criminal proceedings (Department of Justice Panel (hereinafter: “DOJ Panel”), *amparo* proceedings, Administrative Order no. 35 Committee (hereinafter: “the Committee”) and United Nations Joint Programme on Human Rights, Philippine National Police – Internal Affairs Services (hereinafter: “PNP-IAS”) investigations);<sup>106</sup>
- 2) Criminal proceedings (or a lack thereof) (crimes in Davao region, crimes other than murder, killings outside police operations, policy element and systematic nature of the alleged crimes);<sup>107</sup>
- 3) Cases referred to the National Bureau of Investigation (hereinafter: “NBI”);<sup>108</sup>
- 4) National and regional prosecution offices and cases.<sup>109</sup>

89. Acknowledging “the challenges in making such a comparison between an ICC investigation and domestic investigations, especially in the absence, at this stage, of any identified individuals by the Prosecution”, the Pre-Trial Chamber observed that “given the Court’s role and purpose, and the fact that the authorised investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the investigation’s focus”.<sup>110</sup>

90. The Pre-Trial Chamber stated that it considered the various domestic activities of the Philippines “in a holistic manner”, “taking into account the possible interaction between government agencies” and “taking together the entirety of domestic initiatives and proceedings”, “collectively”, in order “to determine whether their ensemble would result in a finding that the State is actively investigating the same conduct that forms part of the Court’s investigation”.<sup>111</sup>

91. Whilst the Pre-Trial Chamber noted the Philippines’ submissions that “some of its government agencies rely on each other for the purpose of advancing investigations”, and found that “in some instances investigative steps have been taken or are ongoing, albeit only with regard to low-ranking law enforcement personnel”, it concluded that “the totality of the national investigations and proceedings presented to the Chamber do not sufficiently, or at all”, “amount to tangible, concrete and progressive investigative steps being carried out with a view to conducting criminal proceedings, in a way that would sufficiently mirror the Court’s investigation as authorised in the Article 15 Decision”.<sup>112</sup>

## 2. Summary of the submissions

92. The Philippines submits that the Pre-Trial Chamber committed an error of law in its application of “the legal standard applicable to a case, overstating the degree of overlap required in the article 18 context”, “which invalidated its entire admissibility assessment”.<sup>113</sup> The Philippines argues that the same person/same conduct test is not expressly provided for in article 17 of the Statute,<sup>114</sup> and rather, it was “developed in the context of article 19 caselaw, which concerns concrete cases”.<sup>115</sup> With respect to the Pre-Trial Chamber’s assessment and rejections of information submitted to substantiate the Philippines’ investigations, the Philippines submits that the Pre-Trial

Chamber erroneously imposed a “high threshold, developed in the article 19 context”.<sup>116</sup> As regards the Pre-Trial Chamber’s assessment concerning the contours of the investigation, the Philippines submits that the Pre-Trial Chamber imposed “a degree of mirroring with the Prosecution’s investigations which cannot reasonably exist” “at the article 18 stage whereby the contours of the Prosecution’s investigations concerning a specific case are undefined and unclear”.<sup>117</sup>

93. In his response to the Appeal Brief, the Prosecutor submits that the Philippines “overlooks that the ‘same person/same conduct’ test has been consistently used not only in the context of concrete cases, under article 19, but also before concrete cases have materialised, such as under article 15 (by reference to potential cases)”.<sup>118</sup> The Prosecutor argues that the Pre-Trial Chamber’s approach in the present situation “is necessary in order to ensure that the article 17 assessment is carried out objectively, on the basis of identifiable allegations and persons or groups of persons, and thus on the basis of evidence rather than vague assertions or intentions”.<sup>119</sup> The Prosecutor adds that while the Philippines seems to suggest that it is merely “the *prima facie* existence” of a State’s investigation,<sup>120</sup> the “consistency of resort to this approach [. . .] illustrates the difficulty in identifying any practicable alternative”, and that an assessment “under article 18(2) *without* the use of relevant comparators [. . .] would undermine the core purpose of article 18 - which is to resolve a conflict of jurisdiction if and when it objectively exists”.<sup>121</sup> The Prosecutor further submits that contrary to the Philippines’ incorrect claim, the “scope of the Court’s intended investigation is sufficiently defined at the article 18(2) stage to enable a proper comparison with the activities of the State seeking deferral”.<sup>122</sup>

94. The OPCV submits that the Pre-Trial Chamber correctly applied the complementarity test under article 17 of Statute, as expressly foreseen by rule 55(2) of the Rules and in accordance with the relevant law.<sup>123</sup> In support, it argues that the distinction drawn by the Philippines between an admissibility challenge under articles 18(2) and 19(2) of the Statute is fictitious, and that when deciding on an application under either of those provisions, the Pre-Trial Chamber “shall consider the factors in article 17”.<sup>124</sup> The OPCV concurs with the Pre-Trial Chamber’s assessment of the deferral material and submits that the Pre-Trial Chamber committed no error of fact or law.<sup>125</sup>

95. The Victims submit that for them “[j]ustice remains largely elusive” and that “[t]heir families face enormous difficulties in seeking accountability using available domestic legal remedies”.<sup>126</sup> They emphasise “the continued lack of investigations and prosecutions of their cases”.<sup>127</sup> The Victims argue that “the inaction on the part of the Philippine government continues under the new administration of President Ferdinand R. Marcos Jr” and quote a government official who stated that “[t]he new government is not disposed to addressing past events”.<sup>128</sup> The Victims contend that “the small number of prosecutions and investigations involving low-level personnel referred to by the Philippines in their deferral request does not establish the existence of an investigation”.<sup>129</sup> They note that investigations by the DOJ Panel, the Committee, the PNP-IAS and in the *amparo* proceedings are insufficient and ineffective.<sup>130</sup>

### 3. *Determination by the Appeals Chamber*

#### i. **Alleged erroneous application of the admissibility test**

96. Article 17 of the Statute, in relevant part, provides:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) [. . .].

97. Article 18(2) of the Statute states:

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

98. Rule 51 of the Rules, "Information provided under article 17", states that

[i]n considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.

99. Rule 52(1) of the Rules provides that the Prosecutor's article 18 notification to States should contain "information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2".

100. Rule 55(1) and (2) of the Rules instructs:

Proceedings concerning article 18, paragraph 2

1. The Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing.
2. The Pre-Trial Chamber shall examine the Prosecutor's application and any observations submitted by a State that requested a deferral in accordance with article 18, paragraph 2, and *shall consider the factors in article 17 in deciding whether to authorize an investigation.*<sup>131</sup>

101. In determining a State's inactivity in relation to article 17(1)(a) and (b) of the Statute, the same conduct/same person test has been developed in the jurisprudence of the Court. The Majority recalls that in the context of challenges to the admissibility of cases, the Appeals Chamber has noted that for 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 alleged in the proceedings before the Court".<sup>132</sup> The Appeals Chamber has also held that "a State is investigating the same case if it has been established that 'discrete aspects' of the case before the Court are being investigated domestically".<sup>133</sup> The Appeals Chamber further noted that for a State's challenge to admissibility "[t]o be successful, this challenge must be able to show what is being investigated by the State (the contours or parameters of the case) such that the Court is able to compare this against what is being investigated by the prosecutor", and that "[i]f a State is unable to present such parameters to the Court, no assessment of whether the same case is being investigated can be meaningfully made".<sup>134</sup>

102. Concerning a chamber's assessment of information provided by States in respect of domestic investigations and prosecutions, the Appeals Chamber noted that "[t]he words 'is being investigated', in this context, signify the taking of steps directed at ascertaining whether those suspects are responsible for that conduct".<sup>135</sup> More specifically, the Appeals Chamber stated that the relevant State must show that it is indeed taking such steps "for instance by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analysis".<sup>136</sup> It emphasised that "the mere preparedness to take such steps or the investigation of other suspects is not sufficient".<sup>137</sup>

103. The present appeal relates to proceedings which are the situation stage. In this regard, the Majority recalls the following jurisprudence.

104. With respect to article 18 proceedings, the Appeals Chamber has indicated that the procedure set forth in article 18(1) of the Statute, providing for "an interested State [. . .] to present detailed information with respect to any

question of admissibility allowing for an informed and meaningful assessment by a pre-trial chamber”, “allows the pre-trial chamber to consider admissibility at a stage designed specifically for that purpose immediately following upon the authorisation of an investigation”.<sup>138</sup>

105. The Appeals Chamber has found that article 17 of the Statute applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute).<sup>139</sup> In relation to the factors set out in article 17 of the Statute, the Appeals Chamber noted that “[t]he meaning of the words ‘case is being investigated’ in article 17(1)(a) of the Statute must [...] be understood in the context to which it is applied”.<sup>140</sup>

106. The Majority recalls that any investigation, irrespective of its stage, have certain defining parameters,<sup>141</sup> which may vary depending on the circumstances of each specific situation. The Majority is of the view that, for the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation. The domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor’s intended investigation. The Majority observes that a pre-trial chamber’s assessment in this context is a largely fact-driven inquiry.

107. The Majority notes that in the present situation, the general parameters of the situation were defined by the Pre-Trial Chamber’s Article 15 Decision and the Prosecutor’s notification to the Philippines under article 18(1) of the Statute, and that those parameters were sufficiently specific to enable the Philippines to provide information in relation to its domestic investigations and prosecutions under article 18(1) of the Statute and demonstrate the degree of mirroring.

108. In the view of the Majority, the test it set forth above provides sufficient flexibility for a pre-trial chamber to integrate the specific circumstances and parameters of each situation in its assessment under article 18 of the Statute, and gives effect to a State’s right under article 18(2) of the Statute to seek the deferral of the Prosecutor’s investigation.

109. The Majority observes that in the situation at hand, the Pre-Trial Chamber stated that it considered whether the domestic investigations and prosecutions of the Philippines cover “the same individuals and substantially the same conduct as the investigations before the Court”.<sup>142</sup> The Majority notes that the Pre-Trial Chamber, however, acknowledged that its assessment must be carried out in the context of a specific situation and taking into account the different types of investigations.<sup>143</sup> Furthermore, in its application of the test, the Pre-Trial Chamber examined whether the Philippines showed that (i) it is indeed investigating and prosecuting the same groups or categories of individuals in relation to the relevant criminality within the scope of the situation, *i.e.* crimes related to the “war on drugs” campaign; (ii) it has undertaken “tangible, concrete, progressive investigative steps” in its investigations and proceedings,<sup>144</sup> and (iii) its domestic investigations and prosecutions “sufficiently mirror the content of the article 18(1) notification, by which the Prosecution notified the concerned State of the opening of an investigation, and its scope”.<sup>145</sup>

110. In light of the foregoing, the Majority considers that in its assessment of complementarity in the context of article 18(2) of the Statute, the Pre-Trial Chamber correctly assessed whether there exists an advancing process of domestic investigations or prosecutions of the same groups or categories of individuals in relation to the relevant criminality within the situation which sufficiently mirrors the scope of the Prosecutor’s intended investigation, taking into account the stage of a situation, as well as the specific circumstances and parameters of the Philippines Situation. Therefore, the Majority finds that the Pre-Trial Chamber did not err in law.

## ii. Examples of the alleged erroneous application of the admissibility test

111. The Philippines alleges a number of errors in the Pre-Trial Chamber’s findings on specific domestic proceedings and on the degree of overlap with the Court’s investigation. While the Philippines appears to present these as errors of fact, the overarching argument is that the Pre-Trial Chamber erred in its findings as a result of the alleged legal errors discussed above. The examples of alleged erroneous factual assessments form the basis for the Philippines’ argument that the threshold of substantiating the existence of domestic investigations and prosecutions was too high,<sup>146</sup> and that the standard to assess the degree of overlap between the domestic and Prosecution investigations was higher than warranted in article 18 proceedings.<sup>147</sup>

112. The Majority will address the alleged errors in turn, consistent with the standard of review set out earlier in this judgment.

*a. Alleged errors in the Pre-Trial Chamber's assessment of the deferral material*

113. The Philippines provides examples of proceedings with respect to which, in its view, the Pre-Trial Chamber applied a “high threshold, developed in the article 19 context” in order “to reject swathes of information submitted by the Philippine Government to substantiate its investigations”.<sup>148</sup>

**(1) Matrix of cases**

(i) Summary of the submissions

114. The Philippines submits that the Pre-Trial Chamber erroneously applied the higher threshold applicable to 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”, to conclude that the four charts listing 302 cases referred to the NBI were not, by themselves, sufficient to substantiate concrete or ongoing investigative steps.<sup>149</sup> The Philippines also argues that, by rejecting material listing cases before the National Prosecution Services (hereinafter: “NPS”), the Pre-Trial Chamber erroneously required that such material should show that actual individual trials took place or are about to take place.<sup>150</sup> The Philippines contends that such scrutiny “goes well beyond the scope of article 18 whereby the existence of investigation is sufficient”, and that it “ignores the framework under article 18(5) whereby the progress of investigations is subject to periodic updates”.<sup>151</sup>

115. In his response to the Appeal Brief, the Prosecutor argues that “the Philippines’ general argument concerning the assessment required and the evidence to be submitted for the purpose of article 18(2) is incorrect” and that “it shows no error for the Chamber to have applied this approach”.<sup>152</sup> He contends that the Pre-Trial Chamber’s reference to uncertainty whether “trials” were taking place “did not reflect any kind of legal requirement [ . . . ] but rather the factual context of the documents in question”.<sup>153</sup> The Prosecutor submits that the Philippines “fails to address other salient reasons” for the Pre-Trial Chamber’s conclusion, such as the lack of supporting documentation for the listed cases, despite a reasonable expectation that the Philippines should have access to relevant information.<sup>154</sup>

116. The OPCV submits that the Philippines’ claim that the Pre-Trial Chamber applied a “higher threshold” in its assessment is flawed, as “most of the documentation was in fact irrelevant or insufficient to establish a link with the issue sub judice”.<sup>155</sup> It argues that the Philippines “disregards the Chamber’s caveat that it laid out the domestic measures separately to mirror the Prosecution’s request to resume the investigation”.<sup>156</sup>

(ii) Determination by the Appeals Chamber

*(a) Four lists of cases referred to the NBI*

117. In its Article 18 Observations, the Philippines submitted that “several cases are already pending before different prosecution offices of the Department of Justice (“DOJ”), specifically in Angeles City (58 cases), San Jose Del Monte City (81 cases), and the Province of Bulacan (111 cases)”, as well as “52 ‘nanlaban’ (resisting arrest) cases referred to the [NBI] for case-build up”.<sup>157</sup>

118. The Pre-Trial Chamber considered the four charts listing 302 cases referred to the NBI and relied upon by the Philippines. It found that the case lists “are not, by themselves, sufficient to substantiate concrete or ongoing investigative steps to support the deferral of the Court’s investigation”, as they do not provide sufficient specificity and do not enable an analysis of “whether the investigative steps into the conduct of the relevant law enforcement agents have in fact occurred or are occurring”.<sup>158</sup>

119. The Pre-Trial Chamber further found that:

[O]f the cases referred to in these four lists, only for eight corresponding documentation was submitted that illustrates possible investigative activities being taken in respect of that case, charges having been recommended, or prosecutions having commenced against the relevant law enforcement agents



involved. However, two of these cases appear to be outside of the temporal scope of the authorised investigation [ . . . ]. That leaves six cases relevant to the Chamber's analysis.<sup>159</sup>

120. Regarding these six relevant cases, the Pre-Trial Chamber found that with respect to two of them,<sup>160</sup> a part of the “documentation is incomprehensible without further explanation and the material is incomplete, as it references attachments which were apparently used to support each recommendation but were not provided to the Court”.<sup>161</sup> As a result, the Pre-Trial Chamber found that it was “difficult to assess whether these two cases show tangible investigative activity” and even if they do, they “appear to have been dismissed by the NBI” and “no information is provided about the reasons for the dismissals”.<sup>162</sup>

121. With respect to the four other cases,<sup>163</sup> the Pre-Trial Chamber stated that “[the investigative] steps [referred to in the supporting documents] – if shown to have taken place – may be considered as tangible, concrete investigative steps”.<sup>164</sup> However, “the number of cases investigated in this manner by the NBI appears to remain very limited in number and scope”.<sup>165</sup>

122. The Philippines argues that the charts of cases referred to the NBI “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”.<sup>166</sup> According to the Philippines, these 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”.<sup>167</sup> The Philippines submits that the Pre-Trial Chamber's conclusion regarding these lists “is indicative of the application of the higher threshold applied in article 19 proceedings”.<sup>168</sup>

123. The Majority notes at the outset that the Philippines does not specifically challenge the Pre-Trial Chamber's analysis of the six cases under this heading. Rather, the Philippines takes issue with the degree to which it was “expected to substantiate the existence of proceedings”<sup>169</sup> in relation to the remainder of the 302 cases listed in the four charts. In this regard, the Majority notes that with respect to the first three lists concerning 250 cases, the Philippines asserted before the Pre-Trial Chamber that those cases were referred to the NBI for investigation and case build-up, but it provided “no documentation outlining concrete investigative activities [ . . . ] for any of them”.<sup>170</sup> By pointing out the lack of such documentation, the Pre-Trial Chamber expressed its concern about the lack of information on whether “concrete investigative activities” were carried out. It is clear from the remarks which the Pre-Trial Chamber made throughout its analysis that it found the information provided by the Philippines to be “limited”.<sup>171</sup> It concluded that the four lists “do [not] contain information enabling the Chamber to analyse whether investigative steps into the conduct of the relevant law enforcement agents have in fact occurred or are occurring”.<sup>172</sup>

124. Furthermore, with respect to the fourth list of cases concerning 52 cases, the Pre-Trial Chamber noted that the recommendations of the Internal Affairs Service contained in that list “appear to consist of administrative findings and sanctions”, with only one reference to a possible criminal process being a “recommendation that an appropriate complaint be filed”.<sup>173</sup> As with the other three lists, the Pre-Trial Chamber was thus concerned about the lack of information on whether any criminal proceedings were conducted.

