

ANNEX
Public



**EMBASSY OF MONGOLIA
BRUSSELS**

A/24- 112

The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and has the honour to request the Registry to forward Mongolia's "Request for partial reconsideration of the decision on the 'application for the disqualification of judges', or alternatively, a submission of a new application for disqualification" to the Plenary of Judges and "Request for reconsideration of "decision on Mongolia's request for leave to appeal, temporary stay of the proceedings, and related matters"" to the Pre-Trial Chamber II of the International Criminal Court.

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

Enclosed: 23 pages

Brussels, 2. December 2024



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT
The Hague

**REQUEST FOR PARTIAL RECONSIDERATION OF THE DECISION ON THE
“APPLICATION FOR THE DISQUALIFICATION OF JUDGES,” OR
ALTERNATIVELY, A SUBMISSION OF A NEW APPLICATION FOR
DISQUALIFICATION**

I. Introduction

1. Mongolia respectfully submits this request for partial reconsideration of the decision denying the disqualification of Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez from Pre-Trial Chamber II. Alternatively, Mongolia submits a new application for their disqualification.
2. Mongolia contends that the continued participation of these judges undermines the fairness and integrity of the proceedings, given their prior involvement in rendering the warrant of arrest against President Vladimir Vladimirovich Putin (“President Putin”) and deciding on issues central to the current proceedings.
3. Mongolia seeks reconsideration based on new facts and evidence that reveal the potential for injustice if the decision is allowed to stand unaltered.
4. Additionally, Mongolia withdraws its previous application for the disqualification of Judge Tomoko Akane, the President of the International Criminal Court (“ICC” or the “Court”), and expresses confidence in her impartiality to adjudicate these proceedings.

II. Procedural History

5. On 17 March 2023, Pre-Trial Chamber II, composed of Judge Akane, Judge Aitala, and Judge Ugalde, issued a warrant of arrest for President Putin (the “Arrest Warrant”).
6. On 24 October 2024, the same Chamber, now including Judge Haykel Ben Mahfoudh, issued a “Finding under Article 87(7) of the Rome Statute” concerning Mongolia’s non-compliance with the Court’s request to arrest and surrender President Putin. Mongolia’s non-compliance was referred to the Assembly of States Parties, in accordance with regulation 109(4) of the Court’s Regulations.
7. On 29 October 2024, Mongolia submitted a “Request for Leave to Appeal Pursuant to Article 82(1)(d) of the Rome Statute,” challenging the Non-Compliance Finding and
8. On the same date Mongolia submitted its request for the Disqualification of Judges to the Plenary of Judges.
9. On 5 November 2024, the plenary of judges issued an order requesting written observations from the three challenged judges regarding the Disqualification Request.
10. On 11 November 2024, the Office of the Prosecutor filed a response to Mongolia’s Disqualification Application.

11. On 13 November 2024, Mongolia filed additional submissions before the Plenary of Judges.
12. On 15 November 2024, Mongolia requested leave to reply to the Prosecutor's response, and that same day, the plenary, excluding Judges Akane, Aitala, and Ugalde, met to discuss the Disqualification Request, ultimately issuing a notification rejecting the request with reasons to follow.
13. On 29 November 2024, the Pre-Trial Chamber issued the Decision on Leave to Appeal, rejecting Mongolia's request on the grounds that an Article 87(7) finding is not an appealable decision and that Mongolia did not meet the required criteria.
14. On 2 December 2024, Mongolia filed a request for reconsideration of the Decision on Leave to Appeal and a stay of proceedings until the Plenary has resolved this request for reconsideration.

III. Applicable law

A. Legal Standards for Reconsideration and Disqualification

15. Reconsideration is an exceptional measure, warranted when new facts or arguments arise that could prevent an injustice. It may also be warranted when a clear error of reasoning has been demonstrated or when reconsideration is necessary to ensure fairness and justice.¹
16. The prior involvement of Presiding Judge Aitala and Judge Ugalde in substantive issues central to the current proceedings, combined with new evidence of their publicly expressed views, warrants reconsideration or disqualification to prevent a miscarriage of justice.

