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Original: **English**

No.: **ICC-01/21**
Date: **18 April 2023**

THE APPEALS CHAMBER

Before: **Judge Marc Pierre Perrin de Brichambaut, Presiding Judge**
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

Public Document

Observations on behalf of victims on the Philippines Government Appeal against the Decision authorising the resumption of the investigation

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. In accordance with the Appeals Chamber's instructions,[1] and pursuant to regulation 81(4) of the Regulations of the Court (the "Regulations"), the Principal Counsel ("Counsel") of the Office of Public Counsel for Victims (the "OPCV" or the "Office") hereby files her observations on the general interests of the victims in relation to the appeal brought by the Republic of the Philippines (the "Philippines" or the "Appellant")[2] against the decision of Pre-Trial Chamber I (the "Chamber") authorising the Prosecutor to resume the investigation into the Situation in the Philippines (the "Impugned Decision").[3]

2. The appeal is directed against the whole decision authorising the resumption of the investigation. As such, the issues on appeal fundamentally affect the general interests of the victims. A reversal of the Impugned Decision on appeal may in fact result in halting the Prosecutor's investigation, thereby jeopardising the victims' rights to truth, justice and reparations.

3. Counsel opposes the four grounds of appeal raised by the Philippines and the relief sought. The Appellant fails to demonstrate that the Chamber committed any error of fact or law in the Impugned Decision. The Appellant must establish an error of law that has materially affected said Decision, in that without that error, the Chamber would have rendered a substantially different decision. Likewise, for any alleged errors of fact, the Appellant must show that the Chamber erred in misappreciating the facts, took into account irrelevant facts or failed to consider relevant facts. The Appellant fails to meet these applicable standards.

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[1] See the "Decision on requests for victims' involvement and access to filings" (Appeals Chamber), No. ICC-01/21-66 OA, 21 March 2023, p. 3 and para. 24.
[2] See the "Philippine Government's Appeal Brief against 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", No. ICC-01/21-65 OA, 13 March 2023 (the "Appeal" or the "Appeal Brief").
[3] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", No. ICC-01/21-56-Red, 26 January 2023 (the "Impugned Decision").

4. Instead, Counsel submits that the Chamber (i) correctly found that the Court has jurisdiction on the basis that the Philippines was a State party at the time of the alleged crimes; (ii) properly applied the complementarity test under article 17 of the Rome Statute (the "Statute"); and (iii) rightly addressed the relevant admissibility factors under article 17 of the Statute, including the genuineness of the domestic proceedings and the gravity of the Situation.

5. The burden of proof to show that the Chamber erred falls on the Philippines. Since it does not show any such error, the Appeal should be dismissed and the Impugned Decision confirmed.

II. PROCEDURAL BACKGROUND

6. On 26 January 2023, the Chamber issued the Impugned Decision.[4]

7. On 3 February 2023, the Philippines filed its Notice of Appeal requesting suspensive effect.[5]

8. On 8 February 2023, the Appeals Chamber issued a decision on the Presiding Judge in the appeal.[6]

9. On 15 February 2023, the Philippines filed a request for extension of time to file its Appeal Brief.[7]

10. On 16 February 2023, the Prosecution filed its response to the request for suspensive effect, asking the Appeals Chamber to reject it.[8]

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[4] *Ibid*.
[5] See the "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-011 21-56) with Application for Suspensive Effect", No. ICC-01/21-57, 6 February 2023 (dated 3 February 2023).
[6] See the "Decision on the Presiding Judge of the Appeals Chamber in 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'", No. ICC-01/21-58 OA, 8 February 2023.
[7] See the "Philippine Government's Application Extension of Time to File the Appeal Brief", No. ICC-01/21-59, 15 February 2023.
[8] See the "Prosecution response to the Philippine Government's Application for Suspensive Effect of the Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation' (ICC-01/21-57)", No. ICC-01/21-60, 16 February 2023.

11. On 17 February 2023, the Appeals Chamber granted the request by the Philippines for an extension of time to file its Appeal Brief, setting the deadline at 16 March 2023.[9]

12. On 24 February 2023, the OPCV filed a request to appear before the Appeals Chamber under regulation 81 of the Regulations.[10]

13. On 13 March 2023, the Philippines filed its Appeal Brief.[11]

14. On 21 March 2023, the Appeals Chamber issued the "Decision on requests for victims' involvement and access to filings", authorising, *inter alia,* the Office to "*submit written observations, not exceeding 40 pages, on the Republic of the Philippines' appeal brief in relation to the general interests of victims by 18 April 2023*".[12]

15. On 27 March 2023, the Appeals Chamber rejected the Philippines' request for suspensive effect of the Impugned Decision.[13]

16. On 4 April 2023, the Prosecution filed its response to the Appeal Brief (the "Prosecution's Response").[14]

17. On 11 April 2023, the Philippines filed a request for leave to reply to the Prosecution's Response,[15] to which the Prosecution responded on 14 April 2023.[16]

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[9] See the "Decision on the Republic of the Philippines' application for extension of time to file the appeal brief" (Appeals Chamber), No. ICC-01/21-61 OA, 17 February 2023.
[10] See the "Request to appear before the Appeals Chamber pursuant to regulation 81(4)(b) of the Regulations of the Court", No. ICC-01/21-63, 24 February 2023.
[11] See the Appeal Brief, *supra* note 2.
[12] See the "Decision on requests for victims' involvement and access to filings", *supra* note 1, p. 3 and para. 24.
[13] See the "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)" (Appeals Chamber), No. ICC-01/21-67 OA,27 March 2023.
[14] See 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)", No. ICC-01/21-68, 4 April 2023 (the "Prosecution's Response").
[15] See the "Request for Leave to Reply", No. ICC-01/21-69, 11 April 2023.
[16] See the "Prosecution's Response to the Philippines Government's 'Request for Leave to Reply' (ICC-01/21-69 OA)", No. ICC-01/21-70, 14 April 2023.

