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Original: ***English*** *No.:* ***ICC-01/21-01/25***
Date: 18 August 2025

Pre-Trial Chamber I

Before: **Judge Iulia Motoc, Presiding Judge**
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

PUBLIC

Public Redacted Version of "Prosecutor's Notification", 6 March 2025, ICC-01/21-01/25-81-Conf

Source: **Prosecutor**

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

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

REGISTRY

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

Introduction

1. The Prosecutor respectfully notifies the Pre-Trial Chamber that in 2018 he was part of a team representing [REDACTED] which requested former Prosecutor Fatou Bensouda to open an investigation into the situation in the Republic of the Philippines. Having carefully considered his position, the Prosecutor considers that no conflict of interest exists which requires the Prosecutor to request excusal from the Presidency pursuant to rule 33(1) of the Rules of Procedure and Evidence ("Rules").

2. This Notification is filed under seal *ex parte* because it refers to an under seal submission and confidential information potentially relating to the investigation.

A. Procedural History

3. On 29 June 2018, a legal team, including the current Prosecutor, Karim A.A. Khan K.C., representing [REDACTED] and more than 100 victims, filed a submission to former Prosecutor H.E. Fatou Bensouda, requesting that she apply to the Pre-Trial Chamber ("PTC") to seek authorisation to open an investigation into the situation in the Republic of the Philippines.[1] The Prosecutor was not directly involved in investigations or interviewing any victim or witness, but participated *pro bono* in reviewing and presenting the submission to the then Prosecutor Bensouda. Mr Khan withdrew from the matter and ceased any involvement shortly thereafter.

4. On 24 May 2021, the former Prosecutor submitted a Request for Authorisation of an Investigation pursuant to Article 15(3).[2]

5. On 15 September 2021, PTC I authorised the opening of the investigation.[3]

6. On 26 January 2023, following a deferral request submitted by the Republic of the Philippines,[4] PTC I authorised the Prosecutor to resume the investigation.[5]

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[1] Annex A ('the submission').
[2] ICC-01/21-7-Red.
[3] ICC-01/21-12.
[4] ICC-01/21-14-AnxA.
[5] ICC-01/21-56-Red.

7. On 18 July 2023, the Appeals Chamber dismissed the appeal filed by the Republic of the Philippines.[6]

8. Since being authorised to resume the investigation, the Office of Prosecutor ("OTP") has continued gathering evidence from a variety of sources. The investigation and review of evidence is led by a team of lawyers in the OTP under the direct supervision of a Deputy Prosecutor. Since commencing his term, Prosecutor Khan never considered there to be any issue regarding his involvement in the Philippines situation. This certainly was the view of his predecessor Madam Bensouda, to whom he passed the Article 15 communication in 2018. This is evidenced by her public statement of 14 June 2021.[7]

9. Notwithstanding Prosecutor Khan's view that no recusal was necessary, he reviewed matters again after an application to disqualify him in the situation in the Bolivarian Republic of Venezuela was made. Whilst this application for recusal was dismissed - and upon learning that the OTP Philippines team was planning an evidence review, Prosecutor Khan decided not to participate in the review until he had brought the matter contained in this filing to the attention of the PTC. For the sake of clarity, the Prosecutor did not participate in the evidence review of the application that is before the PTC, he has not seen it nor has he reviewed any underlying evidence referenced therein. That filing was submitted on behalf of the OTP by a Deputy Prosecutor.

B. Notification to Pre-Trial Chamber I

10. The Prosecutor files this Notification in order to advise PTC I that the Prosecutor has carefully considered whether the circumstances summarised above give rise to any grounds for disqualification and that he does not consider that any grounds for disqualification currently exist.

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[6] ICC-01/21-77.
[7] https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-her-request-open-investigation-situation-philippines: "My term as Prosecutor will end shortly. Any authorised investigation in the Philippines will fall to my able successor, Mr Karim Khan, to take forward."

11. The Prosecutor is mindful that rule 35 of the Rules imposes an obligation on the Prosecutor to request excusal where he "has reason to believe that a ground for disqualification exists". Any such request must be made in writing to the Presidency.[8] However, rule 33(1) only permits the Prosecutor to make a request to the Presidency where the Prosecutor is "seeking to be excused". The Rules do not permit the Prosecutor to seek an advisory opinion from the Presidency in circumstances where, having given due consideration to the matter, the Prosecutor concludes that no grounds for disqualification exist and therefore the Prosecutor is <u>not</u> "seeking to be excused".

