



**DISSENTING OPINION OF**  
**JUDGE PERRIN DE BRICHAMBAUT AND**  
**JUDGE LORDKIPANIDZE**

I. INTRODUCTION

1. This appeal arises from the 26 January 2023 decision of Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) that authorised the Prosecutor to resume the investigation into the Situation in the Philippines (hereinafter: “Philippines Situation”), pursuant to article 18(2) of the Statute (hereinafter: “Impugned Decision”).<sup>1</sup>

2. In today’s judgment,<sup>2</sup> the majority of the Appeals Chamber (hereinafter: “Majority”) dismisses the first ground of appeal raised by the Philippines in its appeal brief (hereinafter: “Appeal Brief”).<sup>3</sup> In its view, since (i) the Impugned Decision does not constitute a decision with respect to jurisdiction, and (ii) 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, the Appeals Chamber cannot entertain the Philippines’ appeal on this point.<sup>4</sup>

3. We respectfully disagree with the Majority in relation to the above-mentioned finding. For the reasons that follow, we find that the first ground of appeal is admissible, and we would have considered its merits and granted it.

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<sup>1</sup> [Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation](#), ICC-01/21-56-Red.

<sup>2</sup> [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”](#), 13 July 2023, ICC-01/21-77 (hereinafter: “Majority Judgment”), para. 58.

<sup>3</sup> [Philippine Government’s Appeal Brief against “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 13 March 2023, ICC-01/21-65.

<sup>4</sup> [Majority Judgment](#), paras 57-58.

4. The Philippines submits that the Pre-Trial Chamber erred in finding that the Court could exercise its jurisdiction on the basis that the Philippines was a State Party at the time of the alleged crimes, despite its subsequent withdrawal from the Statute.<sup>5</sup> More specifically, the Philippines submits that the Pre-Trial Chamber, “in order to make an admissibility determination”, “effectively [...] made a positive finding of jurisdiction based on the [Philippines’] status, as a State Party to the Rome Statute, at the time of the alleged crimes”, and in doing so, “considered the effect of the [Philippines’] withdrawal as a State Party to the Rome Statute and entered further findings concerning the [Philippines’] ‘ensuing obligations’”, which “are not *obiter* and are located in section B [of the Impugned Decision] entitled ‘Determination by the Chamber’”.<sup>6</sup> The Philippines argues that it was, therefore, entitled to raise all errors which were “inextricably linked” to the admissibility ruling in accordance with articles 18(4) and 82(1)(a) of the Statute.<sup>7</sup> Lastly, the Philippines submits that this ground of appeal is “not raised as a challenge to the jurisdiction of the Court in the context of article 19 proceedings, which explicitly concern the jurisdiction of the Court in relation to a concrete case”.<sup>8</sup> In its view, the first ground of appeal, therefore, “does not require an assessment as to whether it qualifies as a jurisdictional challenge under article 82(1)(a)”.<sup>9</sup>

5. As explained in more detail below, in our view, the Appeals Chamber is properly seized of the Philippines’ jurisdictional challenge, as: (i) a finding on jurisdiction is in fact made in the Impugned Decision; and (ii) the Philippines properly raises an error in that finding. Accordingly, we would have addressed the merits of the Philippines’ submissions under the first ground of appeal. Also, we would have found that the Pre-Trial Chamber erred in finding that the Court has jurisdiction in the present situation.

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<sup>5</sup> [Appeal Brief](#), paras 26-62. It is noted that the Philippines announced its withdrawal from the Statute on 17 March 2018 (effective from 17 March 2019) and the Prosecutor filed the “Request for authorisation of an investigation pursuant to article 15(3)” on 24 March 2021 ([a public redacted version](#) filed on 14 June 2021).

<sup>6</sup> [Appeal Brief](#), para. 28 (emphasis in original).

<sup>7</sup> [Appeal Brief](#), para. 29.

<sup>8</sup> [Appeal Brief](#), para. 30.

<sup>9</sup> [Appeal Brief](#), para. 30.

## II. WHETHER THE APPEALS CHAMBER IS PROPERLY SEIZED OF THE PHILIPPINES' JURISDICTIONAL CHALLENGE

6. In our view, the jurisdictional question raised in the Appeal Brief is a concrete issue that has arisen in the context of the Impugned Decision.

