

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-01/22**  
Date: **10 March 2025**

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

**SITUATION IN UKRAINE**

**Public**

**Decision on the Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx)**

Order to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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| <input type="checkbox"/> The Office of the Prosecutor                   | <input type="checkbox"/> Counsel for the Defence                                |
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| <input type="checkbox"/> Unrepresented Victims                          | <input type="checkbox"/> Unrepresented Applicants<br>(Participation/Reparation) |
| <input type="checkbox"/> The Office of Public Counsel for<br>Victims    | <input type="checkbox"/> The Office of Public Counsel for the<br>Defence        |
| <input checked="" type="checkbox"/> States' Representatives<br>Mongolia | <input type="checkbox"/> Amicus Curiae  |

## REGISTRY

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| <b>Registrar</b><br>Mr Zavala Giler, Osvaldo                              | <input type="checkbox"/> Counsel Support Section        |
| <input type="checkbox"/> Victims and Witnesses Unit                       | <input type="checkbox"/> Detention Section              |
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The plenary of judges of the International Criminal Court (the ‘Court’), with the exception of Judge Rosario Salvatore Aitala and Judge Gerardo Ugalde Godínez, has before it the ‘Request for Partial Reconsideration of the “Application for the Disqualification of Judges”, or Alternatively, a Submission of a New Application for Disqualification’ made by Mongolia on 2 December 2024 (the ‘Reconsideration Application’).<sup>1</sup> In the Reconsideration Application, Mongolia requests that the plenary reconsider its decision of 15 November 2024 rejecting the application by Mongolia for the disqualification of judges filed on 31 October 2024 insofar as it relates to Judges Aitala and Ugalde or, alternatively, to accept the Reconsideration Application as a new application for the disqualification of Judges Aitala and Ugalde from Pre-Trial Chamber II. The Reconsideration Application also withdraws a prior request for the disqualification of Judge Tomoko Akane.<sup>2</sup>

## I. RELEVANT PROCEDURAL HISTORY

1. On 15 November 2024, the plenary of judges unanimously rejected the request for disqualification made by Mongolia in the *Situation in Ukraine* filed on 31 October 2024 (the ‘Disqualification Application’),<sup>3</sup> seeking that Judges Aitala and 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 made by Pre-Trial Chamber II on 24 October 2024 (the ‘Non-Compliance Finding’),<sup>4</sup> and that Judges Tomoko Akane and Aitala be disqualified from the Presidency in connection with the Disqualification

<sup>1</sup> Mongolia, *Situation in Ukraine*, [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](#), 2 December 2024, ICC-01/22-113-Anx annexed to Registry, *Situation in Ukraine*, [Registry Transmission of a “Request for Partial Reconsideration of the Decision on the ‘Application for the Disqualification of Judges’” received from Mongolia](#), 2 December 2024, ICC-01/22-113 (the ‘Registry Transmission’).

<sup>2</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 1-4, 67.

<sup>3</sup> [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. See also [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 (the ‘Additional Submission’), 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.

<sup>4</sup> 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.

Application.<sup>5</sup> The reasons for this decision were filed by the plenary of judges on 22 November 2024 (the ‘Plenary Decision’).<sup>6</sup>

2. On 2 December 2024, the Registry of the Court filed before the Presidency a *Note Verbale* received from the Embassy of Mongolia containing the Reconsideration Application.<sup>7</sup>
3. On 9 December 2024, the plenary of judges filed an order requesting that Judges Aitala and Ugalde present any written observations on the Reconsideration Application by 31 December 2024.<sup>8</sup> These written observations were duly filed by the judges before the established deadline.<sup>9</sup>
4. On 3 March 2025, the plenary of judges, with the exception of Judges Aitala and Ugalde, met to consider the Reconsideration Application. In addition, Judges Ibañez and Motoc were unable to attend the plenary, which proceeded with 14 judges present, in full compliance with the quorum requirements of rule 4(3) of the Rules of Procedure and Evidence (the ‘Rules’).
5. On 4 March 2025, a notification of the plenary of judges was filed communicating that the Reconsideration Application had been dismissed with reasons to follow.<sup>10</sup>

## II. SUBMISSIONS

### a. Reconsideration Application

6. In the Reconsideration Application, Mongolia argues that the plenary of judges erred in its reasoning when it concluded that no actual nor reasonable apprehension of bias arose in respect of Judges Aitala and Ugalde. Mongolia submits that the judges’ prior involvement in the issuance of the arrest warrant against Mr Vladimir Vladimirovich

<sup>5</sup> 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-01/22-104.