12. Accordingly, the Prosecutor files this Notification in full transparency to advise the PTC that the matter has been duly considered. The Prosecutor, of course, will provide any further submissions or take any further steps should the Pre-Trial Chamber, in the exercise of its functions to safeguard the fairness of proceedings, deem any further submissions or steps necessary.

C. There are No Grounds for the Prosecutor to be Disqualified

13. Article 42(7) of the Statute provides that "[n]either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, *inter alia*, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted."

14. Rule 34(1) of the Rules particularises a non-exhaustive list of the grounds for disqualification, providing that:

> In addition to the grounds set out in article 41, paragraph 2, and article 42, paragraph 7, the grounds for disqualification of a judge, the Prosecutor or a Deputy Prosecutor shall include, *inter alia*, the following:

[8] Rule 33(1).

(a) […]

(b) […]

(c) Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; […]

15. The Prosecutor is presumed to be impartial.[9] On 16 June 2021, the Prosecutor took a public oath of office, undertaking to perform his duties impartially. The threshold to disqualify the Prosecutor must be a high one to safeguard the interests of the sound administration of justice.[10]

16. It is not necessary to establish an actual lack of impartiality on the part of the Prosecutor, rather the question is whether it reasonably appears that the Prosecutor lacks impartiality.[11] This requires an objective assessment, from the perspective of the "reasonable observer, properly informed".[12] It is insufficient to show that a reasonable observer *could* apprehend bias; instead it must be established by the party requesting disqualification[13] that such apprehension was *objectively reasonable*.[14]

17. The Prosecutor is not aware of any prior case in which the impartiality of the Prosecutor has been challenged on the basis of a prior involvement in an earlier stage of proceedings on behalf of one or more victims or a group representing the interests of victims. However, by analogy with the similar cases discussed below, it is clear that the Prosecutor's prior involvement in the situation in the Republic of the Philippines was not in a capacity by virtue of which his impartiality might reasonably be doubted

[9] ICC-01/05-01/13-648-Red3 ("*Bemba et al.* Disqualification Decision"), para. 26.
[10] *See by analogy* *Banda & Jerbo* Decision on Disqualification of Judge Chile Eboe-Osuji, para. 14. This decision concerned the disqualification of a judge based on the same grounds as disqualification of a Prosecutor or Deputy Prosecutor under rule 34 of the Rules of Procedure and Evidence. See, further, ICC-01/22-107, para. 20, "a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office".
[11] ICC-01/11-01/11-175 ("*Gaddafi & Al-Senussi* Disqualification Decision"), para. 20.
[12] *Gaddafi & Al-Senussi* Disqualification Decision, para. 20.
[13] ICC-01/22-107, para. 20.
[14] ICC-02/05-03/09-344-Anx ("*Banda & Jerbo* Decision on Disqualification of Judge Chile Eboe-Osuji"), para. 13.

and was not such that he could be expected to have formed an opinion of the case in question that, objectively, could adversely affect his impartiality.

18. It is pertinent to recall at the outset that the Appeals Chamber has recently confirmed that a request for the disqualification of the Prosecutor can only be made at a stage of the proceedings when there is a "case" before the Court.[15] Proceedings in the situation in the Republic of the Philippines remain at the investigation phase. There is currently no "case" from which the Prosecutor could be disqualified. Even if the PTC determines that a warrant should be issued, there will still have to be an application by the accused person for the Prosecutor's disqualification pursuant to article 42(8). This situation does not arise at the time of filing the present notification.

19. Not every prior involvement in a case before the Court will require disqualification. In particular, the Presidency has interpreted article 41(2)(a) to mean that a Judge should only be disqualified on the grounds of prior involvement in a case, if the capacity in which they were previously involved was such that their impartiality might reasonably be doubted.[16] Consistent with the practice of the *ad hoc* tribunals[17] and human rights jurisprudence,[18] a Judge who decided on the issuance of an arrest warrant in pre-trial proceedings is not disqualified from sitting on appeal proceedings at the Court.[19] In deciding whether impartiality might reasonably be doubted, the "degree of congruence between the legal issues" and whether "the factual determinations" would be "based on the same evidence" are relevant factors.[20] Although the positions of a Judge and the Prosecutor are not necessarily the same, on this point the drafting of article 41(2)(a) and article 42(7) is identical and the same factors are relevant to the impartiality of the Prosecutor. The Prosecutor must apply different legal tests to different sets of evidence at different phases of proceedings; just as with a Judge, prior involvement in an earlier phase applying different evidence,

[15] ICC-02/18-109, para.60.
[16] ICC-01/04-01/06-2138-AnxIII, p. 7 ; ICC-01/04-584-Anx4, p. 3.
[17] Rules of Procedure and Evidence of the ICTY, rule 15(C).
[18] Hauschildt v. Denmark, App.No; 10486/83, Judgment of 24 May 1989, paragraph 50.
[19] ICC-01/04-584-Anx4.
[20] ICC-02/11-01/12-69-AnxII, p. 3.

does not prevent the Prosecutor from impartially applying a different legal test to different evidence at a later phase of proceedings.

