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Court

Original: **English** No.: **ICC-01/21-01/25**
Date: **7 October 2025**

THE APPEALS CHAMBER

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

SITUATION IN THE REPUBLIC OF THE PHILIPPINES

IN THE CASE OF THE PROSECUTOR v. RODRIGO ROA DUTERTE

Public

Public redacted version of "Prosecutor's Response to Defence Request to Disqualify Chief Prosecutor Karim Khan", 18 August 2025, ICC-01/21-01/25-234-Conf

Source: **The Prosecutor**

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

REGISTRY

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

I. Introduction

1. The Prosecutor opposes the Defence Request to Disqualify Chief Prosecutor Karim Khan.[1] The Prosecutor has carefully considered the position, and as previously notified to Pre-Trial Chamber I,[2] does not consider that any conflict of interest arises from his 2018 representation of a group of victims in submitting an Article 15 communication to former Prosecutor H.E. Fatou Bensouda. That was also the initial view of Defence Counsel.[3]

2. Regrettably, the Disqualification Request contains a series of speculative and, at times, wholly untrue *ad hominem* attacks. These only distract from the core issue, which is whether briefly representing a group of victims in submitting an Article 15 communication and meeting one witness on whom the OTP subsequently relies–and one other person who is not an OTP witness–provides sufficient grounds for disqualification. For the reasons set out below, they do not.

3. Notwithstanding the Prosecutor's clear view that there is no conflict of interest, the Prosecutor acknowledges the Appeals Chamber's authority to rule on matters concerning disqualification. If the Appeals Chamber concludes that there is a reasonable apprehension of bias, the Prosecutor will respect that decision and remove himself from the case.

II. Procedural History

4. On 29 June 2018, a legal team—including the Prosecutor—representing [REDACTED] filed a submission to former Prosecutor H.E. Fatou Bensouda, requesting that she apply to the Pre-Trial Chamber to open an investigation into the situation in the Philippines.[4] Whilst the Article 15 Communication was being

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[1] ICC-01/21-01/25-226-CONF "Disqualification Request". The present Response is filed confidentially pursuant to Regulation 23*bis*(1) is as it contains confidential information.
[2] ICC-01/21-01/25-81-CONF "First Notification"; ICC-01/21-01/25-100-CONF "Second Notification".
[3] ICC-01/21-01/25-102-CONF.
[4] PHLOTP-0005-0005 "Article 15 Communication".

prepared, the Prosecutor was present and participated in the interview of one witness (not a victim) and met a second individual. The Prosecutor delivered the Article 15 Communication to former Prosecutor H.E. Fatou Bensouda. Shortly thereafter, the Prosecutor withdrew from the matter and had no further involvement in it.

5. On 24 May 2021, almost three years after receipt of the Article 15 Communication, the former Prosecutor submitted a Request for Authorisation of an Investigation pursuant to Article 15(3).[5]

6. On 16 June 2021, the Prosecutor took a public oath of office, undertaking to perform his duties impartially.

7. On 15 September 2021, Pre-Trial Chamber I authorised the opening of the investigation.[6]

8. On 26 January 2023, following a deferral request submitted by the Republic of the Philippines,[7] Pre-Trial Chamber I authorised the Prosecutor to resume the investigation.[8]

9. On 18 July 2023, the Appeals Chamber dismissed the appeal filed by the Republic of the Philippines.[9]

10. On 10 February 2025, the Office of the Prosecutor applied for an arrest warrant against the Accused, Rodrigo Roa Duterte.[10] The Prosecutor took no part in the review of the evidence prior to the filing of this application, and the application was signed by Deputy Prosecutor Niang.

11. On 6 March 2025, the Prosecutor filed a Notification to Pre-Trial Chamber I, which advised the Pre-Trial Chamber of the Prosecutor's role in the Article 15

[5] ICC-01/21-07.
[6] ICC-01/21-12.
[7] ICC-01/21-14-AnxA.
[8] ICC-01/21-56.
[9] ICC-01/21-77.
[10] ICC-01/21-01/25-80-CONF.

