

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-01/21-01/25**
Date: **14 November 2025**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC

Appeal Brief on Jurisdiction

Source: Defence for Mr Rodrigo Roa Duterte

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I. INTRODUCTION

1. Mr Duterte hereby submits a brief in support of his appeal ('Appeal') against Pre-Trial Chamber I's 'Decision on the Defence Challenge to the Jurisdiction of the Court', issued on 23 October 2025 ('Impugned Decision').¹
2. In the Impugned Decision, the Pre-Trial Chamber agreed with the Defence in finding that Article 12(2) requires "a State to be a Party to the Statute at the time that the Court exercises its jurisdiction".²
3. Bearing this in mind, the principal issue on appeal is whether the exercise of jurisdiction beyond the effective date of a State Party's withdrawal may be justified, as found by the Pre-Trial Chamber, by construing Article 127(2) as *lex specialis* with respect to Article 12. Should the Appeals Chamber side with the Defence, and reject this legal novelty, then the present Appeal must succeed without consideration of any further argument.
4. Should the Appeals Chamber, however, deem Article 127(2) relevant to the current litigation, the Defence will submit that the Impugned Decision is materially affected by three further errors of law and fact in finding that
 - i) a preliminary examination is a 'matter under consideration';
 - ii) the reference to 'the Court' in Article 127(2) includes the Office of the Prosecutor; and
 - iii) the 'object and purpose' of the Rome Statute permits the opening of an investigation even after the effective withdrawal of the Republic of the Philippines ('the Philippines').

II. PROCEDURAL HISTORY

5. The following procedural landmarks cannot be in dispute.
 - i) **1 November 2011:** The Rome Statute entered into force for the Philippines, following its accession.³

¹ Decision on the Defence Challenge to the Jurisdiction of the Court, [ICC-01/21-01/25-309](#), 23 October 2025 ("Impugned Decision"). All references to "Article" and to "Rules" in the present submission are to the Rome Statute and the International Criminal Court Rules of Procedure and Evidence respectively.

² [Impugned Decision](#), para. 80.

³ United Nations, Ratification by the Philippines of the Rome Statute of the International Criminal Court, [Depositary Notification C.N.530. 2011.TREATIES-3](#), 30 August 2011.

- ii) **8 February 2018:** The Prosecutor announced the opening of her preliminary examination.⁴
- iii) **17 March 2019:** The withdrawal of the Philippines from the Rome Statute became effective.⁵
- iv) **24 May 2021:** The Prosecutor sought authorisation for an investigation into the Situation in the Philippines (‘Philippines Situation’).⁶
- v) **15 September 2021:** The Pre-Trial Chamber authorised the commencement of said investigation.⁷

III. GROUNDS OF APPEAL

1. THE PRE-TRIAL CHAMBER ERRED IN LAW BY FINDING THAT ARTICLE 127 OF THE ROME STATUTE IS *LEX SPECIALIS*

6. In interpreting Article 12, the Pre-Trial Chamber stressed, for the first time, the distinction between jurisdiction *stricto sensu* and the exercise of jurisdiction. In so doing, the Pre-Trial Chamber also found that a State must be “a Party to the Statute at the time that the Court exercises its jurisdiction”.⁸ The Pre-Trial Chamber further ruled that, “for the purposes of articles 12(2) and 13(c) of the Statute, the Court may not exercise its jurisdiction if, at the time that the Prosecutor has initiated an investigation, the State concerned is no longer a Party to the Statute”.⁹ The Pre-Trial Chamber thereby affirmed the crux of the minority ruling of the Appeals Chamber,¹⁰ and the Defence wholeheartedly endorses these legally correct findings.
7. Nonetheless, instead of applying the abovementioned legally-sound reasoning to the case at hand, the Pre-Trial Chamber formulated a novel doctrine for extending the exercise of jurisdiction beyond the effective date of a State Party’s withdrawal. According to the Pre-Trial Chamber, “article 127 [...] was specifically enacted as *lex*

⁴ ICC, [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.

⁵ United Nations, Withdrawal of the Philippines from the Rome Statute of the International Criminal Court, [Depositary Notification C.N.138.2018.TREATIES-XVIII.10](#), 17 March 2018.

⁶ Public redacted version of “Request for authorisation of an investigation pursuant to article 15(3)”, 24 May 2021, ICC-01/21-7-SECRET-Exp, [ICC-01/21-7-Red](#), 14 June 2021 (“[Request for Authorisation of an Investigation](#)”).

⁷ Decision on the Prosecutor’s request for authorisation of an investigation pursuant to Article 15(3) of the Statute, [ICC-01/21-12](#), 15 September 2021.

⁸ [Impugned Decision](#), para. 80.

⁹ [Impugned Decision](#), para. 80.

¹⁰ Dissenting opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze, [ICC-01/21-77-OPI](#), 18 July 2023 (“[Dissenting Opinion](#)”), para. 27.

specialis to set out the regime that would apply to the exceptional circumstance of a State that withdraws from the Statute, providing that the withdrawal of a State from the Statute ‘shall not [...] 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’¹¹. This finding constitutes an error of law for the reasons set out below.

1.1. The Pre-Trial Chamber Did Not Explain in What Way Article 127(2) Constitutes Lex Specialis of Article 12

8. While used in a number of different contexts in international law,¹² the maxim *lex specialis derogat legi generali* – that a more specific rule prevails over a general one – is a well-recognised principle of legal interpretation that is typically employed to resolve normative conflicts.¹³ Underlying this principle is the notion that a more specific norm would, where clarity is required, better reflect the intentions of the contracting parties (‘discernible intention’).¹⁴
9. With this in mind, *lex specialis* may only apply upon satisfaction of two pre-conditions: (i) where two provisions relate to the ‘same subject matter’,¹⁵ and (ii) there is a conflict or need to clarify these two provisions.¹⁶
10. As the International Law Commission noted in its commentary on Article 55 of the Draft Articles on State Responsibility, “[f]or the *lex specialis* principle to apply it is not

¹¹ [Impugned Decision](#), para. 82.