<sup>6</sup> Plenary of judges, *Situation in Ukraine*, [Reasons for the Decision on the ‘Application for the Disqualification of Judges’ filed on 31 October 2024 \(ICC-01/22-92-Anx\)](#), 22 November 2024, ICC-01/22-107 (the ‘Plenary Decision’).

<sup>7</sup> [Registry Transmission](#), ICC-01/22-113, para. 1.

<sup>8</sup> Plenary of Judges, *Situation in Ukraine*, [Order concerning the Request from Mongolia dated 2 December 2024 \(ICC-01/22-113-Anx\)](#), 9 December 2024, ICC-01/22-115, p. 4.

<sup>9</sup> See [Annex I](#) and [Annex II](#) to the Plenary of Judges, *Situation in Ukraine*, [Notification concerning the Request from Mongolia dated 2 December 2024 \(ICC-01/22-113-Anx\)](#), 24 December 2024, ICC-01/22-118, (the ‘Observations of Judge Aitala’ and the ‘Observations of Judge Ugalde’, respectively).

<sup>10</sup> Plenary of judges, *Situation in Ukraine*, Notification of a decision of the plenary on the Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx), dated 3 March 2025 and notified 4 March 2025, ICC-01/22-121.

Putin raises concerns about their impartiality in subsequent proceedings concerning the same individual and the same substantive legal issues, particularly the question of the immunity of Mr Putin (Ground A).<sup>11</sup> Mongolia also argues that the ‘apparent haste’ with which Pre-Trial Chamber II issued its decision on Mongolia’s request for leave to appeal the Non-Compliance Finding reinforces its concerns regarding the impartiality of Judges Aitala and Ugalde (Ground B).<sup>12</sup> In addition, Mongolia submits that it has obtained new evidence concerning Judge Aitala’s impartiality (Ground C),<sup>13</sup> citing a text book authored by Judge Aitala in which he is alleged to have expressed ‘strong opinions on immunity issues’<sup>14</sup> (the ‘Book’) and an article written by Judge Aitala in which he allegedly expressed ‘clear opposition to President Putin’s actions [the ‘Article’], particularly regarding the ongoing conflict in Ukraine’<sup>15</sup> (the Article and Book are referred to collectively as the ‘Publications’). Mongolia argues that the Publications ‘affect, or appear to affect, the judicial independence and impartiality of Judge Aitala, and ... undermine the standing and integrity of the Court’,<sup>16</sup> and that the Publications should be reviewed as part of the request for reconsideration or, alternatively, as the basis of a new application for disqualification.<sup>17</sup> Further, Mongolia submits that the plenary of judges committed a procedural error by depriving Mongolia of the opportunity to reply to the Prosecutor’s Response to the Disqualification Application dated 11 November 2024 (Ground D).<sup>18</sup>

7. Mongolia emphasises that the reconsideration of the Plenary Decision is necessary to prevent an injustice and that the disqualification of Judge Aitala and Ugalde is necessary to preserve the integrity of the judicial process.<sup>19</sup> It further requests that the plenary, in view of the new evidence obtained concerning Judge Aitala, requests information from the three judges of Pre-Trial Chamber II regarding any publications, interviews, or other

<sup>11</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 25-30, 56-62.

<sup>12</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 31-38.

<sup>13</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 39-50.

<sup>14</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 41.

<sup>15</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 43.

<sup>16</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 50.

<sup>17</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 46, 67.

<sup>18</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 51-55; See also Mongolia, *Situation in Ukraine*, [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.