III. SUBMISSIONS

1. On the applicable legal standards

18. In exercising its powers under rule 158 of the Rules of Procedure and Evidence (the "Rules"), the Appeals Chamber will only consider specific grounds of appeal alleging legal, factual or procedural errors that materially affect the impugned decision.[17] The Appeals Chamber will intervene only where "*clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision*"[18] or if the findings of the Chamber "*are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the* sub judice *issues*".[19]

19. Regarding questions of law, the Appeals Chamber "[w]*ill not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision*".[20] In this regard, "[a] *decision is materially*

[17] See the Public redacted version of the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 '*Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo*'" (Appeals Chamber), No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, para. 29.

[18] See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 15; and the Public Redacted Version of the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 62.

[19] See the "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release" (Appeals Chamber), No. ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25. See also, the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", *supra* note 18, para. 61.

[20] See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

affected by an error of law if the Pre-Trial or Trial 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".[21]

20. As regards errors based on a misappreciation of facts, the Appeals Chamber has clarified that it "[w]*ill not interfere with a Pre-Trial or Trial Chamber's evaluation of the evidence just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case of a clear error, namely where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. In the absence of any clear error on the part of the Pre-Trial Chamber, the Appeals Chamber defers to the Pre-Trial Chamber*".[22]

2. The issues raised on appeal affect the general interests of victims

21. The appeal is directed against the whole decision authorising the resumption of the investigation. As such, the issues raised on appeal fundamentally affect the general interests of the victims. A reversal of the Impugned Decision on appeal may in fact result in halting the Prosecutor's investigation, thereby jeopardising the victims' rights to truth, justice and reparations. In particular, the grounds of appeal and the issues raised therein as to (i) the Court's jurisdiction over the Situation in the Philippines; (ii) the admissibility assessment in the context of a situation; and (iii) the related application of the gravity criterion, are all at the core of the victims' interests.

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[21] See the "Judgment on the appeal of Mr Laurent Koudou Gbagbo against the decision of Pre-Trial Chamber I on jurisdiction and stay of the proceedings" (Appeals Chamber), No. ICC-02/11-01/11-321 OA2, 12 December 2012, para. 44; and the "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'" (Appeals Chamber), No. ICC-01/04-169 OA, 13 July 2006, para. 84.

[22] See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'"", *supra* note 18, paras. 1 and 17. See, for a more general definition of error of fact, the "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'" (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 56; and the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction" (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 1 December 2014, para. 21.

22. In fact, depending on their resolution, victims may be denied the opportunity to uncover the truth, present their views and concerns throughout the proceedings, ensure that those responsible are held accountable, and ultimately claim reparation.[23] A decision regarding the opening of an investigation concerns the first step towards perpetrators' accountability before the Court in respect of the crimes suffered by the victims. Their personal interest in seeing that the Court is seized with a situation, and that an investigation proceeds, has been regarded as "*the most essential of all victims' interests*".[24]

23. The Court has a duty to exercise its jurisdiction over those responsible for international crimes when the complementary test is met. Said duty includes respecting the internationally recognised human rights of victims during criminal proceedings, where the "*outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them*".[25]

24. Counsel agrees with the arguments put forward by the Prosecution in its Response and adds the following considerations on the merit of the Appeal Brief.

3. Ground one: the Chamber correctly found that the Court has jurisdiction on the basis that the Philippines was a State Party at the time of the alleged crimes

25. In Ground one, the Appellant argues that the 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 remain

[23] See the "Decision on the victims' request to participate in the appeal proceedings" (Appeals Chamber), No. ICC-01/09-02/11-1015 OA5, 24 April 2015, para. 11; and the "Decision on the Participation of Victims in the Appeal against the 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence' of Trial Chamber III" (Appeals Chamber), No. ICC-01/05-01/08-857 OA4, 18 August 2010, para. 10.
[24] See HUMAN RIGHTS WATCH, Commentary to the 2nd Preparatory Commission Meeting on the International Criminal Court, July 1999, p. 33. See also, ECtHR, *Kaya v Turkey*, App. No. 22535/93, Judgment, 28 March 2000, paras. 121-126; and IACtHR, *Mapiripán Massacre v Colombia,* Merits, Reparations and Costs, Judgment, 15 September 2005, paras. 116 and 123.
[25] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 41.

applicable under the Statute.[26] The Philippines submits that the Court may not indefinitely exercise its jurisdiction in relation to a former State Party,[27] and that the preconditions under article 12 of the Statute should be considered at the time in which said jurisdiction is triggered.[28] It is further argued that Pre-Trial Chamber III's findings in the *Situation in the Republic of Burundi* are not applicable in the present Situation, as Burundi withdrew after the commencement of the investigation, while the Philippines did so before the investigation started.[29] Finally, the Philippines submits that preliminary examinations cannot be considered as *a matter which was already under consideration by the Court* in the meaning of article 127(2) of the Statute and as such, they cannot be used as a means to protract residual obligations upon a State after its withdrawal.[30]

