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**International
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PRE-TRIAL CHAMBER I

Before: Judge Péter Kovács, Presiding Judge
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

Public

Public Redacted Version of "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)"

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I. Introduction

1. In the “Philippine Government’s Observation on the Office of the Prosecutor’s Request”,¹ the Republic of the Philippines (“GovPH”) argues that the Office of the Prosecutor (“the Prosecution”) should not be allowed to investigate allegations of serious crimes against humanity committed on its territory because 1) this Court lacks jurisdiction, 2) the alleged crimes are insufficiently grave to warrant further action, and 3) the GovPH itself has investigated and prosecuted the alleged crimes or is currently doing so. As set forth below, the Prosecution respectfully submits that none of those arguments have merit.

2. First, the GovPH’s challenges to jurisdiction and gravity are not properly before the Court. Article 18 of the Rome Statute (“the Statute”) provides a narrowly limited mechanism for States to bring a preliminary admissibility challenge on complementarity grounds. There is no provision in the Statute for a State to challenge the resumption of an investigation on jurisdictional or gravity grounds at this stage of proceedings.

3. Second, regarding jurisdiction, the GovPH’s contentions that there was no widespread or systematic attack on the civilian population, and that the crimes were not committed in furtherance of any state policy, relate to the merits of an eventual prosecution and not to the jurisdiction of the Court. The GovPH also misstates the law applicable to the state policy requirement, and fails to put forward any concrete evidence or information calling into question the previous findings of this Pre-Trial Chamber (“the Chamber”).

4. Third, the GovPH’s gravity challenge is not supported by the facts or the law. The GovPH bases its gravity challenge on the same factual premise as its jurisdictional challenge – the alleged absence of an attack on a civilian population or state policy – but again fails to provide any concrete evidence or information refuting the Chamber’s findings. Moreover, the GovPH disregards the limited purpose of article 17’s gravity requirement, which is only to exclude “those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court’s jurisdiction is nevertheless of marginal gravity only”.² The Chamber’s findings at the article 15 stage of these proceedings make plain that the alleged crimes are not of exceptionally low gravity; to the contrary, they are serious crimes committed against civilians (including against children) which demand investigation and prosecution.

¹ ICC-01/21/-51 (“GovPH Observations”).

² ICC-01/12-01/18-601-Red, para. 53.

5. Fourth, and of most direct relevance to this litigation under article 18, the GovPH has not demonstrated – even with its additional submissions – that it has conducted or is conducting national investigations or prosecutions that sufficiently mirror the investigation authorised by the Chamber. The GovPH argues that its criminal justice system *generally* functions well,³ and that certain administrative and other mechanisms *may* or *can* result in criminal proceedings.⁴ However, nothing in the observations nor in the hundreds of pages of associated annexes substantiates that criminal proceedings *actually have been or are being conducted* in anything more than a small number of cases. The GovPH has substantiated no criminal investigations of “war on drugs” (“WoD”)-related killings in Davao, no criminal investigations of WoD-related killings by so-called “vigilantes”, no criminal investigations of WoD-related torture,⁵ and only a handful of criminal investigations of other WoD-related crimes within this Court’s jurisdiction. Although the GovPH has provided updates on a small number of criminal proceedings (most of which were already known to the Prosecution and addressed in its request to resume the investigation), the substantiated cases remain 1) very few in number compared to the total number of alleged killings, 2) focused overwhelmingly on low-ranking police officers and physical perpetrators, with no apparent investigation of higher-level perpetrators, and 3) framed in terms of “isolated instances”⁶ without inquiry into larger patterns of conduct or underlying policy. For all of these reasons, the Prosecution submits that deferral is not warranted, and respectfully asks the Chamber to order the resumption of the investigation.

II. Level of confidentiality

6. The Prosecution files this response confidential *ex parte* because it refers to information contained in confidential *ex parte* annexes to the GovPH’s observations. A public redacted version is filed simultaneously.

III. The GovPH’s jurisdictional and gravity challenges are not properly before the Court

7. The GovPH first urges the Chamber to reject the Prosecution’s request to resume the investigation in this situation because, it says, the Court lacks jurisdiction and the crimes are insufficiently grave to be admissible. However, such challenges are not permitted at this stage of proceedings.

³ See, e.g., GovPH Observations, para. 49-70.

⁴ See, e.g., GovPH Observations, para. 76 (“DOJ panel reviews may result in the filing of cases”), p. 36, heading III.A.3 (“Administrative investigations conducted by the PNP-IAS can ripen to criminal investigations”), p. 38, heading III.A.4 (“Writ of Amparo proceedings may lead to criminal proceedings”).

⁵ The GovPH, in the material it submitted to the Prosecution previously, made one reference to a charge of torture, but did not substantiate it. See Article 18(2) Request, para. 97 & fn.182.

⁶ GovPH Observations, para. 20.

