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**International  
Criminal  
Court**

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Date: **9 June 2025**

**PRE-TRIAL CHAMBER I**

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

**SITUATION IN THE REPUBLIC OF THE PHILIPPINES**

**IN THE CASE OF**

***PROSECUTOR V. RODRIGO ROA DUTERTE***

**Public**

**Public redacted version of “Prosecution response to ‘Defence Challenge with Respect to Jurisdiction’”**

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## INTRODUCTION

1. Should this case proceed to trial, the Court will determine whether Mr Duterte—as Mayor of Davao City and then President of the Republic of the Philippines, then a State Party to the Rome Statute—was responsible for the murder of numerous civilians on the territory of the Philippines carried out as part of a widespread and systematic attack pursuant to a State or organisational policy: a crime against humanity.<sup>1</sup> This is one of the archetypal harms that the Court was created to deter and to punish.
2. Yet Mr Duterte’s administration withdrew the Philippines from the Statute even as the alleged campaign continued, commencing this process within days of the former Prosecutor announcing that she had initiated a preliminary examination of these allegations—the statutory precondition to requesting the Pre-Trial Chamber’s leave to open an investigation. While the Prosecutor then duly proceeded to make such a request, which the Chamber granted, the Philippines’ withdrawal from the Statute had taken effect in the intervening period.
3. The Defence for Mr Duterte now asks the Court to find that this withdrawal bars the Court’s exercise of jurisdiction.<sup>2</sup> This strikes at the heart of Philippines’ status as a State Party at the time of the alleged crimes. By an *ex post facto* act, it would render nugatory its own sovereign decision to protect its civilian population from potential article 5 crimes by accepting the jurisdiction of the Court in the first place. As such, in its decision, the Chamber is not merely called to recognise that a State Party has an effective right to withdraw from the Statute, which it does. Crucially, it must also ensure that a State Party’s decision to *accede* to the Statute is no less effective in protecting against article 5 crimes for as long as it is in force.
4. Concretely, the argument on behalf of Mr Duterte rests on two fundamentally flawed propositions. For his challenge to be granted, he must succeed on both.
5. First, the Defence claims (at least for situations in the absence of a referral) that the Statute makes the Court’s jurisdiction conditional not only on the Philippines’ status as a State Party (i) when the alleged crimes were *carried out* but also (ii) when the Court’s exercise of jurisdiction was *triggered* in accordance with article 13(c) of the Statute.<sup>3</sup> The success of this argument depends on the correct interpretation of article 12(2).

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<sup>1</sup> See e.g. [ICC-01/21-83](#) (“Warrant of Arrest”), paras. 10-25.

<sup>2</sup> See generally [ICC-01/21-01/25-121](#) (“Challenge”).

<sup>3</sup> See [Challenge](#), paras. 13-25, 27. See also paras. 28-48.

6. Second, the Defence further contends that article 127(2)—governing withdrawals from the Statute—allows the Court to be deprived of jurisdiction by a withdrawal in the present circumstances. This is notwithstanding the express provision that a State Party is not discharged from its obligations under the Statute as a consequence of withdrawal, and that the Court’s “continued consideration of any matter which was already under consideration” shall not be “prejudice[d]”.<sup>4</sup>

7. The Chamber should reject both Defence arguments, which misinterpret the relevant provisions of the Statute, and find that the Court lawfully exercises jurisdiction over Mr Duterte.

8. In so doing, the Chamber should follow and as necessary elaborate upon its own reasoning in issuing the warrant for Mr Duterte’s arrest,<sup>5</sup> and the reasoning of the Pre-Trial Chamber in its former composition in authorising the investigation of the *Situation in the Philippines*,<sup>6</sup> as well as the reasoning of the Pre-Trial Chamber in the *Situation in Burundi*.<sup>7</sup> While two judges of the Appeals Chamber subsequently expressed concern about the jurisdictional question in the context of admissibility litigation,<sup>8</sup> this was not shared by the majority.<sup>9</sup> The present litigation now offers an opportunity to allay these concerns definitively, in circumstances where all Parties can “make observations on the issue”, enabling the Pre-Trial Chamber to “make a fully informed decision”.<sup>10</sup>

## CONFIDENTIALITY

9. This response is filed confidentially out of an abundance of caution, in accordance with regulation 23bis(2) of the Regulations of the Court, since one passage refers in general terms to the existence of matters which were not public. A public redacted version of this response will be filed shortly.

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<sup>4</sup> See [Challenge](#), paras. 49-113.

<sup>5</sup> [Warrant of Arrest](#), paras. 6-7.

<sup>6</sup> [ICC-01/21-12](#) (“Article 15(4) Decision”), para. 111.

<sup>7</sup> See [ICC-01/17-9-Red](#) (“Burundi Article 15(4) Decision”), paras. 23-26.

<sup>8</sup> See generally [ICC-01/21-77-OPI OA](#) (“Article 18(2) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze”).

<sup>9</sup> See generally [ICC-01/21-77 OA](#) (“Article 18(2) Appeal Judgment”), paras. 48-57.

<sup>10</sup> [Article 18\(2\) Appeal Judgment](#), para. 55. See also para. 57.

## SUBMISSIONS

10. The Chamber should dismiss the Challenge. The Court is lawfully exercising its jurisdiction over this case, in accordance with articles 5-8 and 11-13 of the Statute, because the Philippines was a State Party when the alleged crimes were committed. It is immaterial whether the Philippines was still a State Party when the exercise of the Court's jurisdiction was ultimately triggered because States Parties accept without limitation the Court's jurisdiction over conduct occurring while the Statute is in force. This is the correct interpretation of articles 11-13, and is also consistent with the well-established customary law rule precluding any purely procedural bar (such as a limitation or prescription period) on the investigation and prosecution of core international crimes. The Defence is incorrect to interpret article 12(2) as establishing anything to the contrary.

11. Furthermore, notwithstanding the correct interpretation of article 12(2), article 127(2) still provides an important safeguard where a State Party withdraws from the Statute. This provision achieves three things. First, it establishes a general principle, consistent with the default approach under article 70(1) of the Vienna Convention on the Law of Treaties ("VCLT"), that withdrawal does not discharge a State Party from its obligations under the Statute. Second, it specifically regulates cooperation under Part 9 of the Statute once a withdrawal has become effective. Third, of particular relevance for this case, it affirms that the Court shall not be prejudiced in its continued consideration of any matter which was already under consideration at the time a withdrawal becomes effective.

12. Reading article 127(2) as a whole, therefore, it can only be correctly interpreted to mean that a State Party cannot by its withdrawal deprive the Court of its exercise of jurisdiction over crimes allegedly committed while the State was in force, provided that its "consideration" had been timely triggered—either by a State Party referral, leading to a preliminary examination, or (as in this case) the Prosecutor's decision of their own motion to initiate a preliminary examination. The Defence is incorrect to interpret article 127(2) as establishing anything to the contrary.

13. The following paragraphs explain each of these submissions in more detail.

**A. The Court lawfully exercises jurisdiction over this case because the Philippines was a State Party when the alleged crimes were committed**

14. The Defence distinguishes between the ‘substantive jurisdiction’ of the Court and the Court’s ‘exercise of jurisdiction’, and as a consequence of this distinction asserts that the Philippines’ status as a State Party must be verified on *two* occasions (at the time of the alleged crimes *and* at the time the Court’s exercise of jurisdiction is triggered).<sup>11</sup> However, this semantic distinction is incorrect because it reads the relevant provisions of the Statute in isolation from one another, rather than together. Correctly interpreted, articles 5-8 and 11-13 provide for a *single* temporal condition—that the Philippine was a State Party when the alleged crimes were committed.

15. It is undisputed that, in combination, articles 5, 7, and 12(1) provide the basis for the Philippines’ acceptance of jurisdiction *ratione materiae* over the crimes against humanity alleged in this case. Nor is it disputed that article 11 provides the basis for the Philippines’ acceptance of jurisdiction *ratione temporis* “with respect to crimes committed after the entry into force of this Statute”—in the case of the Philippines, that date was 1 November 2011. Reading article 11(2) with article 127(1), this jurisdiction *ratione temporis* terminated on 17 March 2019, one year after the Philippines deposited its notification of withdrawal, in the sense that the Philippines no longer accepted the Court’s jurisdiction over crimes committed on that date or thereafter.

16. What is disputed in this case is the correct interpretation of article 12(2), governing jurisdiction *ratione loci* and jurisdiction *ratione personae*. The conventional view is that, by this provision read with article 12(1), States Parties accept the jurisdiction of the Court over their territory, and their nationals regardless of their location, with regard to the crimes specified in articles 5 and 12(1) and throughout the temporal period specified in article 11. This view is reflected implicitly in the arrest warrant issued for Mr Duterte, which states:

As to the temporal jurisdiction, the Chamber recalls that, ‘[w]hile 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

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<sup>11</sup> See e.g. [Challenge](#), paras. 13 (“it is essential to differentiate between jurisdiction *stricto sensu* on the one hand and the *exercise* of jurisdiction on the other”, emphasis added), 15 (“criteria of ‘nationality’ and ‘territoriality’ [in article 12(2)] 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”, emphasis added), 21 (“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 [in article 12(2)] is when the Court’s jurisdiction is triggered under Article 13”).

*was a State Party, from 1 November 2011 up to and including 16 March 2019.*’ It further recalls that ‘[t]he Court’s jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which the Philippines was a party at the time of the alleged crimes for which the investigation was authorised. *By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty [...]. These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines[’] withdrawal from the Statute.*’<sup>12</sup>

17. Similar reasoning is expressed in the article 15(4) decision in this situation, issued by the Chamber in its former composition, which states:

*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 the 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.*<sup>13</sup>

18. The principal basis for the alternative view of article 12(2) espoused by the Defence is grammatical. It asserts that “the use of the present simple tense in [a]rticle 12(2) [...] indicates that a State must be a party to the Rome Statute *contemporaneously*” with the trigger for the exercise of the Court’s jurisdiction under article 13.<sup>14</sup> Judges Perrin de Brichambaut and

<sup>12</sup> [Warrant of Arrest](#), para. 6 (emphasis added, citing [ICC-01/21-56-Red](#) (“Article 18(2) Decision”), para. 26; [Article 18\(2\) Appeal Judgment](#), paras. 48-58).

