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**THE APPEALS CHAMBER**

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

**SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I**

**Public**

**Public redacted version of "Prosecutor's Submissions on the Request for the Recusal of the Prosecutor", 29 November 2024, ICC-02/18-99**

**Source: Prosecutor**

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

Mr Karim A.A. Khan KC

**Counsel for Defence****Legal Representatives of the Victims**

Ms Paolina Massidda

**Other**

Arcadia Foundation

**Unrepresented Victims****Unrepresented Applicants for  
Participation/Reparation****The Office of Public Counsel for  
Victims****The Office of Public Counsel for the  
Defence****States' Representatives**Competent authorities of the Bolivarian  
Republic of Venezuela**Amicus Curiae****REGISTRY**

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**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 requests that the “Request for Recusal of the Prosecutor of the International Criminal Court in the Case of Venezuela I Due to Conflict of Interest”<sup>1</sup> filed by the Arcadia Foundation (“Applicant”) be dismissed *in limine*. The Applicant lacks standing under article 42(8), which expressly confines standing to request disqualification of the Prosecutor to “the person being investigated or prosecuted”. The Arcadia Foundation is neither of these. Further, article 42(7) only provides for the Prosecutor to be disqualified “from a case”; at this stage of the *Venezuela I* situation there is no “case” from which the Prosecutor could be disqualified. The Request is also out of time, not having been submitted “as soon as there is knowledge of the grounds on which it is based” in compliance with rule 34(2). The Request is therefore inadmissible, and the Appeals Chamber need not consider its merits.

2. Notwithstanding the inadmissibility of the Request, in the interests of transparency, the Prosecutor provides written submissions on the merits of the Request pursuant to the Chamber’s orders.<sup>2</sup> There are no grounds justifying disqualification. That the Prosecutor’s sister-in-law is one of the lawyers representing the Government of the Bolivarian Republic of Venezuela (“BRV”) does not amount to a “spousal, parental or other close family, personal or professional relationship [...] with any of the parties” within the meaning of Rule 34(1)(a), nor would a fair-minded and informed observer having considered the facts conclude that there is a real possibility of bias. The Prosecutor continues to investigate the *Venezuela I* situation independently, impartially - and actively.

3. These submissions are submitted confidentially and *ex parte* because they include confidential information about ongoing investigations. A public redacted version will be filed simultaneously.

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<sup>1</sup> [ICC-02/18-92-AnxII](#).

<sup>2</sup> [ICC-02/18-94](#), p. 2; [ICC-02/18-97](#), p. 5.

## A. Procedural History

4. On 3 November 2021, the Prosecutor announced his decision to proceed with investigations in the *Venezuela I* situation and concluded the first Memorandum of Understanding with the BRV.<sup>3</sup> As the Prosecutor indicated in the announcement, the decision to open an investigation was made in the face of opposition from the BRV which argued that the conditions for an investigation had not been met.<sup>4</sup>
5. On 21 April 2022, the Office of the Prosecutor (“OTP” or “Office”) notified Pre-Trial Chamber I that the BRV had submitted a deferral request in accordance with Article 18 of the Statute.<sup>5</sup>
6. On 1 November 2022, the OTP applied for authorisation to resume its investigation.<sup>6</sup> The BRV opposed this application.
7. On 9 June 2023, the Prosecutor concluded a further Memorandum of Understanding with the BRV which provided for the establishment of an OTP country office in Venezuela.
8. On 27 June 2023, Pre-Trial Chamber I authorised the investigation to resume.<sup>7</sup>
9. On 14 August 2023, the BRV submitted its Appeal against the Pre-Trial Chamber’s Decision.<sup>8</sup> The OTP opposed the BRV’s appeal in its entirety.

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<sup>3</sup> See ICC press release ICC-OTP-20211105-PR1625.

<sup>4</sup> *Ibid.*

<sup>5</sup> Notification of the Bolivarian Republic of Venezuela’s deferral request under article 18(2) of the Rome Statute, *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-17, 20 April 2022.

<sup>6</sup> Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2), *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-18, 1 November 2022.

<sup>7</sup> Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-45, 27 June 2023.

<sup>8</sup> The Bolivarian Republic of Venezuela’s Appeals Brief against the PreTrial I’s ‘Decision authorizing the resumption of the investigation pursuant to article 18(2) of the Statute’ (ICC-02/18-45), *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-5ANX2-RED, 14 August 2023.

