

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/22**
Date: **22 November 2024**

**THE PLENARY OF JUDGES
OF THE INTERNATIONAL CRIMINAL COURT**

SITUATION IN UKRAINE

Public

**Reasons for the Decision on the ‘Application for the Disqualification of Judges’ filed on
31 October 2024 (ICC-01/22-92-Anx)**

Order 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
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

Mongolia

Amicus Curiae

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

All Judges
Pre-Trial Chamber II

The plenary of judges of the International Criminal Court (the ‘Court’), with the exception of Judge Tomoko Akane, Judge Rosario Salvatore Aitala and Judge Gerardo Ugalde Godínez, has before it a request for the disqualification of judges made by Mongolia in the *Situation in Ukraine* (the ‘Disqualification Request’), seeking that Judge Aitala and Judge Ugalde be disqualified from Pre-Trial Chamber II from adjudicating on Mongolia’s request for leave to appeal the finding of non-compliance by Mongolia entered by Pre-Trial Chamber II on 24 October 2024 (the ‘Request for Leave to Appeal’),¹ and that Judge Akane and Judge Aitala be disqualified from the Presidency in connection with the Disqualification Request.²

I. PROCEDURAL HISTORY

1. On 17 March 2023, Pre-Trial Chamber II, composed, at that time, of Judge Akane, Judge Aitala and Judge Ugalde, issued a warrant of arrest for Mr Vladimir Vladimirovich Putin (the ‘Arrest Warrant’).³
2. On 24 October 2024, Pre-Trial Chamber II, then composed of Judge Aitala, Judge Ugalde and Judge Haykel Ben Mahfoudh, issued a ‘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’ (the ‘Non Compliance Finding’)⁴ in which it found that Mongolia had failed to comply with its international obligations under the Rome Statute (the ‘Statute’) by not executing the Court’s request for the arrest and surrender of Mr Putin while he was on Mongolian territory and that Mongolia’s non-compliance would be referred to the Assembly of States Parties, in accordance with regulation 109(4) of the Regulations of the Court (the ‘Regulations’).

¹ [Request to leave to appeal](#), dated 29 October 2024 and notified on 31 October 2024, ICC-01/22-91-Anx, *annexed to Registry, Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to Pre-Trial Chamber II’s “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” of 24 October 2024, 31 October 2024, ICC-01/22-91.

² [Application for the disqualification of Judges](#), dated 29 October 2024 and notified on 31 October 2024, ICC-01/22-92-Anx, *annexed to Registry, Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to Pre-Trial Chamber II’s “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” of 24 October 2024, 31 October 2024, ICC-01/22-92.

³ Warrant of Arrest for Vladimir Vladimirovich Putin, ICC-01/22-18-SECRET.

⁴ Pre-Trial Chamber II, *Situation in Ukraine*, [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](#), 24 October 2024, ICC-01/22-90.

3. On 31 October 2024, the Registry of the Court filed before Pre-Trial Chamber II and the Presidency, respectively, *Note Verbales* received from the Embassy of Mongolia containing both the Request for Leave to Appeal and the Disqualification Request.
4. On 5 November 2024, the plenary of judges filed an order requesting that the three challenged judges present any written observations on the Disqualification Request (the ‘Order of 5 November 2024’).⁵ These written observations were duly filed by the judges within the established deadline.⁶
5. On 11 November 2024, the Office of the Prosecutor filed a ‘Prosecution Response to Mongolia’s “Application for the disqualification of Judges”’ (the ‘Prosecution Response’).⁷
6. On 13 November 2024, Mongolia filed a set of additional submissions before the plenary of judges (the ‘Additional Submissions’).⁸
7. On 15 November 2024, the plenary of judges, with the exception of Judge Akane, Judge Aitala and Judge Ugalde, met to consider all aspects of the Disqualification Request. That same day, it issued a notification indicating that the plenary had unanimously rejected the Disqualification Request, with full reasons to follow (the ‘Notification of Plenary Decision’).⁹
8. On 19 November 2024, the plenary of judges was notified of a request from Mongolia seeking leave to reply to the Prosecution Response, dated 15 November 2024.¹⁰ The Registry indicates that it received this request from Mongolia on 15 November 2024 at 16:43.¹¹ The plenary thus understands that this request for leave to reply to the

⁵ Plenary of Judges, *Situation in Ukraine*, [Order concerning the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 \(ICC-01/22-92-Anx\)](#), 5 November 2024, ICC-01/22-95.