<sup>13</sup> [Article 15\(4\) Decision](#), para. 111 (emphasis added, citing [Vienna Convention on the Law of Treaties](#) (“VCLT”), art. 70; [Burundi Article 15\(4\) Decision](#), paras. 23-26; [ICC-02/05-01/20-391](#) (“*Abd-Al-Rahman* Jurisdiction Decision”), para. 33; [Statute](#), art. 127(2)).

<sup>14</sup> [Challenge](#), para. 23.



Lordkipanidze also reached similar conclusions, finding that “the preconditions to the exercise of the Court’s jurisdiction must exist at the time that the jurisdiction is triggered”.<sup>15</sup>

19. In the Prosecution’s respectful submission, the Defence view is incorrect. Article 12(2) does not require the conditions of territoriality and nationality to be satisfied at the time of the Court’s exercise of jurisdiction, but rather at the time the alleged crimes were committed. This follows from the correct interpretation of the Statute according to the principles in the Vienna Convention on the Law of Treaties or VCLT, as consistently required by the Court.<sup>16</sup> It is also consistent with the Court’s own prior decisions on this specific issue. Furthermore, it ensures that the jurisdictional regime of the Statute remains consistent with the well-established principle in customary international law precluding any purely procedural bar (such as a limitation or prescription period) to the exercise of jurisdiction over core international crimes.

*A.1. In “accepting the jurisdiction of the Court” under articles 11-13, the Philippines accepted the Court’s exercise of jurisdiction over article 5 crimes without limitation*

20. The Statute is to be interpreted in accordance with the general rule of interpretation in article 31 of the VCLT, which requires an interpretation “in good faith in accordance with the ordinary meaning” of the relevant terms “in their context and in the light of [the] object and purpose” of the treaty.<sup>17</sup> The general rule of interpretation in article 31 of the VCLT requires the *joint* consideration of ordinary meaning, context, and object and purpose, since these factors are necessarily inter-related.<sup>18</sup> The key question is which interpretation *best* satisfies all three of the relevant considerations. Yet in the Challenge, the Defence fails to interpret article 12(2)

<sup>15</sup> [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), paras. 25-26 (citing [D. Jacobs, ‘Burundi withdraws from the ICC: what next for a possible investigation?’, \*Spreading the Jam\*, 28 October 2017](#) (“Jacobs (28 October 2017)”). See also [S. Vasiliev, ‘Piecing the withdrawal puzzle: may the ICC still open an investigation in Burundi? \(Part 2\), \*Opinio Juris\*, 6 November 2017](#) (“Vasiliev”).

<sup>16</sup> See e.g. [ICC-02/04-01/15-2022-Red A](#) (“Ongwen Appeal Judgment”), para. 1061; [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#) (“Bemba *et al.* Appeal Judgment”), para. 675; [ICC-01/04-01/06-3121-Red A5](#) (“Lubanga Appeal Judgment”), para. 277; [ICC-01/04-168 OA3](#) (“DRC Extraordinary Review Appeal Judgment”), para. 33.

<sup>17</sup> [VCLT](#), art. 31(1).

<sup>18</sup> See e.g. [Aguas del Tunari v. Bolivia \(ICSID ARB/02/03\), Decision on Respondent’s Objections to Jurisdiction, 21 October 2005](#) (“*Aguas del Tunari v. Bolivia*”), para. 91 (“Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with (1) the ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty’s object and purpose, and by cycling through this three step process iteratively closes in upon the proper interpretation. In approaching this task, it is critical to observe two things about the general rule of interpretation found in the Vienna Convention. First, the Vienna Convention does not privilege any one of these three aspects of the interpretation method. The meaning of a word or phrase is not solely a matter of dictionaries and linguistics. [...] Second [...] The Vienna Convention’s directive to look at the ordinary meaning of a word in its context and in light of the object and purpose of the treaty is intended to [sic] (1) to find the intent of the parties in the specific instrument, (2) to respect the possibility that the parties have used the instrument to address issues of mutual concern in innovative ways, and (3) to not forcibly conform the specific aims of a treaty to general assumptions about the intent of states, assumptions which necessarily are based on assessments of past practice”). See also [R. Gardiner, \*Treaty Interpretation\*, 2<sup>nd</sup> Ed. \(OUP: 2015\)](#) (“Gardiner”), p. 162.

with sufficient rigour according to this method, but instead emphasises the textual limb of the test<sup>19</sup> and its own partial analysis of the relevant context.<sup>20</sup>

A.1.a. The terms of article 12(2) in their ordinary meaning do not require that the territorial State or State of the suspect's nationality was a State Party when the Court's jurisdiction is exercised

21. Article 12(2) states materially (with emphasis added) that:

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 [...];

(b) The State of which the person accused of the crime is a national.

22. According to the Defence, use of the “present simple tense”—*i.e.*, the word “are” in article 12(2), emphasised above—means that “a State must be a party to the Rome Statute *contemporaneously* with the Court’s decision to exercise jurisdiction”, with the result that “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.”<sup>21</sup> The Defence also recalls that article 12 as a whole is subtitled “[p]reconditions to the exercise of jurisdiction”, which it considers to imply that the preconditions of “territoriality and nationality” in article 12(2)(a) and (b) “do not establish jurisdiction *per se*” but rather “must be assessed [...] at the moment the Court is considering whether to exercise its jurisdiction.”<sup>22</sup>

23. The Defence fails to show that its interpretation of either of these terms amounts to their “ordinary meaning”.

24. First, the significance of the use of the present simple tense (the term “are”) is open to multiple interpretations. While it is possible to read this as meaning that the State of territoriality or the State of the suspect’s nationality must be a State Party *when the Court exercises its jurisdiction*, it is also possible to read this as meaning that the State of territoriality

<sup>19</sup> [Challenge](#), paras. 18-19, 21, 23.

<sup>20</sup> [Challenge](#), paras. 15-16, 20-21.

<sup>21</sup> [Challenge](#), para. 23.

<sup>22</sup> [Challenge](#), para. 18.

or the State of the suspect's nationality must be a State Party *at the time of the alleged crimes*. Typically, article 12(2) has not been seen as establishing any temporal precondition, but merely as setting out the (alternative) preconditions of territoriality or the suspect's nationality.<sup>23</sup> Necessarily, these must be established at the time of the alleged crimes.<sup>24</sup>

25. The reasonableness of this latter interpretation is illustrated by the fact that several Pre-Trial Chambers have already understood article 12(2) in precisely this way.<sup>25</sup> While the Defence criticises these chambers' "failure" to apply its view of "the plain language of Article 12(2)",<sup>26</sup> it does not show (or even assert) that their reading was not at least possible on the face of the provision. It cannot. Even commentators who may be sympathetic to some of the Defence arguments (for the reasons expressed in the Challenge, or otherwise), accept at least the *possibility* of reading article 12(2) as referring to the situation at the time of the alleged crimes.<sup>27</sup>

26. Second, the title of article 12, "preconditions to the exercise of jurisdiction", does not support the Defence's interpretation.<sup>28</sup> The Statute uses the concept of jurisdiction *simpliciter*

<sup>23</sup> See e.g. [ICC-01/18-143](#) ("Palestine Article 19(3) Decision"), para. 90 ("Article 12 of the Statute contains the alternative preconditions under which the Court may exercise jurisdiction: the Court's *ratione loci* jurisdiction under article 12(2)(a) or its *ratione personae* jurisdiction under article 12(2)(b)"). See also para. 93.

<sup>24</sup> For example, consider a national of State A who carries out alleged article 5 crimes on the territory of State A, a non-State Party. After the crimes, the national becomes a national of State B, which at that time and all material times previously was an ICC State Party. If article 12(2)(b) were not understood to anchor the Court's jurisdiction *ratione personae* to the time of the alleged crimes, but instead to some later time, this would seem to allow the Court to exercise jurisdiction over the national even though there was no jurisdictional link between their conduct and the Rome Statute at the time of the alleged crimes.

<sup>25</sup> See especially [Burundi Article 15\(4\) Decision](#), para. 24. See also [Article 15\(4\) Decision](#), para. 111; [Article 18\(2\) Decision](#), para. 26; [Warrant of Arrest](#), para. 6.

<sup>26</sup> See [Challenge](#), para. 31 (concerning the [Burundi Article 15\(4\) Decision](#)).

<sup>27</sup> See e.g. [Jacobs \(28 October 2017\)](#) ("one could wonder if the 'legal situation' that was created through the execution of the treaty is not simply the fact that, under Article 12, the ICC would have jurisdiction over crimes committed in the territory of [a State Party] or by nationals of that State because [it] was a State party at the time of the commission of the alleged crimes. As a consequence of this approach the ICC would still have jurisdiction even after withdrawal [...] [I]t should be recalled that through a weird semantic trick, Article 12 turns out to be not strictly a jurisdictional provision: it is titled 'preconditions to the exercise of jurisdiction', which makes it out to be more of a procedural provision than a jurisdictional one. As a result, Article 12 does not actually say that the Court has jurisdiction over crimes committed on the territory of a State party or by a national of a State party, which is what you would expect from a jurisdictional provision. Article 12 says that the Court can only *exercise* jurisdiction if the State of nationality or the territorial State is a party to the Statute. This would logically suggest that the adequate time to determine whether the pre-conditions of Article 12 are met is when the Court is considering exercising jurisdiction, not when the crimes were actually committed [...] Despite these difficulties, the jurisdictional approach might be worth a try [...] [E]verybody I know, academics and Judges alike, does consider Article 12 as a jurisdictional clause, despite its clear wording to the contrary", emphasis added); [G. Chiarini, "Guerra alla Droga" o Crimini contro l'Umanità? Una valutazione processuale del caso delle Filippine davanti alla Corte Penale Internazionale.](#) *Cassazione Penale, Panorama Internazionale* Sept. 2021, No. 9, 2914-2937, pp. 2931-2932 (informal translation: "the provisions of [article 12(1) and (2)] continue to apply, which provide that the State, once it becomes a party to the Statute, accepts the jurisdiction of the ICC over the offences provided for in Article 5 in cases where [article 12(2)(a) or (b) apply]").

