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No.: **ICC-01/21-01/25**
Date: **16 January 2026**

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

Additional Prosecution observations under regulation 28

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INTRODUCTION

1. On 16 December 2025, pursuant to regulation 28 of the Regulations of the Court,¹ the Appeals Chamber invited the parties and participants to submit additional observations on two discrete issues arising from the Defence appeal against the Pre-Trial Chamber’s decision affirming the jurisdiction of the Court in this case.² These issues concern: (i) the correct interpretation of articles 12(2) and 13(c) of the Statute “within the Court’s legal framework on jurisdiction”, and; (ii) the “consequences of [the] interaction” between articles 12, 13 and 127 of the Statute, “both generally and in the specific case at hand”.³

SUBMISSIONS

2. In the Prosecution’s view: (i) the Pre-Trial Chamber was incorrect in its *obiter dictum* that “articles 12(2) and 13(c) [...] require a State to be a Party to the Statute at the time that the Court exercises its jurisdiction”,⁴ and; (ii) the Chamber’s interpretation of article 127(2) is better understood as *consistent* with Part 2 of the Statute, rather than *lex specialis*. Alternatively, even if the Chamber was correct in its *obiter dictum*, its primary holding also remains correct, namely that jurisdiction is preserved by article 127(2) as *lex specialis* in circumstances such as the present case.⁵

3. Either way, the Chamber correctly concluded that a State Party’s withdrawal from the Statute before the authorisation of an investigation does not preclude the Court’s exercise of jurisdiction over article 5 crimes allegedly committed when it was still a State Party. In this case, the Chamber correctly found that the Philippines’ withdrawal from the Statute did not preclude the Court’s exercise of jurisdiction over Mr Duterte.

A. The Chamber’s *obiter dictum* was incorrect

4. Article 12(2) requires only that a relevant State *has* accepted the jurisdiction of the Court.⁶ In any event, even if articles 12(2) and 13(c) were correctly interpreted as requiring such acceptance to continue when the Court’s exercise of jurisdiction was triggered, the preliminary examination proceedings in this situation sufficed.⁷

¹ [ICC-01/21-01/25-340 OA3](#) (“Regulation 28 Order”).

² See [ICC-01/21-01/25-309](#) (“Decision”). See further [ICC-01/21-01/25-319 OA3](#) (“Appeal Brief”); [ICC-01/21-01/15-328 OA3](#) (“Response to Appeal Brief”).

³ [Regulation 28 Order](#), para. 11.

⁴ [Decision](#), para. 80. See also paras. 78-79.

⁵ [Decision](#), paras. 45-77, 81-83.

⁶ *Contra* [Decision](#), paras. 79-80. See below paras. 5-25.

⁷ See below paras. 26-27.

A.1. Article 12(2) requires only that a relevant State has accepted the Court’s jurisdiction

5. The Statute must be interpreted according to the principles of the VCLT⁸—that is, in good faith in accordance with the ordinary meaning to be given to the relevant terms in their context and in light of the object and purpose of the treaty.⁹ Correctly interpreted, article 12(2) only requires that a relevant State has accepted the jurisdiction of the Court, irrespective of whether it continued to do so when the Court’s exercise of jurisdiction was triggered.

A.1.a. The terms of article 12(2) in their ordinary meaning

6. Article 12(2) provides 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.” [Emphasis added.]

7. The Chamber noted: (i) the use of the present tense (“are”), which it understood to mean that *continued* status as a State Party is a precondition “for the Court to exercise its jurisdiction”; (ii) the titles of articles 12 and 13, in which article 12 addresses “[p]reconditions to the exercise of jurisdiction” and article 13 the “exercise of jurisdiction”.¹⁰

8. The Chamber took this interpretive exercise no further. It did not consider alternative views of the terms of article 12(2); nor did it address the broader context of other provisions of the Statute, or its object and purpose, as set out below.¹¹ While the correct interpretation of a treaty provision may sometimes appear obvious, this must be treated with caution. The only correct interpretive approach is that set out in the VCLT, requiring the *joint* consideration of ordinary meaning, context, and object and purpose, since these factors are necessarily inter-related.¹² Reliance even on well-founded assumptions solely about the ordinary meaning of a

⁸ See [Response to Appeal Brief](#), para. 7.