A. Jurisdiction

8. With regard to jurisdiction, article 18(2) does not allow a State to challenge the Court's jurisdiction with respect to a situation. The provision is clear: a State can request a deferral of the Prosecution's investigation if "it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute [article 5] crimes". Accordingly, under article 18(2) a State can raise admissibility issues based on complementarity, but not jurisdictional issues. This is because a Chamber considering a Prosecution request to initiate an investigation under article 15(4) has already satisfied itself that the Court has jurisdiction in a situation, and thus ensured that the Prosecution's investigation may commence on solid jurisdictional grounds.⁷ The Chamber did precisely that in its article 15(3) decision.⁸ Conversely, it did not assess admissibility since that is not required under the Statute.⁹ Rather, it will do so in these article 18 proceedings based on the GovPH materials and submissions, as well as the information provided by, and submissions of, the Prosecution and the views submitted by victims.¹⁰

9. This does not mean that States are never allowed to raise jurisdictional questions. Article 19(2) of the Statute allows States to challenge the Court's jurisdiction with respect to a "case", that is, once there is an arrest warrant or a summons to appear against an individual for certain acts and crimes.¹¹ However, article 19 provides no similar authority for a State to challenge jurisdiction before there is a case before the Court.¹² To the extent that the GovPH argues that article 53(1) imposes an obligation on the Chamber, that is incorrect. Article 53(1) applies only to the Prosecution's analysis, which is not reviewed by the Pre-Trial Chamber.¹³

10. Consequently, there is no basis under the Statute for the GovPH to challenge the Court's jurisdiction during this article 18 litigation, and the Prosecution respectfully submits that this argument should be dismissed *in limine*.

⁷ ICC-01/18-143, para. 78.

⁸ ICC-01/21-12 ("Article 15(3) Decision"), para. 28-108.

⁹ Article 15(3) Decision, para. 15; ICC-02/17-138, para. 40-41.

¹⁰ As the Appeals Chamber has observed, article 18 provides for a procedural mechanism "based on the full participation of relevant parties, participants and States [...] ensuring that the Court pursues investigations and prosecutions only in relation to admissible cases". ICC-02/17-138, para. 42.

¹¹ ICC-01/18-143, para. 82.

¹² Cf. ICC-02/04-01/15-156, para. 14 (limiting the Court's discretionary consideration of admissibility under article 19(1) to proceedings that have reached the stage of a case, as opposed to the preceding stage of a situation). Article 19(1) requires the Court to satisfy itself that it has jurisdiction in any "case" before it, while article 19(3) authorises specifically the Prosecution to seek a ruling on jurisdiction (with a textual "case" limitation).

¹³ Article 15(3) Decision, para. 14-15, citing ICC-02/17-138, para. 1, 34-35, 37, 46.

B. Gravity

11. The Statute permits States to bring preliminary admissibility challenges under article 18(2), but only on the ground that the State “is investigating or has investigated its nationals and others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5” and which relate to the authorised investigation.¹⁴ Article 19(2)(b), which provides for challenges to the admissibility of a “case” (but, by implication, not a situation¹⁵), similarly limits the grounds available to a State to “the ground that it is investigating or prosecuting the case or has investigated or prosecuted” the case. To the extent that the GovPH suggests that articles 15 and 53(1) together require the Chamber to consider gravity,¹⁶ the Appeals Chamber has made clear that the Prosecution’s admissibility assessment under article 53(1) is not reviewable by the Pre-Trial Chamber deciding upon a request to investigate under article 15.¹⁷

12. In short, no provision of the Statute authorises a State to challenge gravity at this phase of the proceedings. Consequently, the Prosecution respectfully submits that the GovPH’s gravity argument should also be dismissed *in limine*.

IV. The Court has jurisdiction over the alleged crimes

13. The GovPH argues that the Court has no jurisdiction over the Situation in the Philippines, because “the alleged crimes committed in its territory do not constitute ‘crimes against humanity’”.¹⁸ In particular, the GovPH argues that the crimes were not perpetrated pursuant to a state policy, nor as part of a widespread or systematic attack against a civilian population.¹⁹

14. Even if this issue were properly before the Court, the Prosecution respectfully submits that the GovPH’s argument must fail for at least three reasons. First, a factual challenge to the existence of a contextual element of a crime against humanity cannot divest this Court of subject matter jurisdiction. Second, the GovPH misstates the requirements for establishing a state policy. Third, the GovPH has submitted no concrete evidence or information contradicting or undermining this Chamber’s previous conclusions that the alleged crimes were committed as

¹⁴ Rome Statute, art. 18(2).

¹⁵ Cf. ICC-02/04-01/15-156, para. 14.

¹⁶ GovPH Observations, para. 2-6.

¹⁷ Article 15(3) Decision, para. 14-15, citing ICC-02/17-138, para. 1, 34-35, 37, 46.

¹⁸ GovPH Observations, para. 23.

¹⁹ GovPH Observations, para. 23.

part of a widespread and systematic attack against a civilian population and in furtherance of a state policy.

