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Criminal
Court

Original: English **No. ICC-01/21-01/25 OA3**
Date: 22 April 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 document

Judgment on the appeal of Mr Rodrigo Roa Duterte against Pre-Trial Chamber's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025

Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:

☒ **The Office of the Prosecutor**	☒ **Counsel for the Defence**
☒ **Legal Representatives of the Victims**	☐ **Legal Representatives of the Applicants**
☐ **Unrepresented Victims**	☐ **Unrepresented Applicants (Participation/Reparation)**
☐ **The Office of Public Counsel for Victims**	☐ **The Office of Public Counsel for the Defence**
☐ **States' Representatives**	☐ **Amicus Curiae**

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Registrar Mr Osvaldo Zavala Giler	☐ **Counsel Support Section**
☐ **Victims and Witnesses Unit**	☐ **Detention Section**
☐ **Victims Participation and Reparations Section**	☐ **Other**

Table of contents

I. KEY FINDINGS 5

II. INTRODUCTION 6

III. PROCEDURAL HISTORY 8

A. Relevant procedural background 8

B. Proceedings before the Pre-Trial Chamber 10

C. Proceedings before the Appeals Chamber 10

IV. STANDARD OF REVIEW 12

V. RELEVANT LEGAL FRAMEWORK 12

VI. PRELIMINARY ISSUES 16

VII. MERITS 18

A. First Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that article 127(2) of the Statute is *lex specialis* with respect to article 12 of the Statute 18

1. Relevant parts of the Impugned Decision 18

2. Summary of the submissions 19

3. Determination by the Appeals Chamber 23

4. Conclusion 32

B. Second Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that a preliminary examination is a "matter […] under consideration" within the meaning of article 127(2) of the Statute 32

1. Relevant parts of the Impugned Decision 32

2. Summary of the submissions 33

3. Determination by the Appeals Chamber 36

4. Conclusion 45

C. Third Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that "the Court" in article 127(2) of the Statute includes the Office of the Prosecutor .. 45

1. Relevant parts of the Impugned Decision 45

2. Summary of the submissions 46
3. Determination by the Appeals Chamber 47
4. Conclusion 53
D. Fourth Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that the "object and purpose" of the Statute permits the opening of an investigation even after the effective withdrawal of the Philippines from the Statute 53
1. Relevant parts of the Impugned Decision 53
2. Summary of the submissions 54
3. Determination by the Appeals Chamber 55
4. Conclusion 59
VIII. Overall conclusion 60
IX. APPROPRIATE RELIEF 60

The Appeals Chamber of the International Criminal Court,

In the appeal of Mr Rodrigo Roa Duterte against Pre-Trial Chamber I's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025 (ICC-01/21-01/25-309),

After deliberation,

By majority,

Delivers the following

JUDGMENT

1. Pre-Trial Chamber I's "Decision on the Defence Challenge to the Jurisdiction of the Court" of 23 October 2025 (ICC-01/21-01/25-309) is confirmed.

2. The Defence's requests for a finding that there exists no legal basis for the continuation of the Court's proceedings against Mr Duterte, and for his immediate and unconditional release are moot.

3. The request for leave to submit observations under rule 103 of the Rules of Procedure and Evidence transmitted by the Registry to the Appeals Chamber on 2 February 2026 is rejected.

4. The Registrar is directed to consult with the applicant of the request for leave to submit observations under rule 103 of the Rules of Procedure and Evidence as to whether documents ICC-01/21-01/25-364-Conf and ICC-01/21-01/25-364-Conf-Anx can be reclassified as public, or whether public redacted versions should be filed.

REASONS

I. KEY FINDINGS

1. The interpretation of the Rome Statute is governed by the provisions of articles 31 to 33 of the Vienna Convention on the Law of Treaties. The relevant provisions must be interpreted in a systemic manner, taking into account the object and purpose of the

Statute, which is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes.

2. Pursuant to article 12(1) of the Statute, there is a point in time at which a State becomes a Party to the Statute and accordingly accepts the jurisdiction of the Court with respect to the crimes listed in article 5 of the Statute. From this point in time, jurisdiction "exists" with respect to the relevant State until the acceptance is revoked by a State Party's withdrawal from the Statute. However, according to the statutory framework, the existence of jurisdiction needs to be distinguished from the "exercise" of jurisdiction.

3. Articles 12 and 13 of the Statute, read together with article 127 of the Statute, set out the jurisdictional regime applicable in circumstances in which a State Party withdraws from the Statute.

4. This regime preserves the Court's ability to exercise its jurisdiction notwithstanding a State Party's withdrawal from the Statute, given that pursuant to article 127(2) of the Statute the withdrawal 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".

5. The legal framework of the Court establishes that a preliminary examination qualifies as a "matter under consideration" within the meaning of article 127(2) of the Statute. The continuation of the preliminary examination past the one-year withdrawal period is reflective of the balance between the responsibilities that States accept upon ratification of the Statute and the ability of States to effectively withdraw from the Statute within a clear timeline.

II. INTRODUCTION

6. On 7 March 2025, Pre-Trial Chamber I (hereinafter: "Pre-Trial Chamber") issued a warrant of arrest for Mr Rodrigo Roa Duterte (hereinafter: "Mr Duterte") pursuant to article 7(1)(a) and article 58 of the Statute, for the crime against humanity of murder allegedly committed between 1 November 2011 and 16 March 2019 in the Republic of

the Philippines (hereinafter: "the Philippines").[1] On 12 March 2025, Mr Duterte was arrested by the authorities of the Philippines[2] and surrendered to the Court.[3]

7. On 23 October 2025, the Pre-Trial Chamber issued its decision on the Defence's challenge to the jurisdiction of the Court (hereinafter: "Impugned Decision").[4] The Pre-Trial Chamber ruled that

> as a result of the Prosecution's preliminary examination having commenced prior to both the Philippines depositing its written notification of withdrawal from the Statute and the date on which that withdrawal became effective, […] the Court can exercise its jurisdiction in the present case over the crimes alleged against Mr Duterte that were committed on the territory of the Philippines while it was a State Party.[5]

8. On 14 November 2025, the Defence for Mr Duterte (hereinafter: "Defence") submitted its appeal brief against the Impugned Decision (hereinafter: "Appeal Brief").[6] The Defence raises four grounds of appeal, alleging errors of law and fact.

9. The first and, according to the Defence, principal issue on appeal is that, in the Defence's submission, the Pre-Trial Chamber erred in law by finding that article 127(2) of the Statute is *lex specialis* with respect to article 12 of the Statute (hereinafter: "First Ground of Appeal").[7] The Defence is also of the view that, if the Appeals Chamber agrees with the Defence's arguments in this respect, "the present Appeal must succeed without consideration of any further argument".[8]

10. The Defence further asserts that, should the Appeals Chamber, however, reject the First Ground of Appeal, the Impugned Decision is materially affected by three additional errors of law and fact in relation to the Pre-Trial Chamber's findings that: (i) a preliminary examination is a "matter under consideration" within the meaning of article 127(2) of the Statute (hereinafter: "Second Ground of Appeal");[9] (ii) the reference to "the Court" in article 127(2) of the Statute includes the Office of the

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[1] Warrant of Arrest for Mr Rodrigo Roa Duterte, ICC-01/21-01/25-83.
[2] ICC Press Release, Situation in the Philippines: Rodrigo Roa Duterte in ICC custody.
[3] Decision convening a hearing for the first appearance of Mr Rodrigo Roa Duterte, ICC-01/21-01/25-90, para. 6.
[4] Decision on the Defence Challenge to the Jurisdiction of the Court, ICC-01/21-01/25-309.
[5] Impugned Decision, para. 84.
[6] Appeal Brief on Jurisdiction, ICC-01/21-01/25-319.
[7] Appeal Brief, paras 3, 6-26.
[8] Appeal Brief, para. 3.
[9] Appeal Brief, paras 4, 27-46.

Prosecutor (hereinafter: "Third Ground of Appeal");[10] and (iii) the "object and purpose" of the Statute permits the opening of an investigation even after the effective withdrawal of the Philippines from the Statute (hereinafter: "Fourth Ground of Appeal").[11]

11. The Defence accordingly 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".[12]

III. PROCEDURAL HISTORY

A. Relevant procedural background

12. On 1 November 2011, the Statute entered into force for the Philippines following the deposition of its instrument of ratification on 30 August 2011.[13]

13. On 8 February 2018, the then Prosecutor announced that she had decided to open a preliminary examination into the Situation in the Philippines (hereinafter: "Philippines Situation").[14]

14. On 17 March 2018, the Government of the Philippines deposited a written notification of withdrawal from the Statute.[15]

15. On 17 March 2019, the withdrawal of the Philippines from the Statute took effect.

16. On 15 September 2021, further to a request by the then Prosecutor,[16] the Pre-Trial Chamber, in a different composition, authorised the commencement of an investigation into the Philippines Situation under article 15 of the Statute "in relation to crimes within the jurisdiction of the Court allegedly committed on the territory of the Philippines

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[10] Appeal Brief, paras 4, 47-54.
[11] Appeal Brief, paras 4, 55-58.
[12] Appeal Brief, para. 59.
[13] United Nations, Secretary-General, Rome Statute of the International Criminal Court, Philippines: Ratification, C.N.530.2011.TREATIES-3 (Depositary Notification).
[14] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela.
[15] United Nations, Secretary-General, Rome Statute of the International Criminal Court, Philippines: Withdrawal, C.N.138.2018.TREATIES-XVIII.10 (Depositary Notification).
[16] Request for authorisation of an investigation pursuant to article 15(3), 24 May 2021, ICC-01/21-7-SECRET-Exp (a public redacted version was notified on 14 June 2021, ICC-01/21-01/25-7-Red).

between 1 November 2011 and 16 March 2019 in the context of the so-called 'war on drugs' campaign".[17]

17. On 24 June 2022, following a deferral request submitted by the Philippines and a temporary suspension of the investigative activities,[18] the Prosecutor requested the Pre-Trial Chamber to authorise the resumption of the investigation into the Philippines Situation under article 18(2) of the Statute.[19]

18. On 26 January 2023, the Pre-Trial Chamber authorised the Prosecutor to resume the investigation into the Philippines Situation (hereinafter: "Article 18(2) Decision").[20]

19. On 18 July 2023, the Appeals Chamber, by majority, confirmed the Article 18(2) Decision (hereinafter: "Article 18(2) Appeal Judgment"),[21] finding, *inter alia*, that the Article 18(2) Decision was not a decision with respect to jurisdiction and that "the issue of the effect of the Philippines' withdrawal from the Statute on the Court's jurisdiction was neither properly raised and discussed before the Pre-Trial Chamber nor adequately raised on appeal".[22] Judges Perrin de Brichambaut and Lordkipanidze dissented from the Article 18(2) Appeal Judgment in this respect (hereinafter: "Dissenting Opinion").[23]

20. As recalled above, on 7 March 2025, the Pre-Trial Chamber issued a warrant of arrest for Mr Duterte pursuant to article 58 of the Statute.[24]

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[17] Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute, ICC-01/21-01/25-12, p. 41.
[18] Notification of the Republic of the Philippines' deferral request under article 18(2), 18 November 2021, ICC-01/21-01/25-14, with public Annex A, ICC-01/21-01/25-14-AnxA.
[19] Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18(2), ICC-01/21-01/25-46.
[20] Authorisation pursuant to article 18(2) of the Statute to resume the investigation, ICC-01/21-01/25-56-Conf (a public redacted version was notified on the same day, ICC-01/21-01/25-56-Red).
[21] Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's "Authorisation pursuant to article 18(2) of the Statute to resume the investigation", ICC-01/21-01/25-77.
[22] Article 18(2) Appeal Judgment, ICC-01/21-01/25-77, paras 48-58.
[23] Dissenting Opinion of Judge Perrin de Brichambaut and Judge Lordkipanidze, ICC-01/21-01/25-77-OPI.
[24] Warrant of Arrest for Mr Rodrigo Roa Duterte, ICC-01/21-01/25-83.

21. On 12 March 2025, Mr Duterte was arrested by the authorities of the Philippines[25] and surrendered to the Court.[26] He made his first appearance before the Pre-Trial Chamber on 14 March 2025.[27]

B. Proceedings before the Pre-Trial Chamber

22. On 1 May 2025, the Defence filed a challenge to the jurisdiction of the Court under article 19(2) of the Statute (hereinafter: "Defence Challenge").[28]

23. On 23 October 2025, the Pre-Trial Chamber issued the Impugned Decision.[29]

C. Proceedings before the Appeals Chamber

24. On 28 October 2025, the Defence filed a notice of appeal against the Impugned Decision pursuant to article 82(1)(a) of the Statute.[30]

25. On 14 November 2025, the Defence filed its Appeal Brief.[31]

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[25] ICC Press Release, Situation in the Philippines: Rodrigo Roa Duterte in ICC custody.
[26] Decision convening a hearing for the first appearance of Mr Rodrigo Roa Duterte, ICC-01/21-01/25-90, para. 6.
[27] Transcript of hearing, ICC-01/21-01/25-T-002-ENG.
[28] Defence Challenge with Respect to Jurisdiction, ICC-01/21-01/25-121, with Annex A. On 9 June 2025, pursuant to the Order setting time limits for observations in relation to the "Defence Challenge with Respect to Jurisdiction" (ICC-01/21-01/25-121), 7 May 2025, ICC-01/21-01/25-128, the Deputy Prosecutor (hereinafter: "Prosecutor") responded to the Defence Challenge, *see* Prosecution response to "Defence Challenge with Respect to Jurisdiction", ICC-01/21-01/25-146-Conf-Corr (a public redacted version was notified on 10 June 2025, ICC-01/21-01/25-146-Red-Corr). The Office of Public Counsel for Victims (hereinafter: "OPCV") filed its observations on the Defence Challenge, see Victims' Observations on the Defence Challenge with Respect to Jurisdiction, ICC-01/21-01/25-145, with Public Annex A. On 2 July 2025, the Defence, further to a decision of the Pre-Trial Chamber, 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")", 25 June 2025, ICC-01/21-01/25-164, replied to the Prosecutor's response, *see* the Defence Reply to the Prosecution's Response to the Defence Challenge on Jurisdiction (ICC-01/21-01/25-146), ICC-01/21-01/25-171-Conf (a public redacted version was notified on 10 July 2025, ICC-01/21-01/25-171-Red). On 22 July 2025, the Defence filed its Defence Request to Postpone the Decision on the Challenge with respect to Jurisdiction, ICC-01/21-01/25-205-Conf (a public redacted version was notified on the same day, ICC-01/21-01/25-205-Red). The Prosecutor and the OPCV filed their responses, ICC-01/21-01/25-210-Conf (a public redacted version was notified on the same day, ICC-01/21-01/25-210-Red) and ICC-01/21-01/25-212-Conf (a public redacted version was notified on the same day, ICC-01/21-01/25-212-Red) on 23 and 24 July 2025, respectively.
[29] Impugned Decision, p. 32.
[30] Notice of Appeal against Decision ICC-01/21-01/25-309, ICC-01/21-01/25-312.
[31] Appeal Brief.