B. Relevant law

17. Article 41(2) of the Statute provides:

(a) A judge shall not participate in any case where their impartiality could reasonably be questioned on any ground. A judge shall be disqualified from a case under this provision

¹ Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Decision on Defence request for reconsideration of Decision on requests related to the submission into evidence of Mr Al Hassan's statements, ICC-01/12-01/18-2414, para. 7; Prosecutor v. Ali Muhammad Ali Abd-al-Rahman ('Ali Kushayb'), Decision on Defence request for reconsideration of "Decision on Defence submissions on cooperation with Sudan", ICC02/05-01/20-650-Red, para. 10; Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the 'Decision on witness preparation and familiarisation', ICC-01/12-01/18-734, para. 11; Prosecutor v. Bosco Ntaganda, Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table', ICC-01/04-02/06- 2241, para. 4; Prosecutor v. Dominic Ongwen, Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, ICC-02/04-01/15-468, para. 4; Prosecutor v. Jean-Pierre Bemba Gombo et al., Decision on Defence Request for Reconsideration of or Leave to Appeal 'Decision on "Defence Request for Disclosure and Judicial Assistance"', ICC-01/05-01/13-1282, para. 8; Prosecutor v. William Samoei Ruto & Joshua Arap Sang, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, para. 19; Prosecutor v. Thomas Lubanga Dyilo, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, para. 18.

if, for example, they have previously been involved in the case in any capacity before the Court, or in a related criminal case at the national level involving the person under investigation or prosecution. A judge may also be disqualified on other grounds specified in the Rules of Procedure and Evidence.

(b) The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.

(c) Any issue concerning the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge may submit comments on the matter but shall not participate in the decision.

18. Rule 34 of the Rules provides, in relevant part, in addition to the grounds set out in Article 41(2) and Article 42(7), the following grounds for the disqualification of a judge, the Prosecutor, or a Deputy Prosecutor are also recognized:

(c) Having performed functions prior to taking office that might have led them to form an opinion on the case, the parties, or their legal representatives, in a way that could objectively undermine their required impartiality;

(d) Publicly expressing opinions, through the media, in writing, or through other actions, in a manner that could objectively undermine their required impartiality.

19. Code of Judicial Ethics of the ICC, Article 10 states that:

1. Judges shall exercise their freedom of expression and association in a manner that is compatible with their office and that does not affect or appear to affect judicial independence or impartiality.

2. While judges are free to participate in public debate on matters pertaining to legal subjects, including academic publications, the judiciary or the administration of justice, they shall not comment on pending cases and shall avoid expressing views which may undermine the standing and integrity of the Court. In commenting on decisions or judgements of the Court, judges should show at all times judicial restraint and be mindful of the principles set out in this Code.

C. Applicable legal standards

20. Mongolia agrees with the Plenary of Judges that the disqualification of a judge is a serious matter and should not be undertaken lightly. A high threshold must be met to rebut the presumption of impartiality that attaches to judicial office.
21. Mongolia agrees with the Plenary of Judges that justice must not only be done, but must also be seen to be done. Impartiality should be assessed from the perspective of a fair-minded and informed observer. This observer, considering all relevant facts and circumstances, should determine whether there is a reasonable apprehension of bias. This fair-minded observer is objective and takes into account the nature of the judge's profession.
22. Mongolia agrees that, in assessing the appearance of bias, the fair-minded observer must consider the full context of the case.

IV. Withdrawal of Previous Application Regarding Judge Tomoko Akane

23. Mongolia acknowledges the importance of judicial impartiality and fairness in the proceedings before the Court. Upon further consideration, Mongolia has decided to withdraw its previous application for the disqualification of Judge Tomoko Akane from the Presidency in connection with this matter.
24. Mongolia expresses its confidence in Judge Akane's ability to preside over the proceedings impartially and without any perceived conflict of interest.