<sup>28</sup> *Contra* [Challenge](#), para. 18. See also paras. 14-17.

when describing what the *Court as an institution* is *generally* competent to adjudicate—that is, only article 5 crimes,<sup>29</sup> committed by natural persons,<sup>30</sup> which occur after the entry into force of the Statute.<sup>31</sup> It uses the concept of “preconditions to the exercise of jurisdiction” to describe the various circumstances in which the Court may *take action with regard to a particular State*.<sup>32</sup> Entitling a provision “precondition to the exercise of jurisdiction” does not imply the precise time when that criterion must be satisfied—to the contrary, it is neutral on the matter.<sup>33</sup> This highlights the importance of a contextual reading of the relevant provisions, as well as the object and purpose of the Statute, to interpret article 12(2) correctly.<sup>34</sup>

A.1.b. The context of article 12(2) supports the interpretation that the territorial State or State of the suspect’s nationality need not be a State Party when the Court’s jurisdiction is exercised

27. The critical context for the correct interpretation of article 12(2) is its relationship with articles 11(2), 12(1) and 29. These confirm one open interpretation of the terms of article 12(2), requiring that the State of territoriality or the State of the suspect’s nationality must be a State Party *at the time of the alleged crimes*, but need not necessarily remain so when the Court exercises its jurisdiction.

28. First, article 11(2) provides that, in the absence of a declaration by the relevant State Party under article 12(3), the Court may “exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State”. This framing of the Court’s exercise of jurisdiction *ratione temporis* is anchored in the time of the alleged crimes, and is prospective and unlimited. It reflects the underlying assumption that once a State has become a State Party, it will remain so. This is the approach taken generally in Part 2 of the Statute, with the exceptional possibility of withdrawal by a State Party being contemplated only in Part 13 (final clauses).<sup>35</sup>

<sup>29</sup> See [Statute](#), art. 5 (sub-titled “Crimes within the jurisdiction of the Court”).

<sup>30</sup> See [Statute](#), art. 25(1) (sub-titled “Individual criminal responsibility”, but providing that “[t]he Court shall have jurisdiction over natural persons pursuant to this Statute”).

<sup>31</sup> See [Statute](#), art. 11 (sub-titled “Jurisdiction *ratione temporis*”).

<sup>32</sup> See [Statute](#), art. 12 (sub-titled “Preconditions to the exercise of jurisdiction”). This remains clear, even if some additional provisions may also appear to constitute preconditions to the exercise of jurisdiction in this sense: *see e.g.* art. 11(2).

<sup>33</sup> Notably, article 12(1) indisputably applies from the time at which “[a] State becomes a Party to this Statute” (and must be read with article 11(2)), whereas article 12(2) applies *either* at the time of the alleged crimes *or* (according to the Defence) at the time the Court’s exercise of jurisdiction is triggered.

<sup>34</sup> See *above* para. 20; *below* paras. 27-43.

<sup>35</sup> With regard to article 127(2), *see below* paras. 48-94.

29. As such, read with article 11(2) as context, the use of the simple present tense in article 12(2) is unlikely to reflect the drafters' anticipation of the exceptional scenario where a State Party withdraws immediately after the alleged crimes were committed (and potentially before the exercise of the Court's jurisdiction). It is much more likely that the use of the simple present tense was a grammatical convenience intended to reflect the status of the relevant State as a State Party at the time of the alleged crimes (which is essential for the temporal precondition to the exercise of the Court's jurisdiction), rather than at the later time period when the Court's exercise of jurisdiction comes to be triggered (which is purely procedural).

30. Second, article 12(1) provides that "[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." This is the only provision which expressly reflects the State Party's *acceptance* of the Court's jurisdiction (stated in the text) *and* the circumstances in which it may be exercised (stated in the title of the provision).<sup>36</sup> As such, while article 12(1) refers expressly to the Court's jurisdiction *ratione materiae*, it must be understood also to reflect the State Party's plenary and unconditional acceptance of the other dimensions of the Court's jurisdiction—that is, *ratione temporis* (addressed in article 11) and *ratione loci* and *ratione personae* (addressed in article 12(2)). The reference to "the crimes" anchors this acceptance to the time at which alleged crimes are committed.

31. Understanding article 12(1) in this way is significant for the interpretation of article 12(2). If article 12(1) is the basis for the State Party's acceptance of jurisdiction *ratione loci* and *ratione personae*, then article 12(2) merely serves to give further legal definition to those concepts. The *chapeau* of article 12(2) clarifies that these concepts apply not only to States Parties but also to States which have otherwise accepted the jurisdiction of the Court under article 12(3).

32. It would contradict and undermine the acceptance in article 12(1) of the Court's jurisdiction (and its exercise of jurisdiction) if article 12(2) were understood to introduce an additional condition on the Court's exercise of jurisdiction—in effect, that the State Party *does not accept* the Court's jurisdiction if it were to withdraw from the Statute prior to the triggering of the Court's exercise of jurisdiction.

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<sup>36</sup> Cf. [Challenge](#), para. 19.

33. This was precisely the interpretation of the relationship between article 12(1) and 12(2) elaborated by the Pre-Trial Chamber in *Burundi*, and also followed by the different compositions of the Pre-Trial Chamber in this situation and case. As the *Burundi* Pre-Trial Chamber stated:

[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. [...] As a consequence, the *exercise* of the Court's jurisdiction [...] is, as such, not subject to any time limit.<sup>37</sup>

34. It is clear from this reasoning—including the terms it italicised—that the *Burundi* Pre-Trial Chamber did not overlook any terminological distinction between ‘jurisdiction’ and the ‘exercise of jurisdiction’. Rather, it correctly recognised that article 12(1) requires plenary acceptance of *both* the Court's jurisdiction *and* its exercise of jurisdiction in the manner described above.<sup>38</sup> The Defence's concern that this reasoning is technically an *obiter dictum* is immaterial,<sup>39</sup> since the relevant passages show clearly the Chamber's view of the necessity of explaining the legal situation, notwithstanding the existence of another technical basis for its decision.<sup>40</sup> The *Burundi* decision is thus relevant and highly persuasive.<sup>41</sup>

35. Similarly, while the reasoning of the Pre-Trial Chamber in *Abd-Al-Rahman* is more pithy, it also seems to follow the approach of *Burundi* in concluding that the withdrawal of a State

<sup>37</sup> [Burundi Article 15\(4\) Decision](#), para. 24 (emphasis supplied). See also [Article 15\(4\) Decision](#), para. 111; [Article 18\(2\) Decision](#), para. 26; [Warrant of Arrest](#), para. 6.

<sup>38</sup> *Contra* [Challenge](#), para. 31.

<sup>39</sup> Since the Court does not have a strict doctrine of binding precedent, at least between first instance chambers, the distinction between the *ratio decidendi* of a decision and mere *obiter dicta* is not *formally* significant. The nature and detail of the judicial reasoning underlying this distinction may still have some value in a substantial sense, insofar as that judicial reasoning on issues peripheral to a decision is less likely to be developed to the extent that such reasoning is persuasive to other chambers, but this is to be assessed on a case-by-case basis.

<sup>40</sup> *Contra* [Challenge](#), para. 30. See e.g. [Burundi Article 15\(4\) Decision](#), para. 23 (“the Chamber has to define the legal consequences of Burundi's withdrawal [...] In this regard, the Chamber considers that a distinction must be made between, on the one hand, the Court's jurisdiction prior to the entry into effect of the withdrawal and, on the other hand, Burundi's obligations arising from the Statute subsequent to the entry into effect of the withdrawal”).

<sup>41</sup> *Contra* [Challenge](#), para. 32. See also para. 48.



Party “has no effect on the previously established jurisdiction of the Court”.<sup>42</sup> Specifically, as illustrated by the word “also” in the second clause of this sentence,<sup>43</sup> it implies that a State Party’s acceptance of the Court’s jurisdiction and exercise of jurisdiction over alleged crimes committed while the Statute is in force is not conditional on the continued status of that State Party as a State Party.<sup>44</sup>

36. Third, article 29 provides that “[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.” This reflects the principled view of the drafters of the Statute that procedural restrictions should not impede the exercise of jurisdiction over alleged crimes under the Statute. It would thus be contradictory to provide in article 12(2) for a purely procedural bar to the Court’s exercise of jurisdiction over alleged crimes which were committed on the territory of a State Party or by its nationals at a time when that State Party had accepted the Court’s jurisdiction.

37. Again, this was recognised by the *Burundi* Pre-Trial Chamber, which cited article 29 as an additional factor supporting its conclusion that the exercise of the Court’s jurisdiction is, as such, not subject to any time limit.<sup>45</sup> The Chamber thus did not consider article 29 as superseding or precluding the proper application of article 12, but rather as assisting in its correct interpretation.<sup>46</sup>

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<sup>42</sup> See further [Abd-Al-Rahman Jurisdiction Decision](#), para. 33 (“More fundamentally, the Chamber notes that the very idea that the effect of an act triggering the jurisdiction of the Court could be simply taken away by a subsequent act—and one not even relating to the same subject matter—runs counter to fundamental and critical features of the system governing the exercise of the Court’s jurisdiction, as enshrined in the Statute as a whole. Specific mechanisms and guarantees have been built into the Statute precisely against the risk that, once established, the jurisdiction of the Court could be taken away by a simply act purportedly endowed with a contrary effect. The withdrawal of a State Party from the Statute, whilst provided for under article 127 and therefore possible, has no effect on the previously established jurisdiction of the Court”).