26. On 8 December 2025, the Prosecutor[32] and the OPCV[33] responded to the Appeal Brief (hereinafter: "Prosecutor Response" and "OPCV Response", respectively).

27. On 9 December 2025, the Defence requested leave to reply to the Prosecutor Response (hereinafter: "Defence Request for Leave to Reply"),[34] to which the Prosecutor responded on 11 December 2025.[35]

28. On 16 December 2025, the Appeals Chamber rejected the Defence Request for Leave to Reply, and invited the Prosecutor and the OPCV to file additional observations, and the Defence to file a response thereto, on: (i) how articles 12(2) and 13(c) of the Statute should be understood within the Court's legal framework on jurisdiction; and (ii) how articles 12, 13 and 127 of the Statute interact, and the consequences of such interaction, both generally and in the specific case at hand.[36]

29. On 16 January 2026, the Prosecutor[37] and the OPCV[38] filed their additional observations on the aforementioned issues (hereinafter: "Prosecutor's Additional Observations" and "OPCV's Additional Observations").

30. On 23 January 2026, the Defence responded to the Prosecutor's Additional Observations and the OPCV's Additional Observations (hereinafter: "Defence's Response to Additional Observations).[39]

31. On 2 February 2026, a request for leave to submit observations under rule 103 of the Rules of Procedure and Evidence (hereinafter: "the Rules") was transmitted by the Registry to the Appeals Chamber (hereinafter: "Rule 103 Request").[40]

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[32] Prosecution Response to "Appeal Brief on Jurisdiction", ICC-01/21-01/25-328.
[33] Victims' Response to the Defence Appeal against the "Decision on the Defence Challenge to the Jurisdiction of the Court", ICC-01/21-01/25-329.
[34] Defence Request for Leave to Reply, ICC-01/21-01/25-331.
[35] Prosecution Response to "Defence Request for Leave to Reply to the 'Prosecution Response to "Appeal Brief on Jurisdiction"'", ICC-01/21-01/25-335.
[36] Order for Further Submissions, ICC-01/21-01/25-340, para. 11.
[37] Additional Prosecution observations under regulation 28, ICC-01/21-01/25-353.
[38] Victims' Further Submissions on the Defence Appeal against the "Decision on the Defence Challenge to the Jurisdiction of the Court", ICC-01/21-01/25-354.
[39] Defence Response to Additional Submissions on Jurisdiction under Regulation 28 of the Regulations of the Court, ICC-01/21-01/25-355.
[40] Judgment on the appeal against Pre Trial Chamber I's "Decision on the review of Mr Rodrigo Roa Duterte's detention", ICC-01/21-01/25-408-Red (hereinafter: "*Duterte* OA4 Judgment").

IV. STANDARD OF REVIEW

32. With respect to alleged errors of law, the Appeals Chamber has previously held that it "will not defer to the relevant Chamber's legal interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law".[41]

33. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.[42] An impugned decision is "materially affected by an error of law" if the chamber "would have rendered a [decision] that is substantially different from the decision that was affected by the error, if it had not made the error".[43]

34. As to alleged errors of fact,

> the Appeals Chamber will not disturb a Pre-Trial or Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. It will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it. The Appeals Chamber applies a standard of reasonableness in assessing an alleged error of fact in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the Trial Chamber's findings.[44]

35. For all alleged errors, the appellant is obliged to set out the alleged error in the appeal brief and indicate, with sufficient precision, how the alleged error materially affected the impugned decision.[45]

36. The above standard of review will guide the analysis of the Appeals Chamber.

V. RELEVANT LEGAL FRAMEWORK

37. Article 11 of the Statute, which provides for the Court's temporal jurisdiction (*ratione temporis*), provides as follows:

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[41] *See e.g.* *Duterte* OA4 Judgment, para. 21 and references therein.
[42] *See e.g.* *Duterte* OA4 Judgment, para. 22 and references therein.
[43] *See e.g.* *Duterte* OA4 Judgment, para. 22 and references therein.
[44] *See e.g.* *Duterte* OA4 Judgment, para. 23 and references therein.
[45] Judgment on the appeal of Mr Edmond Beina against the decision of Pre-Trial Chamber II entitled "Decision on the Central African Republic's challenge to the admissibility of the case against Edmond Beina", para. 22 and references therein.

> 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
>
> 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

38. Article 12 of the Statute, which sets out the "[p]reconditions to the exercise of jurisdiction" of the Court, stipulates as follows:

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
>
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
>
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
>
> (b) The State of which the person accused of the crime is a national.
>
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

39. Article 13 of the Statute provides for the Court's "[e]xercise of jurisdiction". It is worded as follows:

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
>
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
>
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
>
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

40. Article 127 of the Statute addresses the withdrawal of a State Party from the Statute. It sets out the following:

> 1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
>
> 2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

41. Article 31 of the Vienna Convention on the Law of Treaties, which sets out the general rule of treaty interpretation, provides as follows:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.[46]

[46] Article 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 United Nations Treaty Series 18232 (hereinafter: "VCLT").

42. In respect of supplementary means of treaty interpretation, article 32 of the VCLT stipulates as follows:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[47]

43. In relation to the interpretation of treaties authenticated in two or more languages, article 33 of the VCLT establishes the following:

> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
>
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[48]

44. With regard to article 31(1) of the VCLT, the Appeals Chamber has previously held that a section of the law shall be interpreted in accordance with:

> […] its wording read in context and in light of its object and purpose. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an enactment in its entirety. Its objects may be gathered from the chapter of the law in which the particular section is included and its purposes from the wider aims of the law as may be gathered from its preamble and general tenor of the treaty.[49]

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[47] Article 32, VCLT.
[48] Article 33, VCLT.
[49] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA3), para. 33 (footnotes omitted).

45. For the purposes of the present decision, the Appeals Chamber further emphasises that the Statute must be interpreted in a comprehensive and systemic manner. The jurisprudence of the Appeals Chamber establishes that specific provisions of the Statute must be read as a whole and in their context,[50] as opposed to reading them in isolation. In this connection, the Appeals Chamber has also considered it relevant to read a provision in light of other paragraphs in the same provision,[51] the *chapeau* of the provision,[52] other connected provisions in the Statute,[53] as well as in light of the "statutory scheme as a whole".[54]

VI. PRELIMINARY ISSUES

46. Rule 103 of the Rules provides as follows:

> 1. At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.
>
> 2. The Prosecutor and the defence shall have the opportunity to respond to the observations submitted under sub-rule 1.
>
> 3. A written observation submitted under sub-rule 1 shall be filed with the Registrar, who shall provide copies to the Prosecutor and the defence. The

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[50] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 (OA10) (hereinafter: "*Ruto and Sang* OA10 Judgment"), paras 70-71.

[51] *Ruto and Sang* OA10 Judgment, paras 70; *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgment on the appeal of Mr Abd-Al-Rahman against Pre-Trial Chamber II's "Decision on the review of detention" of 5 July 2021, 27 August 2021, ICC-02/05-01/20-459 (OA9) (hereinafter: "*Abd-Al-Rahman* OA9 Judgment"), para. 37.

[52] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522 (OA3), paras 39, 41; *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017, ICC-01/04-02/06-1962 (OA5), paras 46-47.

[53] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432 (OA9-10), paras 57-62; Judgment on the appeal of the Prosecutor against the decision of [REDACTED], 15 February 2016, ICC-ACRed-01/16, paras 41-52.

[54] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776 (OA7), paras 72-73; *Abd-Al-Rahman* OA9 Judgment, para. 36.

Chamber shall determine what time limits shall apply to the filing of such observations.

47. The Appeals Chamber recalls that its decision under rule 103(1) of the Rules is discretionary and premised on whether it considers it "desirable for the proper determination of the case" to grant leave to the applicants to submit observations on the merits of the legal questions presented in the appeal.[55] It may permit the filing of observations either by inviting such submissions *proprio motu* or, as in this case, following a request for leave to address the Appeals Chamber as an *amicus curiae*.[56]

48. As noted above, the Appeals Chamber is seised with one request for leave to submit observations pursuant to rule 103 of the Rules as an *amicus curiae*.[57] In the circumstances of the present appeal, the Appeals Chamber does not consider that receiving further observations is desirable for the proper determination of the case, given the additional observations which it has already received.[58] Accordingly, the Rule 103 Request is rejected.

49. The Appeals Chamber moreover notes that, while the Chambers Practice Manual requires that a judgment on an interlocutory appeal filed under article 82(1)(a) of the Statute be rendered within four months from the date of the filing of the response to the appeal brief, the present judgment is delivered in open court after this time limit, due in particular to the fact that the applicable time limit fell during the judicial recess, the nature and complexity of the legal issues raised on appeal, the need for additional observations, and for detailed consideration of the relevant arguments.

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[55] *See, for example, Situation in the Bolivarian Republic of Venezuela I*, Decision on the Organization of American States Panel of Independent International Experts' request for leave to submit *amicus curiae* observations pursuant to rule 103 of the Rules of Procedure and Evidence, 3 November 2023, ICC-02/18-78 (OA), paras 6, 8; *The Prosecutor v. Dominic Ongwen*, Decision on the requests for leave to file observations pursuant to rule 103 of the Rules of Procedure and Evidence, 24 November 2021, ICC-02/04-01/15-1914 (A A2), para. 15.

[56] *The Prosecutor v. Bosco Ntaganda*, Decision on the requests for suspensive effect and other procedural issues, 5 February 2024, ICC-01/04-02/06-2892 (A6 A7), para. 62; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the application of 14 September 2009 for participation as an *amicus curiae*, 9 November 2009, ICC-01/05-01/08-602 (OA2), para. 10.

[57] Rule 103 Request.

[58] *See* Prosecution's Additional Observations; OPCV's Additional Observations; Defence's Response to Additional Observations.

VII. MERITS

A. First Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that article 127(2) of the Statute is *lex specialis* with respect to article 12 of the Statute

1. Relevant parts of the Impugned Decision

50. The Pre-Trial Chamber held that the issue as to whether the Court lacks jurisdiction over the crimes alleged against Mr Duterte in circumstances where the Pre-Trial Chamber authorised the Prosecutor to initiate an investigation into the Philippines Situation following the withdrawal of the Philippines from the Statute "requires resolution by reference to article 127 of the Statute" on the basis that it "makes specific provision for the consequences of the withdrawal of a State from the Statute and, as such, constitutes *lex specialis*" in relation to the issues at hand.[59]

51. The Pre-Trial Chamber concluded that the "part of article 127(2) of the Statute [stipulating that the withdrawal of a State Party 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'] results in the jurisdiction of the Court continuing over any such matter".[60]

52. Although it considered that it was not "strictly necessary" to address the Defence's arguments concerning articles 12 and 13 of the Statute (hereinafter: "Provisions in Part 2"), in light of the aforementioned findings, the Pre-Trial Chamber, noting "the importance of the issue", emphasised its agreement with the Dissenting Opinion that "the preconditions to the exercise of the Court's jurisdiction set out in article 12 of the Statute must exist at the time that the exercise of the jurisdiction is triggered pursuant to article 13 of the Statute".[61] It also held that "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".[62] The Pre-Trial Chamber further noted that this conclusion is "subject to the provisions of article 127 of the Statute,

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[59] Impugned Decision, paras 45-47; *see also* paras 68, 82.
[60] Impugned Decision, para. 48.
[61] Impugned Decision, paras 78-79, *referring to* Dissenting Opinion, para. 23.
[62] Impugned Decision, para. 80.

which […] provide for the continuing jurisdiction of the Court in the circumstances set out in that article in respect of a State that has withdrawn from the Statute".[63]

2. Summary of the submissions

Defence's submissions

53. The Defence submits that "[t]he pre-trial chamber erred in law by finding that article 127 of the Rome Statute is *lex specialis*".[64]

54. The Defence maintains that the *lex specialis* principle applies where there is an actual inconsistency between two provisions or a discernible intention that one provision is to exclude the other.[65] As to the discernible intent to apply *lex specialis*, the Defence contends that the Pre-Trial Chamber's assertion that article 127(2) of the Statute was "specifically enacted as *lex specialis*" is "totally unsupported by the drafting history of the Statute or by subsequent scholarship".[66]

55. The Defence further argues that articles 12(2) (regarding the preconditions for the exercise of jurisdiction) and 127(2) (concerning modalities for withdrawal) of the Statute deal with entirely different concepts.[67] The Defence also avers that the Pre-Trial Chamber "failed to elaborate on the purported interpretive or substantive conflict between article 12(2) and 127(2) of the Statute […]".[68] The Defence is of the view that the provisions are "perfectly compatible with each other", since article 12(2) of the Statute fixes preconditions before an investigation is opened, and article 127(2) of the Statute regulates the continuation of that investigation after a State Party withdraws from the Statute.[69] The Defence also asserts that the Pre-Trial Chamber based its finding that article 127(2) of the Statute is *lex specialis* on subjective policy preferences.[70]

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[63] Impugned Decision, para. 81.
[64] Appeal Brief, p. 5.
[65] Appeal Brief, paras 8-10.
[66] Appeal Brief, paras 12-13.
[67] Appeal Brief, para. 14.
[68] Appeal Brief, para. 18.
[69] Appeal Brief, para. 20.
[70] Appeal Brief, para. 24.