7. In accordance with the Pre-Trial Chamber's invitation,<sup>10</sup> the Philippines filed its observations on the Prosecutor's request to resume the investigation (hereinafter: "Article 18(2) Request"),<sup>11</sup> raising, *inter alia*, issues relating to the Court's jurisdiction. Notably, the Philippines submitted arguments in relation to the alleged lack of subject-matter jurisdiction of the Court, the lack of gravity of constituent crimes, and a general argument on the sovereignty of States.<sup>12</sup> While the Philippines' arguments did not expressly relate to the effect of its withdrawal from the Statute, the Pre-Trial Chamber included a finding on this issue in the Impugned Decision.<sup>13</sup>

8. In the section entitled "Determination by the Chamber", the Pre-Trial Chamber addressed, as a preliminary issue, the Philippines' several general challenges to the Court's jurisdiction raised in its observations on the Prosecutor's Article 18 Request,<sup>14</sup> and entered a finding specifically on the effects of the Philippines' withdrawal on the Court's jurisdiction. In particular, in paragraph 26 of the Impugned Decision, the Pre-Trial Chamber stated:

The Philippines' arguments that the Court should not investigate in the Philippines due to the principle of non-intervention are misplaced, as they misappreciate the Court's complementarity system. The Court's jurisdiction and mandate is exercised in accordance with the provisions of the Statute, an international treaty to which *the Philippines was a party at the time of the alleged crimes for which the investigation was authorised*. By ratifying the Statute, the Philippines explicitly accepted the jurisdiction of the Court, within the limits mandated by the treaty, and pursuant to how the system of complementarity functions. As part of the procedure laid down in article 18(2) of the Statute, the Chamber may authorise the Prosecution to resume an investigation, notwithstanding a State's request to defer the

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<sup>10</sup> [Order inviting observations and victims' views and concerns](#), 14 July 2022, ICC-01/21-47.

<sup>11</sup> [Prosecution's request to resume the investigation into the situation in the Philippines pursuant to article 18\(2\)](#), 24 June 2022, ICC-01/21-17.

<sup>12</sup> See [Philippine Government's Observation on the Office of the Prosecutor's Request](#), 08 September 2022, ICC-01/21-51, paras 6, 14-18, 23.

<sup>13</sup> See [Impugned Decision](#), para. 26.

<sup>14</sup> [Impugned Decision](#), paras 6, 18.

investigation. *These provisions and the ensuing obligations remain applicable, notwithstanding the Philippines withdrawal from the Statute.*<sup>15</sup>

9. Contrary to the finding of the Majority, in our view, the Impugned Decision contains a finding on jurisdiction and this finding is an integral part, and indeed forms the basis, of the decision. As such, we would have addressed the merits of the Philippines' submissions challenging the Court's jurisdiction.

10. In this context, we recall that it is an established principle of international law that any international tribunal has the power to determine the extent of its own jurisdiction. This principle of *la compétence de la compétence* has been consistently upheld by the chambers of this Court and other international tribunals and courts.<sup>16</sup> It is emphasised that "this power exists 'even in the absence of an explicit reference to that effect' as an 'essential element in the exercise by any judicial body of its functions'".<sup>17</sup>

11. In addition, we consider that the fundamental issue of the Court's jurisdiction should be resolved at the earliest opportunity. When an aspect of the Court's jurisdiction (subject-matter jurisdiction,<sup>18</sup> temporal jurisdiction,<sup>19</sup> jurisdiction over persons<sup>20</sup> or territorial jurisdiction<sup>21</sup>) is properly challenged, the Court shall, at the earliest opportunity, satisfy itself that it has jurisdiction.<sup>22</sup> This is particularly so in the present case, where the Philippines brought a concrete challenge to the Court's

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<sup>15</sup> [Impugned Decision](#), para. 26 (footnotes omitted, emphasis added).

<sup>16</sup> See, with further references, Pre-Trial Chamber I, *Request under Regulation 46(3) of the Regulations of the Court, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, 6 September 2018, ICC-RoC46(3)-01/18-37 (hereinafter: "Myanmar Decision on Regulation 46(3) Request"), paras 30-33.

<sup>17</sup> [Myanmar Decision on Regulation 46\(3\) Request](#), para. 32, referring to Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424, para. 23; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, [Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang](#), 8 March 2011, ICC-01/09-01/11-1, para. 8; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para. 24.