<sup>43</sup> This suggests that the clause preceding the word “also” is not concerned with article 127(2), which is addressed in the second clause: see e.g. [Abd-Al-Rahman Jurisdiction Decision](#), para. 33 (“withdrawal of a State Party from the Statute [...] has no effect on the previously established jurisdiction of the Court [...]; *also*, it has no impact either on already ongoing proceedings or on duties of cooperation with the Court in connection with investigations and prosecutions having commenced prior to the date on which the withdrawal becomes effective, nor does it otherwise prejudice ‘the continued consideration of any matter which was already under consideration by the Court’ prior to that date”, emphasis added).

<sup>44</sup> *Contra* [Challenge](#), paras. 40-42, 45.

<sup>45</sup> [Burundi Article 15\(4\) Decision](#), para. 24 (fn. 33).

<sup>46</sup> *Contra* [Challenge](#), para. 31.

A.1.c. The object and purpose of the Statute supports the interpretation that the territorial State or State of the suspect's nationality need not be a State Party when the Court's jurisdiction is exercised

38. Consideration of the object and purpose of the Statute further confirms that article 12(2) requires that the State of territoriality or the State of the suspect's nationality must be a State Party *at the time of the alleged crimes*, but need not necessarily remain so when the Court exercises its jurisdiction. This interpretation strikes the correct balance between the competing considerations at stake.<sup>47</sup>

39. As made clear in the Preamble,<sup>48</sup> the Statute aims to ensure that “the most serious crimes of concern to the international community as a whole” do “not go unpunished”, and “to put an end to impunity”.<sup>49</sup> To this end, the Statute calls both for the “taking [of] measures at the national level” *and* “enhancing international cooperation”, including “guarantee[ing] lasting respect for and the enforcement of international justice”. While the Statute enables a State Party to withdraw from the Statute if it chooses,<sup>50</sup> this will not discharge it “from the obligations arising from this Statute while it was a Party”.<sup>51</sup>

40. Reading article 12(2) as imposing a further condition upon States Parties' acceptance of the Court's jurisdiction—such that they may evade this if they withdraw from the Statute before the Court's exercise of jurisdiction over alleged crimes is procedurally triggered—is inconsistent with this object and purpose. It undermines not only the ability of the Court to take its own direct measures to investigate and prosecute alleged crimes committed while the Statute was in force for a State, but also the complementarity mechanism which encourages States to take appropriate measures at the national level. It makes the practical exercise of jurisdiction subject to the possibility of countervailing action by the State<sup>52</sup>—and in precisely the circumstances when the motives behind that action should be treated with the greatest caution.

<sup>47</sup> See [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 28. *Contra* para. 29.

<sup>48</sup> See e.g. [DRC Extraordinary Review Appeal Judgment](#), para. 33 (acknowledging the significance of the “preamble and general tenor of the treaty”). See also [Gardiner](#), p. 205 (“preambles are of both textual and teleological significance”).

<sup>49</sup> See [ICC-02/04-01/05-610 OA4](#) (“*Kony In Absentia* Confirmation Appeal Judgment”), paras. 74, 78. See also [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 28.

<sup>50</sup> See also [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 28.

<sup>51</sup> [Statute](#), art. 127(1) and (2).

<sup>52</sup> Such matters also engage the question of the correct interpretation of article 127(2), including its practicalities: see further below e.g. paras. 88-93.



41. Reading article 12(2) narrowly (*i.e.*, to exclude any requirement that a State must still be a State Party at the time that the Court’s exercise of jurisdiction is triggered, as argued here) does not mean that the withdrawing State must inevitably accept that the Court will conduct an investigation.

42. To the contrary, *any* State—including a former State Party that has withdrawn from the Statute—may request deferral of the Court’s investigation under article 18(2), once it has formally been initiated under articles 15(4) (for *proprio motu* situations) or 53(1) (for referred situations). Such a request is based on the State itself carrying out investigations and/or prosecutions which sufficiently mirror those anticipated by the Prosecutor of the Court.<sup>53</sup> As such, article 18 provides a mechanism by which a former State Party may assert the primacy of its own domestic proceedings concerning alleged crimes if they are genuine and adequate, and thereby defer the Court’s investigation. Likewise, even if the former State Party for whatever reason does not request deferral under article 18, it can challenge the admissibility of specific cases under article 19 on the basis of its own overlapping domestic proceedings. If the former State Party is unable or unwilling to take any of these actions, this only highlights the importance of ensuring that the Court remains in a position to exercise its jurisdiction directly.

43. None of the above means that a State Party cannot effectively withdraw from the Statute.<sup>54</sup> Rather, it simply ensures that a withdrawing State Party acts consistently with the obligations which it accepted under the Statute, as required by the first sentence of article 127(2)—an obligation which States Parties freely accepted when acceding to the Statute in the first place. The State Party remains able to terminate its *prospective* acceptance of the Court’s temporal jurisdiction, from the point at which the withdrawal becomes effective. It is simply prevented from defeating the effect of its *past acceptance* of the Court’s jurisdiction for those times while it was still a State Party, and the consequences which naturally flow from that acceptance under the Statute.

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<sup>53</sup> See e.g. [Article 18\(2\) Appeal Judgment](#), paras. 2, 106-110; [ICC-02/18-89 OA](#) (“Venezuela Article 18(2) Appeal Judgment”), paras. 10, 182, 281.

<sup>54</sup> *Contra* [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 29. See also [K.J. Heller, ‘A dissenting opinion on the ICC and Burundi,’ \*Opinio Juris\*, 19 October 2017](#) (“Heller (19 October 2017)”) (in the context of discussion of article 127, referring to concern that “the withdrawal provision is a virtual nullity”).

A.2. *The correct interpretation of articles 11-13, and especially article 12(2), is consistent with the customary international law rule excluding limitations over article 5 crimes*

44. Article 21(1) of the Statute provides that, while the Statute and subsidiary legal texts are to be applied in the first place, the Court shall “[i]n the second place” and “where appropriate” apply “the principles and rules of international law”. Article 21(3) further provides that “[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights”. As such, for the purpose of these submissions: (i) principles of customary international law may be applied if any material *lacuna* is identified in the Statute;<sup>55</sup> and (ii) internationally recognised human rights shall inform the application and interpretation of the Statute and subsidiary legal texts.<sup>56</sup>

45. As a matter both of customary international law, and with similar effect to article 29 of the Statute, certain core crimes under international law such as those under the jurisdiction of the Court are now regarded as “by their nature imprescriptible” and therefore may not be subject to any limitation on their investigation or prosecution.<sup>57</sup> As the International Law Commission noted in 2019, “[a]t present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.”<sup>58</sup> In their own practice, various

<sup>55</sup> See [ICC-02/05-01/09-397-Corr OA2](#) (“*Bashir* Immunity Appeal Judgment”), para. 97; [ICC-01/04-01/06-772 OA4](#) (“*Lubanga* Jurisdiction Appeal Judgment”), para. 34; [DRC Extraordinary Review Appeal Judgment](#), paras. 33-39. See also [Palestine Article 19\(3\) Decision](#), para. 110.

<sup>56</sup> See also [R. Pangalangan, ‘The elephant in the courtroom: ICC temporal jurisdiction over the Situation in the Philippines,’ Just Security, 29 September 2023](#) (“Pangalangan”) (“Article 21(3) has never been raised in the withdrawal proceedings or in academic commentaries thereon. It should be”).

<sup>57</sup> See e.g. [UN Economic and Social Council, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity](#), UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (“United Nations Principles to Combat Impunity”), principle 23(2). See [G. Pinzauti, ‘Principle 23: restrictions on prescription,’ in F. Haldemann and T. Unger \(eds.\), The United Nations Principles to Combat Impunity: a Commentary \(OUP: 2018\)](#) (“Pinzauti”), p. 256 (mn. 19: “The varying expressions of state practice, and its frequent grounding in domestic law, militate against discerning a general rule or principle of customary international law prohibiting the application of statutory limitations to *all* international crimes. The better view seems to be that specific customary rules provide for the non-applicability of statutory limitations to certain core crimes, such as genocide, and certain war crimes and crimes against humanity”). Prior to the Statute, the prohibition of statutory limitations to international crimes has been asserted in treaties such as the [1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#) (entered into force 11 November 1970), the [1974 European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#) (entered into force 27 June 2003), and the [1994 Inter-American Convention on Forced Disappearance of Persons](#) (entered into force 28 March 1996). Most recently, the ILC *Draft articles on Prevention and Punishment of Crimes against Humanity*, which form the basis for ongoing treaty negotiations, make similar express provision: [ILC, Draft articles on Prevention and Punishment of Crimes against Humanity, 2019](#), art. 6(6).

<sup>58</sup> [ILC, Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries, 2019](#), art. 6(6), Commentary, para. 35 (p. 78).

international human rights bodies have also tended to conclude that rules of prescription may not be applied to gross human rights violations constituting core international crimes.<sup>59</sup>

46. Accordingly, while the Prosecution does not consider that any material *lacuna* exists in article 12 concerning the jurisdictional regime of the Court, this more general practice confirms the Prosecution's interpretation. Interpreting article 12(2) to create an additional procedural bar to investigations and prosecutions would be inconsistent with this general practice, and contrary to the plain intention of the drafters of the Statute as illustrated by article 29. This confirms the correct interpretation as requiring only that the State of territoriality or the State of the suspect's nationality must be a State Party *at the time of the alleged crimes*.

### A.3. Conclusion

47. For all these reasons, article 12(2) (read in context and in light of the object and purpose of the Statute) can only be correctly interpreted to require that the Philippines was a State Party at the time of the alleged crimes, and not that it retained this status at the time the Court's exercise of jurisdiction was triggered under article 13(c). Based on such a finding, the Challenge may be dismissed on this basis alone.