125. The Majority finds that the Pre-Trial Chamber's conclusion that the four lists did not show “concrete or ongoing investigative steps to support the deferral of the Court's investigation”<sup>174</sup> was not the result of the application of a higher threshold as alleged by the Philippines. Rather, the Pre-Trial Chamber's conclusion was based on the fact that it had received only limited information relevant to its enquiry under article 18(2) of the Statute. The Majority finds no error in the Pre-Trial Chamber's approach in this regard. Consequently, the Majority rejects the Philippines arguments on this point.

(b) *The list of cases before the NPS*

126. In its discussion of the “[n]ational and regional prosecution offices cases”, the Pre-Trial Chamber addressed the issue of whether the lists of cases collated from the NPS documents support the deferral of the Court's investigation. The Pre-Trial Chamber held that “apart from one case, no corresponding or underlying prosecutorial documentation has been provided to substantiate the information contained in these lists”.<sup>175</sup> The Pre-Trial Chamber also

noted that “[w]ithout more, it is unclear how and whether the information in these lists relate to trials that actually took place, or are taking place”.<sup>176</sup>

127. The Philippines argues that despite the fact that it provided “what the Prosecution requested”,<sup>177</sup> the Pre-Trial Chamber rejected the lists on the basis that the Philippines did not provide “material to show that the actual individual trials took place”, which is “more scrutiny than was applied at the article 15”.<sup>178</sup> The Philippines also submits that it “goes well beyond the scope of article 18 whereby the existence of the investigation is sufficient” and “ignores the framework under article 18(5) whereby the progress of investigations is subject to periodic updates”.<sup>179</sup>

128. The Majority notes that the Pre-Trial Chamber’s reference to the absence of information on past or ongoing trials is part of its analysis of the information on the cases provided by the Philippines. The main reason for the Pre-Trial Chamber’s conclusion with regard to the lists of cases before the NPS was that the “information [provided by the Philippines] is of limited use to the Chamber’s assessment”.<sup>180</sup> Notably, the Pre-Trial Chamber found that “[t]he list from ‘the dockets of the [NPS]’ includes limited details”, and that the lists from the Regional Prosecution Offices “mainly contain particulars of an administrative nature”.<sup>181</sup> The Majority further notes that the Pre-Trial Chamber examined “the status of each case as of May 2021” indicated in the list from the NPS’ dockets, which included a stage of “trial ongoing”.<sup>182</sup> For instance, the “Partial Listing of Cases” in the dockets of the NPS makes reference to “[t]rial ongoing” with respect to three of the listed cases.<sup>183</sup> Viewed in this context, the Pre-Trial Chamber’s remarks on the uncertainty as to past or ongoing trials seems to relate to the “limited use” of the indication that “[a] trial [is] ongoing” in some of the cases “as of May 2021”, without any information on whether “trials actually took place, or are taking place”.<sup>184</sup>

129. It is thus clear that the Pre-Trial Chamber’s remark on ongoing trials does not constitute a legal requirement but merely a finding that the information provided by the Philippines was of “limited use”. The Philippines thus misrepresents the Impugned Decision by arguing that the Pre-Trial Chamber “demand[ed] [. . .] material to show that the actual individual trials took place”.<sup>185</sup> Therefore, the Majority rejects this argument of the Philippines.

*(c) Conclusion on alleged errors in the Pre-Trial Chamber’s assessment of the matrix of cases*

130. The Majority finds that with respect to the four lists of cases referred to the NBI, the Philippines has not shown that the Pre-Trial Chamber erred in finding that the Philippines failed to provide sufficient information supporting concrete investigative steps that would sufficiently mirror the scope of the Court’s investigation. Regarding the lists of cases before the NPS, the Majority finds that the Philippines has failed to demonstrate that the Pre-Trial Chamber erroneously imposed a requirement that trials must have taken place.

**(2) Investigative files/materials**

**(i) Summary of the submissions**

131. The Philippines’ main contention is that the Pre-Trial Chamber demanded a higher threshold of interrogation and verification of the information provided than is warranted under article 18 of the Statute.<sup>186</sup> It presents two examples where, despite the provision of supporting material, the Pre-Trial Chamber rejected the Philippines’ description of investigative steps taken in relation to recommendations and reports by the NBI.<sup>187</sup> The Philippines contends that the Pre-Trial Chamber ignored the fact that “a State can only be guided by the limited information provided to it in the article 18(1) notice and the article 15 litigation”<sup>188</sup> and demanded “a wealth of in-depth information as well as [. . .] material in relation to the entirety of the Prosecution’s broad investigation” unwarranted in the article 18 context.<sup>189</sup>

132. In his response to the Appeal Brief, the Prosecutor submits that the Philippines failed to show how either of these examples demonstrates that the Pre-Trial Chamber applied an overly strict standard for the purpose of article 18 (2) of the Statute.<sup>190</sup> Regarding the first example, he argues that the Philippines fails to address the “precise reasoning of the Chamber concerning the significance of the missing indictments”.<sup>191</sup> The Prosecutor contends that, in the circumstances of the present situation, the Pre-Trial Chamber’s approach was reasonable.<sup>192</sup> Regarding the second



example, the Prosecutor submits that while he had, in his submissions, considered that the two cases in question were adequately substantiated, it does not necessarily follow that the Pre-Trial Chamber's findings in this respect are unreasonable.<sup>193</sup> The Prosecutor avers that, at any rate, these cases are a small fraction of the claims made by the Philippines concerning the activities of the NBI and any error made by the Pre-Trial Chamber in this respect would not materially affect its overall conclusions.<sup>194</sup>

133. The OPCV argues that the Philippines' contention that the Pre-Trial Chamber "demanded a level of interrogation and verification of official reports which is not warranted in the article 18 context" is unsubstantiated.<sup>195</sup> It argues that "providing a wealth of unrelated and/or inconclusive documentation is [...] unwarranted – and this is what barred the Chamber from making a positive finding for deferral".<sup>196</sup>

(ii) Determination by the Appeals Chamber

(a) *National and regional prosecution offices cases*

134. The first example provided by the Philippines concerns two cases in which the NBI recommended indictments.<sup>197</sup> In this regard, the Majority recalls that in its Article 18 Observations, the Philippines claimed that a number of investigations conducted by the NBI had resulted in the filing of criminal complaints before different offices of the prosecutors in the Philippines.<sup>198</sup> It submitted that (i) the "Partial listing of cases in the dockets of the NPS relating to investigations into deaths during anti-narcotic operations" showed that investigations had been conducted against police officers with respect to their conduct during anti-illegal drug operations<sup>199</sup> and (ii) 52 *nanlaban* (resisting arrest) cases were referred to the NBI for case build-up.<sup>200</sup> Of those, according to the Philippines, 19 cases had been resolved, some had been terminated or dismissed for lack of evidence, and in other cases, the NBI found enough evidence to recommend an indictment.<sup>201</sup>

135. The information provided in this regard consisted of: "one list of cases from 'the dockets of the [NPS]', three lists of cases collated from the dockets of three Regional Prosecution Offices, as well as eight NPS case files".<sup>202</sup> The Philippines also "pointed to various indictments that ha[d] been recommended against police officers who were involved in deaths during anti-illegal drug operations".<sup>203</sup>

136. In respect of the recommended indictments against police officers – highlighted by the Philippines – the Pre-Trial Chamber noted that the Philippines relied on "various types of documentation, differing in detail and scope".<sup>204</sup> The Pre-Trial Chamber observed that some of those items contained "brief summaries of the recommended indictments and include[d] limited details of the result of the NBI's investigation, the charges recommended by the NBI and the status of each case, such as whether they [we]re at trial or remain[ed] at an investigative stage".<sup>205</sup> It concluded that:

89. [...] [N]o further documentation, or the indictments themselves, have been provided. Some incidents for which indictments have been recommended and corresponding investigation files provided are outside the temporal scope of the authorised investigation, and therefore irrelevant for the Chamber's analysis. Other incidents are said to have forthcoming criminal complaints to be filed.

90. The Chamber finds that the mere reference to the existence of cases in the absence of underlying supporting documentation, does not allow for an assessment as to whether any concrete and progressive investigatory steps are being taken or to determine whether prosecutions are actually being undertaken by competent national authorities in respect of these cases.<sup>206</sup>

137. The Philippines submits that it was incorrect for the Pre-Trial Chamber to dismiss, on the basis of the absence of copies of the underlying indictments, the Philippines' information that indictments recommended by the NBI were before regional courts.<sup>207</sup> The Majority notes in this respect that the Pre-Trial Chamber expressed concerns about the absence of "further documentation, or the indictments themselves" in relation to several cases relied upon by the Philippines.<sup>208</sup> The supporting documents indicate that reports were transmitted to DOJ Manila recommending the filing of charges against the named police officers.<sup>209</sup> However, no document has been provided to demonstrate what further steps were taken following the aforementioned recommendations and, notably, whether the indictments recommended by the NBI were actually filed.

138. The Pre-Trial Chamber also noted “inconsistent documentation to suggest that the NBI has in fact dismissed or terminated these cases for lack of evidence”.<sup>210</sup> Indeed, the supporting material suggests that with respect to some of these cases, it was “recommended that these cases be treated closed and terminated”.<sup>211</sup> Therefore, contrary to the Philippines’ contention, the Pre-Trial Chamber did not reject the information regarding those cases solely due to the absence of the underlying indictments. Rather, the Pre-Trial Chamber was confronted with conflicting information as to the status of those cases. It was therefore not unreasonable for the Pre-Trial Chamber to conclude that the absence of further documentation, especially indictments, made it difficult to assess “whether any concrete and progressive investigatory steps are being taken or to determine whether prosecutions are actually being undertaken by competent national authorities in respect of these cases”.<sup>212</sup>

139. In light of the foregoing, the Majority rejects these arguments of the Philippines.

(b) *NBI investigative reports and underlying municipal reports*

140. With respect to the second example, the Philippines refers to two preliminary investigation reports conducted by NBI and submitted before the Provincial Prosecutor.<sup>213</sup> As discussed above in the analysis of the “Matrix of Cases”, the two cases referenced were among six out of a total of 266 cases relied upon by the Philippines to support its claim that the relevant cases had been referred to the NBI for investigation, that were found to fall within the temporal scope of the Court’s investigation and had been sufficiently substantiated.<sup>214</sup> The Pre-Trial Chamber assessed documentation consisting of a cover letter entitled “Transmittal letter” from the NBI to the Provincial Prosecutor, which included the official report from the municipal police station of the incident where the suspect died, the NBI’s investigation and analysis, and the scope of the NBI’s recommended charges.<sup>215</sup> It found that:

[P]art of this documentation is incomprehensible without further explanation and the material is incomplete, as it references attachments which were apparently used to support each recommendation but were not provided to the Court. It is therefore difficult to assess whether these two cases show tangible investigative activity. Moreover, even assuming they do, the two cases appear to have been dismissed by the NBI, but no information is provided about the reasons for the dismissals.<sup>216</sup>

141. The Philippines alleges that “the Pre-Trial Chamber rejected two detailed preliminary investigation reports conducted by NBI and submitted before the Provincial Prosecutor, as the ‘referenced attachments which were apparently used to support each recommendation’ were not provided to the Court”.<sup>217</sup> Indeed, the reports in question make reference to attachments,<sup>218</sup> which were apparently not provided. However, as conceded by the Prosecutor,<sup>219</sup> the reports demonstrate some investigative steps and contain an analysis of evidence. The conclusion, at least for one of the reports,<sup>220</sup> is that “there exists probable cause to collectively charge” the named individuals with crimes.<sup>221</sup>

142. The Majority notes, however, that the lack of attachments was not the only reason for the Pre-Trial Chamber to state that it was difficult for it to assess whether “these two cases show tangible investigative activity”.<sup>222</sup> The Pre-Trial Chamber also noted that “the two cases appear to have been dismissed by the NBI, but no information is provided about the reasons for the dismissals”.<sup>223</sup> Another document indeed indicates that both cases were dismissed.<sup>224</sup> In view of this conflicting information, it was not unreasonable for the Pre-Trial Chamber to consider that if it had received the aforementioned attachments, it would have been in a better position to make a finding on the status of those domestic proceedings, and to express reservations as to whether those two cases showed “tangible investigative activity”.

(c) *Conclusion on alleged errors in the Pre-Trial Chamber’s assessment of the investigative files/materials*

143. In view of the foregoing, the Majority finds that the Philippines has failed to demonstrate any error in the Pre-Trial Chamber’s findings with respect to the two examples, which, according to the Philippines, demonstrate the investigative steps taken in relation to recommendations and reports by the NBI.

### (3) Criminal referrals and disciplinary proceedings

#### (i) Summary of the submissions

144. The Philippines submits that the Pre-Trial Chamber erroneously rejected the material related to the steps undertaken by the Committee, the DOJ Panel and the PNP-IAS, which “demonstrated the overall and general arc of the investigative processes connected to the anti-illegal drug operations”.<sup>225</sup> The Philippines argues that, by treating such material as non-criminal in nature, “the Pre-Trial Chamber undertook a referendum on the Philippines’ national legal processes in an isolated and piecemeal manner”.<sup>226</sup> It contends that, rather than undertaking a holistic assessment of the investigative cycle before those domestic authorities, “the Pre-Trial Chamber reviewed each stage in isolation and demanded information confirming criminal prosecutions of specific cases above and beyond what is required”.<sup>227</sup> According to the Philippines, the Pre-Trial Chamber also failed to take into account the unique character of the Philippines’ domestic legal system, being a combination of common and civil law families, as well as the geographic and technological barriers that complicated the process of evidence collection.<sup>228</sup>

145. In his response to the Appeal Brief, the Prosecutor argues that this aspect of the Philippines’ appeal warrants summary dismissal, as the Philippines fails to show any error and does not assert that the Pre-Trial Chamber’s conclusions were incorrect or unreasonable.<sup>229</sup> He submits that the Philippines raises for the first time on appeal arguments concerning a mandatory progression from the PNP-IAS to review by the DOJ Panel to the case build-up by the NBI, without citing any clear basis requiring this sequence.<sup>230</sup> In the view of the Prosecutor, “PNP-IAS investigations and/or reviews by the [DOJ Panel] are not legal prerequisites to the criminal investigation or prosecution of a police officer”.<sup>231</sup> The Prosecutor notes that the Philippines has not pointed to any concrete further action resulting from the PNP-IAS proceedings.<sup>232</sup> The Prosecutor argues that the Philippines provides no support for its argument that the Pre-Trial Chamber was blind to differences in legal culture or tradition.<sup>233</sup>

146. The OPCV submits that a demonstration of “the overall and general arc of the investigative processes” is not sufficient “if the documentation lacks the minimal preponderance of the evidence”.<sup>234</sup> It argues that the procedural cycle described by the Philippines is flawed, and that the Pre-Trial Chamber’s analysis in this respect was “a sensible approach”.<sup>235</sup> The OPCV contends that even if the Philippines’ assertion that the administrative procedures fit into the broader criminal justice process were correct, the question remains whether such procedures indeed led to criminal investigations and proceedings, which, in its view, the Philippines was unable to demonstrate.<sup>236</sup>

#### (ii) Determination by the Appeals Chamber

147. The Pre-Trial Chamber concluded that the activity of the non-criminal and disciplinary mechanisms, namely the PNP-IAS, DOJ Panel and the Committee, did not amount to “tangible, concrete and progressive investigative steps carried out with a view to conducting criminal proceedings”.<sup>237</sup>

148. In particular, the Pre-Trial Chamber observed that the charts listing 250 NPS cases presented by the Philippines “do not provide information as to whether criminal investigations and prosecutions were initiated against the police officers involved in the killings”.<sup>238</sup> The Pre-Trial Chamber also noted that “there is no indication in the material [. . .] suggesting that the DOJ Panel conducts investigative activity by itself before deciding to refer cases to the NBI for further investigation”.<sup>239</sup> The Pre-Trial Chamber also observed that the number of reviewed cases (302) was very low compared to the estimated number of alleged killings during the “war on drugs” operations.<sup>240</sup>

149. Regarding the activity of the Committee, the Pre-Trial Chamber found that on the basis of the two lists of cases provided by the Philippines, it was impossible to discern whether those cases concerned killings in the context of the “war on drugs”, and that these lists do not “indicate any concrete investigative activity taken by the Committee itself, whose intervention appear[ed] limited to monitoring and evaluating their status”.<sup>241</sup>

150. In relation to the PNP-IAS, the Pre-Trial Chamber noted that, on the basis of the supporting documents, the PNP-IAS disciplinary proceedings were not conducted with the aim, or at least not the primary aim, to further

criminal proceedings.<sup>242</sup> Regarding the 52 *nanlaban* cases, the Pre-Trial Chamber found that they appeared to have in fact been referred to the NBI.<sup>243</sup> However, the Pre-Trial Chamber observed that the list only included limited information for each case,<sup>244</sup> and did not “provide information as to whether criminal investigations and prosecutions were initiated against the police officers involved in the killings”.<sup>245</sup> The Pre-Trial Chamber noted that the list of *nanlaban* cases appeared “to consist of administrative findings and sanctions against the relevant law enforcement personnel involved in each case, with the ‘observations’ similarly outlining general statements on the circumstances of death for each victim”.<sup>246</sup> It found that “[t]he sole reference in the list to any possible criminal process to be taken against a law enforcement officer is a single recommendation that an appropriate criminal complaint be filed”.<sup>247</sup> Therefore, in the view of the Pre-Trial Chamber, the list provided neither a sufficient degree of specificity and probative value, nor the information which would have enabled the Chamber “to analyse whether investigative steps into the conduct of the relevant law enforcement agents have in fact occurred or are occurring”.<sup>248</sup>

151. The first argument of the Philippines in relation to the non-criminal and disciplinary proceedings is that the rejection of material regarding those proceedings was a result of the isolated and piecemeal manner of the Pre-Trial Chamber’s evaluation.<sup>249</sup> The Philippines submits that the Pre-Trial Chamber should have found that such material demonstrates the existence of a three-stage mechanism forming an integral part of the broader investigative processes connected to the anti-illegal drug operations.<sup>250</sup>

152. The Philippines does not clarify, however, whether and to what extent the Pre-Trial Chamber’s allegedly fragmented analysis affected the conclusions it reached in the Impugned Decision. The Majority notes that the Pre-Trial Chamber was unable to determine that the non-criminal and disciplinary proceedings in question would lead to the opening of criminal investigations or prosecutions,<sup>251</sup> and concluded that, on their own, they were insufficient to amount to “tangible, concrete and progressive investigative steps”.<sup>252</sup> The Pre-Trial Chamber relied in this respect on the documents provided by the Philippines, which indeed provide scant information about the nature of the proceedings in question or about their potential to lead to investigations or prosecutions. For instance, the lists of 250 NPS cases only describe some evidentiary shortcomings and provide no information on whether criminal investigations followed or whether charges were brought.<sup>253</sup> Similarly, the list of 52 *nanlaban* cases only refers to administrative measures, such as dismissals, demotion or suspension, rather than to criminal proceedings.<sup>254</sup> The Philippines does not seem to challenge the Pre-Trial Chamber’s findings based on these documents. Notably, the Philippines does not explain how the three-stage mechanism, which it describes in the Appeal Brief, would lead to the initiation of criminal proceedings in the listed cases. As a result, the Majority finds that the Philippines had not demonstrated that the Pre-Trial Chamber erred in this regard.