<sup>19</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 56-62.

public statements they may have made that are relevant to the case.<sup>20</sup> Finally, a number of subsidiary or consequential forms of relief are sought.<sup>21</sup>

#### **b. Observations of the judges**

8. Judge Aitala observes that the Reconsideration Application fails to meet the legal standard for reconsideration of judicial decisions at the Court, which has consistently been considered an exceptional remedy that can only be granted in very limited circumstances.<sup>22</sup> Regarding Ground A of the Reconsideration Application, Judge Aitala submits that the argument put forward by Mongolia under this ground was fully raised in the Disqualification Application and addressed by the plenary in the Plenary Decision.<sup>23</sup> Concerning Ground B, Judge Aitala submits that the allegations advanced are unsubstantiated and incapable of supporting a request for reconsideration.<sup>24</sup> On Ground C, Judge Aitala highlights that the Publications were available in the public domain at the time of the Disqualification Application, and therefore cannot constitute new facts or new evidence, recalling that reconsideration cannot be used merely to supplement an earlier request based on information available at the time of the earlier request.<sup>25</sup> Turning to Ground D, Judge Aitala observes that this issue could not have caused any injustice to Mongolia as the Prosecution's Response was not used by the plenary.<sup>26</sup> Further, Judge Aitala observes that the Reconsideration Application appears, at times, to extend beyond the scope of the standing of Mongolia to represent its own national interests in the context of the proceedings related to the Non-Compliance Finding.<sup>27</sup> He also observes that the Reconsideration Application is practically moot given that the legal proceedings concerning Mongolia before Pre-Trial Chamber II have been completed.<sup>28</sup>
9. Judge Aitala submits that new requests for the disqualification of judges whose disqualification has already been unanimously rejected by the plenary should be

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<sup>20</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 63-66.

<sup>21</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 67.

<sup>22</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, paras 5, 6, 11.

<sup>23</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para. 7.

<sup>24</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para. 8.

<sup>25</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para. 9.

<sup>26</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para. 10.

<sup>27</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, paras 2-3, 18.

<sup>28</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, paras 4, 12.

considered in an exceptional and careful manner, noting rule 34(2) of the Rules and the need to avoid addressing disqualification in a piecemeal manner.<sup>29</sup>

10. While considering that the Publications need not be considered by the plenary,<sup>30</sup> Judge Aitala explains that the Book was published, and the Article submitted, before the *Situation in Ukraine* was assigned to Pre-Trial Chamber II.<sup>31</sup> He recalls that previous plenaries have found that comments by a judge which are general in nature, geopolitical, peripheral to the case and not connected to criminal proceedings against any individual, did not give rise to an actual or appearance of bias.<sup>32</sup> Judge Aitala emphasises that the Book is a purely academic publication, and that the part of the Article he authored provides a strictly academic and informative analysis of the jurisdiction of the Court, irrelevant to the question of Mongolia's interests in the proceedings under article 87(7) of the Statute.<sup>33</sup> Finally, Judge Aitala notes that the request from Mongolia asking the judges of Pre-Trial Chamber II to provide any information they have published concerning matters such as immunity and the situation in Ukraine is inconsistent with the presumption of judicial impartiality, legally untenable and should be rejected by the plenary.<sup>34</sup>
11. Judge Ugalde submits that the Reconsideration Application fails to meet the legal standard for reconsideration of judicial decisions at the Court, pointing out that reconsideration is an exceptional remedy that can only be granted in very limited circumstances.<sup>35</sup> He observes that the Reconsideration Application appears to extend beyond the scope of Mongolia's standing to represent its own national interests in the context the proceedings related to the Non-Compliance Finding, and submits that the plenary should focus exclusively on issues which Mongolia has standing to raise.<sup>36</sup> Judge Ugalde further observes that the Reconsideration Application is moot, given that Pre-Trial Chamber II already issued its decision on Mongolia's request for leave to appeal the Non-Compliance Finding.<sup>37</sup>
12. Judge Ugalde observes that it is unclear upon what grounds the request for reconsideration of the Plenary Decision is based, Mongolia pointing to an alleged error

<sup>29</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para.12.

<sup>30</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para.13.

<sup>31</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para.15.

<sup>32</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, para.16.

<sup>33</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, paras 17-18.

