

1 International Criminal Court
2 Pre-Trial Chamber I
3 Situation: Republic of the Philippines
4 In the case of The Prosecutor v. Rodrigo Roa Duterte - ICC-01/21-01/25
5 Presiding Judge Iulia Antoanella Motoc, Judge Reine Adélaïde Sophie
6 Alapini-Gansou and Judge María del Socorro Flores Liera
7 Confirmation of Charges Hearing - Courtroom 1
8 Thursday, 26 February 2026
9 (The hearing starts in open session at 10.00 a.m.)
10 THE COURT USHER: [10:00:53] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE MOTOC: [10:01:23](Interpretation) Good morning, everyone.
14 I'd like to welcome everyone in the courtroom as well as those who are listening in
15 from outside the courtroom.
16 Court officer, please call the case.
17 THE COURT OFFICER: [10:01:39] Good morning, Madam President, your Honours.
18 Situation in the Republic of the Philippines, in the case of The Prosecutor versus
19 Rodrigo Roa Duterte, case reference ICC-01/21-01/25.
20 And for the record, we are in open session.
21 PRESIDING JUDGE MOTOC: [10:01:55] Thank you very much.
22 I would like to ask parties and participants to confirm that those present in the
23 courtroom today are the same as the people in attendance on Tuesday.
24 Mr Prosecutor.
25 MR NIANG: [10:02:15](Interpretation) Good morning. The OTP is represented by

1 the team. Mr Hai Do Duc, associate trial lawyer, is one additional. I myself, I am
2 back, after a short absence.

3 PRESIDING JUDGE MOTOC: [10:02:31](Interpretation) Thank you very much.
4 Legal Representatives of Victims, Ms Massidda.

5 MS MASSIDDA: [10:02:40](Interpretation) Thank you. Good morning, your Honour.
6 It is the same team as Monday. Not Tuesday, but Monday.

7 PRESIDING JUDGE MOTOC: [10:02:47](Interpretation) Thank you very much.
8 We can now turn to the Defence, Mr Kaufman.

9 MR KAUFMAN: [10:02:58](Interpretation) Good morning, Madam President, your
10 Honours. It is the same line-up as previous days. I will go no further than that in
11 French.

12 PRESIDING JUDGE MOTOC: [10:03:08](Interpretation) Thank you very much.
13 We can now move on to the Defence and their submissions on the merits.
14 Mr Kaufman, you may address the Court.

15 MR KAUFMAN: [10:03:21] Thank you very much, Madam President. Thank you
16 very much, your Honours.

17 Now, before I start, I would like to make one general comment and it's a comment
18 that every Defence counsel who appears before this Court is obliged to make, so if the
19 mainstream media in the Philippines and NGOs reporting on this case today report
20 anything about the Defence's submissions, I hope that they will at least communicate
21 the following faithfully. The Defence does not disrespect the soul of any deceased
22 person, nor does it make light of the loss of life. Any criticism made by us today will
23 not be levelled at the loved ones of those such as the tearful relative who I saw in the
24 gallery here on Tuesday.

25 The Defence's criticism will be confined only to the Prosecution's Document

1 Containing the Charges which governs these proceedings, not what has been reported
2 elsewhere in the media.

3 It's not the Defence's role to give an alternative narrative, nor to give an explanation
4 for the facts and figures presented by the Prosecution. The Defence's role is simply
5 to persuade your Honours that Mr Rodrigo Duterte should not remain in detention
6 for years to come simply because the Prosecution cannot make out substantial
7 grounds to believe that this individual committed the crimes with which he is
8 charged.

9 Now, Mr Julian Nicholls confidentially said the other day that you can ignore
10 Rodrigo Duterte's speeches. "Disregard every speech ever made by Mr Duterte", he
11 said, "throw them all out. There is still ample evidence of [the] substantial grounds
12 based on the other evidence". That's transcript T-4, page 45, lines 5 to 6. Helpful
13 advice from no less than a day-to-day prosecutor in charge of this case, because we
14 will show that the evidence is not substantial; rather, totally inadequate. But in any
15 event, since I can leave no stone unturned, I now turn to those speeches.

16 Now, if there's one thing that I've learnt from the domestic media coverage of this
17 case, it is that journalists and their editors have a tendency to fixate on the salacious
18 elements of a person's speeches while ignoring the less interesting parts. And so it
19 was with Rodrigo Duterte. The Prosecution has had its opportunity to show you a
20 selection of these speeches and seems to believe that the more they show, the greater
21 the chances of convincing your Honours to confirm the charges.

22 But what the Prosecution has not told the public is that in its Document Containing
23 the Charges which governs these proceedings, and nothing else, it has only supplied
24 20 of these speeches as proof of criminal intent. And, as I mentioned in my opening
25 statement, 10 of these speeches, including two referred to by the Deputy Prosecutor,

1 actually contain an exhortation to the use of lawful self-defence.

2 Thereafter, we found a further 35 speeches which will be found at tab 9, 11 to 26, 29 to
3 35, 37 to 41, 43 to 46, 137, and 152.

4 Now, this is obviously not a competition. The point we merely wish to make is that
5 relying on the former president's speeches as a means of proving criminal intent is
6 impossible.

7 Now, I'd like to go back to that one speech which I promised the other day to show
8 you. This is a speech -- the second speech that the Deputy Prosecutor referred to in
9 his opening statement, and this refers to the responsibility that Mr Duterte said that
10 he would shoulder, promising to shield rogue officers from prosecution.

11 If we may, the first of these speeches, and I quote what the Deputy Prosecutor read
12 from this speech:

13 "So the police is under the DILG. So I have to believe the story of the police, for
14 simply, they are my subordinates and I am ultimately responsible for their deeds."

15 Now, let's look at what the Deputy Prosecutor didn't state from the same speech, and
16 the order is simply this:

17 "Go out, arrest them if you can. But if there is no peaceful method of doing it and
18 you're presented with violent resistance thereby placing your jeopardy in your life,
19 you shoot, well, the son of a bitch."

20 Mr Duterte's language obviously, but nevertheless an exhortation to lawful
21 self-defence.

22 Let's have look at another one of the Prosecution's speeches mentioned in their
23 Pre-Confirmation Brief, once again on shielding criminal agents from prosecution.

24 I quote -- this is, I apologise, PHL-OTP-00001127 at page 5. And I quote:

25 "But if you do your duty, do not worry about cases, I will protect you, believe me

1 [...]

2 That's why I will protect them. And if there's somebody who will go to jail, it's me.

3 I will assume full, legal responsibility."

4 Now let's have a look at the exonerating element which comes right underneath the
5 allegedly incriminating element. He said:

6 "Just do it right. We have our trainings, that you can only kill, if your life is in
7 danger. And are you there performing the duty of a law enforcer. That's about it."

8 Now, I will turn to one of our speeches that we found in our research, one of the 35
9 that the Prosecution didn't find. And I will terminate there because we have the rest,
10 which we've referred you to in the tabs.

11 So this is an exonerating speech which the Prosecution either missed or ignored
12 because it doesn't suit its case, and it was a speech which was made right at the start
13 of the presidency, which could be seen as setting out the standard for his presidency.
14 Mr Duterte said this:

15 "I promised them I will suppress crime and take control of the drug situation, which
16 was really running wild in our county today. Make no mistake about it. I repeat
17 again for all -- [and for] everybody's consumption: Do not kill if you are not in
18 danger of losing your life."

19 Well, it goes on. You can see it there on the screen.

20 Well, of course, the Prosecution knows that we are going to argue that many of these
21 speeches - in fact, the majority of these speeches, I would say - contain this

22 exhortation to the lawful use of self-defence. And the learned counsel

23 Mr Edward Jeremy for the Prosecution tried to get around the problem by inventing
24 the novel concept of the elastic mouth, which out of one side emanates the nasty truth
25 while out of the other side issues the supposedly disingenuous advice for the police to

1 act in self-defence. But I ask your Honours and the people of the Philippines
2 listening in today, how many times did you hear the former president state at the
3 beginning of any address that he had the speech of two pages prepared, but to his
4 regret it didn't come from the heart and then he would proceed to speak at length,
5 sometimes for an hour or more, in his own uniquely colourful and crusty language,
6 exposing his homespun theories on crime control, swearing a bit here, boasting a bit
7 there and generally delivering a speech more akin to Finnegans Wake than the
8 Gettysburg Address. That does not suggest crafty design hinted at by Mr Jeremy.
9 Quite the opposite. Mr Jeremy's resort to the "say one thing, mean another thing"
10 theory is complete supposition. It is not a legitimate argument because it implies
11 that one cannot rely on anything coming out of Mr Duterte's mouth, and that does not
12 help the case for the Prosecution at all.

13 Well, that's about it for the speeches. I will now turn to crimes against humanity and
14 the contextual elements.

15 And here I would like to start off by addressing the requirement that the acts of
16 murder alleged be committed as part of or in themselves constitute a widespread or
17 systematic attack. The second requirement is that these acts of murder be directed
18 against a civilian population. With respect to the unique ICC requirement of an
19 organisational policy, I would suggest that this concept has been conflated with the
20 common plan and, as such, I shall address the matter later in my submissions.

21 So to start with the widespread and systematic attack. I would like to draw your
22 Honours' attention to the fact that count 1 contains nine incidents of murder in one
23 city, Davao. Hardly widespread.

24 Ms Robynne Croft in her submissions yesterday for the Prosecution - sorry,
25 Tuesday - told you that the widespread nature of count 1 was evidenced by the

1 multitude of bodies in a quarry, a mass grave. Well, the Prosecution, and the
2 authorities in the Philippines have had years to continue its investigations since the
3 judicial warrant was reimposed. I mean, they could have dug up the entire city of
4 Davao, but all they have managed to do as the Prosecution on the matter is a
5 reference to Leila De Lima in a Senate committee where she talks about the discovery
6 of a few human remains which could have belonged to World War II Japanese
7 soldiers. The same goes for another witness's outlandish assertion that bodies were
8 thrown into the sea off the coast of Davao. Well, the whole gulf could have been
9 dredged, but not one executed corpse has surfaced.

10 As for counts 2 and 3, Ms Croft showed us some maps with coloured dots to indicate
11 the magnitude and geographical spread of what the Prosecution alleges, without of
12 course proving that they were extrajudicial killings not countenanced within the
13 49 incidents. Indeed, for this reason there is nothing to link the charged incidents,
14 those 49 incidents, to the wider picture.

15 According to the Appeals Chamber, which confirmed a Pre-Trial Chamber ruling on
16 the matter in Gbagbo, filing number 432 in the case record at paragraphs 35 to 36, any
17 factual allegations outside the charged incidents - in this case, masses of generically
18 alleged extrajudicial killings - must be proved to the required standard, and for this
19 NGO reports, academic statistics and media articles are, as a rule, considered
20 insufficient.

21 Ms Croft also screened images taken from the Duterte administration's PDEA report
22 for the years 2016 to 2019 - if we can pull that up now - which cite figures of the
23 number of deaths of drug personalities in anti-drug operations without proving that
24 they were illegally murdered. But she neglected to contextualise these numbers by
25 reference to other parts of the same report, which show that in comparison to the

1 number of arrests and operations conducted, the number of deaths are minimal.

2 Please, if you will, show a bar chart that we have helpfully prepared with the figures,
3 and a pie chart with the percentages.