A. A factual challenge to the existence of a contextual element of a crime against humanity does not divest the Court of jurisdiction

15. The Appeals Chamber has held that a challenge to the existence of a state or organisational policy relates to the substantive merits of a case, rather than to whether the Court has subject matter jurisdiction over the alleged crimes.²⁰ Because the existence of a state or organisational policy is ultimately a question of evidence requiring an assessment of the facts of the case, such a challenge is not considered jurisdictional in nature.²¹

16. Accordingly, the GovPH's challenge to the existence of these contextual elements of the alleged crimes against humanity is effectively a factual challenge to the merits of an eventual prosecution. It concerns the sufficiency of evidence for confirmation proceedings or at trial, but cannot divest the Court of jurisdiction to investigate the crimes in the first place. The Prosecution respectfully submits that the GovPH's submissions on jurisdiction should be rejected on this basis alone.

B. The GovPH misstates the requirements for establishing a state policy

17. The GovPH also argues that there was no state policy because its official "war on drugs" campaign, as described in its observations, is not an overt endorsement of criminal activities.²² This argument, however, misstates the requirements for establishing a state policy.

18. A state policy need not be explicitly defined or formalised, and an attack which is planned, directed, or organised – as opposed to spontaneous or isolated acts of violence – will be sufficient.²³ A state policy also need not be conceived at the highest levels of the State, but can be established by evidence that regional or even local state actors actively promoted or encouraged an attack on a civilian population.²⁴ In this situation, the Chamber has already addressed in detail several considerations which establish the existence of a state policy and its connection to the alleged crimes. This included the statements of former President Duterte and other government officials; a clear link between the killings and the government's formal anti-drug campaign, including the increase and decrease of killings coinciding with changes in the

²⁰ See ICC-01/09-02/11-425, para. 36; ICC-01/09-01/11-414, para. 30, 33.

²¹ ICC-01/09-02/11-382-Red, para. 33.

²² GovPH Observations, para. 18, 174.

²³ ICC-01/12-01/18-35-Red2-tENG, para. 48; ICC-01/04-02/06-36-Red, para. 24.

²⁴ Article 15(3) Decision, para. 75-76.

official policy; the use of watch lists; the provision of rewards or promotions to alleged physical perpetrators; and the failure of national authorities to take meaningful steps to investigate or prosecute the killings.²⁵ These facts are more than sufficient to conclude that the killings were committed in furtherance of a state policy.

C. The GovPH has provided no basis to revise the Chamber's previous findings

19. The Chamber has already found, when authorising the investigation, that the alleged crimes took place as part of a widespread and systematic attack on a civilian population and pursuant to or in furtherance of a state policy.²⁶ It examined whether the WoD campaign could be considered a legitimate law enforcement campaign, but found the opposite. It concluded that “the so-called ‘war on drugs’ campaign cannot be seen as a legitimate law enforcement operation”, and that the killings can be considered “neither as legitimate nor as mere excesses in an otherwise legitimate operation.”²⁷

20. The GovPH disagrees with that conclusion, arguing that its WoD campaign is merely “an intensified and comprehensive campaign against the worsening drug situation in the country”.²⁸ However, it has not presented any evidence or concrete information undermining the Chamber's findings. It does not, for instance, refute that “the killings were directed against persons allegedly associated with the use and trafficking of illegal drugs”,²⁹ that victims were unable to contest the allegations against them,³⁰ or that so-called “vigilantes” acted with the apparent support of Philippine security forces.³¹ The GovPH asserts that law enforcement “religiously” followed protocol except in isolated instances, and that the killings did not affect only poor and low-skilled Filipinos.³² However, it has not provided any concrete facts to call into question the Chamber's contrary findings that in “many cases” police appear to have planned killings in advance, staged self-defence scenarios, planted evidence, and produced false reports,³³ and that “the so-called ‘war on drugs’ campaign affected certain segments of the population disproportionately”.³⁴

²⁵ Article 15(3) Decision, para. 93-101

²⁶ Article 15(3) Decision, para. 86-103.

²⁷ Article 15(3) Decision, para. 91.

²⁸ GovPH Observations, para. 18.

²⁹ Article 15(3) Decision, para. 87.

³⁰ Article 15(3) Decision, para. 91.

³¹ Article 15(3) Decision, para. 91.

³² GovPH Observations, para. 20-22.

³³ Article 15(3) Decision, para. 56-58.

³⁴ Article 15(3) Decision, para. 91.

21. In short, the Prosecution respectfully submits that the GovPH has failed to establish that this Court lacks jurisdiction over the alleged crimes against humanity committed in the Philippines between 1 November 2011 and 16 March 2019.

V. The alleged crimes are sufficiently grave

22. The GovPH also argues that the alleged crimes are not of sufficient gravity to justify investigation by the Court.³⁵ In doing so, it repeats its argument that the crimes were not part of a widespread or systematic attack on a civilian population nor committed pursuant to a state policy.³⁶ It also suggests that criticism of the WoD is politically motivated.³⁷ It is respectfully submitted that none of these arguments have merit.

23. First, the Prosecution reiterates its submissions above that the GovPH has not provided any concrete evidence or information undermining the Chamber's amply reasoned conclusions regarding the existence of a widespread and systematic attack on a civilian population and the existence of a state policy.³⁸

24. Second, the GovPH's assertions about the alleged political motivations of particular individuals in the Philippines, and its references to subjective social alarm,³⁹ are beside the point. The Prosecution's article 15 application, the Chamber's article 15(3) decision, and the Prosecution's article 18(2) request to resume the investigation were all based, not on complaints by one or a few individuals, but on a broad foundation of evidence and information. This included open source information, reports by civil society organisations, official documents, accounts from victims and eye-witnesses, and even insider accounts from persons claiming to have participated in the crimes. That is more than adequate basis, particularly at this early stage of proceedings, to objectively establish the requisite gravity of the situation under article 17 of the Statute.

