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OF THE INTERNATIONAL CRIMINAL COURT**

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Public

Prosecution response to Mongolia's "Application for the disqualification of Judges"

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The Office of the Prosecutor
Mr Karim A. A. Khan KC
Ms Brenda J. Hollis

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives
State Authorities of Mongolia

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. Introduction

1. The Plenary of Judges should dismiss Mongolia's application¹ for the disqualification of Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez from participating in Pre-Trial Chamber II's determination of Mongolia's request for leave to appeal² the Chamber's article 87(7) decision referring Mongolia to the Assembly of States Parties ("ASP") for non-compliance with the Court's request to arrest and surrender Vladimir Vladimirovich PUTIN.³ The Application demonstrates neither actual bias/conflict of interest,⁴ nor any absence of objective appearance of impartiality in these Judges as set forth in article 41(2) of the Statute, rule 34(1) of the Rules of Procedure and Evidence, and related jurisprudence.

2. The Prosecution, however, does not oppose the recusal of Judge Aitala from the Presidency and Plenary of Judges convened specifically to deal with the Disqualification Application,⁵ as discussed below.⁶ There is no basis for the recusal of Judge Akane from the Presidency and the Plenary of Judges in connection with the Disqualification Application. The request for her recusal should be rejected for the reasons further discussed below.⁷

II. Submissions

A. There is no basis for Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez to be disqualified from adjudicating the Request for Leave to Appeal

3. Under article 41(2) and rule 34(1), a judge may only be excused from hearing a case if the applicant demonstrates either actual bias or appearance of bias.⁸ *Actual bias* arises where there is a conflict of interest. This is the case, for instance, where a judge, who is the subject of

¹ ICC-01/22-92-Anx, 29 October 2024 ("Disqualification Application" or "Application").

² ICC-01/22-91-Anx, 29 October 2024 ("Request for Leave to Appeal").

³ ICC-01/22-90, 24 October 2024 ("Mongolia Non-compliance/ASP Referral Decision").

⁴ Mongolia does not elucidate what the so-called "perceived conflict of interest" means, as opposed to "actual bias/conflict of interest" or "apparent bias" as articulated in the Court's jurisprudence discussed in paragraphs 4-5 below. See Disqualification Request, p. 2, para. 8; and pp. 13-18. In any event, there are no grounds for disqualifying these Judges however described.

⁵ As noted in paragraph 1, the Disqualification Application requests that the Judges are recused from determining Mongolia's Request for Leave to Appeal the decision referring Mongolia to the ASP for non-compliance with the Court's request to arrest PUTIN.

⁶ See para. 11 below.

⁷ See para. 12 below.

⁸ See also Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010, [ICC-02/05-01/09-76-Anx2](#), p. 5; *Katanga & Ngudjolo* Appeal Decision, [ICC-01/04-01/07-572](#), para. 10.

a disqualification request, participates in the Presidency or deliberations and voting in the Plenary of Judges convened to determine his or her disqualification.⁹

4. Article 41(2) stipulates the threshold test for *apparent bias* as follows: “a judge may not participate in any case in which his or her impartiality *might reasonably be doubted on any ground*.”¹⁰ This includes the circumstances specifically identified in article 41(2) and rule 34(1) (c) and (d), such as a judge’s previous involvement in the case.¹¹ Only previous involvement of a Judge in the same case in more than one phase (i.e., pre-trial, trial or appeal) may be prohibited.¹² According to the Court’s jurisprudence, the standard to assess whether a judge “might reasonably be doubted on any ground” is “whether the circumstances would lead a reasonable observer, properly informed, to apprehend bias in the judge.”¹³ A reasonable and informed observer refers to “an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality, appraised also of the fact that impartiality is one of the duties that Judges swear to uphold.”¹⁴

5. Moreover, this threshold test is concerned “not only with whether a reasonable observer *could* apprehend bias, but whether any such apprehension was objectively reasonable.”¹⁵ The disqualification of a judge is not a step to be undertaken lightly and as such, “a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office, with such high threshold functioning to safeguard the interests of the sound administration of justice.”¹⁶ It follows that “when assessing the appearance of bias in the eyes of a reasonable observer, unless rebutted, it is presumed that the judges of the court are professional judges, and thus, by virtue of their experience and training, capable of deciding the issue before them while relying solely and exclusively on the evidence adduced in the particular case.”¹⁷

⁹ See e.g., Decision on the request for recusal, [ICC-01/04-01/07-1503-Anx2](#), 30 September 2009, p. 2; Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010, [ICC-02/05-01/09-76-Anx2](#), p. 5.