¹² See M. Koskenniemi, [Study on the Function and Scope of the Lex Specialis Rule and the Question of “Self-Contained Regimes”: Preliminary Report](#), U.N. Doc. A/CN.4/LVI/SG/FIL/CRD.1 (2004) (“[Koskenniemi Preliminary Report](#)”). There is no need to address here other applications of *lex specialis* in international law that are irrelevant to the present case, such as where *lex specialis* is not used in case of conflict *per se*, but, rather, to explain the relationship between two non-conflicting norms relating to the same subject matter and which lead to the same result. This does not apply to the present proceedings, however, as (i) Articles 12 and 127 do not relate to the same subject matter, and (ii) there is no suggestion in the Impugned Decision that these two provisions might lead to the same result; quite the opposite.

¹³ N. Prud’homme, [Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?](#), 40 Isr. L. Rev. 356, 369 (2007). The question of whether Article 127(2) is *lex specialis* in relation to Article 70 of the Vienna Convention on the Law of Treaties is entirely different from, and irrelevant to, the present discussion, which turns on whether Article 127(2) can be considered *lex specialis* of Article 12(2).

¹⁴ A. Lindroos, [Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis](#), 74 Nordic J. Int’l L. 27, 36 (2005). See also J. Pauwelyn, [Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law](#) 388 (Cambridge Univ. Press, 2003) (“the principle of *lex specialis* is but a consequence of the contractual freedom of states, grounded in the idea that the ‘most closest, detailed, precise or strongest expression of state consent’ [...] ought to prevail [...] the *lex specialis* principle thus attempt[s] to answer one and the same question, namely: which of the two norms in conflict is the ‘current expression of state consent’?”).

¹⁵ G. Fitzmaurice, [The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points](#), 33 Brit. Y.B. Int’l L. 203, 237 (1957).

¹⁶ [Koskenniemi Preliminary Report](#), para. 61.

enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. Thus, the question is essentially one of interpretation”.¹⁷

11. In the present case, the Pre-Trial Chamber failed to demonstrate that there was ever a ‘discernible intention’ on the part of either the drafters or the signatories to the Rome Statute that Article 127(2) should serve as *lex specialis* with respect to Article 12. The Pre-Trial Chamber equally failed to show that the commonly-accepted criteria for the application of *lex specialis* were satisfied.

1.1.1. Lack of Discernible Intent for the Application of Lex Specialis

12. The Impugned Decision does not cite a single authoritative source in support of its contention that Article 127(2) was “specifically enacted as *lex specialis*”¹⁸ in relation to Article 12. Indeed, the words ‘*lex specialis*’ appear **nowhere** in any of the 10,531 pages of documented preparatory negotiations to the Rome Statute.¹⁹ Nor is there any support whatsoever for such a view in any of the recognised commentaries to the Rome Statute.²⁰ Even the Prosecution, in all its submissions on the issue of jurisdiction in the Philippines Situation,²¹ has not once asserted that Article 127(2) is *lex specialis*. In this respect, the Defence submits that the Prosecution, out of intellectual consistency, cannot now argue in favour of the Impugned Decision in the present appellate proceedings. To do so would be to contradict its own position throughout the process.
13. Accordingly, the Pre-Trial Chamber’s assertion that Article 127(2) is *lex specialis* is totally unsupported by the drafting history of the Statute or by subsequent scholarship.

¹⁷ International Law Commission, [Report of the Commission to the General Assembly on the work of its fifty-third session](#), Y.B. Int’l L. Comm’n, vol. II, pt. II, at 140, U.N. Doc. A/56/10 (2001).

¹⁸ [Impugned Decision](#), para. 82.

¹⁹ See the ICC Preparatory Works and Statute Amendments Collection, containing more than 9,000 documents, on the [Case Matrix Network](#) and the Preparatory Works resource in [Lexis](#).

²⁰ R. S. Clark & S. M. Meisenberg, [Article 127](#), in Rome Statute of the International Criminal Court: A Commentary 2922-25 (K. Ambos ed., Beck Hart, 4th ed., 2021); R. Kolb, [Article 127](#), in Statut de Rome de la Cour pénale internationale, Commentaire article par article 2647-68 (J. Fernandez, X. Pacreau & M. Ubéda-Saillard eds., Pedone, 2nd ed., 2019); W. A. Schabas, [Article 127](#), in The International Criminal Court: A Commentary on the Rome Statute 1534-36 (Oxford Univ. Press, 2nd ed., 2016).

²¹ See [Request for Authorisation of an Investigation](#); Prosecution’s request to resume the investigation into the situation in the Philippines pursuant to article 18(2), [ICC-01/21-46](#), 24 June 2022; Public Redacted Version of “Prosecution’s Response to the Philippine Government’s Observations on the Prosecution’s Request to Resume Investigations”, [ICC-01/21-01/25-54-Red](#), 22 September 2022; 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-01/21-68](#), 4 April 2023.