25. Furthermore, as stated by the Appeals Chamber, the purpose of the gravity requirement in article 17 is to "exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only".⁴⁰ In other words, crimes within the jurisdiction of the

³⁵ GovPH Observations, para. 6, 38-45.

³⁶ GovPH Observations, para. 41, 45.

³⁷ GovPH Observations, para. 43.

³⁸ See Section IV.C above.

³⁹ GovPH Observations, para. 42-43.

⁴⁰ ICC-01/12-01/18-601-Red, para. 53.

Court are presumptively of sufficient gravity to warrant further action,⁴¹ and should be excluded on the basis of gravity only when an assessment of quantitative and qualitative criteria⁴² shows that the case is of marginal gravity.

26. In the present situation, the available information demonstrates that an estimated 12,000 to 30,000 civilians (including children) have been killed by police or by “unidentified” perpetrators apparently acting in coordination with police.⁴³ In many instances, the police allegedly staged self-defence scenarios, planted evidence, or otherwise obstructed justice in an effort to justify the premeditated and deliberate murder of civilians.⁴⁴ Beyond the alleged killings, the Chamber has authorised the investigation of any Rome Statute crime within the geographical and temporal parameters of the situation,⁴⁵ and the available information indicates that torture, other inhumane acts, and other crimes were also committed in connection with the WoD campaign.⁴⁶ Nothing about these crimes, reportedly committed in large part by law enforcement personnel entrusted with protecting citizens from violence, suggests that they are of marginal gravity. To the contrary, they are extremely serious crimes, which appear to have been at the very least encouraged and condoned by high-level government officials, up to and including the former President. The Prosecution therefore submits that the GovPH’s gravity challenge should be rejected.

VI. The GovPH has not demonstrated that there are past or ongoing national proceedings which sufficiently mirror the ICC investigation

27. As set forth below, the Prosecution respectfully submits that the material provided by the GovPH fails to substantiate the existence of national investigations or prosecutions that sufficiently mirror the ICC investigation, because 1) the GovPH continues to rely upon non-criminal proceedings which cannot justify deferral under article 18; 2) the GovPH has not substantiated any relevant criminal proceedings in relation to the 2011-2016 Davao period; 3) the GovPH has not substantiated proceedings related to WoD-related article 5 crimes other than murder; and 4) the small number of investigations and prosecutions arguably substantiated by the GovPH continue to be few in number, are directed at low-level and physical perpetrators, relate only to killings during official police operations, and fail to investigate patterns of conduct or any policy underlying the killings.

⁴¹ ICC-01/12-01/18-601-Red, para. 55.

⁴² ICC-01/12-01/18-601-Red, para. 89-94.

⁴³ Article 15(3) Decision, para. 67.

⁴⁴ See, e.g., Article 15(3) Decision, para. 40-53, 57-58.

⁴⁵ Article 15(3) Decision, p. 41.

⁴⁶ Article 15(3) Decision, para. 71; Article 15(3) Request, para. 129.

A. The non-criminal proceedings relied upon by the GovPH cannot support deferral

28. The GovPH continues to rely on administrative and non-penal mechanisms and proceedings to justify its deferral request. However, it fails to demonstrate that the Department of Justice (“DOJ”) Inter-Agency Review Panel (“Panel”), the Administrative Order No. 35 Committee (“AO 35 Committee”), Philippine National Police - Internal Affairs Service (“PNP-IAS”) disciplinary proceedings, or writ of *amparo* proceedings constitute tangible, concrete, and progressive investigative steps as required to show inadmissibility.

1. DOJ Inter-Agency Review Panel

29. The GovPH disputes the Prosecution’s contention that the review by the Panel is a “desk review” that does not constitute a concrete investigative step justifying deferral. It characterises the DOJ as its prosecution arm and the administrator of the Philippine criminal justice system⁴⁷ and asserts that the Panel’s reviews may result in the filing of criminal cases and thus cannot be regarded as a mere “desk review”.⁴⁸

30. The GovPH must substantiate its deferral request with evidence of a sufficient degree of specificity and probative value that establishes tangible, concrete, and progressive investigative steps seeking to ascertain a person’s criminal responsibility.⁴⁹ Examples of these progressive investigative steps include, among others, interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses.⁵⁰

31. The Panel’s review falls short of comprising such tangible, concrete, and progressive investigative steps. The GovPH’s assertion that the Panel’s review *may* result in the filing of cases⁵¹ does not establish that concrete and tangible investigative steps have actually taken place. Mere speculation as to one possible outcome of a Panel review does not render the process a concrete investigative step. Likewise, simply reviewing case records and referring selected cases to the National Bureau of Investigation (“NBI”) for investigation does not itself amount to a concrete investigative step.