### **B. Article 127(2) precludes a withdrawing State Party depriving the Court of the exercise of its jurisdiction, if under timely "consideration"**

48. In any event, notwithstanding the correct interpretation of article 12(2),<sup>60</sup> article 127(2) establishes an important safeguard where a State Party withdraws from the Statute. *Inter alia*, this provision precludes a withdrawing State Party depriving the Court of the exercise of its jurisdiction, if such a matter is already under consideration before the withdrawal becomes effective. The initiation by the Prosecutor of a preliminary examination is sufficient for such purposes, both as a matter of law (given that a preliminary examination is a statutory proceeding, which is a precondition to opening an investigation) but in any event in the circumstances of this case.

49. Notably, the Prosecutor had publicly announced that she was opening a preliminary examination in the *Situation in the Philippines* on 8 February 2018. In this announcement, she communicated the essence of the allegation(s) to be considered, and stressed that the Prosecution would "be engaging with the national authorities concerned with a view to discussing and assessing any relevant investigation and prosecution at the national level." The

<sup>59</sup> Pinzauti, p. 254 (mns. 12-13). For other practice, *see also* pp. 255-256 (mns. 14-18).

<sup>60</sup> *See above* paras. 14-47.

Prosecutor would then “decide whether to initiate an investigation, subject to judicial review as appropriate”.<sup>61</sup> Just over one month later, on 17 March 2018, the Philippines deposited with the UN Secretary-General its written notification of withdrawal from the Rome Statute.<sup>62</sup> The existing preliminary examination process nonetheless continued.<sup>63</sup> This culminated in the Prosecutor’s article 15(3) request for authorisation to investigate on 24 May 2021,<sup>64</sup> and the Chamber’s grant of authorisation under article 15(4) on 15 September 2021.<sup>65</sup>

50. The Defence asserts that article 127(2) cannot “trump the plain language of Article 12(2)”.<sup>66</sup> It is indeed true that the provisions of the Statute must be interpreted harmoniously and in context, and therefore that one provision cannot be ascribed superior status to another.<sup>67</sup> However, this challenge is answered by arriving at a correct interpretation of each, so that each may be given due effect. It would thus be erroneous to neglect the significance of article 127(2). While article 12(2) may form part of the relevant context in interpreting article 127(2), it is not dispositive. Accordingly, even if the Defence is correct in its view of the jurisdictional framework under articles 11-13, the Chamber may not halt its analysis there. To the contrary, article 127(2) is clearly engaged and requires proper interpretation<sup>68</sup>—as this Chamber, in its former composition, seems already to have recognised.<sup>69</sup>

51. In this regard, the Defence argues that “matters under consideration by the Prosecutor (such as a preliminary examination) are unable to survive the Philippines’ effective withdrawal from the Statute”.<sup>70</sup> It claims that the Prosecutor cannot be encompassed by the reference to

<sup>61</sup> [ICC Office of the Prosecutor, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela,’ 8 February 2018.](#)

<sup>62</sup> [ICC, ‘ICC statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law,’ 20 March 2018.](#)

<sup>63</sup> See also below para. 71.

<sup>64</sup> See [ICC-01/21-7-Red](#) (“Article 15(3) Request”) (redacted version made public on 14 June 2021).

<sup>65</sup> See [Article 15\(4\) Decision](#).

<sup>66</sup> [Challenge](#), para. 52.

<sup>67</sup> Cf. [Challenge](#), para. 51 (“the matter is adequately resolved through the strict application of the relevant provisions of the Rome Statute”).

<sup>68</sup> See also e.g. [Pangalangan](#) (the “elephant in the room”); [A. Whiting, ‘If Burundi leaves the Int’l Criminal Court, can the Court still investigate past crimes there?’, Just Security, 12 October 2016](#) (“[t]he question of whether a preliminary examination survives withdrawal appears to be governed by the second part of Article 127(2)”); [Heller \(19 October 2017\)](#) (“[t]he relevant provision is Art. 127(2)”; [Jacobs \(28 October 2017\)](#) (“[t]he answer [...] depends on the interpretation one adopts of Article 127(2)”).

<sup>69</sup> See e.g. [Article 15\(4\) Decision](#), para. 111 (following its broader interpretation of articles 11-13 in light of the *Burundi* Article 15(4) Decision, further noting that the Prosecutor had initiated the preliminary examination in this situation “prior to the Philippines’ withdrawal”, and referring in a footnote to article 127(2) of the Statute).

<sup>70</sup> [Challenge](#), para. 53.

“the Court” in article 127(2), and that “in any event, “a preliminary examination is not a ‘matter under consideration by the Court’.”<sup>71</sup>

52. The Prosecution submits that this is inconsistent with the correct interpretation of article 127(2), considering the ordinary meaning of its terms, read in context and in light of the object and purpose of the Statute. When correctly interpreted, the second part of the second sentence of article 127(2) precludes a withdrawing State Party depriving the Court of the exercise of its jurisdiction, if such a matter is already under consideration before the withdrawal becomes effective.

*B.1. The terms of article 127(2), in their ordinary meaning, include a preliminary examination as a “matter” under consideration by “the Court”*

53. Article 127(2) states materially (with emphasis added) that:

A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party [...]. *Its withdrawal* shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, *nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.*

54. It is thus plain that article 127(2) contains three components. The first sentence contains a statement of the general approach—that a former State Party remains subject to the obligations arising from its former status as a State Party unless article 127(2) specifies to the contrary. The second sentence is in two separate parts, with the disjunction marked by the phrase “nor shall it”. The first part of the second sentence regulates the cooperation obligations of a former State Party under Part 9 of the Statute, and thus provides a special rule qualifying the first sentence, in that particular respect only. The second part of the second sentence addresses the Court’s “continued consideration” of “any matter” already before it. This does not qualify the first sentence but rather emphasises and clarifies the application of the general principle. It is the second part of the second sentence which is central to the Challenge.

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<sup>71</sup> [Challenge](#), para. 54.

55. In interpreting the second part of the second sentence, it is appropriate to consider the ordinary meaning of the terms “any matter”, “consideration”, and “by the Court”. These equally encompass allegations under preliminary examination initiated by the Prosecutor.

B.1.a. A “matter” refers to the object of proceedings, not a procedural stage

56. In its ordinary meaning, the term “matter” is “[a]n event, circumstance, fact, question, state or course of things, etc., which is or may be an object of consideration or practical concern; a subject, an affair, a business.”<sup>72</sup>

57. It follows from this that use of the term “matter” does not imply a specific procedure or stage of proceedings.<sup>73</sup> Rather, it is a general term to describe the particular allegations which are the *object* of the proceedings, without prejudice to the procedural stage at which they may arise (whether in the context of a particular case, a situation, or even earlier). As such, a “matter” no less refers to the allegations under consideration by the Prosecutor for the purpose of a preliminary examination than it may relate to the investigation of a situation or the prosecution of a case.

58. The broad meaning of “matter” in the second part of the second sentence of article 127(2) is also supported by its direct association with the term “any”. This again emphasises that “matter” should not be interpreted in a fashion unduly limited by formal or procedural considerations.

59. The broad meaning of “matter” is also supported by the drafters’ choice to use this term in preference to other terms contained in the Statute, such as “proceedings” or “case”.<sup>74</sup> While the Defence observes that different linguistic versions of the Statute (in French and Chinese) seem to use terms which are not direct analogues for the term “matter” in English, this does not detract from the ordinary meaning of the term “matter” in English, since all linguistic versions are equally authentic. Rather, by highlighting the possibility that there may be some discrepancy in the precise terms used, this only reinforces the importance of considering the other limbs of the interpretive test: context and object and purpose, as addressed below.<sup>75</sup> As

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<sup>72</sup> *OED*, “matter, n(1).”

<sup>73</sup> *Contra* [Challenge](#), para. 54.

<sup>74</sup> See also e.g. [Statute](#), art. 42(7) (using the term “matter” when describing the broad duty upon the Prosecutor and Deputy Prosecutor(s) to refrain from participating “in any matter in which their impartiality might reasonably be doubted on any ground”). See further art. 46(4). Among various other usages of the term, the Statute also uses the term “matter” on some occasion to describe the allegations referred to the Prosecutor by the UN Security Council: see e.g. art. 87(5) and (7). *Contra* [Challenge](#), paras. 103-105.

<sup>75</sup> See [Challenge](#), para. 106. See also [VCLT](#), art. 33(4); [Gardiner](#), pp. 442-446.

recalled in a passage quoted by the Defence, the drafters were concerned to ensure that “a State could not avoid the Court simply by withdrawing from the Statute.”<sup>76</sup>

B.1.b. The process of “consideration” includes preliminary examination

60. In its ordinary meaning, the term “consideration” refers to “[t]he action of considering”, or “attentive thought”.<sup>77</sup>

61. As such, similar to “matter”, the term “consideration” does not imply any particular procedure or stage of proceedings. The term is equally apt to describe the Prosecutor’s analysis in carrying out a preliminary examination as it is to the Prosecutor’s analysis in carrying out a formal investigation once that preliminary examination is resolved positively, or indeed to the deliberations of chambers of the Court once a prosecution has been initiated.

62. Moreover, the drafters used the term “consideration” in the second part of the second sentence of article 127(2) in apparent preference to other conceivable alternatives. Notably, they did not frame the second part of the second sentence of article 127(2) with express reference to the Court’s exercise of jurisdiction. As such, in submitting that a preliminary examination initiated by the Prosecutor falls within the scope of the second part of the second sentence of article 127(2), it is not necessary to resolve whether such a preliminary examination itself amounts to an exercise of the Court’s jurisdiction for the purpose of article 13—on which the Prosecution presently takes no position.<sup>78</sup> From the ordinary meaning of the term “consideration”, it no less includes the Prosecutor’s formal analysis in determining whether the conditions are met for the Court to exercise its jurisdiction.

63. While the Defence does not directly address the ordinary meaning of the term “consideration”, it states that the preliminary examination process is “internal, informal, and non-justiciable”.<sup>79</sup> Since in its view preliminary examinations are “not a formal procedural phase defined in the Rome Statute”, the Defence suggests that they cannot fall within the

<sup>76</sup> [Challenge](#), para. 105 (quoting CICC).