153. The Philippines’ second argument concerns the alleged failure on the part of the Pre-Trial Chamber to have due regard to the specific features of the domestic criminal justice system.<sup>255</sup> However, the only specificity it describes is that the domestic “procedural rules demand a lengthier investigation phase” and that “the commencement of court proceedings following investigation [is] usually immediate”.<sup>256</sup> The Philippines fails to demonstrate that the Pre-Trial Chamber disregarded this alleged specificity of its legal system. Indeed, even if it were accepted that in the Philippine system, court proceedings immediately follow lengthy investigations, the cases listed in the supporting documentation do not refer to such court proceedings.

154. Similarly, the Philippines does not demonstrate how the alleged “geographic and technological barriers” or the procedural rules prolong investigations,<sup>257</sup> and why the Pre-Trial Chamber’s alleged failure to duly consider such factors affected its assessment of the proceedings in question as being non-criminal.

155. In view of the foregoing, the Majority rejects the Philippines’ arguments concerning the non-criminal and disciplinary proceedings.

***b. Alleged errors in the Pre-Trial Chamber’s assessment concerning the contours of the investigation***

156. The Philippines presents examples of the assessments in which the Pre-Trial Chamber allegedly “required a degree of mirroring with the Prosecution’s investigations which cannot reasonably exist at this point in the proceedings”.<sup>258</sup>

**(1) Investigation of senior officials****(i) Summary of the submissions**

157. The Philippines submits that the Pre-Trial Chamber made “an unreasonable assessment”, as it ignored the fact that there were ongoing investigations within the Philippines’ jurisdiction in relation to the anti-illegal drugs campaign and it “expected the current status of domestic investigations to match future investigations of the Prosecution”.<sup>259</sup> The Philippines states that the Pre-Trial Chamber made a “premature assessment” of its investigations, in contravention of the framework of article 18 of the Statute, which allows for periodic updates on the progress of national investigations.<sup>260</sup> The Philippines argues that its investigations focus on the most responsible perpetrators, who may be low or mid-ranking officials,<sup>261</sup> and that “the only way to establish the culpability of senior officials is through the identification of leads between the direct perpetrator on the one hand and the senior officials on the other”.<sup>262</sup>

158. In his response to the Appeal Brief, the Prosecutor submits that no sufficiently specific evidence was presented about the existence of proceedings against high-ranking officials.<sup>263</sup> He contends that the fact that the Philippines focused on low-ranking individuals made it unclear how the Philippines was investigating “the question of the potential links between criminal incidents, which may be significant to the contextual element of crimes against humanity”.<sup>264</sup>

159. The OPCV argues that “in reference to the policy element and systematic nature of the alleged crimes, the Philippines has not show[n] that it carried out domestic proceeding towards high-ranking officials”.<sup>265</sup>

**(ii) Determination by the Appeals Chamber**

160. In its discussion of the “[p]olicy element and systematic nature of the alleged crimes”, the Pre-Trial Chamber addressed the issue of whether the Philippines “investigated any pattern of criminality or systematicity, including by those who would appear to be most responsible for conceiving or implementing a policy”.<sup>266</sup> The Pre-Trial Chamber held that “given the Court’s role and purpose, and the fact that the authorised investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the investigation’s focus”.<sup>267</sup> As such, “since [the domestic proceedings in the Philippines] only address the physical, low-ranking perpetrators and at present do not extend to any high-ranking officials”,<sup>268</sup> the Pre-Trial Chamber found that they “do not sufficiently mirror the expected scope of the Court’s investigation”.<sup>269</sup>

161. Regarding the Philippines’ argument that the culpability of senior officials is established through the identification of leads between them and the direct perpetrators,<sup>270</sup> the Majority notes that the Pre-Trial Chamber considered a similar argument. The Philippines argued before the Pre-Trial Chamber that “the ‘lowly officers’ identified as the actual perpetrators in alleged killings during anti-drug operations ‘are vital leads that may link higher-ranking officials as part of the chain of command in the commission of the crimes’”.<sup>271</sup> The Pre-Trial Chamber found that the domestic proceedings did not extend to any high-ranking officials,<sup>272</sup> despite the above-mentioned expectation that such officials should be the focus.<sup>273</sup> The Pre-Trial Chamber made it clear that its assessment concerned the domestic proceedings conducted “at present”.<sup>274</sup> The Majority notes in this respect that the Philippines only argues that the identification of leads may facilitate the investigation of high-ranking officials.<sup>275</sup> However, the Philippines does not argue that any such investigation, based on leads identified in this way, is being carried out “at present”.

162. Furthermore, the Pre-Trial Chamber indicated that its findings did not “preclude the Philippines from providing material in the future in order for the Prosecution, or the Chamber, to determine inadmissibility on the basis of complementarity, if and when needed”.<sup>276</sup> The Pre-Trial Chamber thus allowed for the possibility that the status of domestic proceedings may change. The Majority notes in this regard that this is without prejudice to the question of whether the Statute actually allows a State to submit a second request for deferral under article 18(2) or, rather, a challenge to the admissibility of a case, when one has been initiated, as stipulated in article 18(7).<sup>277</sup>

163. Regarding the Philippines’ argument that the most responsible perpetrator may be a low or mid-ranking official,<sup>278</sup> the Appeals Chamber indeed previously noted that “individuals who are not at the very top of an



organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes”.<sup>279</sup> However, the Majority observes that the Pre-Trial Chamber’s enquiry was whether the domestic proceedings sufficiently mirror the Prosecutor’s intended investigation. More specifically, in light of the fact that the Prosecutor’s intended investigation concerns alleged crimes against humanity, the Pre-Trial Chamber expected the domestic proceedings to focus on high-ranking officials.<sup>280</sup> Furthermore, in relation to the contextual elements of the alleged crimes against humanity, the Pre-Trial Chamber noted that “the Philippines does not contest the Prosecution’s suggestion that it has failed to inquire into any pattern of criminality or the systematic nature of crimes”.<sup>281</sup> Given the above, the Majority finds that the Philippines has failed to show any error on the part of the Pre-Trial Chamber in this regard.

## (2) Investigations of vigilantes

### (i) Summary of the submissions

164. The Philippines submits that the Pre-Trial Chamber erred in finding that no material provided by the Philippines suggested that the Philippines investigated the killings outside of police operations, as, in the Philippines’ view, such killings “still had some link to law enforcement”.<sup>282</sup> The Philippines argues that “[t]he 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”.<sup>283</sup> However, the Philippines states that “[t]he fact that conduct or categories of perpetrators are not yet clearly defined is again reflective of the stage of the investigation”.<sup>284</sup> Referring to the domestic proceedings with respect to the Davao Death Squad – an alleged vigilante group connected to extrajudicial killings, the Philippines contends that the Pre-Trial Chamber applied “a much higher standard to assess the degree of overlap between the domestic and Prosecution investigations than is warranted in article 18 context”.<sup>285</sup>

165. In his response to the Appeal Brief, the Prosecutor submits that the Philippines asserts for the first time expressly that the killings outside of police operations had some link to law enforcement.<sup>286</sup> He contends that the Philippines is inaccurate to claim that the Pre-Trial Chamber’s “alleged ‘failure to take into account the material connected to the Davao Death Squad can only be explained by virtue of its application’ of an overly strict standard”.<sup>287</sup> The Prosecutor argues that the Philippines “overlooks that the [Pre-Trial] Chamber did not ignore domestic proceedings concerning the alleged Davao Death Squad Killings [. . .] but expressed concerns about the specificity and probative value of the material provided”.<sup>288</sup> He notes that the Ombudsman’s investigation referred to by the Philippines relates to the alleged killings which fall outside the temporal scope of the Court’s investigation and that it appeared to be an administrative proceeding.<sup>289</sup>

### (ii) Determination by the Appeals Chamber

166. In its discussion of the “[k]illings outside police operations”, the Pre-Trial Chamber addressed the issue of whether the Philippines provided sufficient information about past or ongoing investigations or prosecutions relating to killings outside police operations. In this regard, the Pre-Trial Chamber found that the Philippines “ha[d] not provided any material that would suggest it ha[d] investigated alleged killings related to the ‘war of drugs’ that did not take place as part of police operations”.<sup>290</sup> The Pre-Trial Chamber noted that “the part of the authorised investigation concerning private individuals does not appear to be covered by any domestic investigations”,<sup>291</sup> whereas the Article 15 Decision extended the authorisation to cover the killings by private individuals outside law enforcement operations.<sup>292</sup> In particular, the Article 15 Decision referred to thousands of alleged killings committed outside the context of the official police operations.<sup>293</sup>

167. The Philippines’ argument that the investigation of law enforcement officials may help identify leads in relation to the role of law enforcement in killings conducted outside of police operations<sup>294</sup> is not persuasive. Similar to its submissions on the investigations of senior officials, discussed above, the Philippines did not provide material showing that such leads were in fact identified or that domestic proceedings extending to the killings outside of police operations are conducted at present. On the contrary, the Philippines concedes that “the conduct or categories of perpetrators are not yet clearly defined”, which, in its view, “is [. . .] reflective of the stage of the investigation”.<sup>295</sup>

168. The Philippines submits that it provided material concerning the extrajudicial killings attributed to the Davao Death Squad.<sup>296</sup> The Pre-Trial Chamber found in this regard that: (i) most of the proceedings with respect to those killings related to events that fall outside the temporal scope of the Court's investigation,<sup>297</sup> (ii) it was not clear whether some of those domestic proceedings were conducted in support of criminal prosecutions,<sup>298</sup> and (iii) some of the material provided in support fell short of the required standard of specificity and probative value.<sup>299</sup>

169. The Philippines did not provide any other examples of domestic proceedings concerning the killings outside law enforcement operations. Therefore, the Majority finds that the Philippines has failed to demonstrate that the Pre-Trial Chamber erred in finding that the Philippines had not provided any material showing that it investigated the alleged killings outside of police operations.<sup>300</sup>

### (3) Davao killings

#### (i) Summary of the submissions

170. The Philippines submits that the Pre-Trial Chamber dismissed the material which demonstrated that domestic investigations had been conducted in relation to the killings in Davao in the period 2011 to 2016.<sup>301</sup> The Philippines argues that the Pre-Trial Chamber criticised the Philippines' use of media articles to demonstrate the existence of ongoing investigations and prosecutions, despite the fact that the Prosecutor had relied on similar media sources in the Article 15 Request.<sup>302</sup> The Philippines also submits that "[r]egardless 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".<sup>303</sup> The Philippines argues that "[i]t is the *prima facie* existence of the investigation which must be assessed at this stage" and that the Pre-Trial Chamber applied "a higher standard than is warranted when determining an article 18(2) application".<sup>304</sup>

171. In his response to the Appeal Brief, the Prosecutor contends that the Philippines incorrectly asserts that the Pre-Trial Chamber applied a stricter standard than permitted, and that the Philippines "essentially argues that the Court must accept the Philippines' word and not require evidence", which is "inconsistent with the evidence-driven, objective approach which is fundamental to any kind of analysis under article 17".<sup>305</sup> He also submits that the Pre-Trial Chamber "reasonably rejected" the Philippines' additional reliance on media articles, and that "it shows no error to point to the fact that the Prosecution had relied on media articles for a different purpose" in its Article 15 Request.<sup>306</sup> As a result, the Prosecutor argues that the Pre-Trial Chamber was "neither incorrect nor unreasonable in finding that the Philippines has not taken sufficient tangible, concrete and progressive steps towards investigating alleged crimes in Davao".<sup>307</sup>

#### (ii) Determination by the Appeals Chamber

172. In its discussion of the "[c]rimes in Davao region", the Pre-Trial Chamber addressed the issues of whether "the Philippines failed to identify any investigative steps or prosecutions with regard to the hundreds of alleged killings committed during 2011-2016 in the city of Davao", and whether "this failure alone justifies the resumption of the Court's investigation".<sup>308</sup> The Pre-Trial Chamber recalled that "according to the list of 176 murder incidents recorded by the Davao City Police Office in the period 2011-2016, and the explanation provided in the [Philippines'] Observations, 168 of those incidents did give rise to a case before a court, among those, 51 have been solved and eight are under investigation".<sup>309</sup> The Pre-Trial Chamber noted that the list does not contain (i) any information allowing it to identify "whether any of the 176 incidents listed correspond to the killings referred to in the Article 15 Decision" and (ii) information about "the status of the 109 cases that are not identified as resolved or under investigation".<sup>310</sup> As a result, the Pre-Trial Chamber concluded that the material submitted lacked the required degree of specificity and probative value, despite the fact that "[t]he Philippines' authorities have access to official documents and are in a position to provide detailed information on their domestic proceedings".<sup>311</sup>

173. The Pre-Trial Chamber referred to other mechanisms relied upon by the Philippines, including the 2009 investigation by the Commission on Human Rights (hereinafter: "CHR") into the vigilante killings in Davao City, the Ombudsman disciplinary process against 21 Philippine National Police (hereinafter: "PNP") officers for failure to resolve the killings in Davao City, the 2012 CHR Resolution entitled "Extra-Judicial Killings Attributed or



Attributable to the so-called Davao Death Squad”, and the Field Investigation Office’s Fact Finding Report.<sup>312</sup> The Pre-Trial Chamber held that “most of [these mechanisms] concern events that occurred in Davao prior to 2011 and, as such, fall outside of the temporal scope of the investigation as authorised in the Article 15 Decision” and that, as a result, it was “not necessary to consider whether those mechanisms can show the existence of investigations”.<sup>313</sup>

174. With respect to the Senate enquiries, the Pre-Trial Chamber noted that the “inquiries carried out by political bodies may be relevant to assess investigative activity, but only if they are carried out with a view to conducting criminal (investigations and) prosecutions”.<sup>314</sup> However, the Pre-Trial Chamber found that it was not clear what investigative measures were undertaken, and that the Philippines “[did] not suggest that the inquiries considered the criminal responsibility of individuals, or were conducted in support of criminal prosecutions”.<sup>315</sup>

175. The Pre-Trial Chamber also noted that “several media articles are relied on to substantiate the existence of investigative mechanisms” in the material provided by the Philippines, and observed that “a State ought to be in a position to present material with a higher probative value to substantiate its actions”.<sup>316</sup>

176. The Philippines argues that the Pre-Trial Chamber failed to take into account the material upon which the Philippines relied, and that this failure “can only be explained by virtue of its application of a much higher standard [...] than is warranted in an article 18 context”.<sup>317</sup> The Majority notes, however, that the Pre-Trial Chamber rejected part of the material regarding the Davao Death Squad, because the events in question fell outside the temporal scope of the Court’s authorised investigation.<sup>318</sup>

177. Regarding other domestic proceedings, the Pre-Trial Chamber expressed concerns about the relevance of the list of murder incidents recorded by the Davao City Police Office and relied upon by the Philippines. Indeed, the document merely lists “Murder Cases between 2011-June 30, 2016”, dates of commission and information on whether the cases were “cleared” and “solved”.<sup>319</sup> The Majority therefore considers that the Pre-Trial Chamber reasonably found that the list did not allow it to identify whether the listed murder cases corresponded to the killings referred to in the Article 15 Decision, nor to ascertain the status of those cases.<sup>320</sup>

178. The Philippines also argues that the Pre-Trial Chamber erroneously criticised the Philippines’ use of media articles, noting that the Prosecutor also relied on media sources in the Article 15 Request.<sup>321</sup> The Prosecutor avers in his Response to the Appeal Brief that the Article 15 Request relied on media articles for a different purpose.<sup>322</sup>

179. The Pre-Trial Chamber took note of the Philippines’ reliance on “several media articles” and concluded that “material with a higher probative value” ought to have been provided.<sup>323</sup> The Majority considers that a State is indeed in a position to present official material with a higher probative value than media articles to substantiate the existence of investigative mechanisms.

180. The Majority further notes that with respect to the Philippines’ reliance on media articles in its Article 18 Observations concerning the alleged killings in the Davao region,<sup>324</sup> at least one of them concerns the events which the Pre-Trial Chamber found to fall outside the temporal scope of the Court’s authorised investigations;<sup>325</sup> two others concern the proceedings for which the Philippines also provided official sources;<sup>326</sup> and one of them relates to an investigation by the DOJ,<sup>327</sup> which, in the view of the Pre-Trial Chamber, “does not amount to relevant investigations within the meaning of article[s] 17 and 18 of the Statute”,<sup>328</sup> and would be of limited significance to the Pre-Trial Chamber’s enquiry as it was in fact “shelved”, according to the Philippines’ Article 18 Observations.<sup>329</sup>

181. In light of the foregoing, the Majority considers that it was not unreasonable for the Pre-Trial Chamber to conclude that the Philippines ought to have presented material with a higher probative value, rather than relying solely on media articles, to substantiate the existence of investigations.