4 So, if I may just conclude, the only thing that is widespread here, or, rather, spread
5 wide, is the utility of the Prosecution's statistics.

6 Now, turning to the civilian population or the target of the attack.

7 Let me say straightaway that the Prosecution case theory with respect to the
8 definition of the targeted population is, to put it extremely politely, muddled. In
9 layman's terms, the Prosecution has hedged its bets by presenting two alternative
10 propositions, hoping that this Pre-Trial Chamber will settle for one of them. From
11 paragraph 17 to paragraph 20 inclusive of its Document Containing the Charges, the
12 Prosecution argues that Mr Duterte launched an attack on the entire population of the
13 Philippines pursuant to a policy to neutralise persons perceived or alleged to be
14 engaged in crime. In paragraph 21, however, this so-called attack is directed not
15 against the civilian population at large - the whole population - but, rather, against a
16 considerably smaller and nebulous margin of society; namely, the alleged criminals
17 themselves.

18 Let us start by dealing with the first scenario; namely, that the former president,
19 whose loyalty and love for his country is and has always been beyond question,
20 launched a wholesale attack on the whole population of the Philippines, on the
21 entirety of his nation, including the very same people who put him into power. Such
22 a suggestion is not just incomprehensible, it is quite bizarre.

23 The reason for this rather strange assertion, so I submit, is grounded in the
24 Prosecution's latest brainstorm on the matter, which it set out last year in a brief
25 appealing a decision of this very same Pre-Trial Chamber in the El Hishri case. And

1 I do apologise in advance for the rather dull exposé which will follow, but I do find it
2 instructive to illustrate the chameleon-like nature of the Prosecution's case theory. In
3 this instance, your Honours found that the civilian population attacked by El Hishri
4 comprised prison detainees professing a certain political ideology. In so doing, your
5 Honours declined to issue an arrest warrant for El Hishri where the victims of his
6 crimes had been detained for totally unconnected and nonpolitical reasons.

7 Now, you might ask yourselves, why did the Prosecution decide to appeal this
8 decision? It was not as if it had been denied the arrest warrant for El Hishri that it
9 had sought. Well, a key to the answer, so I believe, is to be found in the chronology
10 of the events.

11 On 10 February 2025, the Prosecution rushed out its application for Mr Duterte's
12 arrest, believing that a unique opportunity to apprehend him had arisen. In this
13 application, the Prosecution defined the attack perpetrated by Mr Rodrigo Duterte as
14 being aimed at the entire population of the Philippines.

15 Let us now fast-forward to 10 July 2025. The Pre-Trial Chamber - this same Pre-Trial
16 Chamber - ordered the arrest of Khaled El Hishri for an attack on an objectively
17 identifiable civilian population of detainees while finding no justification to suspect
18 him of crimes committed against a discrete subsector of that population exhibiting
19 characteristics distinct from those of the general population.

20 Well, as you can guess, the Prosecution didn't like that decision and hastened to
21 appeal it, not, I would suggest, out of any true concern for the purity of international
22 humanitarian law, but, rather, because it put a spanner into the works of the Duterte
23 case; that is, the only other active case that it is prosecuting before this Court.

24 After all, if we apply the resulting logic of your Honours' decision in El Hishri to the
25 Prosecution's case theory in the Duterte case, at least as it stood as of 10 July 2025,

1 then alleged drug pushers and alleged criminals would be deemed a separate
2 subjectively defined subgroup of the general Filipino civilian population displaying
3 different characteristics and, as a result, excluded as targets of the attack.
4 So, eight days passed between this decision of yours, your Honours, and notification
5 of the confidential version of the Prosecution's Pre-Confirmation Brief on 18 July last
6 year, and I am prepared to wager that while beavering away with their attempt to
7 appeal the El Hishri decision, the gurus on the top floor of the Office of the Prosecutor
8 were also frantically discussing how to deal with this inconvenient fly in their
9 conceptual ointment. They had to think of a way to accommodate this Pre-Trial
10 Chamber's ruling while not compromising their appeal. So, lo and behold, and
11 rather unsurprisingly, the Pre-Confirmation Brief contained a new feature; namely,
12 the second scenario to which I referred earlier, that the target of the attack was not the
13 Filipino as a whole, but the suspected drug pushers and criminals.
14 Now, even if the former president did promulgate an organisational policy of
15 eliminating suspected criminals and drug pushers, which he most definitely did not,
16 this policy did not and could not constitute an attack directed against a clearly
17 definable civilian population.
18 Firstly, the segment of society victimised cannot be said to display objective
19 characteristics distinguishing them from other members of society and, thus,
20 rendering them susceptible to an attack. After all, how does one define a suspected
21 drug pusher or suspected criminal for the purposes, let us say, of count 1, where there
22 were no HVTs, or high-value targets, or PRRD lists or kill lists or what have you? It
23 is not as if criminals have identifying features such as a shifty look, or a 5 o'clock
24 shadow, or a sack marked "swag". In other words, the definition "suspected drug
25 pusher" or "suspected criminal" entails the exercise of discretion on the part of the

1 perpetrator implementing the organisational policy. It is a shifting and mutable
2 concept. It is a subjective determination. In our submission, there has to be at the
3 very least an objectively discernible characteristic which unites the members of the
4 targeted groups such that they can be deemed a civilian population for the purposes
5 of the attack. Leaving the determination of membership of a civilian population to
6 the people who pulled the trigger introduces a degree of random selection and, as
7 cited quite clearly in the Al-Hassan confirmation decision at paragraph 149, the
8 Prosecution must prove that the attack was not directed against a limited group of
9 randomly selected persons. This ruling, your Honours, was the expression of the
10 law as it had stood for many years ever since the decision authorising an investigation
11 in the Kenya situation, where, at paragraph 81, the Pre-Trial Chamber defined a
12 civilian population as a group sharing, and I quote, "distinguishing features" and
13 added, as follows, and I quote again:

14 "The Prosecutor will need to demonstrate, to the standard of proof applicable, that the
15 attack was directed against the civilian population as a whole and not merely against
16 randomly selected individuals."

17 So let us ask ourselves whether the alleged attack in this case was directed at the
18 population as a whole or at a subjectively defined subgroup of perceived or alleged
19 criminal offenders. The minute the distinguishing features of the civilian population
20 in question are defined through the application of subjective criteria, the targeting
21 process becomes completely random. The targeted civilians are perceived criminals,
22 but perceived to be so by whom? Is it not the case that one man's despicable
23 criminal is another person's righteous saint? In fact, have we not heard from the
24 civil society that many of the victims were not drug pushers or criminals, but
25 innocent members of the local community.

1 To me, and as a matter of logic, it would appear that the targeted population in the
2 Duterte case was selected randomly, even according to the Prosecution's own
3 witnesses who talk about quotas of neutralisation that had to be met, and their
4 motives for target selection, which had frequently nothing to do with suspected
5 criminality, but, rather, personal vendetta or, on one occasion, just because the victim
6 had cheated at cards.

7 With that, Mr President, your Honours, I conclude the chapeau or contextual
8 requirements of crimes against humanity and I will now turn to the modes of liability
9 or means of perpetration.

10 Now, I have racked my brain for many a month pondering one question: If
11 Rodrigo Duterte was so shamelessly brazen as to broadcast his murderous intent in
12 public ever since he was the mayor of Davao, why did it take the ICC Prosecution
13 almost four years to open an investigation after Rodrigo Duterte pulled his county out
14 of the International Criminal Court? After all, why did the ICC Prosecution not just
15 save itself all the hassle of its jurisdictional problem -- a fundamental issue that still
16 plagues it and remains to be resolved by the Appeals Chamber, and we won't talk
17 about that today obviously? But why did the Prosecution not seek to initiate its
18 official investigation within the one-year withdrawal period, especially given the fact
19 that Mr Karim Khan, the victims' representative embedded in the role of chief
20 Prosecutor, had received judicial authorisation to interview at least one of the
21 criminal cooperating witnesses substantiating the crimes of the Davao mayoral
22 period?

23 Well, for me, at any rate, it didn't take too long for the penny to drop. As
24 I mentioned in my opening statement, the Prosecution knows that it is not enough
25 simply to assert that Rodrigo Duterte said outrageous things and that deaths occurred

1 and, so, as a result, he must be criminally responsible.

2 There is a requirement for what is called a causal nexus. The Prosecution has to

3 show which one of Duterte's statements, orders or commands were given to a specific

4 individual who then went out and pulled the trigger or communicated the command

5 to someone else who also went out and pulled the trigger, killing one of its 78

6 identified victims. That would have been the classical way to prove a causal link

7 between stuff that came out of Rodrigo Duterte's mouth and the deaths pertinent to

8 the case. That would have been ordering under Article 25(3)(b).

9 But the Prosecution cannot show such a causal link. They've never been able to do

10 that. They show you a lovely pyramid - it's on the screen - with Duterte at the top,

11 the co-perpetrators underneath, the DDS handlers underneath them and the hitmen

12 perpetrators at the very bottom. To quote Mr Julian Nicholls, "how cute". But what

13 the learned Prosecutors can't show you is the connecting line between Duterte at the

14 top and the next level down comprising the so-called co-perpetrators. I hope

15 Ms Croft will forgive me for vandalising her screenshot, but there you have it. That

16 is where the apex slips off the pyramid of Giza. The most they can do is allege that

17 their cooperating witnesses who pulled the trigger, and whose credibility is about as

18 worthless as a devalued peso, understood that killing is what Duterte would have

19 wanted. Or that they had no choice but to comply because that was what was

20 expected of them by their handlers, or other such similar expressions of a totally

21 subjective sense of obligation. But, as they know, not one of the 49 incidents

22 mentioned in the Document Containing the Charges manifests such a causal link

23 between a speech and one of the charged incidents.

24 I will state it for the record, in fact I will state it a number of times during my

25 submissions: there is no smoking gun in this case, and that is not for want of a

1 desperate attempt to find one on the part of the Prosecution with all their leading
2 questions when they interviewed their criminal cooperating witnesses. Not one
3 witness relevant to any of the 49 incidents with which Mr Rodrigo Duterte is charged
4 will testify that he received a direct order from the former president to go out and kill
5 someone.

6 Let us just digest this. All those speeches where the former president made various
7 threats to kill, but not one demonstrable instance set out in the Prosecution's
8 Document Containing the Charges which details an act of murder committed as a
9 result of a direct order given by him. This in and of itself should be sufficient to
10 convince any reasonable bystander observing the conduct of these proceedings that
11 Rodrigo Duterte is innocent of these charges levelled at him.

12 It is for this reason, and because of the complete lack of reliable cooperating witnesses,
13 that the Prosecution has alleged not one, but a plethora of theories as to the means of
14 perpetration to link the crimes alleged committed to the person who is far removed
15 from the incidents of murder and who has been targeted for prosecution. And I say
16 "targeted for prosecution".

17 Normally I would say that such a multiplicity of legal theories speaks to a lack of
18 clarity and prosecutorial uncertainty. Indeed, some of these modes of liability as
19 pleaded contradict each other as a matter of logic.