⁹ [VCLT](#), art. 31(1).

¹⁰ See [Decision](#), para. 80 (concluding: “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”). See also [Decision](#), para. 79 (agreeing that “the preconditions to the exercise of jurisdiction set out in article 12 of the Statute must exist at the time that the exercise of the jurisdiction is triggered pursuant to article 13 of the Statute”, quoting [ICC-01/27-77-OPI OA](#) (“*Philippines* Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze”), para. 23).

¹¹ See *further below* paras. 12-22 (context), 23-25 (object and purpose).

¹² See e.g. [ICSID, *Aguas del Tunari v. Bolivia* \(ICSID ARB/02/03\), Decision on Respondent’s Objections to Jurisdiction, 21 October 2005](#), para. 91 (“the Vienna Convention does not privilege any one of these three aspects

provision can lead to error, since the words or syntax apparently used do not *invariably* give effect to the clear intent of the parties to the treaty.

9. Article 12(2) may be a case in point. The Chamber’s view—also expressed by Judges Perrin de Brichambaut and Lordkipanidze—represents one understanding of the terms of article 12(2). It links the verb “are” in the present tense with the term “precondition” to infer that article 12(2) requires a State *still* to be a State Party when the Court’s exercise of jurisdiction is triggered. Yet other chambers have found no such requirement in article 12(2),¹³ which merely sets out the classical jurisdictional bases accepted by States—that is, the occurrence of crimes on the territory of a State Party, or by a national of a State Party.¹⁴ Leading commentaries likewise make no reference to any temporal implication of article 12(2).¹⁵

10. In considering the terms of article 12(2), the Chamber did not address several relevant considerations. First, it failed to consider that it is at least equally plausible that the use of the present tense represented a drafting convenience, or even an oversight, rather than a limit upon the Court’s exercise of jurisdiction. If the latter had been intended, given the importance of the matter, it would more likely have been set out in plain terms, and not left to implication by means of a subtle grammatical nuance.¹⁶

of the interpretation method”). See also e.g. R. Gardiner, *Treaty Interpretation*, 2nd Ed. (OUP: 2015), p. 162; J. Hill, *Aust’s Modern Treaty Law and Practice*, 4th Ed. (OUP: 2023) (“Hill”), pp. 239, 242-244.

¹³ See e.g. [ICC-01/17-9-Red](#) (“Burundi Article 15(4) Decision”), para. 24 (“by 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) [...] 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, i.e. the investigation and prosecution of crimes committed up to and including 26 October 2017, is, as such, *not subject to any time limit*”, italics supplied, bold added); [ICC-01/21-12](#) (“Philippines Article 15(4) Decision”), para. 111 (“the Court retains jurisdiction with respect to alleged crimes that occurred on the territory of the Philippines while it was a State Party [...] This is in line with the law of treaties, which provides that withdrawal from a treaty does not affect any right, obligation or legal situation created through the execution of the treaty prior to its termination [...] The Court’s exercise of such jurisdiction is *not subject to any time limit*”, emphasis added); [ICC-01/21-56-Red](#) (“Philippines Article 18(2) Decision”), para. 26 (“The Court’s jurisdiction and mandate is exercised in accordance with the provisions of the Statute, [...] to which the Philippines was a party *at the time of the alleged crimes*”, emphasis added). See also [ICC-01/21-83](#) (“Duterte Arrest Warrant”), paras. 6-7.

¹⁴ See also e.g. [ICC-01/18-43](#) (“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.

¹⁵ See e.g. W.A. Schabas and G. Pecorella, ‘Article 12: preconditions to the exercise of jurisdiction,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (Hart/Nomos/C.H. Beck) (“Schabas and Pecorella”), pp. 816-826 (mns. 15-29); W.A. Schabas, *The International Criminal Court: a Commentary on the Rome Statute*, 2nd Ed. (OUP: 2016) (“Schabas”), pp. 351-357. See also [ICC-01/21-01/25-146-Red-Corr](#) (“First Instance Response”), para. 25 (fn. 27).

