

Research Article

**The Lacunae in the Rome Statute for the Exercise of Universal Jurisdiction by
the International Criminal Court**

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Received: 03 February 2025 / Accepted: 10 June 2025

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Abstract

The issue of ‘universal jurisdiction’ reveals a legal chasm in the applicability of the Rome Statute by the International Criminal Court (“the Court”). Universal jurisdiction can simply be defined as the exercise of jurisdiction regardless of any other acknowledged jurisdictional relationship to a State party to the Statute. Universal jurisdiction poses a challenge to the Court: it is often criticised for lacking the authority to exercise such jurisdiction over international crimes. Yet, this issue of universal jurisdiction becomes especially important in the case of the Philippines, where crimes committed in the context of their government’s ‘War on Drugs’ campaign is often argued to remain outside the Court’s jurisdiction, due to the country’s withdrawal from the Rome Statute since 17th March 2019. This article explores the limitations of the Statute and highlights the need to better equip the ICC to assert jurisdiction in such scenarios.

I. Introduction

The International Criminal Court (hereinafter “the Court”) aims to promote principles of international cooperation to secure justice for victims of international crimes, but must navigate both supportive and uncooperative governing bodies while adjudicating matters concerning crimes both within and beyond the borders of States.¹¹⁵⁹ The Rome Statute (hereinafter “the Statute”), as the ultimate product of drafting and preparatory talks, was approved by 120, 7 against and 21 abstentions amongst the member States

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¹¹⁵⁹ Philip Allot, *The Health of Nations: Society and Law beyond the State* (Cambridge University Press, 2002), 215-245.

of the United Nations.¹¹⁶⁰

The Court exercises its jurisdiction over four broad categories of international crimes: crimes of aggression, crimes against humanity, war crimes, and genocide.¹¹⁶¹

Alongside the ability of the Court to exercise jurisdiction over international crimes committed within the jurisdiction of a member State, Article 12(3) lets a State consent to the Court's jurisdiction on an ad hoc basis. In such case, a State is required to collaborate with the Court when:

- (a) The conduct in question occurred in the territory of such State or, if the crime was committed on board an aircraft or vessel, the State where the vessel or aircraft is registered; and
- (b) The accused is a citizen of that State.¹¹⁶²

In addition, Article 13(b) grants jurisdiction in case where one or more of these crimes seem to have been committed, regardless of whether State has ratified the Statute. Under this Article, the United Nations (hereinafter "UN") Security Council, in accordance with Chapter VII of the UN Charter, may refer the matter to the Prosecutor. Consequently, the Court only has jurisdiction over crimes committed in cases where a State party to the Statute has territorial jurisdiction over the offence, or in instances reported by the Security Council.

This article will primarily focus on the Court's jurisdiction on matters as a repeatedly contentious issue, reflected in the drafting process of the Statute, which failed to reach consensus on this issue in its original drafting.¹¹⁶³ This issue of jurisdiction will be explored from the context of the situation in the Republic of Phillipines, commonly referred to as the "War on Drugs" campaign.

The article purports to explore four important questions required to be addressed regarding the Phillipines situation:

- I. Can the ICC exercise jurisdiction post-withdrawal of the State Party under Article 127, on the account of existing obligations to cooperate with the Court?

¹¹⁶⁰ United Nations General Assembly, Preparatory Committee on the Establishment of an International Criminal Court, *Report on the Proceedings of the Preparatory Committee during March-April and August 1996*, Vol. I, Fifty-first Session Supplement No.22 (A/51/22) (1996).

¹¹⁶¹ *Rome Statute of the International Criminal Court*, RS 2010, Part 2, art. 12(1).

¹¹⁶² Otto Triffterer and Kai Ambos, *Rome Statute of the International Criminal Court: A Commentary, 3rd Edition* (2016).

¹¹⁶³ David J. Scheffer, "The United States and the International Criminal Court," *American Journal of International Law* 93, no. 1 (1999): 12-22, <https://doi.org/10.2307/2997953>.

