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Date: **1 May 2025**

PRE-TRIAL CHAMBER I

Before: **Judge Iulia Antoanella Motoc, Presiding Judge**
Judge Reine Adélaïde Sophie Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC
With Public Annex A

Defence Challenge with Respect to Jurisdiction

Source: **Defence for Mr Rodrigo Roa Duterte**

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I. INTRODUCTION

1. Pursuant to Article 19(2)(a) of the Rome Statute,[1] the Defence for Mr Rodrigo Roa Duterte hereby respectfully submits a challenge to the exercise of jurisdiction by the International Criminal Court ("ICC" or "the Court") in the Situation in the Republic of the Philippines.

2. For the sake of judicial efficiency, the Defence submits that this challenge should be resolved as a preliminary matter. Such an approach will prevent the unnecessary expenditure of resources incurred by allowing a confirmation of charges hearing to proceed in the absence of any jurisdictional basis.

II. PROCEDURAL HISTORY

3. On 1 November 2011, the Rome Statute entered into force for the Republic of the Philippines ("the Philippines"), following its accession.[2]

4. On 15 March 2018, the Government of the Philippines announced its withdrawal from the ICC.[3]

5. On 16 March 2018, the Government of the Philippines formally submitted its Notice of Withdrawal through a *Note Verbale* to the *Chef de Cabinet* of the United Nations Secretary-General. The Secretary-General received this communication on 17 March 2018.[4]

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[1] All references to "Article" and to "Rules" in the present submission are to the Rome Statute and the International Criminal Court Rules of Procedure and Evidence respectively, unless otherwise indicated.
[2] United Nations, Ratification by the Philippines of the Rome Statute of the International Criminal Court, Depositary Notification C.N.530. 2011.TREATIES-3, 30 August 2011 ("[t]he Statute will enter into force for the Philippines on 1 November 2011 in accordance with its article 126 (2)").
[3] Republic of the Philippines, Department of Foreign Affairs, PH Officially Serves Notice to UN of Decision to Withdraw from ICC, 16 March 2018.
[4] United Nations, Withdrawal of the Philippines from the Rome Statute of the International Criminal Court, Depositary Notification C.N.138. 2018.TREATIES-XVIII.10, 17 March 2018.

6. On 18 March 2018, the ICC, through Mr O-Gon Kwon, the President of the Assembly of States Parties, announced the departure of the Republic of the Philippines from the Rome Statute, effective 17 March 2019.[5]

7. On 24 May 2021, the Prosecutor requested the Pre-Trial Chamber to grant authorisation to commence an investigation into the Situation in the Republic of the Philippines (the "Philippines Situation").[6]

8. On 15 September 2021, the Pre-Trial Chamber authorised the commencement of the investigation into the Philippines Situation, in relation to "crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines between 1 November 2011 and 16 March 2019 in the context of the 'war on drugs' campaign".[7]

9. On 10 February 2025, the Prosecutor filed a request for the issuance of a warrant for the arrest of Mr Rodrigo Roa Duterte.[8]

10. On 7 March 2025, the Pre-Trial Chamber issued an arrest warrant for Mr Rodrigo Roa Duterte.[9]

11. On 12 March 2025, Mr Rodrigo Roa Duterte was surrendered to the ICC.[10]

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[5] ICC Press Release, President of the Assembly of States Parties regrets withdrawal from the Rome Statute by the Philippines, 18 March 2019.
[6] Situation in the Republic of the Philippines, Public redacted version of "Request for authorisation of an investigation pursuant to article 15(3)", 24 May 2021, ICC-01/21-7-SECRET-Exp, ICC-01/21-7-Red, 14 June 2021 ("Request for Authorisation of an Investigation").
[7] Situation in the Republic of the Philippines, Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, ICC-01/21-12, 15 September 2021 ("September 2021 Authorisation Decision").
[8] Situation in the Republic of the Philippines, Public redacted version of "Prosecution's urgent application under article 58 for a warrant of arrest against Rodrigo Roa DUTERTE", 10 February 2025, ICC-01/21-80-US-Exp, ICC-01/21-80-Red, 13 March 2025 ("Prosecution's Urgent Application for an Arrest Warrant").
[9] Situation in the Republic of the Philippines, Warrant of Arrest for Mr Rodrigo Roa Duterte, ICC-01/21-83, 7 March 2025.
[10] ICC Press Release, Situation in the Philippines: Rodrigo Roa Duterte in ICC custody, 12 March 2025.

III. APPLICABLE LAW

12. This submission will address Articles 12, 13 and 19 of the Rome Statute. The relevant statutory provisions read as follows:

> *Article 12*
> *Preconditions to the exercise of jurisdiction*
>
> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.
>
> *Article 13*
> *Exercise of jurisdiction*
>
> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 19
Challenges to the jurisdiction of the Court or the admissibility of a case

> 2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
> (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58.

IV. SUBMISSIONS

1. THE INTERNATIONAL CRIMINAL COURT IS NOT IN A POSITION TO EXERCISE JURISDICTION IN THE PHILIPPINES SITUATION AFTER THE COUNTRY'S EFFECTIVE WITHDRAWAL FROM THE ROME STATUTE

1.1. The jurisdictional framework of the Rome Statute is clear: A State must be a State Party at the time of the exercise of jurisdiction

13. In order to determine whether the Court has jurisdiction to entertain the case against Mr Duterte, it is important to analyse the jurisdictional concepts of the Rome Statute. Specifically, it is essential to differentiate between jurisdiction *stricto sensu* on the one hand and the *exercise* of jurisdiction on the other.

1.1.1. The provisions relating to the Court's jurisdiction stricto sensu

14. The Rome Statute defines the Court's jurisdiction *stricto sensu* by way of three provisions: Article 5 pertains to material jurisdiction (*ratione materiae*), Article 11 to temporal jurisdiction (*ratione temporis*), and Article 25(1) to the Court's personal jurisdiction.

15. That the aforementioned provisions relate to the Court's jurisdiction *stricto sensu* is reflected in the Statute's language, which states, as a factual determination, that the Court "has jurisdiction" over (i) certain crimes (ii) committed after the entry into force of the Statute (iii) by natural persons. From this, it follows that the additional criteria of "nationality" and "territory" are not pertinent to the existence of jurisdiction *stricto sensu* but, rather, are factors requiring consideration in the context of the Court's *exercise* of jurisdiction.

16. The correct moment to determine when the Court "has" jurisdiction *stricto sensu* is, thus, *only* at that point in time when the alleged crimes were committed. This is even more the case when a State has withdrawn from the Statute and the question of whether the Court has jurisdiction *stricto sensu* over the alleged crimes committed in the Philippines Situation is not in dispute.

