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Court

Original: ***English***

No.: ***ICC-01/21-01/25***
Date: **26 August 2025**

THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza , Presiding Judge**
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

Public Redacted Version of ICC-01/21-01/25-233-Conf

Victims' Response to the "Defence Request to Disqualify Chief Prosecutor Karim Khan"

Source: **Office of the Public Counsel for Victims**

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

☒ **The Office of the Prosecutor**

☒ **Counsel for the Defence**
D36

☐ **Legal Representatives of the Victims**

☐ **Legal Representatives of the Applicants**

☐ **Unrepresented Victims**

☐ **Unrepresented Applicants (Participation/Reparation)**

☒ **The Office of Public Counsel for Victims**

☐ **The Office of Public Counsel for the Defence**

☐ **States' Representatives**

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☐ **Other**

I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the "Legal Representative"), appointed to represent the collective interests of potential victims until the mandate of the team of common legal representatives takes effect,[1] files her response to the "Defence Request to Disqualify Chief Prosecutor Karim Khan" (the "Request").[2]

2. The Legal Representative submits that the Request should be dismissed as moot - due to the fact that the Prosecutor is currently on leave from office - and untimely. On the merits, she posits that the Defence fails to demonstrate that the grounds for disqualification of the Prosecutor established under article 42(7) of the Rome Statute (the "Statute") and rule 34(1)(b) and (c) of the Rules of Procedure and Evidence (the "Rules") exist in the present circumstances. In particular, the Defence fails to demonstrate that the facts concerning Mr Karim Khan (Mr "Khan") meet the stringent requirements of said provisions.

II. PROCEDURAL BACKGROUND

3. On 8 February 2018, the then Prosecutor Ms Bensouda (the "Former Prosecutor") opened a preliminary examination in the Situation in the Republic of the Philippines.[3]

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[1] See the "Order on the conduct of confirmation proceedings" (Pre-Trial Chamber I), No. ICC-01/21-01/25-114, 17 April 2025, paras. 68-69.

[2] See the "Defence Request to Disqualify Chief Prosecutor Karim Khan", No. ICC-01/21-01/25-226-Conf, 6 August 2025 (the "Request"). A public redacted version was filed on 7 August 2025, see No. ICC-01/21-01/25-226-Red.

[3] See ICC-OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.

4. On 12 February 2021, Mr Khan was elected as the Prosecutor of the International Criminal Court (the "ICC" or the "Court").[4]

5. On 10 February 2025, the Prosecutor filed an application for a warrant of arrest for Mr Rodrigo Roa Duterte ("Mr Duterte") as an alleged indirect co-perpetrator pursuant to article 25(3)(a) of the Statute for three crimes against humanity allegedly committed in the Republic of the Philippines between 1 November 2011 and 16 March 2019.[5]

6. On 7 March 2025, Pre-Trial Chamber III (the "Chamber") issued a warrant of arrest for Mr Duterte[6] and, on 12 March 2025, Mr Duterte was surrendered to the ICC.[7]

7. On 6 March 2025, the Prosecutor filed a Notification informing the Chamber that, in 2018, he was part of a team representing a number of victims requesting the Former Prosecutor to open an investigation into the crimes allegedly committed in the Republic of the Philippines; and that his previous involvement as a victims' counsel does not impact on his current function. Therefore, there was no ground for disqualification (the "Notification").[8] On 1 April 2025, the Prosecutor filed a Second Notification (the "Second Notification", together the "Notifications"), adding that he had contacted [REDACTED] in his previous role as a victims' counsel.[9]

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[4] See International Criminal Court, Karim A. A. Khan KC .
[5] See the "Public redacted version of 'Prosecution's urgent application under article 58 for a warrant of arrest against Rodrigo Roa DUTERTE'", 10 February 2025, ICC-01/21-80-US-Exp, No. ICC-01/21-01/25-80-Red, 13 March 2025.
[6] See the "Warrant of Arrest for Mr Rodrigo Roa Duterte" (Pre-Trial Chamber I), No. ICC-01/21-01/25-83, 7 March 2025.
[7] See ICC Press Release, Rodrigo Roa Duterte in ICC custody, 12 March 2025.
[8] See the "Prosecutor's Notification", No. ICC-01/21-01/25-81-Conf, 2 April 2025 (the "Notification").
[9] See the "Prosecutor's Second Notification", No. ICC-01/21-01/25-100-Conf, 2 April 2025, reclassified as public on 15 August 2025 (the "Second Notification").

