

ANNEX
Public



**EMBASSY OF MONGOLIA
BRUSSELS**

No A/24-095

The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and with reference to the latter's Note Verbal REG-JCSS-2024-122 dated 25 October 2024, has the honour to forward a Note Verbal No A/24-1568 from the Ministry of Foreign Affairs of Mongolia on asking the Registry's kind assistance in transmitting the attached document to its relevant destination.

The Embassy of Mongolia in Brussels avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration.

Enclosed: 13 pages

Brussels, 29 October 2024



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT
The Hague

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MONGOLIA
MINISTRY OF FOREIGN AFFAIRS

A/24 - 1588

The Ministry of Foreign Affairs of Mongolia presents its compliments to the Registry of International Criminal Court and has the honor to request the Registry to deliver Mongolia's Request to Leave to Appeal and Request for a temporary stay of proceedings to the Pre-Trial Chamber II attached herein. In this regard, the Ministry requests the Registry to deliver Mongolia's Application of disqualification of judges attached herein to the Presidency for its consideration.

The Ministry of Foreign Affairs of Mongolia further has the honor to request the Pre-Trial Chamber II to convene an oral hearing regarding the Request for a temporary stay of proceedings and the Request to Leave to Appeal respectively with the purpose of elaborating and providing additional submission and clarification on critical issues thereof, and requests the Chamber to hold a hearing regarding the Request for a temporary stay of proceedings before the Chamber considers the Request to Leave to Appeal.

In this regard, Mongolia requests the Chamber to convene hearing regarding the Request to Leave to Appeal after the Application of Disqualification of Judges has been fully resolved.

In addition, the Ministry requests the Pre-Trial Chamber II, pursuant to Rule 103 of the Rules of Procedure and Evidence, to issue order inviting expressions of interest as *amici curiae* in judicial proceedings of this Chamber.

Furthermore, the Ministry notes that Mongolia's submission delivered on 03 October 2024 has not been published on the website of the International Criminal Court, resulting in lack of transparency and accessibility, which undermines procedural fairness. Thus, the Ministry requests the Registry to urgently publish these requests, the application of Mongolia and its submission dated 03 October 2024 along with the Pre-Trial Chamber II's decision rendered on 24 October 2024 "Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties" (ICC-01/22) on the official website of the International Criminal Court.

The Ministry of Foreign Affairs of Mongolia avails itself of this opportunity to renew to the Appeals Chamber of the International Court the assurances of its highest consideration.

THE REGISTRY OF
INTERNATIONAL CRIMINAL COURT

The Hague



APPLICATION FOR THE DISQUALIFICATION OF JUDGES

I. Introduction

1. Mongolia respectfully submits this application for the disqualification of Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez of Pre-Trial Chamber II from serving as judges in the specific case and proceedings concerning Mongolia (ICC-01/22).
2. Additionally, Mongolia seeks the disqualification of Judges Tomoko Akane and Rosario Salvatore Aitala from the Presidency in connection with this matter.
3. It is undisputed that questions of appearance and perception lie at the heart of the need to safeguard judicial impartiality. Accordingly, this application is based on the fundamental need to uphold judicial impartiality, as mandated by Article 41(2)(a) of the Rome Statute of the International Criminal Court ("Statute" or "Rome Statute"), to eliminate any risk of an appearance of partiality or a perceived conflict of interest.

II. Procedural Background

4. On 17 March 2023, upon a request submitted by the Prosecution, the Pre-Trial Chamber II, composed of Presiding Judge Tomoko Akane, Judge Rosario Salvatore Aitala, and Judge Sergio Gerardo Ugalde Godínez, issued a warrant of arrest (the "Warrant of Arrest") for President Vladimir Vladimirovich Putin ("President Putin").¹
5. On 24 October 2024, Pre-Trial Chamber II, consisting of Presiding Judge Rosario Salvatore Aitala, Judge Sergio Gerardo Ugalde Godínez, and Judge Haykel Ben Mahfoudh, rendered a decision titled "Finding under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request by the Court to Cooperate in the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties".²
6. On 29 October 2024, Mongolia submitted a "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute" to Pre-Trial Chamber II seeking to appeal the decision regarding Mongolia's alleged non-compliance.
7. Mongolia observes, however, that Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez, who form part of Pre-Trial Chamber II and would therefore rule on Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute", were also responsible for issuing the Warrant of Arrest for President Putin.