17. The true issue in the present instance is whether "dormant jurisdiction"[11] *stricto sensu* could be triggered and whether the Court could properly *exercise* jurisdiction after the Philippines' effective withdrawal from the Rome Statute.

1.1.2. The provisions relating to the exercise of jurisdiction

18. The capacity to exercise jurisdiction, as distinct from the existence of jurisdiction, is predicated on the fulfilment of the conditions set out in Article 12(2). This provision lists two possible and alternative preconditions to the exercise of jurisdiction, which are founded on territory and nationality. These criteria do not establish jurisdiction *per se* but, as the title to Article 12 clearly states, serve as "preconditions to the exercise of jurisdiction". As jurisdictional "preconditions", they must be assessed, as the language suggests, at the moment the Court is considering whether to exercise its jurisdiction.

19. Furthermore, the language employed in Articles 12(1) and 12(2) respectively is instructive. The provisions differentiate between the *acceptance* of material jurisdiction and the *exercise* of jurisdiction once material jurisdiction has been accepted. According to Article 12(1), membership of the Court *ipso facto* entails that a State Party "accepts" its material jurisdiction. For the *exercise* of that material jurisdiction under Article 12(2), however, the Court must verify that the allegedly criminal conduct occurred on the territory of an Article 12(1) State Party or by a national thereof (except in the case of a United Nations Security

[11] H. Olasolo, The Triggering Procedure of the International Criminal Court, Martinus Nijhoff Publishers (2005), p. 39.

Council ("UNSC") referral). Article 12(3) similarly distinguishes between *ad hoc* and selective "acceptance" of material jurisdiction *per se* and the *exercise* of jurisdiction.

20. Article 13, by contrast, sets out the prerequisite triggering mechanisms for the "exercise of jurisdiction" by the Court as opposed to stipulating criteria for the *a priori* existence of jurisdiction.

21. These provisions, and their respective language, unequivocally confirm the clear distinction drawn by the Rome Statute between jurisdiction, on the one hand, and the *exercise* of jurisdiction on the other. Consequently, while the existence of jurisdiction must be determined with respect to the date of the commission of the alleged crimes, a plain reading of Articles 12 and 13 indicates that the appropriate moment to determine the preconditions to the exercise of jurisdiction is when the Court's jurisdiction is triggered under Article 13.

22. The plain reading set out above was confirmed by two judges of the ICC Appeals Chamber who decided to seize themselves of the matter:

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

23. This holistic reading of Articles 12 and 13 is further confirmed by the use of the present simple tense in Article 12(2): "[i]n the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States **are** Parties to this Statute." Textually, this indicates that a State must be a party to the Rome Statute **contemporaneously** with the Court's decision to

[12] Situation in the Republic of the Philippines, Dissenting opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze, ICC-01/21-77-OPI, 18 July 2023 ("Dissenting Opinion"), para. 23.

exercise jurisdiction. There must first be one of the three triggering mechanisms of Article 13, before subsequently checking whether territory and/or nationality is an issue. As a result, determination of whether the conduct was committed on the territory of a State Party or could be attributed to a national of a State Party happens at the time the decision is made to exercise jurisdiction, not at the time of the commission of the crime.

24. With respect to the Philippines Situation, the former Prosecutor adopted the Article 13(c) triggering mechanism on 24 May 2021.[13] For jurisdiction to be exercised under this provision, the statutory language requires the Prosecutor to have initiated an investigation "in accordance with Article 15". This, in turn, would require satisfaction of all the procedural requirements under Article 15, *including* the authorisation to open an investigation under Article 15(4), given that Article 13(c) refers to Article 15 in its totality.[14] This Pre-Trial Chamber only issued its decision to authorise an investigation on 15 September 2021, thus triggering the "initiation of an investigation" when the Philippines was no longer a State Party.[15] As noted by two Judges of the Appeals Chamber:

> [i]n our view, the wording of article 12(2) indicates that the appropriate time to make a determination as to whether the preconditions of article 12 of the Statute are met is when the exercise of the Court's jurisdiction is triggered, not when the crimes were allegedly committed. In other words, the preconditions to the exercise of the Court's jurisdiction must exist at the time that the jurisdiction is triggered pursuant to article 13 of the Statute, which, in the scenario provided for in article 13(c) of the Statute, in our view, definitely occurs when the pre-trial chamber authorizes the commencement of the investigation, pursuant to article 15(4) of the Statute.[16]

[13] Philippines Situation, Request for Authorisation of an Investigation.
[14] *See* S. Vasiliev, Piecing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2), *Opinio Juris*, 6 November 2017; D. Jacobs, Peek-A-Boo: ICC authorises investigation in Burundi, some thought on legality and cooperation, *Spreading the Jam*, 11 November 2017; D. Jacobs, A short rejoinder to Kevin Jon Heller on Burundi and the ICC, *Spreading the Jam*, 12 November 2017.
[15] Philippines Situation, September 2021 Authorisation Decision.
[16] Philippines Situation, Dissenting Opinion, para. 26.

25. The Philippines' withdrawal from the Rome Statute became effective on 17 March 2019. When the former Prosecutor filed her request, and the Pre-trial Chamber issued its decision, more than two years later, the preconditions to the exercise of jurisdiction could no longer be, nor were they, fulfilled. As articulated by Judges Lordkipanidze and Perrin de Brichambaut:

> [j]ust as a State that is not, or is no longer, Party to the Statute cannot refer a situation to the Court under article 13(a) of the Statute and thus trigger the Court's exercise of jurisdiction (albeit it may accept the jurisdiction of the Court under Article 12(3)), the Prosecutor cannot commence the process of triggering the jurisdiction of the Court once a withdrawal has become effective and the State in question is no longer Party to the Statute. The Court's jurisdiction must be triggered before the withdrawal has become effective. Put differently, once the State's withdrawal has become effective, the Prosecutor can no longer open an investigation.[17]

1.2. The Prosecutor has never demonstrated that the Court was legally authorised to exercise jurisdiction after the Philippines' effective withdrawal from the Rome Statute

26. For its part, the Prosecution has consistently failed to justify why the Court should not apply the plain language of the Rome Statute. The Prosecution has, furthermore, systematically confused jurisdiction and the preconditions to the exercise of jurisdiction, as illustrated by paragraph 102 of its application for an arrest warrant ("AWA"):

> [t]he Court has jurisdiction over the crimes alleged in this Application. The crimes were committed when the Philippines was a State Party to the Statute: from 1 November 2011 to 16 March 2019. During this period, all the necessary pre-conditions to the Court's exercise of jurisdiction—set out in articles 11 and 12—were satisfied, namely subject matter (*ratione materiae*), territorial (*ratione loci*), personal (*ratione personae*), and temporal (*ratione temporis*) jurisdiction.[18]

[17] *Id.* para. 27.
[18] Philippines Situation, Prosecution's Urgent Application for an Arrest Warrant, para. 102.