Prosecutor's submissions

56. The Prosecutor submits that the Defence failed to show any error, and that the First Ground of Appeal should therefore be dismissed.[71]

57. The Prosecutor argues that "the Pre-Trial Chamber adopted the correct interpretive approach to the Statute" as required by article 31 of the VCLT.[72] The Prosecutor further notes that the Pre-Trial Chamber emphasised two contextual points which the Defence does not address or challenge, namely the significance of the first sentence of article 127(2) of the Statute that withdrawal does not discharge obligations arising while the State was a Party to the Statute, and the consistency between the scheme of article 127 of the Statute and article 70(1)(b) of the VCLT.[73]

58. The Prosecutor further asserts that, on the basis of the Pre-Trial Chamber's findings in respect of the ordinary jurisdictional requirements in the Provisions in Part 2 and its finding that the second part of the second sentence of article 127(2) of the Statute is jurisdictional in nature, the test to establish *lex specialis* proposed by the Defence that "two provisions relate to the 'same subject matter'" and "there is a conflict or need to clarify these two provisions" is met.[74] The Prosecutor adds that the absence of the term *lex specialis* in the *travaux préparatoires* or scholarship is irrelevant, as what matters is whether the Pre-Trial Chamber correctly understood the relationship between articles 12(2) and 13(c), and article 127(2) of the Statute.[75] The Prosecutor additionally contends that the Defence's argument that the mere opening of a preliminary examination would be sufficient for the exercise of jurisdiction over crimes *committed after* the withdrawal of the State concerned is "immaterial" as it does not correspond to the facts of this situation and was not part of the Pre-Trial Chamber's reasoning.[76]

59. The Prosecutor also argues that, even if the Pre-Trial Chamber had misinterpreted article 127 of the Statute, this would not materially affect the Impugned Decision.[77] The Prosecutor submits that the Pre-Trial Chamber concluded that article 127(2) of the

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[71] Prosecutor Response, para. 11.
[72] Prosecutor Response, p. 5.
[73] Prosecutor Response, paras 13-15.
[74] Prosecutor Response, para. 18.
[75] Prosecutor Response, para. 19.
[76] Prosecutor Response, para. 22.
[77] Prosecutor Response, para. 56.

Statute preserved the Court's jurisdiction notwithstanding its overly narrow interpretation of articles 12(2) and 13(c) of the Statute, which was adopted with very limited reasoning and amounted to an *obiter dictum*.[78]

OPCV's submissions

60. The OPCV submits that the First Ground of Appeal must be rejected.[79]

61. The OPCV argues that the Defence "grossly misrepresents" the reasoning of the Pre-Trial Chamber since the parts of the Impugned Decision "on the parameters of article 12 of the Statute" were "*mere observations* or *obiter dicta* […] *in normal circumstances* […] where *no* matter was already under consideration by the Court prior to the effective date of the withdrawal".[80]

62. The OPCV is further of the view that the Pre-Trial Chamber "correctly interpreted articles 12 and 127(2) of the Statute within the meaning of [the *lex specialis*] principle" as it found that: (i) articles 12, 13(c) and 127(2) of the Statute deal with the same subject-matter; and (ii) there is a "discernible intention for article 127(2) [of the Statute] to exclude the application of articles 12 and 13 [of the Statute] in the event a State withdraws from the Statute".[81] The OPCV adds that, contrary to the Defence's argument, the Pre-Trial Chamber did examine relevant preparatory works, and further posits that, in fact, there exists an enormous body of preparatory works that amply shows the clear intent of the drafters on the matter.[82]

Additional observations

i. Prosecutor's Additional Observations

63. The Prosecutor argues that the Pre-Trial Chamber's interpretation of article 12(2) of the Statute is incorrect.[83] According to the Prosecutor, a textual interpretation of article 12(2) of the Statute reveals that: (i) this provision only requires that a relevant State has accepted the jurisdiction of the Court; (ii) the Pre-Trial Chamber omitted to consider whether the use of the present tense in article 12(2) of the Statute reflects a

[78] Prosecutor Response, paras 9, 56.
[79] OPCV Response, para. 2.
[80] OPCV Response, paras 8-9 (emphasis in the original).
[81] OPCV Response, paras 12-14.
[82] OPCV Response, paras 15-20.
[83] Prosecution's Additional Observations, para. 2.

drafting convenience or an oversight; and (iii) the term "precondition" does not indicate that the Court's jurisdiction depends on a State's continued status as a State Party.[84]

64. In addition, the Prosecutor contends that the context of article 12(2) of the Statute – especially articles 11, 12, 13, 29 and 127 of the Statute – supports his argument.[85] The Prosecutor further submits that, in view of the object and purpose of the Statute, there is no reason why the drafters would have allowed a State Party to avoid the Court's exercise of jurisdiction once article 5 crimes have been committed by withdrawing before that exercise can be triggered.[86]

65. The Prosecutor also argues that, even if the Pre-Trial Chamber's interpretation is correct, the preliminary examination in the present situation suffices for this purpose as the term "investigation" in article 13(c) of the Statute can only be correctly interpreted in the same sense as article 15(1)-(3) of the Statute.[87]

ii. OPCV's Additional Observations

66. The OPCV, with reference to the jurisprudence of the Permanent Court of International Justice and the International Court of Justice, avers that the Defence's interpretation that the Court can exercise its jurisdiction "only if the State concerned *is still* a Party to the Statute" overlooks the context of the Statute as a whole, especially given the fact that the word in question can have more than one sense.[88]

67. The OPCV additionally refers to the jurisprudence of the International Court of Justice to the effect that "the object and purpose of the statute of an international court is to enable it to fulfil the functions provided therein", as well as the jurisprudence of the International Criminal Tribunal for the former Yugoslavia entailing that "an overly-limiting interpretation of the concept of jurisdiction must not be allowed".[89]

iii. Defence's Response to Additional Observations

68. The Defence submits that the Prosecutor and the OPCV conflate the two concepts of "jurisdiction *stricto sensu* (material, temporal and personal)" and the "exercise of

[84] Prosecution's Additional Observations, paras 5-11.
[85] Prosecution's Additional Observations, paras 12-22.
[86] Prosecution's Additional Observations, paras 23-25.
[87] Prosecution's Additional Observations, paras 26-27.
[88] OPCV's Additional Observations, paras 11-12 (emphasis in original).
[89] OPCV's Additional Observations, para. 16.

jurisdiction (*i.e.* the criteria of territoriality and nationality)".[90] The Defence is of the view that neither the Prosecutor's nor the OPCV's arguments displace the plain reading of article 12(2) of the Statute.[91] It adds that the Prosecutor's position that the opening of a preliminary examination would constitute the initiation of an investigation under article 13(c) of the Statute is both unsupported by the Court's case law and is contrary to the Prosecutor's own practice.[92] In addition, the Defence argues that the case law of the Court does not displace the plain language of the Statute.[93]

69. The Defence further reiterates its position that article 127(2) of the Statute is of no relevance in determining the correct application of articles 12 and 13 of the Statute, nor is it *lex specialis* with respect to article 12 of the Statute.[94] It adds that neither the Prosecutor nor the OPCV have pointed to any discussion during the *travaux préparatoires* that the founding States Parties contemplated an exception to the application of article 12(2) of the Statute post-withdrawal.[95] The Defence lastly contends that the Prosecutor's and OPCV's interpretation of article 12(2) of the Statute entails the redundancy of the final sentence of article 127(2) of the Statute.[96]

3. Determination by the Appeals Chamber

70. The Appeals Chamber notes that, in the Impugned Decision, the Pre-Trial Chamber considered the effect of the Philippines' withdrawal from the Statute upon the Court's jurisdiction as a result of the fact that the Prosecutor requested the authorisation of an investigation pursuant to article 15(3) of the Statute and the Pre-Trial Chamber granted that request "after the withdrawal of the Philippines had become effective".[97]

71. The Appeals Chamber observes that part of the Pre-Trial Chamber's reasoning rests on a legal premise which arises from its interpretation of the Provisions in Part 2. The Pre-Trial Chamber proceeded on the basis that, as a general rule, articles 12(2) and 13(c) of the Statute "require a State to be a Party to the Statute at the time that the Court exercises its jurisdiction".[98] However, the Pre-Trial Chamber concluded that article

[90] Defence's Response to Additional Observations, para. 2.
[91] Defence's Response to Additional Observations, paras 7-9.
[92] Defence's Response to Additional Observations, paras 10-13.
[93] Defence's Response to Additional Observations, paras 14-17.
[94] Defence's Response to Additional Observations, para. 18.
[95] Defence's Response to Additional Observations, para. 22.
[96] Defence's Response to Additional Observations, para. 24.
[97] Impugned Decision, para. 45.
[98] Impugned Decision, para. 80.

127(2) of the Statute operates as *lex specialis* to this rule, applicable to situations involving a State Party's withdrawal from the Statute, with the effect that the Court retains jurisdiction in the case at hand.[99]

72. In the present ground of appeal, the Defence contends that the Pre-Trial Chamber erred in law by finding that article 127(2) of the Statute is *lex specialis* to article 12 of the Statute.[100]

73. The Appeals Chamber considers that an assessment of whether article 127 of the Statute may properly be construed as *lex specialis*, that is, as an exception to the Provisions in Part 2, cannot proceed without first determining the scope and meaning of these provisions.[101] Accordingly, the Appeals Chamber sets out below its interpretation of the Provisions in Part 2 insofar as they are relevant to the resolution of the issues arising in the current appeal together with article 127 of the Statute. Subsequently, the Appeals Chamber will assess whether the Pre-Trial Chamber's finding that article 127(2) of the Statute is *lex specialis* to article 12 of the Statute constitutes an error of law.

74. At the outset, the Appeals Chamber reiterates that the interpretation of treaties, such as the Statute, is governed by the provisions of articles 31 to 33 of the VCLT. Pursuant to article 31(1) of the VCLT, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[102] The Appeals Chamber will interpret the relevant provisions in a comprehensive and systemic manner, pursuant to the approach set out in articles 31 to 33 of the VCLT, and taking into account the relevant jurisprudence of the Appeals Chamber quoted above.[103]

75. The Appeals Chamber first notes that the Pre-Trial Chamber concluded that a State must be a Party to the Statute at the time the Court exercises its jurisdiction on the basis of the following reasoning:

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[99] Impugned Decision, para. 82; *see also* paras 47-48, 78-83.
[100] Appeal Brief, paras 3, 6-26.
[101] The Appeals Chamber recalls that it already determined the relevance of the Provisions in Part 2 for purposes of this appeal. *See* Order for Further Submissions, ICC-01/21-01/25-340, para. 11.
[102] Article 31(1), VCLT.
[103] *See* paragraphs 41-45 45above.

> [A]rticles 12(2) and 13(c), which are located within Part 2 of the Statute, require a State to be a Party to the Statute at the time that the Court exercises its jurisdiction. That is clear from the heading of article 12 of the Statute, which addresses "*Preconditions* to the *exercise* of jurisdiction"; from the wording of article 12(2) of the Statute which uses the present tense to provide that, for the Court to exercise its jurisdiction, "one or more of the following States *are* Parties to this Statute" or have accepted the jurisdiction of the Court; and from the heading of article 13 of the Statute and its chapeau which expressly address when the Court may "*exercise*" its jurisdiction. It follows 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.[104]

76. Accordingly, to arrive at its conclusions, the Pre-Trial Chamber relied cumulatively on the following three factors: (i) the heading of article 12 of the Statute, which addresses "*[p]reconditions* to the *exercise* of jurisdiction"; (ii) the use of "the present tense" in article 12(2) of the Statute; and (iii) the heading of article 13 of the Statute and its *chapeau* which address when the Court may "*exercise*" its jurisdiction.[105]

77. The Appeals Chamber observes that the heading of article 12 of the Statute is entitled "[p]reconditions to the exercise of jurisdiction". The ordinary meaning of the word "precondition" is "something that must happen or be true before it is possible for something else to happen".[106] Thus, article 12 of the Statute specifies what needs to happen or exist before the Court can exercise its jurisdiction, in the sense of the requirements or conditions that need to be met or exist for this purpose.