V. Grounds for Reconsideration

A. Error in reasoning: Prior Involvement in Deciding Substantive Issues

25. The Plenary of Judges erred in its reasoning when it concluded that "no actual nor reasonable apprehension of bias arises in respect of Judges Aitala and Ugalde." The Plenary stated that the judges acted in accordance with their judicial duties under the Statute, including issuing the arrest warrant under Article 58, and making decisions under Article 87 concerning cooperation by States Parties. However, Mongolia contends that the involvement of these judges in making significant substantive decisions, such as those related to the immunity of a Head of State, raises concerns about impartiality in subsequent proceedings concerning the same issues and same individual.
26. Mongolia contends that Judges Aitala and Ugalde, having already issued an arrest warrant against President Putin, cannot be expected to impartially reconsider the same substantive legal issues, particularly the question of immunity concerning President Putin.
27. This is especially critical given that these judges have already ruled on the immunity issue, determining that President Putin is subject to arrest and not entitled to immunity. Since Mongolia's legal proceedings are directly tied to the immunity issue concerning President Putin, it is unreasonable to expect these same judges to reassess such fundamental legal questions with impartiality.
28. Mongolia emphasizes that its position is not that judges should be disqualified from all future cases involving similar crimes or proceedings. Rather, Mongolia asserts that once judges have made definitive rulings on key issues concerning an individual—such as the immunity of President Putin—they should not sit on subsequent proceedings involving the same individual and the same substantive issues. Allowing the same judges to reconsider and rule on the same substantive matters, particularly when they have already made a ruling on those issues, undermines the fairness and integrity of the proceedings.
29. It is not a matter of judges being disqualified from cases involving similar factual scenarios, but rather ensuring that they do not revisit decisions on substantive legal questions that they have already adjudicated. In this case, the issue of Head of State immunity is central, and the same judges who have

already ruled on the matter cannot be expected to impartially decide on it again in the context of Mongolia's legal proceedings.

30. Thus, Mongolia asserts that it is neither fair nor just for Judges Aitala and Ugalde, having already formed opinions and rendered decisions on substantive issues related to the immunity of President Putin, to preside over and decide Mongolia's legal proceedings, which involve the same individual and the same issue of immunity.

B. Concerns Regarding the Expediated Decisions

31. Mongolia is concerned by the apparent haste with which Pre-Trial Chamber II rendered its Decision. The Chamber issued the Decision on the request for leave to appeal on 29 November 2024, just days before the Assembly of States Parties ("ASP") session scheduled for 2 December 2024.
32. Mongolia questions both the legal basis and reasoning behind such urgency. The Chamber's emphasis on expeditiousness, seemingly driven by the desire to resolve the matter before the ASP session, should not take precedence over the fundamental principles of procedural fairness and due process.
33. The need to issue a decision before the ASP session does not provide a legitimate or legally sound justification for curtailing Mongolia's right to be heard or for preventing a thorough consideration of its legal arguments.
34. This undue haste raises concerns that factors unrelated to the legal merits of the case may have influenced the Chamber's decision-making process. Such external considerations undermine the integrity of the judicial proceedings and erode trust in the judicial system.
35. The Chamber's focus on efficiency and timing suggests that the motivation for its decision may not have been purely legal but political—driven by a desire to resolve the matter before the ASP session, potentially at the cost of fairness and justice.
36. Mongolia is concerned that the judges' pre-existing views on issues related to President Putin, including immunity and the situation in Ukraine, may have influenced their actions. It appears that the judges may be attempting to make a move that is driven by political motivation rather than adhering strictly to legal principles.
37. Mongolia further notes with concern the statement by the two judges in their observations, in which they requested that the Plenary of Judges handle the matter with urgency to provide clarity for the ASP. Mongolia submits that this urgency has come at the expense of its procedural rights, with the decision seemingly prioritized for political expediency rather than legal fairness.
38. Moreover, the Chamber's rush to issue a decision before the ASP session, particularly in light of the timing, only reinforces Mongolia's concerns regarding the impartiality of the judges. The haste, coupled with the apparent external

motivations, contributes to our allegation of bias, undermining confidence in the fairness of the proceedings.