27. Needless to say, subject-matter jurisdiction (incorrectly referenced) and the criteria of Article 11 are not necessary pre-conditions to the *exercise* of jurisdiction, but are rather for the determination of the *existence* of jurisdiction *stricto sensu*.

28. In the same paragraph of the AWA, the Prosecution refers to other sources of law which, when analysed in detail, are either irrelevant to the current discussion or otherwise fail to provide a solid legal basis to support the Prosecution's legal theory. The Defence will address these sources below.

1.2.1. The 2017 Burundi decision

29. In the 2017 decision authorising an investigation in the Burundi Situation, Pre-Trial Chamber I found that

> [b]y ratifying the Statute, a State Party accepts, in accordance with article 12(1) and (2) of the Statute, the jurisdiction of the Court over all article 5 crimes committed either by its nationals or on its territory for a period starting at the moment of the entry into force of the Statute for that State and running up to at least one year after a possible withdrawal, in accordance with article 127(1) of the Statute. This acceptance of the jurisdiction of the Court remains unaffected by a withdrawal of the State Party from the Statute. Therefore, the Court retains jurisdiction over any crimes falling within its jurisdiction that may have been committed in Burundi or by nationals of Burundi up to and including 26 October 2017. As a consequence, the exercise of the Court's jurisdiction, *i.e.* the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, not subject to any time limit.[19]

30. **First**, the circumstances in the Burundi Situation are fundamentally distinguishable from the Philippines Situation, given that Pre-Trial Chamber III authorised the opening of an investigation ***prior*** to the entry into effect of

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[19] Situation in the Republic of Burundi, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017 ("Burundi Decision"), para. 24.

Burundi's withdrawal from the Rome Statute. With this in mind, any comments by Pre-Trial Chamber III on the Court's ability to exercise jurisdiction after the withdrawal are *obiter dicta*, as they were not necessary for the purposes of issuing the decision. This explains why that Pre-Trial Chamber acknowledged the ambiguity of the language used in Article 127(2) but declined to address it: "[t]he Chamber notes that the relationship between the first and second sentences of article 127(2) of the Statute may be construed in different ways. However, the Chamber considers that it need not resolve this matter in relation to this Request".[20] By the same token, the Pre-Trial Chamber should have declined to comment on the question of *when* the Court can exercise jurisdiction.

31. **Second**, Pre-Trial Chamber III does not provide any legal basis for its assertion that, because the Court has jurisdiction over certain crimes, the *exercise* of jurisdiction would be open-ended in time. The Burundi Decision does not touch on the distinction between jurisdiction and the *exercise* of jurisdiction, nor is there any discussion of the language of Article 12(2). The only legal source cited with respect to the lapse of time is to be found at footnote 33: "[i]t is also to be underlined that, in accordance with article 29 of the Statute, the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."[21] This citation, however, does not justify the failure to apply the plain language of Article 12(2). Indeed, the fact that Rome Statute crimes are not subject to any statute of limitations is not support for the contention that the Court may exercise its jurisdiction indefinitely and at any time, even when the conditions of Article 12(2) are not met.

[20] Burundi Decision, para. 26.
[21] *Id*. fn. 33.

32. In light of the aforementioned, the Burundi Decision is not relevant precedent in the present instance.

1.2.2. The 2021 Philippines Supreme Court decision[22]

33. The Prosecutor, in his application for an arrest warrant in the current case,[23] refers to the 2021 decision by the Supreme Court of the Philippines ("Supreme Court Decision"). This decision is, likewise, of little relevance to the present discussion.

34. **First**, and as a matter of principle, the interpretation or application of the Rome Statute by domestic judges in the context of their national legal framework cannot, and must not, guide ICC judges on how to interpret the Rome Statute. The ICC judges are the primary arbiters of legal issues arising out of the Rome Statute. Such domestic jurisprudence is neither relevant nor derivative applicable law for the purpose of Article 21(c).

35. **Second**, analysis of the domestic litigation generating the Supreme Court Decision indicates that the Supreme Court was not called upon to interpret the Rome Statute. Rather, the issue at the heart of that litigation was whether the Philippines had validly withdrawn from the Rome Statute under the relevant domestic framework; whether such withdrawal could be unilateral; whether it required legislative action or violated any other legislative act or prerogative; and, whether it required the concurrence of two-thirds of all the members of the Senate.[24] Therefore, the pronouncements on the ICC's jurisdiction by the Supreme Court of the Philippines were *obiter dicta*.

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[22] Supreme Court of the Philippines, *Pangili v. Cayetano*, G.R. No. 238875, Decision *En Banc*, 16 March 2021.
[23] Philippines Situation, Prosecution's Urgent Application for an Arrest Warrant, para. 102.
[24] Supreme Court of the Philippines, *Pangili v. Cayetano*, G.R. No. 238875, Decision *En Banc*, 16 March 2021.

36. **Third**, the sections of the Supreme Court Decision referred to by the Prosecutor do not provide any support to the question at the heart of the current challenge: Can the ICC exercise jurisdiction in a situation after the effective withdrawal of a State Party from the Court?

37. One of the sections relied on by the Prosecutor reads as follows:

> [p]etitioners harp on the withdrawal's effectivity, which was one year from the United Nations Secretary-General's receipt of the notification. However, this one-year period only pertains to the effectivity, or when exactly the legal consequences of the withdrawal takes effect. It neither concerns approval nor finality of the withdrawal. Parenthetically, this one-year period does not undermine or diminish the International Criminal Court's jurisdiction and power to continue a probe that it has commenced while a state was a party to the Rome Statute.[25]

38. The Defence notes that the Supreme Court uses the term "parenthetically" in this section, thus confirming the *obiter* nature of its statements. More importantly, however, the Supreme Court confirms that the ICC has jurisdiction (which is not the issue at stake in the current challenge) and that it can continue a probe "that is commenced *while a state was a party to the Rome Statute*" (which is also not the issue at stake in the current challenge, given that the "probe" into the Philippines Situation was authorised *after* the withdrawal became effective and when the Philippines was no longer a State Party).