1.1.2. *The Misapplication of Lex Specialis: Disparity of Subject Matter*

14. As stated above, the principle of *lex specialis* may only be applied to resolve conflicting norms relating to the ‘same subject matter’. Articles 12(2) and 127(2), however, do not concern the same subject matter. Article 12(2), which deals with the preconditions for the exercise of jurisdiction, bears no linguistic similarity or legal connection either to the modalities for withdrawal or to the notion of a ‘matter under consideration by the Court’ provided in Article 127(2). Quite simply, the two statutory provisions deal with entirely different concepts and neither is *lex specialis* of the other.
15. Nor is there a conflict or ambiguity that would require clarification of one provision by contrast to the other. Such notional disparity is evident from the language and purpose of the two statutory provisions: one stipulates the preconditions for the exercise of jurisdiction whereas the other provides for the preservation of pre-existing obligations beyond the date of effective withdrawal. The Impugned Decision itself does not discuss any ‘matter’ in Article 12(2) that would require a ‘special’ application in light of Article 127(2). In fact, its exclusive focus is whether a preliminary examination is relevant to identify a ‘matter under consideration by the Court’; preliminary examinations, however, have nothing to do with Article 12(2).
16. Moreover, Article 12 is self-contained and does not require Article 127(2) to clarify the modalities to be adopted with respect to a Non-State Party. Indeed, Article 12(3) explicitly provides the process to be followed if the preconditions of Article 12(2) are not satisfied because the State concerned is not a Party; namely, obtain the consent of the Non-State Party in question. Article 12(3) makes no distinction as to whether a State has withdrawn or not, and the *lex* provided in Article 12(3) is therefore sufficient. Had the drafters intended to carve out any form of exception to Article 12(2) for States that *have* withdrawn from the Rome Statute, they would have done so in the context of Article 12 – as they did, unequivocally, in Article 12(3) – and not by way of a vague expression in Article 127(2).
17. In light of the aforementioned, it is hard to comprehend how the Pre-Trial Chamber was able to rule that “article 127(2) of the Statute makes **specific** provision for the Court to be able to exercise its jurisdiction if the matter concerned was already under consideration by the Court prior to the withdrawal of a State becoming effective”.²²

²² [Impugned Decision](#), para. 81 (emphasis added). See also [Impugned Decision](#), paras. 67, 75.

Article 127(2) makes no such ‘specific provision’ nor does it allude to any normative connection with the ‘exercise of jurisdiction’. It is clear, therefore, that Article 127 does not relate to the ‘same subject matter’ as does Article 12. For this reason alone, the Pre-Trial Chamber ought not to have deemed Article 127(2) *lex specialis*.

1.1.3. The Misapplication of Lex Specialis: Lack of Normative Conflict or Absence of a Need for Clarification

18. The Pre-Trial Chamber failed to elaborate on the purported interpretive or substantive conflict between Article 12(2) and Article 127(2) that would have justified recourse to the principle of *lex specialis*.
19. Article 12 simply requires that a State be a Party to the Rome Statute at the time the Court is considering exercising jurisdiction – as accepted by the Pre-Trial Chamber itself. There is nothing in the language of Article 127(2) that conflicts with this interpretation or suggests that it should be displaced.
20. In fact, these two statutory provisions are perfectly compatible with each other: Article 12(2) fixes the preconditions for the exercise of jurisdiction prior to the opening of an investigation, whereas Article 127(2) regulates what happens to that same investigation when a State Party withdraws from the Statute.
21. Finally, even if the Pre-Trial Chamber’s interpretation of a ‘matter under consideration’ for the purposes of Article 127(2) can include a preliminary examination (a position vehemently opposed by the Defence), such preliminary examination may continue to be ‘under consideration’ even after a State Party’s withdrawal. Should the Prosecutor wish to open an investigation post-withdrawal, he or she may seek the consent of the withdrawing Non-State Party under Article 12(3). For this additional reason, Article 12 does not conflict with Article 127(2), and there is no need to resort to *lex specialis*.

1.1.4. The Misapplication of Lex Specialis: Part 2 of the Rome Statute

22. As a direct consequence of classifying Article 127(2) as *lex specialis*, the Pre-Trial Chamber found that, post-withdrawal, the jurisdictional provisions of Part 2 of the Statute will continue to apply to a State targeted by a preliminary examination as if that State were still a Party to the Statute.²³ While such a ruling throws the Prosecution a life-belt for its erroneous decision to seek an impermissibly belated investigation, the

²³ [Impugned Decision](#), para. 82.

upshot thereof has far-reaching and undesirable consequences. Given that Part 2 of the Rome Statute incorporates both the material and temporal jurisdiction of the Court, vesting Article 127(2) with the status of *lex specialis* would mean that the mere opening of a preliminary examination would be sufficient for the exercise of jurisdiction over alleged crimes committed even **after** the withdrawal of the State concerned. This is a claim unsupported by any authority,²⁴ and, once again, is something never before argued by the Prosecutor.

23. This would give grossly inflated effect to Article 127(2). As found by Judges Perrin de Brichambaut and Lordkipanidze: “[I]n our view, article 127 of the Statute is contained in the ‘Final clauses’ (Part 13 of the Statute). The provisions contained in that part cannot alter the carefully crafted jurisdictional regime contained in Part 2 of the Statute”.²⁵

1.2. The Pre-Trial Chamber Erred in Law by Basing its Finding that Article 127(2) is Lex Specialis on Irrelevant Policy Considerations

24. As a matter of principle, subjective policy preferences of individual judges should not dictate their decisions. The judiciary is required to apply the Rome Statute in keeping with the intent of the States Parties, and *not* as they would have preferred to have seen it drafted. In the present instance, the Pre-Trial Chamber felt the need to strike “an appropriate balance between the responsibilities that a State adopts when voluntarily ratifying the Statute and its ability to withdraw from it subsequently”.²⁶ This, so it was suggested, would ensure that States Parties do not “abuse” the right to withdraw “by shielding persons from justice”.²⁷
25. However, in presenting its own policy-oriented preference as to how the aforementioned balance *should* be struck, the Pre-Trial Chamber ignored the balance that was *actually* struck by the drafters of the Rome Statute in Article 127(1). Once a State has deposited its instrument of withdrawal, the Prosecutor is afforded one full year to seek an investigation in keeping with the preconditions of Article 12, *i.e.* before that withdrawal becomes effective. This is the only ‘balance’ of consequence and it

²⁴ In particular, the decision in the *Burundi Situation* does not support the interpretation advanced in the Impugned Decision. See Situation in the Republic of Burundi, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X-9-US-Exp, 25 October 2017, [ICC-01/17-9-Red](#), 9 November 2017, para. 24.

