



Internal memorandum  
Memorandum interne

To   À	Plenary of Judges	From   De	Judge Rosario Salvatore Aitala Judge Gerardo Ugalde Godínez
Date	7 November 2024	Through   Via	
Ref.	Copies		
Subject   Objet	Observations of Judge Aitala and Judge Ugalde concerning the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx)		

1. In response to the Order concerning the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx),<sup>1</sup> we, the undersigned Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez, submit the following written observations, pursuant to article 41(2)(c) of the Rome Statute ( 'Statute') and rule 34(2) of the Rules of Procedure and Evidence (the 'Rules').
2. As a preliminary matter, on the legal standing of Mongolia to request the disqualification of judges, we recall that article 41(2)(b) of the Statute only refers to the Prosecutor and the person being investigated or prosecuted as persons who may request the disqualification of judges. We note that in a previous request for disqualification, a majority of the judges found that a person not mentioned in article 41(2)(b), a legal representative of victims, had no standing to bring an application for disqualification under article 41(2)(b) of the Statute.<sup>2</sup> However, we consider that the proceedings under article 87(7) of the Statute, although connected to the criminal proceedings, are of a different nature. This notwithstanding, we find that Mongolia has an interest in raising the question of disqualification and, therefore, we consider that the Plenary of the Judges can legitimately consider the request.
3. Concerning the timing of the request, we observe that Rule 34(2) of the Rules provides that 'a request for disqualification **shall** be made in writing as soon as there is knowledge of the

<sup>1</sup> Plenary of Judges of the ICC, *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.

<sup>2</sup> Plenary of Judges of the ICC, Decision of the Plenary of Judges on the Application of the Legal Representative for Victims for the disqualification of Judge Christine Van den Wyngaert from the case of *The Prosecutor v Germain Katanga*, 22 July 2014, ICC-01/04-01/07-3504-Anx, paras 41-43.

grounds on which it is based' (emphasis added). We note that Mongolia has had knowledge of the circumstances that the undersigned have signed the Arrest Warrant of Mr. Putin since 24 April 2023,<sup>3</sup> and that it has made reference to the Arrest Warrant in several documents and submissions, including request for consultations,<sup>4</sup> request for extension of time limits,<sup>5</sup> and observations under article 87(7) of the Statute<sup>6</sup>. Therefore, the request for disqualification should have been presented prior to the issuance of the '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' ('Finding').<sup>7</sup> We note that the requirement to make requests for disqualification as early as possible is a vital procedural safeguard, designed to ensure judicial efficiency and safeguard the integrity of proceedings. Having failed to raise any concerns as to the involvement of the undersigned in the article 87(7) proceedings, we consider that rule 34(2) prevents such a request from being made for the first time at the stage of the consideration of the request for leave to appeal the Finding, hence barring the applicant to make the request at this stage. We therefore are of the view that the Plenary of the Judges should dismiss the request *in limine*.

4. On the merits, we note that at the International Criminal Court ('ICC'), it is for the Pre-Trial Chamber or the Trial Chamber to grant leave to appeal their own decisions (see article 82(1)(d) and 82(2) of the Statute). The material implication of the reasoning of Mongolia would be that any request for leave to appeal any decision of Pre-Trial and Trial Chambers would have to be entertained by different judges in all instances. This would be tantamount to amending the Rome Statute and would rapidly paralyse the activity of the Court. Needless to say that the interpretation of the Statute advanced by Mongolia to the effect that Judges become conflicted in the stage of the proceedings, which legally is under their competence, because they have issued judicial decisions in that very stage of proceedings, is legally untenable.

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<sup>3</sup> See Request to all States Parties to the Rome Statute for the provisional arrest of Vladimir Vladimirovich Putin pursuant to article 92 of the Rome Statute in implementation of Pre-Trial Chamber II's Order of 24 April 2023, 26 April 2023, ICC-01/22-25-Conf.

