

ANNEX

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**EMBASSY OF MONGOLIA
BRUSSELS**

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The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and has the honour to convey a Note Verbal № A/24-1660 dated 11 November 2024 from the Ministry of Foreign Affairs of Mongolia on requesting the Registry to transmit Mongolia's "Request for Leave to Reply" to Pre-Trial Chamber II, the "Second Urgent Request for Suspensive Effect" to the Appeals Chamber and "Additional Submission in Support of the Application for Disqualification of Judges" to the Judge Reine Alapini-Gansou, Acting President, for due consideration by the Plenary of Judges.

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: 16 pages

Brussels, 12 November 2024



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT
The Hague

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**MONGOLIA
MINISTRY OF FOREIGN AFFAIRS**

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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 for Leave to Reply" to Pre-Trial Chamber II, as well as the "Second Urgent Request for Suspensive Effect" to the Appeals Chamber.

Furthermore, the Ministry request the Registry's assistance in delivering Mongolia's "Additional Submission in Support of the Application for Disqualification of Judges" to the Judge Reine Alapini-Gansou, Acting President, for due consideration by the Plenary of Judges attached herein.

The Ministry of Foreign Affairs of Mongolia avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration and appreciation for its valued cooperation in this matter.



THE REGISTRY OF
INTERNATIONAL CRIMINAL COURT

The Hague

ADDITIONAL SUBMISSION IN SUPPORT OF THE APPLICATION FOR DISQUALIFICATION OF JUDGES

I. Introduction

1. Mongolia respectfully presents this additional submission to aid the plenary of judges in a comprehensive examination of its application for the disqualification of Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez of Pre-Trial Chamber II, as well as Judge Tomoko Akane from the Presidency, in relation to proceedings under Article 87(7) of the Rome Statute of the International Criminal Court ("Rome Statute" or "Statute").
2. Mongolia reiterates and emphasizes that this additional submission based not on any assertion of actual bias, but rather out of respect for the fundamental need to preserve both the fact and the appearance of impartiality in judicial proceedings, especially in matters that directly affect the obligations of a State Party. Mongolia's intent is to assist the International Criminal Court ("ICC" or "Court") in maintaining the highest standards of fairness and integrity, especially in cases bearing significant implications.

II. Preliminary Matters

A. Legal Standing of Mongolia

3. The proceedings under Article 87(7) of the Rome Statute occupy a distinctive position within the ICC's legal framework. Unlike ordinary criminal proceedings, Article 87(7) proceedings assess a State Party's compliance with the Court's cooperation requests, particularly in relation to executing warrants and cooperating with judicial orders. Mongolia, as a State Party and the direct subject of an adverse finding, holds a unique stake in these proceedings. Consequently, Mongolia submits that it has a legally sound basis to raise concerns regarding the impartiality of the judges presiding over its case.
4. Fundamental principles of justice dictate that a party directly impacted by a judicial finding has an inherent right to challenge any perceived lack of impartiality. Although, Article 41(2)(b) primarily names the Prosecutor and the person under investigation or prosecution as parties who may seek the disqualification of judges, it does not preclude Mongolia, as the party directly affected by Article 87(7) findings, from pursuing a legitimate claim to safeguard procedural fairness. The principles of justice and fairness embedded within international legal framework support Mongolia's claim to a participatory role in proceedings where its compliance, reputation, and legal obligations are assessed.
5. Although the Statute does not explicitly extend disqualification rights to States, Mongolia respectfully notes that the Court has, in other contexts, recognized the interests of States as sufficiently significant to justify their participation. In situations where judicial findings hold direct implications for State Parties, it is

consistent with the Court's objectives to interpret Article 41 inclusively. The plenary's recognition of Mongolia's standing here would affirm the Statute's broader purpose of upholding fairness and inclusivity in proceedings.

6. Article 41 was designed to preserve the fairness, objectivity, and integrity of judicial proceedings at the ICC. Restricting the disqualification process to a narrow set of actors, especially when a State Party's legal obligations are in question, risks compromising the fundamental protections that Article 41 seeks to provide. Mongolia's request underscores the need to interpret Article 41's protections in a way that best serves the ICC's mission to deliver impartial justice.
7. Given the distinctive nature of the Article 87(7) proceedings, Mongolia respectfully asserts that it possesses a legitimate interest and clear standing to seek disqualification of judges where it can substantiate a reasonable appearance of bias. Recognizing Mongolia's standing will enable the plenary to fully uphold the principles of fairness and impartiality inherent in the Statute's mandate.