²⁵ [Dissenting Opinion](#), para. 36.

²⁶ [Impugned Decision](#), para. 75. See also [Impugned Decision](#), para. 81.

²⁷ [Impugned Decision](#), para. 83.

addresses the very same considerations deemed relevant by the Pre-Trial Chamber.

26. The Pre-Trial Chamber was not entitled to contrive its own preferred balance between a State's statutory obligations and the right to withdraw from the Rome Statute, especially where such a balance *already* exists.²⁸

2. A PRELIMINARY EXAMINATION IS NOT A 'MATTER UNDER CONSIDERATION' WITHIN THE MEANING OF ARTICLE 127(2)

2.1. *The Overly Broad Interpretation of the Term 'Matter'*

27. The Pre-Trial Chamber erred by adopting an overly broad interpretation of the term 'matter', thus increasing the likelihood of it being deemed 'under consideration' at the time of the Philippines' effective withdrawal. Relying on definitions derived from the Oxford English Dictionary, the Pre-Trial Chamber reduced the concept to a mere 'concern' or even just a 'thought',²⁹ thereby diluting its import and diminishing the need for a preliminary examination to possess some substance. Given that the Pre-Trial Chamber can hardly have been suggesting that a mere prosecutorial 'thought' would constitute a preliminary examination capable of nullifying the legal effect of a State Party's withdrawal, this semantic analysis adds little of relevance to the debate.
28. The Pre-Trial Chamber concomitantly failed to give due weight to the more restrictive language employed in other language versions of the Statute in place of the English term 'matter',³⁰ which could, likewise, have served as an interpretive benchmark. By relying on the principle of equal linguistic authenticity stipulated in Article 128, the Pre-Trial Chamber appears to suggest that the outcome of certain litigation may depend on which version of the Statute is used or the language preferred by the presiding judge.³¹ This is hardly conducive to legal certainty.
29. As a result, the Pre-Trial Chamber erred by resorting to its subjectively formed opinion as to the purpose of the Statute,³² without any attempt at linguistic reconciliation. The Defence submits that if a term in one version of the Statute possesses either a broad or narrow meaning ('matter') while its parallel term in another language version of the Statute has *only* a narrow meaning (such as the French word '*affaires*'), the logical

²⁸ [Dissenting Opinion](#), para. 29.

²⁹ [Impugned Decision](#), para. 51.

³⁰ Contrary to the view of the Pre-Trial Chamber, the word '*affaires*' in the French version **does** detract from the broad meaning of the word 'matter'.

³¹ [Impugned Decision](#), para. 55.

³² [Impugned Decision](#), para. 55.

solution would be to adopt the common denominator, *i.e.* the narrower interpretation. The Impugned Decision erroneously adopts an interpretation of the English term ‘matter’ that is incompatible with its French, or even its Chinese, equivalent.

2.2. *The Pre-Trial Chamber Erred in Law by Finding that a Preliminary Examination Renders a Matter ‘Under Consideration’*

30. The Pre-Trial Chamber is mistaken in asserting that a preliminary examination is a statutory process regulated by Article 15 of the Statute and Rules 46 through 50 of the Rules of Procedure and Evidence.³³ No statutory provisions govern the nature and conduct of a preliminary examination, and there exist no legal or jurisdictional limitations on the Prosecutor’s ability to open a preliminary examination into any situation as he or she sees fit, even concerning matters impacting the interests of a Non-State Party.³⁴ The Prosecutor is free to open, and to keep open, a preliminary examination in relation to a situation in a withdrawing State, even in the absence of Article 127(2). For this reason, there is no need to consider whether Article 127(2) applies to preliminary examinations.
31. Furthermore, even if the Prosecution has taken significant steps during its preliminary examination, investigative measures such as those adopted under Rule 47(2) are discretionary.³⁵ Rules 46 through 50 do not regulate a preliminary investigation; rather, they provide the Prosecutor with the means to preserve evidence which might otherwise be lost. There is no statutory requirement that such concrete steps be effected for a preliminary examination to exist. On the contrary, the Prosecutor is at liberty to conduct such preliminary examination as he or she wishes, without judicial oversight.
32. Given the completely discretionary nature of the process, the Pre-Trial Chamber’s

³³ [Impugned Decision](#), para. 57.

³⁴ See e.g. ICC Communications, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine*, 25 April 2014; *Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine*, 11 December 2020; *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16 January 2015; *Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the Situation in Palestine, and seeking a ruling on the scope of the Court’s territorial jurisdiction*, 20 December 2019.

³⁵ In that respect, the Defence notes that when the Prosecutor filed requests under Rule 47 in the Philippines Situation, the Judges were very clear that they considered each “unique opportunity” request to be a discrete “**matter**” which, once terminated, was no longer before them. See e.g. Decision Ordering the Registrar to Redirect the ‘Prosecution’s Second Request under Rule 47(2) of the Rules (Philippines)’ to the President of the Pre-Trial Division, [ICC-01/21-01/25-25-Conf](#), 14 October 2019, para. 6. Therefore, a ‘matter’ engaged by an Article 15(2) or Rule 47(2) request is strictly limited to that discrete process, and a preliminary examination does not acquire a new status such that it is transformed into a “matter under consideration by the Court”.

analysis of how the Prosecutor conducted the preliminary examination, and the fact that it was an “active and focused inquiry leading to a specific legal conclusion”,³⁶ is irrelevant. The Prosecutor is not legally required to publish the fact that he or she is conducting a preliminary examination any more than he or she is legally required to write policy papers thereupon. There is no legal requirement for the Prosecutor to create complex internal procedures to deal with preliminary examinations; that he or she elects to exploit ‘unique investigative opportunities’, even in the absence of any legal obligation to do so, does not thereafter vest the preliminary examination with greater legal force for enabling the Court’s exercise of jurisdiction.

