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PRE-TRIAL CHAMBER I

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

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC

**Public Redacted Version of the “Defence Reply to the Prosecution’s Response
to the Defence Challenge on Jurisdiction
(ICC-01/21-01/25-146)”, 2 July 2025**

Source: Defence for Mr Rodrigo Roa Duterte

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Duterte Defence Team

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☐ Unrepresented Victims

☐ Unrepresented Applicants
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☒ The Office of Public Counsel for Victims

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I. INTRODUCTION

1. The Defence hereby submits its reply to the Prosecution's Response¹ to the Defence Challenge on Jurisdiction,² focusing on two issues identified at paragraph 4 of the Pre-Trial Chamber's Decision ICC-01/21-01/25-164.³

II. SUBMISSIONS

i) The Reclassified Materials

2. On 19 June 2025, the Pre-Trial Chamber ordered [REDACTED] pertinent to litigation that had been initiated both during the preliminary examination and the deferral stage of proceedings.⁴ These [REDACTED] were unquestionably essential for the preparation of a defence to the Prosecution's contention that a preliminary examination is a "matter under consideration by the Court". The Prosecution had, after all, referred to the "unique opportunity" evidence-gathering mechanisms in the context of its response to the Philippines' appeal against the resumption of the investigation pursuant to Article 18(2).⁵ Despite Counsel's request for disclosure of material "related to jurisdiction and the

¹ Corrected Version of "Public redacted version of the Prosecution response to 'Defence Challenge with Respect to Jurisdiction'", 9 June 2025, ICC-01/21-01/25-146-Red, [ICC-01/21-01/25-146-Red-Corr](#), 10 June 2025 ("Prosecution Response" or "Response"). All references to "Article" and to "Rules" in the present submission are to the Rome Statute and the ICC Rules of Procedure and Evidence ("RPE"), respectively, unless otherwise indicated. This request is filed confidentially pursuant to [Regulation 23bis\(2\)](#) as it is submitted pursuant to litigation of the same classification.

² Defence Challenge with Respect to Jurisdiction, [ICC-01/21-01/25-121](#), 1 May 2025 ("Defence Challenge").

³ Decision on the 'Defence Request for Leave to Reply to the Prosecution's Response to the Defence Challenge on Jurisdiction (ICC-01/21-01/25-146)', [ICC-01/21-01/25-164](#), 25 June 2025.

⁴ Email, Pre-Trial Chamber I to Prosecution, Defence, Office of Public Counsel for Victims and Court Management-Court Records, "[REDACTED]", 19 June 2025, 11:23 ("Pre-Trial Chamber Order").

⁵ Situation in the Republic of the Philippines, Prosecution's response to the Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation" (ICC-01/21-65 OA), [ICC-01/21-68](#), 4 April 2023, para. 35, fn. 58 ("[m]oreover, in the course of a preliminary examination, the Prosecution may take measures to protect victims and (potential) witnesses under article 68(1), may receive written or oral testimony at the seat of the Court and may request the Pre-Trial Chamber to take measures as may be necessary to ensure the efficiency and integrity of the proceedings, including to appoint a counsel or a judge from the Pre-Trial Chamber to be present during the taking of the testimony") (internal citations omitted).

exercise thereof” communicated on 25 April 2025,⁶ the Prosecution refrained [REDACTED] until 30 May 2025 at 14:24 in the afternoon,⁷ and only **after** Counsel had petitioned it once more at 11:54 in the morning.⁸