<sup>34</sup> [Observations of Judge Aitala](#), ICC-01/22-115-AnxI, paras 19-21.

<sup>35</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 2.

<sup>36</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, paras 3-4.

<sup>37</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 5.

of reasoning in the Plenary Decision and the existence of new facts.<sup>38</sup> In this regard, he notes that Mongolia has not produced any evidence showing new facts that concern him<sup>39</sup> and that Mongolia has not specified how the plenary erred in the Plenary Decision but has rather shown mere disagreement with it.<sup>40</sup> Judge Ugalde submits that Mongolia has not pointed to any substantial error in law, nor to any substantial error in the understanding and weight given to the underlying facts giving rise to the Plenary Decision and therefore, no support has been provided for the Reconsideration Application.<sup>41</sup>

### III. DETERMINATION OF THE PLENARY

13. Mongolia requests that the plenary reconsider the Plenary Decision, insofar as it relates to Judge Aitala and Ugalde or, alternatively, to accept the Reconsideration Application as a new application for the disqualification of Judge Aitala and Ugalde from Pre-Trial Chamber II.<sup>42</sup> The plenary will address each request in turn.

#### *i. The request for partial reconsideration*

14. The plenary recalls that it found, in the Plenary Decision, that Mongolia had standing to bring the Disqualification Application in the context of the proceedings under article 87(7) of the Statute, because a State Party engaged in such proceedings at the Court has an entitlement to ensure that such proceedings are conducted impartially.<sup>43</sup> The plenary, acting by majority, considers, as a result, that Mongolia has standing to request partial reconsideration of the Plenary Decision which derived from the Disqualification Application. A minority of judges, consisting of Judges Lordkipanidze and Ben Mahfoudh, considers that Mongolia lacks standing in respect of certain aspects of the Reconsideration Application.

15. The plenary of judges notes that it has not previously addressed the circumstances under which it may reconsider its prior decisions, and observes that Mongolia does not identify

<sup>38</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 7.

<sup>39</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 7.

<sup>40</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 8.

<sup>41</sup> [Observations of Judge Ugalde](#), ICC-01/22-118-AnxII, para. 9.

<sup>42</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 1.

<sup>43</sup> [Plenary Decision](#), ICC-01/22-107, para. 23.



the legal basis for such request. Nonetheless, the plenary recalls that Chambers of the Court and the Presidency have consistently recognised their inherent power to reconsider their own decisions, at the request of one of the parties or *proprio motu*.<sup>44</sup> The plenary recalls the jurisprudence of Chambers which provides that reconsideration is an exceptional measure which should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. New facts and arguments arising since the issuance of the decision might be taken into account. A request for reconsideration cannot be used as an attempt to re-argue points which have already been made. However, if new facts are matters which would have been taken into account when arriving at the impugned decision, then it is clearly in the interests of justice that the Chamber considers whether those facts would provide good and sufficient reason to alter that decision.<sup>45</sup> The plenary considers it appropriate in the present circumstances that these factors guiding reconsideration are considered and applied by the plenary in the context of disqualification proceedings.

16. In respect of Ground A, Mongolia submits that the alleged error of reasoning in the Plenary Decision pertains to the question of whether ‘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’.<sup>46</sup> The plenary considers that submissions on this question were already made by Mongolia in the proceedings relating to Disqualification Application, in particular Mongolia’s clear expression that the Disqualification Request related to 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’.<sup>47</sup> At the time of the Plenary Decision, the plenary was fully apprised of and duly considered this question, unanimously determining that, in the specific circumstances, Judges Aitala and Ugalde took a number of different substantive decisions each involving the application of entirely distinct legal standards and criteria which did not give rise to any

<sup>44</sup> See, e.g. Trial Chamber II, *The Prosecutor v. Germain Katanga*, [Public redacted version of Decision on the request for reconsideration of or leave to appeal the ‘Order on the mandate of the Legal Representative of Victims’ \(ICC-01/04-01/07-3925\)](#), 10 June 2024, ICC-01/04-01/07-3931-Red, para. 21. See also Presidency, *The Prosecutor v. Germain Katanga*, [Decision on ‘Defence Application for Reconsideration of the Presidency “Decision pursuant to article 108\(1\) of the Rome Statute”’ \(ICC-01/04-01/07-3821-Red\)](#), 26 June 2019, ICC-01/04-01/07-3833, para. 25.