33. At the end of the day, a preliminary examination has no special statutory status and comprises nothing more than a catch-all concept encompassing internal deliberations in the Office of the Prosecutor **with a view to** opening a formal investigation. To take the matter to an extreme, this internal process may comprise something as trivial as a Prosecution staff member leafing through an NGO report without taking further action.³⁷ The fact that the OTP has decided to self-regulate, to formalise its preliminary examinations, and to update the public with the progress thereof does not change their non-justiciable and their legally non-consequential nature.

34. As noted by Judges Perrin de Brichambaut and Lordkipanidze:

[a]s to the second limb of the above mentioned sentence in article 127(2) of the Statute, we consider that the Prosecutor’s preliminary examinations are not a “matter [...] under consideration by the Court” within the meaning of article 127(2) of the Statute, and that a situation is only under consideration by the Court once a pre-trial chamber authorises an investigation into that situation. **This is largely due to the informal nature of the preliminary examinations, which do not carry sufficient weight for engaging the Court’s jurisdiction**, in the absence of a pre-trial chamber’s formal authorisation of the commencement of an investigation, pursuant to article 15 of the Statute. We consider that the last sentence of article 127(2) of the Statute cannot be relied upon to extend the Prosecutor’s power to submit an article 15(3) request beyond the time the withdrawal has become effective.³⁸

35. For this reason, an internal prosecutorial concern or random interest in a situational crisis at the pre-investigation stage cannot, and must not, take precedence over a State’s sovereign decision to withdraw from the Rome Statute. To find otherwise would mean

³⁶ [Impugned Decision](#), para. 58.

³⁷ See also K. J. Heller, “[A Dissenting Opinion on the ICC and Burundi](#)”, *Opinio Juris* (29 October 2017).

³⁸ [Dissenting Opinion](#), para. 35 (emphasis added).

that the Prosecution could frustrate the so-called ‘right to withdraw’ merely by declaring the initiation of a preliminary examination within the one-year period envisaged under Article 127(1), thereby granting the Court indefinite time and capacity to exercise its jurisdiction. This eventuality would be totally inapposite.

36. In an apparent attempt to avoid such an outcome, the Pre-Trial Chamber suggested that not every preliminary examination would encompass a ‘matter already under consideration by the Court’ within the meaning of Article 127(2). According to the Pre-Trial Chamber, “[e]ach situation will need to be analysed on its merits” to avoid abuse.³⁹ Having said this, however, the Pre-Trial Chamber gave no indication as to what criteria, precisely, should be applied to determine whether a preliminary examination is a ‘matter under consideration’ on a case-by-case basis. This would result in an untenable situation wherein a withdrawing State is denied knowledge of the legal consequences of its withdrawal until engaged in a process under Article 127(2).
37. Ultimately, the Pre-Trial Chamber’s position is legally unsound. The drafters of the Rome Statute did not intend that the legal consequences of a sovereign State’s withdrawal from the Rome Statute should be determined prospectively and on a case-by-case basis. Nor can the Pre-Trial Chamber predict which preliminary examinations would extend the period for the exercise of jurisdiction when its own tautological analysis posits that the defining feature of a ‘matter under consideration’ is the preliminary examination itself. Indeed, a preliminary examination cannot “encompass”⁴⁰ a ‘matter under consideration’, when what makes a matter ‘under consideration’ is the preliminary examination itself. Given that such an incongruity only arises if a preliminary examination is deemed to be a ‘matter under consideration’ within the meaning of Article 127(2), the Appeals Chamber is urged to reverse this finding for the sake of statutory clarity.

2.3. The Pre-Trial Chamber Erred in Law and Fact by Relying on Alleged ‘Subsequent Practice’ of the Philippines

38. The Pre-Trial Chamber attributed significance to the “continued engagement of the Philippines with the Court, notwithstanding its withdrawal”.⁴¹ Such ‘subsequent practice’, post-withdrawal, would, according to the Pre-Trial Chamber, “establish[] the

³⁹ [Impugned Decision](#), para. 60.

⁴⁰ [Impugned Decision](#), para. 60.

⁴¹ [Impugned Decision](#), para. 69.

agreement of the parties regarding [the] interpretation” of Article 127(2) and lend “further support” for the retention of jurisdiction over the alleged crimes as “a matter [...] under consideration”.⁴²

39. The Pre-Trial Chamber’s application of the concept of ‘subsequent practice’ in the present context was legally inappropriate and factually incorrect. ‘Subsequent practice’ as an interpretive rule relates to the subsequent conduct of contracting Parties to a treaty to determine the existence of an agreement “regarding its interpretation”.⁴³ In the present case, the Pre-Trial Chamber merely considered the sole (and inconsistent) conduct of one Non-State Party (the Philippines) without considering the ‘subsequent practice’ or conduct of other States Parties to the Statute. No attempt was made to determine the existence of any agreement between other States Parties as to the correct interpretation of ‘matter under consideration’.
40. It would, furthermore, be a mistake to draw any legal conclusions from a State’s decision to exercise the rights afforded to it under the Rome Statute. Any State (not just States Parties) is permitted to file a request for the deferral of an ICC investigation (as the Philippines sought to do). Resort to such litigation, as already attempted by another Non-State Party,⁴⁴ by no means entails recognition of the Court’s ability to exercise jurisdiction, implied or otherwise, especially in the present situation, wherein the Philippines has *expressly* challenged the Court’s capacity to exercise jurisdiction.⁴⁵
41. Finally, no less than President Ferdinand Marcos Jr has frequently contested the Court’s jurisdiction over the Philippines and its citizens: “Let me say this for the 100th time. I do not recognize the jurisdiction of ICC in the Philippines. I consider this as a threat to our sovereignty”.⁴⁶ President Marcos has also clearly stated that the surrender of Mr

⁴² [Impugned Decision](#), para. 69.