<sup>77</sup> *OED*, “consideration, n.”

<sup>78</sup> Cf. [Challenge](#), paras. 24-25 (citing [Vasiliev](#); [D. Jacobs, ‘Peek-a-boo: ICC authorises investigation in Burundi, some thoughts on legality and cooperation,’ \*Spreading the Jam\*, 11 November 2017](#) (“Jacobs (11 November 2017)”); [D. Jacobs, ‘A short rejoinder to Kevin Jon Heller on Burundi and the ICC,’ \*Spreading the Jam\*, 12 November 2017](#) (“Jacobs (12 November 2017)”); [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), paras. 26, 30.

<sup>79</sup> *Contra* [Challenge](#), para. 96.



concept of “consideration” for the purpose of article 127(2), and that any conclusion to the contrary would cast the scope of the second part of the second sentence implausibly wide.<sup>80</sup>

64. The Defence characterisation is incorrect. The “preliminary examination”<sup>81</sup> is a statutory process—for example, for the purpose of article 15, it is regulated by article 15(2) and rules 46-50. It has clear external manifestations, a defined purpose, and significant procedural consequences.<sup>82</sup> It may entail judicial functions by chambers, at the request of the Prosecutor, or for referred situations *proprio motu* or at the request of the referring entity. Given these characteristics, irrespective whether they constitute an exercise of the Court’s jurisdiction, preliminary examinations are sufficiently well defined and concrete to fall within the scope of the second part of second sentence of article 127(2). This is unsurprising since they are an essential precondition to the opening of any investigation by the Court.

65. The Defence further mischaracterises a preliminary examination as “an OTP staff member simply reading an NGO report on a particular ICC Situation and taking no further action”.<sup>83</sup> Yet, an analysis both of the Court’s legal framework, and the constant practice of the Prosecution over more than two decades, shows that a preliminary examination is an active and focused inquiry leading to a specific legal conclusion. “Conducting preliminary examinations (PEs) is one of the three core tasks of the OTP, alongside investigations and prosecutions”, and “PE activities [...] are both extensive and complex”.<sup>84</sup>

66. First, “[t]he preliminary examination and examination and evaluation of a situation” must be specifically “*initiated*” by the Prosecutor, based on a referral or particular information concerning suspected crimes under the Statute.<sup>85</sup> It is not a mere ‘passive’ or ongoing

<sup>80</sup> See [Challenge](#), paras. 94-100.

<sup>81</sup> This term features in article 15(6), but not in article 53(1) which governs the similar process for referred situations: *see also* [ICC RPE](#), rules 104-106. For clarity, the Prosecution uses the term to describe this process for both referred and *proprio motu* situations: *see* [Regulations of the Office of the Prosecutor](#), reg. 25. On the statutory foundation of the Regulations of the Office of the Prosecutor, *see* [Statute](#), art. 42(2), [ICC RPE](#), rule 9; [Regulations of the Office of the Prosecutor](#), reg. 1. While some aspects of the Regulations of the Office of the Prosecutor relate purely to matters of internal management, the Court has recognised the relevance of other provisions with implications for the Court’s proceedings more widely: *see e.g.* [ICC-01/15-40-Red](#) (“*Mindzaev Arrest Warrant*”), para. 53 (noting that the Pre-Trial Chamber was not in that case “provided with an early notice of the intention of the Prosecutor to request the issuance of a warrant of arrest against the suspect”, as provided in regulation 53(2) of the Regulations of the Office of the Prosecutor “and stress[ing] the importance of providing such notice”).

<sup>82</sup> [ICC ASP, Independent Expert Report of the International Criminal Court and the Rome Statute System: Final Report, 30 September 2020](#) (“IER Report”), paras. 695, 708.

<sup>83</sup> *Contra* [Challenge](#), para. 96. *See also* [D. Jacobs, ‘South Africa \(and Burundi\) to withdraw from the ICC? Spreading the Jam, 21 October 2016](#) (“Jacobs (21 October 2016)”); [Heller \(19 October 2017\)](#).

<sup>84</sup> [IER Report](#), para. 708.

<sup>85</sup> *See* [Regulations of the Office of the Prosecutor](#), reg. 25(1). *See also* reg. 27 (providing that, in the Prosecutor’s broader discretionary consideration whether to initiate a preliminary examination, the Office shall “make a



background activity, without clear limits or impact, as the Defence suggests.<sup>86</sup> The concrete nature of the decision to open a preliminary examination is further illustrated by the fact that this is generally publicly announced by the Prosecution, as it was in this case.<sup>87</sup>

67. Second, once opened, the conduct of a preliminary examination entails a concrete and substantial process of inquiry,<sup>88</sup> even if with more limited powers than under a full investigation. For example, in order to conduct the analysis required under article 15(3) and rule 48 (for *proprio motu* situations),<sup>89</sup> the Prosecution “may seek additional information” from States, international or non-governmental organisations, or any other appropriate source, “and may receive written or oral testimony at the seat of the Court.”<sup>90</sup> Since the preliminary examination requires assessments both of jurisdiction and admissibility, the Prosecution may need to engage with relevant sources to determine the existence and status of any domestic proceedings.<sup>91</sup> Consistent with article 68(1) and rule 47, the Prosecution may also be required to take appropriate measures to protect the safety, physical and psychological well-being,

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preliminary distinction” between “information relating to matters which manifestly fall outside the jurisdiction of the Court” and information which may “warrant further examination in accordance with rule 48”).

<sup>86</sup> This remains true irrespective whether or not the legal framework envisages a further ‘pre-preliminary examination’ analysis. Compare e.g. [ICC-RoC46\(3\)-01/18-37](#) (“*Bangladesh/Myanmar* Article 19(3) Decision”), paras. 81-82, with [Statute](#), arts. 15(1)-(3) and (6); [ICC RPE](#), rule 48; [Regulations of the Office of the Prosecutor](#), reg. 27. See also e.g. A. Khojasteh, ‘The pre-preliminary examination stage: theory and practice of the OTP’s Phase 1 activities,’ in M. Bergsmo and C. Stahn (eds.), *Quality Control in Preliminary Examination: Volume I (TOAEP: 2018)*, pp. 224 (“Article 15 communications do not necessarily lead to the initiation of a preliminary examination”), 225 (“the OTP must efficiently and effectively filter hundreds of communications every year in order to decide when and where the opening of a preliminary examination is warranted”), 229 (“The purpose of such analysis is to provide an informed, well-reasoned recommendation to the Prosecutor [...] on whether the alleged crimes in question appear to fall within the Court’s jurisdiction and warrant [...] the formal commencement of a preliminary examination”); K. Ambos, *Treatise on International Criminal Law, Volume III: International Criminal Procedure*, 1<sup>st</sup> Ed. (OUP: 2016) (“Ambos”), pp. 337-338; R. Grey and S. Wharton, ‘Lifting the curtain: opening a preliminary examination at the International Criminal Court,’ [2018] 16 *JICJ* 593 (“Grey and Wharton”), pp. 600 (article 15(1) communications “may be sent” to the Prosecution “before a preliminary examination has been opened and may [...] prompt the Prosecutor to open a preliminary examination *proprio motu*”), 601 (“[t]he OTP receives a vast number of these communications in a single year”), 620 (“the decision on whether or not to open a preliminary examination is more [...] complex [...] than was envisaged [...] or appreciated in the literature”); [IER Report](#), paras. 636-639.

<sup>87</sup> See [Regulations of the Office of the Prosecutor](#), reg. 28(2).

<sup>88</sup> See [Ambos](#), p. 339 (“it seems to be more complex than envisaged [in [ICC-01/13-34](#) (“*Comoros* First Article 53(3) Decision”), para. 13”). See also p. 336 (it is “a bit of an understatement” to assume that a preliminary examination “does not necessitate any complex or detailed process of analysis”). Cf. [Bangladesh/Myanmar Article 19\(3\) Decision](#), para. 85.

<sup>89</sup> For the purpose of *proprio motu* situations, the Prosecutor’s decision whether to request the authorisation of an investigation under article 15(3) is ultimately discretionary, based on considerations including but not limited to those set out in rule 48. See [ICC-02/17-138 OA4](#) (“*Afghanistan* Appeal Judgment”), paras. 30-32. For the Prosecution’s position in this respect, see further e.g. [ICC-RoC46\(3\)-01/24-3](#) (“*Nigeria* Prosecution Submissions on Discretion under Article 15(3)”), paras. 2, 8, 12, 15-19.

<sup>90</sup> [Statute](#), art. 15(2). For referred situations, see similarly [Statute](#), art. 53(1); [ICC RPE](#), rule 104(2).

<sup>91</sup> But see also [Afghanistan Appeal Judgment](#), para. 40 (“there is no obligation for the Prosecutor to notify States of her intention to seek authorisation for an investigation”).

dignity, and privacy of victims and witnesses, seeking as necessary the assistance of the Pre-Trial Chamber or other partners.

68. Accordingly, while preliminary examinations are to be conducted efficiently and without delay,<sup>92</sup> they represent a substantial and important dimension of the Court’s activities with both a defined start and a defined end.<sup>93</sup> Additionally, and practically, quite apart from their ‘filtering’ function, preliminary examinations are “inherently connected” to any subsequent investigation, and may provide an important initial knowledge base and contribute to the initial formulation of relevant lines of inquiry.<sup>94</sup>

69. Third, while the power to require the cooperation of States Parties is contingent upon an “investigation” (*stricto sensu*) being “initiated”<sup>95</sup> or “authorised”,<sup>96</sup> this does not mean that prior activities by the Court do not “carry sufficient weight for engaging the Court’s jurisdiction”.<sup>97</sup> Such a view would erroneously confuse the exercise of jurisdiction with the ability to wield compulsory powers. Other measures of legal and adjudicative authority still carry weight, insofar as they entail significant procedural or other consequences, even if they do not necessarily entail binding obligations.