⁶ See [Annex I](#) and [Annex II](#) to Plenary of Judges, *Situation in Ukraine*, Notification concerning the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 (ICC-01/22-92-Anx), 8 November 2024, ICC-01/22-97 (the ‘Observations of Judge Akane’ and the ‘Observations of Judges Aitala and Ugalde’, , respectively).

⁷ Office of the Prosecutor, *Situation in Ukraine*, [Prosecution Response to Mongolia’s “Application for the Disqualification of Judges”](#), 11 November 2024, ICC-02/22-98.

⁸ [Additional submission in support of the Application for disqualification of Judges](#), dated 11 November 2024 and notified on 13 November 2024, ICC-01/22-101-Anx, *annexed to* Registry, *Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to an “Additional Submission in Support of the Application for Disqualification of Judges”, 13 November 2024, ICC-01/22-101.

⁹ Plenary of Judges, *Situation in Ukraine*, [Notification of a decision of the plenary on the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 \(ICC-01/22-92-Anx\)](#), 15 November 2024, ICC-01/02-104.

¹⁰ [Request leave to reply to the Prosecution response to Mongolia’s “Application for the Disqualification of Judges”](#), dated 15 November 2024 and notified on 19 November 2024, ICC-01/22/105-Anx, *annexed to* Registry, Registry Transmission of Communication received from Mongolia in relation to a “Request for Leave to Reply to the Prosecution response to Mongolia’s Application for the disqualification of Judges”, dated 18 November 2024 and notified on 19 November 2024, ICC-01/22-105.

¹¹ Registry, *Situation in Ukraine*, [Registry Transmission of Communication received from Mongolia in relation to a “Request for Leave to Reply to the Prosecution response to Mongolia’s Application for the disqualification of Judges”](#), 19 November 2024, ICC-01/02-105, para. 1.

Prosecution Response was received by the Registry several hours after the plenary of judges had filed its Notification of Plenary Decision at 13:47 that same day, although the plenary of judges understands that Mongolia may not yet have been aware of this development.

II. SUBMISSIONS

a. Disqualification Request

9. The Disqualification Request submits that the prior involvement of Judge Aitala and Judge Ugalde in the issuance of the Arrest Warrant casts doubt on the judges' appearance of impartiality and gives rise to a perceived conflict of interest.¹² The Disqualification Request submits that the judges' involvement in issuing the Arrest Warrant gives rise to an objectively reasonable appearance of grounds to question their impartiality in related proceedings, including proceedings related to the Non-Compliance Finding and the Request for Leave to Appeal.¹³ In addition, their prior involvement in issuing the Arrest Warrant might lead a reasonable observer to perceive a potential conflict of interest, as the Judges may, for instance, hold preconceived opinions related to the case concerning Mr Putin or the immunities of Heads of State, or be inclined to uphold their prior decisions, casting doubt on whether subsequent rulings, including on the Request for Leave to Appeal, would be decided fairly and impartially.¹⁴ For these reasons, the Disqualification Request submits that it would be procedurally inappropriate for these two judges to adjudicate on the Request for Leave to Appeal.¹⁵
10. The Disqualification Request further submits that President Akane and Judge Aitala should be disqualified from the Presidency in relation to this matter, given their involvement in the issuance of the Arrest Warrant and, in relation to President Akane, her role in convening the plenary session which holds the authority to decide on requests for disqualification and her casting vote in the event of an equality of votes during the plenary, provided for in rule 4(4) of the Rules of Procedure and Evidence (the 'Rules').¹⁶ As a result, it is submitted that the Disqualification Request should be considered by a

¹² [Disqualification Request](#), ICC-01/22-92-Anx, pp. 4-7.

¹³ [Disqualification Request](#), ICC-01/22-92-Anx, p. 6-7

¹⁴ [Disqualification Request](#), ICC-01/22-92-Anx, p. 7.