<sup>45</sup> Trial Chamber I, *The 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”](#), 29 March 2022, ICC-02/05-01/20-650-Red, para. 10.

<sup>46</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 25.

<sup>47</sup> [Additional Submission](#), ICC-01/22-101-Anx, para. 20.

appearance of bias or lack of impartiality, being further fully aware of the Head of State context.<sup>48</sup> The plenary considers that this ground was already argued and appears to express mere disagreement with the Plenary Decision. The plenary considers that this ground does not warrant reconsideration.

17. With regard to Ground B, concerning the alleged ‘haste’ with which Pre-Trial Chamber II issued its decision on Mongolia’s request for leave to appeal the Non-Compliance Finding,<sup>49</sup> the plenary finds that this ground is entirely speculative and does not warrant reconsideration.

18. Turning to Ground C, concerning the Publications authored by Judge Aitala,<sup>50</sup> the plenary considers that reconsideration on this ground could only be warranted were it necessary to prevent an injustice. In order to guide its assessment of whether reconsideration is required to prevent an injustice, noting that there are no specific rules or regulations governing the admission of new evidence which was already in existence at the time of the initial disqualification proceedings, the plenary considers it appropriate to draw generally from the principles applied by appellate bodies to the admission of new evidence on appeal. Guided by the practice of the Appeals Chamber of the Court, the plenary considers that new evidence which was not presented in the Disqualification Application would be admissible before the plenary if: (i) the plenary is convinced of the reasons why such evidence was not presented originally, including whether it could have been presented with the exercise of due diligence; and (ii) it is demonstrated that the new evidence would have led the original decision-maker to a different outcome, in whole or in part.<sup>51</sup> These requirements are cumulative. The plenary considers that this approach is consistent with the general standard of reconsideration applied by Chambers of the Court and the Presidency, as set out at paragraph 15 above.

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<sup>48</sup> [Plenary Decision](#), ICC-01/22-107, paras 24-27.

<sup>49</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 31-38.

<sup>50</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 39-50.

<sup>51</sup> Appeals Chamber, *The Prosecutor v. Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”](#), 8 March 2018, ICC-01/05-01/13-2275-Red, para. 509; Appeals Chamber, *The Prosecutor v. Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido*, [Decision on Mr Arido’s application for admission of two hearing transcripts as additional evidence](#), 25 August 2017, ICC-01/05-01/13-2206, para. 14; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red, paras. 58-59.

19. The plenary notes that no new evidence concerning Judge Ugalde has been put forward, thus it considers that this ground relates solely to Judge Aitala. The Book and the Article were published in 2021 and 2022, respectively, and have been publicly available since those dates. In the Reconsideration Application, Mongolia fails to offer any explanation as to why it did not raise these matters when making the original Disqualification Application on 29 October 2024. The plenary therefore considers that the Publications were freely available and accessible to Mongolia at the time of its Disqualification Application and, in the absence of any contrary explanation by Mongolia, the plenary considers that the Publications could have been presented at that time if due diligence had been exercised. Accordingly, the plenary considers that the admission of the Publications before the plenary is not warranted to prevent an injustice in view of such lack of due diligence. The plenary therefore considers that Ground C provides no basis for the reconsideration of the Plenary Decision.
20. In addition, a majority of judges, consisting of Judges Akane, Prost, Korner, Samba, Alexis-Windsor, Paek, Damdin and Hohler, further notes that, in the Reconsideration Application, Mongolia has not articulated how the Publications demonstrate bias, appearance of bias or lack of impartiality on the part of Judge Aitala. A minority of judges, consisting of Judges Alapini-Gansou, Bossa, Lordkipanidze, Flores, Ben Mahfoudh and Guillou, considers that the finding at paragraph 19 is itself determinative of this ground of the Reconsideration Application and that, as a matter of principle, any further comment by the plenary is entirely unnecessary.
21. In relation to Ground D, purporting an alleged procedural error in the Plenary Decision relating to the lack of opportunity to respond to the Prosecution Response,<sup>52</sup> the plenary notes that the Plenary Decision clearly explained that ‘it did not find [the Prosecution Response] of relevance in formulating its views’ and that for this reason, the request for leave to reply by Mongolia, received after the plenary had already taken its decision on the Disqualification Application, ‘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’.<sup>53</sup> Given that the Prosecution Response was immaterial to the Plenary Decision, no injustice or clear error can be shown on the basis of failing to allow Mongolia to respond to it.