Communication and explained that, having considered the position, the Prosecutor did not consider that grounds for disqualification existed.[11]

12. On 7 March 2025, Pre-Trial Chamber I issued the arrest warrant.[12]

13. On 1 April 2025, the Prosecutor filed a further Notification to the Pre-Trial Chamber to clarify and/or correct certain factual averments in the First Notification.[13] The Second Notification clarified that none of the victims referred to in the Article 15 Communication overlap with any of the victims referred to in the application for an arrest warrant.[14] It also corrected an inadvertent error in the First Notification by confirming that, in 2018, in the preparation of the Article 15 Communication, the Prosecutor was involved in the interview of one individual (not a victim) who is now a Prosecution witness and met one other individual.[15]

14. As the Prosecutor undertook to do in the Second Notification,[16] the Prosecutor brought these matters to the attention of Defence Counsel. On 3 April 2025, the Defence responded.[17] The content and tone of the initial Defence response are in stark contrast to the Disqualification Request, and it is therefore worth setting out the initial Defence response in full (footnotes omitted):

> 1. *Conflicts of interest should be determined by counsel and by counsel alone.*
> 2. *Conflicts of interest may be resolved between counsel and his respective clients – whether by waiver or withdrawal.*
>
> *2. The Defence has noted the Prosecutor's voluntary notifications and the distinction that he makes between his involvement in the situation and in the present case for the purpose of Article 42(7) of the Rome Statute. The Defence, also, notes that one of the individuals referenced in paragraph 5 of the second notification is now slated to be a witness in "the case" against Mr. Duterte whereas the other is to be interviewed. Counsel fully accepts that the neglect to mention this matter in the first notification resulted from an "inadvertent oversight".*
>
> *3. 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*

[11] First Notification.
[12] ICC-01/21-83.
[13] Second Notification, para. 1.
[14] Second Notification, para. 4.
[15] Second Notification, paras. 5 and 7.
[16] Second Notification, para. 11.
[17] ICC-01/21-01/25-102-CONF.

> *[REDACTED]. As quasivictims' 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.*
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> *4. To his credit, the Prosecutor immediately contacted Counsel, after the latter's appointment, to brief him on the matter at hand. Counsel is assured that the Prosecutor is aware of his duty to inform the Pre-Trial Chamber, immediately, of any change in circumstances.*
>
> *5. 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.*

15. On 16 May 2025, the Prosecutor voluntarily took a leave of absence from the Court. The Prosecutor has played no role in the situation in the Philippines or any ongoing case since that date.

16. On 27 June 2025, the Prosecutor understands that the OTP disclosed the Article 15 Communication to the Defence.[18]

17. On 6 August 2025, the Defence filed the Disqualification Request.

III. Submissions

i. *Speculative and ill-founded allegations should be disregarded*

18. The Prosecutor regrets that the Disqualification Request indulges in improper and disparaging speculation, rather than confining itself to the facts. In striving to tarnish the Prosecutor, Defence Counsel repeats insinuations which the OTP has already refuted. In evaluating the merits of the Disqualification Requests, these unfounded *ad hominem* attacks should be disregarded.

19. First, the Disqualification Request insinuates that the Prosecutor must have been involved in former Prosecutor H.E. Fatou Bensouda's request to [REDACTED][19] [REDACTED].[20] The Prosecutor has enquired into this matter in order to fully respond to the Disqualification Request and understands that [REDACTED]. The Prosecutor

[18] Disqualification Request, para. 23.
[19] [REDACTED].
[20] Disqualification Request, para. 8.

did not cause, facilitate, or have any involvement with the OTP request [REDACTED]. The implied suggestion to the contrary at paragraph 8 of the Disqualification Request is untrue.

20. Second, the Disqualification Request speculates that [REDACTED] "appears highly unlikely […] were it not for Mr. Khan's involvement", on the sole basis that "[REDACTED] as Mr. Khan: [REDACTED]".[21] The Prosecutor had no involvement in [REDACTED] appointment. Afforded the opportunity to respond, [REDACTED] confirmed that "[REDACTED]".[22] [REDACTED] is a well-known international practitioner who has appeared in numerous cases and situations before this and other Courts and Tribunals; it is not "highly unlikely" that an individual with his profile would be selected for representation by a witness. Despite being expressly told that the Prosecutor was not involved, Defence Counsel Mr Kaufman persists in engaging in baseless speculation, suggesting that Counsel for the witness would not have been approached but for the Prosecutor's involvement. The Prosecutor had no role whatsoever in the appointment of [REDACTED] and any other aspersion to the contrary is false.