¹ Warrant of Arrest for Vladimir Vladimirovich Putin, ICC-01/22-18-SECRET.

² ICC, Pre-Trial Chamber II, Finding under Article 87(7) of the Rome Statute on the Non-Compliance by Mongolia with the Request by the Court to Cooperate in the Arrest and Surrender of Vladimir Vladimirovich Putin and Referral to the Assembly of States Parties, ICC-01/22, 24 October 2024.

8. Accordingly, Mongolia submits that this prior involvement reasonably cast doubt on the judges' appearance of impartiality and gives rise to a perceived conflict of interest, potentially affecting both their ability and the perception of their capacity to adjudicate Mongolia's request fairly and impartially.
9. The authority to decide on the disqualification of judges under such circumstances resides with the plenary session of judges convened by the President of the Court, with the President also holding a casting vote.
10. The current Presidency includes Judge Tomoko Akane as President, Judge Rosario Salvatore Aitala as First Vice-President, and Judge Reine Alapini-Gansou as Second Vice-President.
11. Mongolia respectfully submits that, in addition to the First Vice-President, Judge Rosario Salvatore Aitala, the President of the Court, Judge Tomoko Akane—who also participated in issuing the Warrant of Arrest for President Putin—may reasonably appear to lack impartiality or be perceived as having a conflict of interest, potentially affecting her ability, in her capacity as President, to adjudicate the present matter fairly and impartially.

III. No Challenge to the Integrity or Competence

1. This application does not question the competence, integrity, or professionalism of any judge at this Court. The issue at hand is the appearance of grounds to question impartiality and the perception of a conflict of interest.
2. It is the duty of the Court to ensure that a reasonable observer would not question judges' appearance of impartiality or perceive any grounds for a conflict of interest throughout all proceedings of the Court.

IV. Legal Basis for Disqualification

3. The legal standard for disqualification of a judge at this Court does not necessitate evidence of actual bias; rather, it requires the appearance of reasonable grounds for "doubts" regarding impartiality or a perceived conflict of interest.
4. Article 41(2)(a) of the Rome Statute provides, *inter alia*, that "[a] judge shall not participate in any case in which his or her *impartiality might reasonably be doubted on any ground*".
5. Article 41(2)(c) provides "[a]ny question as to the disqualification of a judge shall be decided by an absolute majority of the judges."
6. In addition, under Rule 34 of the Rules of Procedure and Evidence, the grounds for disqualification of a judge shall include, *inter alia*, the following:

(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;

(d) Expression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.

7. Subsection (c) is particularly relevant, as it notes disqualification grounds related to a judge's prior involvement in functions that could lead to the formation of an opinion on a case. Subsection (d) concerns a judge's previous expressions of opinion, which could affect impartiality.

8. Article 4 of the Code of Judicial Ethics of the International Criminal Court underscores the importance of appearances and perceptions, stating:

1. Judges shall be impartial and ensure the appearance of impartiality in the discharge of their judicial functions.

2. Judges shall avoid any conflict of interest, or being placed in a situation which might reasonably be perceived as giving rise to a conflict of interest.

V. Reasonable appearance of grounds to doubt the impartiality of judges

9. It is well-established in the Court's practice that disqualification of a judge may be warranted based on the *potential existence of an objectively reasonable appearance of grounds to doubt the impartiality of a judge*.³

10. The present case concerns public perception—specifically, the existence of an objectively reasonable appearance of grounds to doubt impartiality.