3. The Prosecution’s failure to initiate [REDACTED] goes beyond mere oversight. Such wilful neglect palpably impeded the Defence’s preparation of the jurisdictional challenge. It led the Defence to seek disqualification of judges when, as it now appears, the Pre-Trial Chamber will, perforce, be seised of new facts permitting it to **reconsider** its former findings on jurisdiction. Moreover, the inaccessibility of these materials until the Prosecution finally [REDACTED] prevented the Defence from [REDACTED], as can now be disclosed, irreparably prejudices the Prosecution case.
4. A review of the [REDACTED] shows that the Prosecutor sought to [REDACTED].⁹ On [REDACTED], during its preliminary examination, and before the expiry of the withdrawal period envisaged in Article 127(2), the Prosecution sought to [REDACTED].¹⁰ Subsequently, on [REDACTED], and after the expiry of the withdrawal period, the Prosecution made a similar request in respect of [REDACTED].¹¹ Yet that Pre-Trial Chamber [REDACTED].¹²
5. Although the Prosecution would like to view its discretionary preliminary examination as comprising a continuum of “meaningful steps [...] prior to the authorization of an investigation”¹³ and supplemented by various ancillary requests, [REDACTED]. [REDACTED],¹⁴ *i.e.* [REDACTED]. In other words,

⁶ Email, Defence to Prosecution, “[REDACTED]”, 25 April 2025, 11:45 (“[REDACTED]”).

⁷ See Pre-Trial Chamber Order.

⁸ Email, Defence to Prosecution, “[REDACTED]”, 30 May 2025, 11:54 (“[REDACTED]”).

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [Prosecution Response](#), para. 70.

¹⁴ See also [REDACTED].

[REDACTED]. The newly revealed information [REDACTED]? The Defence now fully understands why Judges Alapini-Gansou and Flores Liera declined to disqualify themselves from adjudicating on this jurisdictional issue and ruled that there was no appearance of bias. The newly revealed information, [REDACTED], adds a totally new dimension to their decision-making process which should now be exercised in the Defence's favour.

6. In the bigger picture, the Prosecution's ability to adopt measures under Article 15(2) and 18(6) does not accredit a "preliminary examination" with any special status. As mentioned in the Defence Challenge, there are no formal conditions for opening (or even closing) a preliminary examination.¹⁵ In contrast to an investigation, the Prosecutor may embark on a preliminary examination as he sees fit and without considering either jurisdiction or the preconditions for its exercise. Withdrawal of a State from the Rome Statute does not divest the Prosecutor of the ability to conduct a preliminary examination and, accordingly, there is no logical reason for Article 127(2) to be of relevance.
7. In any event, the semantic debate surrounding the quality of "any matter before the Court" is a fundamental red herring that was only entertained by the Defence for the sake of a complete rebuttal of the Prosecution's submissions. The Defence's more commonsense interpretation of Article 12(2) would obviate the need even to consider the legal effect of Article 127(2). Put simply, if the State in question is not a State Party contemporaneously with the exercise of jurisdiction, then no investigation may be initiated and whatever steps were taken during the preliminary examination lack consequence. The Prosecution's

¹⁵ [Defence Challenge](#), paras. 95-96. In the absence of hard and fast rules, and by way of *reductio ad absurdum*, a preliminary examination may constitute something as inconsequential as casting a prosecutorial eye over the headlines in the *Philippine Daily Inquirer*, looking at a map of Manila or reading "*Duterte Harry*" authored by Jonathan Miller ([REDACTED]). It would be unconscionable to suggest that such trivial pursuits can preserve the potential to open an investigation into the Situation in the Philippines – 20 years down the line!

failure to comprehend this aspect of the Defence argument is evidenced by its comment that for Mr Duterte’s jurisdictional challenge to succeed, “he must succeed on **both**” of his statutory propositions.¹⁶

ii) “The Fight against Impunity”

8. The “fight against impunity” cannot warrant an inappropriate application of the Rome Statute. At paragraph 39 of the Response, it would appear that the Prosecution justifies its expansive interpretation of Article 12(2) by reference to the preamble of Rome Statute “to ensure that the most serious crimes of concern to the international community as a whole” do “not go unpunished”.¹⁷ Yet, the provisions of the Rome Statute differ linguistically for a purpose and the Prosecution fails coherently to articulate the textual difference between Articles 5, 11, and 25(1) (jurisdiction *stricto sensu*) and Article 12(2) (preconditions to the exercise of jurisdiction). Moreover, the Prosecution frequently confuses the two concepts¹⁸ even to the extent of tailoring its interpretive methodology elsewhere to suit its situational objectives.¹⁹

¹⁶ [Prosecution Response](#), para. 4.