39. Similarly, another section referenced by the Prosecutor fails to shed any light on the question raised in the current challenge: "the International Criminal Court retains jurisdiction over any and all acts committed by government actors until March 17, 2019. Hence, withdrawal from the Rome Statute does not affect the liabilities of individuals charged before the International Criminal Court for acts committed up to this date."[26] Indeed, in this section, the Supreme

[25] *Pangili v. Cayetano*, Section XI.
[26] *Pangili v. Cayetano*, Section XXI.

Court is patently addressing the question of the ICC's jurisdiction, not the ICC's *exercise* of jurisdiction.

1.2.3. The 2021 **Abd Al Rahman** *decision*

40. Nor does the *Abd-Al-Rahman* decision[27] referred to by the Prosecutor in footnote 553 of the AWA support the Prosecutor's assertions.

41. In that litigation, the Defence was challenging the Court's jurisdiction *per se* as opposed to its exercise of jurisdiction. There was no issue in respect of a State withdrawal from the Rome Statute nor any question in relation to the timing of the exercise of jurisdiction. Moreover, the Court had, evidently, already exercised jurisdiction through a UNSC referral, an additional distinguishing factor not existing in the present case. Essentially, the question there was whether a subsequent UNSC could retroactively remove the Court's jurisdiction, not whether the Court could exercise jurisdiction in the first place.

42. Given its proper context, the statements of the Pre-Trial Chamber in *Abd-Al-Rahman* are not pertinent to the current litigation because: (i) the judges' affirmation in that case – that the Court's jurisdiction proper could not be taken away by a subsequent act – is irrelevant to the question of the timing of the Court's exercise of jurisdiction, and (ii) the generic reference by the judges in that case to the language of Article 127 does not indicate how, precisely, this statutory provision should be applied to the specific factual circumstances of the present case.

[27] *Abd-Al-Rahman*, Decision on the Defence '*Exception d'incompétence*' (ICC-02/05-01/20-302), ICC-02/05-01/20-391, 17 May 2021.

1.2.4. The 2021 Pre-Trial Chamber decision authorising the opening of an investigation in the Situation of the Philippines

43. In its 2021 decision to open an investigation in the Philippines Situation, the Pre-Trial Chamber devoted a paragraph to the question of the Court's capacity to exercise jurisdiction.

> While the Philippines' withdrawal from the Statute took effect on 17 March 2019, the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party, from 1 November 2011 up to and including 16 March 2019. This is in line with the law of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination. Moreover, in the *Burundi* situation, Pre-Trial Chamber III held that a State Party's withdrawal from the Rome Statute does not affect the Court's exercise of jurisdiction over crimes committed prior to the effective date of the withdrawal. This conclusion was recently confirmed by Pre-Trial Chamber II in the *Abd-Al-Rahman* case. The Court's exercise of such jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced prior to the Philippines' withdrawal.[28]

44. **First**, the above-cited pronouncement is notably located in that section of the decision relating to "jurisdiction *ratione temporis*", suggesting once more a confusion between the existence of jurisdiction, on the one hand, and the preconditions to the exercise of jurisdiction on the other.

45. **Second**, the *Abd Al-Rahman* Decision does not support the Chamber's argument. As explained above, the Defence was, in that case, challenging the Court's jurisdiction proper rather than its exercise of jurisdiction. The Pre-Trial Chamber's pronouncements in that case therefore provide no relevant insight as to the pertinent issue here, i.e., the timing of the exercise of jurisdiction by the Court following the effective withdrawal of a State from the Rome Statute.

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[28] Philippines Situation, September 2021 Authorisation Decision, para. 111.

46. **Third**, it should be noted that in support of its final determination in the Philippines Situation ("[t]he Court's exercise of such jurisdiction is not subject to any time limit, particularly since the preliminary examination here commenced prior to the Philippines' withdrawal"),[29] Pre-Trial Chamber I cites two sources that do not, in actual fact, support its assertion: "Rome Statute, article 127(2); Burundi Article 15 Decision, paras. 23-26)".[30]

47. Indeed, neither Article 127(2) nor paragraphs 23 to 26 of the Burundi Decision make any reference to "preliminary examinations". Moreover, as discussed above, the Burundi Decision is of little relevance since, in that instance, the decision to authorise an investigation was issued *prior* to the date of Burundi's effective withdrawal. This makes any discussion on the Court's capacity to exercise jurisdiction after a State's effective withdrawal *obiter*.

48. The Pre-Trial Chamber's 2021 decision in the Philippines Situation does not, as a result, constitute solid legal precedent that can be relied upon in the present litigation.

2. The Irrelevance or Inapplicability of Article 127(2) of the Rome Statute

2.1. The Irrelevance of Article 127(2)

49. In its September 2021 Authorisation Decision, Pre-Trial Chamber I relied, *inter alia*, on the fact that "the preliminary examination here commenced prior to the Philippines' withdrawal".[31] It referred, by way of a footnote and without further explanation, to Article 127(2), following a similarly unsubstantiated

[29] *Id*. para. 111.
[30] *Id*. fn. 235.
[31] *Id*. para. 111.

assertion by the former Prosecutor in her May 2021 request to open an investigation.[32]

50. In his February 2025 application for an arrest warrant against Mr Duterte, the current Prosecutor argued that "[t]he Statute and, in particular, the withdrawal provisions in article 127, do not impose any time limit on the Court's ability to exercise jurisdiction over crimes committed during the period when the State was a party to the Statute".[33]

51. In respect of Article 127, the Defence submits that the matter is adequately resolved through the strict application of the relevant provisions of the Rome Statute. At the time the Court decided to exercise jurisdiction in the current Situation, the Philippines was no longer a State Party, and the Article 12(2) jurisdictional preconditions not met.

52. No interpretation of Article 127(2) can trump the plain language of Article 12(2), which requires that, as a "pre-condition to the exercise of jurisdiction", a State be contemporaneously a party to the Rome Statute. The simple fact is that the Republic of the Philippines was **not** a party to the Rome Statute in 2021. As to the Prosecutor's assertion on the absence of any prescriptive period on the exercise of jurisdiction, the response is clear: the timing consideration is not to be found in Article 127, but in Article 12(2) which, through the use of the present tense, requires contemporaneity.

53. Should the Chamber nonetheless deem it necessary to consider the content of Article 127(2) – and, in particular, the much-dissected phrasing of "any matter which was already under consideration by the Court" – the Defence submits that matters under consideration by the Prosecutor (such as a preliminary

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[32] Philippines Situation, Request for Authorisation of an Investigation, para. 80.
[33] Philippines Situation, Prosecution's Urgent Application for an Arrest Warrant, para. 102.

examination) are unable to survive the Philippines' effective withdrawal from the Statute.