⁴³ M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* 431 (Martinus Nijhoff Publishers, 2008). In that respect, it should be noted that the two ICJ cases cited by the OPCV actually demonstrate this fact. In both cases, the ICJ questioned whether both parties to a treaty had expressed a view following the conclusion of the treaty on how they understood a certain provision of the treaty. See Victim’s Observations on the Defence Challenge with Respect to Jurisdiction, [ICC-01/21-01/25-145](#), 9 June 2025, paras. 36-37, fns. 41, 43, referencing [The Corfu Channel Case Corfu Channel \(United Kingdom of Great Britain and Northern Ireland v. Albania\)](#), Merits, Judgment, 9 April 1949, p. 25; [Maritime Delimitation in the Indian Ocean, \(Somalia v. Kenya\)](#), Preliminary Objections, Judgment, 2 February 2017, para. 92.

⁴⁴ See Public Redacted Version of “Israel’s challenge to the jurisdiction of the Court pursuant to article 19(2) of the Rome Statute”, [ICC-01/18-354-AnxII-Corr](#), 23 September 2024.

⁴⁵ 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, paras. 26-62.

⁴⁶ K. Domingo and J. Balancio, “[‘Threat to sovereignty’: Marcos says gov’t will ‘not lift a finger’ to help ICC probe](#)”, ABS-CBN News (23 January 2024). See also Office of the President of the Philippines, Presidential Communications Office, “[No PH cooperation with ICC unless PRRD wants it – PBBM](#)” (14 November 2024).

Duterte was premised on a request from Interpol, not the ICC.⁴⁷

42. The ‘subsequent practice’ of the Philippines cannot, therefore, serve as an interpretative guideline any more than it can be confined to governmental conduct after Mr Duterte’s surrender to the Court. Indeed, the conduct of the Government of the Philippines, when assessed in its totality, has evinced an explicit **rejection** of the Court’s ability to exercise jurisdiction.

2.4. The Pre-Trial Chamber Erred in Law by Finding that Preliminary Examinations and Investigations Are Not Two Different ‘Matters Under Consideration’

43. Even assuming, *arguendo*, that a preliminary examination is a ‘matter under consideration’ by the Court, it can only entail, at best, the continuation of that preliminary examination beyond the date of effective withdrawal. Such a finding would have no bearing whatsoever on the consideration of the other equally live matter; namely, whether the Court, in its judicial capacity, can exercise jurisdiction under Article 12 and open an investigation.⁴⁸
44. There are, at least, two ‘matters’ under consideration by the Court: On the one hand, the preliminary examination, and, on the other, the decision to open an investigation. These matters “are definitely not identical since the ‘consideration’ of each of them is carried out by different organs of the Court and is subject to distinct provisions. Presenting them as one and the same ‘matter’ in the singular would be stretching this notion to the point where it loses any meaning”.⁴⁹
45. A further problem arises out of the Pre-Trial Chamber’s generic encapsulation of the ‘matter under consideration’. In one instance, the Impugned Decision states that “[t]he Philippines Situation is an example of a matter which was already under consideration by the Court”.⁵⁰ Elsewhere, it is declared that “[t]he matter that was already under consideration by the Court was the allegations of crimes committed in the Philippines”.⁵¹ Such imprecise language endorses an abstract definition of ‘matter

⁴⁷ Office of the President of the Philippines, Presidential Communications Office, “*PBBM: Duterte’s arrest PH commitment to Interpol*” (11 March 2025). See also B. Unite, “*Marcos on Duterte’s arrest: It was not politically motivated*”, Manila Bulletin (12 March 2025).

⁴⁸ See S. Vasiliev, “*Piecing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)*”, *Opinio Juris* (6 November 2017) (“*Vasiliev Article*”).

⁴⁹ See *Vasiliev Article*.

⁵⁰ *Impugned Decision*, para. 76.

⁵¹ *Impugned Decision*, para. 76.

under consideration’ that is disconnected from the legal framework of the Rome Statute, which quite sufficiently articulates the concrete procedural steps of the judicial process within which an interpretation of Article 127(2) must be grounded.

46. As a consequence, for a matter to be ‘under consideration’, it cannot be of such an abstract nature – as seems to be the approach of the Pre-Trial Chamber – but, rather, it must be an issue envisaged both legally **and** procedurally under the Rome Statute. This requires distinguishing the different procedural steps provided for in the Rome Statute (such as preliminary examinations and investigations) to identify a ‘matter under consideration’; this, in practical effect and following the Pre-Trial Chamber’s own logic, leads to the inevitable conclusion that the ‘matter under consideration’ is necessarily the preliminary examination, and not some abstract notion of ‘allegation of crimes’.