182. As a result, the Majority rejects the Philippines’ arguments with respect to the alleged killings in Davao.

#### **(4) Other crimes**

##### **(i) Summary of the submissions**

183. The Philippines submits that although it enumerated its investigations of crimes other than murder, the Pre-Trial Chamber erroneously found that “[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".<sup>330</sup> The Philippines contends that "there is no specific detail concerning the commission of 'other crimes' in either the Article 15 Request or the Article 15 Decision".<sup>331</sup> It argues that in the absence of such detail, "it is almost impossible for the Philippine Government to meet the Pre-Trial Chamber's erroneous demands".<sup>332</sup>

184. In his response to the Appeal Brief, the Prosecutor submits that the Philippines misunderstands the analysis required by article 18.<sup>333</sup> In particular, he argues that the standard applied by the Pre-Trial Chamber was that the Philippines' investigation "sufficiently rather than 'substantially' mirrored the Court's investigation".<sup>334</sup> The Prosecutor contends that on the basis of the Article 15 Request, the Philippines had "adequate notice of the range and scope of additional crimes which may form part of the Court's investigation" and consequently, "was in a position to provide information of criminal proceedings".<sup>335</sup> Regarding the Pre-Trial Chamber's assessment of the specific material provided by the Philippines in support of its contentions, the Prosecutor submits that "[g]iven the nature and scale of the alleged events forming the context of the Court's investigation, the Chamber's conclusion that the remaining domestic proceedings were insufficient for the purpose of article 18(2) [...] was entirely reasonable".<sup>336</sup>

(ii) Determination by the Appeals Chamber

185. At the outset, the Majority notes that in the Article 15 Request, the Prosecutor requested that any authorised investigation also include "other crimes" sufficiently linked to the "war on drugs" campaign.<sup>337</sup> Referring to the alleged beatings and other mistreatment, the Prosecutor stated that "[s]uch conduct may constitute the additional Crimes Against Humanity of Torture or Other Inhumane Acts under articles 7(1)(f) and (k) of the Statute".<sup>338</sup> When authorising the Prosecutor's investigation, the Pre-Trial Chamber indicated that the investigation could "extend to any crime within the jurisdiction of the Court".<sup>339</sup>

186. When seeking the Pre-Trial Chamber's authorisation to resume the investigation, following the Philippines' request for deferral, the Prosecutor provided further information on "other potential crimes", indicating that they may also constitute crimes under article 7(1)(e), (i) and (g) of the Statute.<sup>340</sup>

187. The Pre-Trial Chamber acknowledged this, stating that "the Prosecution had noted allegations of acts that may constitute torture or other inhumane acts under article 7(1)(f) and (k) of the Statute, imprisonment or other severe deprivation of liberty under article 7(1)(e) of the Statute; enforced disappearance under article 7(1)(i) of the Statute; and [sexual and gender-based crimes] under article 7(1)(g) of the Statute".<sup>341</sup>

188. Recalling that it had authorised the investigation to extend to any crime within the jurisdiction of the Court, the Pre-Trial Chamber concluded that "[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".<sup>342</sup> In reaching this conclusion, the Pre-Trial Chamber assessed "four specific cases, a 'partial listing' of cases on the NPS's docket, and a resolution dated 27 November 2020", relied upon by the Philippines in its Article 18 Observations.<sup>343</sup> It found that "[o]ne of the cases [...], and the events covered by the NPS Consolidated Resolution [...] concern events that fall outside the temporal scope of the authorised investigation".<sup>344</sup> Further, "in only two occasions a crime other than murder was pursued, and in only one case actual charges for a crime other than murder were brought".<sup>345</sup>

189. The cases to which the Philippines referred in its Article 18 Observations were the following: (i) the arrest of a police officer of the Manila Police District accused of raping a 15-year-old girl;<sup>346</sup> (ii) the dismissal of a former chief of the Philippine National Police Custodial Service Unit due to an alleged sexual assault complaint;<sup>347</sup> (iii) investigations related to anomalous secret jails uncovered by the CHR in 2017 and related charges against Metro Manila police officers;<sup>348</sup> and (iv) charges of unlawful arrest, false testimony and violation of the Republic Act No. 9165 brought against police officers involved in a buy-bust operation.<sup>349</sup>

190. Furthermore, the Philippines cited a partial listing of cases in the NPS' dockets, which, in its view, "clearly showed that investigations were conducted against police officers with respect to their conduct of anti-illegal drug operations".<sup>350</sup> Lastly, it claimed that additional cases had been filed against police officers concerning resisting arrest cases, while 250 additional incidents were "still undergoing the required review process to ensure that any incident recommended for prosecution will stand trial".<sup>351</sup>

(a) *Alleged lack of detailed notice*

191. The Philippines argues that no specific detail of other crimes was included in either the Article 15 Request or the Article 15 Decision, making it “almost impossible” for the Philippine Government to meet the Pre-Trial Chamber’s demands.<sup>352</sup> The Majority notes that the Prosecutor’s Article 15 Request and the Pre-Trial Chamber’s Article 15 Decision do not provide detail of all crimes other than murder which the Prosecutor intends to investigate. The Prosecutor only referred to alleged beatings and other mistreatment, as well as the “instances in which victims’ family members were forced to witness the killings”.<sup>353</sup> However, in his Article 18(2) Request, the Prosecutor provided more detail. He referred to instances of imprisonment or other severe deprivation of liberty under article 7(1)(e), enforced disappearance under article 7(1)(i) and rape or other sexual violence under article 7(1)(g) of the Statute.<sup>354</sup> As evidenced by the content of its Article 18 Observations, the Philippines appeared to be sufficiently informed of the focus of the Prosecutor’s authorised investigation. Indeed, the Article 18 Observations refer to allegations of crimes similar to the ones listed in the Prosecutor’s documents.

192. The Majority further notes that in his Article 18(2) Request, the Prosecutor provided examples of crimes which he intends to investigate. He referred to: (i) detention of victims by police “for hours or days [ . . . ] in official or unofficial prisons without charges, without access to counsel”, in some cases as part of so-called “One Time Big Time” operations; (ii) “refusals by the police to acknowledge the arrest or abduction or to provide information regarding the fate or whereabouts of the victims”; and (iii) “accounts of rape of women and girls prior to their murder, and allegations that some female family members of potential victims were forced to perform sexual acts in exchange for promises that their loved ones would be spared”.<sup>355</sup>

193. In view of the foregoing, the Majority rejects the Philippines’ argument that due to an alleged insufficiently detailed notice it was unable to provide information on the relevant domestic proceedings.

(b) *Specific cases referred to in the Article 18 Observations*

194. In its Article 18 Observations, the Philippines relied on an online press article reporting that a police officer was arrested on suspicion of rape, and that a police chief director ordered the filing of criminal and administrative cases against him.<sup>356</sup> Although the Pre-Trial Chamber was concerned about the “deficient support” for the Philippines’ contention that the Philippines had prosecuted police officers as a result of its investigation of crimes other than murder which appeared to have been committed in connection with anti-drug operations, it appears to have acknowledged that in two occasions, prosecution of “a crime other than murder was pursued”.<sup>357</sup>

195. In its Article 18 Observations, the Philippines also relied on an online press article about the dismissal of a former chief of the PNP Custodial Centre from the service due to an alleged sexual assault complaint.<sup>358</sup> Noting that the supportive material for this incident suggests that the assault occurred in June 2020, the Pre-Trial Chamber concluded that the incident falls outside the temporal scope of the authorised investigation.<sup>359</sup>

196. Furthermore, the Philippines relied on an online press article reporting that in 2017, the CHR had discovered that a dozen men and women were detained in a secret cell behind the Manila police station, but that the charges against the police officers who were purportedly involved in the illegal detention were later dismissed by the Ombudsman for lack of probable cause.<sup>360</sup> In the Impugned Decision, the Pre-Trial Chamber referred to the Prosecutor’s argument that the Philippines did not substantiate that concrete investigative steps were taken in this instance.<sup>361</sup> The Pre-Trial Chamber also appears to have concluded that this case was none of the three cases in which a crime was pursued or charges were brought.<sup>362</sup>

197. Relying on the “Review Resolution”, the Philippines, in its Article 18 Observations, described a case against eight police officers for unlawful arrest, perjury and violation of the Republic Act No. 9165.<sup>363</sup> According to the “Review Resolution”, a national prosecutor recommended the filing of the resolution with court.<sup>364</sup> In the Impugned Decision, the Pre-Trial Chamber appears to have referred to this case as one of the two cases in which charges were brought.<sup>365</sup>

198. Referring to a list of cases in the NPS’ dockets and a “Joint Resolution”, the Philippines submitted that investigations were conducted with respect to 13 incidents involving police officers.<sup>366</sup> Regarding the cases in

the dockets of the NPS, the Pre-Trial Chamber observed that there was only one on-going case involving a crime other than murder, where one of the charges was torture.<sup>367</sup> The “Joint Resolution” concerned complaints against police officers for kidnapping/serious illegal detention with murder allegedly committed in February 2020.<sup>368</sup> In the Impugned Decision, the Pre-Trial Chamber found that the resolution concerned events falling outside the temporal scope of the authorised investigation.<sup>369</sup>

199. In its Article 18 Observations, the Philippines argued that an “additional 250 incidents” had been referred to the NBI by the DOJ for review “to ensure that any incident recommended for prosecution will stand trial”.<sup>370</sup> The Pre-Trial Chamber, however, noted in this regard that no material was provided to demonstrate that the Philippines was indeed investigating or prosecuting these cases. Consequently, it was not satisfied that this in and of itself amounted to a concrete investigative step.<sup>371</sup>

*(c) Conclusion on alleged errors in the Pre-Trial Chamber’s assessment concerning the contours of the investigation of other crimes*

200. The Majority finds that the Philippines has not demonstrated that the Pre-Trial Chamber erred in finding that “[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”.<sup>372</sup> The above review of the relevant material shows that although the Philippines had received sufficient notice of the crimes, other than murder, which the Prosecutor intends to investigate, it provided information only on a few relevant cases in which charges were brought or the alleged crime was prosecuted. Accordingly, the Majority rejects the Philippines’ arguments in this regard.

**(5) Conclusion on alleged errors in the Pre-Trial Chamber’s assessment concerning the contours of the investigation**

201. In light of the foregoing, the Majority rejects this part of the third ground of appeal. As discussed in the beginning of this section, these essentially factual errors raised by the Philippines are alleged to be a result of the general legal error of applying too high a threshold of substantiating the existence of domestic investigations and prosecutions,<sup>373</sup> as well as too high a standard to assess the degree of overlap between the domestic and Prosecution investigations.<sup>374</sup> The Majority finds that by failing to show instances in which the Pre-Trial Chamber allegedly applied the wrong threshold or standard, the Philippines has also failed to demonstrate the alleged legal error.

**iii. Overall conclusion on ground of appeal 3**

202. Having rejected the totality of the Philippines’ arguments regarding the application of the alleged erroneous admissibility test and the examples of alleged erroneously assessed domestic proceedings, the Majority rejects ground of appeal 3.

**E. GROUND OF APPEAL 4: ALLEGED ERROR IN FAILING TO EXAMINE THE TWO FACTORS UNDER ARTICLE 17 OF THE STATUTE**

203. Under ground of appeal 4, the Philippines alleges that the Pre-Trial Chamber’s finding that it was not satisfied that the Philippines is making “a real or genuine effort” to carry out investigations and prosecutions is not based on any actual assessment, and that the Pre-Trial Chamber failed to consider whether the situation is not of sufficient gravity.<sup>375</sup>

**1. The Pre-Trial Chamber’s failure to consider the Philippines’ willingness and ability to carry out the investigation**

**i. Relevant part of the Impugned Decision**

204. The Pre-Trial Chamber, in the Impugned Decision, applied a two-pronged approach in its assessment under article 17 of the Statute as follows:

[F]or the purposes of article 17(1)(a) and (b), ‘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 and unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute. Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court.<sup>376</sup>

205. Having examined material regarding various domestic initiatives and proceedings, the Pre-Trial Chamber concluded that they “do not amount to tangible, concrete and progressive investigative steps being carried out with a view to conducting criminal proceedings, in a way that would sufficiently mirror the Court’s investigation”.<sup>377</sup>

206. The Pre-Trial Chamber determined as follows:

[W]hilst the Chamber found that in some instances investigative steps have been taken or are ongoing, albeit only with regard to low-ranking law enforcement personnel, it remains that the totality of the national investigations and proceedings presented to the Chamber do not sufficiently, or at all, mirror, the Court’s investigation. The Chamber is therefore 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 criminal prosecutions, that would warrant a deferral of the Court’s investigations as per article 18(2) of the Statute.<sup>378</sup>

## ii. Summary of the submissions

207. The Philippines submits that, although the Pre-Trial Chamber stated that it was not satisfied that the Philippines is making “a real or genuine effort” to carry out investigations and prosecutions, this finding is not based on any actual assessment.<sup>379</sup> The Philippines argues that the two-pronged approach in relation to the inactivity limb and unwillingness/inability limb is not clearly delineated.<sup>380</sup> Referring to article 18(3) and 18(5) of the Statute, as well as rule 55(2) of the Rules, the Philippines contends that the willingness and ability of a State to genuinely carry out the investigations must always be considered in article 18 proceedings.<sup>381</sup> The Philippines refers to the *Afghanistan* OA4 Judgment, which, in its view, shows that “the specific procedural mechanisms in relation to admissibility assessments have been designed for distinct purposes and stages”, and that the two-step assessment designed for article 19 proceedings is inapplicable in the context of article 18 proceedings.<sup>382</sup> The Philippines avers that the Pre-Trial Chamber ignored the facts that the Philippines has a functioning criminal justice system that incorporated article 5 crimes and that the Philippine Government cooperated with the Prosecutor.<sup>383</sup>

208. In his response to the Appeal Brief, the Prosecutor argues that the Philippines takes the Pre-Trial Chamber’s “incidental use of the term ‘genuine’ out of context” and that “this remark does not mean that the Chamber found the Philippines’ proceedings to lack genuineness under article 17(2) and (3)”.<sup>384</sup> The Prosecutor submits that the Pre-Trial Chamber correctly endorsed the two-step process for assessing complementarity under article 17 of the Statute, applicable to other procedural stages.<sup>385</sup> He contends that the Pre-Trial Chamber correctly did not apply article 17(2) and (3) of the Statute because it found that the Philippines was inactive and its proceedings did not sufficiently mirror the Court’s investigation.<sup>386</sup> The Prosecutor argues that, while the factors relevant to determination of inaction may also be relevant to assessment of unwillingness or inability, this “does not mean that the Chamber needs to always assess the latter when it has found the former”.<sup>387</sup>

209. The OPCV submits that the Pre-Trial Chamber correctly limited itself to concluding, on the basis of the assessment of the evidence before it, that the Philippines took no action.<sup>388</sup> The OPCV avers that having so concluded, the Pre-Trial Chamber did not need to further address the willingness or ability of the Philippines to carry out genuine proceedings.<sup>389</sup> It contends that the Pre-Trial Chamber correctly relied on the jurisprudence regarding the two-step analysis for a determination of admissibility.<sup>390</sup>

210. The Victims submit that the Philippines’ argument “contradicts categorical rulings made by the Court in other cases” as they consider that “[b]efore an assessment of unwillingness or inability is made to determine



whether or not a case is inadmissible, there must first be a determination of the existence of an investigation or prosecution of the case”.<sup>391</sup>

### iii. Determination by the Appeals Chamber

211. The Majority recalls articles 17 and 18 of the Statute, as well as rule 55(2) of the Rules, as provided above. The Majority further recalls the two-step analysis under article 17(1)(a) and (b) of the Statute to determine whether a case is inadmissible, as illustrated above.

212. The Majority observes that the Philippines relies on the *Afghanistan* OA4 Judgment to argue that the two-step assessment for article 19 proceedings is inapplicable in the context of article 18 proceedings.<sup>392</sup>

213. In the *Afghanistan* OA4 Judgment, the Appeals Chamber examined the question of whether a pre-trial chamber is required to assess admissibility at different stages of the proceedings, and concluded that at the stage of considering the Prosecutor’s application for authorisation of an investigation under article 15 of the Statute, there is no basis for the pre-trial chamber to consider admissibility.<sup>393</sup> Contrary to the Philippines’ contention, the Appeals Chamber did not make any pronouncement as to which factors listed in article 17 of the Statute should be examined in the course of article 18 proceedings. The Majority therefore rejects the Philippines’ argument, as it misreads the *Afghanistan* OA4 Judgment.

214. Turning to the Philippines’ argument that the Pre-Trial Chamber made a finding on the genuineness of the Philippines’ domestic proceedings without any assessment,<sup>394</sup> the Majority notes that the Pre-Trial Chamber found as follows:

[W]hilst the Chamber found that in some instances investigative steps have been taken or are ongoing, albeit only with regard to low-ranking law enforcement personnel, it remains that the totality of the national investigations and proceedings presented to the Chamber do not sufficiently, or at all, mirror, the Court’s investigation. The Chamber is therefore 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 criminal prosecutions, that would warrant a deferral of the Court’s investigations as per article 18(2) of the Statute.<sup>395</sup>

215. The Philippines appears to argue that the Pre-Trial Chamber, by stating that no “real or genuine effort” was made, in fact made a finding on the Philippines’ willingness and ability to carry out investigations. However, the Majority considers that this finding of the Pre-Trial Chamber should be viewed in light of the two-step approach which the Pre-Trial Chamber applied:

[F]or the purposes of article 17(1)(a) and (b), ‘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 and unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute. Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court.<sup>396</sup>

216. It is thus clear that the approach adopted by the Pre-Trial Chamber would require it to assess the willingness and ability of the domestic authorities to genuinely carry out an investigation or prosecution only if it first found that there were ongoing, or that there had been, investigations or prosecutions.