20 Nonetheless, I would like to make the following general observation: As the Defence
21 has progressively reviewed the massive databases of evidence disclosed, it has
22 become increasingly apparent that given the absence of direct evidence directly
23 implicating Rodrigo Duterte, or even indicating participation in or control over any
24 one of the 49 incidents alleged in the Document Containing the Charges, the
25 Prosecution has resorted to papering over the cracks with human rights reports, press

1 statements, hearsay and, of course, Mr Duterte's bluster and political hyperbole.

2 And where these documents are not suffice, the Prosecution has resorted to the
3 time-worn theory of indirect co-perpetration, Article 25(3)(a), of which the parameters,
4 I would respectfully submit, are still subject to dispute.

5 So, I will now turn to this mode of liability, which is the principle mode of liability
6 levelled at Rodrigo Duterte. As we all know, in order to prove criminal liability
7 through indirect co-perpetration, there is a need to show a common plan upon which
8 the suspect and his co-perpetrators, because you need co-perpetrators for indirect
9 perpetration -- a plan on which they mutually agreed, and that common plan must
10 without exception have a criminal element.

11 As I have already stated, the only plan in play was not just totally legitimate in nature,
12 but was, in addition, wildly supported by the Filipino electorate which ensured that
13 Mayor Rodrigo Duterte's governance of Davao City throughout the years would
14 thereafter put him into the Malacañang. According to the Prosecution, the
15 criminality of the common plan expressed itself as follows, and I quote from their
16 documentation: "an agreement to neutralise" -- to neutralise -- "alleged criminals in
17 the Philippines including those associated with drugs through violent crimes
18 including murder".

19 Well, they really covered all options there.

20 The existence of such a criminal plan is, of course, entirely preposterous and, I should
21 say, totally denied. I would suggest that the Prosecution cannot point to any
22 particular point in time where there is direct evidence indicating that even two of
23 their so-called co-perpetrators actually met to agree to such a preposterous scheme.
24 As such, the plan cannot be described as "common" to anyone.

25 If anything, it's an artificial construct derived from the 10 assertions which are set

1 out in paragraphs 24 to 33 inclusive of the Prosecution's Pre-Confirmation Brief, all of
2 which comprise circumstantial evidence of the lowest quality, pointing to a mutually
3 agreed design which exists in the Prosecution's mind and nowhere else. Of course,
4 there is nothing wrong with construing the existence of a common criminal plan from
5 circumstantial data, but the cardinal rule of such a category of evidence is that the
6 incriminating facts derived therefrom must be the only reasonable inference in the
7 circumstances. What we can say with a degree of certainty, which reaches more than
8 a substantial degree of certainty, is that no inference can be drawn from the comments
9 of crime-based perpetrators.

10 And to hammer the point home I would like to screen you just a selection of excerpts
11 taken from the interviews of a number of the Prosecution's criminal cooperating
12 witnesses -- or witnesses.

13 (Counsel confers)

14 MR KAUFMAN: [10:41:06] "Interviewee: At least more or less than 10 buy-bust
15 operations, [...]"

16 "[...] Where somebody was shot?" asked the interviewer.

17 "[...] Yes, sir. [...]"

18 Interviewer 1: OK. And on those 10 occasions, was the shooting justified?

19 Interviewee: Yes, sir."

20 Number 2:

21 "So, if he shot at us, we would also shoot back. But if he were to stab [at] us with a
22 knife, then we wouldn't ... We wouldn't shoot a person that was holding a knife."

23 And the third one, witnesses who said:

24 "The PNP never said, 'kill those people.' [...]"

25 Another quote:

1 "... from what I recall of the incidents that I was at [...] all of them had guns, and they
2 were pointing them at the pusher-buyers... or they were pointing their guns at the
3 pusher-buyers. [...]"

4 "At the operations I was at. I'm talking about the operations I was at. The reason
5 that they were killed was because they were pointing their guns at [us] or they were
6 firing their guns at the pusher-buyers."

7 That's from the Prosecution's own witnesses.

8 Now, let us analyse the other circumstances as set out in paragraphs 24 to 33 inclusive
9 to see whether a meeting of minds between co-perpetrators is indeed the only
10 reasonable inference in the circumstances.

11 The first indication, and that is that in the late 1980s - in other words, 20 years before
12 the charges in this case - Mayor Duterte allegedly instructed civilian confidantes and
13 local police to neutralise, and I stress "to neutralise", and not to kill criminals. That's
14 what's stated in the PCB. And that he provided weapons and funds for this purpose.
15 Now, I would say that there is nothing untoward in providing policemen or civil
16 volunteers with weapons to carry out their lawful duties. That's what happens in
17 my county.

18 The Prosecution has not shown us how arming civilian volunteers is actually illegal,
19 and the burden of proof rests on it. After all, one does not fight crime with kind
20 words and gentle admonishments. The fact that these conscripted civilians
21 understood the words "to neutralise" to mean "to murder" is not something for which
22 Rodrigo Duterte must be held responsible. Trust me, had any one of the unreliable
23 insider criminal cooperating witnesses substantiating the assertions made in
24 paragraph 24 of the Pre-Confirmation Brief said that Rodrigo Duterte gave a direct
25 order to murder one of the 78 victims, the Prosecution's lawyers would have written

1 it into their charges point-blank. But they did not. And, furthermore, any false
2 allegation made by cooperating criminal witnesses made years before the charged
3 incidents and without the time frame of the case does not constitute pattern or similar
4 fact evidence indicating a predisposition to murder criminals.

5 Accordingly, the allegations concerning the activities of the so-called Davao Death
6 Squad, formerly the so-called Lambada Boys, are irrelevant both to proving a criminal
7 plan and that such a plan, more importantly, was common to any of the so-called
8 co-perpetrators mentioned in the Document Containing the Charges and released a
9 few days before the confirmation hearing in a lesser redacted version of the PCB.

10 Now, thinking like a prosecutor, I would say that the reason why the Prosecution has
11 fixated on incidents without the time period relevant to the charges is because it
12 contains the most salacious evidence provided by {ICR: (Redacted)}, P-26, an
13 individual who professed {ICR: (Redacted)}
14 (Redacted)} Rodrigo Duterte, but, for reasons that cannot be mentioned in open
15 session, has famously contradicted himself elsewhere.

16 And before I move on I would like to state loudly and clearly that the Davao Death
17 Squad is a complete fiction. Just like the person who wrote about it in the trashy
18 novel which I showed you the other day on the screen "Duterte Harry". Fiction.

19 Just like the initiation scene described so gleefully by Mr Edward Jeremy on behalf of
20 the Prosecution, with champagne being sprayed everywhere and guns being handed
21 around in a basket to all present for them to select like candy, something straight out
22 of a Godfather movie with Rodrigo Duterte standing in for Al Pacino. Quite
23 preposterous.

24 The sheer lack of truth in P-26's evidence with all that pertains {ICR: (Redacted)} is
25 nowhere better illustrated than when he is asked to explain the origins of the name

1 the Lambada Boys, the name which supposedly preceded the DDS. {ICR: (Redacted)}
2 the name Lambada Boys derived from the former president's supposed love for
3 shuffling about the dance floor to the strains of Brazilian song and dance.

4 {ICR: (Redacted)} interviewed by the Prosecution, however, {ICR: (Redacted)}, was
5 adamant that the name Lambada means to "knock down", signifying the murderous
6 objectives of this fantasy gang.

7 I now move on to the second and third indicia of a common plan according to the
8 Prosecution, as set out in paragraphs 25 and 26 of its Pre-Confirmation Brief, which
9 concern Mr Duterte's speeches, on which I have already submitted are the ones that
10 Mr Nicholls invited you just to throw them out. Suffice it to say that there is no
11 evidence whatsoever to indicate that the public statements attributed to our client
12 were agreed to by any of those co-perpetrators. The closest the Prosecution can
13 come to indicating a commonality of purpose is its assertion that the statements were
14 so well publicised and Duterte's rhetoric so notorious that anyone who worked for
15 him shared the implied intent expressed in those speeches. Once again, the tenuous
16 nature of such an inference is indicative of the weakness of the Prosecution's
17 evidence.

18 I turn, Madam President, to the fourth supposed indication of a common criminal
19 plan, and that is set out in paragraph 47 and mentions that on the very day that the
20 former president appointed Ronald Dela Rosa, "Bato", as the chief of Philippine
21 National Police, Dela Rosa issued a pre-drafted Command Circular, No. 16-2016, on
22 1 July of that year, formally launching the anti-illegal drugs campaign nationwide in
23 express pursuance of Duterte's campaign promises.

24 There is no dispute that CMC No. 16-2016 mentions Project Double Barrel, which was
25 indeed modelled after Davao City's policing strategy and was directed at the

1 "neutralisation of illegal drug personalities nationwide". But here we come to the
2 crux of the Prosecution's case, the manifestation of the criminal plan in writing;
3 "neutralisation" as a euphemism for "murder". Ms Robynne Croft certainly thought
4 so when making her submission on behalf the Prosecution, highlighting the word in
5 bright red and presenting us with a slide where the word neutralisation forms an
6 integral element of the common plan.

7 To import an element of criminality into what would otherwise be a perfectly
8 anodyne legal document, the Prosecution resorts to relying on speeches and
9 interviews given by Ronald Dela Rosa, "Bato", within a day or two of him being
10 appointed the chief of Philippine National Police. For example, in an interview
11 relied on by the Prosecution at footnote 136 of the Pre-Confirmation Brief, Dela Rosa
12 explains how *tokhang* means knock and plead and that it is a totally legitimate police
13 strategy. However, the citations relied on by the Prosecution to infer that *tokhang*
14 was a criminal *modus operandi* are completely taken out of context.

15 I shall just cite one question and answer from the media interview on which the
16 Prosecution relies at paragraph 27 to prove that Dela Rosa, when talking about
17 instilling fear, instilling fear in the hearts of drug users, was actually proposing a
18 policy which was anything but criminal and totally supportive of the main tenet of
19 defence; namely, that the only use of force would be that envisaged by way of
20 self-defence. And I quote:

21 "[Question]: Sir, you mentioned about instilling fear. When you instill fear, how do
22 you ensure that you do not violate human rights?

23 "[Answer]: Good question. We will see to it that the police operational procedures
24 are being followed in every legitimate police operations. When they see that the
25 police are really determined to go for them, legally, legally" -- he stresses the

1 word -- "and many of them go down, maybe they'll get scared."

2 That's PHL-OTP-00016403 at page 13.

3 In any event, what the Prosecution has not told you and what it has not shown you by
4 way of its opulent images on the video screen is that the supposed criminal blueprint
5 set out in Command Circular 2016, No. 16-2016 is totally negated by the content of the
6 document itself.

7 Let us take a look at paragraph 8e. and f. of the very same command circular, No.
8 16-2016, which states quite clearly that all operations should strictly observe the rights
9 of the accused enshrined in the Philippine Constitution as well as international law
10 and human rights.

11 Why, I ask you, did Mr Edward Jeremy, counsel for the Prosecution, in his very
12 eloquent and gilded address, not screen this part of the command circular? After all,
13 this command circular, as elaborated by Ms Robynne Croft, was the very essence of
14 his criminal common plan, in writing. This is the basis, so Mr Jeremy stated, for the
15 criminal agreement to kill high-value targets. And if that were not enough, the
16 lawfulness of command circular 16-2016 was reiterated three weeks later on 22 July
17 through the initiation and issuance of PNP investigative directive No. 12 of 2016,
18 which set out additional policies and guidelines in the conduct of Double Barrel.
19 I think there, Madam President, if I may, we can take a break, obviously with your
20 permission.