21. Third, the Disqualification Request insinuates either that [REDACTED], was the [REDACTED] lawyer "offered" to represent witness [REDACTED] or that [REDACTED] had some role in suggesting the name of that [REDACTED] lawyer.[23] In assessing this matter, it is pertinent to note that unlike the course Defence Counsel Mr Kaufman adopted in relation to [REDACTED] (where he wrote to [REDACTED] for clarification), he took a different approach when it came to [REDACTED]. [REDACTED] was not afforded the same courtesy of an opportunity to respond to this baseless allegation. Again, the Prosecutor has made enquiries and has been informed by the OTP that the [REDACTED] lawyer in question is an entirely different individual, [REDACTED]. For the avoidance of doubt, [REDACTED].

[21] Disqualification Request, para. 9.
[22] Disqualification Request, fn12.
[23] Disqualification Request, para. 9.

22. The Prosecutor is advised that the OTP informed Defence Counsel, in writing, in July 2025, that the [REDACTED] lawyer [REDACTED]. In full knowledge of this before submitting the Disqualification Request, the Defence nevertheless proceeded to submit to the Appeals Chamber that "[REDACTED]", seeking to leave an impression either that the lawyer for [REDACTED]was [REDACTED] or that [REDACTED] had a role in that person's nomination or possible appointment.[24] This was not a mistake or a misunderstanding. Defence Counsel carefully drafted his filing to leave the impression he sought to convey in his Request. The filing in that regard constitutes speculation without any evidence or basis. It is submitted that the Applicant was indifferent to the truth or falsity of the averments, [REDACTED] or create a spectre of impropriety when none existed. Whilst Defence Counsel cited the email to [REDACTED], it is perhaps telling that he did not cite the very clear email he received from the OTP on this matter.[25] Such conduct served no legitimate forensic purpose.

23. Fourth, the Disqualification Request now pejoratively characterises the Second Notification as an admission that the Prosecutor "had misled the Court."[26] That contrasts markedly with the Defence's earlier filing, which "fully accepts" that the Second Notification "resulted from an inadvertent oversight" and commended the Prosecutor for promptly correcting the error.[27] The Prosecutor has already accepted that the First Notification contained inadvertent factual mistakes. The Second Notification corrected those mistakes in accordance with the Prosecutor's ethical obligation to take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered.[28] The filing of the Second Notification is thus evidence of the Prosecutor's compliance with ethical obligations, not evidence of anything underhand. The Defence itself acknowledged the Prosecutor's integrity and compliance with his professional duties. For the Defence, having praised the

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[24] Disqualification Request, para. 9.
[25] The Prosecutor is informed that the senior lawyer with conduct of the case wrote in July 2025 to Mr Kaufmann in the following terms on this issue "*[REDACTED]. More importantly; there is no point or purpose in disclosing the name of a person who was appointed to possibly serve as potential 55.2 counsel, but who in fact was not chosen by the witness, was not 55.2 counsel, did not attend the interview, took zero part in the interview.*"
[26] Disqualification Request, para. 21.
[27] ICC-01/21-01/25-102-CONF, para. 2.
[28] ICC, Code of Conduct for the Office of the Prosecutor, 5 September 2013, para. 71(g).

Prosecutor's good faith at the time, to now twist that very corrective action into an allegation of dishonesty is a deliberate and misleading distortion. It weaponises an ethical duty to correct the record into a false accusation. The Appeals Chamber should reject such tactics for what they are: an attempt to impugn integrity where integrity was previously expressly recognised.

24. Fifth, the Disqualification Request asserts, having already gratuitously highlighted the sexual misconduct allegations in its very first sentence, that these allegations somehow rebut the presumption of good character to which the Prosecutor is ordinarily entitled.[29] Those allegations are wholly irrelevant to the matter at issue. These allegations were already in existence at the time of the Defence's earlier filing, yet Defence Counsel made no reference to them then. The Appeals Chamber will be aware that they are currently subject of an investigation by another body and no factual findings have been made. To rely on the mere fact of allegations which are untested, unproved and unrelated would be to prejudge the outcome of that investigation and to invite the Chamber into precisely the kind of speculation that is antithetical to fairness.

25. Sixth, and contrary to what is asserted in paragraph 14 of the Request, the Prosecutor did not represent the [REDACTED], as is made clear in the first paragraph of the Article 15 Communication.

26. Seventh, the Request misstates matters in asserting at paragraph 30 that the Prosecutor "had thoroughly convinced himself that Mr Duterte should be prosecuted". It is untrue that the Prosecutor had convinced himself that the evidence sufficed to charge Mr Duterte in 2018—nor was that the purpose of the Article 15 communication. Rather, the Article 15 Communication made it clear that[30]: [REDACTED]."