54. As addressed below, the Defence argues that (1) the expression "the Court" in this provision refers to the judicial organ of the Court, to the exclusion of the Prosecutor, and (2) in any event, a preliminary examination is not a "matter under consideration by the Court".

2.2. The expression "by the Court" does not include the Prosecutor

55. The Prosecutor's sole argument that the expression "by the Court" includes the Prosecution is that the Office of the Prosecutor ("OTP") is an organ of the Court.[34] Yet, a careful and systematic analysis of the Rome Statute and the Rules of Procedure and Evidence shows that, in nearly all instances where the term "by the Court" is used, it refers to the judiciary **to the exclusion** of the Prosecutor.[35]

2.2.1. Analysis of the Rome Statute

2.2.1.1.The use of the expression "under consideration by the Court"

56. The expression "under consideration by the Court" only appears one other time in the Rome Statute. In the context of an admissibility challenge under Article 95, the expression "under consideration by the Court" refers, clearly and unequivocally, to the judiciary. The reference to the judiciary to the exclusion of the Prosecutor is confirmed further below in the Article, wherein "the Court" is patently distinguished from "the Prosecutor": "[…] unless the Court has

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[34] Situation in the Republic of the Philippines, Prosecution's response to the Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-65 OA), ICC-01/21-68, 4 April 2023 ("OTP Response to the Government's Appeal Brief"), para. 34.

[35] To assist in the Pre-Trial Chamber's assessment of this issue, the Defence has included as **Public Annex A** to this submission a table listing all references to the language of "by the Court" in the Court's statutory framework.

specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19".[36]

2.2.1.2.The use of the expression "by the Court"

57. Article 12(3) refers to the "exercise of jurisdiction by the Court", which relates to the triggering mechanisms of Article 13.[37] As indicated above, the exercise of jurisdiction under Article 13(c) only takes place once **the judges** have authorised an investigation under Article 15(4).

58. Article 15(4) refers to "subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case" following the Pre-Trial Chamber's authorisation to open an investigation.[38] Similarly, the *chapeau* of Article 17(1) provides that "the Court shall determine that a case is inadmissible where […]".[39] In both cases, this refers to "the Court" as the judiciary, as it is the judges and not the Prosecutor, who make legal determinations on jurisdiction and admissibility.

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[36] Rome Statute, Art. 95 ("[w]here there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19").

[37] Rome Statute, Art. 12(3) ("[i]f the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9").

[38] Rome Statute, Art. 15(4) ("[i]f the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case").

[39] Rome Statute, Art. 17(1) ("[h]aving regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court").

59. The same applies, equally, to Article 20;[40] only the judges can acquit or convict someone, not the Prosecutor.

60. Article 19 relates to challenges to the jurisdiction or the admissibility of a case. The expression "by the Court" therein patently relates **only** to the judiciary. For example, Article 19(8) indicates that "[p]ending a ruling by the Court, the Prosecutor may seek authorisation from the Court […]",[41] demonstrating a clear distinction between the Prosecutor, on the one hand, and the Court on the other. Article 19(9) similarly distinguishes "any act performed by the Prosecutor" and "any order or warrant issued by the Court", illustrating that "the Court" does not include the Prosecutor.[42] Furthermore, only the judiciary can issue orders or warrants.

61. Article 21, governing the Applicable Law of the ICC, can reasonably be construed as applying to the judges as those called upon to apply the relevant legal framework.[43]

[40] Rome Statute, Art. 20 ("[e]xcept as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court").
[41] Rome Statute, Art. 19(8) ("[p]ending a ruling by the Court, the Prosecutor may seek authority from the Court: (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6; (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58").
[42] Rome Statute, Art. 19(9) ("[t]he making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge").
[43] Rome Statute, Art. 21 ("[t]he Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards").

62. Article 23 relates to the principle of "*nulla poena sine lege*", and refers in this provision to the judiciary, as only the judges can "convict" a person.[44]

63. Article 58 relates to the issuance of an arrest warrant, with Article 58(4) providing that "the warrant of arrest shall remain in effect until otherwise ordered by the Court".[45] "The Court" in this provision manifestly refers to the judiciary, since only the judges can issue, and order to remain effective, an arrest warrant.

64. Article 67 governs the "rights of the Accused", with Article 67(1)(d) enshrining an accused's right to have legal assistance assigned "by the Court". The Court here refers to an administration, and cannot conceivably cover the Prosecutor, who has no role in the assignment of defence counsel to an accused.[46]

65. Article 68 relates to the protection of victims and witnesses. The expression "by the Court" in Articles 68(2) and 68(3) refer to the judiciary as the ones capable of ordering protective measures and to allow the participation of victims at appropriate stages of the proceedings.[47] The Prosecutor may make requests to the Court, but cannot himself order such measures.[48]

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[44] Rome Statute, Art. 23 ("[a] person convicted by the Court may be punished only in accordance with this Statute").

[45] Rome Statute, Art. 58 ("[t]he warrant of arrest shall remain in effect until otherwise ordered by the Court").

[46] Rome Statute, Art. 67(1)(d) ("[s]ubject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it"). The Prosecutor plays no part in the provision or exercise of these rights.

[47] Rome Statute, Art. 68(2) ("[a]s an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness").

[48] Rome Statute, Art. 68(3) ("[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

66. Article 70(4)(b) relates to offences against the administration of justice.[49] The expression "by the Court" in this provision refers to the judiciary, not the Prosecutor, as only the judiciary can request a State Party to submit a case to its competent authorities.

67. Article 72, which provides for the "protection of national security information", refers to the judiciary in its reference to "the Court", and not to the Prosecutor. The fact that the Prosecutor is excluded from the scope of this reference is further cemented by Article 72(6), providing that any State refusing to provide information "shall so notify the Prosecutor **or** the Court".

68. Article 73's reference to "by the Court" can reasonably be interpreted as applying to the judiciary,[50] as only ICC judges may formally issue requests for cooperation to States under the Rome Statute.

69. Similarly, Articles 87, 89, 90, 93, 99 and 100 relate to various forms of requests for cooperation addressed to States. "The Court" in these provisions invariably refers to the judiciary, as only the judges are formally empowered to issue such requests. For example, only judges may refer a matter to the Assembly of States

determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence").

[49] Rome Statute, Art. 70(4)(b) ("[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence").

[50] Rome Statute, Art. 73 ("[i]f a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator").