¹⁶ The Prosecution further notes that multiple tenses are used in article 12(2), both in the English and French versions, distinguishing between the tense used for States Parties (“are” / “sont”) and the tense used for States which make an article 12(3) declaration (“have accepted” / “ont accepté”). While the grammatical significance of

11. Second, nothing in the term “precondition” in the title of article 12 implies that the Court’s exercise of jurisdiction depends on the *continued* status of a State as a State Party when that exercise is triggered. Unsurprisingly given the context of the negotiations,¹⁷ the term “precondition” is simply a neutral means to describe the *connection*¹⁸ between the Court’s jurisdiction and the jurisdiction of States.¹⁹ While such a connection is a threshold condition for the Court’s exercise of jurisdiction, nothing in article 12(2) requires that it must *continue* when that exercise is triggered. To the contrary, this is inconsistent with the broader context of the Statute, and its object and purpose.

A.1.b. Relevant context

12. The context of article 12(2)—especially articles 11, 12, 13, 29, and 127—supports the view that article 12(2) does *not* require that a State is still a State Party when the Court’s exercise of jurisdiction is triggered.

A.1.b.i. Article 11: jurisdiction *ratione temporis* and exercise of jurisdiction

13. Article 11(2) provides that—absent a declaration by the relevant State 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*” (emphasis added).²⁰ It establishes no other temporal limitation on the Court’s exercise of jurisdiction.

14. If the drafters had intended to restrict the Court’s “exercise of jurisdiction” to circumstances when a State Party *continued* to have the status of a State Party at the time the exercise was triggered, article 11 would have been the logical place for such a requirement.

this variation may be open to interpretation, it further underlines the need for caution in relying on the particular tense used. If use of the present tense had been meant to signal that a State must *continue* to accept the Court’s exercise of jurisdiction when triggered, it would arguably have been more natural (and clearer) at least for article 12(2) to use the present tense consistently (e.g. “if one or more of the following States *are* Parties to this Statute or *accept* the jurisdiction of the Court”, emphasis added). By similar logic, under article 12(2)(b), this would seem to lead to the anomalous outcome that suspects with the nationality of a State Party but acting extraterritorially could potentially preclude the Court’s exercise of jurisdiction by renouncing their nationality *after* they had committed article 5 crimes, but before the Court’s exercise of jurisdiction was triggered.

¹⁷ See *Schabas and Pecorella*, pp. 816 (mn. 15: referring to article 12(2) as the “compromise”, “middle ground”, and “accommodation” struck on a “complex and controversial issue”), 832-833 (“a product of compromise [...] far from perfect but [...] all that was possible”). See further *Hill*, p. 238 (emphasising care in interpreting treaties where “the product of negotiations lead[s] to compromises to reconcile, often wide, differences”).

¹⁸ See also *Schabas and Pecorella*, p. 817 (mn. 15: “jurisdictional *nexus*”, emphasis added).

¹⁹ See also below fn. 25.

²⁰ See also *Statute*, art. 11(1). While article 11(2) limits the Court’s (procedural) “exercise of jurisdiction” to crimes committed after the Statute entered into force for a relevant State, article 11(1) limits the Court’s “jurisdiction” *stricto sensu* to crimes committed after the Statute itself entered into force under article 126(1) (i.e., in 2002). This is consistent with the recognition in article 11(2) that the (procedural) exercise of jurisdiction can still be retroactive—if an article 12(3) declaration is made—while never exceeding the Court’s temporal jurisdiction *stricto sensu* in article 11(1). See also below para. 18.

Yet nothing in article 11 implies or refers to any restriction at all on the Court's exercise of jurisdiction *after* the commission of the alleged crimes.