3. THE ‘COURT’ DOES NOT INCLUDE THE OFFICE OF THE PROSECUTOR FOR THE PURPOSES OF ARTICLE 127(2)

47. In first instance, the Defence comprehensively demonstrated how the word ‘Court’, as used in the Rome Statute and the Rules of Procedure and Evidence, overwhelmingly connotes the judiciary to the exclusion of the Prosecutor.⁵²
48. Yet, in the Impugned Decision, the Pre-Trial Chamber relied exclusively on its own singular interpretation of the second sentence of Article 127(2) to conclude that ‘the Court’ must include the Office of the Prosecutor. More specifically, the Pre-Trial Chamber found that the term “clearly includes the Prosecution” because “a State’s withdrawal ‘shall not affect any cooperation with the Court in connection with criminal investigations and proceedings [...]’”.⁵³ In so far as cooperation requests under Part 9 may be made by the Prosecution, the Pre-Trial Chamber found that this organ of the Court must fall, for this discrete issue, within the definition of the term ‘the Court’.
49. Contrary to the Pre-Trial Chamber’s assertion, however, Part 9 does **not** explicitly permit the Prosecutor to promulgate requests for cooperation. The fact that the Prosecutor has previously framed such requests as falling under Part 9, and both States and organisations have voluntarily complied therewith, does not mean that the

⁵² Defence Challenge with Respect to Jurisdiction, [ICC-01/21-01/25-121](#), 1 May 2025 (“[Challenge to Jurisdiction](#)”), paras. 56-90, demonstrating that the 52 references to “the Court” in the official texts did not include the Office of the Prosecutor.

⁵³ [Impugned Decision](#), para. 66.

Prosecutor was legally authorised to do so. Elsewhere in Part 9 where cooperation is discussed, the term ‘the Court’ actually refers exclusively to the judiciary. Article 87(7), for example, provides that where a State manifests a lack of cooperation, ‘the Court’ may refer the issue to the Assembly of States Parties.⁵⁴ This is not something the Prosecutor is empowered to do.

50. In any event, the Pre-Trial Chamber’s decision to interpret ‘the Court’ by reference to ‘cooperation’, as set out in the first part of Article 127(2), is not only arbitrary but lacks relevance to the notion of ‘the Court’ in relation to a ‘matter under consideration’. In these circumstances, it is perhaps more appropriate to consider the **only** other occurrence in the Rome Statute of the expression “under consideration by the Court”, which is to be found in Article 95. In that provision, the expression clearly and unequivocally denotes the judiciary, and manifestly *excludes* “the Prosecutor”.⁵⁵
51. Incidentally, whenever the word ‘Court’ is juxtaposed in the Rome Statute with some variation of the word ‘consider’, the language is *always* intended to denote the judiciary.⁵⁶ This is also the case in other language versions of the Statute. In the Chinese version, for example, the word ‘consideration’ – as used in the phrases ‘continued consideration’ and ‘under consideration’ in Article 127(2) – precedes the reference to ‘any matter’ (‘任何事项’), and is worded as ‘审理’.⁵⁷ As a verb, ‘审理’ means ‘to try’ or ‘to hear’;⁵⁸ as a noun, it means ‘trial’.⁵⁹ Given this very specific linguistic choice by the Chinese drafters, the meaning ascribed to ‘any matter’ is necessarily limited to ‘*any matter being tried or heard*’. Similarly, the term ‘the Court’ must, perforce, be limited to the judiciary, which is the only body able to try or to hear legal proceedings.⁶⁰
52. The exact same wording (‘审理’) is used in the Chinese translation of Article 95,⁶¹ which is the only other article in the Statute where the phrase ‘under consideration’ is used. Article 95 pertains to an admissibility challenge under consideration by ‘the Court’.

⁵⁴ Rome Statute, [Article 87\(7\)](#).

⁵⁵ Rome Statute, [Article 95](#).

⁵⁶ Rome Statute, [Articles 17\(2\)](#), [17\(3\)](#), [31\(3\)](#), [50\(3\)](#), [60\(4\)](#), [68\(3\)](#), [69\(3\)](#), [72\(7\)\(a\)\(i\)](#), [81\(2\)\(b\)](#), [81\(2\)\(c\)](#), and [95](#).

⁵⁷ 《国际刑事法院罗马规约》第127条第2款.

⁵⁸ Oxford Dictionaries: [审理](#); Cambridge Dictionary: [审理](#); Youdao Dictionary: [审理](#).

⁵⁹ Cambridge Dictionary: [审理](#); Youdao Dictionary: [审理](#).

⁶⁰ T. Yudan, “[The Impact of Burundi’s Withdrawal upon the Burundi Situation](#)”, Yudan’s Blog Relating to Law (21 December 2016).

⁶¹ Rome Statute, [Article 95](#); 《国际刑事法院罗马规约》第95条.

Here, ‘the Court’ clearly refers to the judiciary, which is distinguished from the Prosecutor in the same article.⁶² The drafters’ use of the same language to denote the Court’s consideration of the matter in both Articles makes clear that ‘the Court’ was intended to refer *only* to judicial bodies.

53. Similarly, the verb used in the Spanish-language version of the Rome Statute in respect of Article 127(2) is ‘*examinar*’.⁶³ Apart from its use in Article 95, which – like the Chinese, English, and French versions – places the term ‘the Court’ (or ‘*la Corte*’) alongside ‘under consideration’ (or ‘*examinar*’) to signify a singularly judicial role, the same verb is also used throughout the Rome Statute in various other contexts related exclusively to judicial roles and responsibilities. This includes penal sentence review and reduction (“*la Corte examinará la pena*”),⁶⁴ the obligation to issue reasoned decisions based on evidence submitted during trial (“*examinadas ante ella en el juicio*”);⁶⁵ and the Court’s responsibility to determine a State’s unwillingness⁶⁶ or inability⁶⁷ in the context of admissibility. Where the verb is employed outside a judicial capacity, the role – be it the Assembly of States Parties,⁶⁸ the UN Secretary-General,⁶⁹ Pre-Trial or Trial Chambers,⁷⁰ or the Prosecutor (‘*Fiscal*’)⁷¹ – is expressly delineated.
54. The Pre-Trial Chamber’s comparison of two parts of the same sentence addressing different issues was erroneous. It should have interpreted ‘the Court’ in the context of the Statute as a whole and by specific reference to the **only** other use of the expression ‘under consideration by the Court’ as found in Article 95.