32. The GovPH does not assert that the Panel review entails concrete steps such as interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic

⁴⁷ GovPH Observations, para. 75.

⁴⁸ GovPH Observations, para. 76.

⁴⁹ Article 18(2) Request, para. 33.

⁵⁰ Article 18(2) Request, para. 33, citing ICC-01/09-01/11-307, para. 41, 69, ICC-01/09-02/11-274, para.1, 40, and ICC-01/17-9-Red, para. 148.

⁵¹ GovPH Observations, para. 76.

analyses. Instead, the GovPH simply states that the Panel's review "is supposed to ferret out which cases warrant a preliminary investigation that may lead to the filing of a complaint or information, and which ones do not."⁵² There is no indication that this activity requires or entails anything beyond a review of the existing file.

33. Finally, it may be useful to contrast the Panel's activities with those of the NBI in some cases referred to it by the Panel. As noted in the Prosecution's article 18(2) request, in a few particular cases the NBI did appear to conduct investigative steps to inquire into the facts of the killings, including conducting witness interviews and reviewing relevant photographic, documentary, and other evidence.⁵³ The Panel, however, undertakes no such activity on its own. Accordingly, it is respectfully submitted that the GovPH has not demonstrated that the Panel review itself constitutes a concrete and tangible investigative step warranting deferral.

2. Administrative Order No. 35 Committee

34. The GovPH also continues to rely upon the activities of the AO 35 Committee to justify its deferral request. However, it has not shown that the AO 35 Committee has itself taken any concrete or tangible investigative step with regard to any WoD-related killings within the temporal jurisdiction of the Court.

35. The GovPH has submitted [REDACTED]. These documents do not, however, establish that the AO 35 Committee is engaged in concrete investigative steps relevant to the deferral request.

36. [REDACTED]. As regards the cases within the temporal jurisdiction of the Court, none of the remarks point to any connection with the WoD.

37. [REDACTED]. [REDACTED]. However, again, none of the cases within the temporal jurisdiction of the Court relate to killings within the context of the WoD.

38. The Prosecution further notes that the remarks in [REDACTED]. The Prosecution submits that such activity does not comprise a concrete and tangible investigative step.

⁵² GovPH Observations, para. 77.

⁵³ Article 18(2) Request, para.105- 106.

3. PNP-IAS cases and writ of *amparo* proceedings

39. The GovPH seeks to counter the Prosecution's argument that administrative investigations by the PNP-IAS do not amount to concrete investigative steps for purposes of the deferral request. The GovPH asserts that these administrative cases can "ripen" into criminal investigations,⁵⁴ citing a 3 November 2021 PNP-NBI Memorandum of Agreement in which the PNP and NBI undertake to "where necessary, file the appropriate criminal complaints against those found to have committed violations of applicable laws in the conduct of anti-illegal drug operations", and "may recommend the filing of criminal cases separate from the administrative cases that would be pursued by the IAS".⁵⁵

40. Similarly, the GovPH posits that writ of *amparo* proceedings may lead to criminal proceedings, noting that the Supreme Court affirmed a decision of the Court of Appeals recommending the filing of appropriate civil, criminal, and administrative cases against respondent police officers.⁵⁶

41. These arguments, however, fail to persuade. Regardless of what these administrative and non-penal proceedings *may* or *could* lead to, they are not themselves aimed at determining criminal responsibility. Nor has the GovPH identified any concrete instances in which such proceedings have actually resulted in a criminal investigation or a determination of criminal responsibility. Absent such a showing, it is respectfully submitted that these PNP-IAS and *amparo* proceedings cannot justify deferral.

B. The GovPH has not substantiated any relevant criminal proceedings in relation to events in Davao during the period 2011 to 2016

42. The GovPH has also failed to substantiate any relevant criminal proceedings in relation to events in Davao during the period 2011 to 2016. [REDACTED].⁵⁷ [REDACTED].

43. [REDACTED].

44. In addition [REDACTED], the GovPH has provided an overview of various other mechanisms which it claims demonstrate that national investigations have been conducted in

⁵⁴ GovPH Observations, p. 36, heading III.A.3.

⁵⁵ GovPH Observations, para. 91-93.

⁵⁶ GovPH Observations, para. 96-97.

⁵⁷ In its observations, the GovPH states that "there were a total of 176 murder incidents in Davao from 2011 to 2016". See GovPH Observations, para. 99. The Prosecution notes that this is less than the estimated number of extrajudicial killings in Davao during the relevant period. See Article 15(3) Request, para. 124.

relation to Davao.⁵⁸ However, the Prosecution notes that the 2009 CHR investigation⁵⁹ and 2012 CHR Resolution⁶⁰ concerning events in the period 2005 to 2009 cannot demonstrate an overlap between domestic proceedings and the Court's authorised investigation, because the domestic proceedings pertain to events which fall outside the temporal scope of the Court's investigation. Similarly, the Ombudsman's finding in 2012 that 21 PNP officials were guilty of neglect of duty for failing to resolve rising levels of extrajudicial killings in Davao City⁶¹ relates to the failure of national investigations into conduct which pre-dates the temporal period of the Court's investigation, even if these findings are nonetheless pertinent insofar as they indicate a culture of impunity. The Prosecution further notes that the Ombudsman's ruling appears to be a purely administrative one which did not involve any finding of criminal responsibility.