¹⁵ [Disqualification Request](#), ICC-01/22-92-Anx, p. 7.

¹⁶ [Disqualification Request](#), ICC-01/22-92-Anx, pp. 7-8.

plenary of judges convened by an acting President and that an *ad hoc* Presidency should be established to replace Judge Aitala and Judge Ugalde from Pre-Trial Chamber II.¹⁷

b. Observations of the judges

11. In their joint observations, Judges Aitala and Ugalde submit that while article 41(2)(b) of the Statute refers to the Prosecutor and the person being investigated or prosecuted as persons who may request the disqualification of judges, Mongolia has legal standing to request the disqualification of judges in the present case.¹⁸ They submit that the Disqualification Request, however, was not presented ‘as soon as there [was] knowledge of the grounds on which it is based’, as required by rule 34(2) of the Rules, Mongolia having had knowledge that the judges had signed the Arrest Warrant since 24 April 2023.¹⁹ The Disqualification Request should, accordingly, be dismissed *in limine*.²⁰
12. On the merits of the request, Judges Aitala and Ugalde note that at the Court, it is for the Pre-Trial Chamber or the Trial Chamber to grant leave to appeal their own decisions.²¹ The judges submit that the position of Mongolia, that judges become conflicted in a stage of proceedings after having issued decisions in that same stage, is legally untenable,²² and would mean that following the issuance of an arrest warrant, a Pre-Trial Chamber would need to be recomposed for each subsequent decisions, which would paralyse the functioning of the Court.²³ Judges Aitala and Ugalde recall that article 41(2)(a) of the Statute is concerned with reasonable grounds to doubt the impartiality of a judge, which do not arise in a situation where a judge has merely performed his or her judicial functions.²⁴
13. Judge Akane observes that the functions granted to her to convene plenary sessions and to exercise the casting vote in the event of equality of votes during such sessions are vested in her in her capacity of President, having no connection to the Presidency.²⁵ In her view, article 41(2)(c) of the Statute, which makes clear that the judge who is the subject of a disqualification request shall not take part in the decision thereon, already prevents her from convening, being present and participating in the plenary considering

¹⁷ [Disqualification Request](#), ICC-01/22-92-Anx, pp. 7-8.

¹⁸ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 2.

¹⁹ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 3.

²⁰ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 3.

²¹ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 4.

²² [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 4.

²³ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 5.

²⁴ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 6.

²⁵ [Observations of Judge Akane](#), ICC-01/22-97-AnxI, para. 4.

the Disqualification Request.²⁶ She notes, in addition, that the Presidency has no role to perform in respect of disqualification requests.²⁷

c. Prosecution Response

14. The Prosecution submits that neither actual bias, nor any apparent bias, arises from the participation of Judges Aitala and Ugalde from Pre-Trial Chamber II for the purpose of adjudicating on the Request for Leave to Appeal.²⁸ The Prosecution points out that the Judges' participation in issuing the Arrest Warrant is not a prohibited prior involvement in the case within the meaning of article 41(2) of the Statute and rule 34(1)(b), (c) and (d) of the Rules, nor does their participation in the Non-Compliance Finding raise actual or perceived bias in the context of their consideration of the Request for Leave to Appeal.²⁹

d. Additional Submissions

15. In its Additional Submissions, Mongolia submits that, as a State Party and the direct subject of the Non-Compliance Finding, it holds a unique stake in the proceedings under article 87(7) of the Statute and, therefore, has legal standing to seek the disqualification of judges in the context of these proceedings.³⁰ Although the Statute does not explicitly extend the right to request disqualification of judges to States, Mongolia submits that a party directly impacted by a judicial finding has an inherent right to challenge a perceived lack of impartiality of judges and notes that the Court, in other contexts, has recognised the interests of States as sufficiently significant to justify their participation.³¹ Furthermore, Mongolia expresses concerns about the 'markedly expedited timeline' applied to the proceedings under article 87(7) of the Statute in the present instance, as well as the 'expedited handling' of the Disqualification Request, and calls for a rigorous and measured judicial review process by the plenary.³²

16. With regard to the timing of the Disqualification Request, Mongolia submits that the specific concerns underpinning the Disqualification Request emerged progressively,

²⁶ [Observations of Judge Akane](#), ICC-01/22-97-AnxI, para. 4.