8. On 3 April 2025, following the re-classification of the Notifications, the Defence filed its response (the "Initial Response") agreeing with the Prosecutor that there was no ground for disqualification.[10]

9. On 16 May 2025, the Prosecutor went on leave until the conclusion of the external investigation into his alleged misconduct conducted by the United Nations Office of Internal Oversight Services (the "UNOIOS"). On 19 May 2025, the Office of the Prosecutor confirmed that the Deputy Prosecutors have assumed leadership, management and administration of the Office, following Mr Khan's decision to take a leave of absence.[11]

10. On 6 August 2025, the Defence filed its Request.[12]

11. On 15 August 2025, the Legal Representative requested the Appeals Chamber a variation of the time limit to submit her response to the Request, having been notified of a number of confidential documents five days after the filing of the Request.[13] The same day, by e-mail, the Defence informed the Appeals Chamber that it does not oppose the request for variation of the time limit.[14] On 18 August 2025, the Prosecution, by e-mail, also informed that it does not oppose said request.[15]

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[10] See the "Defence Response to ICC-01/21-01/25-81-Conf Defence Response to ICC-01/21-01/25-100-Conf", No. ICC-01/21-01/25-102-Conf, 3 April 2025 (the "Initial Response"). A public redacted version was filed on 15 August 2025, see No. ICC-01/21-01/25-102-Red.
[11] See ICC-OTP, Statement, ICC Deputy Prosecutors: Work of the Office continues across all situations, 19 May 2025.
[12] See the Request, *supra* note 2.
[13] See the "Victims' Urgent Request for Varying Standard Time Limit to Respond to the 'Defence Request to Disqualify Chief Prosecutor Karim Khan'", No. ICC-01/21-01/25-229, 15 August 2025.
[14] See the e-mail sent by the Defence on 15 August 2025 at 15:40.
[15] See the e-mail sent by the Prosecution on 18 August 2025 at 09:31.

III. CLASSIFICATION

12. Pursuant to regulation 23*bis* (1) and (2) of the Regulations of the Court, the present submission is classified as confidential, following the classification chosen by the Defence and because it refers to the content of documents bearing the same classification. A public redacted version will be filed in due course.

IV. SUBMISSIONS

A. Applicable Law

13. Article 42(7) of the Statute provides:

> *The Office of the Prosecutor*
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> […]
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> 7. *Neither 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. The criteria for disqualification of the Prosecutor are further elaborated in rule 34 of the Rules[16] which provides that:

> 1. *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*:
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> […]
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> *(b) Involvement, in his or her private capacity, in any legal proceedings initiated prior to his or her involvement in the case, or initiated by him or her subsequently, in which the person being investigated or prosecuted was or is an opposing party;*
> *(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*

[16] See BERGSMO (M.) and HARHOFF (F.), Article 42, in TRIFFTERER (O.), AMBOS (K.) (Eds.), Rome Statute of the International Criminal Court: Article-by Article Commentary, 4th edition, Verläg C.H. Beck / Nomos, Munich / Hart Publishing, Oxford, 2021, p. 978.

legal representatives that, objectively, could adversely affect the required impartiality of the person concerned;
[…]
2. *Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based*. […]

B. Admissibility of the Request

15. The Defence argues that "*Chief Prosecutor Karim Khan, currently on self-imposed leave because of allegations of sexual misconduct* […] *must now, immediately and without delay, be disqualified from any further role in the case against Mr Rodrigo Roa Duterte*."[17] As also underlined by the Defence, since 16 May 2025, Mr Khan is on leave from office until the conclusion of the UNOIOS' investigations into his alleged misconduct. This was immediately confirmed by the Presidency of the Assembly of States Parties which further assured that the Deputy Prosecutors will be in charge of the management of the Office of the Prosecutor during Mr Khan's absence.[18] The Deputy Prosecutors have indeed assumed leadership, management and administration of the Office of the Prosecutor.[19]