20. The Prosecutor further notes that the text of article 42(7) requires prior involvement "in that case" for a disqualification. The Appeals Chamber has determined that this requires a prior involvement in the very same case.[21] Further, there was no basis for doubting impartiality in circumstances where the Prosecutor was involved in both a substantive case and a contempt case against the same accused arising from the substantive case.[22]

21. It is clear that article 42(7) does not automatically require the disqualification of the Prosecutor from this situation:-

a. in 2018, when the submission was filed, there was no "case" because the investigation had not yet been opened. Accordingly, the Prosecutor's prior involvement was not "in that case" for the purposes of article 42(7);

b. in any event, there is no congruence between the legal issues concerning the opening of an investigation and those applicable at the current stage of proceedings. In 2018, the submission concerned whether there was "a reasonable basis to proceed with an investigation".[23] The former Prosecutor later determined that there was indeed a reasonable basis and opened the investigation. During the investigation phase, the OTP is assessing the evidence against the article 58(1) threshold, namely whether there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court". The legal test is different and more stringent. Unlike the preliminary examination phase, a closer focus on individual criminal responsibility is required. It is also worth recalling that Prosecutor Khan took no part in the evidence review and gave no directions

[21] ICC-01/05-01/13-648-Red3, paras. 33-35.
[22] ICC-01/05-01/13-648-Red3, paras. 33-35.
[23] Article 15(3) of the Statute. See also article 53(1).

relating to any application. The determination as to the sufficiency of evidence was made by the Deputy Prosecutor;

c. the evidential matrix is also different. The submission was based upon information available to the legal team including public source material and [REDACTED]. More than six years have passed since the Article 15 communication was submitted. Although the Prosecutor has not been directly involved in the evidence review, the Prosecutor understands that the evidence available to the OTP has significantly deepened since 2018 and is drawn from multiple sources. The Prosecutor further assumes that the information contained in the Article 15 communication would be but one component of the material which is now available to the OTP. Both the legal test and the factual evidence have thus changed since the submission was filed.

22. Rule 34(1)(c) also does not require the disqualification of the Prosecutor in this situation. First, the Prosecutor could not be expected to have formed an opinion "on the case in question" within the meaning of rule 34(1)(c). As set out above, there was no "case" at the time of the submission. Accordingly, the test in rule 34(1)(c) is not engaged at that early stage of proceedings.

23. Second, if an arrest warrant in the situation in the Republic of the Philippines is granted and a "case" is thereby created, the Prosecutor could not be expected to have formed an opinion on that case at the time of the Article 15 communication in 2018. As set out above, it is extremely likely that the evidential holdings available to the OTP now, will be significantly deeper than the more limited information contained in the Article 15 communication more than six years ago in 2018.

24. Third, the Prosecutor's required impartiality is not adversely affected. Rule 34(1)(c) expressly requires an objective approach. The reasonable observer, properly informed, would take into account the following factors:-

a. The reasonable observer would appreciate that the Prosecutor is not directly involved in the evidence review in every case. The situation in the Republic of the Philippines is being investigated by an assigned team within the OTP, under the direct supervision of a Deputy Prosecutor who has oversight of the evidence review. The Deputy Prosecutor is also obliged to investigate incriminating and exonerating circumstances equally, which further safeguards the rights of the persons under investigation;[24]

b. The Prosecutor is required to be "highly competent in and have extensive practical experience in the prosecution or trial of criminal cases".[25] This requirement, together with the open competition for the role of Prosecutor, means that in order to demonstrate the required experience it is likely that any applicant for the position of Prosecutor will have prior working connections to some of the situations under investigation. This alone cannot be sufficient for disqualification;

c. In a previous similar case, the Presidency has found that Judge Monageng was not disqualified from sitting in the Pre-Trial Chamber on the *Al-Bashir* case, although Judge Monageng had previously participated in a fact-finding mission to Sudan, which had concluded that war crimes and crimes against humanity had been committed and that there should be further investigation of whether genocide had occurred.[26] The Presidency considered that professional judges, by virtue of their experience and training, are capable of deciding issues solely on the basis of the evidence adduced in the relevant case, excluding information available to them in any other capacity.[27] In the same way, the Prosecutor is able to decide issues