21 PRESIDING JUDGE MOTOC: [10:56:56] (Interpretation) Thank you, counsel.

22 Thank you very much. If you can also indicate the numbers of the documents that
23 you have referred to that will be good.

24 Thank you very much. We will take a break now and resume at 11:30. Thank you
25 very much.

- 1 THE COURT USHER: [10:57:18] All rise.
- 2 (Recess taken at 10.57 a.m.)
- 3 (Upon resuming in private session at 11.32 a.m.)
- 4 THE COURT USHER: [11:32:22] All rise.
- 5 Please be seated.
- 6 PRESIDING JUDGE MOTOC: [11:32:45](Interpretation) We are in --
- 7 MR KAUFMAN: [11:32:49] (Overlapping speakers)
- 8 PRESIDING JUDGE MOTOC: [11:32:52] -- closed session, as you requested.
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)
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16 (Redacted)

17 (Redacted)

18 (Open session at 11:37 a.m.)

19 THE COURT OFFICER: [11:37:56] We are in open session, Madam President.

20 MR KAUFMAN: [11:38:00] So, Madam President, your Honours, before the break,

21 we were discussing Command Circular No. 16-2016, and the issuance of PNP

22 investigative directive No. 12-2016, which set out additional policies and guidelines in

23 the conduct of Double Barrel.

24 This directive instructed investigative units on how to perform their responsibilities

25 in the case of armed confrontation during the implementation of Operation Double

1 Barrel. The document also included an exhortation to monitor human rights
2 violations perpetrated by PNP operating units.

3 The term "neutralisation" itself is, of course, not defined anywhere in any of these
4 documents as meaning to kill, a point the Prosecution itself conceded at that moment
5 in time when it was seeking the opening of an investigation. And I refer
6 your Honours to ICC-01 on 21, document number 7.

7 So the Prosecution throughout its Pre-Confirmation Brief invites this Chamber to find
8 by inference that neutralisation means murder and even carves it in stone as its
9 formal statement of the common plan.

10 But we, the Defence, can show that the term "neutralisation" can only mean the use of
11 self-defence where officers' lives are endangered. For this, the text of the circular
12 must be read in the context of the governing framework and other PNP directives.
13 It is our submission that across the political, legislative, judicial and law enforcement
14 contexts, the consistent articulation has always been that neutralisation denotes
15 lawful restraint.

16 At the executive and operational level, the chief of the Philippine National Police,
17 Ronald Dela Rosa, Bato, publicly clarified in 2017 that "neutralisation means arrest".
18 Furthermore, in an official transcript dated 28 October 2024, the former chief of police,
19 Dela Rosa, testifying before the Committee on Accountability of Public Offices and
20 Investigations, testified that the term "neutralisation" was anchored in the PNP
21 Operational Procedures Manual, where it is specifically and strictly defined.

22 Let us just have a look at what he said. And for your ease of reference, we will also
23 display the said passage in the PNP Operational Procedural Manual to which Dela
24 Rosa referred, which incidentally was published in 2021.

25 "Neutralization -", and I quote, "A police intervention in strict accord with the use of

1 force continuum and/or principle of proportionality on the use of force purposely to
2 contain or stop the unlawful aggression of the offender. This may include an arrest,
3 capture, surrender, or other acts to subdue the suspect."

4 It strikes us as rather mind-boggling that the Prosecution should have failed to
5 appreciate the significance of this. It was aware of Dela Rosa's speech because they
6 disclosed it to us, but the Prosecution's investigators clearly never bothered to read
7 the procedural manual to which Dela Rosa was referring. In fact, we know that they
8 didn't because it's not on their list of evidence.

9 Within the judicial sphere, when the terminology was examined before the
10 Supreme Court of the Philippines in petitions challenging aspects of the anti-drug
11 campaign, the government defended the circulars on the basis that they did not
12 confer a licence to kill. The Supreme Court of the Philippines, however, to date, has
13 declined to issue any ruling declaring the campaign unconstitutional, has declined to
14 invalidate circulars, and has declined to rule to date that "neutralise" or
15 "neutralisation" means to kill. The Supreme Court's treatment of the issue is
16 particularly instructive.

17 The court observed that the wording was neither novel nor introduced during the
18 Duterte administration. It had already appeared, for example, in the 2014 revised
19 PNP Manual on Anti-Illegal Drugs Operations and Investigation; in other words, the
20 term formed part of the existing police vocabulary.

21 The court further clarified that the mere inclusion of the term in a circular does not
22 render that instrument unconstitutional, especially where the circular expressly
23 mandates compliance with internationally accepted legal principles, public policy,
24 and the full observance of human rights, as we showed you earlier.

25 No circular has been invalidated on this basis. Nor has it ever been established at

1 the highest level of domestic judiciary that to "neutralise" means to kill. The judicial
2 record does not sustain such an equation.

3 In each institutional setting, therefore, the term has been situated within ordinary
4 policing powers and constrained by the lawful use-of-force framework.

5 The testimonies of those operating within that framework, the Prosecution's witnesses
6 no less, are aligned with this documentary record. For example, Witnesses P-1158

7 and P-1170 explained that "neutralise" means to arrest or to incarcerate through legal
8 means. It did not mean to kill. Witnesses P-1050 and 1 -- and P-1174 confirmed

9 that lethal force arose only where a suspect's resistance placed an officer's life at risk,
10 reflecting the ordinary doctrine of self-defence and consistent with Mr Duterte's

11 repeated public declarations that force was justified only in such circumstances.

12 P-1214 further indicates that operational decisions were made by officers on the
13 ground within established protocols. So --

14 PRESIDING JUDGE MOTOC: [11:47:33](Interpretation) I'm sorry to interrupt,
15 counsel, but once again you need to be specific and provide the document reference
16 number. You must specify the document number -- the reference number for us.

17 MR KAUFMAN: [11:47:48] If I may, Madam President, of course --

18 PRESIDING JUDGE MOTOC: [11:47:57](Interpretation) Thank you very much.

19 MR KAUFMAN: [11:47:58] -- and I do apologise, I thought we had an
20 understanding with the -- with the learned Chamber's legal officers that we would be
21 able to provide the references after the hearing, but of course the document that I was
22 referring to is PHL-OTP-00090518-R01.

23 So, Madam President, your Honours, taken together, the manual, the public
24 clarifications by police leadership, the state's position before the highest court in the
25 Philippines, and even the Prosecution's own corroborative witness testimony, all of

1 this material demonstrates a coherent and consistent understanding that
2 neutralisation was articulated as lawful incapacitation through arrest and related
3 measures, not as a policy of killing. And if the Prosecution's case for the common
4 plan in Counts 2 and 3 is based on Command Circular No. 16-2016, we might as well
5 pack up and go home because Mr Duterte is simply not guilty. However, for the
6 sake of completeness, I continue.

7 The fifth indicator of a common criminal plan as alleged by the Prosecution in
8 paragraph 28 of the Pre-Confirmation Brief appears to be the concerted broadcasting
9 of inflammatory speech. Here the Prosecution once again selectively cites excerpts
10 from 2016 media interviews with Ronald Dela Rosa, Bato, and Vitaliano Aguirre,
11 which suit its purpose and case theory while totally ignoring the more unequivocal
12 comments in those interviews which destroy its case.

13 Regarding the interview with Dela Rosa mentioned in paragraph 28, after supposedly
14 inciting a crowd of drug addicts to cause criminal damage to the properties of their
15 narcotics suppliers, the newly elected chief of police states:

16 "It's either you will die from police gunfire," and he adds, "if you resist."

17 That's PHL-OTP-00000849, page 2.

18 Likewise with the comments in an Al Jazeera interview, PHL-OTP-00090340,
19 comments attributed to Aguirre from which the Prosecution imputes criminality to
20 Rodrigo Duterte by citing Aguirre's comment that the administration's policy was to
21 stop crime and kill drug lords. Such throwaway comments reflect on Aguirre
22 alone - and, God forbid, we're not alleging that Aguirre did anything
23 wrong - especially when in the very same Al Jazeera interview Aguirre states not once,
24 but twice, that the policy of Duterte himself was for the police to use lethal force only
25 in self-defence.

1 We can display that on the screen, and the part I want to read is highlighted:

2 "... and President Duterte was very clear on this matter", he said, Aguirre, "that there
3 will be no killing of unarmed offenders, meaning to say that you use force only when
4 your life is in danger."

5 Later on in the very same interview, Aguirre would repeat the same theme which
6 exculpates Mr Duterte. PHL-OTP-00090340 at page 4. And I read out the relevant
7 passage which is highlighted, once again:

8 "They are supposed to arrest them. But when they fight back, then the president has
9 instructed them that they must first protect themselves."

10 So much for Mr Jeremy's elastic mouth theory. Even he thought that Duterte's
11 speech was bifurcated, and even if he did think so, his so-called perpetrators did not.

12 So why does the Prosecution cite the excerpts which support its case so selectively?

13 Well, I'm not going to impute any malfeasance, but I can hazard a wild guess. I
14 would suggest that the people reviewing the Prosecution's massive databases for
15 suitable evidence are performing keyword searches. Most likely some of the most
16 utilised operands were the words "kill" and perhaps sometimes "neutralisation" or
17 "neutralise". Once the member of the Prosecutor's staff has his hit, he excises the
18 excerpt, rejoices that he can slot it into the predetermined case theory and does not
19 bother to read the rest of the item of the evidence where the exonerating evidence is
20 unequivocal.

21 Turning to the sixth indicator of the supposed criminal plan, as set out in paragraph
22 29 of the Pre-Confirmation Brief, none of the speeches imputed to the former
23 president, nor the use of what the Prosecution calls "dehumanising"
24 language -- "dehumanising" language by the alleged co-perpetrators suggest
25 criminality.

1 I would suggest that it is within the bounds of acceptable albeit extreme political
2 discourse to refer to drug users in such a way as "beasts", "animals", or to the
3 *barangays* as being plagued by the drug menace. Well, the last one is true. You can
4 hardly expect populist politicians and law enforcement officers to refer to drug
5 pushers and criminals as upstanding pillars of the local community. I really do feel
6 that the Prosecution is at a loss if this is its circumstantial evidence for proving the
7 existence of a common criminal plan.

8 The same goes for the seventh supposed indicator of criminality, which is based on
9 the names created for the two police operations, Double Barrel and Tokhang, along
10 with their supposed evocation of firearms metaphors. While the source for this
11 particular gem - Witness P-1207, a self-confessed murderous villain - might have guns
12 perpetually on his mind and insert their imagery into his daily speech, it does not
13 mean that those who formulated the anti-drugs policy were acting under a similar
14 caprice when they devised the nomenclature for these two particular police
15 operations. And of course there were other police operations with completely
16 different imagery, such as the One Time, Big Time operation referred to by a few
17 Prosecution witnesses. And the Riding-in-Tandem operation. The mind can only
18 boggle as to what type of nefarious imagery the Prosecution believes that that last title
19 evokes.

20 None of the indicators I have mentioned up until now have shown in any way
21 a mutual meeting of minds between alleged co-perpetrators evincing a communality
22 of purpose or an agreement to act in an illegal fashion. Of course the Prosecution
23 has shown us pictures of the alleged co-perpetrators uttering comments similar to
24 those issuing from Rodrigo Duterte. But this does not indicate a meeting of minds,
25 as I will elaborate shortly.