10. On 7 and 8 November 2023, at the Appeal Hearing, the BRV was represented by Mr Ben Emmerson KC, as lead Counsel, and he publicly introduced eight other representatives, including Ms Venkateswari Alagendra.<sup>9</sup>

11. The Prosecutor, with oversight over all the situations and cases before the Court and the strategic direction of the OTP, cannot be personally involved in every filing or hearing. The OTP was represented at the Appeal Hearing by its Senior Appeal counsel, and a team of OTP lawyers and staff. Both Deputy Prosecutors supervised the OTP's conduct of the Appeal Hearing, in their roles supervising the *Venezuela I* situation and the Appeals and Prosecution Legal Coordination Service respectively. The Prosecutor did not attend or participate in the Appeal Hearing.

12. Certainly, from the time of the Appeal Hearing OPCV was aware that Ms Alagendra was one of the lawyers representing the BRV and that she is the sister-in-law of the Prosecutor. No issue was taken during the Appeal Hearings of 7 or 8 November 2023 by any party or participant about Ms Alagendra's presence in the legal team of the BRV.

13. The first formal notification from the BRV regarding the composition of its legal team was received by the OTP by way of correspondence dated 16 February 2024. This communication stated that Mr Emmerson KC and Ms Alagendra had been instructed to advise and assist the Government of the BRV before the ICC, whilst noting that any agreement or engagement would require the express written authorisation of a duly authorised official of the BRV.

14. Almost four months after the Appeal Hearing, on 1 March 2024, the Appeals Chamber dismissed the BRV's appeal.<sup>10</sup> The BRV was represented at the hearing by

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<sup>9</sup> Transcript of Hearing 7 November 2023, page 2 lines 3-14, ICC-02/18-T001-RED2-ENG.

<sup>10</sup> Judgment on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18-89, 1 March 2024.

Mr. Emmerson KC, as lead counsel and other lawyers including Ms Alagendra.<sup>11</sup> Again, no point was taken by any party or participant.

15. The Prosecutor confirms that at no point following these hearings, or the formal notification of the composition of the BRV legal team until the time of the present Application, has the Prosecutor ever received any concerns regarding Ms Alagendra's role in the BRV legal team.

16. The only possible inference from this sequence of events is that none of the parties or participants considered that there was a conflict of interest or appearance of bias on account of Ms Alagendra's presence.

17. As a senior member of the Bar of England and Wales (called in 1992, appointed Queen's Counsel in 2011) the Prosecutor has, at all times, also considered that no conflict of interest exists on the facts of this situation, nor is there an appearance thereof from the perspective of the reasonable observer, properly informed of the relevant facts.

18. The Prosecutor further confirms that the Prosecutor has never discussed any confidential information about any aspects of the *Venezuela I* situation with Ms Alagendra. Indeed, neither does the Prosecutor recall any conversation with Ms Alagendra about public facts involving the *Venezuela I* situation.

19. On 24 April 2024, the Prosecutor concluded a visit to Venezuela and opened the OTP's in-country office in Caracas. The Prosecutor emphasised that in addition to strengthening domestic accountability initiatives, "*without delay, we will continue to pursue our independent investigations into the Venezuela situation*". Whilst the Prosecutor has had various meetings with senior officials of the BRV since the appeal hearing, the Prosecutor confirms that he has never participated in *any* meeting which Ms Alagendra attended.

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<sup>11</sup> Transcript of Hearing 1 March 2024, page 1 line 24 – page 2 line 5, ICC-02/18-T003-ENG.

20. On 12 August 2024, following the presidential elections in Venezuela, the OTP made a public statement that it is *“actively monitoring the present events and has received multiple reports of incidents of violence and other allegations following the presidential election of 28 July in Venezuela”*. The statement continued that the OTP has *“engaged with the Government of Venezuela at the highest-level to underline the importance of ensuring that the rule of law is adhered to in the present moment and emphasise that all persons must be protected from violations that may constitute Rome Statute crimes”* and that the *“investigations are continuing with focus”*, and underlined that *“should any individual or organization have information that may be relevant to this ongoing investigation, we would welcome you to submit this [to the OTP]”*.<sup>12</sup> This addresses an erroneous perception that the Prosecutor has not taken a public stance in relation to alleged recent crimes.<sup>13</sup>

21. On 12 November 2024, the Request was filed.

22. On 22 November 2024, the OPCV submitted its Views and concerns of Victims on the Request for recusal of the Prosecutor, which does not take a position on the merits of the Request but focuses instead on the risk of delay if the Request is granted, and alleged the lack of visible progress in the investigation and a contended emphasis by the Prosecutor on pursuing positive complementarity.<sup>14</sup>

23. The Prosecutor cannot jeopardise ongoing investigations by disclosing activities publicly in response to the Request. The OTP continues to work towards strengthening domestic accountability, whilst also pursuing the OTP’s own independent investigation – this has been the consistent approach of the OTP since the investigation was opened in this situation.