[24] Article 54(1)(a).
[25] Article 42(3).
[26] ICC-02/05-01/09-76-Anx2.
[27] ICC-02/05-01/09-76-Anx2, p.6.

solely on the basis of the evidence available to him at that time, disregarding anything else;

d. International tribunals have also appointed prosecutors who had involvement in prior investigative proceedings. The Kosovo Specialist Chambers require the Specialist Prosecutor to be "independent".[28] David Schwendiman had previously been the lead investigator of the Special Investigative Task Force in Kosovo and became the first prosecutor of the Kosovo Specialist Chambers.[29] Alex Whiting was acting specialist prosecutor at the Kosovo Specialist Chambers, despite having previously prosecuted other cases related to the mandate of the Kosovo Specialist Chambers at the ICTY.[30] William J. Fenrick was appointed a member of the Commission of Experts Established Pursuant to United Nations Security Council Resolution 780 (1992) and in that capacity looked into allegations of breaches of International Humanitarian Law in the former Yugoslavia. The Commission's report called for and was a precursor to the creation of the ICTY. He then served for many years as Senior Legal Advisor and Head of International Law section at the OTP-ICTY.[31] The Special Tribunal for Lebanon ("STL") also required the Prosecutor to be independent.[32] Daniel Bellemare became the Prosecutor of the STL despite previously being commissioner of the UN International Independent Investigation Commission, which had a substantially identical mandate. The Prosecutor is not aware that the independence or impartiality of any of these prosecutors was challenged on the basis that they should have recused themselves on account of their previously referenced activities. These examples clearly show that prior involvement in investigative activities in different or associated bodies (or even related prosecutions in the same

[28] Kosovo Specialist Chambers, Law on Specialist Chambers and Specialist Prosecutor's Office, Article 24(2), 35(1); Code of Conduct for Counsel and Prosecutors, Articles 31, 32.
[29] https://www.scp-ks.org/en/spo/former-specialist-prosecutors
[30] See, for instance, ICTY, Prosecutor v Limaj et al, IT-03-66-T, Judgment, 30 November 2005.
[31] https://www.refworld.org/legal/resolution/unsc/1994/en/113325 ; https://www.icc-cpi.int/node/194070
[32] Special Tribunal for Lebanon, Statute, article 11(1).

situation involving some of the same witnesses) do not necessarily prevent a Prosecutor from acting impartially and independently;

e. The obligations of the Prosecutor are entirely different from the obligations of a legal team submitting an Article 15 communication on behalf of [REDACTED] or victims. In particular, the Prosecutor must investigate incriminating and exonerating circumstances equally[33] and has a range of other responsibilities and duties under the Statute. The reasonable observer would perceive that this is an entirely different role and hence any opinions formed in the course of the submission would not reasonably impair the Prosecutor's impartiality today;

f. There is no congruence between the legal tests and factual matrix at the current stage of proceedings. Prior to seeking an arrest warrant, the OTP must apply its mind to all the evidence in its holding and determine whether that evidence meets the standard required by article 58(1). No reasonable observer would consider that the Prosecutor's ability to apply this test impartially to the evidence currently available is compromised by his prior involvement in applying a different and lower test to a smaller subset of the evidence more than six years ago;

g. A reasonable observer would not confuse an Article 15 communication by a legal team on behalf of one or more clients, with the formation of a personal opinion by a member of the team. Lawyers represent their clients. The submission put forward on behalf of [REDACTED] was simply a communication requesting the Prosecutor to open an investigation. The contents of the communication should not be equated automatically with the personal opinion of Prosecutor Khan or any member of the legal team.

Conclusion

[33] Article 54(1)(a).

25. The Prosecutor notifies the PTC that the Prosecutor considers that there is no conflict of interest requiring him to seek to excuse himself from the situation in the Republic of the Philippines in accordance with rule 33. The Prosecutor will, of course, keep the position under review as matters progress and will provide further submissions or take further steps should the PTC deem it necessary. Accordingly, and unless further direction or order is received from the PTC, the Prosecutor hereby respectfully notifies the PTC that he intends to lead the prosecution of any case arising out of the situation in the Republic of the Philippines.

Respectfully submitted,

Karim A.A. Khan KC, Prosecutor

Dated this 18th day of August 2025
At The Hague, The Netherlands