<sup>18</sup> Article 5 of the Statute.

<sup>19</sup> Article 11 of the Statute.

<sup>20</sup> Article 12 of the Statute.

<sup>21</sup> Articles 12 and 13(b) of the Statute.

<sup>22</sup> See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi"](#), 21 May 2014, ICC-01/11-01/11-547-Red (OA4), para. 84 (in the context of a challenge to admissibility under article 19(5) of the Statute, the Appeals Chamber noted: "as soon as a State can present its challenge in such a way that it can show a conflict of jurisdictions, it must be submitted").

jurisdiction, as a result of its withdrawal from the Statute. This approach is, in our view, consistent with the Appeals Chamber’s recent judgment in the Situation in the Islamic Republic of Afghanistan in which it examined the *scope of the Court’s jurisdiction* in an appeal arising from proceedings under article 18 of the Statute.<sup>23</sup>

12. A ruling on jurisdiction at the situation stage ensures certainty on a fundamental issue, especially if it is likely to arise at a later stage of the proceedings.<sup>24</sup> Additionally, in the present situation, it would be counter-productive and a waste of the Court’s resources to allow an investigation to proceed, only to declare later in the proceedings, when a challenge is made with respect to a specific case arising from this very situation, that the Court has no jurisdiction.

13. As found above,<sup>25</sup> the Pre-Trial Chamber made a positive determination regarding the exercise of the Court’s jurisdiction in the Philippines Situation as part of its admissibility assessment under article 18(2) of the Statute. In the Appeal Brief, the Philippines raises, under its first ground of appeal, an error of law in the Pre-Trial Chamber’s above finding, in accordance with articles 18(4) and 82(1)(a) of the Statute.

14. While the Pre-Trial Chamber had already made similar findings on jurisdiction in its previous article 15 decision, which are referred to in the Impugned Decision, article 15 of the Statute does not foresee the participation of the concerned State in the relevant proceedings, and the Statute does not provide for the possibility of a State to file an appeal against a pre-trial chamber’s ruling in the context of article 15 proceedings. Accordingly, the Philippines was neither a party nor a participant in the article 15 proceedings in this situation.<sup>26</sup> It is only in the context of article 18(2)

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<sup>23</sup> See *Situation in the Islamic Republic of Afghanistan*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation”](#), 4 April 2023, ICC-02/17-218 (OA5). See also *Situation in the Islamic Republic of Afghanistan*, [Notice of Appeal of “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)](#), 7 November 2022, ICC-02/17-197 (OA5), para. 3 (“Decisions with respect to jurisdiction and admissibility may be directly appealed under article 82(1)(a) of the Statute. Since the Decision is a preliminary ruling on admissibility under article 18(2), it is susceptible to direct appeal. *To any extent that paragraph 59 of the Decision – which, on its face, appears to modify the parameters of the situation as confirmed by the Appeals Chamber in its judgment of 5 March 2020 – may be considered to bind the Prosecution in the conduct of its investigation, it is a ruling on jurisdiction which materially affects the Decision*” (emphasis added)).

<sup>24</sup> See also Pre-Trial Chamber I, *Situation in the State of Palestine*, [Decision on the ‘Prosecution request pursuant to article 19\(3\) for a ruling on the Court’s territorial jurisdiction in Palestine’](#), 5 February 2021, ICC-01/18-143, para. 83; [Myanmar Decision on Regulation 46\(3\) Request](#), paras 32-33.

<sup>25</sup> See paragraphs 8-9 above, referring to [Impugned Decision](#), para. 26.

<sup>26</sup> See also [Appeal Brief](#), para. 31.

proceedings that the Philippines had the opportunity to raise the issue of the Court’s jurisdiction. As recalled above, pursuant to article 18(2) of the Statute, the Philippines was invited to participate in such proceedings, and, in that context, it raised issues relating to the Court’s jurisdiction. While its arguments did not expressly relate to the withdrawal from the Statute, the Pre-Trial Chamber included a finding on this issue in the Impugned Decision.<sup>27</sup> As such, we consider that the Philippines’ challenge regarding the Court’s jurisdiction is properly raised on appeal and the Appeals Chamber should have addressed it on the merits.