24. In response to concerns that the OTP is prioritising complementarity,<sup>15</sup> the Prosecutor takes the opportunity to underline that complementarity efforts and active investigations in the Venezuela situation have never been planned as consecutive

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<sup>12</sup> [Associated Press Article, ICC prosecutors are monitoring Venezuela, where security forces are cracking down on dissent, 12 August 2024.](#)

<sup>13</sup> ICC-02/18-98, para. 39

<sup>14</sup> ICC-02/18-98, para. 3, 28 and 31.

<sup>15</sup> ICC-02/18-98, para. 3

actions, but are concurrent activities. Investigations have been maturing and progressing since authorisation was granted by the judges of the ICC. This has been made absolutely clear, for example, in the Prosecutor's public end of mission statement from Venezuela in April 2024.<sup>16</sup>

25. This has also been demonstrated by the activities of the OTP team which must remain confidential. [REDACTED].

26. [REDACTED]

### **B. The Request should be dismissed *in limine***

27. The Request should be dismissed *in limine* because the applicant lacks standing, the relevant provisions are inapplicable at this stage of proceedings, and the Request was not made as soon as there was knowledge of the grounds on which it is based. Any one of these three defects is sufficient for the Request to be dismissed *in limine*.

28. The Request seeks the Prosecutor's recusal under article 41(2) of the Rome Statute,<sup>17</sup> however this provision relates to the disqualification of judges and is thus inapplicable in this context. Rather, the relevant provisions governing the disqualification of the Prosecutor are article 42, sub-paragraphs (7) and (8).

29. First, the Applicant lacks standing to bring a request under article 42(8). Article 42(8) of the Statute is unambiguous: a request for disqualification of the Prosecutor may be made by "the person being investigated or prosecuted". This imposes a clear limitation; only the individual being investigated or prosecuted can bring such a disqualification request. The Applicant is neither of these, nor does it claim to represent individuals being investigated in the *Venezuela I* situation, or even to have any concrete link to the parties and participants in the article 18 litigation.<sup>18</sup>

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<sup>16</sup> [Statement of the Prosecutor, 24 April 2024](#)

<sup>17</sup> [Request](#), p. 2.

<sup>18</sup> See ICC-02/18-89 ("[Venezuela Article 18 Judgment](#)"). The Applicant describes itself as a non-governmental and non-profit organisation with a global mandate" which is "dedicated to the protection of human rights and the fight against corruption on a global scale: [Request](#), p. 1.



30. The jurisprudence of this Court has elaborated on the meaning of the phrase “persons being investigated or prosecuted”, both in the context of standing under article 42(8)(a), and the analogous provision on standing to request the disqualification of a judge, article 41(2)(b), which states that “[t]he Prosecutor *or the person being investigated or prosecuted* may request the disqualification of a judge under this paragraph” (emphasis added). Given the same terminology is used in both provisions, the Court’s interpretation of “the person being investigated or prosecuted” under one provision must apply *mutatis mutandis* to the other.

31. In that context, the plenary of judges found inadmissible a request by the Legal Representative of Victims to disqualify a judge under article 41(2)(b) due to lack of standing since victims are not named in article 41(2)(b) amongst those who may seek a judge’s disqualification.<sup>19</sup> The plenary found that the ordinary meaning of article 41(2)(b) was “neither ambiguous nor unreasonable. Nor was there any lacuna in the law which called for further judicial interpretation. The law was plain and determinate as to who was entitled to bring an application for the disqualification of a judge. That right was limited to the Prosecutor and the person being investigated or prosecuted”.<sup>20</sup> Fatal to the Request, the plenary thus confirmed that the LRV did not have standing to seek disqualification; this Applicant cannot be in a better position than the LRV.

32. This interpretation is consistent with the provision’s drafting history. That the drafters made a deliberate choice to limit standing to the persons being investigated or prosecuted is evident from their rejection of a proposal to allow victims to request disqualification of the Prosecutor.<sup>21</sup>

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<sup>19</sup> ICC-01/04-01/07-3504-Anx (“[Katanga Decision on the Disqualification of Judge Christine Van den Wyngaert](#)”), paras. 41-42.

<sup>20</sup> [Katanga Decision on the Disqualification of Judge Christine Van den Wyngaert](#), para. 44. *See also* para. 54 (in which Judge Eboe-Osuji in a concurring separate opinion stated, “There appears to be little room for ambiguity as to whom article 41(2)(b) permits to bring such an application [...] There is no room for ambiguity in that provision, such that the victims may also be read into article 41(2)(b) as among parties and participants who may bring applications for disqualification of judges”).