1 The eighth factor purportedly evincing a plan of agreed criminality is set out at
2 paragraph 31 of the Prosecution's Pre-Confirmation Brief and avers that the alleged
3 co-perpetrators were involved in ensuring impunity. Examples are given of which
4 the first is the assertion that one co-perpetrator intervened with {ICR: (Redacted)
5 (Redacted)

6 (Redacted)}. He admits that he had heard a report of the episode from others.

7 Nowhere does he say that the co-perpetrator concerned facilitated the release of
8 anyone. And when {ICR: (Redacted)

9 (Redacted)}. I shall refer -- I

10 shall return to this when I analyse each of the 49 incidents at a later stage in my
11 submissions.

12 Nonetheless, I feel it necessary to stress once again that the frolics and loose tongues
13 of alleged co-perpetrators are not circumstantial evidence for a commonality of
14 purpose or a solidarity of intent as would be required for a common criminal plan or
15 a common plan.

16 Concerning -- I'm coming to the ninth category of circumstantial proof for a common
17 criminal plan. The Prosecution relies on what it believes to be the Duterte
18 administration's unabashed publication of statistics recording the number of deaths
19 occasioned in the context of the so-called war on drugs.

20 But let us just look at how and where the statistics relied upon were being published.

21 In two government reports, the first of which being the Duterte administration's
22 year-end report for 2017, totalling 63 pages, covering every sector of government and
23 the economy and of which just two pages are devoted to policing activities -- we can
24 give you the document ID number shortly.

25 Ah, it's on the -- on the screen.

1 While the deaths of 3,967 drug personalities mentioned are indeed recorded, as
2 Ms Robynne Croft so helpfully pointed out in her presentation and are not
3 insubstantial, these deaths comprise a faction, a fraction, of the 118,287 total arrests
4 for drug-related activities, especially when the government is conducting special
5 operations in a concerted drive to curb the narcotics problem.

6 Such statistics are certainly not indicative of a wholesale policy of murder designed to
7 supplant the process of law. If they were, then certain Latin American State Parties
8 would have regularly equalled or exceeded the Philippines in the number of law
9 enforcement killings per capita of the population.

10 What is quite egregious, however, regarding the Prosecution's reliance on a 2017 key
11 achievement report is the way in which it glosses over or, rather, ignores those pages
12 which do not suit its case theory. Take for example page 28 of the document, which
13 highlights the fact that 1,900 drug-related investigations had been carried out against
14 law enforcement officers in the preceding year, with 375 police officers being
15 dismissed, including the two policemen involved in the murder of Carl Arnaiz, who
16 were later convicted and sentenced to life imprisonment.

17 These policemen were affiliated with the Caloocan City Police Station and where, so
18 the report mentions, 1,000 personnel belonging to that station were sent for retraining.

19 To conclude, this document, far from being evidence of a conspiracy hatched between
20 co-perpetrators, is, in fact, a testament to the Duterte administration's respect for the
21 rule of law and written proof of its intolerance for rotten apple police officers.

22 As for the second official publication, which is supposed to substantiate the criminal
23 plan, we turn to the 2016 annual report issued by the Philippine National Police.

24 The statistics are quoted, with all respect, in a misleading fashion. The tables used
25 by Dela Rosa, and particularly the pie chart, show a remarkably low incidence of

1 deaths in comparison to arrests and voluntary surrenders. Obviously the misleading
2 aspect of that is the Prosecution's representation of the statistics, it's not Dela Rosa's.
3 So, coming to the tenth and final source of circumstantial evidence supposedly
4 supporting the mutually agreed nature of the criminal plan, and this is the fact that
5 the extrajudicial killings, to quote the Prosecution's words, "followed the same
6 patterns and modus operandi" with the perpetrators covering their tracks.

7 But here, let me ask a question which begs an answer: If the Duterte administration
8 was so bare-faced as to openly declare its intent to kill drug users and pushers and
9 celebrate this -- as the Prosecution argues -- in official governmental publications,
10 why would it encourage the perpetrators to go to such lengths to disguise such an
11 intent?

12 I mean, of course anything is possible. But I'm just pointing out the internal
13 contradiction in the Prosecution's case theory.

14 In any event, as they say in English, there is more than one way to skin a cat, and the
15 differing types of modus operandi that we have encountered in the Prosecution's 49
16 incidents of murder involve all conceivable modes of butchery, ranging from
17 strangulation, suffocation, to stabbing and shooting.

18 Now, assuming that the Prosecution can overcome the hurdle of proving the
19 existence of a common criminal plan, how has it shown that the so-called
20 co-perpetrators coordinated between themselves to reach a mutual agreement to
21 execute it?

22 Well, it hasn't. All it can do is show a selection of comments made by Mr Duterte's
23 closest colleagues in government, and all of which take their rhetorical cue from him.
24 The Prosecution then artificially defines the intended individuals -- the identified
25 individuals -- as a collective of co-perpetrators.

1 Now, common law jurisdictions such as the one I come from, are familiar with these
2 issues in the context of the law of conspiracy. The federal rules in the United States,
3 for example, allow the statements of co-perpetrators to be used as circumstantial
4 evidence, one against the other to establish the existence of a conspiracy, but require
5 that these statements be made during and in furtherance thereof.

6 Narrative venting, which is what all the supposed co-perpetrators did, the ones
7 identified by the Prosecution, does not further the criminal objective. "In
8 furtherance" thereof means that the statement relied on must advance the objectives
9 of the conspiracy, such as through reassurances, updates, or actions taken to avoid
10 detection.

11 Now, I do realise, your Honours, that there isn't too much jurisprudence on this
12 matter, but let us look at it logically. Where can one really draw the line if it is
13 sufficient to infer a mutual agreement to execute a criminal plan if we rely only on the
14 statements of the people in the vicinity of a criminally verbose suspect because of the
15 same quality of verbosity it alleges? This is what could be called bootstrapping logic.
16 Building on limited information with the very same information in an attempt to
17 validate that information or to create a structure there-without. Put simply, the
18 Prosecution has advanced its cart before its horse. It has merely selected a number
19 of individuals working alongside the former president who made similarly offensive
20 comments and has then called them co-perpetrators.

21 Instead of seeking evidence which might shed light on the interactions of these
22 individuals between one and another, and construing a criminal conspiracy therefrom,
23 should the evidence even support such a hypothesis, the Prosecution has taken its
24 preconceived and predetermined premise of a criminal plan and forcibly
25 superimposed it on these individuals.

1 The artifice of the Prosecution's working methodology in conjuring up this criminal
2 collusion becomes even more apparent if we examine the evidence emanating from
3 the crime-based perpetrators themselves on a granular level, especially from the
4 Prosecution's own star witnesses, two or three of whom supposedly formed the hard
5 core of a more limited organisation referred to earlier in my submissions.

6 I'm trying to comply with redactions.

7 P-1, for example, a self-confessed murderer, whose recruitment by the Prosecution
8 will be examined elsewhere, was asked about the common criminal plan of his
9 associates up to 2017 and this is what he had to say:

10 "Every time somebody was at fault against the government of Rodrigo Duterte, we
11 didn't bother to send them to prison. We would just kill them."

12 That is PHL-OTP-0001-2584 at lines 248 to 250. That was the audio which I just
13 quoted and here we have the transcript, PHL-OTP-0001-2376-R02, lines 248 to 250.

14 So, having given you that quote from P-1, I would say that as far as this witness was
15 concerned, the common plan was not a refined policy of cleaning up the streets, but
16 rather a killing frenzy of the political opposition. Obviously, no such policy existed
17 and no such policy is alleged.

18 P-3, whose evidence relates to the presidential period, describes a similar orgy of
19 killing without rhyme and without reason, but not drug addicts, nor alleged criminals,
20 but rather intelligence assets whose handlers felt it expedient to just have them
21 whacked. Either that or persons who P-3 had been informed were on a list.

22 For example, when one asset, {ICR: (Redacted)}, became a trying nuisance and was
23 thought to be on the verge of ratting on his partners in crime, P-3 relates that he was
24 eliminated. And I quote:

25 "They said they didn't trust him, and that's why they wanted to kill him, because they

1 were thinking that he might sing towards the end."

2 To "sing" means to incriminate.

3 P-3 further elaborates on his -- in this way that his targets were selected for him.

4 According to his evidence, he would receive information from a *kagawad* or

5 a neighbourhood chief regarding somebody who uses drugs, and I stress, or doesn't

6 stop what they're doing, and then a drive-by motorcycle hit would be arranged.

7 And I stress the words once again, "someone who does not stop what they are doing".

8 It could be anything, but it is clear that P-3 was not acting in accordance with

9 a well-defined policy ensuing from a common criminal plan, but rather acting

10 according to the whim of a *barangay* chief who could have taken a dislike to a local

11 personality merely, for the sake of example, because he had been consistently cheated

12 at cards.

13 And if there is a need for further clarity, after being grilled by an ICC investigator for

14 at least two days, P-3 was specifically interrogated about the reasons for the

15 extrajudicial killings that he had perpetrated. And I quote the first question:

16 "You've mentioned yesterday and today people being killed in different scenarios, the

17 'One Time, Big Time' Operation, the 'Riding in Tandem' Operation. What was the

18 purpose behind all these killings?"

19 And the answer that the investigator received was:

20 "Actually, I don't know [what] the reason [was]."

21 The same again with respect to the planned assassination of an individual by {ICR:

22 (Redacted)}. Question:

23 "What was the reason that {ICR: (Redacted)} was targeted to be killed?"

24 Answer:

25 "I don't know what {ICR: (Redacted)} reason was for giving up one of his men."

1 P-3 even talks about a watch-list of supposed drug users circulated by the *kagawad* of
2 various *barangays*, but P-3 would not necessarily follow this list and if a target would
3 prove too difficult to capture and to kill, he would, and I quote:

4 "... take somebody else..., and just use the name that's on that list for the person we've
5 captured."

6 That is PHL-OTP-00000553-0016 at lines 509 to 510.

7 In other words, P-3 was not implementing a common plan to kill drug users and
8 criminals per se. Rather, he was pursuing a policy of random killing in order to
9 maintain a quota, in this case, a quota for the purpose of the so-called One Time, Big
10 Time operation. There even came a point in time that P-3 was so petrified of not
11 meeting this quota of slaughter that he was randomly grabbing and killing just so that
12 there would be something to report on TV for the One Time, Big Time operation.

13 Now, I ask you, how can P-3 have been operating under a clear criminal direction to
14 target drug users for murder, criminals for murder, when he states that on occasion
15 he would perform so-called clean arrests? Prosecution's witness, P-3. He's not clear
16 when he's actually following their supposed criminal theory or when he is. What are
17 clean arrests? These are arrests subsequent to which the apprehended criminal
18 would be handed over for a judicial process.

19 And so with that, I believe, I have exhausted the first limb of the objective
20 requirement for indirect co-perpetration and have shown conclusively that there was
21 no mutually agreed common criminal plan.

22 Madam President, there are 10 minutes to go, I will start with the concept of essential
23 contribution, which is indeed the second limb that I want to talk about with respect to
24 this mode of liability, which requires the Prosecution to show objectively that
25 Mr Duterte himself made an essential contribution to the furtherance of this scheme

1 of criminality, and what is more, that subjectively he was aware that he was making
2 such a contribution.