70. For example, as one Pre-Trial Chamber has stressed, “meaningful steps may already be undertaken under article 68(1) of the Statute *prior* to the authorization of an investigation”—and “the fact that States Parties are not obliged to cooperate with the Court prior to the initiation of an investigation does not prevent the Prosecutor from seeking their voluntary cooperation”, which indeed is the limit of the Court’s powers vis-à-vis “States not Parties to the Statute and non-state entities” even during an investigation.<sup>98</sup> Likewise, at various times in the course of the preliminary examination phase (or even, exceptionally, before a preliminary examination),

<sup>92</sup> [Bangladesh/Myanmar Article 19\(3\) Decision](#), para. 86.

<sup>93</sup> See also e.g. [Grey and Wharton](#), pp. 595-596, 620; [C. Stahn](#), ‘Damned if you do, damned if you don’t: challenges and critiques of preliminary examinations at the ICC,’ [2017] 15 *JICJ* 413 (“Stahn (2017)”), pp. 415-416.

<sup>94</sup> See e.g. [C. Stahn](#), ‘From preliminary examination to investigation: rethinking the connection,’ in [X. Agirre Aranburu et al. \(eds.\)](#), *Quality Control in Criminal Investigation* (TOAEP: 2020), pp. 38-39; [Stahn \(2017\)](#), p. 434. This does not mean, however, that the preliminary examination pre-determines all the specific lines of inquiry which may be pursued in the investigation, within the parameters of the situation: see e.g. [Afghanistan Appeal Judgment](#), paras. 59-61, 64.

<sup>95</sup> [Statute](#), art. 53(1) (for referred situations).

<sup>96</sup> [Statute](#), art. 15(4) (for *proprio motu* situations).

<sup>97</sup> *Contra* [Challenge](#), para. 97; [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 35.

<sup>98</sup> [Burundi Article 15\(4\) Decision](#), para. 15 (emphasis added). See also para. 19 (referring to “meaningful action in the preliminary examination phase”).

the Court may be called upon to make substantive judicial decisions, including under regulation 46(3) and/or article 19(3),<sup>99</sup> under article 15(4),<sup>100</sup> and under article 53(3).<sup>101</sup>

71. [REDACTED].<sup>102</sup> [REDACTED].

#### B.1.c. The Prosecutor is part of “the Court”

72. The final relevant term in the second part of the second sentence of article 127(2), which is to be considered in its ordinary meaning, is “the Court”. It is true that, according to one ordinary meaning, this term could refer to a deliberative judicial body (i.e., the chambers of the Court) to the exclusion of the parties appearing as litigants before it, such as the Prosecutor and his Office. Yet on the other hand, according to another ordinary meaning of the term, “the Court” could be an abbreviated reference to an institution of that name (such as the International Criminal Court). According to this meaning, the term would then incorporate that institution and all its organs, such as the Prosecutor and his Office.

73. For these reasons, it cannot be said that the ordinary meaning of the term “the Court” necessarily excludes the Prosecutor and his Office. Affirming whether “the Court” should be read in a broad or narrow sense therefore requires consideration of the context in which the term is used, both within article 127(2) and more widely, as well as the object and purpose of the Statute as a whole.

#### *B.2. The context of article 127(2) supports the inclusion of preliminary examinations*

74. The context of article 127(2) supports the view that preliminary examinations initiated by the Prosecutor are encompassed within the term “any matter [...] under consideration by the Court” for the purpose of the second part of the second sentence of article 127(2). This includes both the context provided to the relevant terms by article 127(2) read as a whole, and

<sup>99</sup> See e.g. [Bangladesh/Myanmar Article 19\(3\) Decision](#); [ICC-01/18-143](#) (“Palestine Article 19(3) Decision”).

<sup>100</sup> See e.g. [ICC-01/09-19-Corr](#) (“Kenya Article 15(4) Decision”); [ICC-02/11-14-Corr](#) (“Côte d’Ivoire Article 15(4) Decision”); [ICC-01/15-12](#) (“Georgia Article 15(4) Decision”); [Burundi Article 15\(4\) Decision](#); [ICC-02/17-33](#) (“Afghanistan Article 15(4) Decision”); [ICC-01/19-27](#) (“Bangladesh/Myanmar Article 15(4) Decision”); [Afghanistan Appeal Judgment](#); [Article 15\(4\) Decision](#).

<sup>101</sup> See e.g. [Comoros First Article 53\(3\) Decision](#); [ICC-01/13-68](#) (“Comoros Second Article 53(3) Decision”); [ICC-01/13-111](#) (“Comoros Third Article 53(3) Decision”).

<sup>102</sup> See also [Pangalangan](#) (noting that the mere fact of the preliminary examination was apparently sufficient to prompt the Philippines’ withdrawal from the Statute: “[f]or the Philippine government, [...] the preliminary examination was as real a consideration as it gets!”).

the context provided by other provisions of the Statute, as well as other relevant rules of international law such as article 70(1) of the VCLT.<sup>103</sup>

B.2.a. The broad reading of the second part of the second sentence of article 127(2) is consistent with the general principle in the first sentence, echoing the VCLT

75. The second part of the second sentence of article 127(2)—providing that a State Party’s withdrawal shall not prejudice the Court’s continued consideration of any matter which was already under consideration—should be read in the context of, and consistently with, the general principle established in the first sentence: that “a State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party”. This general statement, which is subject only to a narrow exception regarding Part 9 cooperation (specified in the first part of the second sentence), strongly supports a broad understanding of the saving in the second part of the second sentence. Consequently, this should include preliminary examinations initiated by the Prosecutor—an essential precondition to any investigation—within the scope of the “Court’s consideration” of “any matter”.

76. In considering the importance of the first sentence of article 127(2), it is also apparent that it echoes the general principle set in article 70(1)(b) of the VCLT.<sup>104</sup> This provides that, while a party may be released from any further obligation to perform the treaty as a consequence of its termination in force for that party, this “does not affect any right, obligation, or legal situation of the parties created through the execution of the treaty prior to its termination.”

77. While article 70 VCLT permits the parties to a treaty to depart from this principle,<sup>105</sup> the Statute only does so with regard to Part 9 cooperation as made clear in the first part of the second sentence of article 127(2).

78. Otherwise, consistent with article 70(1)(b), any “legal situation” created by the existence of a treaty regime should remain unaffected by a State Party’s withdrawal. In the terms of the

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<sup>103</sup> [VCLT](#), art. 31(3) (providing that “any relevant rules of international law applicable in the relations between the parties” shall be “taken into account, together with the context”, in applying the general rule of interpretation in article 31(1)).

<sup>104</sup> See [Burundi Article 15\(4\) Decision](#), para. 25 (“On the whole, article 127(2) of the Statute gives effect to the principle contained in article 70(1)(b) of the [VCLT]”). See also [Chiarini](#), p. 2931; [Vasiliev](#) (“it is arguable that Article 70 VCLT informs the interpretation and application of Article 127(2) and/or applies subsidiarily pursuant to Article 21(2)(b) of the Statute”). Cf. R. Clark and S. Meisenberg, ‘Article 127: withdrawal,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4<sup>th</sup> Ed. (C.H. Beck/Hart/Nomos: 2022) (“Clark and Meisenberg”), p. 2925 (mn. 8).

<sup>105</sup> See also [Challenge](#), para. 109; [Jacobs \(28 October 2017\)](#); [Pangalangan](#).

Court, the possibility that the Court might exercise its jurisdiction over alleged article 5 crimes occurring while the Statute was in force for a State Party is just such a situation. Interpreting the second part of the second sentence of article 127(2) to include preliminary examinations initiated by the Prosecutor would be consistent with this approach.

79. By contrast, a narrower view of the second part of the second sentence of article 127(2) would be inconsistent with article 70(1)(b) VCLT. This is implausible in the absence of any plain language suggesting the drafters' intention to this effect—especially when juxtaposed with their apparent endorsement of the principle in article 70(1)(b) VCLT in the first sentence of article 127(2) of the Statute.

#### B.2.b. The Statute relevantly uses the term “the Court” to include the Prosecutor

80. The Defence asserts that “in nearly all instances where the term ‘by the Court’ is used, it refers to the judiciary to the exclusion of the Prosecutor.”<sup>106</sup> This is not only beside the point, but an overstatement.

81. First, while it is acknowledged that the term “the Court” can be—and is—sometimes used in relevant provisions of the Statute to refer to the judicial organ of the Court, this does not mean that the term can *only* be used in this way. Such a view is untenable given the express provision of article 34 of the Statute, which the Defence omits to address. This states in terms that the organs of the Court include the “Office of the Prosecutor”. Furthermore, even if *arguendo* the term “the Court” were used more frequently in the Statute to refer to the judicial organ in particular rather than the institution as a whole (including all relevant organs, such as the Prosecutor and his Office), this may be unsurprising given the central role played by the Statute and the Rules in regulating the wide variety of judicial functions.<sup>107</sup> This would still not preclude the broader meaning of the term “the Court” in provisions where this is apposite.

82. Second, the Defence overlooks or misinterprets a number of significant statutory provisions which do indeed clearly incorporate the Prosecution within the notion of “the Court”. These apply to a number of cross-cutting areas—like the question of a State Party’s withdrawal from the Statute—where it makes obvious sense for “the Court” to be used in an institutional sense, and this is consistent with established practice. Thus:

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<sup>106</sup> [Challenge](#), para. 55.

<sup>107</sup> By comparison, relatively few provisions are concerned primarily and directly with prosecutorial functions. See e.g. [Statute](#), arts. 15, 18, 42, 53-58.