45. The GovPH's reliance on the Ombudsman's dismissal of the CHR's recommendation to investigate Rodrigo Duterte for killings in Davao City,⁶² and the DOJ's apparent shelving of its investigation into the Davao Death Squad,⁶³ similarly do not establish inadmissibility, because they fail to demonstrate that concrete and progressive investigative steps have been taken. The GovPH merely refers to the existence of these findings without specifying any actual investigative activity. Furthermore, the GovPH's reliance on the Senate Committee inquiries into extrajudicial killings⁶⁴ cannot establish inadmissibility because these inquiries, which concluded "with accusations of whitewashing",⁶⁵ were not designed to (and did not in fact) result in criminal prosecutions.⁶⁶

46. In sum, the GovPH fails to substantiate any relevant national criminal proceedings in relation to events in Davao during the period 2011 to 2016. This alone, in the Prosecution's respectful submission, would justify ordering the resumption of the Court's authorised investigation.⁶⁷

⁵⁸ GovPH Observations, para. 100-119.

⁵⁹ GovPH Observations, para. 101.

⁶⁰ GovPH Observations, para. 103.

⁶¹ GovPH Observations, para. 102.

⁶² GovPH Observations, para. 104-105.

⁶³ GovPH Observations, para. 106.

⁶⁴ GovPH Observations, para. 107-118.

⁶⁵ Amnesty International, Philippines: Amnesty International Calls for Independent Investigation of Human Rights Violations Committed in the Context of the 'War on Drugs', PHL-OTP-0003-0799 at 0801.

⁶⁶ ICC-01/17-9-Red, para. 152.

⁶⁷ See Article 18(2) Request, para. 96.

C. The GovPH has not identified relevant investigations into Rome Statute crimes other than murder

47. The GovPH asserts that crimes other than murder which appear to have been committed in connection with the WoD have been investigated nationally.⁶⁸ However, it has offered scant evidence in this regard.

48. While the GovPH has identified two instances of investigations into rape and/or sexual violence, one of these cases (involving a victim in detention at the PNP Custodial Center)⁶⁹ appears to have involved two incidents on 9 June and 7 September 2020⁷⁰ and therefore falls outside the temporal scope of the Court's authorised investigation. In relation to the other case (the alleged rape of a 15-year old girl),⁷¹ the GovPH does not identify any concrete and progressive investigative steps taken therein, although a news article suggests that a low-level police officer (with the rank of PO1) was arrested for the crime.⁷² Assuming this is accurate, this would still only demonstrate activity in respect of the alleged direct perpetrator and could only result in the inadmissibility before the Court of a case concerning this perpetrator.

49. The GovPH also asserts that there was an investigation into secret jails uncovered by the CHR in 2017, but that charges were dismissed because there was insufficient evidence to conclude that the victims were held beyond the period allowed by law.⁷³ The Prosecution submits that this case is not inadmissible, because the GovPH has not substantiated that concrete and progressive investigative steps were taken, but has instead merely referred to the existence of an investigation.⁷⁴

50. The GovPH has also referred to the case of Jomer Dela Cruz.⁷⁵ The Prosecution notes that while the false testimony and planting of evidence alleged in that case would not constitute article 5 crimes, the alleged unlawful arrest might be relevant to an investigation of unlawful

⁶⁸ GovPH Observations, para. 120-127.

⁶⁹ GovPH Observations, para. 122.

⁷⁰ According to the article referred to by the GovPH. *See* GovPH Observations, fn. 152.

⁷¹ GovPH Observations, para. 121.

⁷² GovPH Observations, fn. 121.

⁷³ GovPH Observations, para. 123.

⁷⁴ GovPH Observations, para. 123.

⁷⁵ GovPH Observations, para. 124, [REDACTED].

imprisonment under article 7(e) of the Statute. However, [REDACTED].⁷⁶ [REDACTED], or after the cut-off date of 31 March 2022.⁷⁷

51. Insofar as the GovPH has referred to materials it had presented previously,⁷⁸ the Prosecution refers to its own previous submissions about these materials.⁷⁹

52. In sum, the Prosecution respectfully submits that the GovPH has not substantiated any relevant national investigations or prosecutions involving torture, enforced disappearance or – aside from charges against one alleged direct perpetrator with the rank of PO1 in one case – sexual and gender-based crimes.

D. The GovPH has not substantiated criminal proceedings except for a limited number of killings

53. Finally, the information provided by the GovPH which purportedly relates to criminal investigations for murder fails to demonstrate that there are, or have been, national proceedings that sufficiently mirror the Court's authorised investigation. The new information provides updates on less than 20 cases, several of which fall outside the Court's temporal jurisdiction or do not relate to the WoD at all. Almost all are effectively unsubstantiated, amounting to bare assertions of investigative or prosecutorial activities by the GovPH. Moreover, even if these cases were accepted as substantiated, they remain few in number compared to the total number of alleged killings, target only low-level and physical perpetrators, reveal no investigation of killings by so-called "vigilantes", and evince no inquiry into patterns of crimes or a state policy.