²⁷ [Observations of Judge Akane](#), ICC-01/22-97-AnxI, para. 4.

²⁸ [Prosecution Response](#), ICC-02/22-98, paras 1, 6.

²⁹ [Prosecution Response](#), ICC-02/22-98, paras 7-8.

³⁰ [Additional Submissions](#), ICC-01/22-101-Anx, paras 3, 7.

³¹ [Additional Submissions](#), ICC-01/22-101-Anx, paras 4-5.

³² [Additional Submissions](#), ICC-01/22-101-Anx, paras 8-13.

culminating in the issuance of the Non-Compliance Finding,³³ which prompted Mongolia, who had anticipated that the proceedings under article 87(7) would take a more deliberative pace, to file its Disqualification Request.³⁴ Given that rule 34(2) of the Rules should be understood to permit the raising of reasonable doubts at any stage where concerns about a judge's impartiality arise, and the expedited nature of the proceedings in the present case, Mongolia submits that the Disqualification Request was 'timely and appropriate'.³⁵

17. On the merits, Mongolia emphasises that it is not advocating for a general rule that would require different judges for each decisions within a given stage of the proceedings but, rather, points out that the Disqualification Request is confined to the specific circumstances at hand, where judges who issued an arrest warrant against a Head of State are tasked with adjudicating a State Party's compliance with the arrest warrant.³⁶ Mongolia submits that article 41(2)(a) of the Statute and rule 34(c) of the Rules prioritise the prevention of any reasonable appearance of partiality, that prior judicial involvement can create a reasonable appearance of bias and that the Disqualification Request does not seek to paralyse the Court but, rather, will reinforce its commitment to impartial justice.³⁷ Finally, Mongolia submits that the establishment of an acting President and an *ad hoc* Presidency for this limited purpose would reinforce the Court's role as an independent judicial institution and strengthen its reputation.³⁸

III. RELEVANT LAW

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

- (a) A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, *inter alia*, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for 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.

³³ [Additional Submissions](#), ICC-01/22-101-Anx, para. 14.

³⁴ [Additional Submissions](#), ICC-01/22-101-Anx, paras 15-16.

³⁵ [Additional Submissions](#), ICC-01/22-101-Anx, paras 18-19.

³⁶ [Additional Submissions](#), ICC-01/22-101-Anx, paras 20, 25.

³⁷ [Additional Submissions](#), ICC-01/22-101-Anx, paras 21-24.

³⁸ [Additional Submissions](#), ICC-01/22-101-Anx, paras 25-29.

- (c) Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

19. Rule 34 of the Rules provides, in relevant parts:

1. 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:

[...]

(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.

2. Subject to the provisions set out in article 41, paragraph 2, and article 42, paragraph 8, a request for disqualification shall be made in writing as soon as there is knowledge of the grounds on which it is based. The request shall state the grounds and attach any relevant evidence, and shall be transmitted to the person concerned, who shall be entitled to present written submissions.

IV. DETERMINATION OF THE PLENARY

a. Applicable legal standards

20. The plenary of judges notes that the disqualification of a judge is not a step to be undertaken lightly and that a high threshold must be satisfied in order to rebut the presumption of impartiality which attaches to judicial office.³⁹ The Disqualification

³⁹ [Decision of the plenary of the 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. 14; [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. 37 (the ‘*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, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*](#), 20 June 2014, ICC-01/05-01/13-511-Anx, para. 18 (the ‘*Bemba et al* Disqualification Decision 20 June 2014’); [Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi from the case of *The Prosecutor v. Thomas Lubanga Dyilo*](#), 3 August 2015, ICC-01/04-01/06-3154-AnxI, para. 29; [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. 31 (the ‘*Ntaganda* Disqualification Decision 20 June 2019’); [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. 26 (the ‘*Lubanga* Disqualification Decision 28 June 2019’); [Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Marc Perrin de Brichambaut](#)