¹⁰ Article 41(2) (emphasis added).

¹¹ See Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010, [ICC-02/05-01/09-76-Anx2](#), p. 5 (underlining that, examples of appearance of bias include “circumstances set out in rule 34(1)(c) and 34(1)(d) of the Rules, which concern an objective appearance impartiality due, *inter alia*, to extra-judicial activities (...”).

¹² See e.g., Article 39(4) of the Statute.

¹³ Decision, [ICC-02/05-03/09-344-Anx](#), para. 11.

¹⁴ [Nahimana et al ICTR Appeal Judgement](#), para. 50; [Čelebići ICTY Appeal Judgement](#), para. 683.

¹⁵ Banda Decision, [ICC-02/05-03/09-344-Anx](#), para. 13.

¹⁶ Banda Decision, [ICC-02/05-03/09-344-Anx](#), para. 14.

¹⁷ Banda Decision, [ICC-02/05-03/09-344-Anx](#), para. 14.

6. Neither actual bias, nor any apparent bias (that is to say, any absence of objective appearance of impartiality) arises from the participation of Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez in Pre-Trial Chamber II's adjudication of Mongolia's Request for Leave to Appeal the Chamber's article 87(7) Mongolia Non-compliance/ASP Referral Decision.

7. *First*, the Judges' participation in issuing the underlying warrant of arrest is not a prohibited prior involvement in the case within the meaning of article 41(2) and rule 34(1)(b), (c) and (d).¹⁸ These provisions only bar a pre-trial judge from participating in the same case at more than one of the pre-trial, trial and appeal stages.¹⁹ This is not the situation here. Indeed, there is no precedent for the proposition that new judges must be sworn in every time a new pre-trial issue is raised, nor would it be consistent with the requirements of fair and expeditious proceedings.

8. Nor does the Judges' participation in the Non-compliance/ASP Referral Decision raise actual or perceived bias in the context of their consideration of the Request for Leave to Appeal. In deciding Mongolia's Request for Leave to Appeal, the Judges will not be determining an "appeal". Rather, like all requests under article 82(1)(d), without engaging in the merits, the Judges will only be deciding – based on objective criteria - whether the issues proposed in the Request meet the threshold test under that provision for the Appeals Chamber to be seised of the appeal.²⁰

9. *Second*, Pre-Trial Chamber II's determination of whether the Request for Leave to Appeal its Mongolia Non-compliance/ASP Referral Decision meets the article 82(1)(d), falls within the Chamber's authority specifically laid down in article 82(1)(d).²¹ The Statutes of the *ad hoc* international criminal tribunals also contain a similar provision.²² Indeed, necessarily,

¹⁸ *Contra* Disqualification Application, e.g., paras. 7-8.

¹⁹ Indeed, a judge who participated in the pre-trial phase of the case is ineligible to sit on the Trial Chamber and the Appeals Chamber hearing the same case. See e.g., Article 39(4) of the Statute.

²⁰ Before granting the request for leave to appeal under article 82(1)(d), the Chamber will have to assess whether Mongolia as the applicant has demonstrated: (i) an (appealable) *issue* arising from the Non-compliance/ASP Referral Decision; (ii) the issue would significantly affect both the fair and expeditious conduct of the proceedings, or the outcome of the trial; and (iii) an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings. See *Said* Decision, [ICC-01/14-01/21-514](#), paras. 13, 18; *DRC* Judgment, [ICC-01/04-168](#), paras. 7-18.

²¹ See also [ICC-01/05-01/13-877](#), para. 8 (finding that the established practice of the Court is that "the chamber issuing the original decision generally rules upon applications for leave to appeal that decision").