1. The annexes contain updates on a limited number of cases

54. The GovPH argues that the Prosecution "failed to weigh material information",⁸⁰ reiterating that 250 cases are pending before DOJ prosecution offices in Angeles City (58), San Jose del Monte City (81), and Bulacan province (111), and that 52 cases pertaining to incidents of people who were killed while allegedly resisting arrest ("nanlaban") have been referred to the NBI for case build-up.⁸¹ However, all of these cases were already addressed by the Prosecution in its request to resume the investigation.⁸²

⁷⁶ [REDACTED].

⁷⁷ See Article 18(2) Request, para. 43 (explaining that the deferral request must be justified on the basis of proceedings completed or ongoing by the date of the deferral request on 10 November 2021, or at the latest by 31 March 2022, the final deadline for provision of substantiating information). See also para. 71 below.

⁷⁸ GovPH Observations, para. 125-126.

⁷⁹ See Article 18(2) Request, para. 70-132.

⁸⁰ GovPH Observations, para. 26.

⁸¹ GovPH Observations, para. 26.

⁸² See Article 18(2) Request, para. 76-78, 104-131.

55. The GovPH submits in particular that 19 of the 52 *nanlaban* cases referred to the NBI for further investigation and case build-up have now been “resolved”.⁸³ The GovPH had previously referred to the filing of criminal complaints in three of these 52 cases, only two of which fell within the Court’s temporal jurisdiction.⁸⁴ Excluding these three cases, and as discussed below, the GovPH has now provided updates on a further 17 of the 52 *nanlaban* cases, as well as some information about other cases.⁸⁵ Several of the updates relate to killings which occurred outside the Court’s temporal jurisdiction.⁸⁶

56. [REDACTED].⁸⁷ The Prosecution had observed in its article 18(2) request that the NBI appeared to have conducted concrete investigative steps in the cases involving the killing of Kent Lee Caballes and Jessica Albaran.⁸⁸ The Prosecution notes with concern, however, that [REDACTED].⁸⁹

57. According to [REDACTED],⁹⁰ [REDACTED]. [REDACTED].⁹¹

58. [REDACTED] also states that two cases were closed [REDACTED] due to the lack of investigative leads.⁹² However, there is insufficient detail as to the actual investigative steps which led to the closure of these two cases.

59. [REDACTED] provides an update on the case relating to the killing of [REDACTED].⁹³ The Prosecution notes that this appears contrary to the GovPH’s previous submission that there was nothing to support the police claim that the suspect fired at them.⁹⁴ As discussed above, this administrative case, being non-criminal in nature, cannot justify deferral.

60. [REDACTED] relates to the killing of [REDACTED]. The Prosecution notes that [REDACTED] does not specify whether the investigative steps described therein were taken before 31 March 2022.⁹⁵

⁸³ GovPH Observations, para. 78.

⁸⁴ Article 18(2) Request, para. 21, 116: the cases involving the killings of Caballes and Albaran are within the Court’s temporal jurisdiction, while the case involving the killing of Vedaño is beyond its scope.

⁸⁵ GovPH Observations, para. 78 and annexes cited therein.

⁸⁶ For example, [REDACTED]. See para. 64 below.

⁸⁷ [REDACTED].

⁸⁸ Article 18(2) Request, para. 106.

⁸⁹ [REDACTED].

⁹⁰ [REDACTED].

⁹¹ [REDACTED].

⁹² [REDACTED].

⁹³ [REDACTED].

⁹⁴ PHL-OTP-0008-0050 at 0050.

⁹⁵ [REDACTED].

61. [REDACTED] concerns the killing of [REDACTED]. While this document indicates that the killing was investigated, no details are provided. There is a general reference to an interview with [REDACTED], but it is not specified whether such interview related to the conduct of police or that of the victim. [REDACTED].⁹⁶

62. [REDACTED] - but merely indicates that there are no witnesses to these killings and that the private complainants in these cases are no longer interested in pursuing the cases. There is no indication of any other investigative steps which have been taken.

63. [REDACTED] refer to the case involving the victims [REDACTED].⁹⁷ Although the Annexes show no connection to the WoD, [REDACTED].⁹⁸ [REDACTED].⁹⁹

64. [REDACTED]. In any event, this incident occurred on [REDACTED], outside the Court's temporal jurisdiction in this situation.¹⁰⁰ Likewise, [REDACTED] appears to refer to an incident on [REDACTED], which is also outside the Court's temporal jurisdiction for the situation.¹⁰¹

65. [REDACTED]. The document, however, does not specify the dates of the underlying killings. Since these underlying killings span the period [REDACTED], a number of the listed cases may fall outside the Court's temporal jurisdiction. [REDACTED].

66. The Prosecution was able to tentatively identify a few cases [REDACTED] for which the dates of the underlying killings are known: [REDACTED]¹⁰²), [REDACTED].¹⁰³ As noted above, the [REDACTED] cases fall outside the Court's temporal jurisdiction, as do [REDACTED].¹⁰⁴

67. According to [REDACTED].¹⁰⁵ The Prosecution understands this to refer [REDACTED].¹⁰⁶ This incident not only falls outside the Court's temporal jurisdiction, but it

⁹⁶ [REDACTED].