- II. Can a preliminary examination by the OTP be considered as a matter under consideration under Article 127 of the Statute, or is an investigation only required to trigger the ICC's jurisdiction?
- III. Can the 'OTP' and 'Court' interchangeably exercise jurisdiction as per the Statute?
- IV. What is the legal framework followed by the Prosecutor and what consequences ensue from a preliminary examination?

The above issues reveal a legal chasm in the applicability of the Statute and have plagued the Court with criticisms for not having the right to exercise universal jurisdiction over international crimes, namely as 'the exercise of jurisdiction regardless of any other acknowledged jurisdictional relationship to a State party to the Statute'. This article provides insights into such lacunae to support the ICC for exercising its jurisdiction in similar situations or cases.

II. Establishing the Context

As President of the Philippines between 2016 to 2022, Rodrigo Duterte launched an aggressive anti-drug campaign known as the 'War on Drugs' to counter the risk of the country becoming a narcotic state.¹¹⁶⁴ His approach to the situation was to prioritise eradication above rehabilitation. Extrajudicial executions reportedly committed by the police and unidentified attackers have plagued the campaign.¹¹⁶⁵ Duterte urged the public to kill drug addicts¹¹⁶⁶ to achieve his objective of decreasing the spread of illegal substances throughout the nation.¹¹⁶⁷ The official death toll from drug suspects was 6,252 by 2022.¹¹⁶⁸ However, human rights organisations claim that between 12,000

¹¹⁶⁴ Nico Alconaba, "Digong defends war on drugs, crime, graft," *INQUIRER.net*, June 28, 2016, <https://newsinfo.inquirer.net/792773/digong-defends-war-on-drugs-crime-graft>.

¹¹⁶⁵ Catherine S. Valente, "First 100 days yield significant accomplishments," *The Manila Times*, October 8, 2016, <https://www.manilatimes.net/2016/10/08/news/top-stories/first-100-days-yield-significant-accomplishments/290072/>.

¹¹⁶⁶ Agence France-Presse, "Philippines president Rodrigo Duterte urges people to kill drug addicts," *The Guardian*, July 1, 2016, <https://www.theguardian.com/world/2016/jul/01/philippines-president-rodrigo-duterte-urges-people-to-kill-drug-addicts>.

¹¹⁶⁷ Christopher Lloyd Caliwan, "Over 24K villages 'drug-cleared' as of February: PDEA," *Philippine News Agency*, March 30, 2022, <https://www.pna.gov.ph/articles/1171001>.

¹¹⁶⁸ Zacarian Sarao, "6,252 drug suspects killed as of May 31 – PDEA," *INQUIRER.net*, June 22, 2022, <https://newsinfo.inquirer.net/1614260/pdea-says-6252-drug-suspects-died-as-of-may-31-in-war-against-drugs>.

and 30,000 citizens were killed in this campaign.¹¹⁶⁹

Media organisations and human rights groups have criticised the anti-narcotics campaign, which reportedly created crime scenes where police murdered defenceless drug suspects, while placing firearms and drugs as proof of their killings to be “upon self-defence”.¹¹⁷⁰ Despite surrendering to register with authorities in exchange for safety, many drug users have lost their lives as a consequence of police brutality.¹¹⁷¹

According to a 2021 quote from Prosecutor Fatou Bensouda, a preliminary investigation that started in February 2018 found “that there was a reasonable basis to believe that the crimes against humanity of murder had been committed” in the Philippines following Rodrigo Duterte's victory in the 2016 presidential election.¹¹⁷²

This issue of universal jurisdiction becomes especially important when currently, the Court struggles to exercise jurisdiction over the crimes committed in the Philippines. In the context of this ‘War on Drugs’ campaign, the Office of the Prosecutor (hereinafter “the OTP”) requested permission from the Pre-Trial Chamber (hereinafter “the PTC”) on 24th May 2021, to launch an investigation into alleged crimes committed in the territory of the Philippines between 1st November 2011 and 16th March 2019. On 15th September 2021, the PTC gave permission to pursue the investigation.