C. New Evidence Affecting Impartiality

39. Judicial impartiality requires that a judge approach each case with an open mind, free from preconceived opinions or biases. A judge who has publicly expressed strong views on issues such as immunity, responsibility, or the legal treatment of heads of state undermines the perception of impartiality.
40. This is particularly concerning when the judge is tasked with deciding core issues of the case, such as whether President Putin is entitled to immunity in the context of the arrest warrant. A judge who has already taken a firm public stance on the legal status of an individual or on key principles of international law risks actual or apparent bias, even if they consciously attempt to maintain neutrality in their judicial role.
41. Mongolia has obtained new evidence indicating that Presiding Judge Rosario Salvatore Aitala authored a book titled *Diritto internazionale penale* (Mondadori, Milano, 2021).² In this publication, Judge Aitala expresses strong opinions on immunity issues directly relevant to the current case involving Mongolia.
42. Notably, in *Part 2, Chapter 3, Section 7* of the book, Judge Aitala discusses the Al-Bashir case and the concept of head-of-state immunity, personal and functional immunity, suggesting that such immunity does not bar prosecution by international courts for international crimes. These statements raise concerns that Judge Aitala may have preconceived views on the very issues under consideration in Mongolia's case, thereby affecting his impartiality.
43. Furthermore, Judge Aitala authored an article titled "*Nel Fragore Delle Armi La Legge Non È Silente.*" In this article Judge Aitala expresses clear opposition to President Putin's actions, particularly regarding the ongoing conflict in Ukraine. The article also touches on issues related to international law, especially concerning the prosecution of state officials and war crimes.³
44. This new information raises concerns about Judge Aitala's impartiality in relation to Mongolia's proceedings. His publicly stated views on Russia and President Putin could suggest a preconceived stance on the legal questions central to the case, which may undermine the fairness of the judicial process. Given the sensitive nature of the case, especially if it involves issues of state accountability or war crimes, such prior opinions could potentially be seen as a conflict of interest, compromising the perception of objectivity in the proceedings.

² Rosario Salvatore Aitala, *Diritto internazionale penale*, Mondadori, Milano, 2021, 368 pages, isbn: 9788800792677.

³ Aitala, Rosario, and Fulvio M. Palombino. "*Nel fragore delle armi la legge non è silente: La giustizia internazionale potrebbe occuparsi dei crimini commessi in Ucraina, ma lo sbarramento politico lo rende improbabile. Il ruolo della CPI e la questione dei neonazisti. Come decrittare la 'dichiarazione di guerra' di Putin.*" *La Russia cambia il mondo*, no. 2, 2022, 4 Mar. 2022, updated 5 Mar. 2022.

45. The appearance of bias, or the perception that a judge may have prejudged the key issues, can jeopardize the integrity and legitimacy of the legal process.
46. The new evidence regarding Judge Aitala's published works has not been considered in the previous proceedings and must be examined to assess its impact on the judge's impartiality. This material should be reviewed as part of the reconsideration process, as it could indicate a conflict of interest or bias that warrants disqualification.
47. An article authored by a judge is a public declaration of their views. In the context of a high-profile case such as this, such writings may influence public perception and create a situation where parties feel that the judge's impartiality has been compromised. Even if Judge Aitala believes his prior views will not influence his decision-making, the appearance of bias—especially in cases involving situation in Ukraine and head-of-state immunity—raises serious concerns about the fairness of the process.
48. The ICC has consistently emphasized the importance of both actual impartiality and the appearance of impartiality. The ICC highlighted that the "appearance of impartiality" is a critical component of the right to a fair trial. Similarly, the Court reaffirmed that "the perception of impartiality is as important as actual impartiality," and that any actions that could create doubt about a judge's fairness must be avoided.⁴
49. In light of these precedents, Judge Aitala's published views—particularly those that may reveal a predisposition toward certain legal outcomes—could reasonably be perceived as creating actual or apparent bias. While judges are free to express opinions and contribute to academic discussions, the publication of highly relevant works on such central issues case is problematic when the same judge is involved in adjudicating those very issues.
50. Mongolia submits that these publications affect, or appear to affect, the judicial independence and impartiality of Judge Aitala, and that these publications undermine the standing and integrity of the Court.