3 This is what us Latin lawyers -- Latin-speaking lawyers would call the *sine qua non test*,
4 or to put it another way: Did these 49 murders, which the Prosecution has identified,
5 occur specifically because of Rodrigo Duterte's involvement? Or, to make the logic
6 a whole lot simpler: Would Rodrigo Duterte's withdrawal from this criminal scheme
7 to target suspected criminals, as alleged by the Prosecution, have led to the avoidance
8 of these 78 deaths?

9 Let us see where this test is set out in the Ali Kushayb trial judgment. Paragraph 796,
10 and I'm going to quote the essential part for the purpose of the essential contribution.
11 "The accused must make an essential contribution without which the commission of
12 the offence would not be possible. To hold an accused liable as a co-perpetrator
13 under Article 25(3)(a) of the Statute, it has to be established, *inter alia*, that he or she
14 had control over the crime, by virtue of his or her essential contribution to it and the
15 resulting power to frustrate its commission [...]"

16 Well, here, I would like to show you the statistics pertaining to the rate of killings
17 since the former president has left power and the responsibility for law and order has
18 passed into the hands of President Ferdinand Marcos Junior. I rely on a report
19 published by academics at the Third World Studies Center in the University of the
20 Philippines in the context of what is called the Dahas project. And trust me, the
21 authors of this report comprising weekly statistics on the first year of the Marcos
22 administration from 2022 to 2023 are no great friends of the former president,
23 Mr Duterte. This report was even cited in, I remember, in a Rappler article, but it's
24 to be found on our list of evidence at PHL-D36-0006-0001, pages 0006 to 0010.
25 The report for the first year of the Marcos administration showed that out of 342

1 killings, 160 were at the hands of state agents. And the figures and the statistics just
2 kept on rising with the second year of the Marcos administration, 2023 to 2024,
3 showing an increase in deaths at the hands of vigilantes, albeit a decrease in deaths at
4 the hands of law enforcement officers from 46.8 per cent to 34 per cent, hardly
5 a statistic to be proud of.

6 So with all the Prosecution's fancy bar charts, I'm pretty sure that if they were to
7 recreate them for the period of two years after Duterte left power, they wouldn't have
8 room left on their computer screen, the numbers would be so sky-high.

9 The conclusion is that there is no reason to believe that Duterte's disappearance from
10 the political scene would have frustrated the ongoing incidents of murder at the
11 hands of state agents or vigilantes.

12 Clearly, I'm forced to ask myself whether anyone on the other side of this room has
13 thought of investigating the Marcos regime and the related phenomenon and holding
14 someone accountable. Why are my colleagues sitting to their right, the victims'
15 representatives, not clamouring for accountability for those deaths or is it of no
16 consequence now that Mr Duterte is sitting in the ICC Detention Centre?

17 I've reached a natural break, Madam President, in my submission. With your
18 permission, I would like to continue after lunch.

19 PRESIDING JUDGE MOTOC: [12:27:16](Interpretation) Thank you very much, Mr
20 Kaufman. We will suspend the hearing now for 90 minutes to resume at 2 p.m.

21 Thank you very much.

22 THE COURT USHER: [12:27:24] All rise.

23 (Recess taken at 12.27 p.m.)

24 (Upon resuming in open session at 2.03 p.m.)

25 THE COURT USHER: [14:03:18] All rise.

1 Please be seated.

2 PRESIDING JUDGE MOTOC: [14:03:46](Interpretation) Good afternoon.

3 I'd like to begin with an oral ruling regarding the redactions made to the transcript
4 and direct broadcasting today.

5 The Chamber notes that redactions were made to the transcript and to the direct
6 broadcast of the hearing, subsequent to an application by the Prosecution, and which
7 was opposed by the Defence.

8 The application of the requested redactions apparently would be a problem and could
9 lead to hearings being held in closed session.

10 The Chamber wishes to recall an earlier ruling during which the Chamber stressed
11 that it is up to the parties and participants to ensure that their submissions are
12 worded in such a way as to avoid going into closed session, thus ensuring the
13 transparency of the proceedings and to avoid the disclosure of confidential
14 information. The Chamber would remind the parties to comply with these
15 instructions.

16 Furthermore, the Chamber is of the view that the information that was asked to be
17 redacted, and also from the direct broadcast today, were limited to identifying
18 information of witnesses and victims mentioned during the submissions. The
19 Defence disclosed information on several occasions that allowed for the identification
20 of victims and witnesses. For example, positions held and nicknames, things that
21 must be -- must not be disclosed so as to ensure the protection of witnesses and
22 victims.

23 The redactions had only to do with identifying information and were not as
24 general -- were not general redactions to the events within the case. This was the
25 appropriate recourse to implement the Chamber's duty to protect the safety and

1 well-being, including psychological well-being, the dignity and privacy of victims
2 and witnesses in accordance with Article 68 of the Rome Statute, without having to
3 hold the hearing in private or closed session.

4 Thus, the Chamber has decided to maintain the redactions that were applied earlier
5 and reminds the Defence not to disclose information that may not be necessary and
6 information that could identify witnesses and victims in accordance with Article 8 of
7 the Code of Conduct of Counsel.

8 I thank you very much.

9 And, Mr Kaufman, you may now proceed and continue your submissions on the
10 merits. You have until 3 p.m. Thank you very much.

11 MR KAUFMAN: [14:07:41] Thank you, Madam President.

12 As you can see, we have a number of yellow Post-Its on our table here. These are the
13 document identification numbers of all the matters that I will be talking about, but
14 since we only have until 3 and one hour tomorrow morning, I can provide the ID
15 number if necessary. But I will move on and we promise to give the Chamber at the
16 conclusion of the hearing the full ID numbers of everything that I've talked about.

17 And if the Prosecution obviously wants something as well, he can --

18 PRESIDING JUDGE MOTOC: (Microphone not activated)

19 MR NICHOLLS: [14:08:17] Afternoon, Madam President.

20 I would just ask my friend, if he can read out the tab numbers, because every item,
21 per the Chamber's instruction, has a tab number. So even if my friend doesn't read
22 out the entire ERN, ERN of the page he's citing, the lines, if he gives us the tab
23 number, at least we can check his homework in real time.

24 PRESIDING JUDGE MOTOC: [14:08:40](Interpretation) Thank you very much.

25 Counsel, are you in agreement with this position taken by the Prosecution? Well,

1 rather, the representative of the OTP.

2 MR KAUFMAN: [14:08:55](Interpretation) Yes, ma'am.

3 PRESIDING JUDGE MOTOC: [14:08:57](Interpretation) Please proceed.

4 MR KAUFMAN: [14:09:01] Madam President, your Honours, I now come to ask
5 myself another question concerning the nature of a common plan theory which
6 applies equally to its subjective requirements: Has the Prosecution shown substantial
7 grounds to believe that Rodrigo Duterte's implementation of its fantasy criminal
8 scheme was of such a nature that the murders detailed in its 49 charged incidents
9 would have ensued as a virtual certainty in the ordinary course of events and that he
10 foresaw that they would occur as a virtual certainty in the normal course of events?
11 Let us take a moment so that I can assure you that these wonderful words "virtual
12 certainty" actually do exist in the Court's case precedent and are not a fiction of my
13 own.

14 If you will, please display the first of two citations from the Abd-Al-Rahman,
15 otherwise known as the Ali Kushayb trial judgment, from 2025. First of all,
16 paragraph 795:

17 "While the common plan between individuals need not be specifically directed at the
18 commission of a crime', it must nevertheless involve 'a critical element of criminality',
19 meaning that, in the context of the specificities of the case it was virtually certain that
20 the implementation of the common plan would lead to the commission of the crimes."

21 We can have a look at paragraph 706, and it talks about the general knowledge
22 requirements which I am sure your Honours are very familiar with.

23 So with respect to the question whether the common plan entailed the occurrence of
24 murders as a virtual certainty, the answer is an emphatic and resounding no. First of
25 all let us recall what the Prosecution defines as the former president's list of

1 high-value targets, what the media calls the kill list, and what one of Mr Edward
2 Jeremy's quoted witnesses referred to as the dead list.

3 The number of individuals on this so-called "kill list", the very list on which the
4 Prosecution relies to show the knowledge that death would ensue, is 4,817. Those
5 who are actually neutralised dwarfs in comparison and stands at 248.

6 So assuming that "neutralised" actually means killed, which it does not, then there is
7 no virtual certainty attributable to Rodrigo Duterte that death would ensue from this
8 kill list. Rather, a 5 per cent chance.

9 Let us have a look at a bar chart for exactly the same figures used by the Prosecution
10 as distributed geographically.

11 I now turn to the issue of control as it did, or did not, manifest itself in the crime base.

12 In other words, can it safely be argued that substantial grounds exist to believe that
13 Mr Duterte's supposed diktat filtered its way down from his mouth and via his
14 co-perpetrators to those who were supposedly going about committing these murders.

15 How has the Prosecution shown the concept of automatic compliance or even
16 virtually automatic compliance, so essential to its pyramidal structure.

17 Well, by and large, and judging from Ms Robynne Croft's submissions, it would
18 appear that the concept of automatic compliance is substantiated by reference to
19 subjective comments made by perpetrators who talk about their will being controlled.

20 For example, transcript page 37, line 7 onwards: "I felt like [that] I didn't have any ...
21 choice but to follow their orders. It wasn't possible not to [...] obey his commands."

22 Another example, transcript page 38, line 17: "co-perpetrators controlled the will of
23 the physical perpetrators." End quote.

24 According to the Prosecution, members of the Davao Death Squad had to seek
25 clearance from Mr Duterte to conduct killings in Davao City. For this wild assertion,

1 the Prosecution relies, once again, on the evidence of criminals it has recruited, all of
2 whom are inherently unreliable because of their being self-confessed vicious
3 murderers testifying in return for virtual immunity from proceedings at the ICC.

4 We shall analyse the testimonies emanating from these individuals in greater
5 later -- in detail later in my submissions.

6 Now, I can see Mr Nicholls scribbling away there, but I shall be referring to what are
7 called statements of limited use.

8 As for the other modes of liability charged - ordering, under Article 25(3)(b), and
9 Article 25(3)(c), aiding and abetting - as I have said, no smoking gun, no evidence of a
10 direct order, solicitation, or inducement with respect to any one of the 49 incidents.

11 No documentary record exists of a presidential order, so how could these orders have
12 been transmitted for the purposes of Article 25(3)(b)? Well, unless Mr Nicholls
13 envisages mental telepathy, I think that we can discount ordering.

14 The Prosecution has failed to elaborate in its oral submissions what it means truly by
15 soliciting. If it means the ambiguous public speeches, then it is difficult to reconcile
16 the frequent exultations to self-defence with soliciting, unless, of course, you accept
17 that Mr Duterte super-craftily inserted these exonerating comments into his speeches
18 in order to craft himself a defence when the day of reckoning would come. As the
19 Prosecution asserts, speaking with a forked tongue, sometimes speaking his mind,
20 sometimes saying what he wants you, your Honours, to hear.