Parties;[51] issue a request for the surrender of a person;[52] determine that a case is admissible;[53] and give assurances to a witness.[54] Moreover, Article 100, relating to costs, refers to the ICC as an administrative entity, and not to the Prosecutor who takes no part in such decisions.[55]

70. Article 103 relates to "the enforcement of sentences" with "the Court" in this provision evidently referring to the judges, not the Prosecutor.[56] After all, only the judiciary can designate a State in which a sentence will be served or agree to conditions stipulated by a State for receipt of a convicted person.

71. Article 107 refers to the ICC as an administrative entity that bears the costs of transferring a person to another State. This would necessarily exclude the Prosecutor.[57]

72. Article 108, specific to the possible domestic prosecution of a person in custody, refers here to the judiciary, given that only the judges can approve the prosecution of a detained person[58] or impose a sentence.[59]

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[51] Rome Statute, Art. 87(7) ("[w]here a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council").
[52] Rome Statute, Art. 89(3).
[53] Rome Statute, Art. 90(5).
[54] Rome Statute, Art. 93(2).
[55] Rome Statute, Art. 100.
[56] Rome Statute, Art. 103 ("[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons").
[57] Rome Statute, Art. 107 ("[i]f no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court").
[58] Rome Statute, Art. 108(1) ("[a] sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State […] unless […] approved by the Court at the request of the State of enforcement").
[59] Rome Statute, Art. 108(3) ("[p]aragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it").

73. Article 109 relates to the enforcement of fines and forfeiture measures ordered by "the Court", which concerns the judiciary as only the judges can order fines or forfeitures, not the Prosecutor.

74. Article 110 relates to the reduction of sentence. This provision concerns the judiciary, as only the judges can pronounce a sentence.

75. Article 111 relates to the consequences of the escape of a person. In this provision "by the Court" clearly refers to the judiciary, as only the judges can designate a State in which the person should serve its sentence, to the exclusion of the Prosecution.[60]

2.2.2. Analysis of the Rules of Procedure and Evidence

76. Rule 12 relates to the election of the Registrar and deputy Registrar. In particular, Rule 12(5) provides that "[t]he Deputy Registrar shall be elected **by the Court**, meeting in plenary session, in the same manner as the Registrar". "The Court" here refers to the judges who elect the Registrar (see Article 43(4)), to the exclusion of the Prosecutor.

77. Rule 22 relates to the "appointment and qualification of Counsel for the Defence" and refers to the fact that Defence Counsel are subject to "any other document adopted **by the Court**". This does not cover the Prosecutor, who does not have the authority to adopt any document that would be binding on Defence Counsel.

Rome Statute, Art. 108(3) ("[p]aragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it").

[60] Rome Statute, Art. 111 ("[i]f a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court").

78. Rule 32 on disciplinary measures mentions the "salary paid by the Court". This concerns the Court as an administrative body and excludes the Prosecutor, who does not pay salaries.

79. Rule 39, concerning the designation of alternate judges in accordance with a "procedure pre-established by the Court", does not cover the Prosecutor.

80. Rule 64 concerns the procedure relating to the relevance or admissibility of evidence and the expression "by the Court" in Rule 64(1) does not include the Prosecutor, because it is the judges or the Court as an administration that can communicate motions to the participants or decide not to do so.

81. Rule 65 on the compellability of witnesses necessarily implicates only the judiciary since only the judges can compel a witness to provide testimony, not the Prosecutor.

82. Rule 74 relates to risks of self-incrimination by a witness. "The Court" in this provision clearly refers to the judiciary, as only the judges can give assurances to a witness (Rule 74(2)) or require a witness to answer questions (Rule 74(3)).

83. Rule 90(5) relates to the remuneration of a common legal representative "chosen by the Court", which does not include the Prosecutor, who is not involved in the choice of legal representative for victims.

84. Rule 101 concerns time limits "ordered by the Court", which refers to the judges, who are the ones setting time limits, to the exclusion of the Prosecutor.

85. Rule 117 refers to requests made "by the Court" under Article 89 or Article 92, which concerns the judiciary which will be the one issuing such orders.

86. Rules 146 and 166 concern measures adopted "by the Court" if a convicted person does not pay fines. "The Court" here can only refer to the judges, as

only they can order measures such as, for example, the extension of the term of imprisonment [Rule 146(5) and Rule 166(5)].

87. Rule 168 relates to the "*ne bis in idem*" principle, with "the Court" in this provision obviously referring to the judiciary as the only ones able to issue convictions or acquittals.

88. Rule 171 concerns the refusal to comply with a direction by the Court, which very obviously covers the judges who have the authority to issue binding directions, to the exclusion of the Prosecutor.

89. Rules 180, 184, 191, 193, 200, 203 and 208 all concern the implementation modalities of requests for cooperation issued by "the Court", referring unequivocally to the judiciary, as only judges have the authority to issue formal and legally binding requests for cooperation under the Rome Statute, provide assurances under Article 93(2),[61] or sentence a person.[62]

90. Finally, Rules 212, 215, 218, 219, and 225 concern various aspects of the enforcement of sentences. "The Court" in these provisions patently refers to the judiciary, to the exclusion of the Prosecution, given that only judges can designate a State to enforce a sentence (Rule 215), order the forfeiture of assets (Rule 218), or order reparations (Rule 219).

2.2.3. Other relevant provisions

91. Beyond these instances, numerous examples exist of provisions in the Rome Statute and the Rules of Procedure and Evidence that explicitly distinguish the "Court" from the "Prosecutor", as also noted by Kevin Jon Heller, the current

[61] Rule 191 RPE.
[62] Rules 193 and 200 RPE.

Special Advisor on War Crimes to the Office of the Prosecutor.[63] The Defence provides the following examples:

- Article 19(3): "the Prosecutor may seek a ruling from the Court";
- Article 19(8): "[p]ending a ruling by the Court, the Prosecutor may seek authority from the Court";
- Article 19(10): "[i]f the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17";
- Article 68(4): "[t]he Victims and Witnesses Unit may advise the Prosecutor and the Court"; and
- Rule 58: "[t]he Court shall transmit a request or application received under sub-rule 2 to the Prosecutor and to the person referred to in article 19, paragraph 2."

92. In all these instances, the use of the term "Prosecutor" in the same sentence and contemporaneously with the language of "the Court" demonstrates that the two organs are separate and distinct entities under the Rome Statute.

2.2.4. Conclusion

93. A comprehensive and systematic analysis of the Rome Statute and the Rules of Procedure and Evidence makes it clear that the Prosecutor is not subsumed within the expression "the Court" in reference to the various functions exercised thereby.