217. In the present situation, the Pre-Trial Chamber concluded that both questions were answered in the negative. Having examined the material regarding various domestic initiatives and proceedings, it found that they “do not amount to tangible, concrete and progressive investigative steps being carried out with a view to conducting criminal proceedings, in a way that would sufficiently mirror the Court’s investigation”.<sup>397</sup> Consequently, the Pre-Trial Chamber did not examine the Philippine Government’s willingness and ability to carry out the relevant investigations and proceedings, which is consistent with the two-step approach set out in article 17 of the Statute, and the relevant jurisprudence.

218. The Majority therefore rejects the Philippines' argument that the Pre-Trial Chamber's reference to "a real or genuine effort to carry out such investigations and any subsequent criminal prosecutions"<sup>398</sup> amounts to a finding on the Philippine Government's willingness and ability to do so.

219. The Philippines also refers to rule 55(2) of the Rules, which requires the Pre-Trial Chamber to "consider the factors in article 17 in deciding whether to authorize an investigation", and argues that the willingness and ability of a State to genuinely carry out the investigations must *always* be considered in article 18 proceedings.<sup>399</sup> The Majority, however, recalls that the requirement in rule 55(2) of the Rules to "consider the factors in article 17" does not mean that a State's willingness and ability to genuinely carry out investigations must always be considered in article 18 proceedings. In particular, such willingness and ability are "the second halves of sub-paragraphs (a) and (b)"<sup>400</sup> of article 17(1) of the Statute, and rule 55(2) does not expressly require the Pre-Trial Chamber to consider both halves of each of these sub-paragraphs of article 17(1). In addition, these second halves both begin with the word "unless", which makes it clear that "the question of unwillingness or inability is linked to the activities of the State having jurisdiction".<sup>401</sup> The Philippines does not explain why this principle should apply differently to the proceedings under article 18 of the Statute. The Majority therefore rejects this argument of the Philippines.

220. In support of its argument, the Philippines further refers to article 18(3) of the Statute, which provides that the Prosecutor's deferral to a State's investigation shall be open to review where "there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation".<sup>402</sup> In accordance with this procedure, the need for the Prosecutor's review under article 18(3) of the Statute arises in cases where, having been notified of the Prosecutor's investigation, a State requests that the Prosecutor defer his investigation because that State itself is investigating or has investigated relevant crimes. However, the Majority is not persuaded by this argument. The procedure to which the Philippines refers presupposes that the relevant investigations are being or have been carried out, whereas in the present circumstances, the Pre-Trial Chamber was not satisfied that this was the case. The Majority therefore finds that the Philippines' reliance on this procedure is inapposite.

221. Turning to the argument of the Philippines that the inactivity limb and unwillingness/inability limb of the test are "not clearly delineated",<sup>403</sup> the Majority notes that the Philippines refers to the following ruling of Pre-Trial Chamber I:

The Chamber recognizes that 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.<sup>404</sup>

222. The Majority notes that, contrary to the Philippines' assertion, this ruling of Pre-Trial Chamber I does not suggest that the two limbs of the admissibility test are not clearly delineated. It only refers to the possibility of relying on the same evidence to substantiate both limbs. However, Pre-Trial Chamber I made it clear that while "intimately and inextricably linked", the two limbs are nonetheless distinct. The argument of the Philippines is therefore rejected.

223. In light of the foregoing, the Majority finds that the Philippines has not demonstrated that the Pre-Trial Chamber ought to have considered the Philippines' willingness and ability to genuinely carry out the relevant investigation. Given its conclusion on the Philippines' inactivity with regard to the relevant crimes, it was correct for the Pre-Trial Chamber not to consider the issue of the Philippines' willingness and ability to investigate. The Majority therefore rejects this part of ground of appeal 4.

## 2. *The Pre-Trial Chamber's alleged failure to consider gravity*

### i. **Relevant part of the Impugned Decision**

224. In the Impugned Decision, the Pre-Trial Chamber noted as follows:

[S]everal of the Philippines' preliminary submissions show its disagreement with the Chamber's findings in the Article 15 Decision. Yet, article 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of article 15 proceedings. The Philippines' submission that the situation is not of sufficient gravity to justify further action by the Court, for example, is merely based on the argument that there would not have been any widespread or systematic attack directed against any civilian population or that the crimes were not committed pursuant to a state policy, which the Chamber already considered and rejected for the purposes of the Article 15 Decision. The Chamber therefore rejects those arguments.<sup>405</sup>

## ii. Summary of the submissions

225. The Philippines argues that the Pre-Trial Chamber failed to consider whether the situation is not of sufficient gravity.<sup>406</sup> The Philippines submits that the Pre-Trial Chamber erred in law by deciding not to consider the potential gravity of the Philippines Situation at this point in the proceedings.<sup>407</sup> Referring to rule 55(2) of the Rules, the Philippines argues that article 17(1)(d) of the Statute, governing gravity, "had to be considered by the Pre-Trial Chamber".<sup>408</sup> According to the Philippines, gravity is considered to be an essential component for the Court's admissibility determination, and as such "is always a factor to be considered".<sup>409</sup> It contends that the Pre-Trial Chamber's failure to consider gravity "vitiates the entire reasoning of the Pre-Trial Chamber" and renders it incomplete.<sup>410</sup>

226. In his response to the Appeal Brief, the Prosecutor argues that a determination under article 18 of the Statute is limited to complementarity matters, and does not extend to gravity.<sup>411</sup> In relation to rule 55(2) of the Rules, the Prosecutor submits that the Rules are "are an instrument for the application of the Rome Statute [. . . ], to which they are subordinate in all cases" and "should be read in conjunction with and subject to the provisions of the Statute".<sup>412</sup> Furthermore, the Prosecutor asserts that he is always required to assess gravity prior to the opening of an investigation,<sup>413</sup> and that the Philippines takes paragraph 25 of the Impugned Decision "out of context" as it was part of the "jurisdictional analysis under article 15(4), and not in the context of article 17(1)(d)".<sup>414</sup> Finally, the Prosecutor contends that in any event, the available information in connection with the "war on drugs" campaign indicates that the potential cases within the situation are sufficiently grave.<sup>415</sup>

227. The OPCV submits that the Pre-Trial Chamber did not commit any discernible error and correctly considered that the Philippines could not make use of article 18 of the Statute to re-litigate the Article 15 Decision.<sup>416</sup> The OPCV argues that it is the Prosecutor's duty to assess the requirement of gravity when deciding to initiate an investigation, which had already been considered by the Prosecutor and was as such, "outside of the scope of [the Pre-Trial Chamber's] determination under article 18(2) of the Statute".<sup>417</sup>

## iii. Determination by the Appeals Chamber

228. The Philippines submits that the Pre-Trial Chamber committed "a clear error of law" by declining to consider the potential gravity of the Philippines Situation at this point in the proceedings.<sup>418</sup> The Majority notes, however, that the Pre-Trial Chamber did consider the Philippines' arguments on gravity. In the Impugned Decision, the Pre-Trial Chamber noted as follows:

[S]everal of the Philippines' preliminary submissions show its disagreement with the Chamber's findings in the Article 15 Decision. Yet, article 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of article 15 proceedings. The Philippines' submission that the situation is not of sufficient gravity to justify further action by the Court, for example, is merely based on the argument that there would not have been any widespread or systematic attack directed against any civilian population or that the crimes were not committed pursuant to a state policy, which the Chamber already considered and rejected for the purposes of the Article 15 Decision. The Chamber therefore rejects those arguments.<sup>419</sup>

229. The Majority observes that the above paragraph does not cover all potential aspects of gravity of the Philippines Situation. Rather, the Pre-Trial Chamber's finding is limited to the arguments which the Philippines actually raised and

which focused on the existence of a widespread or systematic attack and of a state policy. The Majority finds no error in the Pre-Trial Chamber's approach to only address those issues of gravity that the Philippines had actually raised before it.

230. The Majority therefore rejects the argument of the Philippines that the Pre-Trial Chamber declined to consider gravity.

### 3. Conclusion

231. Having rejected or dismissed all arguments under ground of appeal 4, the Majority rejects this ground of appeal in its entirety.

## VI. APPROPRIATE RELIEF

232. In an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.<sup>420</sup> In the present case, the Appeals Chamber, by majority, Judge Perrin de Brichambaut and Judge Lordkipanidze dissenting, confirms the Impugned Decision.

Judge Perrin de Brichambaut and Judge Lordkipanidze append a joint dissenting opinion to this judgment.

Done in both English and French, the English version being authoritative.



**Judge Marc Perrin de Brichambaut,  
Presiding**



**Judge Piotr Hofmański**



**Judge Luz del Carmen Ibáñez Carranza**



**Judge Solomy Balungi Bossa**



**Judge Gocha Lordkipanidze**

Dated this 18th day of July 2023  
At The Hague, The Netherlands

## ENDNOTES

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| <p>1 See Section V below.</p> <p>2 <a href="#">Request for authorisation of an investigation pursuant to article 15(3)</a>, 14 June 2021, ICC-01/21-7-Red (original secret <i>ex parte</i> version filed on 24 May 2021), with public Annexes 1, 4 and 5, and secret <i>ex parte</i> Annexes 2 and 3.</p> | <p>3 <a href="#">Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute</a>, ICC-01/21-12.</p> <p>4 <a href="#">Annex A to the Notification of the Republic of the Philippines' deferral request under article 18(2)</a>, ICC-01/21-14-AnxA.</p> |
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- 5 Notification of the Republic of the Philippines' deferral request under article 18(2), ICC-01/21-14.
- 6 Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2), 24 June 2022, ICC-01/21-46 (hereinafter: "Prosecutor's Article 18(2) Request"), paras 10-11.
- 7 Prosecutor's Article 18(2) Request.
- 8 Order inviting observations and victims' views and concerns, ICC-01/21-47, p. 7.
- 9 Philippine Government's Observation on the Office of the Prosecutor's Request, ICC-01/21-51, with confidential *ex parte* Annexes A to T.
- 10 Prosecution's Response to the Philippine Government's Observations on the Prosecution's Request to Resume Investigations (ICC-01/21-51, filed 8 September 2022), ICC-01/21-54-Red (confidential version notified same day).
- 11 Authorisation pursuant to article 18(2) of the Statute to resume the investigation, ICC-01-21-56-Red (confidential version notified same day).
- 12 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-01/21-56) with Application for Suspensive Effect, ICC-01/21-57.
- 13 Notice of Appeal, para. 10.
- 14 Philippine Government's Application for Extension of Time to File the Appeal Brief, ICC-01/21-59.
- 15 Prosecution response to the Philippines 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), ICC-01/21-60.
- 16 Decision on the Republic of the Philippines' application for extension of time to file the appeal brief, ICC-01/21-61.
- 17 Registry Transmission of an "Application to present victims' views and concerns in the appeal of the Republic of the Philippines against the Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", 24 February 2023, ICC-01/21-62-Red (confidential *ex parte* version notified same day), with confidential *ex parte* Annexes I and II, and public Annex III.
- 18 Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court, 24 February 2023, ICC-01/21-63.
- 19 Response to requests to participate before the Appeals Chamber, ICC-01/21-64.
- 20 Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", ICC-01/21-65.
- 21 Decision on requests for victims' involvement and access to filings, ICC-01/21-66.
- 22 Decision on request for suspensive effect of Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" of 26 January 2023 (ICC-01/21-56), ICC-01/21-67.
- 23 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), ICC-01/21-68.
- 24 Request for Leave to Reply, ICC-01/21-69.
- 25 *See* Request for Leave to Reply, fn. 15.
- 26 Prosecution's Response to the Philippines Government's "Request for Leave to Reply" (ICC-01/21-69 OA), ICC-01/21-70, para. 5.
- 27 Observations on behalf of victims on the Philippines Government Appeal against the Decision authorising the resumption of the investigation, ICC-01/21-71.
- 28 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), ICC-01/21-72 (hereinafter: "Decision on Philippines' Request for Leave to Reply").
- 29 Decision on Philippines' Request for Leave to Reply, para. 11.
- 30 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"", ICC-01/21-73.
- 31 Registry Transmission of Victims' Representations, ICC-01/21-74, with 5 confidential *ex parte* Annexes.
- 32 Registry Report on Article 18(2) Victims' Representations in Appeals Proceedings, ICC-01/21-75, with confidential and public redacted Annex I and confidential *ex parte* Annexes II and III.
- 33 Appeal Brief, fn. 17.
- 34 *The Prosecutor v. Thomas Lubanga Dyilo, 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, ICC-01/04-01/06-717 (hereinafter: "Lubanga Decision on Request for Extension of Page Limit"), para. 9.*
- 35 *Lubanga Decision on Request for Extension of Page Limit, para. 8. See also The Prosecutor v. Laurent Koudou Gbagbo, Decision on requests related to page limits and reclassification of documents, 16 October 2012, ICC-02/11-01/11-266, paras 11, 13.*
- 36 *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled "Decision on the admissibility of video (DAR-OTP-0216-0119) and records of telephone calls (DAR-OTP-0216-0127, DAR-OTP-0216-0128)", 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: "Abd-Al-Rahman OA12 Judgment"), para. 20, referring to *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka, 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, ICC-01/14-01/22-124-Red (OA3) (hereinafter: "Mokom OA3 Judgment"), para. 19; The Prosecutor v. Bosco Ntaganda, Judgment on the appeal of Mr Bosco Ntaganda against the "Decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February**



- 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute", 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: "*Al Hassan* OA Judgment"), para. 38.
- 37 *Abd-Al-Rahman* OA12 Judgment, para. 21, referring to *Mokom* OA3 Judgment, para. 20; *Al Hassan* OA Judgment, para. 38; *The Prosecutor v. Simone Gbagbo*, 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, ICC-02/11-01/12-75- Red (OA) (hereinafter: "*Simone Gbagbo* OA Judgment"), para. 40. See also *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* ("*Ali Kushayb*"), Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05- 01/20-302)", 1 November 2021, ICC-02/05-01/20-503 (OA8) (hereinafter: "*Abd-Al-Rahman* OA8 Judgment"), para. 12; *The Prosecutor v. Dominic Ongwen*, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', 17 July 2019, ICC-02/04-01/15-1562 (OA4) (hereinafter: "*Ongwen* OA4 Judgment"), para. 45.
- 38 *Abd-Al-Rahman* OA12 Judgment, para. 21, referring to *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled "Reparations Order", 12 September 2022, ICC-01/04-02/06-2782 (A4-A5) (hereinafter: "*Ntaganda* A4-A5 Judgment"), para. 29; *Mokom* OA3 Judgment, para. 20; *Al Hassan* OA Judgment, para. 38; *Simone Gbagbo* OA Judgment, para. 41. See also *Abd-Al-Rahman* OA8 Judgment, para. 12; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled 'Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55(2) of the Regulations of the Court', 1 July 2021, ICC-01/12- 01/18-1562-Red (OA3), para. 18; *Ongwen* OA4 Judgment, para. 45. See also *Situation in the Islamic Republic of Afghanistan*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber II entitled "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", 4 April 2023, ICC-02/17-218 (OA5), para. 23.
- 39 *Abd-Al-Rahman* OA12 Judgment, para. 22, referring to *Mokom* OA3 Judgment, para. 21. See also *Ntaganda* A4-A5 Judgment, para. 30; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment in the appeal of the Prosecutor against Trial Chamber I's decision on the no case to answer motions, 31 March 2021, ICC-02/11-01/15-1400 (A), para. 68; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment', 30 March 2021, ICC-01/04-02/06-2667-Red (A3), paras 27-29; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled "Decision on Mr Gbagbo's Detention", 19 July 2017, ICC-02/11-01/15-992-Red (OA10), para. 16.
- 40 *Abd-Al-Rahman* OA12 Judgment, para. 23, referring to *Abd-Al-Rahman* OA8 Judgment, para. 14; *The Prosecutor v. Joseph Kony et al.*, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19(1) of the Statute" of 10 March 2009, 16 September 2009, ICC- 02/04-01/05-408 (OA3), para. 48.
- 41 *Impugned Decision*, paras 18-19.
- 42 *Impugned Decision*, para. 26 (footnotes omitted).
- 43 *Appeal Brief*, paras 26-62. It is noted that the Philippines announced its withdrawal from the Statute on 17 March 2018 (effective from 17 March 2019) and the Prosecutor filed the *Article 15 Request* on 24 May 2021 (a public redacted version filed on 14 June 2021).
- 44 *Appeal Brief*, para. 28.
- 45 *Appeal Brief*, para. 29.
- 46 *Appeal Brief*, para. 30.
- 47 *Appeal Brief*, para. 30.
- 48 *Prosecutor's Response*, para. 31.
- 49 *Prosecutor's Response*, para. 36; see also para. 10.
- 50 *Prosecutor's Response*, para. 37.
- 51 *Prosecutor's Response*, paras 12-35.
- 52 *OPCV Observations*, para. 26.
- 53 *OPCV Observations*, paras 27-34.
- 54 Annex 4 to the *Registry Transmission of Victims' Representations*, ICC-01/21-74-Conf-Exp-Anx4 (hereinafter: "Victims Representations, Annex 4"), p. 9.
- 55 Annex 5 to the *Registry Transmission of Victims' Representations*, ICC-01/21-74-Conf-Exp-Anx5, paras 8-12.
- 56 *The Situation in the Republic of Kenya*, Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility", 28 July 2011, ICC-01/09-01/11-234 (hereinafter: "*Kenya* OA Decision"), para. 12.
- 57 *Kenya* OA Decision, para. 13. See also *Simone Gbagbo* OA Judgment, paras 43-44.
- 58 *Impugned Decision*, para. 26 (footnotes omitted), referring to article 127 of the Statute and *Article 15 Decision*, paras 110-111.
- 59 *Appeal Brief*, para. 29.
- 60 *Appeal Brief*, para. 30.
- 61 *Impugned Decision*, para. 26 (footnotes omitted), referring to article 127 of the Statute and *Article 15 Decision*, paras 110-111.
- 62 *Appeal Brief*, para. 29.
- 63 It is further noted that the relevant statements in paragraph 26 of the Impugned Decision were made in the section of "Preliminary Issues" and not in the section of "Issues material to the article 18(2) proceedings".
- 64 See in particular, *Article 15 Decision*, paras 110-111 (footnotes omitted):