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<sup>52</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 51-55.

<sup>53</sup> [Plenary Decision](#), ICC-01/22-107, para. 22.

Accordingly, the plenary finds that this ground does not satisfy the requirements for reconsideration.

22. In light of the above, the plenary of judges considers that the various grounds for reconsideration raised by Mongolia demonstrate no error of reasoning, nor is reconsideration necessary to avoid an injustice. The plenary of judges therefore dismisses the request to reconsider the Plenary Decision.

*ii. New request for disqualification*

23. The plenary of judges notes the alternative submission of Mongolia that the plenary ‘accept this submission as a new application for disqualification, based on the new evidence presented’.<sup>54</sup> The plenary understands this new evidence to refer to the Publications. The plenary understands this request to concern solely Judge Aitala because no arguments or evidence concerning Judge Ugalde have been put forward which would support a request for his disqualification.
24. The plenary is of the view that a subsequent disqualification request against the same judge, in the same proceedings, and by the same applicant, should only be granted on an exceptional basis so as to not disrupt the proper management of the proceedings and ensure that disqualification requests are presented in their entirety. Such exceptional basis to consider a subsequent disqualification request may include cases where the evidence on which a new disqualification request is based was not available or could not have been discovered with the exercise of due diligence at the time of the original disqualification request. This raises issues which are materially identical to those already elucidated at paragraphs 18-20 above. Accordingly, the plenary dismisses this aspect of the Disqualification Application on the same basis as above.

*iii. Procedural requests*

25. The plenary notes the request by Mongolia to obtain 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.<sup>55</sup> The plenary recalls that a strong presumption of impartiality attaches to the judges of the Court, and such presumption can

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<sup>54</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 67.

<sup>55</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, paras 63-66.

only be rebutted with evidence, with the burden of proof resting on the party requesting disqualification.<sup>56</sup> The plenary is of the view that the request from Mongolia to obtain information concerning the judges of Pre-Trial Chamber II seeks to reverse this burden of proof, by suggesting that it is for these judges to demonstrate that they are not biased. The plenary considers that this request is entirely lacking in legal basis.

26. Turning to the additional forms of relief sought by Mongolia,<sup>57</sup> the plenary considers that, having dismissed Mongolia's request for reconsideration<sup>58</sup> and disqualification,<sup>59</sup> as well as the request to obtain information from the judges of Pre-Trial Chamber II,<sup>60</sup> requests (v) and (vi), as well as the remaining aspects of request (iii), have become moot. With regard to request (iv), the plenary confirms that, in making its decision, it considered thoroughly Mongolia's submissions and all related relevant aspects. Regarding request (vii), the plenary considers that it is under no obligation to disclose the date on which it convenes and notes that a majority of judges decided that it was not necessary to do so in the present circumstances, which caused no prejudice to Mongolia. A minority of judges, consisting of Judges Prost, Flores and Damdin, while recognising there was no obligation, for the transparency of the proceedings which were based on a public filing and noting this was a specific request of a State Party, would have granted the request.

#### **IV. DISPOSITION**

27. The plenary of judges, acting unanimously, dismisses the Reconsideration Application.

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

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<sup>56</sup> [Plenary Decision](#), ICC-01/22-107, para. 20.

<sup>57</sup> [Reconsideration Application](#), ICC-01/22-113-Anx, para. 67.

<sup>58</sup> *Infra*, para. 22.

<sup>59</sup> *Infra*, para. 24.

<sup>60</sup> *Infra*, para. 25.

赤根智子

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**Judge Tomoko Akane**  
**President**

Dated this 10 March 2025

At The Hague, The Netherlands