⁹⁷ [REDACTED].

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ PHL-OTP-0008-0050 at 0069.

¹⁰¹ PHL-OTP-0008-0050 at 0053.

¹⁰² [REDACTED].

¹⁰³ [REDACTED].

¹⁰⁴ [REDACTED].

¹⁰⁵ [REDACTED].

¹⁰⁶ [REDACTED].

is irrelevant to the Prosecution's investigation as it does not pertain to the killing of drug suspects [REDACTED].

68. In sum, by the Prosecution's count, the GovPH has provided updates on 17 of the 52 *nanlaban* cases (excluding the three cases of Caballes, Albaran, and Vedaño, regarding which the Prosecution had already noted the filing of criminal complaints).¹⁰⁷ As noted above, it is concerning that a number of these cases apparently have been closed or terminated for lack of evidence, but the GovPH has not provided sufficient information showing which investigative steps were taken before reaching this conclusion. The Prosecution also recalls, as noted above, that several of these cases concern crimes committed outside the Court's temporal jurisdiction.

69. Finally, [REDACTED] contains court records relating to the kidnapping and killing of [REDACTED]. Like the Caballes, Albaran, and Vedaño cases referenced above, the Prosecution had already taken this case into account in its article 18(2) request, having also cited it in its article 15 request.¹⁰⁸

2. Unsubstantiated lists of alleged investigations are insufficient to justify deferral

70. The GovPH bears the evidential burden and the burden of proof to convince the Chamber that national proceedings are ongoing which meet the requirements of article 17 and 18(2) of the Statute and to thereby justify deferral of the investigation.¹⁰⁹ The Prosecution respectfully submits that the new material provided by the GovPH, however, still fails to substantiate the existence of the claimed investigative steps in most instances. Tangible and concrete investigative steps must be substantiated by court records, police reports, internal memos, or other relevant documentation. Tables and lists of alleged investigations, without supporting documentation, are insufficient. For the most part, [REDACTED], and thus fall short of the substantiation required.

3. Prospective investigations and investigative steps taken after 31 March 2022 should be disregarded

71. Updates provided by the GovPH on several cases specify that criminal complaints have been filed or other investigative steps have been taken after 31 March 2022.¹¹⁰ Articles 17 and 18 of the Statute require that relevant domestic proceedings must have already existed at the

¹⁰⁷ The 17 cases can be found [REDACTED].

¹⁰⁸ [REDACTED].

¹⁰⁹ Article 18(2) Request, para. 30.

¹¹⁰ [REDACTED].

time when the State requests the deferral.¹¹¹ The Prosecution respectfully submits that the Chamber should therefore consider only concrete investigative steps taken as of 10 November 2021, when the GovPH submitted its deferral request, or at the latest 31 March 2022, which was the Prosecution's last deadline for the GovPH to provide additional information substantiating its deferral request.

4. The additional information relates to proceedings which remain few in number, overwhelmingly against low-level and physical perpetrators, and do not address vigilante killings

72. The Prosecution respectfully submits that, even if the GovPH's updates were considered substantiated, these cases represent only a small fraction of the alleged criminal conduct in the situation,¹¹² and concern only low-level and physical perpetrators.¹¹³ They relate only to killings during official police operations, and ignore entirely the large number of WoD-related killings perpetrated by so-called "vigilantes".¹¹⁴ For these reasons alone, it is submitted that the Chamber should order the resumption of the investigation.

5. The substantiated proceedings do not address patterns or policy

73. Finally, the proceedings referred to in the additional information provided by the GovPH also do not address the apparently systematic nature of the killings and, as such, show no investigation of possible patterns or policy behind the killings. Also noteworthy is the GovPH's insistence that WoD-related killings were "isolated instances".¹¹⁵

74. The GovPH has asserted that direct perpetrators "are vital leads that may link higher-ranking officials as part of the chain of command in the commission of the crimes", but that "[u]ntil such link is discovered, the prosecution will have no firm basis to investigate or prosecute high-ranking officials".¹¹⁶ Even recognising that investigations of this kind are challenging and time-consuming, the Prosecution respectfully notes that the GovPH has shown no effort to pursue such leads or to otherwise establish a "firm basis" for investigation or prosecution. That failure speaks to the need for an impartial investigation by the Prosecution.

¹¹¹ Article 18(2) Request, para. 43.

¹¹² See para. 26 above.

¹¹³ Cf. Article 18(2) Request, para. 132.

¹¹⁴ Cf. Article 18(2) Request, para. 100.

¹¹⁵ GovPH Observations, para. 20.

¹¹⁶ GovPH Observations, para. 127.

VII. Conclusion

75. For the reasons set forth above, the Prosecution respectfully reiterates its request that the Chamber order the resumption of the investigation into the Situation in the Republic of the Philippines.



Karim A.A. Khan KC, Prosecutor

Dated this 22nd day of September 2022

At The Hague, The Netherlands