<sup>4</sup> Annex I to Registry transmission of a communication received from Mongolia in relation to Pre-Trial Chamber II's Order dated 24 April 2023 (ICC-01/22-23-Conf-Exp), ICC-01/22-83-Conf-Exp-AnxI; Annex I to Registry transmission of additional communication received from Mongolia in relation to Pre-Trial Chamber II's Order dated 24 April 2023 (ICC-01/22-23-Conf-Exp), ICC-01/22-84-Conf-ExpAnxI.

<sup>5</sup> Registry transmission of communication received from Mongolia in relation to Pre-Trial Chamber II's Decision inviting Mongolia to provide any further submissions on its failure to arrest and surrender Vladimir Vladimirovich Putin dated 10 September 2024 (ICC-01/22-86-Conf), 20 September 2024, ICC-01/22-87-Conf-Exp.

<sup>6</sup> Annex I (confidential *ex parte* Prosecution only) to Registry transmission of the submissions sent by Mongolia in relation to Pre-Trial Chamber II's Decision inviting Mongolia to provide any further submissions on its failure to arrest and surrender Vladimir Vladimirovich Putin dated 10 September 2024 (ICC-01/22-86-Conf), ICC-01/22-89-Anx (dated 4 October 2024 and notified on 7 October 2024).

<sup>7</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.

5. We further note that at the ICC, judges cannot sit in different stages of the proceedings for the same case, in accordance with article 39(4) of the Statute. Judges who have dealt with certain situation and cases at the pre-trial stage cannot sit in chambers at trial and both pre-trial and trial judges cannot sit in appeals in the same case. However, they obviously must deal with all required decisions within the same stage of the proceedings, which constitute their judicial mandate. The implication of the reasoning of Mongolia would be that, following the issuance of an Arrest Warrant, the judges who have issued it would not be able to conduct the confirmation proceedings and decide on the confirmation of the charges.<sup>8</sup> Effectively, this rationale would require that following the issuance of an Arrest Warrant, the Pre-Trial Chamber would need to be recomposed for each subsequent decision, an approach which is not mandated by the Court's legal texts and would again paralyse the functioning of the Court. Similarly, replacement judges could only issue one decision and become conflicted with any subsequent ones.
6. Moreover, following the logic of Mongolia with respect to President Akane, the judges participating in the Plenary deciding this matter could not attend any judicial matter in respect of the concerned proceedings, neither at pre-trial, trial or at appeals. None of the judges of the Court would be able to entertain these matters. In this respect, it might also be noted that there are currently applications from Mongolia related to the article 87(7) proceedings before both Pre-Trial Chamber II<sup>9</sup> and the Appeals Chamber.<sup>10</sup> Given that Mongolia has requested the disqualification of three judges, if judges before other chambers are also seized of related matters in this case, they might also be considered conflicted, and a situation could very rapidly be created in which the quorum of judges needed for a plenary session on a disqualification matter could not be met. The absurdity of such situation highlights that what must be kept in mind is that article 41(2)(a) of the Statute is concerned with reasonable grounds to doubt the impartiality of a judge. Such reasonable grounds simply do not arise in a situation where a judge has merely performed her or his assigned judicial functions in a case and the applicable rules of involvement across various phases of the proceedings have not been violated. Therefore, should the Plenary decide to accept the disqualification request, the Judges of the Appeals Division sitting in the Plenary would have to immediately excuse themselves from hearing any Application submitted by Mongolia in the proceedings under art. 87(7) of the Statute.

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<sup>8</sup> Previously, the same judge who has issued a warrant of arrest has also determined a request from a State Party for leave to appeal a decision under article 87(7) of the Statute in the same case. See: 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 on Jordan's request for leave to appeal, 21 February 2018, ICC-02/05-01/09-319.

<sup>9</sup> Annex to Registry transmission of a 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, ICC-01/22-91-Anx (dated 29 October 2024 and notified on 31 October 2024).

<sup>10</sup> Annex to Registry transmission of a communication received from Mongolia in relation to an "Urgent Request for Suspensive Effect", ICC-01/22-94-Anx (dated 1 November 2024 but notified on 4 November 2024).

7. We respectfully ask the Plenary of the Judges to deal with this matter with urgency in order to allow the decision on the request of leave to appeal to be rendered expeditiously and allow the Assembly of the State Parties to have clarity on the way forward.