Request pertains only to an alleged appearance of bias, rather than any allegations of actual bias. The plenary of judges recalls that justice must not only be done, but must additionally be seen to be done.⁴⁰ The plenary of judges has consistently considered that the question of impartiality should be viewed from the objective perspective of whether a fair-minded and informed observer, having considered all the facts and circumstances, would reasonably apprehend bias in the judge.⁴¹ It has regularly been emphasised that such fair-minded person is an objective observer,⁴² whose consideration of facts and circumstances includes an understanding of the nature of a judge's profession.⁴³ The plenary of judges specifies that, in forming a view regarding the appearance of bias, the fair-minded observer should take into account the entire context of the case.⁴⁴ The plenary

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. 19 (the '*Al Hassan* Disqualification Decision 8 July 2019'); [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, para. 23 (the '*Al Hassan* Disqualification Decision 12 September 2019'); [Decision of the Plenary of Judges on the Defence Application for the Disqualification of Judge Lordkipanidze from the case *The Prosecutor v. Bosco Ntaganda*](#), 29 September 2021, ICC-01/04-02/06-2711-Anx, para. 19 (the '*Ntaganda* Disqualification Decision 29 September 2021'); 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. 21 (the '*Gicheru* Disqualification Decision 1 November 2021').

⁴⁰ [Lubanga Disqualification Decision 11 June 2013](#), ICC-01/04-01/06-3040-Anx, para. 67, referring to United Kingdom, King's Bench Division, *The King v. Sussex Justices*, Ex parte McCarthy, 9 November 1923 [1924] 1 K.B. 256, p. 259; See also [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 24; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 20; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 22.

⁴¹ [Lubanga Disqualification Decision 11 June 2013](#), ICC-01/04-01/06-3040-Anx, para. 34; [Bemba et al Disqualification Decision 20 June 2014](#), ICC-01/05-01/13-511-Anx, para. 44; [Ntaganda Disqualification Decision 20 June 2019](#), ICC-01/04-02/06-2355-AnxI-Red, para. 32; [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 8 July 2019](#), ICC-01/12-01/18-398-AnxI, para. 20; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 25; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 21; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 23.

⁴² [Lubanga Disqualification Decision 11 June 2013](#), ICC-01/04-01/06-3040-Anx, para. 35, referring to *Helow v. Secretary of State for the Home Department and another (Scotland)* [2008] UKHL 62, para. 2. See also [Ntaganda Disqualification Decision 20 June 2019](#), ICC-01/04-02/06-2355-AnxI-Red, para. 32; [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 8 July 2019](#), ICC-01/12-01/18-398-AnxI, para. 20; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 25; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 21; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 23.

⁴³ [Lubanga Disqualification Decision 11 June 2013](#), ICC-01/04-01/06-3040-Anx, para. 36; [Ntaganda Disqualification Decision 20 June 2019](#), ICC-01/04-02/06-2355-AnxI-Red, para. 32; [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 8 July 2019](#), ICC-01/12-01/18-398-AnxI, para. 20; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 25; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 21; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 23.

⁴⁴ [Lubanga Disqualification Decision 11 June 2013](#), ICC-01/04-01/06-3040-Anx, para. 38; [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 8 July 2019](#), ICC-01/12-01/18-398-AnxI, para. 20; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 25; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 21; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 23.

of judges recalls that it is for the party requesting the disqualification to demonstrate the appearance of bias.⁴⁵

b. Preliminary issues

21. The plenary of judges notes that one of its members, Judge Erdenebalsuren Damdin, bears the nationality of the State Party which has brought the Disqualification Request. Judge Damdin observed that a judge of the Court is entirely independent from his State of nationality and/or the State which nominated him for election as a judge, and noted for the record that he had closely considered the matter and is of the view that the circumstances at hand have no impact on his ability to be impartial in his consideration of the matter and do not create any appearance of a lack of impartiality.
22. The plenary of judges further notes that both the Additional Submissions and Prosecution Response were not requested in its Order of 5 November 2024. The plenary recalls that disqualification proceedings are *sui generis* in nature, with the plenary having considerable scope to determine the procedural steps which it considers would be of assistance to it in the circumstances, with the most important submissions in disqualification proceedings being those of the entity requesting disqualification and those of the challenged judge.⁴⁶ It reminds any party or participant seeking to make filings not requested by the plenary of judges in disqualification proceedings, to seek leave in this regard. Nonetheless, the plenary of judges considers it appropriate to refer to the Additional Submissions insofar as these aid its consideration of the matter. In particular, noting the need to protect the interests of a State Party, it has fully considered the submissions made by Mongolia in the Additional Submissions. The plenary of judges takes note of the Prosecution Response but observes that it did not find them of relevance in formulating its views. The plenary of judges notes that the Request for Leave to Reply from Mongolia was only received by the Registry of the Court after the plenary had