### III. WHETHER THE PRE-TRIAL CHAMBER ERRED IN FINDING THAT THE COURT HAS JURISDICTION IN THE PHILIPPINES SITUATION

15. The Philippines submits that the Pre-Trial Chamber “erred in law in finding that the Court could exercise its jurisdiction on the basis that the Philippines was a State party ‘at the time of the alleged crimes’ and that the ‘ensuing obligations’ of the Rome Statute remain applicable notwithstanding the Philippines withdrawal from the Statute”.<sup>28</sup>

16. For the reasons that follow, we consider that the preconditions to the exercise of the jurisdiction set out in article 12 of the Statute must exist at the time that the Court’s exercise of the jurisdiction is triggered under article 13 of the Statute. As will be demonstrated below, because the preconditions were not met – the Philippines was not a State Party at the relevant time – the Court’s jurisdiction could not be triggered.

#### A. Relevant provisions

17. Before proceeding to our analysis, we consider it important to recall the relevant provisions of the Statute.

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<sup>27</sup> See [Impugned Decision](#), para. 26.

<sup>28</sup> [Appeal Brief](#), paras 5, 26-62.

18. Article 12 of the Statute is titled “[p]reconditions to the exercise of jurisdiction”, and in its second paragraph reads as follows:

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 [...].<sup>29</sup>

19. Article 13 of the Statute is titled “Exercise of jurisdiction” and, in its relevant part, provides that:

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:

[...]

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

20. Article 15 of the Statute provides that:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

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<sup>29</sup> Emphasis added.

21. Pursuant to article 18(1) of the Statute:

When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

22. Finally, article 127 of the Statute, which concerns the withdrawal of a State from the Statute, provides as follows:

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.

## **B. Analysis**

23. Based on a holistic reading of the relevant provisions, as set out above, we consider that there is a distinction between the *existence* of jurisdiction and the Court's ability to *exercise* the jurisdiction, and 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.

24. Article 12(2) of the Statute provides that the Court can only exercise jurisdiction if the State of nationality or the territorial State is a Party to the Statute. For the Court



to exercise its jurisdiction, it is required that the preconditions set forth in article 12 of the Statute are met.<sup>30</sup>

25. Article 12(2) of the Statute, read in conjunction with articles 13(c) and 15 of the Statute, provides that when the Prosecutor has initiated an investigation *proprio motu* in respect of a crime within the Court’s jurisdiction in accordance with article 15 of the Statute, “the Court may exercise its jurisdiction if one or more of the [States concerned] are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with [article 12(3) of the Statute]”.<sup>31</sup> It is further recalled that pursuant to article 18(1) of the Statute, when “*the Prosecutor initiates an investigation pursuant to article 13(c) and 15*” of the Statute, the Prosecutor shall notify all State Parties and those States concerned.<sup>32</sup>

26. In our view, the wording of article 12(2) indicates that the appropriate time to make a determination as to whether the preconditions of article 12 of the Statute are met is when the exercise of the Court’s jurisdiction is triggered, not when the crimes were allegedly committed.<sup>33</sup> In other words, the preconditions to the exercise of the Court’s jurisdiction must exist at the time that the jurisdiction is triggered pursuant to article 13 of the Statute, which, in the scenario provided for in article 13(c) of the Statute, in our view, definitely occurs when the pre-trial chamber authorizes the commencement of the investigation, pursuant to article 15(4) of the Statute.<sup>34</sup>

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<sup>30</sup> See J. Kleffner, ‘ICC (Trigger Mechanisms)’, in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009), pp. 353-354; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2nd. ed., 2016) (hereinafter: “W. Schabas, Commentary on the Rome Statute”), pp. 344-366, 367-380; W. A. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 6th. ed., 2020), pp. 151-180; S. Vasiliev, ‘Piercing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)’ on OpinioJuris (6 November 2017), <http://opiniojuris.org/2017/11/06/piercing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/> (hereinafter: “S. Vasiliev, ICC Investigation in Burundi II”). Vasiliev emphasises the importance of the “distinction between mere existence of jurisdiction and the Court’s ability to exercise it” as “[i]t is the cornerstone of the Court’s jurisdictional mechanism which consists of two elements”: (i) the preconditions to the exercise of jurisdiction, under article 12 of the Statute; and (ii) the triggering mechanisms set out in article 13 of the Statute.