<sup>21</sup> C. Steains, “Situations that May Affect the Functioning of the Court”, in R.S. Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Inc., 2001), p. 303 (“Also uncontroversial was the decision not to include the concept of the victim being able to make a request for disqualification (which had been originally contained in the Spain/Venezuela proposal) on the grounds that

33. Moreover, this interpretation of article 42(8)(a) is consistent with a reading of the provision in good faith, and in light of its ordinary meaning, purpose and context.<sup>22</sup> On the one hand, it ensures that the persons directly affected by prosecutorial power and discretionary decision-making — namely, persons being investigated or prosecuted — have an adequate mechanism to challenge the Prosecutor’s independence and impartiality in the case against them. On the other hand, it recognises that the Prosecutor is entitled to a presumption of impartiality,<sup>23</sup> such that disqualification should be an exceptional remedy.<sup>24</sup> As such, article 42(8)(a) requires a strict interpretation as to who has standing to request disqualification.

34. The fact that rule 34(3) of the Rules of Procedure states that “any question relating to the disqualification of the Prosecutor [...] shall be decided by a majority of the judges of the Appeals Chamber” is irrelevant to the question of standing under article 42(8)(a). The wording “any question” in this rule, does not confer standing on any person or organisation to raise questions concerning the Prosecutor’s disqualification. Rather, the wording “any question” is mirrored in the chapeau of article 42(8), which goes on in sub-paragraph (a) to expressly limit the field of potential applicants to “the person being investigated or prosecuted”. Similarly, that the plenary found that Mongolia had standing to request disqualification of Judges in relation to article 87(7) proceedings is distinct from this situation: standing was not challenged in that case;

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this notion was inconsistent with the Statute”); *see also* fn. 117 (“The Statute stipulates clearly that only the Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge (art. 41, para. 2 (b)), and that the person being investigated or prosecuted may request the disqualification of the Prosecutor or a Deputy Prosecutor (art. 42, para. 8(a))”).

<sup>22</sup> *See* [Vienna Convention on the Law of Treaties](#), article 31(1). *See further e.g.* ICC-01/05-01/13-2275-Red (“[Bemba et al. AJ](#)”), para. 675; ICC-01/05-01/08-3343 (“[Bemba TJ](#)”), para. 77; ICC-01/04-01/07-3436-tENG (“[Katanga TJ](#)”), para. 45.

<sup>23</sup> ICC-01/05-01/13-648-Red3 (“[Bemba et al. Disqualification Decision](#)”), para. 26 (“[T]he Prosecutor, like the judges, is bound under article 45 of the Statute to exercise his/her functions “impartially and conscientiously”. Accordingly, the Appeals Chamber finds that, despite the obvious difference in the respective roles of the judges and the Prosecutor in the proceedings, a presumption of impartiality is equally applicable to the Prosecutor [...]).

<sup>24</sup> *See by analogy* [Katanga Decision on the Disqualification of Judge Christine Van den Wyngaert](#), para. 45 (finding in the context of article 41(2)(b) requests for disqualification of a judge that such requests may only be brought by the Prosecutor or the person being investigated or prosecuted, as specified in the provision, and not by the victims).

and, in article 87(7) proceedings, the State is directly a party to litigation which could result in a finding against the State.<sup>25</sup> The same cannot be said for this Applicant.

35. Finally, to find that this applicant has standing would lead to an absurd result in which *any* observer of the proceedings, however tenuous their involvement, would be able to request disqualification. Such an interpretation would render article 42(8)(a) otiose; there would have been no need for to drafters to specify who may request the disqualification of the Prosecutor, if any observer can make such a request. Further, it would allow an unlimited field of potential applicants to file any spurious or frivolous disqualification requests, which would be unduly disruptive to the work of the OTP and the expeditious conduct of proceedings before the Court.

36. Second, pursuant to the terms of article 42(8), the earliest point at which a disqualification request can be made is once an individual becomes aware that he or she is the subject of the Prosecution's investigations. Article 42(7) relates to the Prosecutor or Deputy-Prosecutor being disqualified "from a case". Rules 34(1)(a), (b) and (c) all expressly define grounds for disqualification in relation to "the case". Whilst the Request incorrectly refers to "the case of *The Prosecutor v. Nicolás Maduro Moros*" and asserts that "defence counsel" represents Nicolás Maduro Moros,<sup>26</sup> no such case exists before the Court, nor has the Prosecution named any individuals for the purposes of its ongoing investigation. The litigation in the *Venezuela I* situation has involved only the Prosecution and the BRV as parties to the article 18 litigation, and the LRV as a participant.<sup>27</sup> No provision in the Statute permits the Prosecutor to be disqualified from a situation. Nor does any person have standing to seek disqualification at this early stage of the proceedings, since there is no person aware that they are being investigated or prosecuted.