D. Procedural Error: Lack of Opportunity to Respond to the Prosecutor's Submissions

51. Mongolia submits that a procedural error occurred during the consideration of its previous disqualification application, specifically regarding the lack of an opportunity to address or respond to the Prosecutor's submissions prior to the rendering of the decision.

⁴ 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. 67; 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. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, 8 July 2019, ICC-01/12-01/18-398-AnxI, para. 24; Decision of the Plenary of Judges on the Defence Request for the Disqualification of Judge Kuniko Ozaki from the case of *The Prosecutor v. Bosco Ntaganda*, 20 June 2019, ICC-01/04-02/06-2355-AnxI-Red, para. 20; Plenary of the Judges, *The Prosecutor v. Paul Gicheru*, Reasons for the Decision on the 'Request for the Disqualification of Judge Miatta Maria Samba' dated 17 September 2021 (ICC-01/09-01/20-173-Conf), 1 November 2021, ICC-01/09-01/20-205-Red, para. 22.

52. The principle of *audi alteram partem*—the right of a party to be heard and to respond to all arguments and evidence presented against it—is a cornerstone of procedural fairness, as enshrined in international law and the Rome Statute.
53. While Mongolia notes that the Plenary has not formally considered the Prosecutor's submission, it is nonetheless available to the public, and therefore, Mongolia must be allowed to address the content therein. The failure to provide Mongolia with an opportunity to respond to the Prosecutor's submissions has hindered its ability to fully present its case, including addressing any arguments or evidence that may adversely affect its position.
54. This procedural irregularity undermines the integrity of the judicial process and constitutes an additional ground for reconsideration of the decision. Alternatively, it supports the submission of a new application for disqualification.
55. Mongolia respectfully asserts that rectifying this procedural error is essential to uphold the principles of justice and fairness, which are fundamental to the Court's mandate and the right to a fair trial.

VI. Necessity to Prevent an Injustice

56. Mongolia submits that the reconsideration of the previous decision denying the disqualification of Judges Aitala and Ugalde is necessary to preserve the integrity of the judicial process. The principle of impartiality is at the heart of international justice, particularly in proceedings before the Court. Where there is a reasonable apprehension that the impartiality of the judges may be compromised—due to prior involvement, public statements, or pre-existing opinions on key issues—the need for reconsideration becomes paramount to avoid potential injustice.
57. The decision to allow Judges Aitala and Ugalde to continue participating in proceedings that directly concern the immunity of President Putin raises serious concerns about the impartiality of the Court's process. Both judges have already ruled on critical legal questions that are central to the current proceedings, particularly the issue of immunity. Allowing them to continue in their roles, despite these prior decisions, risks compromising the fairness of Mongolia's legal position and could lead to a miscarriage of justice.
58. Moreover, public statements made by judges on similar matters—especially concerning the situation in Ukraine and immunity—further reinforce the perception that their impartiality could be questioned. Given the sensitive nature of this case, the continued involvement of these judges risks creating an appearance of bias, which could undermine the legitimacy of the ICC in the eyes of both the parties involved and the broader international community.
59. The right to a fair trial, as enshrined in international law, guarantees that parties to a case have an opportunity to be heard and to challenge any factors that may compromise the impartiality of the judicial process. Mongolia's concerns regarding the impartiality of Judges Aitala and Ugalde are not just

theoretical; they are grounded in concrete facts and new evidence, including their prior rulings on matters directly relevant to the case.