⁴⁵ [Ntaganda Disqualification 20 June 2019](#), ICC-01/04-02/06-2355-AnxI-Red, para. 33; [Lubanga Disqualification Decision 28 June 2019](#), ICC-01/04-01/06-3459-Anx, para. 27; [Al Hassan Disqualification Decision 8 July 2019](#), ICC-01/12-01/18-398-AnxI, para. 20; [Al Hassan Disqualification Decision 12 September 2019](#), ICC-01/12-01/18-458-AnxI-Red, para. 25; [Ntaganda Disqualification Decision 29 September 2021](#), ICC-01/04-02/06-2711-Anx, para. 21; [Gicheru Disqualification Decision 1 November 2021](#), ICC-01/09-01/20-205-Red, para. 23.

⁴⁶ See Plenary of the Judges, *The Prosecutor v. Paul Gicheru*, [Decision on the “Request for Leave to Reply to the Prosecution response to the Defence “Request for the Disqualification of Judge Miatta Maria Samba””](#) dated 4 October 2021 (ICC-01/09-01/20-186-Conf) and [notification of Judge Samba’s Observations](#), 8 October 2021, ICC-01/09-01/20-190, para. 8.

already taken and communicated its decision on the Disqualification Request. Moreover, the plenary of judges emphasises that such request would have been practically moot even if it had been received in a timely manner in view of its non-reliance on the Prosecution Response.

c. Merits

i. Standing

23. Article 41(2)(b) of the Statute indicates that the Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge. Nonetheless, the plenary of judges considers that proceedings under article 87(7) of the Statute are unique in this regard and that a State Party engaged in such proceedings at the Court clearly has an entitlement to ensure that such proceedings are conducted impartially.⁴⁷ The plenary also notes that the challenged judges do not question the standing of Mongolia to bring the Disqualification Request.⁴⁸ The plenary of judges, acting unanimously, considers it evident that the fundamental importance of impartiality to proceedings before the Court makes it appropriate for Mongolia to have standing to bring the Disqualification Request in the context of proceedings under article 87(7) of the Statute.

ii. Disqualification Request concerning Judges Aitala and Ugalde

24. The plenary of judges, acting unanimously, considers that no actual nor reasonable apprehension of bias arises in respect of Judges Aitala and Ugalde. The judges acted, at all times, in accordance with the judicial duties assigned to them under the Statute. As judges of Pre-Trial Chamber II, Judges Aitala and Ugalde issued the Arrest Warrant in accordance with their functions under article 58 of the Statute. As judges of Pre-Trial Chamber II, Judges Aitala and Ugalde also have functions under article 87 of the Statute, in connection with cooperation by States Parties. This includes the making of findings of

⁴⁷ See [Additional Submissions](#), ICC-01/22-101-Anx, paras 3-7.

⁴⁸ [Observations of Judges Aitala and Ugalde](#), ICC-01/22-97-AnxII, para. 2; [Observations of Judge Akane](#), ICC-01/22-97-AnxI.

non-compliance under article 87(7) of the Statute. Mongolia has sought leave to appeal the Non-Compliance Finding under article 82(1)(d) of the Statute.⁴⁹