37. Third, rule 34(2) provides that "a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based". This

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<sup>25</sup> ICC-01/22-107, para. 23.

<sup>26</sup> [Request](#), p. 1.

<sup>27</sup> See [Venezuela Article 18 Judgment](#).

requirement is mandatory, reflecting the strong public interest in raising questions of disqualification as early as possible. Ms Alagenda's involvement as one of the lawyers representing the BRV has been known to the parties, participants and public since at least 7 November 2023. No party or participant raised any concerns at the time of the hearing. Absent any adequate explanation, the delay in raising this matter is a further reason to dismiss the Request *in limine*.

38. In sum, the Request should be dismissed *in limine* due to the Applicant's lack of standing, the inapplicability of the provisions relating to disqualification at this stage of proceedings, and delay. On that basis, the Chamber should refrain from delving into the merits of the Request.<sup>28</sup>

### C. The Prosecutor should not be Disqualified

39. 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... ." 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.<sup>29</sup> This requires an objective assessment, from the perspective of the "reasonable observer, properly informed".<sup>30</sup> It is insufficient to show that a reasonable observer *could* apprehend bias; instead it must be established by the party requesting disqualification<sup>31</sup> that such apprehension was *objectively reasonable*.<sup>32</sup>

40. The Prosecutor is presumed to be impartial.<sup>33</sup> On 16 June 2021, the Prosecutor took a public oath of office, undertaking to would undertake his duties impartially.

<sup>28</sup> ICC-01/09-47 ("[Kenya Leave to Participate Decision](#)"), para. 7 ("[O]nce the Chamber has detected that the person concerned lacks a procedural standing before the Court, it should primarily refrain from delving into the merits of his/her application, save for exceptional situations where it deems necessary to ensure, for instance, future clarity, judicial economy and expeditiousness of the proceedings").

<sup>29</sup> ICC-01/11-01/11-175 ("[Gaddafi & Al-Senussi Disqualification Decision](#)"), para. 20.

<sup>30</sup> [Gaddafi & Al-Senussi Disqualification Decision](#), para. 20.

<sup>31</sup> ICC-01/22-107, para. 20.

<sup>32</sup> ICC-02/05-03/09-344-Anx ("[Banda & Jerbo Decision on Disqualification of Judge Chile Eboe-Osuji](#)"), para. 13.

<sup>33</sup> ICC-01/05-01/13-648-Red3 ("[Bemba et al. Disqualification Decision](#)"), para. 26.

The threshold to disqualify the Prosecutor must be a high one to safeguard the interests of the sound administration of justice.<sup>34</sup>

41. The facts and circumstances of a particular case are of paramount importance in determining whether disqualification is justified.<sup>35</sup> Other jurisdictions have considered the following factors in determining whether there is a reasonable apprehension of bias in cases concerning *Judges*: the oath of impartiality taken by the impugned person and their ability to carry out that oath through their experience and training;<sup>36</sup> whether the nature and degree of the impugned relationship are sufficiently close to indicate a lack of impartiality;<sup>37</sup> the distinction between the interests of husband and wife;<sup>38</sup> the position of the relative in the legal team and the size of the team;<sup>39</sup> any possible financial interest or benefit to the relative or to the impugned person;<sup>40</sup> and that motions for bias should not be capable of paralysing the legal system.<sup>41</sup>

42. Rule 34(1) of the Rules provides 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) Personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties [...]

<sup>34</sup> 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”.

<sup>35</sup> See, for instance, ICC-01/22-107, para. 20; Malaysia, Perbadanan Pengurusan and Two Square v Two Square Sdn Bhd, [2017] MLJU 948, para. 8.

<sup>36</sup> England and Wales, DAS Legal Expenses Insurance Co Ltd and others, [2003] EWCA Civ, 1071, para. 28(vi).

<sup>37</sup> ECtHR, Micallef v Malta (App. No. 17056/06), Judgment, 15 October 2009, para. 97; Ramljak v Croatia (App. No. 5856/13), Judgment 27 June 2017, paras. 34, 38.

<sup>38</sup> England and Wales, R (United Cabbies Group (London) Ltd) v Transport for London and others, [2019] EWHC 409 (admin), para.36(iv).

<sup>39</sup> ECtHR, Nicholas v Cyprus (App. No. 63246/10), Judgment, 9 January 2018, para. 62.

<sup>40</sup> ECtHR, Nicholas v Cyprus (App. No. 63246/10), Judgment, 9 January 2018, para. 62; England and Wales, DAS Legal Expenses Insurance Co Ltd and others, [2003] EWCA Civ, 1071, para. 28(ii), (iv) and (v).