16. Therefore, the Legal Representative submits that, in the circumstances, the Request is moot. The undeniable fact is that Mr Khan is no longer at the helm of the Office of the Prosecutor, exercising his statutory authority. In other words, he is no longer responsible for: (i) receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, examining them and conducting investigations and prosecutions before the Court; and (ii) heading the Office of the Prosecutor and having full authority over its management and administration, including the staff, facilities and other resources thereof as provided in the Statute, the Rules and the relevant regulations.

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[17] See the Request, *supra* note 2, para. 1.
[18] See Press Release-Assembly of States Parties, Statement of the Presidency of the Assembly of States Parties on current situation in the Office of the Prosecutor, 18 May 2025.
[19] *Ibid*.

17. While the Prosecutor took leave of absence only, it is highly uncertain *when* and *if* he will come back to re-assume his role and authority under the Court's statutory instruments. Indeed, at present, the UNOIOS is still continuing its investigation into the alleged misconduct. There is no indication as to the total duration of said investigation or when exactly the Court will be informed of its conclusion. Even if the UNOIOS concludes its investigation sometime in the near future, the matter will not have been resolved conclusively and immediately. In fact, the Presidency of the Assembly of States Parties publicly informed that, once the UNOIOS completes its investigation and submits its report, an external panel of judicial experts will further assess said report under the legal framework of the Statute, the Rules and relevant administrative instruments of the Court in consideration of the appropriate next steps.[20] This necessarily means that the process at hand is far from over and, as a result, it is certainly the case that Mr Khan *will not re-assume his role for a considerable duration of time in the near future*.

18. In this regard, the Legal Representative submits that the Statute and the Rules require that the Prosecutor *be in office* and *must be effectively exercising his or her statutory authority* at the time any request for his or her disqualification is filed with the Appeals Chamber. In fact, the Appeals Chamber held that:

> […] *The Request for Disqualification seeks the disqualification of the Prosecutor from investigating Mr Nyekorach-Matsanga. At the time that the Request for Disqualification was registered on 1 June 2012, the Prosecutor of the Court was Mr Moreno-Ocampo, and the Request for Disqualification is based on Mr Moreno-Ocampo's alleged direct and personal interest in investigating Mr Nyekorach-Matsanga.* […] *Mr Moreno-Ocampo's term of office began on 16 June 2003 and, pursuant to article 42 (4) of the Statute, lasted for nine years. His term of office ended on 15 June 2012. With Mr Moreno-Ocampo having left office, the request to disqualify him has been rendered moot and must be dismissed as such.* [21]

[20] See Press Release – Assembly of States Parties, Statement by the ASP Presidency concerning the assignment of the OIOS fact-finding report on alleged misconduct by ICC Prosecutor to an external judicial expert Panel, 24 June 2025.
[21] See the "Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga (Appeals Chamber)", No. ICC-01/09-96-Red OA2, 6 September 2012, paras. 18-19.

19. While it is true that Mr Khan has taken leave of absence only, the ensuing practical effects remain the same since the nature of his leave is not *normal* or *routine*. Indeed, due to the serious and complex nature of the allegations of misconduct against him and the significant scope and length of the external investigation and other legal processes expected to take place after the completion of the latter, the leave of absence taken by Mr Khan is functionally comparable to being absent after the end of the Prosecutor's term in office. The undisputable fact is that, even if the Defence succeeds in its efforts, the disqualification of Mr Khan as an individual, who is: (i) already *out of office* and is no longer exercising his statutory authority over *the Duterte case*; and (ii) replaced or substituted by the Deputy Prosecutors in the Office, will serve no practical purpose whatsoever. Not only such disqualification proceedings will cause unnecessary distraction or erosion of confidence in the Court as a whole among victims and the general public but will also waste precious time and resources of the Court. Therefore, on this ground alone, the Request should be dismissed as moot.