The Philippines asked, in accordance with Article 18(2), that the investigation into the situation be postponed as notified by the OTP. However, the PTC-I authorised the Prosecutor's request to continue investigations into the potentially crimes committed in the Philippines. After carefully reviewing the evidence gathered, the PTC concluded that the Philippines did not conduct relevant and proper investigations that would justify deferring the ICC's investigation under the principle of complementarity.¹¹⁷³

The Philippines filed an appeal against the PTC's authorisation to investigate, but the

¹¹⁶⁹ Sol Dorotea R. Iglesias, “Explaining the Pattern of ‘War on Drugs’ Violence in the Philippines Under Duterte” *Asian Politics and Policy* 15 no. 2 (2023): 164-184, <https://doi.org/10.1111/aspp.12689>.

¹¹⁷⁰ Carlos H. Conde, “Duterte Vows More Bloodshed in Philippine ‘Drug War’,” *Human Rights Watch*, July 23, 2018, <https://www.hrw.org/news/2018/07/23/duterte-vows-more-bloodshed-philippine-drug-war>.

¹¹⁷¹ Manuel Mogato and Clare Baldwin, “Special Report - Police describe kill rewards, staged crime scenes in Duterte's drug war,” *Reuters*, April 19, 2017, <https://www.reuters.com/article/us-philippines-duterte-police-specialrep/special-report-police-describe-kill-rewards-staged-crime-scenes-in-dutertes-drug-war-idUSKBN17K1F4/>.

¹¹⁷² Al Jazeera Staff, “ICC prosecutor seeks full probe into Duterte's drug war killings,” *Al Jazeera*, June 14, 2021, <https://www.aljazeera.com/news/2021/6/14/icc-prosecutor-seeks-probe-philippines-crackdown-on-drug-crime>.

¹¹⁷³ Press Release, “ICC Pre-Trial Chamber I authorises Prosecutor to resume investigation in the Philippines,” *International Criminal Court*, January 26, 2023, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-i-authorises-prosecutor-resume-investigation-philippines>.

Appeals Chamber denied the Philippines' plea for the suspension of the authorisation. Consequently, the Philippines, as a State Party to the Statute since 1st November 2011, formally notified the Court of its withdrawal from the Statute on 17th March 2018, becoming effective a year later.¹¹⁷⁴ The Philippines severed relations with the Court in 2018, when the Philippine Supreme Court dismissed petitions challenging the country's decision to withdraw from the international body.¹¹⁷⁵ The withdrawal followed the Court's preliminary investigation in 2018 into allegations of mass murder and crimes against humanity committed by Duterte and other Philippine authorities during the drug war.¹¹⁷⁶

Duterte was arrested in March 2025 based on a warrant issued by the Court accusing him of crimes against humanity for his central role in the drug war.¹¹⁷⁷ Justice Secretary Remulla admitted the failure of the Philippines justice system in delivering justice to victims of the drug war extrajudicial deaths during Duterte's presidency.¹¹⁷⁸ After Duterte's arrest, the House of Representatives (Dangerous Drugs, Public Order and Safety, Human Rights, and Public Accounts) stated that it may turn over drug war evidence to the ICC.¹¹⁷⁹

A. Fulfilment of Articles 12(3) & 13(C)

Article 12(3) addresses a non-party State accepting the jurisdiction of the Court on an *ad hoc* basis, by virtue of which it requires such a State to lodge a declaration with the Registrar to accept the exercise of jurisdiction by the Court 'with respect to the crime in question'.¹¹⁸⁰ The Court may only effectively exercise jurisdiction upon a State's

¹¹⁷⁴ Jason Gutierrez, "Philippines Officially Leaves the International Criminal Court," *The New York Times*, March 17, 2019, <https://www.nytimes.com/2019/03/17/world/asia/philippines-international-criminal-court.html>.

¹¹⁷⁵ Azer Parrocha, "Palace confident ICC will reject probe into drug war," *Philippine News Agency*, December 15, 2020, <https://www.pna.gov.ph/articles/1124849>.