<sup>41</sup> ECtHR, A.K. v Liechtenstein (App. No. 38191/12), Judgment, 9 July 2015, para. 82.

43. Rule 34(1) thus particularises a non-exhaustive list of the grounds for disqualification. It provides a clear definition of the circumstances in which a personal interest in the case provides grounds for disqualification. In a situation not addressed by the specifics of Rule 34(1), the general test for impartiality would continue to apply.

#### **D. THERE IS NO PERSONAL INTEREST WITHIN RULE 34(1)(A)**

44. Rule 34(1)(a) has no application to the Request because the Prosecutor's relationship with Ms Alagendra is not a "spousal, parental or other close family, personal or professional relationship [...] with any of the parties". The Request is solely premised on the fact that Ms Alagendra is the Prosecutor's sister-in-law. However, this relationship was considered during the drafting process and was *not* included in the text of Rule 34(1)(a). Nor is the relationship of sister-in-law to a legal representative included in other similar international instruments. A sibling-in-law is not an inherently close family relationship, not being a spouse or blood relative. The Request therefore falls outside the scope of the disqualification provision in Rule 34(1)(a).

45. The drafting history makes it clear that subsection 1(a) was not intended to apply to a sibling-in-law relationship. At the Preparatory Commission for the International Criminal Court, in drafting rules concerning the disqualification of Judges, the Prosecutor and Deputy Prosecutors, Spain and Venezuela proposed detailed grounds of disqualification including "the existence of a matrimonial bond or a comparable situation of fact, or the fact of being a relative in the ascending or descending line, or a sibling, by consanguinity or affinity, with any of the persons referred to in the previous article or their legal counsel" (underlining added).<sup>42</sup> This proposal was rejected, and in drafting the detailed grounds in Rule 34(1)(a), the drafter excluded any reference to a "sibling by consanguinity or affinity" or to "legal counsel". As a result, the drafters decided to place the relationship of sibling-in-law to a legal

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<sup>42</sup> See PCNICC/1999/WGRPE/DP.11 (legal-tools.org) ; See, further, *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy S. Lee, 2001, pp. 284 and 302-304.

representative *outside* the scope of the situations requiring disqualification in rule 34(1)(a).

46. In addition to deliberately excluding siblings by affinity from the disqualification provisions in rule 34(1)(a), the drafters chose to include the adjective “close” before “family”. This inclusion was recognised to be important “in order to establish an appropriate threshold for such relationships”.<sup>43</sup> The ordinary and natural meaning of the inclusion of “close” is to restrict the scope of the provision. Further, the Rules must be capable of being applied to Prosecutors and Judges from all cultures; sibling-in-law cannot be said to be an inherently close relationship being neither a blood relative nor a spouse or partner.

47. This interpretation of Rule 34(1)(a) is consistent with other similar rules. The ICC Staff Rules provide at Rule 104.12(a) that “no employment contact may be concluded with the father, mother, son, daughter, brother or sister of a staff member” (not sibling in law).<sup>44</sup> The United Nations Appeals Tribunal has ruled that a “half-brother” did not fall within the equivalent provision in the UN Staff Rules.<sup>45</sup> A sister-in-law is thus outside the scope of relationships that the UN has generally considered would pose a conflict of interest.

48. As regards Judges, other international courts apply a similar test to Rule 34(1)(a). Thus, Rule 28(2)(a) of the European Court of Human Rights Rules of Court is materially identical to Rule 34(1)(a) and applies where the Judge “has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties”.<sup>46</sup> Rule 20(1)(a) of the Rules of Procedure and Evidence applicable before the Kosovo Specialist Chamber provides that grounds for disqualification include “personal interest in the case, including a spousal, parental or other immediate family interest, a

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<sup>43</sup> Lee (2001), p. 304.

<sup>44</sup> This is consistent with other UN Staff Rules, including Rule 4.7(a) of the UN DP Staff Rules.

<sup>45</sup> United Nations Appeals Tribunal, *Surenda Bista v Secretary-General of the United Nations*, Judgment, 28 June 2024, para. 66.

<sup>46</sup> See, further, Rule 9(4)(b) of the Rules of Court, African Court on Human and Peoples’ Rights.

personal, professional or subordinate relationship, with any of the Parties or Victims' Counsel [...]"'. These texts consistently make no mention of the relationship of siblings by affinity in defining the category of relationships which warrant disqualification.

49. Whilst there are reported international cases addressing impartiality in the context of judges having family relationships with legal representatives appearing before them, it is important to underscore that the position of the Prosecutor is not the same as the position of the Judge in proceedings at the Court and these cases are inapposite. A Judge has to decide between the arguments presented by the parties' legal counsel. The Prosecutor, by contrast, is the chief legal counsel for one of the adversarial parties appearing in cases and situations before the Court. A more relevant analogy is therefore to the ethical rules relating to personal or family relationships with opposing counsel.