11. The participation of Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez in issuing the Warrant of Arrest against President Putin on 17 March 2023 gives rise to an objectively reasonable appearance of grounds to question their impartiality in related proceedings,

³ Decision of the Plenary of Judges on the Defence Application for the Disqualification of judges of Pre-Trial Chamber I from the case *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 12 September 2019, ICC-01/12-01/18-458-AnxI-Red, paras. 24-25. See also Decision of the plenary of judges on the 'Defence Request for the Disqualification of a Judge' of 2 April 2012, 5 June 2012, ICC-02/05-03/09-344-Anx, para. 11 ('Banda & Jerbo Disqualification Decision 5 June 2012'); Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of *The Prosecutor v. Thomas Lubanga Dyilo*, 11 June 2013, ICC-01/04-01/06-3040-Anx, para. 9 ('Lubanga Disqualification Decision 11 June 2013'); Decision of the Plenary of Judges on the Defence Applications for the Disqualification of Judge Cuno Tarfusser from the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jean- Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, 20 June 2014, ICC- 01/05-01/13-511-Anx, para. 16 ('Bemba et al Disqualification Decision 20 June 2014'); Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v. Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, para. 38; Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut from the case *The Prosecutor v. Thomas Lubanga Dyilo*, 28 June 2019, ICC-01/04-01/06-3459-Anx, para. 27.

including, *inter alia*, proceedings of Non-Compliance concerning the Warrant of Arrest and Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute."

12. It is therefore procedurally inappropriate for Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez to preside over and adjudicate Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute," given their direct involvement in the issuance of the Warrant of Arrest.

VI. Perception of a conflict of interest

13. In addition to ensuring the appearance of impartiality, judges must also avoid any actual conflict of interest or circumstances that might reasonably be perceived as giving rise to such a conflict.
14. Given their prior involvement, a reasonable observer might perceive a potential conflict of interest, for instance, by concluding that Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez may hold preconceived notions or opinions related case concerning to President Putin or to issues related to Head of State immunity.
15. This perception could suggest that they might be more inclined to uphold their own prior decisions rather than providing the fair, impartial, and thorough consideration warranted.
16. Furthermore, the issuance of the Warrant of Arrest could reasonably be viewed as an expression of the judges' previous opinions, which might appear to compromise their impartiality.
17. This perception of a conflict of interest could negatively affect credibility and confidence in the Court's proceedings, casting doubt on whether subsequent rulings related to the Warrant of Arrest—such as Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute"—would be decided fairly and impartially, free from any bias or conflict of interest.
18. It is therefore procedurally inappropriate for Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez to preside over and adjudicate Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute," given their direct involvement in the issuance of the Warrant of Arrest.

VII. Basis for disqualification of the President

19. The plenary session of judges, convened by the President, holds the authority to decide on the disqualification of judges.
20. According to Rule 4 of the Rules of Procedure and Evidence, decisions of the plenary session are made by a majority vote of the judges present. In the event

of a tie, the President holds a casting vote, effectively granting the President a decisive advantage in such proceedings.

21. Given the President's role in convening the plenary session and the potential to cast the deciding vote, it is essential that the President avoid any appearance of partiality or perceived conflict of interest in this matter.
22. In this case, the involvement of the President of the Court, Judge Tomoko Akane, and the First Vice-President, Judge Rosario Salvatore Aitala, in issuing the Warrant of Arrest for President Putin reasonably raises concerns regarding their impartiality and the potential for a conflict interest.
23. These concerns extend to whether the proceedings of the plenary session would be conducted impartially and fairly. Consequently, these considerations warrant the disqualification of Judges Tomoko Akane and Rosario Salvatore Aitala from the Presidency in relation to this matter.

A. Relief requested

24. Mongolia respectfully requests the Court to appoint *acting* President to convene a special plenary session in accordance with Rule 4(2) of the Rules of Procedure and Evidence for the following purposes:
 - i. To consider disqualification of Judges Tomoko Akane and Rosario Salvatore Aitala from the Presidency in connection with this matter;
 - ii. To consider the disqualification of Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez from serving on Pre-Trial Chamber II and ruling on the Mongolia's "Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute";
 - iii. To issue an interim order suspending the activities of Pre-Trial Chamber II in ruling on the Mongolia's "Request for Leave to Appeal," and to hold such proceedings in abeyance pending the resolution of the request for disqualification of the current Pre-Trial Chamber II judges.
 - iv. Should the plenary determine that it does not have the authority to issue such an interim order, Mongolia respectfully requests that it defer this matter to the competent authority within the Court to consider and, if possible, issue the requested suspension.
25. Mongolia respectfully requests the Court to establish *ad hoc* Presidency to replace the Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez from serving on Pre-Trial Chamber II, in accordance with the Rule 38 of the Rule of Procedure and Evidence and Regulation 15 of the Regulations of the Court.

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