26. At the outset, Counsel notes that, contrary to the Philippines' submissions,[31] this appeal is not its first opportunity to address the consequences of its withdrawal and the scope of the Court's jurisdiction. The Philippines already did so in its additional observations on the Prosecution's request to resume the investigation, arguing that the Court has no jurisdiction pursuant to the principles of non-intervention and sovereign equality, and the crimes alleged do not constitute crimes against humanity.[32] The Chamber correctly concluded that "*several of the*[se] *preliminary submissions show* [the Philippines'] *disagreement with the Chamber's findings in the Article 15 Decision*", and stressed that "*article 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of article 15 proceedings*".[33] In fact, the question which lies at the heart of these proceedings is whether the Philippines is conducting genuine investigations or prosecutions, mirroring the ones conducted by the Prosecutor, which would warrant

[26] See the Appeal Brief, *supra* note 2, paras. 26-62.
[27] *Idem*, paras. 35 and 37.
[28] *Idem*, paras. 38-46.
[29] *Idem*, paras. 47-49.
[30] *Idem*, paras. 50-59.
[31] *Idem*, para. 31.
[32] See the "Philippine Government's Observation on the Office of the Prosecutor's Request", No. ICC-01/21-51, 9 September 2022 (dated 8 September 2022), paras. 7-23.
[33] See the Impugned Decision, *supra* note 3, para. 25.

a deferral. Accordingly, the Chamber did not err in disregarding the Philippines' arguments as being outside of the scope of its determination under article 18(2) of the Statute.[34]

27. Nor did the Chamber err in finding that the Court has jurisdiction over the Situation and that the ensuing obligations remain applicable notwithstanding the Philippines' withdrawal.[35] Pursuant to article 12(1) of the Statute, a State's ratification of the Statute creates a *legal situation* in which the Court has jurisdiction in relation to that State, irrespective of the actual exercise of said jurisdiction. In accordance with article 70(1)(b) of the Vienna Convention, to which the Chamber also rightly referred,[36] the Court's jurisdiction is not affected by the withdrawal of that State from the Statute, since "*the termination of a treaty* […] *does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination*".[37]

28. This conclusion is also in line with the Court's relevant jurisprudence.[38] In the *Burundi* Situation, Pre-Trial Chamber III held that "*by ratifying the Statute, a State Party accepts, in accordance with article 12(1) and (2) of the Statute, the jurisdiction of the Court over all article 5 crimes committed either by its nationals or on its territory for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute. This acceptance of the jurisdiction of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the exercise of the Court's jurisdiction, i.e. the*

[34] *Ibid.*
[35] *Idem*, para. 26.
[36] See the "Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute" (Pre-Trial Chamber I), No. ICC-01/21-12, 15 September 2021 ("Article 15 Decision"), para. 111.
[37] See article 70(1)(b) of the Vienna Convention on the Law of Treaties.
[38] See the "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017" (Pre-Trial Chamber III), No. ICC-01/17-9-Red, 9 November 2017, paras. 24-26; and the "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)" (Pre-Trial Chamber II), No. ICC-02/05-01/20-391, 17 May 2021, para. 33. See also, the Article 15 Decision, *supra* note 36, para. 111.

investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit".[39]

29. Pre-Trial Chamber III explicitly differentiated between, on the one hand, a State's *acceptance*, and thus the *existence*, of the Court's jurisdiction, and, on the other hand, the Court's *exercise* of said jurisdiction. This interpretation mirrors articles 12 and 13 of the Statute which determine respectively how a State can accept the Court's jurisdiction, and how such jurisdiction can be triggered.

30. In the same vein, Pre-Trial Chamber II held, in the *Abd-Al-Rahman* case, that "[s]*pecific mechanisms and guarantees have been built into the Statute precisely against the risk that, once established, the jurisdiction of the Court could be taken away by a simple act purportedly endowed with a contrary effect. The withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court and takes effect only one year after the date of its receipt at the earliest; also, it has no impact either on already ongoing proceedings or on duties of cooperation with the Court in connection with investigations and proceedings having commenced prior to the date on which the withdrawal became effective, nor does it otherwise prejudice 'the continued consideration of any matter which was already under consideration by the Court' prior to that date*".[40]

31. Therefore, an assessment of a State's acceptance of jurisdiction at the time it is triggered - as suggested by the Appellant[41] - not only runs contrary to the law of treaties, but also to the essence of the Court's *raison d'être*.[42] If a State's acceptance of the Court's jurisdiction was to be determined "*at the point in time in which said jurisdiction is triggered*",[43] a State Party could easily evade its responsibilities by

[39] See the "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017", *supra* note 38, para. 24.
[40] See the "Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302)", *supra* note 38, para. 33. See also, the Article 15 Decision, *supra* note 36, para. 111.
[41] See the Appeal Brief, *supra* note 2, paras. 38-46.
[42] See the Preamble of the Statute. See also, the Prosecution's Response, *supra* note 14, paras. 16 *et seq*..
[43] See the Appeal Brief, *supra* note 2, para. 40.

notifying its withdrawal as soon as the Court turns its attention to crimes committed either by nationals of the State concerned or on its territory. Counsel notes that the Philippines notified its withdrawal from the Statute on 17 March 2018,[44] just over a month after the former Prosecutor announced the opening of a preliminary examination in the Situation.[45]

32. Lastly, the question of whether the Court's obligatory cooperation scheme is still applicable in the present circumstances does not affect the Court's jurisdiction at the time of the alleged crimes. Therefore, the Philippines' submissions that it is under no obligation to cooperate do not alter the fact that the Court retains jurisdiction over the present Situation,[46] and as such are irrelevant.