20. The Legal Representative further submits that the Request is untimely. Rule 34(2) of the Rules requires that a request for disqualification of the Prosecutor be made in writing *as soon as there is knowledge of the grounds on which it is based*. The Defence filed its Request after more than four months following the date of reception of the Notifications (whose content should have alarmed the Defence about raising possible grounds for disqualification at that time).

21. In particular, the Prosecutor notified the Chamber, on 6 March 2025 and 1 April 2025 respectively, of the relevant facts, including that, in 2018: (i) he was part of a team representing the [REDACTED] and a number of victims which requested the Former Prosecutor to open an investigation into the crimes allegedly committed in the Republic of the Philippines by submitting a communication pursuant to article 15 of the Statute (the "Article 15 Communication"); and (ii) as part of his previous mandate as a victims' counsel, he did contact [REDACTED].[22]

[22] See the Notifications *supra* note 8 and 9.

22. On 3 April 2025, the Defence filed its Initial Response to the Notifications, essentially approving the conduct of Mr Khan and stating that there was no ground necessitating his disqualification.[23] In particular, the Defence was adamant in elaborating that:

> "[…] *On the face of the notifications, there is no ostensible reason to doubt the Prosecutor's impartiality or his assertions that he is not conflicted on account of his former representation of* [REDACTED]. *As quasi-victims' counsel, and as the Prosecutor, it is understood that interests are aligned. There is no reason to believe that the Prosecutor will not act in accordance with his duties to 'investigate…exonerating circumstances', to 'fully respect the rights of' Mr. Duterte and, overall, to act fairly* […] *Accordingly, and despite the mandatory nature of Article 42(7) of the Rome Statute, the Defence, for its part, will not impede the smooth running of proceedings by seeking the Prosecutor's disqualification*."[24]

23. Nonetheless, the Defence now claims that, at the time of filing its Initial Response, Counsel had not seen the Article 15 Communication.[25] However, the fact that the Defence was allegedly unaware of the specific content of said Communication at the time is irrelevant and inconsequential. Indeed, the most important factual information on which the Defence now bases its Request - namely that (i) Mr Khan previously represented a number of victims as their counsel; (ii) he was a member of team of lawyers who submitted the Article 15 Communication and requested the Former Prosecutor to open an investigation into the crimes allegedly committed in the Republic of the Philippines; and (iii) he, as a victims' counsel, contacted [REDACTED] had all been clearly communicated to the Defence via the Notifications.

24. Consequently, the Defence was already in position to fully identify, if any, potential grounds for disqualification of the Prosecutor under article 42(7) of the Statute and rule 34(1) of the Rules immediately after receiving the Notifications as of

[23] See the Initial Response, *supra* note 10.
[24] *Idem*, paras. 2 and 5.
[25] See the Request, *supra* note 2, para. 22.

2 April 2025. Pursuant to paragraph 2 of rule 34 of the Rules, the Defence should have made its request for disqualification "*as soon as there was knowledge of the grounds on which it is based.*" According to the jurisprudence of the Court, this requirement "*safeguards the efficiency of proceedings by ensuring that disqualification requests are brought at the earliest possible moment*."[26] In particular, the Appeals Chamber held that "*the earliest point a disqualification request can be made is once an individual becomes aware that he or she is the subject of the Prosecutor's investigations*".[27]

25. However, in its Initial Response, not only did the Defence decline to request for disqualification of the Prosecutor but also it generously commended Mr Khan's voluntary notifications and his subsequent actions (such as contacting the Defence Counsel and briefing him on the matter at hand).[28] Furthermore, the Defence expressed its full support of Mr Khan by stating that there was *no reason* to believe that the Prosecutor will not respect the rights of Mr Duterte and act impartially.[29]

26. Hence, waiting for four months to file the Request after gaining knowledge of the potential grounds of disqualification of the Prosecutor (especially after positively informing the Pre-Trial Chamber of his intention not to seek Mr Khan's disqualification) cannot possibly be considered as raising the matter with the Appeals Chamber at the *earliest possible moment*. Based on these facts, it can be concluded that the Defence forfeited its right to timely submit the request for disqualification of the Prosecutor. Consequently, the Request should also be dismissed as untimely.