[29] Disqualification Request, paras. 1, 36.
[30] Page 3 of the Article 15 Communication.

27. Eighth, the Request again engages in speculation when it states at paragraph 30 that "Mr. Khan has acquired unknown information, which he could, conceivably, have used to sway those answerable to him to pursue the prosecution of Mr. Duterte." The Prosecutor has previously stated that he had no involvement in the evidence review [REDACTED]. The OTP has however noted [REDACTED] submitted to the former prosecutor in 2018. This annex is described as a timeline of events prepared by [REDACTED] investigation into the war on drugs that was "submitted to the legal team of Karim A.A. Khan QC". In any event, The Head of the Unified Team of the Philippines case is an immensely experienced and well respected lawyer, working under the supervision of Deputy Prosecutor Niang, both of whom would only be guided by evidence and the law. It is additionally completely untrue that the Prosecutor has discussed [REDACTED] or any witness with them, let alone tried "to sway" them in any manner in relation to this case.

ii. *Applicable Legal Principles*

28. 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."

29. 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:
>
> a. […]

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 legal representatives that, objectively, could adversely affect the required impartiality of the person concerned; […]

30. The Prosecutor is presumed to be impartial.[31] The threshold to disqualify the Prosecutor must be a high one to safeguard the interests of the sound administration of justice.[32]

31. 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.[33] This requires an objective assessment, from the perspective of the "reasonable observer, properly informed".[34] It is insufficient to show that a reasonable observer *could* apprehend bias; instead it must be established by the party requesting disqualification[35] that such apprehension was *objectively reasonable*.[36]

32. Not every prior involvement in a case before the Court will require disqualification. 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

[31] ICC-01/05-01/13-648-Red3 ("*Bemba et al.* Disqualification Decision"), para. 26.
[32] *See by analogy* ICC-02/05-03/09-344-Anx ("*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".
[33] ICC-01/11-01/11-175 ("*Gaddafi & Al-Senussi* Disqualification Decision"), para. 20.
[34] *Gaddafi & Al-Senussi* Disqualification Decision, para. 20.
[35] ICC-01/22-107, para. 20.
[36] ICC-02/05-03/09-344-Anx ("*Banda & Jerbo* Decision on Disqualification of Judge Chile Eboe-Osuji"), para. 13.

might reasonably be doubted.[37] Consistent with the practice of the *ad hoc* tribunals[38] and human rights jurisprudence,[39] a Judge who decided on the issuance of an arrest warrant in pre-trial proceedings is <u>not</u> disqualified from sitting on appeal proceedings at the Court.[40] 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.[41] 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 a with a Judge, prior involvement in an earlier phase, applying different evidence, does not prevent the Prosecutor from impartially applying a different legal test to different evidence at a later phase of proceedings.

33. 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.[42] 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.[43]

iii. <u>*Disqualification is not warranted*</u>

34. Stripped of its innuendo and baseless speculation, the Disqualification Request essentially argues that the Prosecutor's prior involvement in interviewing a witness now relied on by the Prosecution leads to a conflict of interest,[44] or that acting for a

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[37] lCC-01/04-01/06-2138-AnxlIl, p.6 ; ICC-01/04-584-Anx4 p.3.
[38] Rules of Procedure and Evidence of the ICTY, rule 15(C).
[39] Hauschildt v. Denmark, App.No; 10486/83, Judgment of 24 May 1989, paragraph 50.
[40] ICC-01/04-584-Anx4.
[41] ICC-02/11-01/12- 69-AnxII, p.4.
[42] ICC-01/05-01/13-648-Red3, paras. 33-35.
[43] ICC-01/05-01/13-648-Red3, paras. 33-35.
[44] Disqualification Request, para. 35.

group of victims in the Article 15 Communication which named Rodrigo Roa Duterte as a suspect otherwise amounts to a conflict of interest. Neither proposition is tenable.

35. In this regard, it is pertinent to note that after notifying the Pre Trial Chamber that he had acted *pro bono* in submitting an Article 15 communication in 2018 to the then Prosecutor, the Pre Trial Chamber did not intimate that a conflict arose that required any additional action by the Prosecutor.