<sup>31</sup> Article 12(2) of the Statute (emphasis added).

<sup>32</sup> Article 18(1) of the Statute (emphasis added).

<sup>33</sup> See also D. Jacobs, ‘Burundi withdraws from the ICC: what next for a possible investigation?’ on Spreading the Jam (28 October 2017), <https://dovjacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/>.

<sup>34</sup> It is noted that in the instant situation, both the Prosecutor’s filing of the request for authorisation and the Pre-Trial Chamber’s decision authorising the investigation occurred after the Philippines’ withdrawal had taken effect.

27. Just as a State that is not, or is no longer, Party to the Statute cannot refer a situation to the Court under article 13(a) of the Statute and thus trigger the Court's exercise of jurisdiction (though it may accept the jurisdiction of the Court under article 12(3)), the Prosecutor cannot commence the process of triggering the jurisdiction of the Court once a withdrawal has become effective and the State in question is no longer Party to the Statute. The Court's jurisdiction must be triggered before the withdrawal has become effective. Put differently, once the State's withdrawal has become effective, the Prosecutor can no longer open an investigation.

28. Bearing in mind that the Rome Statute is an international treaty and international criminal code at the same time, two concomitant interests may be discerned when a State withdraws from the Statute. Article 127 of the Statute guarantees to the State Parties a right to withdraw from the Statute. In this regard, we consider that it is a fundamental right of States to decide whether they want to be bound by a treaty or not.<sup>35</sup> We are also mindful of the Statute's important objective "to put an end to impunity".<sup>36</sup> There is a clear potential for conflict between these two competing considerations. Indeed, there is a risk that a State may use its right to withdraw from the Statute in order to shield certain persons from the Court's prosecution.

29. We consider that the Statute strikes the right balance between these competing considerations and provides for a procedure that enables the Court to prevent any misuse of the State's right to withdraw. Article 127(1) of the Statute stipulates that "[t]he withdrawal shall take effect one year after the date of receipt of the notification". Therefore, the Prosecutor has to make all efforts to trigger the Court's jurisdiction in a manner that would not infringe the right of a State to withdraw from the Statute. We are of the view that one year is sufficient for the Prosecutor to conduct his preliminary examination and request a pre-trial chamber to authorise the commencement of the investigation, and for the pre-trial chamber to rule upon such a request. The Statute thus gives the Court an opportunity to assert its jurisdiction. However, it also respects the

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<sup>35</sup> See W. Schabas, [Commentary on the Rome Statute](#), pp. 1534-1536. See also Republic of the Philippines Supreme Court, *Pangilinan et al v. Cayetano et al.*, [Decision on applications G.R. No. 238875, 239483 and 240954](#), 16 March 2021, part XV ("[t]he President's withdrawal from the Rome Statute was in accordance with the mechanism provided in the treaty. The Rome Statute itself contemplated and enabled a State Party's withdrawal. A [S]tate [P]arty and its agents cannot be faulted for merely acting within what the Rome Statute expressly allows").

<sup>36</sup> Statute, Preamble.

States' right to withdraw from the Statute and therefore provides for limitations to this power of the Court. Without such limitations, the Court's jurisdiction would stretch to an extent that would defy the assurances and guarantees to the States embedded in the Statute.<sup>37</sup> This could have negative repercussions for the entire Court's system. In the instant situation, since the Prosecutor had not proceeded to trigger the Court's jurisdiction before the withdrawal became effective, the Philippines reasserted what it considered to be its primary jurisdiction.

30. When the former Prosecutor submitted her request for authorisation of an investigation on 24 May 2021,<sup>38</sup> the Philippines was no longer a Party to the Statute, its withdrawal having become effective on 17 March 2019. It is further noted that the Pre-Trial Chamber issued its Article 15(4) Decision, authorising the commencement of the Prosecutor's investigation, on 15 September 2021,<sup>39</sup> more than two years after the Philippines' withdrawal took effect.

31. We also note that the aforementioned article 127 has been referred to by the parties and participants to these appeal proceedings in support of various views on the effect of a State's withdrawal from the Statute. Article 127(2) of the Statute provides (i) that "[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" and that a State's 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", as well as (ii) that such a 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".