33. As to the Appellant's argument that the preliminary examination is not to be considered as *a matter which was already under consideration by the Court* in the meaning of article 127(2) of the Statute,[47] Counsel agrees with the Chamber's determination that "*the ensuing obligations* [of the Statute] *remain applicable, notwithstanding the Philippines withdrawal*",[48] "*particularly since the preliminary examination here commenced prior to the Philippines' withdrawal*".[49] Counsel submits that the Chamber committed no error in considering that a preliminary examination is in fact a matter already before the Court, insofar as a situation is being the object of an evaluation in terms of jurisdiction, admissibility and the overall interest of justice against the backdrop of the relevant statutory provisions.

34. For all these reasons, Ground one should be dismissed.

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[44] See the United Nations, Depositary Notification of the Rome Statute of the International Criminal Court of July 17, 1998 – Philippines: Withdrawal, UN Doc C.N.138.2018.TREATIES-XVIII.10, 17 March 2018.
[45] See the "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela", 8 February 2018.
[46] See the Appeal Brief, *supra* note 2, paras. 43-46. See also, the Prosecution's Response, *supra* note 14, para. 10, paras. 26 *et seq*..
[47] See the Appeal Brief, *supra* note 2, paras. 50-59.
[48] See the Impugned Decision, *supra* note 3, para. 26.
[49] See the Article 15 Decision, *supra* note 36, para. 111.

4. Grounds two to four: the Chamber correctly applied the complementarity test under article 17 of the Statute

35. In Grounds two to four, the Appellant argues that the Chamber erred in law by imposing in the proceedings at hand "*legal standards and thresholds that are strictly applicable to article 19 proceedings*".[50] Counsel submits that the 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. In particular, contrary to the Philippines' arguments in this regard, the Chamber: (i) did not reverse the burden of proof as to the existence of national investigations and prosecutions; (ii) accurately assessed the evidence submitted in this regard by the Philippines, and (iii) properly addressed all admissibility factors under article 17 of the Statute relevant to article 18(2) proceedings.

a) Grounds two and three: the Chamber did not reverse the burden of proof as to the existence of national proceedings and correctly applied the admissibility test under article 17 of the Statute

36. The Philippines argues that by putting the "*onus on the state to show that investigations or prosecutions are taking place or have taken place*",[51] the Chamber reversed the burden of proof in the context of article 18(2) proceedings. It argues that instead, it should have been for the Prosecutor to present evidence as to the existence of such investigations or prosecutions. Counsel submits that the distinction drawn by the Philippines between an admissibility challenge under article 18(2) and 19(2) of the Statute is fictitious. In fact, when deciding on an application under either of those provisions, the Pre-Trial Chamber "*shall consider the factors in article 17*".[52] Accordingly – and in line with the consistent jurisprudence of this Court[53] – the State bears the

[50] See the Appeal Brief, *supra* note 2, para. 63.
[51] *Idem*, para. 65.
[52] See rule 55(2) of the Rules.
[53] See the Public redacted version of the "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" (Appeals Chamber), No. ICC-02/11-01/12-75-Red, 27 May 2015, para. 29; and the "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'", No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 166.

burden of proof to show that it is conducting genuine investigations or prosecutions, mirroring the ones conducted by the Prosecutor.[54]

37. In addition, a complementarity assessment must be made on the basis of the facts as they presently exist.[55] The complementarity principle is properly applied by ensuring that article 18 of the Statute is not used to create an impunity gap. So that effective investigations of the alleged crimes in the situation are timely carried out primarily by a State with jurisdiction, but otherwise by the Court.

38. The wording of article 15 of the Statute is clear. It sets out the procedure for the triggering of an investigation by the Prosecutor *proprio motu*, that is, on his own initiative when a situation has not been referred to him. Article 15 recognises the discretionary nature of this power, providing in paragraph 1 that '*the Prosecutor may initiate investigations* proprio motu' (emphasis added). In this context, it is for the Prosecutor to determine whether there is a reasonable basis to initiate an investigation *proprio motu* and to seek the pre-trial chamber's authorisation, in accordance with article 15(3) and (4) of the Statute. If authorisation is granted, the Prosecutor may initiate an investigation directly. He is not required to determine for a second time under article 53(1) of the Statute that there is a reasonable basis to proceed with an investigation. The information that the Prosecutor must provide at this preliminary stage of the proceedings is of a limited nature. He is not required to present evidence to support his request and to present information regarding his assessment of complementarity (admissibility and gravity) with respect to the cases or potential cases.[56]

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[54] See also, the arguments in the Prosecution' Response, *supra* note 14, paras. 61 *et seq.*.
[55] See the "Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 56. See also, the "Decision on the admissibility of the case under article 19(1) of the Statute"(Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2003, paras. 49-52 (noting that admissibility assessments cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time).
[56] See the Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan (Appeals Chamber), No. ICC-02/17-138 OA4, 5 March 2020, para. 39.