50. In this regard, the Codes of Conduct for Counsel applicable at the ICC,<sup>47</sup> the ICTY,<sup>48</sup> and the KSC<sup>49</sup> contain general provisions on conflict of interest, but do not specifically prohibit Counsel representing a party where Counsel's family member represents an opposing party.

51. In the time available, it has not been possible to carry out a comprehensive survey of national practice. That said, the Prosecutor has not been able to find any authority where a Director of Public Prosecutions or person in a similar position would have to recuse themselves if a sibling in law appeared for an adverse party in circumstances akin to the present case. Where national rules address the position of family members, some, such as Japan, provide that there is a conflict in "a matter in which the opposing party is the attorney's spouse, a person with a lineal relationship, a brother or sister, or a person who has kinship with the attorney and lives together".<sup>50</sup> Similarly, in New Zealand, "close personal relationship" is defined to include "relationships of parents

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<sup>47</sup> ICC, Code of Professional Conduct for Counsel, article 16.

<sup>48</sup> ICTY, Code of Professional Conduct for Counsel appearing before the International Tribunal, article 14.

<sup>49</sup> KSC, Code of Professional Conduct for Counsel and Prosecutors before the Kosovo Specialist Chambers, articles 28, 31.

<sup>50</sup> Japan, Basic Rules on the Duties of Practising Attorneys, Federation Rules 70 of 10 November 2004, article 28(1), (available at [https://www.nichibenren.or.jp/library/en/about/data/Basic\\_Rules\\_Practicing.pdf](https://www.nichibenren.or.jp/library/en/about/data/Basic_Rules_Practicing.pdf)).



and children, siblings, spouses, civil union partners, and the relationship between persons living together as partners on a domestic basis".<sup>51</sup> No general principle of law prohibiting siblings-in-law representing opposing counsel can be deduced from national systems.

52. The Request is solely based on the formal categorisation of the Prosecutor's relationship with Ms Alagendra as the Prosecutor's sister-in-law. The bare fact that Ms Alagendra is the Prosecutor's sister-in-law cannot be enough. If the drafters intended a sibling-in-law relationship to be sufficient, then this would have been included in Rule 34(1)(a) expressly. As set out above, the drafters elected not to do so.

53. The relationship of siblings-in-law is not necessarily "close" and is certainly not analogous to the relationships of spouse or parent, which are expressly included in the Rule. A sibling-in-law is not a blood relative and does not have the same shared history as a blood sibling. Depending on culturally specific factors, a sibling-in-law is unlikely to reside in the same house, may not ordinarily reside in the same country and is likely to have entirely distinct financial interests. As an example of the law's approach to close family relationships, the Prosecutor is not aware of any tradition in which a sister-in-law would inherit upon intestacy.<sup>52</sup>

#### **E. NO REASONABLE OBSERVER PROPERLY INFORMED WOULD REASONABLY APPREHEND BIAS**

54. On the facts of the *Venezuela I* situation, no reasonable observer properly informed would reasonably apprehend bias in the present case justifying the disqualification of the Prosecutor. The following factors, taken together, demonstrate that no fair minded and informed observer would conclude that there is a real possibility of bias on the particular facts of this case:

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<sup>51</sup> New Zealand, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, Schedule, clause 1.2 and 5.6.4 (available at <https://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437875.html>)

<sup>52</sup> England and Wales, Administration of Estates Act 1925 s.46 ; Indian Succession Act 1925, s.34.

- a) A fair minded and informed observer would presume the Prosecutor to be impartial, taking into account his oath of impartiality and his years of experience and training to adopt a position of impartiality;
- b) As set out above, the relationship of sister-in-law is not automatically a close or immediate family relationship. Since the jurisprudence relating to judges recognises a distinction between the interests of a husband and spouse, it must also recognise that the interests of husband and sister-in-law are even more remote;
- c) Ms Alagendra does not reside with the Prosecutor or constitute part of his household and she ordinarily resides in a different country on a different continent. The Prosecutor's financial interests are also entirely distinct from Ms Alagendra's. Further, the fair-minded observer would know that Ms Alagendra's financial position cannot be affected by the outcome of the situation, because the Code of Conduct prohibits contingency fee arrangements;<sup>53</sup>
- d) There has been no direct interaction between the Prosecutor and Ms Alagendra relevant to the situation. The Prosecutor has not attended the Appeal Hearing, nor any meeting with Ms Alagendra;
- e) The *Venezuela I* situation is one of 17 situations currently under investigation. The *Venezuela I* situation is led by the Head of the unified team under the direct supervision of a Deputy Prosecutor. The OTP was represented by its senior appeals counsel, during the Appeal Hearing. As a result, the reasonable observer would take into account that the Prosecutor is not micromanaging the *Venezuela I* Situation;

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<sup>53</sup> ICC, Code of Professional Conduct for Counsel, article 21(2).