- (1) The Chamber notes that the Philippines deposited its instrument of ratification of the Rome Statute on 30 August 2011, and the Statute entered into force for the Philippines on 1 November 2011, in accordance with Article 126(1) of the Statute. On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute with the UN Secretary-General, and in accordance with Article 127 of the Statute, the withdrawal took effect on 17 March 2019. While the relevant crimes appear to have continued after this date, the Chamber notes that alleged crimes identified in the Article 15(3) Request are limited to those during the period when the Philippines was a State Party to the Statute and was bound by its provisions.
- (2) While 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.
- 65 Indeed, questions of admissibility only arise if the Court has jurisdiction. *See also* rule 58(4) of the Rules, which stipulates that "[t]he Court shall rule on any challenge or question of jurisdiction first and then on any challenge or question of admissibility".
- 66 [Appeal Brief](#), paras 63-75.
- 67 [Impugned Decision](#), para. 14 (footnotes omitted).
- 68 [Appeal Brief](#), para. 63.
- 69 [Appeal Brief](#), paras 67-69.
- 70 [Appeal Brief](#), paras 72-73.
- 71 [Appeal Brief](#), para. 66.
- 72 [Prosecutor's Response](#), paras 53-54, 56.
- 73 [Prosecutor's Response](#), para. 54.
- 74 [Prosecutor's Response](#), para. 44.
- 75 [Prosecutor's Response](#), paras 44-45, 74-77.
- 76 [Prosecutor's Response](#), paras 51-60.
- 77 [Prosecutor's Response](#), paras 61-66.
- 78 [Prosecutor's Response](#), paras 67-70.
- 79 [OPCV Observations](#), para. 36.
- 80 Victims Representations, Annex 4, p. 11.
- 81 [Appeal Brief](#), para. 67.
- 82 *The Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 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, ICC-01/09-01/11-307 (OA) (hereinafter: "*Ruto et al.* OA Judgment"), para. 62. *See also The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 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, ICC-01/09-02/11-274 (OA) (hereinafter: "*Muthaura et al.* OA Judgment"), para. 61; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, 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, ICC-01/11-01/11- 565 (OA6) (hereinafter: "*Al Senussi* OA6 Judgment"), para. 166; *Simone Gbagbo* OA Judgment, paras 29, 128.
- 83 *Situation of Uganda, Judgment on the appeals of the Defence against the decisions entitled "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06"*, 23 February 2009, ICC-02/04-179 (OA) and ICC-02/04-01/05-371 (OA2), para. 36; *Al Senussi* OA6 Judgment, para. 167.
- 84 *See also*, in this context, International Court of Justice (hereinafter: "ICJ"), *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, *Judgment of 26 November 1984*, I.C.J. Reports 1984, p. 392 at para. 101 ("[A]ny judgment on the merits in the present case will be limited to upholding such submissions of the Parties as have been supported by sufficient proof of relevant facts, and are regarded by the Court as sound in law [...]. Ultimately, however, it is the litigant seeking to establish a fact who bears the burden of proving it" (emphasis added)); ICJ, *Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, 20 April 2010, I.C.J. Reports 2010, p. 14 at para. 162 ("[I]n accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court [...] applies to the assertions of fact both by the Applicant and the Respondent" (emphasis added)).
- 85 [Impugned Decision](#), para. 10.
- 86 [Appeal Brief](#), para. 73.
- 87 *See* J. Stigen, 'The Admissibility Procedures' in C. Stahn and M. El Zeidy (eds), *The International Criminal Court and Complementarity: From Theory to Practice, Vol. I* (2011), p. 518 ("if the request is not substantiated at all, the Pre-Trial Chamber will be able to authorize an investigation quickly"); J. T. Holmes, 'Complementarity: National Courts versus the ICC' in A. Cassese, P. Gaeta, and J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*

- (2002), p. 681 (“the information must be sufficiently detailed to demonstrate that the State is investigating or has investigated criminal acts which relate to the information provided by the Prosecutor in the original notification”).
- 88 [Prosecutor’s Response](#), para. 63.
- 89 [Impugned Decision](#), para. 14.
- 90 [Appeal Brief](#), paras 76-83, 137-140.
- 91 [Appeal Brief](#), paras 84-136.
- 92 [Impugned Decision](#), para. 10.
- 93 [Impugned Decision](#), para. 10.
- 94 [Impugned Decision](#), para. 12, *referring to* Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, 31 October 2022, ICC-02/17-196 (hereinafter: “*Afghanistan Article 18(2) Decision*”), para. 46.
- 95 [Impugned Decision](#), para. 12.
- 96 [Impugned Decision](#), para. 13 (emphasis added), *referring to* *Muthaura et al. OA Judgment*, para. 39; *Ruto et al. OA Judgment*, para. 40.
- 97 [Impugned Decision](#), para. 13, *referring to* *Afghanistan Article 18(2) Decision*, para. 46.
- 98 [Impugned Decision](#), para. 13 (emphasis added).
- 99 [Impugned Decision](#), para. 14.
- 100 [Impugned Decision](#), para. 14 (footnotes omitted, emphasis in original).
- 101 [Impugned Decision](#), para. 15.
- 102 [Impugned Decision](#), para. 16 (footnote omitted, emphasis added).
- 103 [Impugned Decision](#), para. 16 (footnotes omitted, emphasis added).
- 104 [Impugned Decision](#), para. 17 (emphasis added).
- 105 [Impugned Decision](#), para. 17 (emphasis added).
- 106 [Impugned Decision](#), paras 29-48.
- 107 [Impugned Decision](#), paras 49-69.
- 108 [Impugned Decision](#), paras 70-84.
- 109 [Impugned Decision](#), paras 85-95.
- 110 [Impugned Decision](#), para. 68 (emphasis added).
- 111 [Impugned Decision](#), para. 97.
- 112 [Impugned Decision](#), paras 96-98.
- 113 [Appeal Brief](#), para. 83.
- 114 [Appeal Brief](#), para. 80.
- 115 [Appeal Brief](#), para. 80, *referring to* *Ruto et al. OA Judgment*, para. 40; *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, 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, ICC-01/11-01/11-547-Red (OA4), (hereinafter: “*Gaddafi OA4 Judgment*”), paras 62, 70; *Al Senussi OA6 Judgment*, paras 99-100; Pre-Trial Chamber I, *The Prosecutor v. Simone Gbagbo*, Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, ICC-02/11-01/12-47-Red, para. 33.
- 116 [Appeal Brief](#), para. 84.
- 117 [Appeal Brief](#), paras 112-116.
- 118 [Prosecutor’s Response](#), paras 83, 88-92.
- 119 [Prosecutor’s Response](#), para. 83.
- 120 [Prosecutor’s Response](#), para. 91.
- 121 [Prosecutor’s Response](#), paras 91-92 (emphasis in original).
- 122 [Prosecutor’s Response](#), paras 93-97.
- 123 [OPCV Observations](#), para. 35.
- 124 [OPCV Observations](#), para. 36 (emphasis in original omitted).
- 125 [OPCV Observations](#), para. 50.
- 126 Annex 1 to the [Registry Transmission of Victims’ Representations](#), ICC-01/21-74-Conf-Exp-Anx1, p. 9.
- 127 Annex 2 to the [Registry Transmission of Victims’ Representations](#), ICC-01/21-74-Conf-Exp-Anx2 (hereinafter: “*Victims Representations, Annex 2*”), pp. 4-5. *See also* Annex 3 to the [Registry Transmission of Victims’ Representations](#), ICC-01/21-74-Conf-Exp-Anx3, p. 2.
- 128 *Victims Representations, Annex 2*, p. 9.
- 129 *Victims Representations, Annex 4*, p. 13.
- 130 *Victims Representations, Annex 4*, pp. 13-14.
- 131 Emphasis added.
- 132 *Ruto et al. OA Judgment*, para. 40. *See also* *Muthaura et al. OA Judgment*, paras 1, 39, 41.
- 133 [Gaddafi OA4 Judgment](#), para. 59 (footnotes omitted).
- 134 [Gaddafi OA4 Judgment](#), para. 84.
- 135 *Ruto et al. OA Judgment*, para. 41.
- 136 *Ruto et al. OA Judgment*, para. 41.
- 137 *Ruto et al. OA Judgment*, para. 41.
- 138 *Situation in the Islamic Republic of Afghanistan, 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, ICC-02/17-138 (OA4) (hereinafter: “*Afghanistan OA4 Judgment*”), para. 42.
- 139 *Muthaura et al. OA Judgment*, para. 37 (emphasis added).
- 140 *Ruto et al. OA Judgment*, para. 39. *See also* *Muthaura et al. OA Judgment*, para. 38. *See also* Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire, Corrigendum to Decision Authorizing the Investigation in the Situation in Côte d’Ivoire*, 15 November 2011, ICC-02/11-14-Corr, para. 190.
- 141 [Gaddafi OA4 Judgment](#), para. 83.
- 142 *See* [Impugned Decision](#), para. 13 (emphasis added), *referring to* *Muthaura et al. OA Judgment*, para. 39; *Ruto et al. OA Judgment*, para. 40.
- 143 [Impugned Decision](#), paras 12-13, *referring, inter alia, to* *Afghanistan Article 18(2) Decision*, para. 46.
- 144 [Impugned Decision](#), para. 14.
- 145 [Impugned Decision](#), para. 16 (footnote omitted).
- 146 [Appeal Brief](#), paras 90, 96, 98-99, 111.
- 147 [Appeal Brief](#), paras 120, 123, 128, 131, 136.
- 148 [Appeal Brief](#), para. 84.
- 149 [Appeal Brief](#), paras 89-90.
- 150 [Appeal Brief](#), paras 91-93.

- 151 [Appeal Brief](#), para. 93.
- 152 [Prosecutor's Response](#), para. 111.
- 153 [Prosecutor's Response](#), para. 111.
- 154 [Prosecutor's Response](#), para. 112.
- 155 [OPCV Observations](#), paras 51, 53 (emphasis in original omitted).
- 156 [OPCV Observations](#), para. 53 (emphasis in original omitted).
- 157 [Philippines Article 18 Observations](#), para. 26.
- 158 [Impugned Decision](#), para. 79.
- 159 [Impugned Decision](#), para. 80 (footnotes omitted).
- 160 "Transmittal letter" from the NBI to the Provincial Prosecutor (PHL-OTP-0008-1633); the NBI's investigation and analysis (PHL-OTP-0008-1633).
- 161 [Impugned Decision](#), para. 81.
- 162 [Impugned Decision](#), para. 81.
- 163 "Final reports" from the NBI. Annex C-1 to C-4 to [Philippines Article 18 Observations](#).
- 164 [Impugned Decision](#), para. 82.
- 165 [Impugned Decision](#), para. 82.
- 166 [Appeal Brief](#), para. 89.
- 167 [Appeal Brief](#), para. 90 (emphasis in original omitted).
- 168 [Appeal Brief](#), para. 90.
- 169 [Appeal Brief](#), para. 90.
- 170 [Impugned Decision](#), para. 74.
- 171 [Impugned Decision](#), paras 74, 75.
- 172 [Impugned Decision](#), para. 79.
- 173 [Impugned Decision](#), para. 78.
- 174 [Impugned Decision](#), para. 79.
- 175 [Impugned Decision](#), para. 88 (footnote omitted).
- 176 [Impugned Decision](#), para. 88.
- 177 [Appeal Brief](#), para. 91.
- 178 [Appeal Brief](#), paras 92-93.
- 179 [Appeal Brief](#), para. 93.
- 180 [Impugned Decision](#), para. 88.
- 181 [Impugned Decision](#), para. 88.
- 182 [Impugned Decision](#), para. 88, fn. 223 ("These stages include: Prosecution ongoing; dismissed; *trial ongoing*; pending for petition for review with DOJ; convicted and pending preliminary investigation" (emphasis added)).
- 183 "Partial Listing of Cases in the Dockets of the National Prosecution Service relating to Investigations into Deaths during Anti-Illegal Drug Operations", PHL-OTP-0008-0046, pp. 1-3.
- 184 [Impugned Decision](#), para. 88.
- 185 [Appeal Brief](#), paras 92-93.
- 186 [Appeal Brief](#), para. 96.
- 187 [Appeal Brief](#), para. 97.
- 188 [Appeal Brief](#), para. 99.
- 189 [Appeal Brief](#), para. 98.
- 190 [Prosecutor's Response](#), para. 117.
- 191 [Prosecutor's Response](#), para. 115.
- 192 [Prosecutor's Response](#), para. 115.
- 193 [Prosecutor's Response](#), para. 116.
- 194 [Prosecutor's Response](#), para. 116.
- 195 [OPCV Observations](#), para. 53 (emphasis in original omitted).
- 196 [OPCV Observations](#), para. 53.
- 197 [Appeal Brief](#), para. 97.
- 198 [Philippines Article 18 Observations](#), para. 37.1.2.
- 199 [Philippines Article 18 Observations](#), para. 125 (emphasis in original omitted), *referring to* PHL-OTP- 0008-0046.
- 200 [Philippines Article 18 Observations](#), para. 78.
- 201 [Philippines Article 18 Observations](#), para. 78.
- 202 [Impugned Decision](#), para. 87.
- 203 [Impugned Decision](#), para. 87, *referring to* PHL-OTP-0008-0046, PHL-OTP-0008-1338, PHL-OTP- 0008-1341, PHL-OTP-0008-1334, PHL-OTP-0008-1348; PHL-OTP-0008-1392, PHL-OTP-0008-1416, PHL-OTP-0008-1451, PHL-OTP-0008-1476, PHL-OTP-0008-1505, PHL-OTP-0008-1532, PHL-OTP- 0008-1580.
- 204 [Impugned Decision](#), paras 87, 89, *referring to* Annexes C, D, E, F, G, H to the [Philippines Article 18 Observations](#). *See also* [Appeal Brief](#), para. 97, *referring to* [Philippines Article 18 Observations](#), para. 78.
- 205 [Impugned Decision](#), para. 89.
- 206 [Impugned Decision](#), paras 89-90 (footnotes omitted).
- 207 [Appeal Brief](#), paras 97-99.
- 208 [Impugned Decision](#), para. 89.
- 209 Annex D to [Philippines Article 18 Observations](#), pp. 1-2.
- 210 [Impugned Decision](#), para. 89, fn. 228.
- 211 Annex C to [Philippines Article 18 Observations](#), p. 18.
- 212 [Impugned Decision](#), paras 89-90 (footnotes omitted).
- 213 [Appeal Brief](#), para. 97, *referring to* PHL-OTP-0008-1633 (Annex P to the Philippines' letter of 31 March 2022).
- 214 [Impugned Decision](#), para. 81. For the assessment of cases referred to the NBI, *see* paragraphs 117- 125 above.
- 215 [Impugned Decision](#), para. 81, *referring to* PHL-OTP-0008-1633.
- 216 [Impugned Decision](#), para. 81 (footnotes omitted).
- 217 [Appeal Brief](#), para. 97, *referring to* PHL-OTP-0008-1633 (Annex P to the Philippines' letter of 31 March 2022).
- 218 PHL-OTP-0008-1633.
- 219 [Prosecutor's Article 18\(2\) Request](#), para. 106.
- 220 The conclusion of the second report is illegible.
- 221 PHL-OTP-0008-1633, at 1644.
- 222 [Impugned Decision](#), para. 81.
- 223 [Impugned Decision](#), para. 81 (footnotes omitted).
- 224 Annex C to [Philippines Article 18 Observations](#), p. 2.
- 225 [Appeal Brief](#), paras 100, 102.
- 226 [Appeal Brief](#), para. 101.
- 227 [Appeal Brief](#), para. 108.
- 228 [Appeal Brief](#), para. 109.
- 229 [Prosecutor's Response](#), paras 121, 124.
- 230 [Prosecutor's Response](#), para. 122.