39. It is thus also for the Prosecutor to conduct the primary review of the scope and purpose of the national proceedings, as identified in the deferral request. Such review can only be based on the evidence provided by the State concerned. As a necessary determination in deciding whether to seek an order under article 18(2) of the Statute, the Prosecutor's review of the national proceedings includes their compatibility with article 17 of the Statute in terms of jurisdiction and complementarity.[57] Because of its preliminary nature, any ruling under article 18 of the Statute is without prejudice to any subsequent article 19(2)(b) challenge with regard to any concrete case brought before the Court by a State which has jurisdiction, on the ground that it is investigating or prosecuting or has investigated or prosecuted that case.[58] In the same vein, when seized of an application under article 18(2) of the Statute, the Pre-Trial Chamber "*shall consider the factors in article 17*".[59]

40. In this regard, Counsel recalls that pursuant to article 17(1) of the Statute:

> *"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;*

[57] See the "Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request'" (Pre-Trial Chamber II), No. ICC-02/17-156, 3 September 2021, para. 23 ("*Article 18(2)* […] *confers upon the Prosecution the exclusive power to review the Deferral Request with the modalities and the timing it regards as appropriate*"). See also, rule 55(2) of the Rules.

[58] See e.g., J. T. HOLMES, 'The principle of complementarity,' in R. S. LEE (ed.), The International Criminal Court - the Making of the Rome Statute: Issues, Negotiations, Results (The Hague: Kluwer, 1999), pp. 72-73. See also, D. D. NTANDA NSEREKO, 'Article 18: preliminary rulings regarding admissibility,' in O. TRIFFTERER and K. AMBOS (eds.), The Rome Statute of the International Criminal Court: a Commentary, 3rd Ed. (München/Oxford/Baden Baden: C.H. Beck/Hart/Nomos, 2016), pp. 847-848 (mns. 37-39).

[59] See rule 55(2) of the Rules.

> *(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) The case is not of sufficient gravity to justify further action by the Court".*

41. Accordingly, there exists a precondition for the applicability of article 17(1) of the Statute, namely the existence of ongoing investigations or prosecutions at the national level.[60] The further requirement of "genuineness" provided for in article 17(1) of the Statute concerns whether a State as a whole is "*willing and able* genuinely *to carry out the investigation or prosecution*".

42. In turn, pursuant to article 17(2):

> *"In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:*
>
> *(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;*
>
> *(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;*
>
> *(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice".*

43. Paragraph 2 of article 17 therefore defines unwillingness as the lack of intention on the part of the State concerned to conduct the proceedings in accordance with the "*principles of due process recognized by international law*".[61] To determine the status of national proceedings it is thus necessary to verify that: (i) the procedural steps taken

[60] See the "Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 55, para. 7.
[61] See also, article 21(1)(b) of the Statute.

are lawful; (ii) the essential guarantees provided for by international law are enshrined in domestic legislation and applied in accordance with duly ratified international and regional legal instruments for the protection of human rights;[62] and (iii) the intention of the State to see the persons concerned brought to justice is real.

44. Pre-Trial Chamber II clarified that the intention of the State can be expressed before the Court or "*be inferred from unequivocal facts*".[63] To a certain extent, the intention can thus also be deduced from "*legislation adopted by the authorities of the State, as well as other supports such as testimonies, official or unofficial working documents, reports*".[64] However, it is not enough for a State to rely on judicial reform actions and promises for future investigative activities.[65]

45. Scholars have identified some of the elements to be considered in such an assessment, including *inter alia*: (i) the relevance of the responses given to the alleged crimes according to the mechanisms actually available and the relevant socio-political context, in particular if pardon and/or amnesty are applied or envisaged; (ii) the integrity of the process of investigation and overall handling of cases by the magistrates – including the degree of their independence from authorities external to the judiciary; and (iii) the genuineness of the investigation of cases and its direct consequences on the outcome of the proceedings.[66]

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[62] See articles 14 and 15 of the International Covenant on Civil and Political Rights; articles 6 and 7 of the European Convention on Human Rights; articles 8 and 9 of the American Convention on Human Rights; articles 5, 6, 7 and 26 of the African Charter on Human and Peoples' Right; Common article 3 of Geneva Conventions, articles 84 *et seq*..

[63] See the "Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute)" (Pre-Trial Chamber II), No. ICC-01/04-01/07-1213-tENG, 16 June 2009, para. 90.

[64] See, SHOAMANESH (S. S.) et MBAYE (A. A.), "Article 17 – Questions relatives à la recevabilité", *in* FERNANDEZ (J.) et PACREAU (X.) (ed.), *Statut de Rome de la Cour pénale internationale – Commentaire article par article*, Editions A. Pedone, Paris, 2012, p. 703.

[65] See the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-101, 30 May 2011, para. 64. See also, the "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017", *supra* note 38, para. 162.

[66] See SHOAMANESH (S. S.) et MBAYE (A. A.), *op. cit.*, *supra* note 64, p. 704. See also, the "*Informal Expert Paper for the Office of the Prosecutor, The Principle of complementarity in practice*", May 2003, 14 and Annexe 4 to "*List of indicia of unwillingness or inability to genuinely carry out proceedings*", p. 28.

46. Counsel underlines that the evidence presented by a State in this regard must be of a "*sufficient degree of specificity and probative value*" which demonstrates that it is indeed genuinely investigating the case.[67] In this regard, the Appeals Chamber ruled that:

> […] *'a statement by a Government that it is* actively investigating *is not* […] *determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations'. In other words, there must be evidence with probative value".*[68]

47. Accordingly, the information provided must be relevant, probative, and sufficiently specific to enable the Prosecution – and the Chamber, if applicable – to ascertain the stage of the domestic proceedings, assess the investigative steps taken, and determine whether deferral is justified considering the State's proceedings as a whole.[69] In this sense, it would never suffice for a State *merely to assert* that investigations are ongoing.[70]

i. The Chamber accurately assessed the evidence submitted in this regard by the Philippines

48. As regards the Philippines' argument that the Chamber failed to consider relevant procedural activities undertaken domestically,[71] Counsel considers that the Appellant incorrectly presents this argument as an error of law. The Appeals Chamber should examine it as an alleged error of fact. In any case, contrary to the Appellant's submissions,[72] the Chamber properly assessed the evidence submitted by the

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[67] See the "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'", *supra* note 22, para. 2.
[68] *Idem*, para. 62 (footnotes omitted).
[69] See *supra*, para. 39.
[70] See the "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'", *supra* note 22, paras. 62-63. See also, the "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'", *supra* note 53, paras. 29 and 128.
[71] See the Appeal Brief, *supra* note 2, paras. 84-86.
[72] *Ibid*.