78. As to the term "jurisdiction", the Appeals Chamber observes that it is generally understood to mean "[a] court's power to decide a case".[107] In its early jurisprudence, the Appeals Chamber underlined that the jurisdiction of the Court has four different facets: jurisdiction *ratione materiae*, *personae*, *loci* and *temporis*.[108] Article 12(2)(a) of the Statute stipulates the preconditions for jurisdiction *ratione loci* and article 12(2)(b) the preconditions for jurisdiction *ratione personae*[109] for the exercise of the Court's

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[104] Impugned Decision, para. 80 (emphasis in original).
[105] Impugned Decision, para. 80 (emphasis in original).
[106] Cambridge Dictionary, definition of: "precondition".
[107] B.A. Garner (ed.), *Black's Law Dictionary* (Thomson Reuters, 11th edition, 2019), p. 1017.
[108] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772 (OA4), para. 21.
[109] The Appeals Chamber further notes article 26 of the Statute which stipulates that "[t]he Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime".

jurisdiction in respect of situations referred to the Prosecutor by States Parties and investigations initiated by the Prosecutor pursuant to article 13(a) and (c) of the Statute, respectively. The first sentence of article 12(2) of the Statute stating "[i]n the case of article 13, paragraph (a) or (c) […]" makes it clear that these parameters do not apply, and are not preconditions, when the Court exercises its jurisdiction pursuant to article 13(b) of the Statute.[110]

79. Turning to the use of "the present tense" in article 12(2) of the Statute, the Appeals Chamber notes the wording of article 12(2) of the Statute, which stipulates that the Court may exercise its jurisdiction "if one or more of the following States [that is, the State on the territory of which the conduct in question occurred, or the State of which the person accused of the crime is a national] *are Parties to this Statute*".[111] The Prosecutor contends that the Pre-Trial Chamber's interpretation fails to consider other explanations for this wording that are equally plausible,[112] and that the use of the present tense may plausibly reflect "drafting convenience, or even oversight", rather than the introduction of something as important as a restriction on the Court's exercise of jurisdiction.[113] The Appeals Chamber is not persuaded by this submission. As noted by commentators, during the discussions leading up to the Rome Conference, the adoption of article 12 of the Statute proved to be "[p]erhaps the most difficult compromise in the entire negotiations".[114] It cannot be assumed that this language, which is repeatedly and interconnectedly employed in Part 2 of the Statute, can be easily dismissed as accidental.

80. As noted in the jurisprudence of the Appeals Chamber, a phrase in a provision "must be read as a whole and in a manner that gives meaning and effect to all of its constituent words, rather than in a disjointed manner".[115] Giving meaning and effect to

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[110] Indeed, the Court may also exercise its jurisdiction without such territoriality or active nationality links to a State Party, premised solely on its subject-matter jurisdiction, namely on the appearance that a crime under article 5 has been committed, when the proceedings originate from Security Council referrals.
[111] Article 12(2) of the Statute (emphasis added).
[112] Prosecution's Additional Observations, paras 8-10.
[113] Prosecution's Additional Observations, para. 10.
[114] W Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, (Oxford Commentaries on International Law, 2nd Edition, 2016), p. 344, citing P Kirsch and D Robinson, 'Reaching Agreement at the Rome Conference', in A Cassese, *Rome Statute*, pp. 67–91, at p. 83.
[115] *The Prosecutor v. Paul Gicheru*, Judgment on the appeal of the Office of Public Counsel for the Defence against the decision of Pre-Trial Chamber A of 10 December 2020 entitled 'Decision on the

the words "one or more of the following States [that is, the State on the territory of which the conduct in question occurred, or the State of which the person accused of the crime is a national] are Parties to this Statute*"* as preconditions to the exercise of jurisdiction lends support to the interpretation that the relevant State must be a Party to the Statute at the time the Court exercises its jurisdiction.

81. The Appeals Chamber observes, moreover, that the Provisions in Part 2 must be interpreted in light of the framework of the Statute in its entirety[116] and in a manner consistent with internationally recognised human rights.[117] Articles 11 to 15 of the Statute, all referring to the exercise of the Court's jurisdiction, are interconnected and must be subject to a systemic reading. Article 11 of the Statute sets out the scope of the temporal jurisdiction of the Court, regulating in paragraph (2) that if a State becomes a Party after the entry into force of the Statute, the Court "may exercise its jurisdiction" only with respect to crimes committed after the entry into force of the Statute for that State.

82. Pursuant to article 12(1) of the Statute, there is a point in time at which a State becomes a Party to the Statute and accordingly accepts the jurisdiction of the Court with respect to the crimes listed in article 5 of the Statute. From this point in time, jurisdiction "exists" with respect to the relevant State until the acceptance is revoked by a State Party's withdrawal from the Statute. However, according to the statutory framework, the existence of jurisdiction needs to be distinguished from the "exercise" of jurisdiction.[118]

83. The exercise of the Court's jurisdiction may be triggered in accordance with article 13(a) to (c) of the Statute at a subsequent point in time, namely when a State Party or the Security Council of the United Nations refers a situation to the Prosecutor

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Applicability of Provisional Rule 165 of the Rules of Procedure and Evidence', 8 March 2021, ICC-01/09-01/20-107 (OA), para. 69.

[116] *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (OA3) (hereinafter: "*DRC* OA3 Judgment"), para. 33. *See also The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal Against the Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573 (OA6), para. 5.

[117] Article 21(3) of the Statute states that "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights […]".

[118] Impugned Decision, para. 79.

or when the Prosecutor initiates investigations in accordance with article 15 of the Statute. As noted above, such exercise of the jurisdiction of the Court, in the sense that it may be "used", requires, pursuant to article 12(2) of the Statute that "one or more of the following States [the State on the territory of which the conduct in question occurred, or the State of which the person accused of a crime is a national] *are Parties to this Statute*".[119]

84. In situations involving a State Party's withdrawal from the Statute, these provisions must be assessed systemically in light of article 127 of the Statute, which specifically addresses the consequences of such a withdrawal. The Defence's assertion that article 127 is unconnected to article 12 of the Statute based on its placement within Part 13 of the Statute is,[120] in the view of the Appeals Chamber, unpersuasive for three reasons. First, article 127(1) of the Statute regulates the consequences of a State Party's notification to the Secretary-General of the United Nations of its withdrawal from the Statute, providing that it takes effect one year after the date of receipt of the notification, unless the notification specifies a later date. These consequences necessarily have an impact on the jurisdiction of the Court, as further elaborated below. Therefore, article 127 is undoubtedly connected to the jurisdictional Provisions in Part 2. Second, the mere location of a provision within the Statute is not determinative of its legal character and does not preclude article 127(2) of the Statute from regulating aspects pertaining to the Court's jurisdiction. Third, and pursuant to article 32 VCLT, the Appeals Chamber has also taken into account the drafting history of article 12 of the Statute which it considers confirms the aforementioned interpretation of article 12(2) of the Statute. During the negotiation of the Statute, the debate concerning acceptance and exercise of jurisdiction was fully connected with the issue of a State Party's withdrawal from the Statute. These issues were, in the International Law Commission's Draft Statute, even addressed in the same provisions.[121]

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[119] Article 12(2) of the Statute (emphasis added).
[120] Defence's Response to Additional Observations, para. 20; Appeal Brief, para. 16.
[121] *See* United Nations General Assembly, *Draft Statute for an International Criminal court with commentaries*, 22 July 1994, pp. 41-43. **Article 21**. *Preconditions to the exercise of jurisdiction*
1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if: (a) In a case of genocide, a complaint is brought under article 25, paragraph 1; (b) In any other case, a complaint is brought under article 25, paragraph 2, and the jurisdiction of the Court with respect to the crime is accepted under article 22: (i) By the State which has custody of the suspect with respect to the

85. The Appeals Chamber further observes that the provisions referred to above must also be interpreted in line with the object and purpose of the Statute, which is "to put an end to impunity" for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes. In this connection, as correctly noted by the Pre-Trial Chamber, and further addressed by the Appeals Chamber below under the Fourth Ground of Appeal, it would be incompatible with the object and purpose of the Statute to enable a State Party to evade its responsibilities under the Statute by depositing a written notice of withdrawal once it discovers that alleged crimes committed on its territory or by its nationals are being examined by the Office of the Prosecutor.[122] Article 127 of the Statute addresses this situation – the purpose of that one year period set out in this provision is, *inter alia*, to prevent a State Party from withdrawing from the Statute with immediate effect once it discovers that alleged crimes are being considered by the Court.[123]

86. Moreover, the Appeals Chamber finds that the interpretation according to which these provisions require that the relevant State be a Party to the Statute at the time the Court exercises its jurisdiction ensures an appropriate balance between the responsibilities that States accept upon ratification of the Statute and the ability of States to effectively withdraw from the Statute.[124] A State's sovereign right to withdraw from the Statute would not be effective if the Court were able to exercise its jurisdiction indefinitely despite the State no longer being a Party. The aforementioned interpretation ensures that, in circumstances where a State becomes aware that alleged crimes committed on its territory or by its nationals are being examined, the Court may

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crime ("the custodial State"); and (ii) By the State on the territory of which the act or omission in question occurred.
[…]
Article 22. *Acceptance of the jurisdiction of the Court for the purposes of article 21*
1. A State Party to this Statute may: (a) At the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or (b) At a later time, by declaration lodged with the Registrar; accept the jurisdiction of the Court with respect to such of the crimes referred to in article 20 as it specifies in the declaration.
2. A declaration may be of general application, or may be limited to particular conduct or to conduct committed during a particular period of time.
3. A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving six months' notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.

[122] Impugned Decision, para. 71; *see also* paras 72-75.
[123] *See* paragraphs 189191 below.
[124] Impugned Decision, paras 82-83.

continue to exercise its jurisdiction, with the aim of preventing impunity, whilst providing a clear timeline within which said examinations must be pursued. The Appeals Chamber finds that the aforementioned interpretation is therefore in line with the object and purpose of the Statute.

87. The Appeals Chamber acknowledges that in the Situation in the Republic of Burundi (hereinafter: "Burundi Situation"), in which a former State Party withdrew from the Statute, the Pre-Trial Chamber concluded that the *exercise* of the Court's jurisdiction, is, as such, not subject to any time limit.[125] However, the Appeals Chamber considers that the circumstances in the Burundi Situation were different from those of the present appeal. Indeed, in the Burundi Situation, the Prosecutor requested authorisation to commence an investigation and the Pre-Trial Chamber granted this authorisation before Burundi's withdrawal from the Statute became effective. In this regard, the Pre-Trial Chamber concluded:

> The Chamber notes that the relationship between the first and second sentences of article 127(2) of the Statute may be construed in different ways. However, the Chamber considers that it need not resolve this matter in relation to this Request. In the view of the Chamber, any obligations on the part of Burundi arising out of the Chamber's article 15(4) decision would survive Burundi's withdrawal. The reason is that the present decision is delivered prior to the entry into effect of Burundi's withdrawal on 27 October 2017.[126]

The Appeals Chamber therefore observes that the Pre-Trial Chamber in the Burundi Situation did not address the question subject to analysis under the present ground of appeal.

88. In light of the foregoing, the Appeals Chamber finds that the Provisions in Part 2, read together with article 127 of the Statute, need to be interpreted to require that the relevant State be a Party to the Statute at the time the Court exercises its jurisdiction.

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[125] 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", 9 November 2017, ICC-01/17-9-Red, 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) of the Statute. This acceptance of the *jurisdiction* of the Court remains unaffected by a withdrawal of the State Party from the Statute. […] As a consequence, the *exercise* of the Court's jurisdiction, […] is, as such, not subject to any time limit" (emphasis in original, footnotes omitted).
[126] 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", 9 November 2017, ICC-01/17-9-Red, para. 2.

This regime preserves the Court's ability to exercise its jurisdiction notwithstanding a State Party's withdrawal from the Statute, given that pursuant to article 127(2) of the Statute the withdrawal 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".

89. The Appeals Chamber now turns to the principal contention of the Defence under the First Ground of Appeal, namely that the Pre-Trial Chamber erred in law by formulating "a novel doctrine" that construes article 127(2) of the Statute as *lex specialis vis-à-vis* articles 12(2) and 13(c) of the Statute.[127]

90. The Appeals Chamber notes that the Defence presents its arguments under the First Ground of Appeal in largely dogmatic terms, focusing on the abstract requirements of the *lex specialis* maxim, which, it submits, only applies if certain pre-conditions are satisfied, namely: (i) the same subject matter is dealt with by two provisions; and (ii) there is a normative conflict between, or a need to clarify these two provisions, or else a discernible intention that one provision is to exclude the other.[128] The Defence argues that in the present case, these preconditions are not fulfilled and accordingly article 127 of the Statute cannot be treated as *lex specialis* in relation to articles 12(2) and 13(c) of the Statute.[129]

91. The Appeals Chamber observes that the Pre-Trial Chamber properly framed "the central issue that arises in this case" as concerning the effect of the withdrawal of the Philippines from the Statute upon the Court's ongoing jurisdiction.[130] It considered that this issue requires resolution by reference to article 127 of the Statute, which specifically provides for the withdrawal of a State Party from the Statute and its consequences[131] and addressed the relationship between the aforementioned article and the Provisions in Part 2.[132]

92. The Appeals Chamber considers that in the present circumstances, the central question is not whether article 127(2) satisfies a formalistic *lex specialis* test, but how

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[127] Appeal Brief, paras 7-23.
[128] Appeal Brief, paras 9-10.
[129] *See* Appeal Brief, paras 8-21.
[130] Impugned Decision, para. 45.
[131] Impugned Decision, para. 47.
[132] Impugned Decision, paras 78-83.

it operates within the jurisdictional framework of the Statute. What is determinative to this appeal is not the taxonomy of interpretative maxims, but whether the Pre-Trial Chamber incurred an error of law in its interpretation of the Statute. Therefore, the Appeals Chamber does not consider it necessary to engage with the Defence's arguments concerning the scope and applicability of the *lex specialis* principle, as it involves a theoretical question with no bearing on the determination of the present appeal.