36. There is nothing unusual or inherently problematic about a prosecutor having previous involvement in factual investigations regarding a crime or situation. The Kosovo Specialist Chamber requires the Specialist Prosecutor to be "independent".[45] 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.[46] Alex Whiting was acting specialist prosecutor at the Kosovo Specialist Chambers, despite having previously prosecuted other cases at the International Criminal Tribunal for Former Yugoslavia (ICTY) related to the mandate of the Kosovo Specialist Chambers.[47] 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 presented to the United Nations Security Council called for and was a precursor to the creation of the ICTY. After preparing that report, William J. Fenrick then served for many years as the Senior Legal Advisor and Head of International Law section at the OTP-ICTY under successive Chief Prosecutors.[48] The Special Tribunal for Lebanon also required the Prosecutor to be independent.[49] Daniel Bellemare became the Prosecutor of the STL sfter previously being Commissioner of the UN International Independent Investigation Commission, which had a substantially identical mandate.

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

The Prosecutor is not aware that the independence or impartiality of these prosecutors was challenged on the basis of their prior involvement in related investigative mechanisms.

37. Similarly, the Presidency determined 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.[50] 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.[51] The statutory provisions on the disqualification of Judges and the Prosecutor are strikingly similar, and, in the absence of any reason for a distinction, the same logic should apply. The Prosecutor too is able to decide issues solely on the basis of the evidence available to him at that time, disregarding anything else.

38. Accordingly, the mere fact of the Prosecutor's involvement in a prior factual investigation cannot suffice for disqualification. Nor do the facts support the Disqualification Request. The Prosecutor did not represent either of the two individuals that he met in 2018 and which were referred to in the Second notification. They were not amongst the victims that he represented. As a result, the Prosecutor did not owe any relevant obligation to those putative witnesses and, certainly, does not owe any obligation to them which subsisted after his withdrawal from that instruction seven years ago. No conflict of interest could therefore arise from the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally in relation to those witnesses.[52] Indeed, a full and complete investigation of the facts is in the interests of the Prosecution, the Defence and the victims.

[50] ICC-02/05-01/09-76-ANX2.
[51] ICC-02/05-01/09-76-ANX2, p.7.
[52] Article 54(1)(a) of the Statute.

39. Moreover, the evidence contained in the Article 15 Communication in 2018 is only one part of the greater body of evidence now available to the Prosecution. Former Prosecutor H.E. Fatou Bensouda did not open an investigation immediately after receipt of the Article 15 Communication but continued gathering material for almost three years. As the Disqualification Request acknowledges,[53] the OTP [REDACTED], and was therefore not reliant on information provided at the interview attended by the Prosecutor. The OTP's investigations continued between the opening of the investigation in September 2021 and the application for an arrest warrant in February 2025. As a result, the material available to the Prosecutor in 2018 at the time of the Article 15 Communication is only a small fraction of the deeper evidential matrix available to the OTP now.

40. Contrary to the Disqualification Request, Article 42(7) does not automatically require disqualification of the Prosecutor for the following reasons:

a. in 2018, when the Article 15 Communication 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. 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 Article 15 Communication concerned whether there was "a reasonable basis to proceed with an investigation".[54] During the investigation phase and in applying for the arrest warrant, the Office of the Prosecutor assesses 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 case is currently at the confirmation stage, which applies the standard of "substantial

[53] Disqualification Request, para. 8.
[54] Article 15(3) of the Statute. See also Article 53(1).

grounds to believe that the person committed each of the crimes charged".[55] The legal test is now different, more stringent, and requires a focus on individual criminal responsibility;

c. the factual matrix is also different since the evidence available to the OTP in 2025 is significantly deeper than that available to the Prosecutor in 2018. The Prosecutor is able to comply with his obligation to apply the legal standard applicable at this stage of proceedings to the evidence currently available and to disregard any other factors.

41. The Disqualification Request also fails to make out the test under Rule 34(1)(b).[56] First, Rule 34(1)(b) relates only to legal proceedings in the Prosecutor's "private capacity". It comes between Rule 34(1)(a), which relates to personal interests, and Rule 34(1)(c), which relates to "[p]erformance of functions prior to taking office". In that sequence, the reference to "private capacity" clearly distinguishes Rule 34(1)(b) from actions carried out in professional capacity, which are the province of Rule 34(1)(c). The Prosecutor did not submit the Article 15 Communication in his private capacity, but in the performance of his professional functions as an international lawyer.