21 Furthermore, generalised statements months before specific incidents do not establish
22 causation or instruction. For aiding and abetting, there is no reliable evidence that
23 Mr Duterte provided practical assistance, encouragement or moral support that
24 substantially affected the commission of a crime, with knowledge of the perpetrator's
25 intent.

1 And, finally, on modes of perpetration, modes of liability, I would beg you not to take
2 heed of Ms Paolina Massidda's assertion that Rodrigo Duterte failed to prevent or
3 punish. The Prosecution has not charged command responsibility under Article 28,
4 and the reasons for that are clear. It is the same reason why it cannot prove ordering.
5 There is no ascertainable chain of command descending from Duterte at the top, via
6 the co-perpetrators - so-called co-perpetrators - all the way down to the crime base.
7 As I said, it all breaks down at the level of the co-perpetrators. And I would ask you,
8 very respectfully, not to exercise your discretion to requalify, pursuant to Regulation
9 55 of the Regulations of the Court. But, if you do, if you do - and you shouldn't, I
10 respectfully submit - you should order the Prosecution to resubmit its Document
11 Containing the Charges, and its Pre-Confirmation Brief as amended, and to release
12 Mr Duterte in the interim.

13 Now, I have finished that section of my submissions and I will now turn to the
14 witnesses themselves and I will be very careful not to mention anything that I'm not
15 meant to. And I will discuss first of all the general reliability.

16 A genuine criminal investigation is meant to be directed at establishing the truth. It
17 is meant to elicit facts in an impartial manner and not to present witnesses with a
18 preconceived idea, and to seek confirmation thereof, whether it be by way of leading
19 questions or anything else.

20 By this, I mean that the golden thread linking practically every one of the interviews
21 of the Prosecution's so-called insider witnesses, who are, for the most part, ruthless
22 criminals, is the a priori targeting of Rodrigo Duterte. In my submission, no real
23 attempt was made to perform this duty of examining exonerating circumstances, or
24 even to establish the existence of other actors who might be responsible for the high
25 incidence of deaths in the context of the war on drugs.

1 Most prosecutors will collate the evidence and thereafter analyse it and decide
2 whether to prosecute with a view to obtaining a reasonable prospect of conviction,
3 which is, indeed, the standard supposedly applied since Mr Karim Khan assumed the
4 role of chief Prosecutor. A prosecutor is meant -- is not meant, sorry, to choose his
5 target in advance and then find the evidence to support a preconceived desire.
6 Now, I'm not going to engage upon a wholesale forensic analysis of the credibility of
7 each and every witness. I am long enough in the tooth to appreciate that issues of
8 credibility and weight are not normally litigated at confirmation, but are left to trial.
9 This case, however, is unique and, as I have said, the Prosecution's star witnesses are
10 self-confessed murderers. And most of their statements were taken by the
11 Prosecution's investigators with the assurance of limited use, namely, that anything
12 self-incriminating would not be used against them in proceedings at the ICC.
13 Although Mr Nicholls will undoubtedly tell you that these agreements of limited use
14 are not to be understood as the grant of immunity from Prosecution, for all intents
15 and purposes, they are, and I am prepared to wager that we will not see even
16 one - not one - of these incriminating witnesses in a dock at this Court, nor in the dock
17 at any court anywhere in the world after they have been re-housed and given
18 protection at considerable expense to the State Parties funding this Court. I do not
19 think that I would be alone, either, in believing that there is something morally
20 repugnant or even questionable from a public policy standpoint to shield not only one,
21 but a number of murderers from prosecution at the ICC just in an attempt to nail
22 Rodrigo Duterte.
23 Indeed, in many common law jurisdictions, the use of a self-avowed murderer to
24 convict an alleged murderer would normally entail vetting and scrutiny of the highest
25 order. Those words, if I'm not mistaken, come from the Crown Prosecution Service's

1 instruction manual. Public source.

2 In fact, I would suggest that it would normally only be approved, firstly, when it is
3 considered of more value to have a suspected person as a witness than as a possible
4 accused; secondly, whether obtaining the conviction of an alleged murderer is more
5 important than the release of a self-confessed murderer; and, finally, whether it is
6 likely that a conviction could be obtained without the cooperation of the
7 self-confessed murderer, or a number of them.

8 Even after this vetting process, most courts in common law jurisdictions require an
9 evidentiary supplement before relying on the sole testimony of a cooperating criminal
10 witness, or what is otherwise called an accomplice witness. Such an evidentiary
11 supplement in legal parlance is called corroboration, and rules exist governing what
12 may be deemed suitable corroboration.

13 I'm pretty sure that these considerations were never considered by the Prosecution,
14 for one very simple reason. At least two of the most prominent accomplice
15 witnesses were offered up to the Prosecution on a silver platter and I cannot say by
16 who in open session.

17 Neither the Rome Statute, nor its accompanying texts, regulate the way statements of
18 limited use are employed. I would like the Pre-Trial Chamber to consider the way
19 academics and the Prosecution itself has qualified the implementation of limited use
20 statements in the past. And I quote from paragraph 49, which is open source, of a
21 chapter on the Office of the Prosecutor in the 2022 edition of the Max Planck
22 encyclopedia of international law, written by no less than Judge Betti Hohler of this
23 Court, and I quote:

24 "One of the agreements the OTP may enter into during the investigation is an
25 agreement with a person suspected of committing crimes within the jurisdiction of

1 the Court is to provide a statement of limited use. The idea is that the person
2 provides the Office of the Prosecutor with an oral or written statement for the
3 purpose of pursuing leads or developing additional information or evidence on the
4 condition that the statement will not be used against the interviewed person, except
5 as stipulated in the agreement. The purpose of such agreements is to ensure
6 cooperation of so-called insider witnesses whom the OTP does not intend to
7 prosecute but are expected to provide key information or evidence against other,
8 usually more senior, suspects."

9 Judge Hohler was effectively relying on footnote 20 to the Prosecution's own filing
10 number 1118 in the Bemba Article 70 case, which states the same thing. Both sources
11 stress that limited use statements should be used as a rule to pursue leads or to
12 develop information but not, apparently, outright at any rate, to serve as the key and
13 main testimony against a suspect.

14 In my opinion, there is a good reason for this and it is contained in the wording of
15 Article 54(3)(d) of the Rome Statute which is cited as the statutory basis for limited
16 use statements. The Prosecutor is entitled to enter into such agreements granting
17 limited use on condition that the agreement would not be inconsistent with the
18 Statute. And I stress those words "not inconsistent with the Statute".

19 Using the evidence of self-confessed murderers to obtain leads or develop evidence
20 from other sources, I would suggest, is consistent with the Statute, as mentioned by
21 Judge Betti Hohler.

22 To give a get out of jail card, however, to a whole bunch of murderers in order to fix
23 liability to another, albeit pre-selected, individual also selected of murder is, in my
24 opinion, totally and wholly inconsistent with the object and purpose of the
25 Rome Statute which, according to its preamble, oft cited by the victims and the

1 Prosecution, is dedicated to the eradication of impunity.

2 In my opinion, granting immunity to a murder suspect for core international crimes

3 would be seen as undermining the object and purpose of the Rome Statute.

4 Accordingly, I would ask the Chamber to find the statements of those witnesses

5 afforded such limited use and to be of negligible evidentiary weight.

6 Another issue pertaining to the general credibility of the Prosecution's witnesses is the

7 way in which they were recruited. In my opening remarks a couple of days ago, I

8 talked about the general fairness of pursuing charges brought by a Prosecutor who

9 was formerly a representative for more than 100 victims of Mr Duterte's alleged

10 crimes. I also talked about a recorded telephone conversation in which one of the

11 participants bragged about acting as President Marcos Junior's silent partner for

12 channelling witnesses to the ICC. Apparently, I raised the presidential

13 spokesperson's hackles considerably, so let me quote a bit more so that I can assure

14 her that my cognitive faculties, which she doubted, are, in fact, intact. And this is

15 what this covertly recorded individual, who I am forbidden from naming, said:

16 "They cooperate through me, since I don't hold a position [redacted] but we are able

17 to do it. So what ... what happened here is an ICC investigator will give me a list of

18 witnesses, documents they need to bolster the case against Duterte, then I provide it.

19 I give it to the different agencies so it can be approved. There are witnesses who

20 need a pardon. I get the authority from the President and they are granted a pardon.

21 Basically like that, [it becomes] a priority mission of the government."

22 I don't think I've disclosed here, Madam President, any working methodology of the

23 Office of the Prosecutor.

24 So, now I turn to the incidents themselves, the 49 incidents

25 The Prosecution invites you to view these incidents as the manifestation of a much

1 larger pattern. To quote the Prosecution's very words in filing number 330, at
2 paragraph 5:

3 "The 49 incidents are a non-exhaustive list of examples of the conduct underlying the
4 charges."

5 Indeed, the Prosecution speaks of thousands of victims in toto, datasets and patterns
6 of violence. Now, the Defence does not deny that much drug-related violence did
7 occur. It was occurring before Mr Duterte assumed the reins of power and
8 continued, as we have shown by way of a sharp increase after he left office. But
9 these grandiose visions of the Prosecution are of no avail if the core criminality and
10 incidents alleged in its Document Containing the Charges are not made out.

11 So the question before you is whether there are substantial grounds to believe, firstly,
12 that each of these specific incidents were unlawful killings - namely, deliberate acts of
13 murder - and, secondly, that they were knowingly committed to further the criminal
14 objective of the so-called common plan or the state organisational policy with which it
15 has been conflated, and, finally, that they are indeed attributable to Mr Duterte under
16 a recognised mode of liability.

17 Pre-empting a possible defence - always a good tactic for a Prosecutor unsure of the
18 strength of his own case - there is a heavy reliance on expert analysis of datasets to
19 argue that reported instances of self-defence were statistically improbable. Let me
20 stress that it is the Defence's view that if the contextual case depends on the scale of
21 victims - namely, thousands as alleged by the Prosecution - then establishing the
22 evidentiary integrity of each charged incident is imperative. In other words, the
23 Defence firmly submits that the Pre-Trial Chamber should not commit any one of the
24 49 incidents to trial unless it concludes that there are substantial grounds to believe
25 that Mr Duterte's criminal linkage and liability has been established for each one.

1 When these incidents are disaggregated and examined one by one, as the Statute
2 requires, we submit, what becomes apparent is not the cumulative strength; rather,
3 the recurrence of certain symptoms of inherent weakness in the evidence.

4 These weaknesses fall into six broad categories.

5 The first is the over-heavy reliance on the testimony of cooperating witnesses who are
6 inherent criminals, with an inherent propensity to be unreliable, and whose
7 statements, as I mentioned, are not corroborated by external evidence.

8 The second, hearsay attribution or, in less legal parlance, incriminating statements
9 heard from a source twice or even three times removed.

10 The third weakness, which infects the evidence, is the fact that some of the victims are
11 unidentified, making it virtually impossible for the Defence to pursue its own lines of
12 inquiry. This weakness affects at least nine out of the 49 incidents.

13 The fourth weakness, documentary records such as police and forensic reports are at
14 variance with and are contradicted by testimony of a single Prosecution witness.

15 Fifth, the hoary old chestnut of conflicting statements emanating from two or more
16 witnesses testifying to the same event, some contradicting one another, some
17 contradicting even themselves.

18 And, finally, the sixth weakness being the repeated absence of any evidence to link
19 the hitmen to our client, despite the Prosecution's best efforts to chivvy such linkage
20 out of them.