4. Conclusion

93. In light of the foregoing, the Appeals Chamber finds no error in the Pre-Trial Chamber's interpretation of article 12(2) of the Statute as requiring that the relevant State be a Party to the Statute at the time the Court exercises its jurisdiction. This provision must be read together with article 127 of the Statute, which establishes when the withdrawal takes effect and the regime applicable under these circumstances.

94. For the above reasons, the Appeals Chamber unanimously rejects the Defence's First Ground of Appeal.

B. Second Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that a preliminary examination is a "matter […] under consideration" within the meaning of article 127(2) of the Statute

1. Relevant parts of the Impugned Decision

95. Interpreting the ordinary meaning of the words "any matter" under article 127(2) of the Statute, the Pre-Trial Chamber considered definitions of the word "matter" in the Oxford English Dictionary and concluded that "the ordinary meaning of the word [matter] is clearly broad enough to incorporate the subject of the preliminary examination in this case".[133] The Pre-Trial Chamber further held that the inclusion of the word "any" made it "even clearer that this is a broad general term".[134] The Pre-Trial Chamber also observed that the drafting history of the provision is consistent with this finding.[135] The Pre-Trial Chamber ruled that the fact that the French and Chinese versions of the Statute might support a narrower understanding of the word "matter"

[133] Impugned Decision, para. 51; *see also* paras 52-55.
[134] Impugned Decision, para. 52.
[135] Impugned Decision, para. 54.

was not determinative as each language version is equally authentic, and the object and purpose of the Statute and of article 127 of the Statute best reconciles any difference of wording in favour of a broad reading of "any matter".[136]

96. The Pre-Trial Chamber, in its interpretation of the ordinary meaning of the term "under consideration" in article 127(2) of the Statute, noted that "[w]hat is of importance is that, during the preliminary examination, the Prosecution was considering allegations that crimes had been committed in the Philippines".[137] It further emphasised that "the preliminary examination is a statutory process which is a necessary precondition to seeking authorisation for the commencement of an investigation".[138]

97. The Pre-Trial Chamber additionally noted that "there is nothing in the context of article 127(2) of the Statute that would suggest the phrase in question should be given a more specific or restricted meaning […]".[139]

98. With reference to "any relevant rules of international law applicable in the relations between the parties", the Pre-Trial Chamber noted that article 127(2) of the Statute is similar to article 70(1)(b) of the VCLT.[140] As to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", the Pre-Trial Chamber considered that the Philippines' continued engagement with the Court after its withdrawal lends further support to the interpretation that the Court retained jurisdiction over the alleged crimes in this case.[141]

2. Summary of the submissions

a. Defence's submissions

99. The Defence submits that "[t]he Pre-Trial Chamber erred by adopting an overly broad interpretation of the term 'matter' [under article 127(2) of the Statute]".[142]

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[136] Impugned Decision, para. 55.
[137] Impugned Decision, para. 56.
[138] Impugned Decision, para. 57.
[139] Impugned Decision, para. 67.
[140] Impugned Decision, para. 68.
[141] Impugned Decision, para. 69.
[142] Appeal Brief, para. 27.

100. The Defence contends that, "[r]elying on definitions derived from the Oxford English Dictionary, the Pre-Trial Chamber reduced the concept to a mere 'concern' or even just a 'thought'".[143] It further argues that the Pre-Trial Chamber failed to reconcile or give due weight to the more restrictive language used in other linguistic versions of the Statute, such as the French word "*affaires*".[144]

101. In the submission of the Defence, the Pre-Trial Chamber is "mistaken in asserting that a preliminary examination is a statutory process" as no statutory provisions "govern the nature and conduct of a preliminary examination".[145]

102. The Defence asserts that the Pre-Trial Chamber also erred in law and fact by relying on alleged "subsequent practice".[146] It contends that the Pre-Trial Chamber "considered the sole (and inconsistent) conduct of one Non-State Party (the Philippines) without considering the 'subsequent practice' or conduct of other States Parties".[147] The Defence finally observes that President Ferdinand Marcos Jr has "frequently contested the Court's jurisdiction over the Philippines and its citizens".[148]

103. The Defence finally argues that, even assuming that a preliminary examination is a "matter under consideration", it can only relate to the continuation of that preliminary examination beyond withdrawal, and "would have no bearing whatsoever on the consideration […] whether the Court […] can exercise jurisdiction under Article 12 and open an investigation".[149] The Defence further argues that the Pre-Trial Chamber inconsistently defined the "matter under consideration".[150]

Prosecutor's submissions

104. The Prosecutor is of the view that, "[s]ince the Defence fails to show error […], the second ground of appeal should be dismissed".[151]

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[143] Appeal Brief, para. 27.
[144] Appeal Brief, paras 28-29.
[145] Appeal Brief, para. 30.
[146] Appeal Brief, para. 38.
[147] Appeal Brief, para. 39.
[148] Appeal Brief, para. 41.
[149] Appeal Brief, para. 43.
[150] Appeal Brief, para. 45.
[151] Prosecutor Response, para. 24.

105. The Prosecutor submits that the Defence mischaracterises the Pre-Trial Chamber's reasoning by suggesting that a mere "concern" or "thought" would suffice for these purposes, whilst the Pre-Trial Chamber actually emphasised that the term "any matter" is sufficiently broad to incorporate the subject of the preliminary examination in this case.[152] He also underlines that the Defence ignores that the Impugned Decision reflected that article 127(2) of the Statute does not simply refer to "matter" but to "*any* matter", and that the Pre-Trial Chamber addressed the drafting history of the provision.[153] The Prosecutor further submits that the Defence's argument that the narrower meaning of a term appearing in different language versions of a treaty must be adopted misconceives article 33(4) of the VCLT.[154] He adds that the Pre-Trial Chamber correctly applied this provision by adopting the interpretation that best reconciles the texts in light of the Statute's object and purpose.[155]

106. The Prosecutor is also of the view that, contrary to the Defence's arguments, a preliminary examination is undoubtedly a statutory process regulated by the Court's legal texts.[156] The Prosecutor further contends that "[n]othing in article 127(2) [of the Statute] impedes a State Party's ability to withdraw from the Statute".[157]

107. The Prosecutor lastly asserts that the Pre-Trial Chamber's reference to the practice of the Philippines after withdrawal was expressly treated as merely "lend[ing] further support", but "not essential", for its interpretation of "any matter".[158]

OPCV's submissions

108. The OPCV, providing consolidated submissions regarding the Second Ground of Appeal and the Third Ground of Appeal, is of the view that both grounds of appeal must be rejected.[159]

109. The OPCV argues that the Pre-Trial Chamber did not rule "that a prosecutorial thought would constitute a preliminary examination under article 127(2) of the Statute",

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[152] Prosecutor Response, para. 27.
[153] Prosecutor Response, para. 28 (emphasis in the original).
[154] Prosecutor Response, para. 30.
[155] Prosecutor Response, para. 31.
[156] Prosecutor Response, paras 34-35.
[157] Prosecutor Response, para. 38.
[158] Prosecutor Response, para. 39.
[159] OPCV Response, para. 2.

but correctly resorted to a dictionary definition in its interpretation of the terms "a matter under consideration" and "Court" within that provision.[160]

110. The OCPV further avers that the Defence's arguments challenging the Pre-Trial Chamber's approach to the different language versions of the Statute: (i) do not rebut the "presumption of equal authority" of the texts; (ii) do not show that the words or terms employed in the French, Chinese and Spanish versions of the Statute "actually contain real difference of meaning" compared to the English version; and (iii) at best, entail that the different versions use dissimilar words of terms and thus must inevitably mean something else "without clearly identifying an interpretation error".[161] According to the OPCV, even if there were a "real difference of meaning", a "judicial interpreter" must adopt the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, which the Pre-Trial Chamber did.[162]

111. The OPCV also submits that the Pre-Trial Chamber correctly considered that the fact that the Philippines surrendered Mr Duterte six years after terminating its membership to the Court shows that it still considered itself to be bound by the Statute under article 127(2) of the Statute.[163]

112. Lastly, the OPCV avers that the Defence's argument regarding a decision to open an investigation not being identical to a preliminary examination must be dismissed as beyond the parameters of the appeal since the Impugned Decision only concerned the withdrawal of the Philippines following the preliminary examination.[164]

3. Determination by the Appeals Chamber

113. The Appeals Chamber has found above that the Provisions in Part 2, read together with article 127 of the Statute, set out the jurisdictional regime applicable in circumstances in which a State withdraws from the Statute. According to article 127(2) of the Statute, the withdrawal 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". For the reasons set out below,

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[160] OPCV Response, paras 21-22.
[161] OPCV Response, para. 28.
[162] OPCV Response, paras 29-30.
[163] OPCV Response, para. 33.
[164] OPCV Response, para. 38.

the Appeals Chamber, by majority, Judge Lordkipanidze dissenting, considers that the Pre-Trial Chamber did not err when finding that a preliminary examination initiated by the Prosecutor may qualify as a "matter under consideration" within the meaning of article 127(2) of the Statute.

114. As set out in more detail in his dissenting opinion,[165] Judge Lordkipanidze considers that the Pre-Trial Chamber erred in finding that a preliminary examination initiated by the Prosecutor may qualify as a "matter under consideration" within the meaning of article 127(2) of the Statute. Accordingly, all references to the "Appeals Chamber" in the sections of the present judgment dealing with the Second Ground of Appeal should be understood in light of this qualification, meaning that the relevant findings pertain to the majority of the Appeals Chamber.

115. The first sub-ground raised by the Defence is that the Pre-Trial Chamber adopted "an overly broad interpretation of the term 'matter' [under article 127(2) of the Statute]".[166] It argues that, "[r]elying on definitions derived from the Oxford English Dictionary, the Pre-Trial Chamber reduced the concept [of a matter under article 127(2) of the Statute] to a mere 'concern' or even just a 'thought'".[167]

116. The Appeals Chamber considers that the Defence misrepresents the Impugned Decision.

117. In general, reviewing the linguistic meaning of a term appearing in the Statute is an accepted method of establishing its "ordinary meaning" in accordance with article 31(1) of the VCLT. More specifically, the Pre-Trial Chamber referred to "two main headings that are of relevance for [the interpretation of the word 'matter']".[168] The "first is '[a] thing, affair, concern'; and the second is '[t]hat which constitutes or forms the basis of thought, speech, or action'".[169] The Pre-Trial Chamber then referred to a further sub-definition arising from *the first heading* and, on that basis, it concluded that "[t]hat ordinary meaning of the word ['matter'] is clearly broad enough to incorporate the subject of the preliminary examination in this case".[170] Contrary to the Defence's

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[165] *See* the Partly Dissenting Opinion of Judge Lordkipanidze, ICC-01/21-01/25-415-OPI, paras 4, 14.
[166] Appeal Brief, para. 27.
[167] Appeal Brief, para. 27.
[168] Impugned Decision, para. 51.
[169] Impugned Decision, para. 51 (footnotes omitted).
[170] Impugned Decision, para. 51.

submission, there is, therefore, no indication that the Pre-Trial Chamber considered that the word "matter" in article 127(2) of the Statute may amount to a mere "concern" or "thought" pursuant to *the second heading* of the dictionary definition.

118. In any event, in addition to the aforementioned linguistic definition, the Pre-Trial Chamber further considered the ordinary meaning of the term "any", which precedes the word "matter" in article 127(2) of the Statute.[171] It then proceeded to address the Defence's arguments concerning the drafting history of article 127 of the Statute and, as also further set out below, the French and Chinese versions of the Statute.[172] It was on the basis of all these elements that the Pre-Trial Chamber reached its conclusion. Considering the Pre-Trial Chamber's reasoning as a whole, the Appeals Chamber finds that the Defence fails to demonstrate an error in this regard.

119. The Defence further avers that the Pre-Trial Chamber "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' [under article 127(2) of the Statute]".[173]

120. The Appeals Chamber notes that the Pre-Trial Chamber recalled that, pursuant to article 128 of the Statute, all versions of the Statute are "equally authentic" and, on that basis, it concluded that the use of a dissimilar word in other versions of the Statute does not detract from the broad meaning of the English word "matter" in article 127(2) of the Statute.[174] Therefore, the Pre-Trial Chamber did not, as suggested by the Defence, espouse a particular preference for the English version of the Statute. It rather considered the different versions and, upon comparison, concluded that other versions do not affect its interpretation.

121. In this regard, the Appeals Chamber recalls that under article 33(4) of the VCLT, "[…] when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". Therefore, the Defence's submission that, "if a term in one version of the Statute possesses either a broad or narrow meaning […] while its parallel term in another

[171] Impugned Decision, para. 52.
[172] Impugned Decision, paras 53-55.
[173] Appeal Brief, para. 28.
[174] Impugned Decision, para. 55.

language version of the Statute has only a narrow meaning […], the logical solution would be to adopt […] the narrower interpretation"[175] is devoid of any legal basis. Rather, the Pre-Trial Chamber proceeded in accordance with the test enshrined in article 33(4) of the VCLT when finding that "the object and purpose of the Statute as a whole and of article 127 itself best reconciles any difference of wording in the texts in favour of a broad reading of the phrase 'any matter'".[176]

122. As a result, the Appeals Chamber does not discern any error and rejects the Defence's first sub-ground of appeal.

123. The second sub-ground of appeal raised by the Defence is that the Pre-Trial Chamber "erred in law by finding that a preliminary examination renders a matter 'under consideration'" within the meaning of article 127(2) of the Statute.[177]

124. In this respect, the Defence first asserts that "[n]o 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 […]".[178]

125. The Appeals Chamber considers that the Defence's argument is devoid of merit. The Appeals Chamber recalls that article 15(6) of the Statute refers to the "preliminary examination […] in paragraphs (1) and (2) [of article 15 of the Statute]". Thus, the first two paragraphs of article 15 of the Statute explicitly enshrine the preliminary examination to be carried out by the Prosecutor as a precursor to his or her decision as to whether to submit a request for authorisation by the pre-trial chamber to open an investigation *proprio motu* under the third sub-paragraph of article 15 of the Statute.[179] In this regard, the Prosecutor must consider the factors set out in article 53(1)(a)-(c) of the Statute in deciding whether there is a reasonable basis for submitting such a request.[180]

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[175] Appeal Brief, para. 29.
[176] Impugned Decision, para. 55.
[177] Appeal Brief, paras 30-37.
[178] Appeal Brief, para. 30.
[179] Article 15(3) of the Statute.
[180] Rule 48 of the Rules.