42. Be that as it may, Rule 34(1)(b) applies to "legal proceedings initiated prior to his or her involvement in the case" in which Mr Duterte was or is "an opposing party". An Article 15 communication is submitted before an investigation has even been opened, and certainly before a case has been initiated against any identified individual. It cannot be considered "legal proceedings". It is not a filing before any Chamber. Nor does it trigger any formal legal process. There is no "opposing party" to the Article 15 Communication since no party has any right to respond to or oppose such a Communication. The Article 15 Communication identified [REDACTED] but asking for an investigation into an individual cannot be equated with being an opposing party in a legal process. If the Prosecutor requests authorisation of an

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[55] Article 61(7).
[56] Disqualification Request, para. 35.

investigation, Article 15(3) provides that victims may make representations to the Pre-Trial Chamber but gives no equivalent right to any individual accused, demonstrating that there is no case against any individual and no "opposing party" at that stage of proceedings.

43. Although a potential argument based on Rule 34(1)(c) is not developed in the Disqualification Request, for completeness, the Prosecutor submits that it too is without merit for the following reasons. 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 Article 15 Communication. Accordingly, the test in Rule 34(1)(c) is not engaged at that early stage of proceedings. Further, the Prosecutor could not be expected to have formed an opinion on the case currently defined by the arrest warrant. The evidential holdings available to the OTP now, which will ultimately shape any "case", are significantly deeper than the more limited evidence available to the Prosecutor more than six years ago in 2018.

44. Moreover, 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 was investigated by an assigned team within the OTP, under the direct supervision of a Deputy Prosecutor who had 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;[57]

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

b. The Prosecutor is required to be "highly competent in and have extensive practical experience in the prosecution or trial of criminal cases".[58] This requirement, together with the open competition for the role of Prosecutor, means that in order to demonstrate the required experience it should be anticipated 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. As set out above, it is not uncommon or improper for Prosecutors, and indeed Judges, to have involvement in relevant investigative activities prior to their appointment at the Court. The mere fact of such involvement does not demonstrate an appearance of bias;

d. The obligations of the Prosecutor are entirely different from the obligations of a legal team submitting a request relating to Article 15 on behalf of [REDACTED]. In particular, the Prosecutor must investigate incriminating and exonerating circumstances equally[59] 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 Article 15 Communication would not reasonably impair the Prosecutor's impartiality today;

e. 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) or Article 61(7). No reasonable observer would consider

[58] Article 42(3).
[59] Article 54(1)(a).

that the Prosecutor's ability to apply this test impartially to the evidence now 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;

f. A reasonable observer would not confuse the submissions made 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 Article 15 Communication put forward the case of [REDACTED] [REDACTED]. Its contents should not be equated automatically with the personal opinion of the Prosecutor or any member of the legal team.

45. Assessed in the light of all the circumstances, rather than showing grounds for disqualification, the Disqualification Request actually highlights the limited nature of the Prosecutor's prior involvement in the Article 15 Communication. There is no overlap between the victims briefly represented by the Prosecutor in 2018 and the victims relied upon in applying for the arrest warrant, and therefore no conflict of interest arises. The Prosecutor's [REDACTED], also cannot sensibly create a conflict of interest. Further, the Prosecutor withdrew from representing [REDACTED] shortly after submitting the Article 15 Communication. His last involvement with them was therefore more than seven years ago.

46. When Defence Counsel was advised of the position by the Prosecutor, his initial response was to agree with the Prosecutor that there was "no ostensible reason to doubt the Prosecutor's impartiality or his assertions that he is not conflicted".[60] This initial assessment was correct. There has been no relevant change of circumstances sufficient to justify Defence Counsel's *volte-face*. There continues to be no reason to

[60] ICC-01/21-01/25-102-CONF, para. 3.

doubt the Prosecutor's impartiality or the Prosecutor's assessment that he is not conflicted.

IV. Conclusion

47. In conclusion, the Prosecutor respectfully requests the Appeals Chamber to dismiss the Disqualification Request.

48. During the Prosecutor's leave of absence, this case is being supervised by Deputy Prosecutor Niang. If, contrary to this submission, the Appeals Chamber considers that the Prosecutor's impartiality may reasonably be doubted, the Prosecutor assures the Appeals Chamber that he would fully respect any decision made by the Appeals Chamber. The work of the OTP on this case will continue to be supervised by Deputy Prosecutor Niang. In any event, and to be clear, the Prosecutor will have no involvement in the case against Mr Duterte before the confirmation hearing and until this matter is determined by the Appeals Chamber.

Karim A.A. Khan KC, Prosecutor

Dated this 7th day of October 2025