¹¹⁷⁶ Ruth Abbey Gita-Carlos, "It's time for ICC to stop interfering: Panelo," *Philippine News Agency*, March 16, 2021, <https://www.pna.gov.ph/articles/1133818>.

¹¹⁷⁷ Luisa Cabato, "Palace confirms arrest warrant from ICC for Rodrigo Duterte," *INQUIRER.net*, March 11, 2025, <https://globalnation.inquirer.net/266600/palace-confirms-arrest-warrant-from-icc-for-rodrigo-duterte>.

¹¹⁷⁸ Jean Mangaluz, "DOJ admits: Justice system failed families of drug war victims," *Philstar Global*, March 20, 2025, <https://www.philstar.com/headlines/2025/03/20/2429819/doj-admits-justice-system-failed-families-drug-war-victims>.

¹¹⁷⁹ Gabriel Pabico Lalu, "Quad comm may turn over drug war evidence if ICC issues subpoena – solon," *INQUIRER.net*, March 12, 2025, <https://globalnation.inquirer.net/267044/fwd-quad-comm-may-turn-over-drug-war-evidence-if-icc-issues-subpoena-solon>.

¹¹⁸⁰ Triffterer and Ambos, *Rome Statute*.

domestic matters when the preconditions under Article 12 of the Statute are fulfilled (refer to the 'Introduction'), which is intimately related to Article 13 of the Statute on exercise of jurisdiction;¹¹⁸¹ state acceptance is a precondition if the Prosecutor has initiated an investigation *proprio motu*, which means 'by one's own initiative', under Article 13(c).¹¹⁸² Once the exercise of the ICC's jurisdiction is triggered, recourse must be made to Article 12 as the Court may exercise its jurisdiction once these preconditions are met.¹¹⁸³

The preconditions are determined when the Court's jurisdiction is triggered, not when crimes are allegedly committed.¹¹⁸⁴ Thus, once the withdrawal is effective, the Prosecutor cannot initiate the jurisdiction-triggering process. The Court's jurisdiction must be triggered before withdrawal. Post-withdrawal, the Prosecutor is precluded from initiating any investigations.¹¹⁸⁵

Additionally, the 'principle of effectiveness' means that the provision must be interpreted to attain its appropriate effects and give full meaning to it.¹¹⁸⁶ The State's withdrawal from a treaty implies the withdrawal from the treaty's obligations and, consequently,¹¹⁸⁷ consent is essential to bind the State, and the withdrawal signifies the intention not to be bound by the statutory obligations anymore. Thus, the Court cannot adjudicate upon the domestic matters of the Philippines without its express consent, as it no longer remains a State party to the Statute.

Thus, the preconditions under Articles 12(3) & 13(c) need to be fulfilled for the Court to exercise jurisdiction.

¹¹⁸¹ Antonio Cassese, Paola Gaeta and Salvatore Zappalà, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (Oxford University Press, 2012).

¹¹⁸² Triffterer and Ambos, *Rome Statute*.

¹¹⁸³ Sergey Vasiliev, "Piercing the Withdrawal Puzzle: May the ICC still open an investigation in Burundi? (Part 2)," *Opiniojuris*, November 6, 2017, <http://opiniojuris.org/2017/11/06/piercing-the-withdrawal-puzzle-may-the-icc-still-open-an-investigation-in-burundi-part-1/>.

¹¹⁸⁴ Dov Jacobs, "Burundi Withdraws from the ICC: What Next for a Possible Investigation?," *Spreading the Jam*, October 28, 2017, <https://dovjacobs.com/2017/10/28/burundi-withdraws-from-the-icc-what-next-for-a-possible-investigation/>.

¹¹⁸⁵ International Criminal Court, *Dissenting Opinion of Judge Perrin de Brichambaut & Judge Lordkipanidze in the Situation of the Republic of Philippines*, ICC-01/21 OA, July 18, 2023.

¹¹⁸⁶ Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-388 (2009).

¹¹⁸⁷ Laurence R. Helfer, "Exiting Treaties," *Virginia Law Review* 91 (2005): 1579, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=683481#.