15. Like other relevant provisions in Part 2, article 11 also reflects the presumption that a State will remain a State Party once it has acceded to the Statute. The exceptional circumstance of a State Party's withdrawal, and its consequences, are regulated only in article 127 and Part 13 (final clauses). Use of the present tense in article 12(2) is likewise consistent with the presumption that, once a State has become a State Party, it will ordinarily continue as such.²¹

A.1.b.ii. Articles 12 and 13: acceptance of jurisdiction, and its exercise

16. Since article 12(2) must be read and understood as an integral part of article 12, articles 12(1) and 12(3) provide essential context for its interpretation.

17. First, article 12(1) provides that a State Party "accepts" the jurisdiction of the Court "with respect to the crimes referred to in article 5". Necessarily, this implies consent that the Court may exercise its jurisdiction over all conduct occurring while the relevant State is a State Party, within the jurisdictional limits specified in articles 11 and 12(2), and according to the procedure in articles 13, 15, and/or 53, without temporal limitation.²² This was the logic in *Burundi*,²³ and *Abd-Al-Rahman*.²⁴ Given the fundamental significance of article 12(1), it is implausible that article 12(2) would—through mere grammar—make this consent conditional on the State being a State Party when the Court's exercise of jurisdiction is triggered. Such a qualification would substantially undermine article 12(1).

18. Second, as noted above, article 12 describes the required *connection* between the jurisdiction of the Court and the jurisdiction of States, by specifying two alternative "preconditions" in articles 12(1) and 12(3).²⁵ Article 12(2) makes clear that these "preconditions" may be satisfied *either* by a territorial State or a State of a suspect's nationality.

²¹ See also above para. 10.

²² See e.g. *Schabas*, p. 351 ("[j]urisdiction over the crimes listed in article 5(1) and over the time period identified in article 11 is automatic", emphasis added). See further [First Instance Response](#), paras. 30-35. On the absence of temporal limitation, see below para. 22.

²³ See [Burundi Article 15\(4\) Decision](#), para. 24. See further above fn. 13. See also [First Instance Response](#), paras. 33-34.

²⁴ See [ICC-02/05-01/20-391](#) ("Abd-Al-Rahman Jurisdiction Decision"), para. 33. See also [First Instance Response](#), para. 35.

²⁵ See above para. 11. Article 12 only deals with circumstances where there is no relevant UN Security Council referral, which (although not labelled as such) effectively constitutes a third alternative "precondition" in article 13(b). This is because a UN Security Council referral under chapter VII of the UN Charter not only serves as a trigger for the Court's (procedural) exercise of jurisdiction, but also represents an indirect connection to the jurisdiction of States, since States are bound to accept such chapter VII decisions of the UN Security Council: see e.g. [ICC-02/05-01/09-397-Corr OA2](#) ("Bashir Article 87(7) Appeal Judgment"), paras. 139-140.

Yet the alternative “preconditions” in article 12(1) and 12(3) vary in their temporal relationship with alleged crimes: article 12(1) has only prospective effect,²⁶ whereas article 12(3) also has retrospective effect.²⁷ Since article 12(2) was carefully drafted in a temporally neutral way to be compatible with *both* article 12(1) and 12(3),²⁸ it is unlikely that its grammar was also intended to establish any additional procedural condition on the Court’s exercise of jurisdiction.

19. Third, even if the opposite conclusion were reached—and it were assumed *arguendo* that article 12(2) requires not only that a relevant State *has* accepted jurisdiction but also that this acceptance must *continue* until some point—the critical question would still be *until when*. In one part of its *obiter dictum*, the Chamber suggested that a State must remain a State Party “at the time that the Court exercises its jurisdiction”.²⁹ Yet it is uncontested that this does not mean at *all* times that the Court exercises its jurisdiction. For example, it is not required when a case comes to trial or even when an individual prosecution is commenced. Such a position would be inconsistent with the intention manifest in article 127(2), and could substantially diminish the Court’s independence. Nor is this likely to have been the Chamber’s intended implication, since it cited with approval the views of Judges Perrin de Brichambaut and Lordkipanidze,³⁰ and later concluded that, “for the purposes of article 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.”³¹