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<sup>37</sup> R. Kolb 'Article 127' in J. Fernandez, X. Pacreau, M. Dosen, M. Ubeda-Saillard (2<sup>e</sup> ed), *Statut de Rome de la Cour pénale internationale : commentaire article par article* (2019), pp. 2219-2220 ("L'interprétation large signifierait que des poursuites peuvent être intentées longtemps après le retrait de l'Etat en cause").

<sup>38</sup> Request for authorisation of an investigation pursuant to article 15(3), 24 March 2021, ICC-01/21-7-SECRET-Exp, with secret *ex parte* Annexes 1, 2, 3, 4 and 5 (a [public redacted version](#) filed on 14 June 2021 as ICC-01/21-7-Red with Annexes 2 and 3 reclassified as public).

<sup>39</sup> [Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15\(3\) of the Statute](#), 15 September 2021, ICC-01/21-12.

32. Pursuant to the first limb of the above sentence of article 127(2) of the Statute, the cooperation duties of the withdrawing State are limited to “investigations and proceedings” that have commenced prior to the date on which the withdrawal became effective.<sup>40</sup>

33. In this regard, Pre-Trial Chamber III in the Situation in the Republic of Burundi (hereinafter: “Burundi Situation”) found that:

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*. Accordingly, it cannot be disputed that, if authorized, an investigation into the situation in Burundi would commence prior to the date on which the withdrawal became effective.<sup>41</sup>

34. It is our view that the Court retained jurisdiction over the Burundi Situation precisely because the former Prosecutor sought authorization and Pre-Trial Chamber III authorised the investigation before the withdrawal became effective on 27 October 2017.

35. As to the second limb of the above mentioned sentence in article 127(2) of the Statute, we consider that the Prosecutor’s preliminary examinations are not a “matter [...] under consideration by the Court” within the meaning of article 127(2) of the Statute, and that a situation is only under consideration by the Court once a pre-trial chamber authorises an investigation into that situation. This is largely due to the informal nature of the preliminary examinations, which do not carry sufficient weight for engaging the Court’s jurisdiction, in the absence of a pre-trial chamber’s formal authorisation of the commencement of an investigation, pursuant to article 15 of the Statute. We consider that the last sentence of article 127(2) of the Statute cannot be relied upon to extend the Prosecutor’s power to submit an article 15(3) request beyond the time the withdrawal has become effective.<sup>42</sup>

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<sup>40</sup> See also K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, Fourth Edition, 2022 (hereinafter: “K. Ambos, Commentary of the Rome Statute”), p. 2924.

<sup>41</sup> Pre-Trial Chamber III, *Situation in the Republic of Burundi*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi](#), ICC-01/17-X-9-US-Exp, 9 November 2017, ICC-01/17-9-Red, para. 26.

<sup>42</sup> See also S. Vasiliev, [ICC Investigation in Burundi II](#).

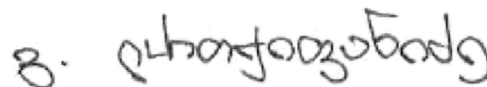
36. Crucially, the interpretation of article 127(2) of the Statute, as espoused by the Prosecutor, cannot be reconciled with the principles of the Vienna Convention on the Law of Treaties and with the intention of the drafters of the Statute, as that interpretation would render article 127 meaningless by allowing to trigger the Court's jurisdiction indefinitely. In our view, article 127 of the Statute is contained in the "Final clauses" (Part 13 of the Statute). The provisions contained in that part cannot alter the carefully crafted jurisdictional regime contained in Part 2 of the Statute.

37. For the foregoing reasons, we consider that the Pre-Trial Chamber erred in law in concluding that the Court had jurisdiction over the Philippines Situation despite the Philippines' withdrawal from the Rome Statute. As a result, we would have granted the Philippines first ground of appeal and found that the Court cannot exercise jurisdiction in the Philippines Situation. Consequently, we would have found the remaining grounds of appeal moot. We would also have directed the Pre-Trial Chamber to withdraw its authorisation for the Prosecutor's investigation and discontinue all proceedings in the situation.

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



**Judge Marc Perrin de Brichambaut,  
Presiding**



**Judge Gocha Lordkipanidze**

Dated this 18th day of July 2023

At The Hague, The Netherlands