B. The Relationship between Articles 127 & 86

The duty to cooperate arises from Article 86 of the Statute. This general obligation however is confined to State Parties, and only in relation to “investigations and prosecution of crimes within the jurisdiction of the Court”.¹¹⁸⁸ A systematic interpretation of this Article, when read in conjunction with Article 13(c) and Article 15, indicates that the obligatory cooperation scheme comes into play only after the Prosecutor's assessment has been confirmed by the PTC. If the State has effectively withdrawn from the Statute, and was no longer a State Party, it will be exempted from the obligations outlined in Article 86.

Article 86 stipulates the general obligation of States to cooperate with the Court in the investigation and prosecution of crimes. Third-party States are under no statutory obligation to cooperate under ‘*pacta tertiis nec nocent nec prosunt*’, meaning ‘the binding power of the treaty is only limited to the consenting State party’, as per Article 35 of the Vienna Convention of the Law of Treaties. Additionally, article 86 stipulates the term ‘investigation’ does not extend to preliminary examinations under both Article 15(2) and Rule 104 of the Rules and Procedure of Evidence (hereinafter “the RPE”), as they are conducted to finding out whether there exists a reasonable basis to proceed with an investigation. The combined reading of all above Articles indicates that the obligation to cooperate must be assessed according to the acceptance of the Statute. The Court exercising its jurisdiction based on the announcement of preliminary examination may threaten a State’s sovereignty, going against the object and purpose of the Statute. Additionally, if a State has already conducted its investigation and decided not to prosecute the Defendant, which has been notified to the ICC Registrar after the effective withdrawal, the matter falls under the domestic jurisdiction of the State, and any undue interference will go against the principle of State sovereignty to decide its internal affairs.

The duty to cooperate exists when criminal investigations and proceedings commenced prior to the State’s withdrawal.¹¹⁸⁹ However, a preliminary examination is not equivalent to criminal investigations and proceedings; the term ‘investigation’ does not include the preliminary examination conducted under Article 15(2) and Rule 104 to determine a legitimate basis for proceeding with an investigation.¹¹⁹⁰

¹¹⁸⁸ Triffterer and Ambos, *Rome Statute*.

¹¹⁸⁹ Triffterer and Ambos, *Rome Statute*.

¹¹⁹⁰ Triffterer and Ambos, *Rome Statute*.

During the preliminary examination due to external sources providing the bulk of information, in contrast to the investigation stage where the OTP has evidence-gathering powers, the OTP emphasises evaluating source reliability and information credibility and the principle of objectivity guides this assessment of information that may lead to a decision to proceed with an investigation.¹¹⁹¹ The emphasis on source reliability and information credibility, guided by the principle of objectivity, underscores the specific considerations inherent in the preliminary examination, distinguishing the preliminary examination as a unique and crucial phase with a distinctive purpose in the investigative process.

Pursuant to Article 127 of the Statute obligation to cooperate with the Court may at times be unclear due to complex legal or factual circumstances, for which a State may, nevertheless, agree to cooperate voluntarily without resolving the legal or factual issues. However, voluntary cooperation does not, by itself, convert into a legal obligation upon withdrawal. Hence, a vigilant Prosecutor needs to be careful to commence proceedings formally within the relevant timeframe, irrespective of any technical issues relating to the procuring of evidence.¹¹⁹²

Thus, withdrawal under Article 127 precludes the State from any Residual Obligations, as the Obligation to Cooperate under Article 86 only extends to the “Investigation and Prosecution of Crimes”.

C. Preliminary Examination as a “Matter under Consideration of the Court”

Article 16 expressly mentions that the scope of ‘matters under consideration’ overlaps with and can be construed from the ‘criminal investigations and proceedings’ in the previous part.¹¹⁹³ The phrase excludes the preliminary examination from the provision of ‘investigation’.

The meaning can be interpreted using the maxim *expressio unius est exclusio alterius*, meaning that ‘the express mention of a term excludes others’,¹¹⁹⁴ which aligns with the intention of the framers of the Rome Statute.¹¹⁹⁵ Simultaneously reading Article 15(6)

¹¹⁹¹ International Criminal Court, Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (2013).