- f) Similarly, Ms Alagendra is only one of the team of lawyers representing BRV. Lead Counsel was Mr Emmerson KC. It is lead Counsel who has decision-making authority and the primary responsibility to determine the direction and strategy of the legal team.<sup>54</sup> The possibility of bias is further diminished because Ms Alagendra is not even the only co-counsel representing BRV, but only one of a larger team of lawyers;
- g) Article 18 proceedings have concluded with the Appeals Chamber's Decision. There is no litigation pending. The nature, degree and intensity of the involvement of a legal representative of a State in a situation is wholly different and less intense than that of a legal representative of a suspect or Accused in a case. No real possibility of bias exists in the present situation;
- h) A fair minded observer would conclude that the Prosecution has not changed its position in any way since Ms Alagendra's appointment. Quite the contrary - the Prosecution opposed BRV's appeal and succeeded on all points;
- i) The fair-minded observer should also be taken to know the confidential information contained in this filing, which clearly refutes any allegation that the Prosecution has changed its position or delayed investigations. Investigations are ongoing with focus and recent events are being monitored – and that also has been stated publicly;
- j) No objection was made by any party to Ms Alagendra's representation during or after the Appeal Hearing or delivery of the Appeal Chamber's Decision, which were attended by experienced representatives of the OTP, BRV and OPCV. No concerns were raised with the Prosecutor by any member of the Prosecution team. Indeed, even after the Request, the OPCV

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<sup>54</sup> See, for example, Article 7(4) ICC Code of Professional Conduct for Counsel

has not directly supported disqualification.<sup>55</sup> That no party or participant raised any issue either at the hearings or thereafter, would strongly suggest to the fair-minded observer that nobody perceived that there was any real possibility of bias;

- k) Finally, the fair-minded observer would note that granting the Request could have undesirable consequences for the integrity of the legal system. Many Accused may perceive it to be in their interests to disqualify the Prosecutor or Deputy-Prosecutor. If the Request is granted, such persons could seek to manipulate the process by deliberately instructing a family member of the Prosecutor or Deputy-Prosecutor and then filing for disqualification. No systems are in place at the Court for parties and participants to notify all relevant family relationships of their chosen Counsel.

55. The Prosecutor therefore submits that the fair-minded observer would conclude that there is no real possibility of bias on the specific facts of this situation.

#### **F. Response to allegations of procedural deficiencies by the Office of the Prosecutor**

56. In a further submission filed since the Request, the Applicant alleges that the OTP failed to take action following the Applicant's submission of its recusal request via the ICC's official portal in the section designated for complaints directed to the OTP on 8 September 2024.<sup>56</sup>

57. The Office received a submission from Arcadia Foundation *via* its online portal, OTP Link, on or about 8 September 2024. That submission was addressed to the Presidency, nonetheless the Prosecution was considering it. In this context, it must be noted that the Office receives a large volume of submissions via OTP Link which it

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<sup>55</sup> ICC-02/18-98.

<sup>56</sup> [ICC-02/18-95-AnxI](#), pp. 1-2.

must first filter for the credibility and reliability of all information received, and then assess accordingly. The Office does not, as a matter of routine, contact all source providers to advise on procedural matters given the sheer volume of information that the OTP receives. The team forwarded the recusal request to the relevant Deputy Prosecutor on 10 September 2024, and on 12 September this was forwarded to the Immediate Office of the Prosecutor but did not come to the Prosecutor's direct attention for any action. In any event, the Applicant has suffered no prejudice since it had also forwarded the recusal request to the Registry and this was subsequently transmitted to the Chamber for its determination under rule 34(3) of the Rules of Procedure and Evidence.<sup>57</sup>

### Conclusion

58. The Prosecutor respectfully request that the Request be dismissed *in limine* due to the Applicant's lack of standing, the inapplicability of the relevant provisions at this stage of proceedings, and delay.

59. In the event that the Appeals Chamber goes on to consider the merits of the Request, the Prosecutor respectfully submits that the Request fails to demonstrate that the Prosecutor should be disqualified from the *Venezuela I* situation.



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**Karim A.A. Khan KC, Prosecutor**

Dated this 29<sup>th</sup> day of November, 2024  
At The Hague, The Netherlands

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<sup>57</sup> [ICC-02/18-92](#), paras. 2-10.