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[26] See the "Reasons for the Decision on the 'Corrigendum to Request for the Disqualification of Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera from Adjudicating on the Issue of Jurisdiction' filed on 9 May 2025 (ICC-01/21-01/25-130-Corr) (Plenary of Judges of the International Criminal Court)", No. ICC-01/21-01/25-172, 3 July 2025, para. 29.
[27] See the "Decision on the 'Request for Recusal of the Prosecutor of the International Criminal Court in the Case of Venezuela I Due to Conflict of Interest'" (Appeals Chamber), No. ICC-02/18-109, 10 February 2025, para. 67.
[28] See the Initial Response, *supra* note 10, paras. 2 and 4.
[29] *Idem*, para. 3.

C. Merits of the Request

27. The Defence argues that the Prosecutor: (i) first acted in his capacity as a private lawyer for over 100 victims, actively and aggressively advocating for the prosecution of Mr Duterte; and (ii) collected testimony from a witness [REDACTED]; (iii) then, seemingly exploited the information that he had acquired as a victims' counsel to conduct an investigation that ultimately led to Mr Duterte's arrest.[30] The Defence adds that this conflation of roles is precisely what rule 34(1) of the Rules seeks to prevent.[31]

28. The Legal Representative submits that these arguments are misconceived. Article 42(7) of the Statute and rule 34(1)(b) of the Rules require that, for the Prosecutor to be disqualified, he or she must have been involved, in his or her private capacity, *in any legal proceedings* initiated prior to his or her involvement *in the case*, or initiated by him or her subsequently, in which *the person being investigated or prosecuted was or is an opposing party*. As held by the Appeals Chamber, the wording of these provisions should be interpreted *strictly* since disqualification of the Prosecutor is an extraordinary remedy.[32]

29. The first requirement of these provisions is that the Prosecutor must have been in his or her private capacity involved in *the case.* In the framework of the statutory instruments of the Court, a situation generally refers to the broader context of alleged crimes within a specific geographical area involving a particular group or armed force(s) whereas a case primarily relates to the prosecution of a specific individual or individuals within that situation, starting point being – the issuance of warrant of arrest or summons to appear under article 58 of the Statute.[33] Indeed, the drafters of

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[30] See the Request, *supra* note 2, para. 35.
[31] *Ibid.*
[32] See the "Decision on the 'Request for Recusal of the Prosecutor of the International Criminal Court in the Case of Venezuela I Due to Conflict of Interest'", *supra* note 27, para. 64.
[33] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'" (Appeals Chamber), No. ICC-01/09-02/11-274 OA, 30 August 2011, paras. 38 and 39 and the "Judgment on the appeal of Libya against

the Statute and the Rules purposefully defined the parameters of disqualification of the Prosecutor by specifically stating that his or her previous involvement must be with a *case*.[34] In this regard, the Appeals Chamber also held that there must be a "*case*" before the Court when disqualification of the Prosecutor is requested.[35] However, at the time Mr Khan submitted as a victims' counsel the Article 15 Communication to the Former Prosecutor, the *Duterte case* was not opened.

30. The second requirement of rule 34(1)(b) of the Rules is that the Prosecutor's previous involvement must be in *an actual legal proceedings* initiated prior to his or her involvement in the case.[36] At the time Mr Khan submitted as a victims' counsel the Article 15 Communication, there was no *legal proceedings* (in its proper meaning of term) in which victims and their legal representatives were authorised to or could participate.

31. In this regard, the Appeals Chamber held:

> "[…] *The article of the Statute that confers power upon a victim to participate in any proceedings is article 68(3). What emerges from the case law of the Appeals Chamber is that participation can take place only within the context of judicial proceedings. Article 68 (3) of the Statute correlates victim participation to 'proceedings', a term denoting a judicial cause pending before a Chamber. In contrast, an investigation is not a judicial proceeding but an inquiry conducted by the Prosecutor into the commission of a crime with a view to bringing to justice those deemed responsible*. […][T]*here is ample scope within the statutory scheme of the Statute for victims and anyone else with*

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the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'"(Appeals Chamber), No. ICC-01/11-01/11-547-Red OA4, 21 May 2014, para. 61 and 62.