[63] K. J. Heller, A Dissenting Opinion on the ICC and Burundi, *Opinio Juris*, 29 October 2017.

2.3. *"Preliminary examination" is not a "matter under consideration" under Article 127(2)*

2.3.1. *There is no reasonable interpretation of the Rome Statute that supports the view that a "matter under consideration" would include a "preliminary examination"*

94. The Defence submits that a "preliminary examination" is not a "matter under consideration" under Article 127(2).

95. A preliminary examination is not a formal procedural phase defined in the Rome Statute, but is, rather, a catch-all phrase designed to cover internal deliberations within the Office of the Prosecutor and a possible decision, at some future point in time, to open a formal investigation. In other words, this term refers to the Prosecution doing its job under the Rome Statute, or, indeed, the work of any Prosecutor anywhere in the world: choosing what situations to investigate and whom to prosecute. When the ICC Prosecutor contends, in defence of his position, that "[i]f the Prosecution were not to conduct this assessment there would be no investigations or prosecutions by this Court"[64], he is stating the obvious: that without a Prosecutor, there would be no prosecutions.

96. This internal process may commence with an OTP staff member simply reading an NGO report on a particular ICC Situation and taking no further action.[65] The fact that the OTP has decided to self-regulate and formalise this "preliminary examination" process in a policy paper does not change its ultimately internal, informal, and non-justiciable nature. That the OTP *may*, in certain circumstances and in the context of such preliminary examinations, take more formal actions[66] does not change the practical reality that even the most

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[64] Philippines Situation, OTP Response to the Government's Appeal Brief, para. 34.
[65] *See also* K. J. Heller, A Dissenting Opinion on the ICC and Burundi, *Opinio Juris*, 29 October 2017.
[66] Philippines Situation, Prosecution's Response to the Philippine Government's Appeal Brief, para. 35.

mundane acts – such as analysing open-source information – constitutes a "preliminary examination".

97. As noted by Judges Brichambaut and Lordkipanidze:

> [a]s to the second limb of the above mentioned sentence in article 127(2) of the Statute, we consider that the Prosecutor's preliminary examinations are not a "matter […] under consideration by the Court" within the meaning of article 127(2) of the Statute, and that a situation is only under consideration by the Court once a pre-trial chamber authorises an investigation into that situation. This is largely due to the informal nature of the preliminary examinations, which do not carry sufficient weight for engaging the Court's jurisdiction, in the absence of a pre-trial chamber's formal authorisation of the commencement of an investigation, pursuant to article 15 of the Statute. We consider that the last sentence of article 127(2) of the Statute cannot be relied upon to extend the Prosecutor's power to submit an article 15(3) request beyond the time the withdrawal has become effective.[67]

98. It is unreasonable to interpret the Rome Statute as permitting an internal decision by the OTP to take an interest in a Situation as sufficient to trump a State's sovereign decision to withdraw from the Rome Statute. This is even more pertinent given the one-year notice period for a withdrawal to take effect. This would mean that the Prosecution, in order to circumvent the legal effect of the withdrawal, need only announce that it is conducting a "preliminary examination" during that one-year period – just to grant "the Court" indefinite time and capacity to exercise jurisdiction in any given situation. This is wholly impracticable and inapposite.

99. Judges Brichambaut and Lordkipanidze both agreed that

> the interpretation of article 127(2) of the Statute, as espoused by the Prosecutor, cannot be reconciled with the principles of the Vienna Convention on the Law of Treaties and with the intention of the drafters of the Statute, as that interpretation would render article 127 meaningless by allowing to trigger the Court's

[67] Philippines Situation, Dissenting Opinion, para. 35.

> jurisdiction indefinitely. In our view, article 127 of the Statute is contained in the "Final clauses" (Part 13 of the Statute). The provisions contained in that part cannot alter the carefully crafted jurisdictional regime contained in Part 2 of the Statute.[68]

100. Professor Alex Whiting, former Coordinator of Prosecutions and Investigations (partially during the tenure of Prosecutor Fatou Bensouda)[69] himself acknowledged that

> [t]he preliminary examination stage is not formally mentioned in the Rome Statute, but is simply implied from the Prosecutor's obligation to assess whether certain jurisdictional and admissibility requirements have been met before commencing an investigation. In addition, to the extent Article 127 seeks to give departing States Parties (and nationals within those States Parties) notice of the scope of the ICC's ongoing jurisdiction, defining the "continued consideration of any matter" to include preliminary examinations would not necessarily further that goal, since there is no obligation that the Prosecutor publicly announce that she has commenced a preliminary examination (though ordinarily she does so). Finally, defining the "continued consideration of any matter" to include preliminary examinations risks creating an odd incongruity in the Statute: the ICC would have ongoing jurisdiction over the subject of the preliminary examination, but the departing State Party would have no duty to cooperate after departure because that duty is limited by Article 127(2) to "investigations and proceedings" already commenced before the effective date of departure".[70]

101. The Defence observes that there is, technically, no legal need to discuss whether Article 127(2) should even cover "preliminary examinations". Simply put, there are no legal or jurisdictional limitations on the Prosecution's ability to open a preliminary examination into any situation as it sees fit, even that concerning a non-State Party. Technically, the Prosecution is free to open, and to keep open, a preliminary examination in relation to a situation in a withdrawing State,

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[68] *Id*. para. 36.
[69] *See* Prof. Alex Whiting, Head of Investigations, Kosovo Specialist Prosecutor's Office, Prosecutions Coordinator and Investigations Coordinator at the International Criminal Court (2010-2013).
[70] A. Whiting, If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?, *Just Security*, 12 October 2016.

even in the absence of Article 127(2). There thus exists no reason to consider whether or not Article 127(2) applies to "preliminary examinations".

2.3.2. Other sources support a narrower reading of Article 127(2)

102. The *travaux préparatoires* to the Rome Statute do not provide a definitive answer as to the interpretation of a "matter under consideration by the Court".

103. It is notable, however, that the only provision in respect of withdrawal in the 1994 draft Statute – also present in the draft discussed at the 1996 Preparatory Committee – was phrased in the following way: "withdrawal does not affect proceedings **already commenced** under this Statute".[71] This appears to indicate that, from the outset, a narrow interpretation was intended as to the kinds of activities that could continue at the Court after a withdrawal.