Philippines. It also correctly concluded that it did not present any elements to the degree of precision and probative value required by the Court's jurisprudence as to the authentic character of the national proceedings allegedly underway.[73] Counsel reviews below the Chamber's analysis *vis-à-vis* the arguments raised under appeal.

49. The Philippines initially avers that the Chamber erred in its assessment of the deferral material by applying a higher threshold than the one required for the purposes of article 18(2) proceedings.[74] Its arguments are structured under three categories: (i) matrix of cases – referring to four charts listing 302 cases by the National Bureau of Investigation ("NBI"), as well as list of cases before the National Prosecution Services ("NPS"); (ii) investigative files/materials – mentioning NBI and police reports, non-provision of indictments and reports submitted to the Provincial Prosecutor; and (iii) criminal referrals and disciplinary proceedings – including material concerning the Administrative Order no. 35 Committee and United Nations Joint Programme on Human Rights ("UNJPHR"), the Department of Justice Panel ("DOJ Panel") and the Philippine National Police – Internal Affairs Service ("PNP-IAS").[75]

50. The Chamber properly carried out its assessment based on the documentation provided by the Appellant and considering the issues material to the article 18(2) proceedings, in particular (i) the non-criminal nature of certain initiatives relied upon in the Deferral Request; and (ii) the lack of criminal proceedings among the listed cases. The Chamber further assessed the cases referred to the NBI as well as the ones before the national and regional prosecution offices, and correctly concluded that "*the various domestic initiatives and proceedings relied on by the Philippines 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 as authorised in the Article 15 Decision*".[76] Counsel concurs with the

[73] See the Impugned Decision, *supra* note 3, para. 98.
[74] See the Appeal Brief, *supra* note 2, paras. 84-111.
[75] See also the arguments in the Prosecution' Response, *supra* note 14, paras. 104 *et seq.*.
[76] See the Impugned Decision, *supra* note 3, para. 96.

Chamber's assessment of the deferral material and submits that the Chamber committed no discernible error of fact or law.

Matrix of cases and Investigative files/materials

51. Regarding the cases referred to the NBI and the four lists presented by the Philippines, the Chamber – whilst accepting the NBI's as an agency capable of undertaking criminal investigations – noted: (i) the limited information included in the lists; (ii) the lack of documentation outlining concrete investigative activities; (iii) that the sole reference in the fourth list to any possible criminal process against a law enforcement officer is a single recommendation that an appropriate criminal complaint be filed; (iv) that only six cases could illustrate possible investigative-related activities, yet the material provided for assessment of two cases is incomplete – leaving four cases out of 266 which could be said would meet the minimum threshold for deferral; and (v) that no material was provided which demonstrates the alleged investigation of 250 additional incidents by the NBI.[77] As such, the Philippines' assertion that "*the lists provided* prima facie *evidence of the existence of the investigations and proceedings before the NBI*" and its claim that the Chamber applied a "*higher threshold*" in the assessment of the document are flawed,[78] as most of the documentation was in fact irrelevant or insufficient to establish a link with the issue *sub judice*.

52. As for the cases before the national and regional prosecution offices, the Chamber noted: (i) that, apart from one case of the lists supplied by the Philippines, "*no corresponding or underlying prosecutorial documentation* [was] *provided to substantiate the information*" contained therein;[79] (ii) the lack of relevant documentation with regard to the recommended indictments against police officers;[80] (iii) that the eight NPS case

[77] *Idem*, paras. 74, 78, 80-81, 84.
[78] See the Appeal Brief, *supra* note 2, paras. 89-90.
[79] On this point, Counsel notes that the Appellant takes issue with *one of the aspects* enumerated by the Chamber in its comprehensive analysis of the material submitted, *i.e.* that "*it is unclear how and whether the information in these lists relate to trials that actually took place, or are taking place*"; see the Impugned Decision, *supra* note 3, para. 88. See also, the Appeal Brief, *supra* note 2, paras. 92-93.
[80] *Contra*, see the Appeal Brief, *supra* note 2, para. 97.

files concern the potential victims rather than perpetrators; and (iv) that the ongoing prosecutions in (only) two proceedings pointed out by the Philippines do not cover "*patterns of criminality or the responsibility of individuals beyond the physical perpetrators of the alleged crimes*".[81]

53. 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 for ease of reference. Notwithstanding this, the Chamber did not carry out the analysis in isolation and, when appropriate, it considered "*the interaction between different domestic proceedings and their complementarity*".[82] As a result, the Philippines' contention that the Chamber "*demanded a level of interrogation and verification of official reports which is not warranted in the article 18 context*" is unsubstantiated.[83] There is no demand at this stage to provide "*a wealth of in-depth information as well as supporting and corroborating material in relation to the entirety of the Prosecution's broad investigation*" as the Philippines understands.[84] This was not the threshold applied by the Chamber. In the same vein, providing a wealth of unrelated and/or inconclusive documentation is also unwarranted – and this is what barred the Chamber from making a positive finding for deferral.