20. Importantly, article 13 does not equate the Court’s exercise of jurisdiction with the opening of an investigation. To the contrary, for situations referred to the Prosecutor by States Parties or the UN Security Council under articles 13(a) and (b), these provisions unequivocally state that the Court’s exercise of jurisdiction is triggered by the *referral*—that is, by the act which in turn triggers the Prosecutor’s initiation of a *preliminary examination*. By contrast, for *proprio motu* situations in the absence of a referral, article 13(c) refers to the time when the “Prosecutor has initiated an investigation [...] in accordance with article 15”. Yet this plainly

²⁶ Compare [Statute](#), art. 12(1), with art. 11(2). See further above para. 13.

²⁷ Compare [Statute](#), art. 12(3), with art. 11(2). See further above fn. 20.

²⁸ The Prosecution notes that, in its earlier submissions including at first instance, it loosely referred at times to article 12(2) as requiring that a State must be a State Party at the time of the alleged crimes. Strictly speaking, this conflated two separate considerations—articles 11 and 12(1) entail that, for States which have acceded to the Statute, they must be a State Party at the time of the alleged crimes (see above fn. 26), whereas article 12(2) merely requires that a relevant State *has* accepted jurisdiction of the Court.

²⁹ [Decision](#), para. 80.

³⁰ [Decision](#), para. 79 (“The Chamber agrees with the finding that [...] ‘[...] the preconditions to the exercise of the Court’s jurisdiction set out in article 12 [...] must exist *at the time that the exercise of the jurisdiction is triggered pursuant to article 13*’, quoting [Philippines Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 23, emphasis added).

³¹ [Decision](#), para. 80 (emphasis added). See also above fn. 10.

cannot mean what it appears to say, since article 15(4) expressly reserves the power to “authorize the commencement of the investigation” to the Pre-Trial Chamber. It is true that the procedural step contemplated by article 13(c) has at least “definitely occur[red]” when the Pre-Trial Chamber authorises an investigation under article 15(4).³² But this does not mean that article 13(c) should be correctly interpreted to state that the Court is not exercising its jurisdiction *until* this point—an issue on which the Chamber declined to offer an opinion in the Decision. Rather, as set out below, article 13(c) should be correctly interpreted to mean that the Court exercises its jurisdiction when the Prosecutor *commences* a preliminary examination *proprio motu*.³³

21. In sum, article 13 means that, even if article 12(2) were to be interpreted as requiring that a relevant State has *continued* to accept jurisdiction, this is only until the Prosecutor has commenced a preliminary examination.

A.1.b.iii. Article 29: no prospective limitations on jurisdiction once established

22. 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—consistent with customary international law³⁴—that procedural restrictions should not curtail prospective jurisdiction over article 5 crimes once established. Article 29 is difficult to reconcile with any interpretation of article 12(2) introducing a procedural bar to the Court’s own exercise of jurisdiction once accepted by a State.³⁵ Specifically, interpreting article 12(2) to require that a State remains a State Party when the Court’s exercise of jurisdiction is triggered introduces a conditionality to the acceptance of the Court’s jurisdiction over article 5 crimes at odds with

³² [Philippines Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 26.

³³ See below paras. 26-27.

³⁴ 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, principle 23(2); 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). See also [1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#) (entered into force 11 November 1970); [1974 European Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity](#) (entered into force 27 June 2003); [1994 Inter-American Convention on Forced Disappearance of Persons](#) (entered into force 28 March 1996); [ILC, Draft articles on Prevention and Punishment of Crimes against Humanity, 2019](#), art. 6(6); [ILC, Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries, 2019](#), art. 6(6), Commentary, para. 35 (p. 78). While there is no relevant statutory lacuna necessitating recourse to customary international law under article 21(1), it remains the case under article 21(3) that the application and interpretation of the Statute must be consistent with internationally recognised human rights. Likewise, in interpreting a treaty provision, it is relevant to take into account together with the context “any relevant rules of international law applicable in the relations between the parties”: [VCLT](#), art. 31(3)(c). See also [First Instance Response](#), paras. 44-46.