[34] See BERGSMO (M.) and HARHOFF (F.), Article 42, in TRIFFTERER (O.), AMBOS (K.) (Eds.), Rome Statute of the International Criminal Court: Article-by Article Commentary, *supra* note 16, p. 978. See also, STEAINS (C.), Situations that May Affect the Functioning of the Court, in LEE (R.S.) (Ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Ardsley, N.Y., Transnational Publishers, 2001, p. 303.

[35] See the "Decision on the 'Request for Recusal of the Prosecutor of the International Criminal Court in the Case of Venezuela I Due to Conflict of Interest'", *supra* note 27, para. 60.

[36] For drafting history, see STEAINS (C.), Situations that May Affect the Functioning of the Court, in LEE (R.S.) (Ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *supra* note 34, p. 303. See also, Proposal by Spain and Venezuela concerning the Rules of Procedure and Evidence Excusing and disqualification of judges, UN Doc. PCNICC/1999/WGRPE/DP.11, 19 July 1999.

relevant information to pass it on to the Prosecutor without first being formally accorded 'a general right to participate'. For example, under Article 15(2) the Prosecutor is authorised to receive information from, inter alia*, any 'reliable source' including victims. He is similarly authorised under article 42(1) to receive and consider 'any substantiated information on crimes within the jurisdiction of the Court'. Victims may thus make representations to the Prosecutor on any matter pertaining to the investigations and to their interests.* […]".[37]

32. Therefore, in submitting the Article 15 Communication to the Former Prosecutor, Mr Khan and victims represented by him were not actually participating in a legal or judicial proceeding *per se*. As underlined by the Appeals Chamber, he was simply transmitting "*substantiated information on crimes within the jurisdiction of the Court*" to the Former Prosecutor pursuant to article 15 (2) of the Statute as the latter is authorised to receive information from, *inter alia*, any "*reliable source*" including victims.

33. The third requirement of rule 34(1)(b) of the Rules is that the Prosecutor's previous involvement must be in a legal proceeding *in which the person being investigated or prosecuted was or is an opposing party*. It appears that the drafters of the Rules did not consider victims or victims' counsel to be a "*party*" or '"*an opposing party*" within the meaning of said provision when developing grounds for disqualification of the Prosecutor.[38]

34. In this regard, the Appeals Chamber also recalled that:

"[…] *Participation pursuant to article 68 (3) of the Statute is confined to proceedings before the Court, and aims to afford victims an opportunity to voice their views and concerns on matters affecting their personal interests. This does not equate them, as the*

[37] See the "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007" (Appeals Chamber), No. ICC-01/04-556 OA4 OA5 OA6, 19 December 2008, paras. 45-59.

[38] For drafting history, see STEAINS (C.), Situations that May Affect the Functioning of the Court, in LEE (R.S.) (Ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *supra* note 34, p. 304. See also, Proposal by Spain and Venezuela concerning the Rules of Procedure and Evidence Excusing and disqualification of judges, *supra* note 36, 19 July 1999.

case law of the Appeals Chamber conclusively establishes, to parties to the proceedings before a Chamber […]."[39]

35. In the practice of the Court, the term "*party*" has been interpreted as referring to the Prosecutor and the Defence.[40] Therefore, it appears that Mr Khan in his previous role as a victims' counsel cannot be qualified as a party to the proceedings, let alone opposing party to Mr Duterte.

36. Furthermore, the Legal Representative recalls that, for disqualification under rule 34 (1)(c) of the Rules, the Prosecutor must have performed 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 his or her impartiality. Indeed, the terms "*objectively*" and "*on the case*" were included on purpose by the drafters of the Rules in order to make clear that the intent of the provision was not to disqualify the Prosecutor on the grounds that he or she had performed functions that had led to general opinions being formed about the crimes falling under the jurisdiction of the Court.[41] Accordingly, the opinion formed on a case by the Prosecutor must be based upon consideration of the same issues and evidence, from which it would appear that he or she is not free to depart.[42]

[39] See the "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", *supra* note 37, para. 55.
[40] See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 93.
[41] For drafting history, see STEAINS (C.), Situations that May Affect the Functioning of the Court, in LEE (R.S.) (Ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, *supra* note 34, p. 304. See also, Proposal by Spain and Venezuela concerning the Rules of Procedure and Evidence Excusing and disqualification of judges, *supra* note 36, 19 July 1999.
[42] See the "Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010 to be excused from reconsidering whether a warrant of arrest for the crime of genocide should be issued in the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir, pursuant to article 41(1) of the Statute and rules 33 and 35 of the Rules of Procedure and Evidence" (Presidency), No. ICC-02/05-01/09-76-Anx2, 19 March 2010, pp. 6-7.