- 231 [Prosecutor's Response](#), para. 122.
- 232 [Prosecutor's Response](#), para. 123.
- 233 [Prosecutor's Response](#), para. 124.
- 234 [OPCV Observations](#), para. 55.
- 235 [OPCV Observations](#), para. 58.
- 236 [OPCV Observations](#), para. 58.
- 237 [Impugned Decision](#), para. 48.
- 238 [Impugned Decision](#), para. 34.
- 239 [Impugned Decision](#), para. 35.
- 240 [Impugned Decision](#), para. 35.
- 241 [Impugned Decision](#), para. 43.
- 242 [Impugned Decision](#), para. 47.
- 243 [Impugned Decision](#), para. 75.
- 244 [Impugned Decision](#), para. 75.
- 245 [Impugned Decision](#), para. 34.
- 246 [Impugned Decision](#), para. 78.
- 247 [Impugned Decision](#), para. 78.
- 248 [Impugned Decision](#), para. 79.
- 249 [Appeal Brief](#), para. 101.
- 250 [Appeal Brief](#), paras 103-105.
- 251 [Impugned Decision](#), paras 34, 35, 43, 47.
- 252 [Impugned Decision](#), para. 48.
- 253 [PHL-OTP-0008-1228](#); [PHL-OTP-0008-1259](#); [PHL-OTP-0008-1294](#).
- 254 [PHL-OTP-0008-0050](#).
- 255 [Appeal Brief](#), para. 109.
- 256 [Appeal Brief](#), para. 109.
- 257 [Appeal Brief](#), para. 109.
- 258 [Appeal Brief](#), para. 112.
- 259 [Appeal Brief](#), para. 120.
- 260 [Appeal Brief](#), para. 123.
- 261 [Appeal Brief](#), para. 122.
- 262 [Appeal Brief](#), para. 121.
- 263 [Prosecutor's Response](#), paras 125-126.
- 264 [Prosecutor's Response](#), para. 128.
- 265 [OPCV Observations](#), para. 54.
- 266 [Impugned Decision](#), para. 66.
- 267 [Impugned Decision](#), para. 68.
- 268 [Impugned Decision](#), para. 68.
- 269 [Impugned Decision](#), para. 68.
- 270 [Appeal Brief](#), para. 121.
- 271 [Impugned Decision](#), para. 67, *quoting* [Philippines Article 18 Observations](#), para. 127.
- 272 [Impugned Decision](#), paras 68, 93.
- 273 [Impugned Decision](#), para. 68.
- 274 [Impugned Decision](#), paras 68, 93.
- 275 [Appeal Brief](#), para. 121.
- 276 [Impugned Decision](#), para. 99.
- 277 Article 18(7) of the Statute reads: "A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances".
- 278 [Appeal Brief](#), para. 122.
- 279 *Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58"*, 13 July 2006, ICC-01/04-169 (OA), para. 77.
- 280 [Impugned Decision](#), para. 68.
- 281 [Impugned Decision](#), para. 67.
- 282 [Appeal Brief](#), paras 124-125.
- 283 [Appeal Brief](#), para. 125.
- 284 [Appeal Brief](#), para. 125.
- 285 [Appeal Brief](#), paras 126-128.
- 286 [Prosecutor's Response](#), para. 130.
- 287 [Prosecutor's Response](#), para. 131. *See also* paras 87-103.
- 288 [Prosecutor's Response](#), para. 131.
- 289 [Prosecutor's Response](#), para. 131.
- 290 [Impugned Decision](#), para. 65.
- 291 [Impugned Decision](#), para. 65.
- 292 [Impugned Decision](#), para. 65.
- 293 [Article 15 Decision](#), paras 61-66. *See also* [Article 15 Request](#), para. 65.
- 294 [Appeal Brief](#), para. 125.
- 295 [Appeal Brief](#), para. 125.
- 296 [Appeal Brief](#), para. 127.
- 297 [Impugned Decision](#), para. 57.
- 298 [Impugned Decision](#), para. 59.
- 299 [Impugned Decision](#), paras 56, 58.
- 300 [Impugned Decision](#), para. 65.
- 301 [Appeal Brief](#), para. 129.
- 302 [Appeal Brief](#), para. 130.
- 303 [Appeal Brief](#), para. 131.
- 304 [Appeal Brief](#), para. 131.
- 305 [Prosecutor's Response](#), para. 135.
- 306 [Prosecutor's Response](#), para. 135.
- 307 [Prosecutor's Response](#), para. 136.
- 308 [Impugned Decision](#), para. 50.
- 309 [Impugned Decision](#), para. 55; [Article 15 Decision](#), para. 69.
- 310 [Impugned Decision](#), para. 55.
- 311 [Impugned Decision](#), para. 56.
- 312 [Impugned Decision](#), para. 57, *referring to* [Philippines Article 18 Observations](#), para. 113.
- 313 [Impugned Decision](#), para. 57.
- 314 [Impugned Decision](#), para. 59.
- 315 [Impugned Decision](#), para. 59.
- 316 [Impugned Decision](#), para. 58.



- 317 [Appeal Brief](#), para. 128.
- 318 [Impugned Decision](#), para. 57.
- 319 Annex K to [Philippines Article 18 Observations](#).
- 320 [Impugned Decision](#), para. 56.
- 321 [Appeal Brief](#), para. 130.
- 322 [Prosecutor's Response](#), para. 135; [Appeal Brief](#), para. 130.
- 323 [Impugned Decision](#), para. 58.
- 324 [Philippines Article 18 Observations](#), fns 120, 122, 126, 129.
- 325 [Philippines Article 18 Observations](#), fn. 120.
- 326 [Philippines Article 18 Observations](#), fns 122, 126.
- 327 [Philippines Article 18 Observations](#), fn. 129.
- 328 [Impugned Decision](#), para. 35.
- 329 [Philippines Article 18 Observations](#), para. 106.
- 330 [Appeal Brief](#), paras 132-133, 135, *referring to* [Philippines Article 18 Observations](#), paras 121-122, 124, [Impugned Decision](#), para. 63.
- 331 [Appeal Brief](#), paras 134, 135.
- 332 [Appeal Brief](#), para. 136.
- 333 [Prosecutor's Response](#), para. 139.
- 334 [Prosecutor's Response](#), para. 139 (emphasis in original omitted).
- 335 [Prosecutor's Response](#), para. 139, *referring to* [Impugned Decision](#), para. 61, fn. 154, *citing* [Article 15 Request](#), para. 129.
- 336 [Prosecutor's Response](#), para. 141.
- 337 [Article 15 Request](#), para. 129.
- 338 [Article 15 Request](#), para. 129.
- 339 [Article 15 Decision](#), para. 118.
- 340 [Prosecutor's Article 18\(2\) Request](#), para. 99.
- 341 [Impugned Decision](#), fn. 154.
- 342 [Impugned Decision](#), para. 63.
- 343 [Impugned Decision](#), para. 61 (footnotes omitted), *referring to* [Philippines Article 18 Observations](#), paras 121-124.
- 344 [Impugned Decision](#), para. 63.
- 345 [Impugned Decision](#), para. 63.
- 346 [Philippines Article 18 Observations](#), para. 121.
- 347 [Philippines Article 18 Observations](#), para. 122.
- 348 [Philippines Article 18 Observations](#), para. 123.
- 349 [Philippines Article 18 Observations](#), para. 124.
- 350 [Philippines Article 18 Observations](#), para. 125.
- 351 [Philippines Article 18 Observations](#), para. 126.
- 352 [Appeal Brief](#), paras 134-136.
- 353 [Article 15 Request](#), para. 129.
- 354 [Prosecutor's Article 18\(2\) Request](#), para. 99.
- 355 [Prosecutor's Article 18\(2\) Request](#), para. 99.
- 356 [Philippines Article 18 Observations](#), para. 121, *referring to* R. Galupo, 'Cop nabbed for rape of girl, 15' on PhilStar Global (29 October 2018), <https://www.philstar.com/nation/2018/10/29/1864004/cop-nabbed-rape-girl-15>.
- 357 [Impugned Decision](#), para. 63.
- 358 [Philippines Article 18 Observations](#), para. 122, *referring to* G. Pabico Lalu, 'Ex-chief of PNP Custodial Center dismissed due to Parojinog sexual assault case' on Inquirer.net (6 October 2021), <https://newsinfo.inquirer.net/1498178/pnps-ex-custodial-center-head-dismissed-from-service-after-parojinogs-sexual-assault-complaints>.
- 359 [Impugned Decision](#), para. 63, fn. 166.
- 360 [Philippines Article 18 Observations](#), para. 123, *referring to* A. Balagtas See, 'Drug suspects found in secret police cell' on Inquirer.net (27 April 2017), <https://newsinfo.inquirer.net/892537/drug-suspects-found-in-secret-police-cell>.
- 361 [Impugned Decision](#), para. 62.
- 362 [Impugned Decision](#), paras 61, 63.
- 363 [Philippines Article 18 Observations](#), para. 124, *referring to* Review Resolution, 13 May 2022 (Annex L to [Philippines Article 18 Observations](#)).
- 364 Annex L to [Philippines Article 18 Observations](#), p. 9.
- 365 [Impugned Decision](#), paras 61, 63.
- 366 [Philippines Article 18 Observations](#), para. 125, *referring to* PHL-OTP-0008-0046 (Annex A to the Philippines' letter of 22 December 2021), Joint Resolution, 27 November 2020 (Annex M to [Philippines Article 18 Observations](#)).
- 367 [Impugned Decision](#), para. 63, fn. 168, *referring to* PHL-OTP-0008-0046 (Annex A to the Philippines' letter of 22 December 2021), entry no. 10.
- 368 Annex M to [Philippines Article 18 Observations](#), p. 3.
- 369 [Impugned Decision](#), para. 63, fn. 167.
- 370 [Philippines Article 18 Observations](#), para. 126.
- 371 [Impugned Decision](#), para. 84, *referring to* [Philippines Article 18 Observations](#), para. 126.
- 372 [Impugned Decision](#), para. 63.
- 373 [Appeal Brief](#), paras 90, 96, 98-99, 111.
- 374 [Appeal Brief](#), paras 120, 123, 128, 131, 136.
- 375 [Appeal Brief](#), paras 141-162.
- 376 [Impugned Decision](#), para. 11 (footnote omitted), *quoting* *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, 25 September 2009, ICC-01/04-01/07-1497 (OA8) (hereinafter: "*Katanga* OA8 Judgment"), para. 78.
- 377 [Impugned Decision](#), para. 96.
- 378 [Impugned Decision](#), para. 98.
- 379 [Appeal Brief](#), paras 143-145 (emphasis in original omitted).
- 380 [Appeal Brief](#), para. 146.
- 381 [Appeal Brief](#), paras 148-151; [Reply to the Prosecutor's Response](#), para. 27.
- 382 [Reply to the Prosecutor's Response](#), paras 23-26.
- 383 [Appeal Brief](#), paras 152-153.
- 384 [Prosecutor's Response](#), paras 147, 150.
- 385 [Prosecutor's Response](#), paras 151-152.
- 386 [Prosecutor's Response](#), paras 147, 151, 153.
- 387 [Prosecutor's Response](#), para. 156.
- 388 [OPCV Observations](#), para. 64.

- 389 [OPCV Observations](#), para. 64.
- 390 [OPCV Observations](#), paras 65-67.
- 391 [Victims Representations](#), Annex 4, p. 12.
- 392 [Reply to the Prosecutor's Response](#), paras 23-26.
- 393 [Afghanistan OA4 Judgment](#), para. 40.
- 394 [Appeal Brief](#), paras 143-145.
- 395 [Impugned Decision](#), para. 98.
- 396 [Impugned Decision](#), para. 11 (footnote omitted), *quoting Katanga OA8 Judgment*, para. 78.
- 397 [Impugned Decision](#), para. 96.
- 398 [Impugned Decision](#), para. 98.
- 399 [Appeal Brief](#), paras 148-151; [Reply to the Prosecutor's Response](#), para. 27.
- 400 [Katanga OA8 Judgment](#), para. 78.
- 401 [Katanga OA8 Judgment](#), para. 76.
- 402 [Appeal Brief](#), paras 148-149.
- 403 [Appeal Brief](#), para. 146.
- 404 Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the case against Abdullah Al-Senussi](#), 11 October 2013, ICC-01/11-01/11-466-Red, para. 210.
- 405 [Impugned Decision](#), para. 25 (footnotes omitted).
- 406 [Appeal Brief](#), paras 154-162.
- 407 [Appeal Brief](#), para. 154.
- 408 [Appeal Brief](#), para. 155.
- 409 [Appeal Brief](#), para. 156.
- 410 [Appeal Brief](#), para. 160.
- 411 [Prosecutor's Response](#), paras 158-159.
- 412 [Prosecutor's Response](#), para. 160.
- 413 [Prosecutor's Response](#), para. 161.
- 414 [Prosecutor's Response](#), para. 162.
- 415 [Prosecutor's Response](#), para. 163.
- 416 [OPCV Observations](#), para. 68.
- 417 [OPCV Observations](#), paras 69-70.
- 418 [Appeal Brief](#), para. 154.
- 419 [Impugned Decision](#), para. 25 (footnotes omitted).
- 420 *See* rule 158(1) of the Rules.



**DISSENTING OPINION OF  
JUDGE PERRIN DE BRICHAMBAUT AND  
JUDGE LORDKIPANIDZE**

**I. INTRODUCTION**

1. This appeal arises from the 26 January 2023 decision of Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) that authorised the Prosecutor to resume the investigation into the Situation in the Philippines (hereinafter: “Philippines Situation”), pursuant to article 18(2) of the Statute (hereinafter: “Impugned Decision”).<sup>1</sup>

2. In today’s judgment,<sup>2</sup> the majority of the Appeals Chamber (hereinafter: “Majority”) dismisses the first ground of appeal raised by the Philippines in its appeal brief (hereinafter: “Appeal Brief”).<sup>3</sup> In its view, since (i) the Impugned Decision does not constitute a decision with respect to jurisdiction, and (ii) the issue of the effect of the Philippines’ withdrawal from the Statute on the Court’s jurisdiction was neither properly raised and discussed before the Pre-Trial Chamber nor adequately raised on appeal, the Appeals Chamber cannot entertain the Philippines’ appeal on this point.<sup>4</sup>

3. We respectfully disagree with the Majority in relation to the above-mentioned finding. For the reasons that follow, we find that the first ground of appeal is admissible, and we would have considered its merits and granted it.

4. The Philippines submits that the Pre-Trial Chamber erred 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, despite its subsequent withdrawal from the Statute.<sup>5</sup> More specifically, the Philippines submits that the Pre-Trial Chamber, “in order to make an admissibility determination”, “effectively [. . .] made a positive finding of jurisdiction based on the [Philippines’] status, as a State Party to the Rome Statute, at the time of the alleged crimes”, and in doing so, “considered the effect of the [Philippines’] withdrawal as a State Party to the Rome Statute and entered further findings concerning the [Philippines’] ‘ensuing obligations’”, which “are not *obiter* and are located in section B [of the Impugned Decision] entitled ‘Determination by the Chamber’”.<sup>6</sup> The Philippines argues that it was, therefore, entitled to raise all errors which were “inextricably linked” to the admissibility ruling in accordance with articles 18(4) and 82(1)(a) of the Statute.<sup>7</sup> Lastly, the Philippines submits that this ground of appeal 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”.<sup>8</sup> In its view, the first ground of appeal, therefore, “does not require an assessment as to whether it qualifies as a jurisdictional challenge under article 82(1)(a)”.<sup>9</sup>

5. As explained in more detail below, in our view, the Appeals Chamber is properly seized of the Philippines’ jurisdictional challenge, as: (i) a finding on jurisdiction is in fact made in the Impugned Decision; and (ii) the Philippines properly raises an error in that finding. Accordingly, we would have addressed the merits of the Philippines’ submissions under the first ground of appeal. Also, we would have found that the Pre-Trial Chamber erred in finding that the Court has jurisdiction in the present situation.

## II. WHETHER THE APPEALS CHAMBER IS PROPERLY SEIZED OF THE PHILIPPINES' JURISDICTIONAL CHALLENGE

6. In our view, the jurisdictional question raised in the Appeal Brief is a concrete issue that has arisen in the context of the Impugned Decision.

7. In accordance with the Pre-Trial Chamber's invitation,<sup>10</sup> the Philippines filed its observations on the Prosecutor's request to resume the investigation (hereinafter: "Article 18(2) Request"),<sup>11</sup> raising, *inter alia*, issues relating to the Court's jurisdiction. Notably, the Philippines submitted arguments in relation to the alleged lack of subject-matter jurisdiction of the Court, the lack of gravity of constituent crimes, and a general argument on the sovereignty of States.<sup>12</sup> While the Philippines' arguments did not expressly relate to the effect of its withdrawal from the Statute, the Pre-Trial Chamber included a finding on this issue in the Impugned Decision.<sup>13</sup>

8. In the section entitled "Determination by the Chamber", the Pre-Trial Chamber addressed, as a preliminary issue, the Philippines' several general challenges to the Court's jurisdiction raised in its observations on the Prosecutor's Article 18 Request,<sup>14</sup> and entered a finding specifically on the effects of the Philippines' withdrawal on the Court's jurisdiction. In particular, in paragraph 26 of the Impugned Decision, the Pre-Trial Chamber stated:

The Philippines' arguments that the Court should not investigate in the Philippines due to the principle of non-intervention are misplaced, as they misappreciate the Court's complementarity system. The Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which *the Philippines was a party at the time of the alleged crimes for which the investigation was authorised*. By ratifying the Statute, the 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.*<sup>15</sup>

9. Contrary to the finding of the Majority, in our view, the Impugned Decision contains a finding on jurisdiction and this finding is an integral part, and indeed forms the basis, of the decision. As such, we would have addressed the merits of the Philippines' submissions challenging the Court's jurisdiction.

10. In this context, we recall that it is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction. This principle of *la compétence de la compétence* has been consistently upheld by the chambers of this Court and other international tribunals and courts.<sup>16</sup> It is emphasised that "this power exists 'even in the absence of an explicit reference to that effect' as an 'essential element in the exercise by any judicial body of its functions'".<sup>17</sup>

11. In addition, we consider that the fundamental issue of the Court's jurisdiction should be resolved at the earliest opportunity. When an aspect of the Court's jurisdiction (subject-matter jurisdiction,<sup>18</sup> temporal jurisdiction,<sup>19</sup> jurisdiction over persons<sup>20</sup> or territorial jurisdiction<sup>21</sup>) is properly challenged, the Court shall, at the earliest opportunity, satisfy itself that it has jurisdiction.<sup>22</sup> This is particularly so in the present case, where the Philippines brought a concrete challenge to the Court's jurisdiction, as a result of its withdrawal from the Statute. This approach is, in our view, consistent with the Appeals Chamber's recent judgment in the Situation in the Islamic Republic of Afghanistan in which it examined the *scope of the Court's jurisdiction* in an appeal arising from proceedings under article 18 of the Statute.<sup>23</sup>

12. A ruling on jurisdiction at the situation stage ensures certainty on a fundamental issue, especially if it is likely to arise at a later stage of the proceedings.<sup>24</sup> Additionally, in the present situation, it would be counter-productive and a waste of the Court's resources to allow an investigation to proceed, only to declare later in the proceedings, when a challenge is made with respect to a specific case arising from this very situation, that the Court has no jurisdiction.