21 The Defence will now show how these identified weaknesses reduce below the
22 substantial grounds threshold the evidence for these incidents in the three counts as
23 they appear in the Document Containing the Charges.

24 Count 1: the alleged murders during the mayoral period.

25 Count 2: alleged murders of HVTs, the high-value targets, during the presidential

1 period.

2 And count 3: the *barangay* clearance operations also during the presidential period.

3 So I shall start with count 1.

4 As we know, the first cluster of incidents falling under count 1 concerns the so-called
5 and totally fictitious Davao Death Squad period. This concerns incidents 1 through 9
6 of the Document Containing the Charges. The Prosecution's attribution theory here
7 is straightforward, that Rodrigo Duterte, as mayor, authorised killings through
8 intermediaries. But, when the evidence for this count is examined, as I've already
9 mentioned, not one witness can say that he heard the mayor give an order to kill.

10 The attribution of criminality to Mr Duterte arises for the most part out of assumption,
11 layered on top of hearsay, and follows a repetitive pattern which would, as a rule,
12 entail the same mechanism of attribution; namely, a hitman witness for the
13 Prosecution would state that his handler said that clearance came from, and I quote,
14 "above". But what does the word "above" mean? It means an unnamed superior
15 and nothing more.

16 The mode of liability imputed to Mr Duterte - namely, indirect perpetration - requires
17 the Prosecution to establish a stable chain of command through which the common
18 enterprise filtered, if there indeed existed a structured approval process, as the
19 Prosecution alleges. One would expect operational consistency, not variability.

20 The incidents contained in count 1 are also marked by internal inconsistencies which
21 cannot be reconciled and which are indicative of the fragility of the Prosecution's
22 overall case.

23 Incident number 1, for example, is based on the evidence of two witnesses who
24 contradict each other on fundamental and materially crucial issues. Let me explain
25 in more detail.

1 P-26, who presents himself as a participant, claims that Mr Duterte telephoned a
2 redacted third party to order the operation and was told that it was the mayor on the
3 phone -- was told that the mayor was on the phone. Pure hearsay. The Prosecution
4 seeks to reinforce this through P-2, yet P-2 was not present at the time. He was
5 inactive for reasons I can't mention, and relies entirely on what he heard from the
6 redacted third party and another individual at a later date. P-2's account is therefore
7 pure unadulterated hearsay.

8 More significantly, it diverges from P-26's version on fundamental points: The year of
9 the incident, 2014 and not 2013; the number of victims, two rather than three; the
10 identity of the perpetrators; the channel through which alleged clearance was
11 conveyed, via driver and bodyguard to a different DDS member rather than through,
12 redacted. And if that is not enough, the method of killing, strangulation rather than
13 stabbing. These aren't minor inconsistencies, they concern the core factual matrix.
14 If the Pre-Trial Chamber is unable to determine even these basic circumstances which
15 establish opportunity, method and purported linkage, then how can it be said that
16 substantial grounds exist to conclude that the incident occurred as charged.

17 Incident 2, once again hearsay upon hearsay. It rests entirely on the word of P-26,
18 and when pressed as to how he knew that the order to kill came from Mr Duterte,
19 P-26 didn't claim personal knowledge; he said only that a now deceased individual
20 told him so. That is not just hearsay, but hearsay which can't even be corroborated
21 and tested by the Defence unless they resurrect a corpse. But the Prosecution, for its
22 part, could very well have corroborated this incident because {ICR: (Redacted)}.
23 However, in disregard for their truth-seeking function, the Prosecutor's investigators
24 neglected to question P-2 on that incident.

25 I would just add that with respect to incident number 2, there is a three-year

1 difference between the dates of the incidents as indicated by the witness and that
2 indicated by the Prosecution in the Pre-Confirmation Brief.

3 Moving on, for all incidents 3 through 9, the evidence adduced to link the murder
4 incidents in the crime base to Mayor Duterte, as he then was, becomes even more
5 tenuous. The sole witness for the incidents {ICR: (Redacted)}. For the majority of
6 the incidents, P-1 does not actually describe the means for the transmission of
7 criminal commands, but, rather, indicates what "usually happened". In other words,
8 P-1 infers that because approval was typically obtained in some format, then it must
9 also have been similarly obtained in respect of all these incidents. That, your Honours,
10 is conjecture, and we would submit that Article 61(7) of the Rome Statute does not
11 permit charges to be confirmed on the basis of conjecture, on the basis of such a weak
12 evidentiary basis.

13 Now, since the Prosecution made such a big deal out of incident 3 on Monday, and
14 screened the video of the hit job itself, if you recall, the one in the marketplace which
15 was supposedly viewed with approval by our client, I would like to devote a few
16 words to it. If your Honours follow the transcript that accompanies this video
17 viewing session, the Prosecution fixated on the comments of Mr Duterte telling the
18 person operating the video not to zoom in, the implication being that he wanted to
19 screen the murderers from detection.

20 Indeed, when asked how he interpreted this throwaway comment of Mr Duterte, P-1
21 provided gratuitous opinion evidence and stated that he understood the former
22 president to be giving tacit approval. I find this quite disturbing since most of the
23 Philippines, and ourselves included, understand this to have been the former
24 president marvelling at the capacities of the CCTV system in Davao City, which was
25 relatively new, being able to zoom in and out for the purpose of frustrating crime.

1 Mr Nicholls made such a big deal of this supposed incident in the Agdao Market, and
2 since he follows the media closely, he cannot be ignorant of the storm that his
3 submission has generated in the Philippines. As the Defence, we are muted to the
4 extent that we are reduced to the bare minimum in our public submissions for fear of
5 exposing the identities of Prosecution witnesses, but Mr Nicholls hasn't considered
6 the fact that he has outed the person who was operating that CCTV system for the
7 mayor on that day and has exposed him to danger. It is too late in the day for me to
8 introduce that individual's affidavit into evidence for confirmation, so I merely repeat
9 that this video cannot be used as proof of the fact that the mayor retroactively
10 approved of an incident two weeks earlier. The chain of custody of this item is
11 seriously disputed and the Prosecution made no attempt - and this is truly
12 grievous - to interview the CCTV operator.

13 {ICR: (Redacted)}

14 (Redacted)

15 (Redacted)

16 (Redacted)}. Hardly evidence of a compelling pedigree.

17 In all cases, the evidence is hearsay, {ICR: (Redacted)}

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)
2 (Redacted)}, and I'm mindful of the time, P-1's evidence is not only uncorroborated, it
3 directly undermines the Prosecution's own presentation of the facts. {ICR:
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)}. When pressed as to whether this reflected what actually occurred in
9 this incident or merely what usually happened, P-1 conceded that he was surmising.
10 In truth was not actually privy to any conversation at all. He merely assumed that
11 this was the process because that was how it had supposedly operated on other
12 occasions.
13 The alleged link thus rests entirely on admitted speculation.
14 {ICR: (Redacted)
15 (Redacted)
16 (Redacted)}.
17 This contradicts the Prosecution's own pleaded date of commission which is on or
18 about 10 June 2016. Such a discrepancy is not tangential or peripheral. Once again,
19 it goes to the basic factual framework of incident 9.
20 Finally and most significantly, when shown the very media article relied upon by the
21 Prosecution to substantiate this incident - {ICR: (Redacted)
22 (Redacted)
23 (Redacted)
24 (Redacted)
25 (Redacted)}. In other

1 words, the sole witness to incident 9 refutes the only documentary material cited in
2 support thereof.

3 To cut a long story short, when comparing incidents 1 to 9, none of them present the
4 same chain of authorisation, nor is there a consistent explanation of how instructions
5 were communicated. The same weakness infects the evidence of other protected
6 Prosecution witnesses operating in the mayoral period.

7 P-2. Let me quote from P-2's testimony, PHL-OTP-00015507-R01 at 0007, lines 217 to
8 220:

9 "We cannot conduct a clearing ... or killing operations without his clearance. We
10 called it clearance. Now, how do we know that it is a legitimate order from
11 Superman? Because [...] it comes from Sonny or through ..." another person who's
12 redacted.

13 "And then, after the killing, two, three days [later], we receive our respective reward."

14 In other words, P-2, {ICR: (Redacted)}, never heard Duterte himself deliver any
15 instruction to kill. Furthermore, the totality of P-2's disclosed statements are encumbered
16 with an additional evidentiary problem insofar as this witness is currently inaccessible to
17 the Court. Regardless of the means whereby the Prosecution could seek to introduce this
18 witness's recorded testimony at trial, if he's still inaccessible, the inability to
19 cross-examine him and, worse still, the fact that the counsel appointed to represent
20 general defence interests for an Article 18(6) interview did absolutely nothing to question
21 him, will render the weight of his testimony minimal. Anyhow, no external corroboration
22 emerges anywhere to support the combined statements of the three criminals associated
23 with count 1. His statements, and the statements we have just shown, are not only
24 inherently flawed, but rotten to the core.

25 And if this were not enough, in three of the nine incidents falling under count 1, the

1 victims are not even identified. Despite contemporaneous media reports, no attempt
2 has been made to collate identification documentation, nor autopsy reports, nor death
3 certificates. Not a shred of forensic material has been gathered. Allegations
4 concerning unnamed individuals deprive this Chamber of a meaningful factual basis
5 for judicial assessment and deprive the Defence of the ability to investigate and
6 respond effectively.

7 I have a few more minutes, if I may, Madam President, and then I can finish count 1.

8 PRESIDING JUDGE MOTOC: [14:58:52](Interpretation) Yes, continue to conclude,
9 because we also had a decision of the Chamber at the beginning.

10 MR KAUFMAN: [14:59:05] So, on a final and crucial note and perhaps the most
11 staggering inconsistency, {ICR: (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)}.

23 Three o'clock, Madam President, I have finished, for today at any rate.

24 PRESIDING JUDGE MOTOC: [15:00:48](Interpretation) Thank you, Mr Kaufman.

25 We have come to the end of today's hearing, the third day. The hearing shall resume

1 tomorrow at 10 a.m. Thank you, parties and participants. I thank our interpreters,
2 the Registry, the technical staff and all those who have allowed this -- yes,
3 Mr Nicholls?

4 MR NICHOLLS: [15:01:12] I'm very sorry to interrupt, your Honours, just at the end
5 of the day, but I wonder if we could go into private session for one minute before you
6 leave the bench.

7 PRESIDING JUDGE MOTOC: [15:01:22](Interpretation) Yes, Mr Nicholls.
8 (Private session at 3.01 p.m.)

9 THE COURT OFFICER: [15:01:30] We are in private session, Madam President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

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Confirmation of Charges Hearing

(Private Session)

ICC-01/21-01/25

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1 (Redacted)

2 (Redacted)

3 (Redacted)

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5 (Open session at 3.06 p.m.)

6 THE COURT OFFICER: [15:06:18] We are back in open session, Madam President.

7 PRESIDING JUDGE MOTOC: [15:06:22](Interpretation) I was thanking the

8 participants and parties and then we had a few moments in private session. Now I

9 would like to wish you a pleasant afternoon. We will see you all tomorrow. And,

10 once again, I thank everyone and this hearing is now adjourned. We will see one

11 another tomorrow.

12 (The hearing ends in open session at 3.07 p.m.)