37. In this connection, the Defence argues that Mr Khan had placed Mr Duterte as the top of the list of persons worthy of prosecution in the Article 15 Communication transmitted to the Former Prosecutor.[43] Firstly, the Defence misrepresents the relevant facts. Annex 6 of the Article 15 Communication lists [REDACTED] in total for potential investigation, not just Mr Duterte.[44] Obviously, being the former President of the Republic of the Philippines, Mr Duterte was logically expected to prominently feature in such Communication given his enormous power and command position previously held in the Government.

38. Moreover, in the Article 15 Communication, Mr Khan and others who formed the group of lawyers did not determine whether Mr Duterte actually committed crimes falling under the jurisdiction of the Court. But he (and others in the collective) merely recommended investigation by the Former Prosecutor as to whether such crimes may have been committed in the Republic of the Philippines. The aim or content of the Communication was not to establish the individual criminal responsibility of Mr Duterte. Nor did they have any authority to do so. In the legal framework of the Court, it is the Prosecutor's function to conduct investigation, formulate the charges and prove the guilt of the suspect/accused, not victims or their legal representative.[45]

39. While fulfilling his professional responsibility as a victims' counsel, it was expected that Mr Khan would become intimately familiar with the facts of the situation (later the case) and, in particular, acts or omissions of Mr Duterte. Yet, the fact that the Prosecutor, who was previously familiar with the facts that lead to the opening of the case, carries out investigation or prosecution of the case at hand does not, on its own,

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[43] See the Request, *supra* note 2, para. 7.
[44] See Annex 6 to the Article 15 Communication, pp. 1- 14.
[45] See the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January", *supra* note 40, para. 93.

give rise to reasonable doubts as to his impartiality.[46] Said circumstances do not raise a question of partiality of Mr Khan or show that he previously made determinations about Mr Duterte's criminal responsibility, from which, he is not free to depart.

40. It is for the Defence to establish that the Prosecutor is beholden to his previously expressed position on the case, if any.[47] Nevertheless, the Request fails to show that Mr Khan is still and strictly bound by the content of the Article 15 Communication.

41. Furthermore, the Defence argues that Mr Khan as a victims' counsel [REDACTED].[48] In his previous role, Mr Khan was legally required to present potential evidence and a comprehensive report to the Former Prosecutor in accordance with the instructions given by his clients. In this regard, pursuant to the United Nations "Basic Principles on the Role of Lawyers", counsel in the exercise of their professional mandate are legally obliged to, *inter alia*, assist their clients in every appropriate way, take legal action to protect their interests, represent their clients before courts and act at all times freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.[49]

42. The Code of Professional Conduct for Counsel at the Court (the "Code") also promotes the same professional obligations by stating that counsel must act in good faith when dealing with the client and abide by their client's decisions concerning the objectives of their representation.[50] In particular, article 26 of the Code explicitly provides that, when required in the course of representation, counsel may communicate with and meet an unrepresented person in the client's interest.[51] But, the

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[46] See the "Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff" (Appeals Chamber), No. ICC-01/05-01/13-648-Red3 OA, 21 October 2014, para. 40.
[47] See the "Decision on the Request for Disqualification of the Prosecutor" (Appeals Chamber), No. ICC-01/11-01/11-175 OA3, 12 June 2012, para. 41.
[48] See the Request, *supra* note 2, paras. 8-9.
[49] See Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, paras. 12-15.
[50] See the Code of Professional Conduct for counsel, 2011, para. 14.
[51] *Idem*, para. 26(1).