³⁵ See also [Burundi Article 15\(4\) Decision](#), para. 24 (fn. 33). See further [First Instance Response](#), paras. 36-37.

the apparent intention of article 29. This is further confirmed by article 127(2), which likewise aims to ensure that the withdrawal of a State Party does not alter the legal situation created by its prior acceptance of the Court’s jurisdiction, except to the extent expressly provided (such as with regard to some of the cooperation obligations of a withdrawing State Party).³⁶

A.1.c. The object and purpose of the Statute

23. As clear from the Preamble and article 127, the Statute seeks to ensure that the most serious crimes of international concern do not go unpunished, while ensuring that a State Party can withdraw from the Statute if it chooses to do so.³⁷ Yet, as recalled in article 127, this will not discharge a State “from the obligations arising from this Statute while it was a Party”.

24. Within the context of this careful balance,³⁸ there is no reason why the drafters would have qualified a State Party’s plenary acceptance of the Court’s jurisdiction in article 12(1) by means of an implicit temporal condition in article 12(2)—that is, once article 5 crimes have been allegedly committed, to allow a State Party to avoid the Court’s exercise of jurisdiction by withdrawing from the Statute before that exercise can be triggered. This undermines not only the Court’s own ability to investigate and prosecute, but also the complementarity mechanism which encourages States to exercise their own jurisdiction.³⁹

25. Nor is such a reading necessary to give effect to a State Party’s right to withdraw from the Statute. Effective withdrawal terminates acceptance of the Court’s jurisdiction over any *subsequent* article 5 crimes. Moreover, even a former State Party may still assert its own jurisdiction over a case or situation, potentially rendering the Court’s proceedings inadmissible under articles 18 or 19.⁴⁰

A.2. Even if article 12(2) is interpreted more narrowly, the preliminary examination in this situation triggered the Court’s exercise of jurisdiction

26. In any event, even if the Chamber was correct in its *obiter dictum* that continued status as a State Party is ordinarily required when the Court triggers its exercise of jurisdiction, the preliminary examination in this situation sufficed for that purpose.⁴¹ This is because the term “investigation” in article 13(c) can only be correctly interpreted in the same sense as article

³⁶ See also [VCLT](#), art. 70; [Decision](#), paras. 47, 68; [Response to Appeal Brief](#), para. 15.

³⁷ See further [First Instance Response](#), paras. 38-39. See also [Response to Appeal Brief](#), paras. 51-55.

³⁸ Cf. [Philippines Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), paras. 28-29.

³⁹ See also [First Instance Response](#), para. 40.

⁴⁰ See also [First Instance Response](#), paras. 41-43; [Response to Appeal Brief](#), para. 38.

⁴¹ The Prosecution formerly reserved its position on this question: [First Instance Response](#), para. 62; [Response to Appeal Brief](#), para. 57.

15(1) to (3)—which address generally the Prosecutor’s power to “initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”. The process of *initiating* an investigation in article 15(1) to (3) is not the same as an investigation *stricto sensu*, but rather relates to a *preliminary examination*. While it is not the Prosecution’s position that its initial assessment of *whether* to open a preliminary examination *proprio motu* amounts to an exercise of jurisdiction, this is triggered when the formal preliminary examination in the manner contemplated in rule 48 begins.⁴²

27. This interpretation of article 13(c) is strongly favoured by the context of this provision, since it would establish a common approach under article 13(a) to (c) to the triggering of the Court’s exercise of jurisdiction. It also has obvious benefits for the clarity of the law, and is consistent with the “essential” nature of the Prosecutor’s article 15 power to the Court’s mandate.⁴³ It would mean that there is no greater hurdle in triggering the exercise of the Court’s jurisdiction under this mechanism than as a consequence of a referral—consistent with the purpose of article 15 as ensuring that the absence of a referral does not preclude the possibility of the Court exercising its jurisdiction.⁴⁴ If a preliminary examination carries sufficient weight to engage the Court’s jurisdiction for the purpose of referred situations, it must likewise do so for *proprio motu* situations.⁴⁵