54. Regarding the Chamber's assessment of relevant criminal proceedings, a number of findings need to be recalled. First, with regard to crimes in Davao region, the Chamber concluded that the material submitted: (i) lacks sufficient degree of specificity and probative value; (ii) concerns, in some instances, events outside of the temporal scope of the authorised investigation; (iii) includes several media articles in support of its submissions *in lieu* of a higher probative value material; and (iv) regarding the Senate inquiries, is neither clear on the scope of investigations nor on consideration of criminal responsibility of individuals or support of criminal

[81] See the Impugned Decision, *supra* note 3, paras. 88-91, 93-94.
[82] *Idem*, para. 28.
[83] See the Appeal Brief, *supra* note 2, paras. 96, 98.
[84] *Idem*, para. 98.

prosecutions.[85] Second, the limited number of cases of crimes other than murder and the type of persons charged are not in line with the range and scope of crimes under the Court's investigation.[86] Third, the Philippines does not report on any activity concerning killings outside police operations.[87] Last, in reference to the policy element and systematic nature of the alleged crimes, the Philippines has not showed that it carried out domestic proceeding towards high-ranking officials.[88]

Criminal referrals and disciplinary proceedings

55. The Chamber analysed the Administrative Order no. 35 Committee and the UNJPHR. It concluded that the two lists of cases provided by the Philippines contained limited information concerning murder-related cases and that it could not be discerned "*whether these cases relate to killings in the context of the 'war on drugs' nor do the lists indicate any concrete investigative activity taken by the Committee itself*".[89] The Chamber further noted that the Committee's intervention appears to be limited to monitoring and evaluating the status of the cases. What is more, the Chamber highlighted that "*several of the cases appear to fall outside the temporal scope of the authorised investigation*".[90] Lastly, the Chamber underlined that "*there is no information before* [it] *suggesting that the activities of the UNJPHR, a capacity-building programme, have resulted in concrete investigations and prosecutions related to the events subject to the authorised investigation*".[91] On this account, demonstration of "*the overall and general arc of the investigative processes connected to the anti-illegal drug operations*"[92] does not suffice for the purpose of the assessment, more so if the documentation lacks the minimal preponderance of the evidence.

56. In relation to the proceedings conducted by the PNP-IAS, as well as the DOJ Panel and its case referral to the NBI and NPS, the Philippines attempts to justify its

[85] See the Impugned Decision, *supra* note 3, paras. 56-59. *Contra*, see the Appeal Brief, *supra* note 2, fn. 85.
[86] See the Impugned Decision, *supra* note 3, para. 63.
[87] *Idem*, para. 65.
[88] *Idem*, para. 68.
[89] *Idem*, para. 43.
[90] *Ibid.*
[91] *Idem*, paras. 43-44.
[92] See the Appeal Brief, *supra* note 2, para. 101.

assertations by evoking an overall case analysis through a three-phase procedure.[93] In its assessment of internal disciplinary proceedings conducted by the PNP-IAS, the Chamber emphasised that the information provided suggests that such procedure does not have the (primary) *aim* to further criminal proceedings and it is not known whether it leads to criminal investigations. As such, the Chamber properly concluded that said proceedings do not meet the threshold for a deferral.[94] This is more apparent when considering the further findings below.

57. Regarding the mandate of the DOJ Panel and its case referral to the NBI and NPS – the second and third stages of the process, according to the Philippines – the Chamber concluded that: (i) 52 '*nanlaban*' cases referred to the NBI concerned administrative liability; (ii) the charts submitted by the Philippines of 250 NPS cases not only contained limited information but also had no information on the initiation of criminal investigations and prosecutions against those involved; (iii) there is lack of information on how the DOJ Panel conducts its review and if it investigates by itself; and (iv) the DOJ Panel reviewed a low number of cases. In sum, the Chamber reasonably found that it "*appears that the DOJ Panel review does not amount to relevant investigations within the meaning of article 17 and 18 of the Statute*".[95]

58. Consequently, the three-phase procedural cycle claimed by the Philippines as demonstrating the overall "*investigative processes connected to the anti-illegal drug operations*"[96] is flawed. Since "*not all cases involving police officers are subject to each of these stages*",[97] the Chamber's analysis of each step in isolation – together with its holistic assessment – was a sensible approach in light of the material and information at hand.[98] The allegation that "*the administrative procedures fit into the broader criminal justice process*"[99] may well be coherent, but the question still lies *if* they had indeed led to

[93] *Idem*, paras. 103-108.
[94] See the Impugned Decision, *supra* note 3, paras. 47-48.
[95] *Idem*, paras. 34-35.
[96] See the Appeal Brief, *supra* note 2, paras. 102, 107.
[97] *Idem*, para. 107.
[98] *Contra,* see the Appeal Brief, *supra* note 2, para. 108.
[99] See the Appeal Brief, *supra* note 2, para. 107.

criminal investigations and proceedings, which the Philippines was unable to demonstrate.