126. Moreover, during the preliminary examination phase, the Prosecutor is endowed with certain prerogatives, such as seeking additional information,[181] receiving written or oral testimony[182] and taking necessary measures in respect of the information received, including regarding the protection of the confidentiality of such information.[183] The conduct of the preliminary examination phase may also involve proceedings before the pre-trial chamber, including in respect of applications by the Prosecutor for measures in respect of testimony to be received.[184]

127. The preliminary examination further entails particular legal obligations. If, after the preliminary examination, the Prosecutor concludes that there is no reasonable basis for an investigation, he or she must inform those having provided the relevant information accordingly.[185] However, if the Prosecutor is satisfied that a reasonable basis exists to open an investigation *proprio motu*, he or she is under an obligation to present an application for authorisation to do so to the pre-trial chamber.[186]

128. The Appeals Chamber finds that the preliminary examination phase has a clear basis in the Court's legal texts and therefore rejects the arguments presented by the Defence.

129. The Defence's submission that the Prosecutor has a degree of discretion in relation to this phase does not detract from this conclusion.[187] Such discretion is a necessary corollary of one of the essential functions exercised by the Prosecutor in the context of the Court's legal framework, namely deciding whether to initiate an investigation *proprio motu* under the oversight of the pre-trial chamber. What is determinative in this regard is that, as also further addressed hereinafter, the preliminary examination phase is a necessary prerequisite for an essential legal procedure. Indeed, the Prosecutor can only apply to the pre-trial chamber to authorise an investigation *proprio motu* once the Prosecutor has autonomously determined that there is a reasonable basis to proceed with such an investigation.

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[181] Article 15(2) of the Statute.
[182] Article 15 (2) of the Statute and rule 47(1) of the Rules.
[183] Rule 46 of the Rules.
[184] Rule 47(2) of the Rules.
[185] Article 15(6) of the Statute and rule 49 of the Rules.
[186] Article 15(3) of the Statute.
[187] Appeal Brief, paras 30-32.

130. The Defence further contends that the Pre-Trial Chamber's "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', is irrelevant".[188] It also submits that 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.".[189]

131. The Appeals Chamber is not persuaded by these arguments.

132. In general terms, the Court's legal texts do not specify the type of activities to be carried out by the Prosecutor in the course of a preliminary examination. Article 15(2) of the Statute merely stipulates that "[t]he Prosecutor shall analyse the seriousness of the information received", without further qualification.

133. The Appeals Chamber notes that, in the specific circumstances detailed in the Impugned Decision, the Prosecutor: (i) decided to initiate a preliminary examination prior to the Philippines' withdrawal from the Statute; (ii) publicly announced the initiation of a preliminary examination; (iii) adopted a number of procedural steps, some of which involved judicial rulings; and (iv) submitted a request to initiate a *proprio motu* investigation on the basis of the results of the preliminary examination.[190] The Appeals Chamber finds that, contrary to the submission of the Defence,[191] the preliminary examination in the Philippines Situation properly qualifies as "any matter which was already under consideration by the Court" for the purposes of article 127(2) of the Statute.

134. The Appeals Chamber is further of the view that the preceding conclusions do not take precedence over a "State's sovereign decision to withdraw" from the Statute, as submitted by the Defence.[192] Article 127 of the Statute regulates the procedure for the withdrawal of States Parties, explicitly stipulating that a withdrawal shall not "prejudice in any way the continued consideration of any matter which was already under consideration by the Court […]". For the reasons set out above, as well as

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[188] Appeal Brief, para. 32.
[189] Appeal Brief, para. 32.
[190] Impugned Decision, paras 57-61.
[191] Appeal Brief, para. 33.
[192] Appeal Brief, paras 35-37.

hereinafter, a proper interpretation of the legal framework of the Court establishes that a preliminary examination qualifies as such a matter. As a result, a State Party's withdrawal is conditioned by this stipulation and a State's decision to become a State Party, as well as to withdraw from the Statute, must be considered to have been taken in full cognisance thereof.

135. For the preceding reasons, the Appeals Chamber rejects the Defence's second sub-ground of appeal.

136. The third sub-ground of appeal raised by the Defence is that the Pre-Trial Chamber's "application of the concept of 'subsequent practice' in [relation to the Philippines' continued engagement with the Court after its withdrawal] was legally inappropriate and factually incorrect'.[193]

137. Commencing with the Defence's submissions regarding the factual inaccuracy of the Pre-Trial Chamber's finding, the Appeals Chamber notes that the Pre-Trial Chamber emphasised the Philippines' request to defer the Prosecutor's investigation, as well as its decision to surrender Mr Duterte.[194] However, the Appeals Chamber notes that, in the context of its request to defer the Prosecutor's investigation under article 18(2) of the Statute, the Philippines also underlined that the Court lacks jurisdiction over the Philippines Situation.[195] In addition, as highlighted by the Defence, representatives of the Philippines have also declared that, in their view, the Court lacks jurisdiction following its withdrawal.[196]

138. Therefore, the Appeals Chamber is of the view that the Philippines' decision to arrest and surrender Mr Duterte, as well as its further engagement with the Court, is insufficient to support a conclusion that the practice of the Philippines following its withdrawal qualifies as "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of article 31(3)(b) of the VCLT. The Appeals Chamber cannot objectively discern how the Pre-Trial Chamber could have reasonably reached said conclusion. The factual conclusion reached by the Pre-Trial Chamber thus amounts to an error of fact in the

[193] Appeal Brief, para. 39.
[194] Impugned Decision, para. 69.
[195] Article 18(2) Appeal Judgment, paras 42-44.
[196] Appeal Brief, para. 41.

particular circumstances at hand. In view of this conclusion, the Appeals Chamber does not consider it necessary to address the remaining aspects of the Defence's third sub-ground.

139. Nonetheless, the Appeals Chamber considers that the aforementioned error did not materially affect the Impugned Decision. The Pre-Trial Chamber held that the Philippines' continued engagement with the Court after its withdrawal "*lends further support* to the interpretation that the Court retained jurisdiction over the alleged crimes in this case as they were a matter which was already under consideration by the Court prior to the date on which the withdrawal became effective".[197] This finding, therefore, was not determinative of the issue before the Pre-Trial Chamber but rather constituted an ancillary element in its analysis. Had the Pre-Trial Chamber not erred in relation to this finding, it would not have rendered a substantially different decision considering that the remaining aspects of its reasoning sufficiently uphold its conclusion that a preliminary examination amounts to a "matter which was already under consideration by the Court" under article 127(2) of the Statute.

140. Accordingly, the Appeals Chamber rejects the Defence's third sub-ground of appeal.

141. The Defence's final sub-ground of appeal is that, "[e]ven 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" and it "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".[198]

142. In this respect, the Defence first contends that a preliminary examination and a decision to open an investigation "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".[199]

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[197] Impugned Decision, para. 69 (emphasis added).
[198] Appeal Brief, para. 43.
[199] Appeal Brief, para. 44.

143. The Appeals Chamber is not persuaded by the Defence's submission.

144. As already indicated, a preliminary examination is a necessary prerequisite for the Prosecutor's decision to request a pre-trial chamber to authorise a *proprio motu* investigation under article 15(3) of the Statute. It is no more than logical that the Prosecutor must, in accordance with his or her responsibilities under the Statute, first autonomously decide that there is reasonable basis to pursue a *proprio motu* investigation. A positive conclusion by the Prosecutor subsequently triggers his or her obligation to present an application to the pre-trial chamber under article 15(3) of the Statute. The pre-trial chamber's decision under article 15(4) of the Statute is, in turn, based on the Prosecutor's conclusions arising from the preliminary examination. Therefore, contrary to the Defence's submission, there is no strict separation between the preliminary examination and the opening of a *proprio motu* investigation as they constitute two components of an integral legal procedure. The fact that they are carried out by different organs of the Court, namely the Prosecutor and the Chambers, does not undermine this conclusion.

145. Lastly, the Defence asserts that "[a] further problem arises out of the Pre-Trial Chamber's generic encapsulation of the 'matter under consideration'" in view of the Chamber's references to "[t]he Philippines Situation" and "the allegations of crimes committed in the Philippines" as the matter under consideration.[200]

146. In the view of the Appeals Chamber, it is clear that, when read in context, the references to the "[t]he Philippines Situation" and "the allegations of crimes committed in the Philippines" concern the question of whether the preliminary examination conducted by the Prosecutor in the Philippines Situation amounts to a "matter which was already under consideration by the Court" within the meaning of article 127(2) of the Statute. The reason is that, in the same paragraph, the Pre-Trial Chamber was addressing the arguments of the Defence that "*the preliminary examination* and the decision to authorise an investigation were different 'matters'".[201]

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[200] Appeal Brief, para. 45.
[201] Impugned Decision, para. 76 (emphasis added).

147. Accordingly, the Appeals Chamber rejects the Defence's fourth sub-ground of appeal.

148. Judge Lordkipanidze considers that the Pre-Trial Chamber erred in law in its interpretation of article 127(2) of the Statute, namely that the Court can exercise its jurisdiction over the alleged crimes in this case. For the reasons set out in his partly dissenting opinion, he is of the view 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".[202] Accordingly, he would have granted the Second Ground of Appeal and found that the Court cannot exercise jurisdiction in the present case.

4. Conclusion

149. For the foregoing reasons, the Appeals Chamber, by majority, Judge Lordkipanidze dissenting, rejects the Second Ground of Appeal.

C. Third Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that "the Court" in article 127(2) of the Statute includes the Office of the Prosecutor

1. Relevant parts of the Impugned Decision

150. The Pre-Trial Chamber, noting that the word "Court" in article 127(2) of the Statute is capitalised, found that its ordinary meaning is better defined by reference to the institution of the International Criminal Court, as per article 1 of the Statute, rather than the judicial Chambers.[203] It further considered that the Court is expressly stated to be composed of four organs, including the Office of the Prosecutor, under article 34 of the Statute.[204] The Pre-Trial Chamber also noted that article 127(2) of the Statute does not limit its wording to any matter under consideration "*by the Chamber*".[205]

151. The Pre-Trial Chamber observed that the first reference to "Court" in article 127(2) of the Statute clearly includes the Office of the Prosecutor "as it is provided that a State's withdrawal 'shall not affect any cooperation with the Court in

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[202] *See* the Partly Dissenting Opinion of Judge Lordkipanidze, ICC-01/21-01/25-415-OPI, para. 12.
[203] Impugned Decision, para. 62.
[204] Impugned Decision, para. 63.
[205] Impugned Decision, para. 63 (emphasis in original).

connection with criminal investigations and proceedings […]'" and "requests for cooperation under Part 9 of the Statute can be made by the Prosecution" as evidenced, for example, by article 93(1)(e) of the Statute.[206] The Pre-Trial Chamber, thus, concluded that "the term 'the Court' should be given the same meaning – and include the Prosecution – on the other occasion on which it is used in the same sentence".[207] Finally, the Pre-Trial Chamber noted that this "is further confirmed by the overall context of the phrase in question and its object and purpose".[208]

2. Summary of the submissions

a. Defence's submissions

152. The Defence submits that, contrary to the Pre-Trial Chamber's determination, Part 9 of the Statute does not explicitly authorise the Prosecutor to issue requests for cooperation.[209] The Defence notes that, elsewhere in Part 9 of the Statute, "the Court" refers exclusively to the judiciary, for example under article 87(7) of the Statute.[210] It further contends that the only other occurrence of the expression "under consideration by the Court" in the Statute, namely in article 95 of the Statute, "clearly and unequivocally denotes the judiciary, and manifestly *excludes* 'the Prosecutor'".[211]

153. The Defence also avers that, whenever "Court" is paired with a variation of "consider" in the Statute, "the language is *always* intended to denote the judiciary", including in other language versions.[212]

Prosecutor's submissions

154. The Prosecutor submits that the Defence fails to show any error in the Impugned Decision and rather simply disagrees with it.[213]

155. According to the Prosecutor, the Defence's references to "the Court" that do not include "the Prosecution" are beside the point, as the Pre-Trial Chamber acknowledged that there are multiple references to this term that do include "the Prosecution".[214] The

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[206] Impugned Decision, para. 66.
[207] Impugned Decision, para. 66.
[208] Impugned Decision, para. 66.
[209] Appeal Brief, para. 49.
[210] Appeal Brief, para. 49.
[211] Appeal Brief, para. 50 (emphasis in original).
[212] Appeal Brief, paras 51-53 (emphasis in original).
[213] Prosecutor Response, paras 43, 45.
[214] Prosecutor Response, paras 45-46.