Defence does neither allege nor is there any evidence demonstrating that the actions of Mr Khan in his previous role as a victims' counsel were unlawful, unethical or inappropriate. Indeed, the ordinary exercise of assigned legal functions does not give rise to any appearance of bias or a lack of impartiality, but is, rather, part of the clear design of the Statute.[52]

43. Moreover, in order to establish that the person in question appears to *have formed an opinion*, previous involvement in the *case* must entail congruence between the legal issues and factual determinations "*based on the same evidence.*"[53] This is to show that the Prosecutor lacks impartiality where he or she is not free to depart from previous factual findings which he or she has made upon consideration of the same issues and evidence.[54] However, the Defence only argues to the extent that the Prosecution will [REDACTED] for the purposes of the confirmation of the charges hearing.

44. Due to the complex nature of the crimes investigated and prosecuted at the Court, the Office of the Prosecutor habitually relies on thousands of pieces of evidence, including many dozens of witness testimonies. Indeed, the Prosecution's list of evidence of this case contains thousands of items at present. Thus, the fact that [REDACTED] falls far short from establishing that the *Duterte* case is based "*on the same evidence*" that Mr Khan had allegedly collected and formed his opinion during his previous mandate as a victims' counsel. Since the vast majority of the evidence to be presented by the Prosecution against Mr Duterte at the confirmation of charges hearing was not obtained by Mr Khan in the capacity of a victims' counsel, there is nothing else to suggest that he is not free to depart from previous, if any, factual findings which he has made in relation to that [REDACTED].

[52] See the "Reasons for the Decision on the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx) (Plenary of Judges of the International Criminal Court)", No. ICC-01/22-107, 22 November 2024, para. 25.
[53] See the "Decision on the request for excusal" (Presidency), No. ICC-02/11-01/12-69-AnxII, 23 March 2015, p. 3.
[54] *Ibid.*

45. Lastly, the question of impartiality should be examined from the objective perspective of a fair-minded and informed observer, having considered all the facts and circumstances, including *an understanding of the nature of a Prosecutor's profession*.[55] In forming a view regarding the appearance of bias, the fair-minded observer must take into account the "*entire context of the case*".[56] Based on the entire context of the *Duterte* case, nothing in the Request demonstrates that Mr Khan conducted himself in an unlawful or unethical or inappropriate manner in his previous role as a victims' counsel in the past and as the Prosecutor at present. Rather, the facts show that, since being elected as the Prosecutor, Mr Khan has acted in compliance with the Court's legal framework and pursuant to the duties it imposes upon him to investigate and prosecute crimes within the jurisdiction of the Court.

46. The disqualification of the Prosecutor is not a step to be undertaken lightly and a high threshold must be satisfied in order to rebut the presumption of impartiality in order to safeguard the interests of the sound administration of justice.[57] It is for the party requesting the disqualification to demonstrate that Mr Khan lacks impartiality under the requirement of article 42(7) of the Statute and Rule 34(1)(b) and (c) of the Rules.[58] In the present circumstances, the Defence's allegations fall short of meeting this high threshold and thus should be rejected.

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55 See the "Reasons for the Decision on the 'Corrigendum to Request for the Disqualification of Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera from Adjudicating on the Issue of Jurisdiction' filed on 9 May 2025 (ICC-01/21-01/25-130-Corr)", *supra* note 26, para. 23.
56 *Ibid.*
57 See the "Decision on the requests for the Disqualification of the Prosecutor, the Deputy Prosecutor and the entire OTP staff", *supra* note 46, paras. 25 and 26.
58 See the "Reasons for the Decision on the 'Corrigendum to Request for the Disqualification of Judge Reine Adélaïde Sophie Alapini-Gansou and Judge María del Socorro Flores Liera from Adjudicating on the Issue of Jurisdiction' filed on 9 May 2025 (ICC-01/21-01/25-130-Corr)", *supra* note 26, para. 23.

V. CONCLUSION

47. For the foregoing reasons, the Legal Representative respectfully requests the Appeals Chamber to reject the Request.

Paolina Massidda
Principal Counsel

Dated this 26th day of August 2025
At The Hague, The Netherlands