59. The Chamber further looked into the '*amparo* proceedings' and noted that: (i) there is no information on the initiation of criminal investigations; and (ii) the proceedings are not aimed at establishing criminal responsibility *per se*. As a result, a mere *possibility* of the proceedings leading to criminal investigations does not suffice for the purpose of article 18(2) of the Statute.[100]

60. Finally, the Philippines dwells over the Chamber's assessment concerning the contours of the investigation. However, it is impossible to assert that genuine investigations or prosecutions are ongoing based on mere statements by senior officials, as contended by the Philippines. On the contrary, an analysis of the material presented shows a significant fragmentation, uncertainty and lack of accuracy of the elements provided in support of the Deferral Request. The available information also illustrates a significant and unjustified delay in undertaking some scarce and partial proceedings – which is inconsistent with the intent to bring the perpetrators to justice.

61. Accordingly, the Philippines' submissions that it simply "*provided what the Prosecution requested*" and that the Chamber "*scrutinized the material through an article 19 lens*"[101] are misconceptions of its obligations to provide relevant and probative documentation of the alleged proceedings at the national level. Therefore, Counsel submits that the Chamber did not commit any discernible error of law or fact in its assessment of the deferral documents, and thus in concluding that the requirements of article 17 of the Statute are not met.[102]

62. For all these reasons, Grounds two and three should be dismissed.

[100] See the Impugned Decision, *supra* note 3, paras. 39-40.
[101] See the Appeal Brief, *supra* note 2, paras. 91 and 93.
[102] See the Impugned Decision, *supra* note 3, paras. 96-99.

b) Ground four: the Chamber properly addressed all relevant admissibility factors under article 17 of the Statute

63. In Ground four, the Appellant argues that the Chamber erred in law by failing to consider the Philippines' willingness and ability to *genuinely* carry out investigations and whether the situation is of sufficient gravity to justify further action by the Court.[103]

64. First, as regards the Chamber's assessment - or lack thereof - of the requirement of genuineness as to the domestic proceedings, Counsel submits that the Chamber did not commit any discernible error. In fact, the Chamber correctly limited itself to assessing the evidence before it and concluding that the Philippines took no action, in terms of taking "*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*".[104] Since the Chamber was not satisfied that the Philippines is undertaking relevant investigations or subsequent criminal prosecutions, it did not need to further address the *willingness or ability* to domestically carry on *genuine* proceedings.

65. The Appeals Chamber has in fact established that "*in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court*".[105]

66. The Chamber correctly relied on the Appeal Chamber's jurisprudence according to which "*article 17(1)(a) of the Statute entails a two-step analysis to determine whether a case is inadmissible: in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, 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*

[103] See the Appeal Brief, *supra* note 2, paras. 141-153.
[104] See the Impugned Decision, *supra* note 3, para. 96.
[105] See the Public redacted version of the "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", *supra* note 53, para. 30.

the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse".[106]

67. In addition, the Philippines' reference to the decision on the admissibility of the *Al-Senussi* case - that "*the two limbs of the admissibility test are intimately and inextricably linked*", is inapposite. In fact, as previously noted by the Appeals Chamber,[107] this finding was made in a different context. The conclusion concerned the possibility of relying on the same considerations with respect to both limbs of the admissibility test, rather than comparing the criteria for establishing each of the limbs of the test.

68. Second, as regard the Chamber's lack of assessment of the requirement of gravity of the Situation in the Philippines, Counsel submits that the Chamber did not commit any discernible error. In fact, the Chamber correctly considered that the Philippines could not make use of article 18 to re-litigate what has already been ruled on by the Article 15 Decision authorising the opening of an investigation into the Situation.[108]

69. In this regard, Counsel recalls that is for the Prosecution to assess the requirement of gravity when deciding to initiate an investigation. It is in fact primarily for the Prosecutor to evaluate the information made available to him and apply the law (where relevant, as interpreted by the pre-trial chamber) to the facts found. This is consistent with the role of the Prosecutor during the preliminary examination.

70. To the extent that the Prosecutor's decision to initiate an investigation is based on a positive assessment of gravity under article 53(1)(b) read with article 17(1)(d), such an assessment involves, as in the case at hand, the evaluation of numerous factors

[106] *Idem*, para. 27. See also the Prosecution's Response, *supra* note 14, para. 148 *et seq.*.
[107] See the Public redacted version of the "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", *supra* note 53, para. 60.
[108] See the Impugned Decision, *supra* note 3, para. 25.

and information relating thereto, which the Prosecutor had already balanced in reaching his decision when seeking authorisation to open an investigation under article 15(3) of the Statute. The Appellant accepts that information concerning its investigation is subject to review by the Chamber in accordance with article 18(2) of the Statute and rules 54 and 55 of the Rules. In particular, it accepts that the Chamber must consider "*(1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned*".[109] This assessment is consistent with those factors in article 17 which must be considered by the Chamber when seized with an article 18(2) application in accordance with rule 55(2). In fact, as discussed above,[110] the question which lies at the heart of these proceedings is whether the Philippines is conducting genuine investigations or prosecutions, mirroring the ones conducted by the Prosecutor, which would warrant a deferral. Accordingly, the Chamber did not err in refraining from reassessing the Philippines arguments on gravity, as being outside of the scope of its determination under article 18(2) of the Statute.[111]

71. In light of the above, Ground four should also be dismissed.

[109] See the Appeal Brief, *supra* note 2, para. 77.
[110] See *supra*, para. 26.
[111] See the Impugned Decision, *supra* note 3, para. 25

IV. CONCLUSION

72. For the foregoing reasons, Counsel respectfully requests the Appeals Chamber to dismiss the Appeal in its entirety and confirm the Impugned Decision.

Paolina Massidda
Principal Counsel

Dated this 18th day of April 2023

At The Hague, The Netherlands