¹⁷ [Prosecution Response](#), para. 39. The Office for Public Counsel for Victims similarly asserted that considerations of accountability should trump legal niceties issuing an inappropriately stark threat to the Court that “concluding otherwise would mean upholding impunity and depriving Victims of justice”. See Victims’ Observations on the Defence Challenge with Respect to Jurisdiction, [ICC-01/21-01/25-145](#), 9 June 2025 (“OPCV Observations”), para. 4.

¹⁸ [Prosecution Response](#), para. 30 (“[a]s 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))”).

¹⁹ In the Palestine Situation, for example, the Prosecution criticises Israel because it “conflates the existence of territorial jurisdiction and limitations that a State might have in relation to its exercise” when trying to exclude the relevance of the Oslo Accords. See Situation in the State of Palestine, Prosecution’s Observations to “Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute”, [ICC-01/18-448](#), 27 June 2025 (“Palestine Prosecution Observations”), para. 110. Yet, in the Philippines Situation, it tars itself with the very same brush when attacking the Defence’s interpretation of Article 12(2). See [Prosecution Response](#), para. 24 (“[w]hile 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 or the

9. The Prosecution harps on the Vienna Convention on the Law of Treaties (“VCLT”) and the necessity for a statutory provision to be given its “ordinary meaning”. But what can be more “ordinary” than affording Article 12(2) its most basic grammatical construction that the Prosecution dismisses in cavalier fashion?²⁰ As noted in [REDACTED],²¹ it is not the Defence but, rather, the Prosecution that eschews clarity by commenting that the use of the present simple tense in Article 12(2) of the Rome Statute “is open to multiple interpretations”.²² This mirrors the OPCV’s assertion that Articles 12 and 127 are “crystal clear”,²³ while arguing, in a feat of mental gymnastics, that Article 12(2) engages not only “States that ‘are’ still Parties to the Statute” but **also** “States that ‘were’ Parties to the same”.²⁴ No resort to the principle of accountability can validate such tortuous textual interpretation which, as mentioned, [REDACTED]. Had the drafters of the Rome Statute intended a more casual or even retrospective attitude to temporality for determining the Court’s ability to exercise jurisdiction over **former** State Parties, they would have omitted the use of the present tense entirely or have added the past tense.
10. To be clear, the Trial Chamber in *Katanga* specifically found that the “fight against impunity” cannot justify an interpretation of the Rome Statute inconsistent with plain language:

State of the suspect’s nationality must be a State Party *at the time of the alleged crimes*”) (emphasis in original).

In other words, when the Prosecution is defending an Israeli jurisdictional challenge, it claims to adhere strictly to the distinction between “jurisdiction” and the “exercise of jurisdiction” in a way it refuses to do so in the Philippines’ situation.

²⁰ Indeed, it is striking to note that in the Situation of Palestine, once again, the Prosecution favours what it considers to be a “ordinary meaning” of the term “State” in Article 12(2) of the Rome Statute yet refuses to do so for the verb “are” in the same provision of the Rome Statute. See [Palestine Prosecution Observations](#), paras. 47-48.

²¹ [REDACTED].

²² [Prosecution Response](#), para. 24.

²³ [OPCV Observations](#), para. 2.

²⁴ [OPCV Observations](#), para. 35.

[...] the Chamber considers it self-evident that the aim of the Statute, *viz.* to put an end to impunity for the perpetrators of the most serious crimes within the jurisdiction of the Court, **can under no circumstance be used to create a body of law extraneous to the terms of the treaty or incompatible with a purely literal reading of its text.**²⁵

11. The object and purpose of the Rome Statute, equally, enshrines fundamental rights such as those of an accused to due process and a fair trial under Article 67. These rights are in no way subservient to the principle of accountability, as further noted by Judge Van den Wyngaert in *Katanga*:

[s]ympathy for the victims' plight and an urgent awareness that this Court is called upon to "end impunity" are powerful stimuli. Yet, the Court's success or failure cannot be measured just in terms of "bad guys" being convicted and innocent victims receiving reparation. Success or failure is determined first and foremost by whether or not the proceedings, as a whole, have been fair and just.²⁶

In other words, even if combatting impunity is deemed by many to be the *raison d'être* for the International Criminal Court, the pursuit of accountability cannot prioritise victims' expectations over a suspect's right to legal propriety and due process.