¹¹⁹² Triffterer and Ambos, *Rome Statute*.

¹¹⁹³ Roger Clark, “Withdrawal” in *Rome Statute of the International Criminal Court: A Commentary*, Otto Triffterer and Kai Ambos, 3rd Edition (C.H.Beck, Hart, Nomos, 2016), 2324.

¹¹⁹⁴ Prosecutor v. Ruto and Sang, ICC-01/09-01/11-777 (2013).

¹¹⁹⁵ Prosecutor v. Kenyatta, ICC-01/09-02/11-863-Anx-Corr (2013).

of the Statute, the scope of the term 'investigation' is defined under Article 15(1) and Article 15(2) as a preliminary examination to determine the reasonable basis under which an 'investigation' can commence. The investigative stage under Article 15(1) and Article 15(2) of the Statute is distinct from the investigation under Article 54 of the Statute.

The contextual reading of Rule 48 & 104 of the RPE regarding the initiation of preliminary examination and investigation also support that the investigation under Article 15(1) is only a preliminary examination, which is different from proper 'investigation'. Therefore, the 'criminal investigation and proceedings', and consequently, 'matters under consideration' in Article 127(2) commence when the preliminary examination has been concluded by the OTP and has been authorised by the PTC under Article 15(3).

Also, defining the 'continued consideration of any matter' to include preliminary examinations risks creating an odd incongruity: the Court would have ongoing jurisdiction over the subject of the preliminary examination, but the withdrawing State Party would have no duty to cooperate after departure because that duty is limited by Article 127(2) to 'investigations and proceedings' which have already commenced before the effective date of withdrawal pursuant to Article 86 of the Statute.¹¹⁹⁶

Since the obligation applies to the investigation of a case and to the initiation and conduction of proceedings against the person(s) accused of a crime under the jurisdiction of the Court, including the pre-trial, trial, and post-trial phases, the preliminary examination cannot be taken as synonymous to an investigation for the purpose of Article 127(2).

A State's obligations to cooperate endure in situations where there is an ongoing matter already under the Court's consideration, which is not applicable to preliminary examinations. Article 42 of the Statute provides that the OTP shall act independently of directions from any external source. Moreover, there is no judicial oversight of the Prosecution's assessment at the preliminary examination phase - either at the time it is conducted or for the purposes of Article 15(4).¹¹⁹⁷ The prosecution's exclusive development and execution of the preliminary examination procedure constitutes an autonomous action outside the scope of judicial oversight. The absence of the Court's

¹¹⁹⁶ Alex Whiting, "If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?," *Just Security*, November 4, 2023, <https://www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there/>

¹¹⁹⁷ Situation in the Islamic Republic of Afghanistan, ICC-02/17-138 (2020).

intervention during this phase is consistent with Article 15(4), which emphasises prosecutorial independence.

To determine the opening of an investigation, Article 53(1)(b) requires the OTP to consider whether the case is or would be admissible under Article 17. At the preliminary examination stage there is not yet a 'case', as understood to "comprise an identified set of incidents, suspects and conduct".¹¹⁹⁸ The preliminary examination does not involve a 'case' because its analysis does not focus on a specific set of incidents, suspects, or conduct. This demonstrates the independence of the preliminary examination from the formal Court's proceedings.

Thus, a preliminary examination cannot be termed as a "matter under consideration of the Court" under Article 127 of the Statute.

D. Absence of Applicable Framework & Legal Consequences of Preliminary Examinations

The Statute does not provide any timeline for the OTP to close the preliminary examination. Regulation 19(4) of the OTP Regulations generally provides that the preliminary examination shall continue for as long as the situation is investigated. It does not mention any limitation on the period or applicable framework within which the preliminary examination must be concluded.