Prosecutor further submits that the Defence fails to address different provisions included in Part 9 of the Statute allowing the Prosecutor to make requests for cooperation.[215] The Prosecutor also avers that there is "nothing especially salient" in article 95 of the Statute for the purposes of interpreting article 127(2) of the Statute given the Pre-Trial Chamber's careful contextual analysis.[216]

156. Finally, the Prosecutor argues that

> [s]ince the Court can include the Prosecution, and both judicial Chambers of the Court and the Prosecution can "consider" a matter, it is immaterial for the purpose of interpreting article 127(2) whether and to what extent the Statute may also refer to "the Court" (meaning a judicial Chamber) "considering" a matter.[217]

OPCV's submissions

157. The OPCV's consolidated submissions regarding the Second Ground of Appeal and the Third Ground of Appeal are set out above.[218]

3. Determination by the Appeals Chamber

158. The Defence argues that it was erroneous for the Pre-Trial Chamber to rely on a comparison of the term "the Court" in the first and second part of the second sentence of article 127(2) of the Statute as a basis for its conclusion that the term included the Office of the Prosecutor, as the two parts of the sentence address different issues.[219] Instead, the Defence avers that the Pre-Trial Chamber "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".[220]

159. The Appeals Chamber[221] notes that the Pre-Trial Chamber correctly recalled that consistent with article 31(1) VCLT, "the provisions of the Statute are to be interpreted

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[215] Prosecutor Response, para. 48.
[216] Prosecutor Response, para. 49.
[217] Prosecutor Response, para. 50 (footnote omitted).
[218] *See* paragraphs 108-112 above.
[219] Appeal Brief, paras 48-49, 54.
[220] Appeal Brief, para. 54 (emphasis removed).
[221] As noted in paragraph 114 above, Judge Lordkipanidze considers that the Pre-Trial Chamber erred in finding that a preliminary examination initiated by the Prosecutor may qualify as a "matter under consideration" within the meaning of article 127(2) of the Statute. Given his position with respect to the Second Ground of Appeal, Judge Lordkipanidze does not find it necessary to address the present ground of appeal. All references to the "Appeals Chamber" in the present ground of appeal should be understood in light of this qualification, meaning that the relevant findings pertain to the majority of the Appeals Chamber.

according to their ordinary meaning in their context and in the light of the object and purpose of the treaty".[222]

160. The Appeals Chamber further observes that in line with the interpretative methodology required by the VCLT, the Pre-Trial Chamber first considered the ordinary meaning of the word "court". In this regard, it noted that whilst one of its dictionary definitions lends support to the notion that the term "could refer solely to the judicial Chambers of this Court", in light of the capitalisation of the word in article 127(2) of the Statute, "its ordinary meaning is better defined by reference to the specific institution of the International Criminal Court" which is designated in article 1 of the Statute as "the Court".[223] The Pre-Trial Chamber then emphasised that (i) article 34 of the Statute expressly states that "the Court" is composed of four organs, including the Office of the Prosecutor; and (ii) "article 127(2) of the Statute does not limit its wording to any matter under consideration '*by the Chamber*'".[224]

161. Noting the ambiguities in the ordinary meaning of the word, the Pre-Trial Chamber correctly concluded, in line with the Appeals Chamber's jurisprudence on article 31(1) of the VCLT,[225] that "further interpretation" of the phrase "by the Court" is required "by reference to the context in which it is used in article 127(2) of the Statute *and in the Statute as a whole*".[226] The Appeals Chamber observes that the Pre-Trial Chamber first proceeded to consider the context of the term in the Statute as a whole, noting that whilst the Defence had proffered "numerous examples where the term is used to refer to the Chambers of the Court",[227] in article 34 of the Statute and other provisions, the same term includes the Office of the Prosecutor.[228]

162. In this regard, the Appeals Chamber observes that the Defence reiterates in its Appeal Brief an argument it initially raised in its submissions before the Pre-Trial Chamber, namely that "52 references to 'the Court' in the official texts did not include the Office of the Prosecutor".[229] In the view of the Appeals Chamber, the relative

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[222] Impugned Decision, para. 49.
[223] Impugned Decision, para. 62.
[224] Impugned Decision, para. 63 (emphasis in original).
[225] *See* paragraphs 44-45 above.
[226] Impugned Decision, para. 63 (emphasis added).
[227] Impugned Decision, para. 65. *See also* Appeal Brief, para. 47.
[228] Impugned Decision, fn 139 *referring to* articles 1, 4, 42, 48, 86, 112(2), 113-116, 118 of the Statute.
[229] Appeal Brief, fn. 52.

frequency with which the term appears in one sense as opposed to another is inconsequential. What matters is that the Statute employs the term in distinct senses and it must be ascertained which one is appropriate with respect to the provision under interpretation. The Appeals Chamber considers that in view of the differing meanings of the phrase "the Court" across the Statute, it was correct for the Pre-Trial Chamber to conclude that the meaning of the term "therefore depends upon the context of the provision" in which it is being used.[230]

163. In light of the above, the Appeals Chamber finds that the Defence's argument that the Pre-Trial Chamber failed to interpret the term "the Court" in the context of the Statute as whole and instead "relied exclusively on its own singular interpretation of the second sentence of Article 127(2)" is without basis and misrepresents the Impugned Decision.[231] Accordingly, the Appeals Chamber finds no error in this regard.

164. Nor can of the Appeals Chamber discern any error with regard to the Pre-Trial Chamber's analysis of the context in which the term "the Court" is used within article 127(2) of the Statute. The Defence presents two arguments regarding the Pre-Trial Chamber's substantive finding that "[t]he fact that the 'Court' includes the Prosecution for the purposes of article 127(2) of the Statute is clear from its context".[232]

165. The Defence challenges the Pre-Trial Chamber's conclusion that the first time the term "the Court" is used in the second sentence of article 127(2) of the Statute[233] it "clearly includes the Prosecution", as "requests for cooperation under Part 9 of the Statute can be made by the Prosecution" and thus "[i]t follows that the term "the Court" should be given the same meaning – and include the Prosecution – on the other occasion on which it is used in the same sentence".[234] In this respect, the Defence argues that the Pre-Trial Chamber's "decision to interpret 'the Court' by reference to 'cooperation'" was "arbitrary",[235] particularly noting that "Part 9 does not explicitly permit the Prosecutor to promulgate requests for cooperation" and "[e]lsewhere in Part 9 where

[230] Impugned Decision, para. 65.
[231] Appeal Brief, paras 48, 54.
[232] Impugned Decision, para. 66.
[233] The first part of the second sentence of article 127(2) of the Statute provides that a State Party's withdrawal from the Statute "shall not affect any cooperation with the Court in connection with criminal investigations and proceedings […]".
[234] Impugned Decision, para. 66.
[235] Appeal Brief, para. 50.

cooperation is discussed, the term 'the Court' actually refers exclusively to the judiciary".[236]

166. Regarding the Defence's arguments on Part 9 of the Statute, the Appeals Chamber notes, as the Prosecutor argues,[237] that in support of its aforementioned conclusion the Pre-Trial Chamber pointed to a decision from the preliminary examination in the present case which makes clear that the Prosecutor can make a formal request for cooperation.[238] The Appeals Chamber further notes that the Defence did not address, nor show an error in the Pre-Trial Chamber's conclusion in this regard. Moreover, there are multiple other provisions in the Court's legal texts which confirm the Pre-Trial Chamber's conclusion that certain requests for cooperation under Part 9 of the Statute can be made by the Prosecutor as well as by a chamber.

167. In particular, rule 176 of the Rules, which pertains to article 87 of the Statute containing general provisions on requests for cooperation, sets out the "[o]rgans of the Court responsible for the transmission and receipt of any communications relating to international cooperation and judicial assistance". In this respect, rule 176(2) of the Rules expressly provides that "[t]he Office of the Prosecutor shall transmit the requests for cooperation made by the Prosecutor and shall receive the responses, information and documents from requested States". Article 54(3)(c) of the Statute states that the Prosecutor may "[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate".

168. In light of the above, the Appeals Chamber considers that the Defence failed to demonstrate an error in the Pre-Trial Chamber's conclusions regarding Part 9 of the Statute.

169. Turning to the Defence's second argument challenging the Pre-Trial Chamber's reasoning on the context of article 127(2) of the Statute, the Defence asserts that the

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[236] Appeal Brief, para. 49 (emphasis removed).
[237] Prosecutor Response, para. 48.
[238] Impugned Decision, fn 142 which states that "[t]o provide but one example from the preliminary examination in the present case, it is clear that the Prosecution can make a formal request for cooperation under article 93(1)(e) of the Statute (which provides that States Parties shall comply with 'requests by the Court' to assist in relation to investigations or prosecutions in facilitating the appearance of persons as witnesses or experts before the Court), as the Prosecution was instructed by Pre-Trial Chamber III to confirm that such a request had been made […]".

Pre-Trial Chamber should have considered the notion of "the Court" in relation to the phrase a "matter under consideration" by way of reference to article 95 of the State, which contains the "only other occurrence […] of the expression 'under consideration by the Court'".[239] The Defence argues that this provision "clearly and unequivocally denotes the judiciary".[240] It further argues that "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".[241]

170. At the outset, the Appeals Chamber observes, as set out above, that the Defence argues that the Pre-Trial Chamber's interpretation of "the Court" by reference to the provisions on cooperation in Part 9 of the Statute, was "arbitrary".[242] Yet the Defence simultaneously argues that the Pre-Trial Chamber should have instead considered article 95 of the Statute – an even more specific provision pertaining to cooperation – concerning the postponement of the execution of a Part 9 request in circumstances where an admissibility challenge pursuant to article 18 or 19 of the Statute is pending before the Pre-Trial Chamber. In this regard, the Appeals Chamber is of the view that the Pre-Trial Chamber was not required to assess in detail every provision in the Statute where the word "Court" does not encompass the judiciary, nor was it required to compare every such provision against article 127(2) of the Statute. On this basis, and further having regard to the fact that the Pre-Trial Chamber considered the term "the Court" in the context of the Statute as a whole,[243] the Appeals Chamber does not consider that the Pre-Trial Chamber erred by failing to specifically consider article 95 of the Statute in its assessment.

171. As to the Defence's broader argument that when the term "the Court" is placed alongside the word "consider" it denotes the judiciary, the Appeals Chamber first notes that the word "considering", deriving from the verb "consider" means, *inter alia*, "to spend time thinking about a possibility or making a decision" and "to give attention to a particular subject or fact when judging something else".[244] Based on these definitions, there is no indication that this word is inapplicable to assessments conducted by the

[239] Appeal Brief, para. 50 (emphasis removed).
[240] Appeal Brief, para. 50.
[241] Appeal Brief, para. 51 (emphasis in original).
[242] Appeal Brief, para. 50.
[243] *See* paragraphs 161-163 above.
[244] Cambridge dictionary, definition of word "consider".

Prosecutor. The Appeals Chamber further notes, as argued by the Prosecutor,[245] that the verb "consider" is not exclusively utilised in the Statute to denote judicial deliberation. Indeed there are instances in the Statute in which the Prosecutor "considers" information. By way of example, article 15(6) of the Statute refers to the Prosecutor considering information in the context of a preliminary examination of a *proprio motu* situation and article 53(1) of the Statute refers to the Prosecutor considering certain factors in order to decide whether to initiate an investigation. Further emphasising that article 34 of the Statute explicitly states that the Office of the Prosecutor is an organ of the Court, and that the Statute details scenarios in which both the Prosecutor and the judiciary can "consider" a matter, the Appeals Chamber is of the view that the mere fact that certain provisions in the Statute refer to "the Court" in the narrower sense of the judiciary "considering" a matter, does not necessarily mean that all provisions deploying the same or analogous language should be given an equivalent meaning.[246]

172. Additionally, the Appeals Chamber considers that the Defence's observation that the Spanish and Chinese versions of the Statute also utilise language which signifies "a singularly judicial role" whenever "the Court" is used in combination with an equivalent word to "consider",[247] is immaterial to the present discussion. The Appeals Chamber notes that the Pre-Trial Chamber took into account the ordinary meaning of the word "consideration" used in the English version of the Statute.[248] It further observes that the ordinary meaning of "consideration", does not lead to the conclusion that when it is used in the context of the "the Court" considering something, it exclusively refers to the judiciary.

173. The Appeals Chamber notes that the Defence is correct in its assertion that the Pre-Trial Chamber did not have regard to the meaning of the word "consideration" in any other language version of the Statute. Nonetheless, the Appeals Chamber also recalls, as set out above[249] and as noted by the Pre-Trial Chamber,[250] that pursuant to article 33(4) of the VCLT, if different linguistic versions of the authentic texts cannot

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[245] Prosecutor Response, para. 50.
[246] *See also* Prosecutor Response, para. 50.
[247] Appeal Brief, paras 51-53.
[248] *See* Impugned Decision, para. 56.
[249] *See* paragraph 43 above.
[250] *See for example* Impugned Decision, para. 55.

be reconciled, then the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, should be adopted. Thus even if the Chinese and Spanish versions of the Statute deploy terms with a narrower meaning than the English word "consideration", this does not *ergo* result in an interpretation whereby "the term 'the Court' must, perforce, be limited to the judiciary".[251] Rather, in accordance with the test set out in article 33(4) of the VCLT, the Appeals Chamber considers that the object and purpose of the Statute as a whole,[252] and of article 127 itself, best reconciles the difference of wording in the authentic texts of the Statute in favour of not automatically limiting the term "the Court" to the judiciary when it is used alongside the word "consideration".