12. Finally, the Prosecution, OPCV, and civil society at large have argued that Mr Duterte should not "benefit" from his administration's decision to withdraw from the Rome Statute. Yet such an assertion ignores the principle of complementarity, disregards moves that were put in place domestically to prosecute the extra-judicial killings by a Government now opposed to Mr Duterte, and belies a belief that the only credible form of justice is that

²⁵ *Katanga*, Judgment pursuant to article 74 of the Statute, [ICC-01/04-01/07-3436-tENG](#), 7 March 2014, para. 55 (emphasis added).

²⁶ *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, [ICC-01/04-01/07-3436-AnxI](#), 7 March 2014, para. 310.

administered at the International Criminal Court.²⁷ **Mr Duterte has never expressed a desire to shirk accountability.** Quite the opposite. Upon arrest, Mr Duterte had the following to say:

[i]f I committed a sin, prosecute me in Philippine courts, with Filipino judges, and I will allow myself to be jailed in my own nation.²⁸

13. At the end of the day, it is the Prosecution which must shoulder the responsibility for its miscalculated and, ultimately, erroneous decision not to initiate an investigation within the designated time-period. On this point, the Defence need do no more than refer to the *dicta* of Judges Brichambaut and Lordkipanidze:

[t]he Prosecutor has to make all efforts to trigger the Court's jurisdiction in a manner that would not infringe the right of a State to withdraw from the Statute. **We are of the view that 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. The Statute thus gives the Court an opportunity to assert its jurisdiction.**²⁹

²⁷ The Prosecution, conveniently, has now dropped its reliance on precedent of the Supreme Court of the Philippines, not mentioning it even once in its Response. This is not surprising since it would conflict with the view formerly articulated by the Marcos administration. *See* Situation in the Republic of the Philippines, Philippine Government's Appeal Brief against "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", [ICC-01/21-65](#), 13 March 2023, para. 31, fn. 23 ("[f]or completeness, the Philippine Government recalls the decision of the Supreme Court of the Philippines in *Pangilinan v. Cayetano* [G.R. Nos. 238875, 239483, 240954, 16 March 2021] whereby the Supreme Court stated that "[c]onsequently, liability for the alleged summary killings and other atrocities committed in the course of the war on drugs is not nullified or negated here. The Philippines remained covered and bound by the Rome Statute until March 17, 2019". The Philippine Government observes that the decision itself concerned the validity of the executive's unilateral withdrawal from the Rome Statute. **Having found that the withdrawal was valid, the referenced comment is obiter dicta.** It is not binding and does not form part of the legal system of the Philippines pursuant to article 8 of the Civil Code of the Philippines [Republic Act No. 386, 18 June 1949]. Nor is it part of the applicable law of this Court" (emphasis added).

²⁸ Guinto J., and Head J., "[Philippines ex-leader Duterte on plane to The Hague after arrest](#)", BBC, 11 March 2025. *See also* "Duterte flows to the Hague after arrest over Philippines drug war killings", [REDACTED], 11 March 2025, p. 2.

²⁹ Situation in the Republic of the Philippines, Dissenting Opinion of Judge Perrin De Brichambaut and Judge Lordkipanidze, [ICC-01/21-77-OPI](#), 18 July 2023, para. 29 (emphasis added).

III. RELIEF SOUGHT

14. In light of all the aforementioned, and reincorporating all its previous arguments on the matter, the Defence respectfully **REQUESTS** the Pre-Trial Chamber to find that there is no jurisdictional basis for the continuation of proceedings against Mr Duterte and to order his immediate and unconditional release.



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Dated this 10th July 2025
The Hague, The Netherlands