B. Concerns Regarding Procedural Expediency and Fairness

8. Mongolia respectfully questions the markedly expedited timeline applied to its non-compliance proceedings under Article 87(7). Mongolia notes that, in comparison, similar non-compliance cases, such as, but not limited to, those involving Djibouti, South Africa and Jordan, were granted extended procedural timelines that allowed for thorough examination and deliberation. This differential treatment raises significant concerns, as the proceedings against Mongolia have advanced at an *unprecedented* pace, with critical procedural steps compressed or entirely omitted, such as the lack of an oral hearing to allow Mongolia's position to be fully heard and adequately considered.
9. This unwarranted expedited pace limited Mongolia's ability to raise concerns in a timely fashion and, importantly, diminished the opportunities for Mongolia to present its full perspective on critical issues.
10. The accelerated pace of these proceedings, absent a clear procedural justification, creates an impression of mere formality rather than genuine judicial engagement with Mongolia's specific concerns. Mongolia fears that this approach risks sacrificing not only its procedural rights but also the ICC's foundational commitment to impartial and deliberate adjudication.
11. Further, the expedited handling of Mongolia's current application for disqualification on the grounds of "urgency" raises additional concerns, as this accelerated process could undermine both its procedural rights and the ICC's fundamental commitment to impartial and considered adjudication.
12. Mongolia respectfully emphasizes that, as a judicial institution, the ICC's primary duty is to uphold legal standards, even—and especially—when faced

with sensitive issues. The Court's credibility and authority rest on its commitment to apply legal standards consistently and without regard to external pressures or political considerations. Mongolia, therefore, respectfully request the plenary to resist any inclination toward expedience, advocating instead for a rigorous and measured judicial review process.

13. Accordingly, Mongolia requests the plenary to apply a consistent standard to its case, one that aligns with the extended procedural timelines. Such consistency not only ensures fairness but reinforces the ICC's reputation as an impartial judicial body committed to due process.

A. Timing of the Application

14. Mongolia acknowledges the procedural requirement under Rule 34(2) to file a disqualification request as soon as grounds become known. It is important to underscore, however, that the specific concerns underpinning Mongolia's disqualification request did not become evident immediately upon the judges' issuance of the arrest warrant. Rather, these concerns emerged progressively, culminating with the Article 87(7) finding, which placed Mongolia in direct and adverse standing before the Court. Furthermore, the unjustified expedited pace limited Mongolia's ability to timely raise concerns regarding the impartiality of judges.
15. Mongolia respectfully clarifies that it had already initiated the process of preparing its disqualification request when, unexpectedly, the 24 October 2024 decision was issued by the Pre-Trial Chamber II. Mongolia anticipated that the non-compliance proceedings would follow a more deliberative pace, as has been customary in similar cases, allowing for further procedural steps—including an oral hearing, which Mongolia had requested. Given these expectations, Mongolia was working to submit the disqualification request at an appropriate juncture to ensure a fair and unbiased review of the issues raised.
16. However, the issuance of the 24 October 2024 decision before these procedural steps could unfold prompted Mongolia to submit its disqualification request immediately, based on its ongoing concerns regarding the appearance of impartiality. This timeline underscores that Mongolia was already addressing these issues as part of a principled approach to ensure impartial proceedings and was compelled to finalize the filing of its request when it became evident that the process had concluded abruptly.
17. Mongolia respectfully submits that the plenary should consider the unique and evolving circumstances of this application and recognize its timeliness in the interest of fairness and integrity.

B. Continuing Duty to Ensure Impartiality

18. Judicial impartiality is an ongoing duty, and Rule 34(2) should be understood to permit parties to raise reasonable doubts at any stage where credible concerns about a judge's impartiality arise. This ongoing duty is especially relevant in matters where the interests of a State Party are directly affected by judicial findings.
19. Mongolia's application is timely and appropriate, submitted in response to developments that emerged over the course of the Article 87(7) proceedings. Given the expedited nature of these proceedings and the gradual emergence of concerns, Mongolia respectfully requests the plenary to consider the timeliness of the application in light of these factors, thereby ensuring procedural fairness.