25. Article 82(1)(d) of the Statute and rule 155(1) of the Rules establish a procedure at the Court in which the Chamber which made any finding of non-compliance is required to determine any application for leave to appeal such finding. Thus, at the Court, this type of leave to appeal is certified by the Chamber which made the original impugned decision. Such decisions on leave to appeal are based on objective criteria, including assessment of whether the issue would significantly affect the fair and expeditious conduct of proceedings and whether an immediate resolution by the Appeals Chamber would materially advance the proceedings. In this regard, the criteria for granting leave to appeal are distinct from the merits of a given appeal⁵⁰ and the consideration of a request for leave to appeal does not involve the reconsideration or re-examination of the merits of the decision originally taken by the Chamber, thus ensuring that no conflict of interest arises. The plenary of judges also observed that this procedure by which a Pre-Trial or Trial Chamber is required to certify leave to appeal its own decision is widely used at other international criminal courts and tribunals.⁵¹ Accordingly, the plenary of judges emphasises that Judges Aitala and Ugalde have exercised or will exercise judicial powers assigned to them under the Rome Statute in respect of three separate legal decisions, each involving distinct legal standards and criteria. The ordinary exercise of such assigned legal functions does not give rise to any appearance of bias or a lack of impartiality, but is, rather, part of the clear design of the Rome Statute.
26. Further, the plenary of judges is not convinced by the submission from Mongolia that the issue of an arrest warrant against a Head of State creates an exceptional context.⁵² To the contrary, it notes that the above provisions of the Statute have already been applied in the

⁴⁹ [Request to leave to appeal](#), dated 29 October 2024 and notified on 31 October 2024, ICC-01/22-91-Anx, *annexed to Registry, Situation in Ukraine*, Registry transmission of communication received from Mongolia in relation to Pre-Trial Chamber II's "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" of 24 October 2024, 31 October 2024, ICC-01/22-91.

⁵⁰ Pre-Trial Chamber II, *Situation in Uganda*, [Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58](#), 19 August 2005, ICC-02/04-01/05-20, para. 22.

⁵¹ See [Rules of Procedure and Evidence](#), International Residual Mechanism for Criminal Tribunals, MICT/1/Rev.8, 26 February 2024, rule 80(B); [Rules of Procedure and Evidence](#), International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, IT/32/Rev.50, 8 July 2015, rule 73(B); [ICTR Rules of Procedure and Evidence](#), 13 May 2015, rule 73(B); Kosovo Specialist Chambers, [Rules of Procedure and Evidence before the Kosovo Specialist Chambers](#), KSC-BD-03/Rev3/2020/1, rule 77; Special Tribunal for Lebanon, [Rules of Procedure and Evidence](#), STL-BD-2009-01-Rev.10, April 2019, rule 126.

⁵² [Additional Submissions](#), ICC-01/22-101-Anx, para. 20.

context of decisions involving Head of State immunity, with a judge of the Court having previously issued a warrant of arrest against a Head of State and then issuing both a non-compliance finding against a State Party in connection with the presence of the subject of an arrest warrant on that State's territory and a decision on leave to appeal the non-compliance finding.⁵³

27. In sum, the plenary of judges considers that the Rome Statute requires Judges Aitala and Ugalde to exercise the functions assigned to them under articles 58, 87(7) and 82(1)(d) and that no actual bias or appearance of bias arises from having done so in the present circumstances.
28. The plenary of judges also closely considered rule 34 of the Rules. The plenary considers that rule 34(1)(c) and (d), referred to by Mongolia, relate to functions performed prior to taking office as an ICC judge and expressions of opinions outside of the context of judicial office. These sub-paragraphs are, therefore, not relevant to the present circumstances of judges having exercised judicial functions assigned to them as pre-trial judges.
29. The plenary of judges also discussed the requirement of rule 34(2) of the Rules, which necessitates that a request for disqualification shall be made as soon as there is knowledge of the grounds on which it is based. The plenary of the judges observes that such requirement safeguards the efficiency of proceedings by ensuring that disqualification requests are brought at the earliest possible moment and removing any incentive to await the outcome of decisions before raising disqualification issues. The plenary of judges notes that Mongolia considered that the pace of the article 87(7) proceedings prevented it from making the request for disqualification at an earlier stage.⁵⁴
30. The plenary of judges considers that, in view of its unanimous finding on the merits of the Disqualification Request, it is unnecessary for it to make any determination on whether the requirement of rule 34(2) was satisfied.