104. In the 1997 Preparatory Committee, the draft that would later become Article 127 read as follows: "Withdrawal shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The withdrawal shall not affect any obligations of the withdrawing State under the Statute".[72]

105. The language "nor shall it prejudice in any way the continued consideration of any matter which is already under consideration by the Court prior to the date at which the withdrawal becomes effective" only appears during the 1998 Preparatory Committee,[73] and there is no indication that the participants intended to deviate from the narrow understanding of the consequences of withdrawal as laid down in 1994. The same holds true for the 1998 diplomatic

[71] United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/51/22, vol. II (1996), Article 22(3), p. 73.
[72] United Nations, Draft text relating to final clauses, final act and establishment of a preparatory commission, A/AC.249/1998/L.11 (1997), p. 4.
[73] United Nations, Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/Add.1 (1998), p. 167.

conference, where the final version of Article 127 was adopted without any specific discussion on the definition of a "matter already under the consideration by the Court". Interestingly, it appears from the records available that certain NGOs, later regrouped under the umbrella of the Coalition for the International Criminal Court, adopted a narrow understanding of this provision:

> A state can notify the UN if it withdraws from the statute. This would take effect a year later. But the state would still be obligated to pay contributions incurred during the period of membership. Withdrawal would not affect the "continued consideration of any matter which is already under consideration" by the Court prior to withdrawal. In other words, **once a case is under way** a State could not avoid the Court simply by withdrawing from the Statute.[74]

106. The Defence points out , incidentally, that versions of the Rome Statute, in other languages, seem to support a narrower understanding of the expression "matter". Indeed, the French version of the Rome Statute uses the word "*affaires*", which is clearly narrower in the context of the Rome Statute. It also appears that the Chinese version of the Rome Statute adopts a narrow term.[75]

2.3.3. Article 70 of the Vienna Convention on the Law of Treaties is irrelevant

107. Finally, the Defence submits that reference to Article 70 of the Vienna Convention on the Law of Treaties ("VCLT") does not provide an alternative understanding of Article 127(2).

108. Article 70(1) of the VCLT provides that:

> [u]nless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not

[74] CICC, ON THE RECORD: Your link to the Rome conferences for the establishment of an international criminal court, Volume 1(20) CICC Team Reports (14 July 1998), p. 8.
[75] T. Yudan, The Impact of Burundi's Withdrawal upon the Burundi Situation, *Yudan's Blog Relating to Law,* 21 December 2016.

affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.[76]

109. **First**, it is apparent from Article 70(1) that the rules governing the consequences of treaty termination are of a suppletory nature — they apply only when the treaty itself does not provide otherwise. This reflects the principle of *lex specialis*, whereby specific provisions within a treaty override the general rules of the Convention, as confirmed by the International Law Commission.[77] In this context, Article 127 is clearly *lex specialis* on withdrawal and recourse to Article 70(1) is unwarranted. The *lex specialis* nature of Article 127 on withdrawal has been recognised as such,[78] including by one of the negotiators present at the preparatory negotiations in Rome, Roger Clark[79].

110. **Second**, Article 70(1) does not change the interpretation of Article 127(2) proposed in the current challenge. Indeed, prior to the exercise of jurisdiction by the Court, the only "legal situation" that had been created through the execution of the treaty before the Philippines' withdrawal is that the Court may be considered to have jurisdiction over alleged crimes committed while the Republic of the Philippines was a State Party. This is a separate legal situation than the one that is created following the exercise of jurisdiction by the Court after the withdrawal of the Republic of the Philippines. The same holds true for the Prosecutor's "preliminary examination" which, even assuming that it might be a "matter" for the purposes of Article 127(2), does not create any

[76] Article 70(1), VCLT.
[77] International Law Commission, Draft Articles on the Law of Treaties with commentaries, 18th session, 1966, p. 265.
[78] S. Wittich, "Article 70 – Consequences of the termination of a treaty", in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer (2012), p. 1199.
[79] K. Ambos, "Article 127" in *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, pp. 2922-2925.

particular "legal situation" and is, in any case, different from the legal situation created by the Court's exercise of jurisdiction.[80]

2.3.4. *Even if a "preliminary examination" were a "matter under consideration", this would not allow the Court to ignore the plain language of Article 12 and exercise jurisdiction after the Philippines' effective withdrawal from the Rome Statute*

111. Even if a "preliminary examination" were, *arguendo*, considered to be a "matter under consideration" by the Court, this has no bearing on whether the Court was allowed to exercise jurisdiction under Article 12, which is a different "matter" entirely.

112. In other words, the only consequence of such a finding is that the OTP can continue its preliminary examination, but it has no bearing whatsoever on whether the Court can exercise jurisdiction under Article 12.

113. There is, on the one hand, one "matter under consideration by the Court", that is the "preliminary examination" and, on the other hand, another "matter under consideration by the Court", namely the decision to open an investigation. These matters "are definitely not identical since the 'consideration' of each of them is carried out by different organs of the Court and are subject to distinct provisions. Presenting them as one and the same 'matter' in the singular would be stretching this notion to the point where it loses any meaning".[81]

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[80] *See* S. Vasiliev, Piecing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2), *Opinio Juris*, 6 November 2017.
[81] *Id*.

V. CONCLUSION AND RELIEF SOUGHT

114. The liberty of the individual is at stake and the present Prosecutor should not be fighting tooth and nail to perpetuate or defend an erroneous decision taken by his predecessor. Indeed, the Defence is informed that neither the former or current Prosecutor sought input from any of their 'special advisors' on the issues pertinent to the current debate.

115. Moreover, and as can now be revealed, no less than the incumbent President of the Philippines, Ferdinand Marcos Jr, has impliedly accepted, for jurisdictional reasons, that former President Duterte should not be tried at the International Criminal Court. In an exchange of letters, President Marcos even gave a written undertaking to the effect that his government would not "assist the ICC, in any way, shape or form".[82]

116. In light of the aforementioned, the Defence reiterates that the preconditions for the exercise of jurisdiction under Article 12 in the Situation of the Philippines were not met at the time the Pre-Trial Chamber authorised the opening of an investigation on 15 September 2021. The Republic of the Philippines was no longer a State Party to the Rome Statute at that critical point in time.

117. As a consequence, all procedural steps taken in the Situation and, subsequently, in the case against Mr Rodrigo Roa Duterte, lack legal foundation and should be nullified forthwith.

[82] Video, First Hearing of the Senate of the Republic of the Philippines, Committee on Foreign Relations, chaired by Senator Imee Marcos, 20 March 2025, at 1:09:15.

118. The Defence requests the Pre-Trial Chamber find that there is no legal basis for the continuation of the proceedings against Mr Rodrigo Roa Duterte and to order his immediate and unconditional release.

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Prof. Dr. Dov Jacobs
Associate Counsel for Mr Rodrigo Roa Duterte

Dated this 1st of May 2025

At The Hague, The Netherlands