III. On the Merits

20. Mongolia's disqualification request is confined to specific circumstances where judges who issued an arrest warrant against a Head of State are now tasked with adjudicating a State Party's compliance with that warrant. This particular combination of roles raises legitimate questions regarding impartiality that do not apply to routine procedural decisions. Mongolia is not advocating for a general rule that would require separate judges for each decision within a given stage of proceedings; rather, it is urging the Court to recognize the appearance of bias in this exceptional context.
21. Article 41(2)(a) and Rule 34(c) prioritize the prevention of any reasonable appearance of partiality. Mongolia respectfully asserts that issuing an arrest warrant for a sitting Head of State creates a unique context in which judges may reasonably be perceived as having a vested interest in affirming their prior decisions. The impartiality expected under international judicial standards is necessarily heightened in cases involving sovereign entities and Heads of State, where political implications may intersect with judicial decisions.
22. Domestic and international judicial practices have established that prior judicial involvement can create a reasonable appearance of bias, particularly when a judge's previous decisions bear directly on the present case. Mongolia's application aligns with these standards, underscoring that the appearance of impartiality is essential for maintaining credibility and trust in international adjudicatory bodies.
23. While administrative efficiency of judiciary is indeed vital, it cannot supersede the need for impartial adjudication, especially in cases with complex and sensitive legal dimensions. Mongolia's request does not seek to compromise the Court's administrative functions but rather calls for an approach that prioritizes judicial integrity. Upholding this principle in the present case will

ultimately bolster confidence in the Court's mission and ensure procedural safeguards for all parties.

24. Mongolia's disqualification request is consistent with the Rome Statute's provisions that aim to uphold judicial impartiality. This submission highlights specific and reasonable concerns within the unique context of the arrest warrant, Article 87(7) and Article 82(1)(d) proceedings, advocating for a measured response that respects both judicial efficiency and procedural integrity. Thus, Mongolia's application will not paralyze the Court but will reinforce its commitment to impartial justice.

IV. Judicial Efficiency and Functioning of the Court

25. Mongolia's application stems from a unique context involving a Head of State of a non-member State, absence of UN Security Council Resolution and alleged non-compliance by a State Party. Mongolia emphasizes that its request is limited to these specific and unusual circumstances, which do not establish a precedent that would disrupt the Court's routine functioning. Recognizing the exceptional nature of this case will allow the plenary to address Mongolia's application without compromising the Court's broader efficiency.
26. The ICC's legal framework already provides for judge replacement in cases where impartiality may reasonably be doubted. Mongolia's application calls upon these mechanisms to be used judiciously in this exceptional situation to safeguard judicial integrity. The Court's existing rules allow for pragmatic solutions in cases where judicial impartiality might be compromised, ensuring that the Court's efficiency remains intact.
27. Mongolia understands that the members of the Presidency have historically participated in administrative decisions regarding chamber composition, even in cases where they previously issued significant rulings. However, Mongolia submits that the present case, involving the issuance of an arrest warrant against a Head of State of a non-member State and absence of UN Security Council Resolution represents an exceptional situation.
28. The objective appearance of impartiality is especially critical in cases where judicial decisions intersect with contexts that may give rise to perceived biases. In this instance, administrative decisions cannot be viewed in isolation from the substantive judicial actions that preceded them, as these prior actions can influence perceptions of fairness.
29. The establishment of an *acting* President and *ad hoc* Presidency for the limited purpose, such as, considering replacements in this exceptional instance would reinforce the ICC's role as an independent judicial institution that prioritizes fairness, impartiality, and consistency. Mongolia respectfully asserts that, especially in cases involving State compliance, judicial bodies must take all necessary measures to avoid any appearance of bias, thus strengthening the

Court's reputation among State Parties and the international community at large.

30. Mongolia remains committed to cooperating with the Court and respectfully request the plenary to consider this supplementary submission with the care and diligence reflective of the ICC's mission to uphold impartial justice.

V. Relief sought

31. In addition to the relief sought in the submission dated 29 October 2024, Mongolia respectfully requests that the Plenary of Judges grant the following additional relief:

(i) Permit Mongolia's standing to bring forth a disqualification application in circumstances where the impartiality of judges may reasonably be questioned, as a State Party directly impacted by the Court's findings;

(ii) Ensure that the plenary of judges is granted an adequate and extended period to thoroughly and genuinely consider Mongolia's submission well in advance of the session of the plenary of judges, preventing any rushed or expedited review of the disqualification to allow judges ample time for a comprehensive and impartial evaluation and consideration;

(iii) Ensure that the plenary session is not convened in a rushed or expedited manner for the disqualification review, and that a sufficiently extended period is provided to allow judges ample time for thorough and unbiased deliberation; and

(iv) In the event that the disqualifications are granted, establish an *ad hoc* Presidency specifically for the purpose of appointing a reconstituted panel of judges, free from potential conflicts of interest, to oversee all further proceedings related to Mongolia's case under Articles 87(7) and 82(1)(d).

32. Mongolia appreciates the plenary's careful and thorough consideration of this additional submission, in line with the ICC's commitment to the highest standards of judicial integrity and impartial justice.

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