In the Situation of the Central African Republic, the OTP did not provide any information on the preliminary examination for over two years.¹¹⁹⁹ On the emphasis by the PTC to complete the preliminary examination, the Prosecution asserted that the PTC does not have supervisory power at this 'early stage' of opening of investigation.¹²⁰⁰ Similarly, in the situation of the Islamic Republic of Afghanistan, the preliminary examination was concluded after 10 years.¹²⁰¹

The power of the OTP to initiate *proprio motu* investigation was a point of contention evidenced by the '*travaux préparatoires*' of the Statute. The International Law Commission Draft Statute did not contain a provision for the OTP to be given such investigative powers.¹²⁰² The seemingly wide discretion of the OTP to investigate is

¹¹⁹⁸ Prosecutor v. Lubanga, ICC-01/04-01/06 (2006).

¹¹⁹⁹ Situation in the Central African Republic, ICC-01/05-6 (2006).

¹²⁰⁰ Central African Republic (2006).

¹²⁰¹ Situation in the Islamic Republic of Afghanistan, ICC-02/17-33 (2019).

¹²⁰² UNGA, Preparatory Committee, *Report on the Proceedings during March-April and August 1996* (1996).

squarely limited by the PTC.¹²⁰³ Moreover, the OTP can only seek authorisation for crimes that have been committed or are taking place when the request is submitted. Therefore, there is no applicable legal framework or timeline within which the preliminary examination must be conducted.

At the preliminary examination stage, the OTP does not enjoy investigative powers, other than those for the purpose of receiving testimony at the seat of the Court and cannot invoke the forms of State cooperation specified in Part IX of the Statute.¹²⁰⁴ The OTP conducts preliminary examinations to determine a reasonable basis to proceed with an investigation.¹²⁰⁵ The *proprio motu* powers given to the OTP are subject to the judicial authorisation by the Court, pursuant to Article 15 of the Statute. The OTP does not have full investigative powers at the stage of preliminary examinations. The procedures enunciated under provisions such as Article 53 allows the Court to oversee the jurisdiction triggered through Article 13.

The exercise of jurisdiction is undertaken only by the Court as the preliminary examination relates only to the “reasonable basis to proceed” towards trial.¹²⁰⁶ Therefore, the preliminary examination is essentially only a “pre-investigation” into the factual situation undertaken by the OTP.¹²⁰⁷ Also, the Prosecutor may seek additional information from States and other reliable actors during a preliminary examination pursuant to Article 15(2). Nevertheless, it is up to the concerned State to decide whether it wishes to assist the Prosecutor.¹²⁰⁸

In conclusion, there is no obligation to cooperate when the Prosecutor is conducting a preliminary examination of information received related to crimes within the jurisdiction of the Court, and thus, there are no direct legal consequences ensuing from a preliminary examination.

III. Recommendations for Smoother Enforcement of Universal Jurisdiction

The OTP’s failure to surmount the Philippines situation towards trial in the Court results from the above-listed analyses. However, these hurdles can be countered by introducing various reforms in the international criminal justice system for exercising

¹²⁰³ Situation in the Republic of Kenya, ICC-01/09-19-Corr (2010).

¹²⁰⁴ Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (2013).

¹²⁰⁵ Triffterer and Ambos, *Rome Statute*.

¹²⁰⁶ Triffterer and Ambos, *Rome Statute*.

¹²⁰⁷ Situation in the Republic of Côte d'Ivoire, ICC- ICC-02/11-14-Corr (2011).

¹²⁰⁸ Triffterer and Ambos, *Rome Statute*.

universal jurisdiction.

States must agree on uniform definitions of international crimes, standardized procedural guarantees, mutual legal assistance, extradition rules, and evidence sharing, which will be possible when more States ratify to the Statute.¹²⁰⁹ There is also the issue of the difficulties associated with extradition of criminals without violating territorial sovereignty, especially in cases involving hijackers or terrorists. Universal jurisdiction necessitates not just resources, but also cross-border collaboration and legal norm harmonisation, both of which can be difficult to achieve. Furthermore, acquiring custody of offenders without violating territorial sovereignty, particularly in situations involving terrorism or international crime, presents extra challenges. In such cases, international cooperation is essential, even if extradition is not always possible, potentially leading to prosecutions *in absentia*.¹²¹⁰ In such cases, international coordination is critical. To solve this, universal jurisdiction and the Court should not be perceived to be mutually exclusive. Instead, a hybrid system would use national courts for initial prosecution and an international court for review and oversight.¹²¹¹ In this way, the complementarity principle will be upheld, wherein the sovereignty of the State will not be compromised, and the effectiveness of the delivery of justice shall also be effectively measured. This aligns with the legal maxim '*aut dedere aut judicare*', which means 'either extradite or prosecute'.¹²¹²