B. The Chamber was correct that, in any event, article 127(2) preserves the Court’s exercise of jurisdiction in circumstances such as the present case

28. If article 12(2) is interpreted correctly, as above, article 127(2) is better understood as *consistent* with Part 2 of the Statute, rather than as an exception which is *lex specialis*.⁴⁶ In the Prosecution’s primary submission, article 12(2) and article 127(2) are consistent in recognising that the Court can exercise its jurisdiction over article 5 crimes allegedly committed while a

⁴² In other words, the process sometimes described by the Office of the Prosecutor as a “Phase 1” analysis—that is, determining on the basis of an article 15(1) communication *whether* to open a preliminary examination, in the absence of a referral—is not itself a preliminary examination. See [First Instance Response](#), paras. 66-68, *especially* fn. 86; see also [Response to Appeal Brief](#), paras. 32-37. See further [ICC-02/17-138 OA4](#) (“Afghanistan Article 15(4) Appeal Judgment”), para. 37 (characterising the Prosecutor’s preliminary examination under article 15(3)).

⁴³ See W.A. Schabas and G. Pecorella, ‘Article 13: exercise of jurisdiction,’ in K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (Hart/Nomos/C.H. Beck), p. 852 (mn. 27).

⁴⁴ See e.g. [Afghanistan Article 15\(4\) Appeal Judgment](#), para. 30 (“when a situation has not been referred”).

⁴⁵ *Contra* [Philippines Article 18 Appeal Judgment, Dissenting Opinion of Judges Perrin de Brichambaut and Lordkipanidze](#), para. 35. Should any need arise for jurisdictional purposes, the Prosecution further notes the possibility canvassed by the Chamber—albeit in the context of article 127(2)—that the Court could rule on the question whether proceedings were sufficiently substantive to amount to an exercise of jurisdiction under article 13(c): see e.g. [Decision](#), paras. 58, 60. *But see* [Response to Appeal Brief](#), para. 37 (noting that it need not be decided in this appeal “whether the Chamber correctly implied that not every preliminary examination would satisfy article 127(2)”).

⁴⁶ See [Response to Appeal Brief](#), paras. 17-18.

State is a State Party, even if it withdraws from the Statute before an investigation is opened.⁴⁷ Further, and in any event, a preliminary examination itself serves to trigger the Court's exercise of jurisdiction under article 13(c).⁴⁸

29. Yet even if the Statute were to be interpreted contrary to both the above propositions—in line with the Chamber's *obiter dictum*—the Chamber still remained correct in its *ratio decidendi* that the Court has jurisdiction based on article 127(2) as *lex specialis*. While the Chamber viewed the jurisdictional framework more narrowly, it correctly recognised the drafters' intention to ensure that a State Party could not withdraw in order to defeat the Court's exercise of jurisdiction.

30. Either way, the Chamber's ultimate conclusion—that the Court is properly exercising jurisdiction over the *Situation in the Philippines*—remains correct.

CONCLUSION

31. For the reasons set out in the Response Brief, the Appeals Chamber should dismiss the Appeal. If it considers necessary to address the Chamber's *obiter dictum* concerning the interpretation of article 12(2) of the Statute, the Appeals Chamber should clarify that it is only required that a relevant State was a State Party when alleged article 5 crimes were committed, and/or that in any event proceedings such as the preliminary examination in this situation were sufficient to trigger the Court's exercise of jurisdiction under articles 12(2) and 13(c).

32. In any event, the Chamber was correct in its ultimate holding that the Court's exercise of jurisdiction was preserved notwithstanding the Philippines' withdrawal from the Statute. This is so whether article 127(2) is best understood as *consistent* with articles 12(2) and 13(c), as correctly interpreted, or as the Chamber had understood article 127(2), as an exception which is *lex specialis* to those articles.



Mame Mandiaye Niang, Deputy Prosecutor

Dated this 16th day of January 2026

At The Hague, the Netherlands

⁴⁷ See above paras. 5-25.

⁴⁸ See above paras. 26-27.