²² See e.g., Rule 73(B)(ii) ([International Criminal Tribunal for Rwanda's Rules of Procedure and Evidence](#)); Rule 73(B) ([International Criminal Tribunal for the former Yugoslavia's Rules of Procedure and Evidence](#)); Rule 73(B) ([Special Court for Sierra Leone's Rules of Procedure and Evidence](#)).

chambers of the Court, like courts elsewhere, are invested with powers not only to issue decisions, but also to supervise their enforcement. Therefore, there is nothing exceptional in Pre-Trial Chamber II determining matters related to the enforcement of the warrant for the arrest of PUTIN, including Mongolia's application for leave to appeal the Non-compliance/ASP Referral Decision. Based on these factors, no reasonable observer properly informed of all relevant circumstances, including the Court's legal framework, can reasonably apprehend bias in the Judges participating in the determination of Request for Leave to Appeal in this case.

10. *Third*, Mongolia wrongly relies on rule 34(c) and (d) of the Rules.²³ Rule 34(c) concerns a judge's "[p]erformance of functions, *prior to taking office* [at the Court], 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." Mongolia has not adduced any such prior functions of the Judges that would undermine their impartiality. Nor has Mongolia adduced any evidence regarding the Judges' expression of opinions that objectively could adversely affect their required impartiality under rule 34(d).

B. Judges Aitala and Ugalde may be recused from the Presidency and Plenary, but there is no basis for the recusal of Judge Akane

11. The Prosecution does not oppose the recusal of Judge Aitala from the Presidency in connection with the Disqualification Application.²⁴ Equally, the Prosecution does not oppose the recusal of Judge Aitala and Judge Ugalde from participating in voting or deliberations in the Plenary of Judges²⁵ convened to decide the Disqualification Application. Since the two Judges are the subject of the Disqualification Application itself, their participation in the Disqualification Application would raise a clear conflict of interest.²⁶ The Prosecution notes the order of the Plenary of Judges issued on 5 November 2024 which, "with the exception of Judge Tomoko Akane, Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde

²³ Disqualification Request, paras. 6-7.

²⁴ As noted in paragraph 1, the Disqualification Application requests that the Judges are recused from determining Mongolia's Request for Leave to Appeal the decision referring Mongolia to the ASP for non-compliance with the Court's request to arrest PUTIN.

²⁵ Disqualification Request, paras. 19-23.

²⁶ See e.g., Decision on the request for recusal, [ICC-01/04-01/07-1503-Anx2](#), 30 September 2009, p. 2; Decision on the request of Judge Sanji Mmasenono Monageng of 25 February 2010, [ICC-02/05-01/09-76-Anx2](#), p. 5

Godínez,” was signed by Judge Reine Alapini-Gansou as Acting President.²⁷ Therefore, any concerns of conflict of interest in relation to the two Judges, appear to be moot.

12. The Prosecution notes that Mongolia has only requested Judge Akane’s recusal from the Presidency in connection with the Disqualification Application. However, she is not the subject of the Disqualification Application since she is no longer part of Pre-Trial Chamber II. There is thus no conflict of interest; her prior participation in the issuance of the arrest warrant does not raise actual bias or the appearance of bias. Judge Akane, like any other Judge, cannot lightly be disqualified from discharging her functions based on tangential and speculative reasons. On this basis, the Prosecution opposes Mongolia’s request for her recusal from the Presidency. Her recusal from the Plenary of Judges is similarly unwarranted.

IV. Conclusion

13. For the reasons set out above, Mongolia’s Request for the disqualification of Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez from serving as Judges in the determination of Mongolia’s Request for Leave to Appeal should be denied. The Plenary should also dismiss Mongolia’s request for the recusal of Judge Akane as discussed in paragraph 12 above.

14. The Prosecution does not object to the recusal of Judges Aitala and Ugalde from the Presidency or Plenary for the purposes of the Disqualification Application for the reasons outlined in paragraph 11 above.



Karim A. A. Khan KC, Prosecutor

Dated this 11th of November 2024

At The Hague, The Netherlands

²⁷ [ICC-01/22-95](#). The Order requests Judge Akane, Judge Aitala and Judge Ugalde to present written observations to the Plenary of Judges which will be convened after the Order to address the Disqualification Request.