Every stage of the Court's operations, from inquiry to prosecution, necessitates careful preparation and a significant time and financial commitment. To finance its operations, the Court depends on donations from member nations and other sources. The thoroughness of investigations, the calibre of legal counsel, and even the duration of trials may all be compromised by inconsistent and insufficient funding, which could be affected by member nations donations.¹²¹³ As a result, the Court's capacity to administer justice is closely tied to its financial stability. There is tremendous pressure

¹²⁰⁹ Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law* 1 no. 1 (1990): 67-89,), <https://doi.org/10.1093/oxfordjournals.ejil.a035783>.

¹²¹⁰ Democratic Republic of the Congo v. Belgium, International Court of Justice (2000).

¹²¹¹ Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court," *European Journal of International Law*.

¹²¹² Dan E. Stigall, "Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law" *Notre Dame Journal of International and Comparative Law* 3, no.1 (2013), <https://ssrn.com/abstract=2211219>.

¹²¹³ Ishita Chandra, "The Echoes of Justice: Embracing Universal Jurisdiction to Ensure Accountability," *NLIU-CRIL International Law Blogs*, October 28, 2024, <https://cril.nliu.ac.in/2024/10/28/the-echoes-of-justice-embracing-universal-jurisdiction-to-ensure-accountability/>.

to act cautiously while preserving procedural efficiency since international crimes carry such high risks. The Court must strike a careful balance between thorough investigations and the prompt administration of justice, frequently while being closely watched by a worldwide public that demands responsibility and promptness. Thus, establishing specialized investigation and prosecution units, legislative frameworks and adequate resources for effective investigations can mitigate delays in handling cases. Even monitoring bodies such as the International Committee of the Red Cross, as well as credible human rights organizations, must be given the requisite resources to monitor and report any potential international crimes under the radar.

IV. Conclusion

While the Statute represents a significant milestone in the quest for international criminal justice, its provisions regarding the exercise of universal jurisdiction by the Court contain notable lacunae. These gaps undermine the Court's ability to effectively prosecute individuals responsible for the most egregious crimes, such as genocide, crimes against humanity, crimes of aggression, and war crimes, regardless of when and where these crimes occur.

One of the primary shortcomings lies in the reliance on the principle of complementarity, which grants states primary jurisdiction over such crimes. While intended to encourage state accountability, this principle often results in impunity when states are unwilling or unable to prosecute perpetrators. Additionally, the Court's jurisdiction is limited to crimes committed after the Statute's entry into force in 2002, leaving past atrocities unaddressed.

Furthermore, the Court's jurisdiction is contingent upon the initiation of an investigation by the Court, which undermines the ability of the Court to extend its jurisdiction towards the crimes being preliminarily investigated by the OTP. This is because there is no detailed framework for how preliminary examinations should be conducted, and with no legal consequences ensuing from this process.

Moreover, the Statute lacks mechanisms to address crimes committed by non-state actors or in territories not under the jurisdiction of any state. This gap is particularly relevant in cases of transnational terrorism or conflicts involving non-state armed groups, where accountability remains elusive due to lack of international cooperation with respect to extradition of criminals.

And lastly, State parties can withdraw from the Statute without being required to provide reasons for such withdrawal, even if it is clearly with bad intention.

Addressing these lacunae requires collective efforts to strengthen the Statute framework, enhance cooperation among states, and bolster the Court's capacity to investigate and prosecute crimes under universal jurisdiction. Only by closing these gaps can the Court fulfil its mandate to deliver justice for the most heinous crimes and contribute to the promotion of peace, security, and respect for human rights on a global scale.

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