⁶² See [Challenge to Jurisdiction](#), para. 56.

⁶³ Estatuto de Roma de la Corte Penal Internacional, [Artículo 127\(2\)](#) (“*la denuncia tampoco obstará en modo alguno a que se **sigan examinando las cuestiones que la Corte tuviera** ante sí antes de la fecha en que la denuncia surta efecto*”) (emphasis added).

⁶⁴ Estatuto de Roma de la Corte Penal Internacional, [Artículo 110\(3\)](#) (“*la Corte examinará la pena para **determinar si ésta puede reducirse***”); [Artículo 110\(5\)](#) (“*la Corte [...] volverá a examinar la cuestión*”) (emphasis added).

⁶⁵ Estatuto de Roma de la Corte Penal Internacional, [Artículo 74\(2\)](#) (“*la Corte podrá fundamentar su fallo únicamente en las pruebas presentadas y examinadas ante ella en el juicio*”).

⁶⁶ Estatuto de Roma de la Corte Penal Internacional, [Artículo 17\(2\)](#).

⁶⁷ Estatuto de Roma de la Corte Penal Internacional, [Artículo 17\(3\)](#) (“*[a] fin de determinar la incapacidad para investigar o enjuiciar en un asunto determinado, la Corte examinará si el Estado [...] no puede hacer comparecer al acusado, no dispone de las pruebas y los testimonios necesarios o no está por otras razones en condiciones de llevar a cabo el juicio*”).

⁶⁸ Estatuto de Roma de la Corte Penal Internacional, [Artículo 112\(2\)](#).

⁶⁹ Estatuto de Roma de la Corte Penal Internacional, [Artículo 123\(1\)](#).

⁷⁰ Estatuto de Roma de la Corte Penal Internacional, [Artículos 53\(3\)\(a\); 58\(1\)](#).

⁷¹ Estatuto de Roma de la Corte Penal Internacional, [Artículos 18\(3\); 42\(1\); 54\(3\)\(a\); 56\(1\)\(a\)](#).

4. THE PRE-TRIAL CHAMBER ERRED IN LAW BY FINDING THAT ‘THE OBJECT AND PURPOSE’ OF THE ROME STATUTE PERMITTED THE OPENING OF AN INVESTIGATION EVEN AFTER THE PHILIPPINES’ EFFECTIVE WITHDRAWAL

55. To support its broad interpretation of a ‘matter under consideration’, the Pre-Trial Chamber made a policy-oriented determination and concluded that “[i]t would be entirely against that object and purpose to interpret article 127 of the Statute to enable a State Party to evade its responsibilities under the Statute by depositing a written notice of withdrawal from the Statute once it discovers that alleged crimes committed on its territory or by its nationals are being examined by the Prosecution”.⁷²
56. If, however, it is truly necessary to preserve the ‘object and purpose’ of the Statute by preventing a State Party from frustrating an investigation by way of withdrawal, then the necessary safeguard must surely be the one-year period already provided by the drafters of the Rome Statute in Article 127(1). This is the very balance which the Pre-Trial Chamber insists must be struck to uphold the Statute. There is no conflict or lacuna that would justify perverting the preexisting statutory regime set out in Article 127.
57. Given that the Prosecutor could have prevented the feared impunity by seeking its investigation within the statutory withdrawal period, it is unclear why the Pre-Trial Chamber failed to insist on an explanation for the Prosecution’s dilatory attitude rather than promoting a strained interpretation of Article 127(2) to prevent the plain application of Article 12(2) of the Statute.
58. By speculating on the reasons for the Philippines’ withdrawal, the Pre-Trial Chamber unduly relied on a subjective political critique.⁷³ Such individual policy considerations dependent on contemporaneous circumstances cannot dictate the correct legal interpretation of Article 127(2). To this end, the Impugned Decision, as it stands, risks setting a dangerous precedent for the Court being able to *negate* the effects of a withdrawal simply because its ‘case by case’ evaluation leads it to disapprove of and, consequently, reject the reasons for a State Party’s withdrawal. The Defence does not deny that, in certain cases, the Court may consider policy, but such consideration cannot override clarification of predetermined statutory intent. In the present scenario, the Pre-Trial Chamber’s policy-driven deliberations were aimed solely at countering what it, subjectively, perceived to be the rationale for the Philippines’ withdrawal. In so doing,

⁷² [Impugned Decision](#), para. 71.

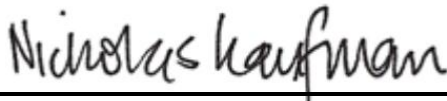
⁷³ [Impugned Decision](#), paras. 72-74.

the Pre-Trial Chamber misconstrued the statutory intent underlying Article 127(2) while engendering a far more dangerous policy risk; namely, the creation of a prosecutorial power to frustrate legitimate withdrawal simply by opening a preliminary examination before the one-year withdrawal period becomes effective.

IV. RELIEF SOUGHT

59. The Defence respectfully requests the Appeals Chamber to:

- i. **REVERSE** the Impugned Decision;
- ii. **FIND** that there exists no legal basis for the continuation of International Criminal Court proceedings against Mr Rodrigo Roa Duterte; and
- iii. **ORDER** his immediate and unconditional release.



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Dated this 14th day of November 2025
At The Hague, The Netherlands