174. In light of the above, the Appeals Chamber considers that the Defence has failed to show that the Pre-Trial Chamber erred in finding that the term "the Court" includes the Office of the Prosecutor for the purposes of article 127(2) of the Statute.

175. As set out in his partly dissenting opinion,[253] given his position with respect to the Second Ground of Appeal, Judge Lordkipanidze does not find it necessary to address the present ground of appeal.

4. Conclusion

176. For the foregoing reasons, the majority of the Appeals Chamber rejects the Third Ground of Appeal.

D. Fourth Ground of Appeal: alleged error by the Pre-Trial Chamber in finding that the "object and purpose" of the Statute permits the opening of an investigation even after the effective withdrawal of the Philippines from the Statute

1. Relevant parts of the Impugned Decision

177. The Pre-Trial Chamber found that "States Parties [by ratifying the Statute] demonstrate a commitment to punishing and preventing the commission of the most

[251] Appeal Brief, para. 51.
[252] *See* paragraph 8585 above.
[253] *See* the Partly Dissenting Opinion of Judge Lordkipanidze, ICC-01/21-01/25-415-OPI, para. 14.

serious crimes of international concern throughout the period that they are Parties to the Statute".[254]

178. It further considered 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".[255]

2. Summary of the submissions

Defence's submissions

179. According to the Defence, "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".[256]

180. In the submission of the Defence, the Pre-Trial Chamber made a "policy-oriented determination".[257] It contends that, if it is necessary to preserve the "object and purpose" of the Statute by preventing a State from frustrating an investigation, the safeguard is already provided in the one-year period under article 127(1) of the Statute.[258] The Defence further argues that, "[g]iven 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 […]".[259]

Prosecutor's submissions

181. The Prosecutor argues that the Fourth Ground of Appeal should be rejected, as the Defence "takes the Chamber's reasoning out of context and shows no error".[260]

182. The Prosecutor submits that "it was not necessary for the Chamber to exclude or discount all other conceivable means by which the object and purpose of the Statute

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[254] Impugned Decision, para. 70.
[255] Impugned Decision, para. 71.
[256] Appeal Brief, p. 20.
[257] Appeal Brief, para. 55.
[258] Appeal Brief, para. 56.
[259] Appeal Brief, para. 57.
[260] Prosecutor Response, para. 51.

could be promoted".[261] The Prosecutor adds that "[t]he Defence's subjective view of the sufficiency of the 'one-year' withdrawal period under article 127(1) is immaterial" and, "[i]n any event, the Chamber *did* take account of the function of article 127(1)".[262]

183. The Prosecutor also argues that the Pre-Trial Chamber's conclusions concerning the Philippines' apparent motivation for withdrawing from the Statute "did not form part of its legal assessment in interpreting article 127(2)" as it drew on these facts "as an *example* of the very harm that article 127(2) was designed to prevent".[263]

OPCV's submissions

184. The OPCV argues that the Fourth Ground of Appeal must be rejected.[264]

185. It avers that "[t]he Defence does not argue that the [Pre-Trial Chamber] somehow misunderstood and thus misinterpreted the object and purpose of the Statute" and, therefore, its arguments "amount to mere disagreement".[265]

186. The OPCV further submits that the Defence's arguments that the Prosecutor would have only one year to seek an investigation are "baseless", in light of the fact that a withdrawing State "may offer a date that is longer than one year".[266] According to the OPCV, the Statute "does not indicate at all that the [Prosecutor] has only one year to seek an investigation after a State notifies its intention to withdraw".[267]

3. Determination by the Appeals Chamber

187. The Defence submits that the Impugned Decision is materially affected by an error of law by virtue of the Pre-Trial Chamber's finding that "the 'object and purpose' of the Rome Statute permits the opening of an investigation even after the effective withdrawal of the [Philippines]".[268]

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[261] Prosecutor Response, para. 53.
[262] Prosecutor Response, para. 53 (emphasis in original).
[263] Prosecutor Response, para. 55 (emphasis in original).
[264] OPCV Response, para. 2.
[265] OPCV Response, para. 40.
[266] OPCV Response, para. 41.
[267] OPCV Response, para. 42.
[268] Appeal Brief, para. 4.

188. The Appeals Chamber[269] notes that in its submissions in support of the Fourth Ground of Appeal, the Defence seems to imply that the Pre-Trial Chamber's interpretation of article 127(2) of the Statute was inconsistent with the object and purpose of the Statute.[270] Significantly however, the Defence does not identify an error in the Pre-Trial Chamber's articulation of the object and purpose of the Statute.[271]

189. Addressing specifically the object and purpose of the Statute, the Defence argues that if "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)".[272] The Defence argues that this provision provides an adequate safeguard by enabling the Prosecutor to prevent "the feared impunity by seeking its investigation within the [one-year] statutory withdrawal period".[273]

190. The Appeals Chamber observes that the Pre-Trial Chamber did take into account article 127(1) of the Statute, but contrary to the Defence, it concluded that this provision supports a broader interpretation of article 127(2) of the Statute. Notably it found that

> [i]t would be entirely against that object and purpose [of the Statute] 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. This is also clear from article 127 of the Statute itself. Article 127(1) of the Statute provides that a State Party may withdraw from the Statute by written notification and that "[t]he withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date". The object and purpose of that one year period is, *inter alia*, to prevent a State Party from withdrawing from the Statute with immediate effect once it discovers that alleged crimes for which it has responsibility are being considered by the Court. To find that the Prosecution's preliminary examination in the present case does not encompass a matter which was already under consideration by the Court prior to the date on which the

[269] As noted in paragraph 114 above, Judge Lordkipanidze considers that the Pre-Trial Chamber erred in finding that a preliminary examination initiated by the Prosecutor may qualify as a "matter under consideration" within the meaning of article 127(2) of the Statute. All references to the "Appeals Chamber" in the present ground of appeal should be understood in light of this qualification, meaning that the relevant findings pertain to the majority of the Appeals Chamber.
[270] Appeal Brief, paras 56-57.
[271] *See* Impugned Decision, para.70. *See also* Defence's Response to Additional Observations, para. 25; Appeal Brief, paras 56-57.
[272] Appeal Brief, para. 56.
[273] Appeal Brief, para. 57.

withdrawal of the Philippines became effective, pursuant to article 127(2) of the Statute, would go directly against that object and purpose.[274]

191. The Appeals Chamber cannot discern any error in the Pre-Trial Chamber's interpretation of article 127 of the Statute. The Appeals Chamber is not persuaded by the Defence's submission that the one-year withdrawal period under article 127(1) of the Statute sufficiently preserves the Statute's object and purpose as the Prosecutor may seek an investigation within this period.[275] As noted above, if the Prosecutor is satisfied that a reasonable basis exists to open an investigation *proprio motu*, he or she is under an obligation to present an application for authorisation to do so to the pre-trial chamber.[276] Allowing the preliminary examination to continue past the one-year withdrawal period is reflective of the balance, found above by the Appeals Chamber,[277] between the responsibilities that States accept upon ratification of the Statute, including the aim set out in the Preamble to put an end to impunity, and the ability of States to effectively withdraw from the Statute within a clear timeline.

192. The Defence's remaining arguments in support of the Fourth Ground of Appeal centre on the assertion that in "support [of] its broad interpretation" of article 127(2) of the Statute, the Pre-Trial Chamber made a "policy-oriented determination"[278] in its conclusion that it would be against the object and purpose of the Statute to interpret this article in such a way that would "enable a State Party to evade its responsibilities" by withdrawing from the Statute once alleged crimes are the subject of a preliminary examination.[279] The Defence argues that the Pre-Trial Chamber's decision was "aimed solely at countering what it, subjectively, perceived to be the rationale for the Philippines' withdrawal".[280] The Defence further argues that "in certain cases, the Court may consider policy, but such consideration cannot override clarification of predetermined statutory intent".[281]

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[274] Impugned Decision, para. 71.
[275] Appeal Brief, para. 56-57. *See also* Prosecutor Response, para. 53.
[276] *See* paragraph 127 above.
[277] *See* paragraph 86 above.
[278] Appeal Brief, para. 55; *see also* para. 58.
[279] Impugned Decision, para.71.
[280] Appeal Brief, para. 58.
[281] Appeal Brief, para. 58; *see also* para. 56: "There is no conflict or lacuna that would justify perverting the preexisting statutory regime set out in Article 127"; Defence's Response to Additional Observations, para. 25, *referring to* jurisprudence that the fight against impunity "cannot, under any circumstances, justify an interpretation of the Rome Statute that is inconsistent with a literal reading of its text".

193. The Appeals Chamber considers that the Defence misrepresents the Impugned Decision. The Appeals Chamber notes, as set out above,[282] that the Pre-Trial Chamber correctly recalled that consistent with article 31(1) VCLT, "the provisions of the Statute are to be interpreted according to their ordinary meaning in their context and in the light of the object and purpose of the treaty".[283] In accordance with these interpretative principles, the Pre-Trial Chamber did not consider the object and purpose of the Statute in isolation, using it to override and "displace" what the Defence submits is "the clear application of the Rome Statute",[284] but rather considered it alongside the ordinary meaning of the pertinent terms of article 127(2) of the Statute in their relevant context[285] and in line with its object and purpose - to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes.

194. In this regard, the Pre-Trial Chamber stated that its assessment of the object and purpose of the Statute "confirms an interpretation of article 127(2) of the Statute that finds the Prosecution's preliminary examination in the present case to be encompassed by the phrase 'any matter which was already under consideration by the Court'".[286] In drawing this conclusion the Pre-Trial Chamber relied on paragraphs 4, 5 and 11 of the Preamble to the Statute and relevant case law of the Appeals Chamber,[287] and on article 127 of the Statute itself.[288] In light of the aforementioned sources, the Pre-Trial Chamber concluded that (i) States Parties "demonstrate a commitment to punishing and preventing the commission of the most serious crimes of international concern throughout the period that they are Parties to the Statute";[289] and (ii) "[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".[290]

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[282] *See* paragraph 159 above.
[283] Impugned Decision, para. 49.
[284] Defence's Response to Additional Observations, para. 25.
[285] *See* Impugned Decision, paras 51-63, 64-69, 70-77.
[286] *See* Impugned Decision, para. 70. *See also* para. 75.
[287] *See* Impugned Decision, fns 152-154.
[288] *See* Impugned Decision, para. 71.
[289] *See* Impugned Decision, para. 70.
[290] Impugned Decision, para. 71.

195. The Appeals Chamber further notes that the Pre-Trial Chamber's assessment of certain facts led it to conclude "that there is a direct relationship between the Prosecutor's announcement of the opening of the preliminary examination and the decision of the Philippines to withdraw from the Statute".[291] Nevertheless, the Appeals Chamber considers that the Defence has failed to demonstrate how, on the basis of this factual finding, the Pre-Trial Chamber "unduly relied on a subjective political critique"[292] which dictated its legal interpretation of article 127(2) of the Statute. Instead, as set out above, the Pre-Trial Chamber clearly interpreted article 127 of the Statute in line with the methodology set out in the VCLT.[293] It is further evident that the Pre-Trial Chamber's discussion of the Philippines' potential motivations for withdrawing from the Statute did not form part of the reasoning contributing to its legal interpretation of article 127(2) of the Statute.[294] Rather, having explained why the object and purpose of the Statute also supported its interpretation of article 127 of the Statute, the Pre-Trial Chamber merely referenced the aforementioned facts to provide an example of "what article 127 of the Statute, read as a whole, is designed to prevent".[295]

196. Therefore, the Appeals Chamber considers that the Defence has failed to demonstrate that the Pre-Trial Chamber committed an error of law in finding that the "object and purpose" of the Statute permitted the opening of an investigation even after the Philippines' effective withdrawal from the Statute.

197. As set out in his partly dissenting opinion,[296] given his position with respect to the Second Ground of Appeal, Judge Lordkipanidze does not find it necessary to address the present ground of appeal.

4. Conclusion

198. In light of the above, the Appeals Chamber rejects the Fourth Ground of Appeal.

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[291] Impugned Decision, para. 74.
[292] Appeal Brief, para. 58.
[293] *See* paragraphs 193-194 above.
[294] *See* Impugned Decision, paras 70-71.
[295] Impugned Decision, para. 74.
[296] *See* the Partly Dissenting Opinion of Judge Lordkipanidze, ICC-01/21-01/25-415-OPI, para. 14.

VIII. OVERALL CONCLUSION

199. The Appeals Chamber has rejected the First Ground of Appeal unanimously and the Second, Third and Fourth Grounds of Appeal by majority. Accordingly, the present appeal is rejected.

200. The Appeals Chamber, having rejected the entire appeal, considers the Defence's requests for a finding that there exists no legal basis for the continuation of the Court's proceedings against Mr Duterte, and for his immediate and unconditional release moot.

201. Judge Lordkipanidze appends a partly dissenting opinion to this judgment.

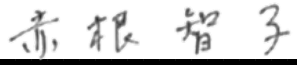
IX. APPROPRIATE RELIEF

202. In an appeal pursuant to article 82(1)(a) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed.[297] In the present case, the Appeals Chamber, by majority, confirms the Impugned Decision.

[297] *See* rule 158(1) of the Rules.

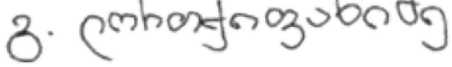
Done in both English and French, the English version being authoritative.

Judge Luz del Carmen Ibáñez Carranza
Presiding



Judge Tomoko Akane

Judge Solomy Balungi Bossa



Judge Gocha Lordkipanidze

Judge Erdenebalsuren Damdin

Dated this 22nd day of April 2026

At The Hague, The Netherlands