- Concerning privileges and immunities, article 48 refers to “[t]he judges, the Prosecutor, the Deputy Prosecutors and the Registrar” all as carrying out “the business of the Court”.
- Concerning Part 9 cooperation, article 86 refers to the general obligation of States Parties to “cooperate fully with the Court in its *investigation and prosecution* of crimes within the jurisdiction of the Court” (emphasis added). Article 87(1)(a) provides that “[t]he Court shall have the authority to make requests to States Parties for cooperation”—and this is a power which is routinely exercised by the Prosecution in its independent capacity, consistent with articles 42 and 54 of the Statute. References to “the Court” in articles 93, 94, 96, 97, and 99 must be read similarly, at least for the purpose of requests for cooperation initiated by the Prosecutor directly.<sup>108</sup> Rather than acknowledging these provisions, the Defence incorrectly suggests that “only the judges are formally empowered to issue such requests”.<sup>109</sup>
- Concerning the management of the Court, article 112(2) refers to the functions of the ASP, which include “management oversight [...] regarding the administration of the Court” (provided to “the Presidency, the Prosecutor and the Registrar”) and setting “the budget for the Court”—which necessarily includes the Prosecution. The same is true of references to the Court in other financial matters, including articles 113-116 and 118.

83. If it is true that the term “the Court” thus appears to be used in different ways in different provisions of the Statute—sometimes referring only to the judicial organs, sometimes referring more broadly to all relevant organs of the institution as a whole—the question then arises as to which meaning is appropriate in article 127(2).

84. The answer is provided by the context of the other passages within article 127(2) itself. In particular, the first part of the second sentence of article 127(2) regulates Part 9 cooperation matters once a State Party has withdrawn from the Statute. Reference to “the Court” in this context must logically mean the same as references to “the Court” as an entity which can make Part 9 cooperation requests—and, as noted above, this includes all relevant organs of the Court

<sup>108</sup> Indeed, article 99 is a good illustration of the need for care and contextual analysis of the reference to “the Court” in each provision, since on the one hand article 99(2) must be understood to refer generally to “the Court” (given the context of urgent requests made under articles 93 or 96), even though article 99(4) separately and explicitly addresses the measures which might directly be executed by “the Prosecutor”.

<sup>109</sup> *Contra* [Challenge](#), para. 69. *See also* para. 68.



including the Prosecution. This in turn provides the context for the meaning of the same term when used again in the second part of the second sentence. While the subject matter of the first part and second part is different, it would strain interpretive logic for the same term in the same sentence to be used in two different ways.<sup>110</sup>

85. The Defence suggestion that the term “the Court” in article 127(2) should be interpreted in the same way as in article 95, simply because this provision also uses the phrase “consideration by the Court”, is much less convincing. Whereas the second sentence of article 127(2) can clearly be linked to usage of the term “the Court” in the same way as in relevant provisions of Part 9, it makes no reference at all to admissibility matters such as those in article 95.<sup>111</sup>

B.2.c. Interpreting “matter under consideration” to include preliminary examinations would not be inconsistent even with the Defence view of the jurisdictional framework

86. Finally, even if the Defence interpretation of the jurisdictional framework in articles 11-13 were correct, it would not be inconsistent to interpret the second part of the second sentence of article 127(2) to include preliminary examinations initiated by the Prosecutor. To the contrary, this would follow the logic of the *Burundi* Pre-Trial Chamber, which noted that the Court must necessarily be entitled to continue exercising its jurisdiction if an investigation is opened before the withdrawal of a State Party becomes effective—with the former State Party retaining full Part 9 cooperation obligations in that respect—without the need to enter into the question of the correct interpretation of the second part of the second sentence of article 127(2).<sup>112</sup>

87. In circumstances where an investigation is *not* opened before the withdrawal of a State Party becomes effective, it may follow from the first part of the second sentence of article 127(2) that a State Party no longer has Part 9 cooperation obligations. Yet the second part of the second sentence of article 127(2) would then address this situation, by providing that the absence of cooperation obligations does imply that the Court itself is prevented from continuing to consider such matters. Reading this to encompass preliminary examinations initiated by the

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<sup>110</sup> See also [Whiting](#).

<sup>111</sup> *Contra* [Challenge](#), para. 56 (noting, for example, that in article 95, “[t]he reference to the judiciary to the exclusion of the Prosecutor is confirmed further below [...], wherein ‘the Court’ is patently distinguished from ‘the Prosecutor’: ‘[...] unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19’”). See also [Pangalangan](#).

<sup>112</sup> See [Burundi Article 15\(4\) Decision](#), para. 26.



Prosecutor—and any investigations or prosecutions which may ensue from such preliminary examinations—ensures this second part of the second sentence is not redundant.<sup>113</sup>

*B.3. The object and purpose of the Statute supports the inclusion of preliminary examinations*

88. As explained above, the object and purpose of the Statute is to ensure that the most serious crimes of international concern do not go unpunished.<sup>114</sup> The regime for States Parties to withdraw from the Statute was carefully calibrated in the context of that overall objective. Interpreting the second part of the second sentence of article 127(2) to encompass preliminary examinations initiated by the Prosecutor is most consistent with that approach.

89. First, this interpretation of article 127(2) merely ensures that, by acting with due diligence, the Court may take reasonable and realistic measures to ensure that the withdrawal prerogative is not used in a manner which undermines the overall objective to address article 5 crimes.<sup>115</sup> That this object and purpose was foremost in the drafters' minds when framing article 127(2) is apparent from the first sentence of article 127(2) itself.

90. Second, there should be no inconsistency in the application of the second part of the second sentence of article 127(2) between situations which may be referred to the Prosecutor by States Parties and situations which the Prosecutor decides to consider *proprio motu* under article 15. This follows from the purpose of article 15 as an effective safeguard in the absence of a referral.<sup>116</sup> In both scenarios, satisfactory resolution of the Prosecutor's preliminary examination is an essential condition to opening the investigation; the difference between the two is merely that for referred situations the independent affirmation that the Court should investigate comes first (from the referring entity); for *proprio motu* situations, it comes second (from the Pre-Trial Chamber).

91. Third, a narrow reading of the second part of the second sentence of article 127(2) might be justified on the assumption that it is always possible for an investigation to be opened before a State Party's withdrawal becomes effective<sup>117</sup>—in other words, if a State Party starts the

<sup>113</sup> *Contra* [Challenge](#), paras. 101, 112-113.

<sup>114</sup> *See above* para. 39.

<sup>115</sup> *See above* para. 39; [Whiting](#); [Pangalangan](#).

<sup>116</sup> [Schabas and Pecorella: Article 13](#), p. 852 (mn. 27: "The *proprio motu* power is essential to the effective functioning and independence of the ICC").

<sup>117</sup> *See* [Article 18\(2\) Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 29. Judges Perrin de Brichambaut and Lordkipanidze expressly premised their analysis on the understanding that the Statute "gives the Court an opportunity to assert its jurisdiction", but this was based on their "view that

process as soon as the preliminary examination is announced, potentially in less than one year. However, as this situation demonstrates, this is not invariably the case, even acting expeditiously and with due diligence.<sup>118</sup> Even considering the time required by the Pre-Trial Chamber for its article 15(4) decision alone, the mean time for deliberations is approximately 22 weeks (or approximately 5 months).<sup>119</sup> In the present situation, for example, it took approximately 15 weeks (or approximately 3.5 months). Given the various processes involved, and notwithstanding the best efforts of the Prosecution, it thus cannot safely be assumed that a preliminary examination can be appropriately and effectively concluded in the time required. Not only does the object and purpose of the Statute not favour a rushed approach in this regard, but neither do the interests of the withdrawing State Party—since this could lead to opening investigations in such circumstances simply to retain the future possibility of action before the Court, rather than on the basis of objective assessment.

92. Fourth, and similar to the argument with regard to the correct interpretation of article 12(2),<sup>120</sup> interpreting the second part of the second sentence of article 127(2) broadly does not infringe upon the ability of a State Party acting in good faith to withdraw from the Statute. Rather than “trump[ing]” a State Party’s decision to withdraw, it merely defines the contours of the obligation which the State Party freely assumed when acceding to the Statute.<sup>121</sup>

93. Notably, withdrawal still remains effective in halting the Court’s prospective jurisdiction *ratione temporis* (such that the Court may not exercise jurisdiction over any conduct committed one year after the deposit of the instrument of withdrawal). Furthermore, withdrawal still provides finality to the withdrawing State Party if no preliminary examination is initiated by the Prosecutor prior to the effective date of withdrawal.

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one year is sufficient for the Prosecutor to conduct his preliminary examination *and* request a pre-trial chamber to authorise the commencement of the investigation, *and* for the pre-trial chamber to rule upon such a request”, emphasis added).

<sup>118</sup> See above para. 71.

<sup>119</sup> This is estimated based on the time elapsed between the article 15(3) requests and the article 15(4) decisions for the seven situations in which the Prosecutor has proceeded to request the opening of an investigation *proprio motu*, i.e. in *Kenya* (approximately 17 weeks), *Côte d’Ivoire* (approximately 19 weeks), *Georgia* (approximately 14 weeks), *Burundi* (approximately 6 weeks), *Afghanistan* (approximately 71 weeks), *Bangladesh/Myanmar* (approximately 18 weeks), and *the Philippines* (approximately 15 weeks). The calculation for *Afghanistan* does not include the period of the subsequent appeal against the article 15(4) decision rendered in that situation.

<sup>120</sup> See above para. 43.

<sup>121</sup> Contra [Jacobs \(21 October 2016\)](#).

*B.4. Conclusion*

94. For all these reasons, irrespective of the interpretation of articles 11-13, article 127(2) can only be correctly interpreted to preclude a withdrawing State Party depriving the Court of the exercise of its jurisdiction, if such a matter is already under consideration before the withdrawal becomes effective. In this case, the Prosecutor's initiation of a preliminary examination was sufficient for this purpose, both as a matter of law (given that a preliminary examination is a statutory proceeding, which is a precondition to opening an investigation) but in any event in the particular circumstances.

**CONCLUSION**

95. For all the reasons above, the Challenge should be dismissed, and the Court's exercise of jurisdiction over Mr Duterte should be affirmed.

A handwritten signature in black ink, appearing to read 'Mame Mandiaye Niang', written over a horizontal line.

**Mame Mandiaye Niang, Deputy Prosecutor**

Dated this 9<sup>th</sup> day of June 2025

At The Hague, the Netherlands