⁵³ Pre-Trial Chamber I, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir](#), 12 July 2010, ICC-02/05-01/09-95; Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision under article 87\(7\) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or \[sic\] Omar Al-Bashir](#), 11 December 2017, ICC-02/05-01/09-309; Pre-Trial Chamber II, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, [Decision on Jordan's request for leave to appeal](#), 21 February 2018, ICC-02/05-01/09-319.

⁵⁴ [Additional Submissions](#), ICC-01/22-101-Anx, paras 8-17.

iii. Disqualification Request concerning Judges Akane and Aitala

31. The Disqualification Request also sought the disqualification of Judges Akane and Aitala from the Presidency in connection with disqualification matters and asked that an *ad hoc* Presidency be established for future replacement decisions.⁵⁵ The basis for this Disqualification Request was also the involvement of the two judges in question in the issuance of the Arrest Warrant. The plenary of judges considered, acting unanimously, that this aspect of the Disqualification Request was both speculative and practically moot given that Judges Aitala and Ugalde had not been disqualified thus no need for any re-composition of Pre-Trial Chamber II arose, noting also that neither Judges Akane nor Aitala had played any role in the plenary, in compliance with article 41(2)(c) of the Statute.

iv. Other Subsidiary Requests

32. The plenary of judges notes a number of forms of subsidiary relief requested by Mongolia.⁵⁶ It considers, acting unanimously, that it does not have any jurisdiction to suspend the activities of Pre-Trial Chamber II in relation to the Request for Leave to Appeal and further notes that such request is practically moot, given that Pre-Trial Chamber II did not issue any decisions in this regard prior to the Notification of Plenary Decision on the Disqualification Request.

33. The plenary of judges, acting unanimously, also conveys that the timing of the plenary session enabled it to conduct a thorough and full review of all matters raised by Mongolia, observing that disqualification requests are ordinarily addressed as expediently as possible due to their often having an impact on related judicial proceedings.

⁵⁵ [Disqualification Request](#), ICC-01/22-92-Anx, paras 24-25; [Additional Submissions](#), ICC-01/22-101-Anx, para. 31.

⁵⁶ See [Disqualification Request](#), ICC-01/22-92-Anx, para. 23(iii) and (iv); [Additional Submissions](#), ICC-01/22-101-Anx, para. 31(ii) and (iii).

V. DISPOSITION

34. The plenary of judges, acting unanimously, finds as follows in relation to the relief sought by Mongolia in the Disqualification Request and Additional Submissions:

- (i) The request to allow Mongolia to bring a disqualification request⁵⁷ is granted;
- (ii) The request to disqualify Judges Aitala and Ugalde⁵⁸ is rejected;
- (iii) The request to disqualify Judges Akane and Aitala⁵⁹ is rejected as moot;
- (iv) The request to suspend specified activities of Pre-Trial Chamber II (or to refer this matter to a competent authority)⁶⁰ is rejected as outside of the competence of the plenary, in addition to being practically moot;
- (v) The requests to ensure that the plenary thoroughly and genuinely consider Mongolia's submissions and allow necessary time for consideration⁶¹ has been fully taken into account in the procedures adopted by the plenary throughout the Disqualification Request; and
- (vi) The request to establish an *ad hoc* Presidency⁶² is rejected as moot.

Done in both English and French, the English version being authoritative.



Judge Reine Alapini-Gansou
Acting President

Dated this 22 November 2024

At The Hague, The Netherlands

⁵⁷ [Additional Submissions](#), ICC-01/22-101-Anx, para. 31(i).

⁵⁸ [Disqualification Request](#), ICC-01/22-92-Anx, para. 24(ii).

⁵⁹ [Disqualification Request](#), ICC-01/22-92-Anx, para. 24(i).

⁶⁰ [Disqualification Request](#), ICC-01/22-92-Anx, para. 24(iii)-(iv).

⁶¹ [Additional Submissions](#), ICC-01/22-101-Anx, para. 31(ii)-(iii).

⁶² [Additional Submissions](#), ICC-01/22-101-Anx, para. 31(iv).