13. As found above,<sup>25</sup> the Pre-Trial Chamber made a positive determination regarding the exercise of the Court's jurisdiction in the Philippines Situation as part of its admissibility assessment under article 18(2) of the Statute. In the

Appeal Brief, the Philippines raises, under its first ground of appeal, an error of law in the Pre-Trial Chamber's above finding, in accordance with articles 18(4) and 82(1)(a) of the Statute.

14. While the Pre-Trial Chamber had already made similar findings on jurisdiction in its previous article 15 decision, which are referred to in the Impugned Decision, article 15 of the Statute does not foresee the participation of the concerned State in the relevant proceedings, and the Statute does not provide for the possibility of a State to file an appeal against a pre-trial chamber's ruling in the context of article 15 proceedings. Accordingly, the Philippines was neither a party nor a participant in the article 15 proceedings in this situation.<sup>26</sup> It is only in the context of article 18(2) proceedings that the Philippines had the opportunity to raise the issue of the Court's jurisdiction. As recalled above, pursuant to article 18(2) of the Statute, the Philippines was invited to participate in such proceedings, and, in that context, it raised issues relating to the Court's jurisdiction. While its arguments did not expressly relate to the withdrawal from the Statute, the Pre-Trial Chamber included a finding on this issue in the Impugned Decision.<sup>27</sup> As such, we consider that the Philippines' challenge regarding the Court's jurisdiction is properly raised on appeal and the Appeals Chamber should have addressed it on the merits.

### III. WHETHER THE PRE-TRIAL CHAMBER ERRED IN FINDING THAT THE COURT HAS JURISDICTION IN THE PHILIPPINES SITUATION

15. The Philippines submits that 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".<sup>28</sup>

16. For the reasons that follow, we consider that the preconditions to the exercise of the jurisdiction set out in article 12 of the Statute must exist at the time that the Court's exercise of the jurisdiction is triggered under article 13 of the Statute. As will be demonstrated below, because the preconditions were not met – the Philippines was not a State Party at the relevant time – the Court's jurisdiction could not be triggered.

#### A. RELEVANT PROVISIONS

17. Before proceeding to our analysis, we consider it important to recall the relevant provisions of the Statute.

18. Article 12 of the Statute is titled "[p]reconditions to the exercise of jurisdiction", and in its second paragraph reads as follows:

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 [...].<sup>29</sup>

19. Article 13 of the Statute is titled "Exercise of jurisdiction" and, in its relevant part, provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

[...]

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

20. Article 15 of the Statute provides that:

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together



with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

21. Pursuant to article 18(1) of the Statute:

When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

22. Finally, article 127 of the Statute, which concerns the withdrawal of a State from the Statute, provides as follows:

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. 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 matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

## B. ANALYSIS

23. Based on a holistic reading of the relevant provisions, as set out above, we consider that there is a distinction between the *existence* of jurisdiction and the Court's ability to *exercise* the jurisdiction, and that the preconditions to the exercise of the Court's jurisdiction set out in article 12 of the Statute must exist at the time that the exercise of the jurisdiction is triggered pursuant to article 13 of the Statute.

24. Article 12(2) of the Statute provides that the Court can only exercise jurisdiction if the State of nationality or the territorial State is a Party to the Statute. For the Court to exercise its jurisdiction, it is required that the preconditions set forth in article 12 of the Statute are met.<sup>30</sup>

25. Article 12(2) of the Statute, read in conjunction with articles 13(c) and 15 of the Statute, provides that when the Prosecutor has initiated an investigation *proprio motu* in respect of a crime within the Court's jurisdiction in accordance with article 15 of the Statute, "the Court may exercise its jurisdiction if one or more of the [States concerned] are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with [article 12(3) of the Statute]".<sup>31</sup> It is further recalled that pursuant to article 18(1) of the Statute, when "*the Prosecutor initiates an investigation pursuant to article 13(c) and 15*" of the Statute, the Prosecutor shall notify all State Parties and those States concerned.<sup>32</sup>

26. In our view, the wording of article 12(2) indicates that the appropriate time to make a determination as to whether the preconditions of article 12 of the Statute are met is when the exercise of the Court's jurisdiction is triggered, not when the crimes were allegedly committed.<sup>33</sup> In other words, the preconditions to the exercise of the Court's jurisdiction must exist at the time that the jurisdiction is triggered pursuant to article 13 of the Statute,

which, in the scenario provided for in article 13(c) of the Statute, in our view, definitely occurs when the pre-trial chamber authorizes the commencement of the investigation, pursuant to article 15(4) of the Statute.<sup>34</sup>

27. Just as a State that is not, or is no longer, Party to the Statute cannot refer a situation to the Court under article 13(a) of the Statute and thus trigger the Court's exercise of jurisdiction (though it may accept the jurisdiction of the Court under article 12(3)), the Prosecutor cannot commence the process of triggering the jurisdiction of the Court once a withdrawal has become effective and the State in question is no longer Party to the Statute. The Court's jurisdiction must be triggered before the withdrawal has become effective. Put differently, once the State's withdrawal has become effective, the Prosecutor can no longer open an investigation.

28. Bearing in mind that the Rome Statute is an international treaty and international criminal code at the same time, two concomitant interests may be discerned when a State withdraws from the Statute. Article 127 of the Statute guarantees to the State Parties a right to withdraw from the Statute. In this regard, we consider that it is a fundamental right of States to decide whether they want to be bound by a treaty or not.<sup>35</sup> We are also mindful of the Statute's important objective "to put an end to impunity".<sup>36</sup> There is a clear potential for conflict between these two competing considerations. Indeed, there is a risk that a State may use its right to withdraw from the Statute in order to shield certain persons from the Court's prosecution.

29. We consider that the Statute strikes the right balance between these competing considerations and provides for a procedure that enables the Court to prevent any misuse of the State's right to withdraw. Article 127(1) of the Statute stipulates that "[t]he withdrawal shall take effect one year after the date of receipt of the notification". Therefore, the Prosecutor has to make all efforts to trigger the Court's jurisdiction in a manner that would not infringe the right of a State to withdraw from the Statute. We are of the view that one year is sufficient for the Prosecutor to conduct his preliminary examination and request a pre-trial chamber to authorise the commencement of the investigation, and for the pre-trial chamber to rule upon such a request. The Statute thus gives the Court an opportunity to assert its jurisdiction. However, it also respects the States' right to withdraw from the Statute and therefore provides for limitations to this power of the Court. Without such limitations, the Court's jurisdiction would stretch to an extent that would defy the assurances and guarantees to the States embedded in the Statute.<sup>37</sup> This could have negative repercussions for the entire Court's system. In the instant situation, since the Prosecutor had not proceeded to trigger the Court's jurisdiction before the withdrawal became effective, the Philippines reasserted what it considered to be its primary jurisdiction.

30. When the former Prosecutor submitted her request for authorisation of an investigation on 24 May 2021,<sup>38</sup> the Philippines was no longer a Party to the Statute, its withdrawal having become effective on 17 March 2019. It is further noted that the Pre-Trial Chamber issued its Article 15(4) Decision, authorising the commencement of the Prosecutor's investigation, on 15 September 2021,<sup>39</sup> more than two years after the Philippines' withdrawal took effect.

31. We also note that the aforementioned article 127 has been referred to by the parties and participants to these appeal proceedings in support of various views on the effect of a State's withdrawal from the Statute. Article 127(2) of the Statute provides that "[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" and that a State's 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", as well as (ii) that such a withdrawal "shall [not] 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".

32. Pursuant to the first limb of the above sentence of article 127(2) of the Statute, the cooperation duties of the withdrawing State are limited to "investigations and proceedings" that have commenced prior to the date on which the withdrawal became effective.<sup>40</sup>

33. In this regard, Pre-Trial Chamber III in the Situation in the Republic of Burundi (hereinafter: "Burundi Situation") found that:

In the view of the Chamber, any obligations on the part of Burundi arising out of the Chamber's *article 15(4) decision* would survive Burundi's withdrawal. The reason is that the present decision is *delivered prior to the entry into effect of Burundi's withdrawal on 27 October 2017*. Accordingly, it cannot be disputed that, if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective.<sup>41</sup>

34. It is our view that the Court retained jurisdiction over the Burundi Situation precisely because the former Prosecutor sought authorization and Pre-Trial Chamber III authorised the investigation before the withdrawal became effective on 27 October 2017.

35. As to the second limb of the above mentioned sentence in article 127(2) of the Statute, we consider that the Prosecutor's preliminary examinations are not a "matter [. . .] under consideration by the Court" within the meaning of article 127(2) of the Statute, and that a situation is only under consideration by the Court once a pre-trial chamber authorises an investigation into that situation. This is largely due to the informal nature of the preliminary examinations, which do not carry sufficient weight for engaging the Court's jurisdiction, in the absence of a pre-trial chamber's formal authorisation of the commencement of an investigation, pursuant to article 15 of the Statute. We consider that the last sentence of article 127(2) of the Statute cannot be relied upon to extend the Prosecutor's power to submit an article 15(3) request beyond the time the withdrawal has become effective.<sup>42</sup>

36. Crucially, the interpretation of article 127(2) of the Statute, as espoused by the Prosecutor, cannot be reconciled with the principles of the Vienna Convention on the Law of Treaties and with the intention of the drafters of the Statute, as that interpretation would render article 127 meaningless by allowing to trigger the Court's jurisdiction indefinitely. In our view, article 127 of the Statute is contained in the "Final clauses" (Part 13 of the Statute). The provisions contained in that part cannot alter the carefully crafted jurisdictional regime contained in Part 2 of the Statute.

37. For the foregoing reasons, we consider that the Pre-Trial Chamber erred in law in concluding that the Court had jurisdiction over the Philippines Situation despite the Philippines' withdrawal from the Rome Statute. As a result, we would have granted the Philippines first ground of appeal and found that the Court cannot exercise jurisdiction in the Philippines Situation. Consequently, we would have found the remaining grounds of appeal moot. We would also have directed the Pre-Trial Chamber to withdraw its authorisation for the Prosecutor's investigation and discontinue all proceedings in the situation.

Done in both English and French, the English version being authoritative.



**Judge Marc Perrin de Brichambaut,  
Presiding**



**Judge Gocha Lordkipanidze**

Dated this 18th day of July 2023  
At The Hague, The Netherlands

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## ENDNOTES

- 1 [Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation, ICC-01/21-56-Red.](#) 2 [Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to](#)

- article 18(2) of the Statute to resume the investigation”, 13 July 2023, ICC-01/21-77 (hereinafter: “Majority Judgment”), para. 58.
- 3 [Philippine Government’s Appeal Brief against “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 13 March 2023, ICC-01/21-65.
- 4 [Majority Judgment](#), paras 57-58.
- 5 [Appeal Brief](#), paras 26-62. It is noted that the Philippines announced its withdrawal from the Statute on 17 March 2018 (effective from 17 March 2019) and the Prosecutor filed the “Request for authorisation of an investigation pursuant to article 15(3)” on 24 March 2021 (a public redacted version filed on 14 June 2021).
- 6 [Appeal Brief](#), para. 28 (emphasis in original).
- 7 [Appeal Brief](#), para. 29.
- 8 [Appeal Brief](#), para. 30.
- 9 [Appeal Brief](#), para. 30.
- 10 [Order inviting observations and victims’ views and concerns](#), 14 July 2022, ICC-01/21-47.
- 11 [Prosecution’s request to resume the investigation into the situation in the Philippines pursuant to article 18\(2\)](#), 24 June 2022, ICC-01/21-17.
- 12 See [Philippine Government’s Observation on the Office of the Prosecutor’s Request](#), 08 September 2022, ICC-01/21-51, paras 6, 14-18, 23.
- 13 See [Impugned Decision](#), para. 26.
- 14 [Impugned Decision](#), paras 6, 18.
- 15 [Impugned Decision](#), para. 26 (footnotes omitted, emphasis added).
- 16 See, with further references, Pre-Trial Chamber I, Request under Regulation 46(3) of the Regulations of the Court, [Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19\(3\) of the Statute”](#), 6 September 2018, ICC-RoC46(3)-01/18-37 (hereinafter: “Myanmar Decision on Regulation 46(3) Request”), paras 30-33.
- 17 [Myanmar Decision on Regulation 46\(3\) Request](#), para. 32, referring to Pre-Trial Chamber II, The Prosecutor v. Jean-Pierre Bemba Gombo, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424, para. 23; Pre-Trial Chamber II, The Prosecutor v. William Samoei Ruto et al., [Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang](#), 8 March 2011, ICC-01/09-01/11-1, para. 8; Pre-Trial Chamber II, The Prosecutor v. William Samoei Ruto et al., [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para. 24.
- 18 Article 5 of the Statute.
- 19 Article 11 of the Statute.
- 20 Article 12 of the Statute.
- 21 Articles 12 and 13(b) of the Statute.
- 22 See also The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, [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, ICC-01/11-01/11-547-Red (OA4), para. 84 (in the context of a challenge to admissibility under article 19(5) of the Statute, the Appeals Chamber noted: “as soon as a State can present its challenge in such a way that it can show a conflict of jurisdictions, it must be submitted”).
- 23 See Situation in the Islamic Republic of Afghanistan, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation”](#), 4 April 2023, ICC-02/17-218 (OA5). See also Situation in the Islamic Republic of Afghanistan, [Notice of Appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)](#), 7 November 2022, ICC-02/17-197 (OA5), para. 3 (“Decisions with respect to jurisdiction and admissibility may be directly appealed under article 82(1)(a) of the Statute. Since the Decision is a preliminary ruling on admissibility under article 18(2), it is susceptible to direct appeal. To any extent that paragraph 59 of the Decision – which, on its face, appears to modify the parameters of the situation as confirmed by the Appeals Chamber in its judgment of 5 March 2020 – may be considered to bind the Prosecution in the conduct of its investigation, it is a ruling on jurisdiction which materially affects the Decision” (emphasis added)).
- 24 See also Pre-Trial Chamber I, Situation in the State of Palestine, [Decision on the ‘Prosecution request pursuant to article 19\(3\) for a ruling on the Court’s territorial jurisdiction in Palestine’](#), 5 February 2021, ICC-01/18-143, para. 83; [Myanmar Decision on Regulation 46\(3\) Request](#), paras 32-33.
- 25 See paragraphs 8-9 above, referring to [Impugned Decision](#), para. 26.
- 26 See also [Appeal Brief](#), para. 31.
- 27 See [Impugned Decision](#), para. 26.
- 28 [Appeal Brief](#), paras 5, 26-62.
- 29 Emphasis added.
- 30 See J. Kleffner, ‘ICC (Trigger Mechanisms)’, in A. Cassese (ed.), [The Oxford Companion to International Criminal Justice](#) (Oxford University Press, 2009), pp. 353-354; W. A. Schabas, [The International Criminal Court: A Commentary on the Rome Statute](#) (Oxford University Press, 2nd ed., 2016) (hereinafter: “W. Schabas, Commentary on the Rome Statute”), pp. 344-366, 367-380; W. A. Schabas, [An Introduction to the International Criminal Court](#) (Cambridge University Press, 6th ed., 2020), pp. 151-180; S. Vasiliev, ‘Piercing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)’ on [OpinioJuris](#) (6 November 2017), <http://opiniojuris.org/2017/11/06/piercing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/> (hereinafter: “S. Vasiliev, ICC Investigation in Burundi II”). Vasiliev emphasises the importance of the “distinction between mere existence of jurisdiction and the Court’s ability to exercise it” as “[i]t is the cornerstone of the Court’s jurisdictional mechanism which consists of two elements”: (i) the preconditions to the exercise of jurisdiction, under article 12 of the Statute; and (ii) the triggering mechanisms set out in article 13 of the Statute.
- 31 Article 12(2) of the Statute (emphasis added).
- 32 Article 18(1) of the Statute (emphasis added).
- 33 See also D. Jacobs, ‘Burundi withdraws from the ICC: what next for a possible investigation?’ on [Spreading the Jam](#) (28 October

- 2017), <https://dojacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/>.
- 34 It is noted that in the instant situation, both the Prosecutor's filing of the request for authorisation and the Pre-Trial Chamber's decision authorising the investigation occurred after the Philippines' withdrawal had taken effect.
- 35 See W. Schabas, [Commentary on the Rome Statute](#), pp. 1534-1536. See also Republic of the Philippines Supreme Court, Pangilinan et al v. Cayetano et al., [Decision on applications G.R. No. 238875, 239483 and 240954](#), 16 March 2021, part XV (“[t]he President's withdrawal from the Rome Statute was in accordance with the mechanism provided in the treaty. The Rome Statute itself contemplated and enabled a State Party's withdrawal. A [S]tate [P]arty and its agents cannot be faulted for merely acting within what the Rome Statute expressly allows”).
- 36 Statute, Preamble.
- 37 R. Kolb ‘Article 127’ in J. Fernandez, X. Pacreau, M. Dosen, M. Ubeda-Saillard (2<sup>de</sup> ed), *Statut de Rome de la Cour pénale internationale : commentaire article par article* (2019), pp. 2219-2220 (“L'interprétation large signifierait que des poursuites peuvent être intentées longtemps après le retrait de l'Etat en cause”).
- 38 Request for authorisation of an investigation pursuant to article 15(3), 24 March 2021, ICC-01/21-7- SECRET-Exp, with secret ex parte Annexes 1, 2, 3, 4 and 5 (a [public redacted version](#) filed on 14 June 2021 as ICC-01/21-7-Red with Annexes 2 and 3 reclassified as public).
- 39 [Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15\(3\) of the Statute](#), 15 September 2021, ICC-01/21-12.
- 40 See also K. Ambos, *Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth Edition*, 2022 (hereinafter: “K. Ambos, *Commentary of the Rome Statute*”), p. 2924.
- 41 Pre-Trial Chamber III, Situation in the Republic of Burundi, [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](#), 9 November 2017, ICC-01/17-9-Red, para. 26.
- 42 See also S. Vasiliev, [ICC Investigation in Burundi II](#).