60. It is not simply the fact of prior involvement that raises questions, but the content of their previous rulings, writings, and public statements, which are highly relevant to the legal issues currently before the Court. Judicial impartiality requires not only the absence of bias but also the avoidance of any appearance of bias. In this case, the appearance of impartiality is significantly compromised due to the judges' prior rulings and publicly expressed views on issues central to the case.
61. The objective of this request for reconsideration is not to challenge the competence or qualifications of the judges, but rather to protect the fairness of the judicial process and to prevent harm to Mongolia's legal interests. The fairness of judicial proceedings must be assured not only through legal arguments but also by the perception of impartiality. Where new evidence suggests that a judge's views may influence their decision-making, reconsideration of their participation is essential to prevent any adverse impact on Mongolia's case.
62. The integrity of the ICC, as the foremost institution for the prosecution of international crimes, depends on its ability to inspire confidence in its impartiality and fairness. If this case is perceived as being tainted by bias or undue influence, it risks undermining the Court's credibility and authority in the international legal community. Reconsideration of the disqualification decision is, therefore, a crucial step to ensuring that the Court's proceedings remain just and that any appearance of injustice is addressed proactively.

VII. Request for Disclosure of Relevant Publications and Statements to Ensure Judicial Impartiality

63. Mongolia notes that the two writings it has obtained represent only a fraction of the potential publications by Judge Aitala, and it is possible that other relevant works or expressions exist that further indicate a potential compromise of impartiality.
64. In light of the new evidence obtained, and to ensure the integrity of Mongolia's legal proceedings before the ICC, Mongolia respectfully requests Plenary of Judges to attain information from the three judges of Pre-Trial Chamber II regarding any publications, interviews, or other public statements they may have made that are relevant to the case. This includes any writings or expressions that could relate to the current proceedings, particularly in relation to immunity and the situation in Ukraine.
65. Where judges have publicly expressed strong preconceived opinions on issues directly related to the proceedings—such as immunity under international law or the legal status of individuals involved in this case—such matters should be disclosed and carefully considered to ensure the fairness of the process.
66. The specific information requested includes:

- (i) Whether the judges have published any works, articles, or statements in any language relating to the situation in Ukraine or Russia;
- (ii) Whether the judges have published or expressed opinions regarding the issue of immunity under international criminal law;
- (iii) Whether the judges have made any statements or disclosures about their personal views or opinions that they wish to make public in relation to the situation in Ukraine or issues of immunity;
- (iv) Any additional information or publications that may be relevant to the proceedings.

VIII. Relief Sought

67. Mongolia respectfully requests that the Plenary of Judges:

- (i) Reconsider its previous decision and disqualify Judges Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez from participating in any further proceedings related to Mongolia's current legal proceedings;
- (ii) Alternatively, accept this submission as a new application for disqualification, based on the new evidence presented.
- (iii) Prior to considering this request, require the Judges of the Pre-Trial Chamber to provide the information Mongolia has requested. Mongolia should then be given an opportunity to respond to this information. Once this process has been completed, the Plenary should convene to discuss this request in full;
- (iv) Ensure that the Plenary thoroughly and genuinely considers Mongolia's submissions, including the available publications, writings, and expressions of Judges in question, and allow sufficient time for these materials to be fully considered within the procedures adopted by the Plenary for the Reconsideration of the Disqualification Request;
- (v) If disqualification is granted, to establish an ad hoc Presidency, excluding Judge Aitala, to consider replacements for the disqualified judges or to reconstitute the Chamber, as necessary;
- (vi) In the event of disqualification, assess whether prior decisions made by these judges concerning Mongolia have been compromised or undermined, and provide appropriate remedies, including the potential reevaluation of those decisions;
- (vii) Notify Mongolia of the dates of the Plenary's session prior to its convening.

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