

**ANNEX**  
**Public**



EMBASSY OF MONGOLIA  
BRUSSELS

№ A/24-106

The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and has the honour to convey a Note Verbal № A/24-1685 dated 15 November 2024 from the Ministry of Foreign Affairs of Mongolia on requesting the Registry to transmit Mongolia's "Request for Leave to Reply to the Prosecution response to Mongolia's Application for the disqualification of Judges".

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

Enclosed: 8 pages

Brussels, 15 November 2024



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT  
The Hague

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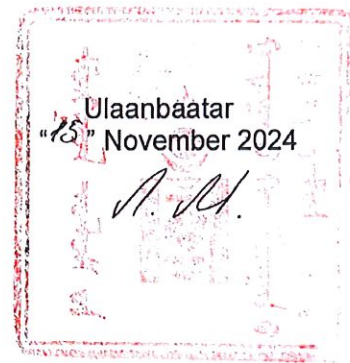


MONGOLIA  
MINISTRY OF FOREIGN AFFAIRS

*AA*  
*24-1685*

The Ministry of Foreign Affairs of Mongolia presents its compliments to the Registry of International Criminal Court and has the honor to request the Registry to forward Mongolia's "Request for Leave to Reply to the Prosecution response to Mongolia's Application for the disqualification of Judges", submitted on 11 November 2024, to the Acting President Judge Reine Alapini-Gansou, for due consideration by the Plenary of Judges.

The Ministry of Foreign Affairs of Mongolia avails itself of this opportunity to renew to the Registry of the International Criminal Court the assurances of its highest consideration.



THE REGISTRY OF  
INTERNATIONAL CRIMINAL COURT

The Hague

**REQUEST LEAVE TO REPLY**  
**TO THE PROSECUTION RESPONSE TO MONGOLIA'S**  
**"APPLICATION FOR THE DISQUALIFICATION OF JUDGES"**

**I. Introduction**

1. Mongolia respectfully requests the Plenary of Judges, for leave to reply ("Reply") to the "Prosecution response to Mongolia's "Application for the disqualification of Judges"" ("Prosecutor's Response"), submitted on 11 November 2024, pursuant to Regulation 24(5) of the Regulations of the Court.
2. Mongolia submits that a Reply is both necessary and justified under the Court's regulations due to (i) the introduction of new arguments in the Prosecutor's Response which Mongolia could not reasonably have anticipated, and (ii) a need to clarify significant mischaracterizations and misrepresentations within the Prosecutor's Response.
3. Mongolia emphasizes that a Reply is necessary to assist the Plenary of Judges in its determination of Mongolia's "Application for the disqualification of Judges" ("Application"). Granting leave to reply will ensure that the Plenary of Judges is fully informed of all relevant legal and factual matters, thereby promoting the fair and just conduct of the proceedings.
4. Thus, Mongolia respectfully requests that the Plenary of Judges exercise its discretion to allow the requested Reply for the purposes of achieving clarity, procedural fairness, and a fully informed and unbiased assessment of the issues relevant to its Application.

**II. Procedural Background**

5. On 29 October 2024, Mongolia submitted an "Application for the Disqualification of Judges", seeking, *inter alia*, the disqualification of Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez from Pre-Trial Chamber II.
6. On 5 November 2024, the Plenary of Judges issued an order inviting submissions on the Application.
7. On 8 November 2024, the Plenary of Judges issued Notification concerning the Application.
8. On 11 November 2024, Mongolia submitted "Additional submission in support of the Application for Disqualification of Judges."
9. On 11 November 2024, the Prosecutor filed a response opposing Mongolia's Application and raised several new arguments and interpretations that Mongolia could not have reasonably anticipated at the time of filing its Application.

### III. Legal Basis for the Request

10. Pursuant to Regulation 24(5) of the Regulations, participants may submit a reply to a response with the permission of the Chamber. Any such reply must address new issues raised in the response that the replying participant could not reasonably have anticipated.
11. In this context, Mongolia submits that the Plenary of Judges should be equated with a Chamber for the purposes of Regulation 24(5) and possesses the same discretionary power to allow a reply. The Plenary, when acting in judicial capacity, exercises functions analogous to those of a Chamber and is vested with the authority to manage proceedings before it in the interests of justice.
12. Mongolia notes that in addition to the Regulation 24(5) a reply is justified where, as affirmed by the Appeals Chamber, the Prosecutors's Response presents issues that necessitate a reply for the proper adjudication of the matter at hand.<sup>1</sup>

### IV. Grounds for Granting Leave to Reply

#### A. New Issues and Arguments Raised by the Prosecutor's Response

13. The Prosecutors's Response introduces several new issues that Mongolia could not have reasonably anticipated, and which necessitate a reply to ensure that the Plenary of Judges has a comprehensive understanding of the matters at hand.

##### ***1. Prosecutors's Procedural Framing of the Leave to Appeal Process***

14. The Prosecution in its response minimizes the significance of the Pre-Trial Chamber's role in determining Mongolia's Request for Leave to Appeal, framing it as a purely procedural determination, therefore, does not implicate judicial impartiality. This framing is entirely novel and overlooks the substantive implications of procedural rulings, particularly in the context of Article 82(1)(d).
15. Mongolia must address this new argument to demonstrate that procedural rulings, especially in sensitive and high-profile cases, carry significant implications for perceptions of fairness and impartiality.
16. In its Reply, Mongolia will submit that even procedural rulings carry substantive implications, particularly when they involve decisions on issues

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<sup>1</sup> Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Decision on Mr Ntaganda's request for leave to reply, 3 March 2017, ICC-01/04-02/06-1813 (OA5), para. 8. See also Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Decision on Mr Ntaganda's request for leave to reply, 17 July 2017, ICC01/04-02/06-1994 (OA6), paras 13-14; Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, Decision on the Prosecutor's request for leave to reply, 23 December 2022, ICC-02/17 OA5.

such as state compliance, which directly implicate Mongolia's legal obligations and rights under international law.

17. Mongolia seeks to address how procedural rulings, especially in this context, can substantially impact perceptions of fairness and impartiality.

## **2. *Narrow interpretations of Article 41(2), Rule 34(c) and (d)***

18. The Prosecutors's Response narrowly interprets Article 41(2), Rule 34(c) and (d) of the Rules of Procedure and Evidence, asserting that these provisions apply exclusively to a judge's pre-ICC functions or external expressions of opinion. The Prosecutor also argues that the legal standard for disqualification is concerned only with a judge's prior involvement in different phases of the same case (pre-trial, trial, appeal), suggesting that prior involvement in issuing a warrant of arrest does not constitute grounds for disqualification under the Rome Statute.
19. This interpretation mischaracterizes the intent and scope of the article and rules by introducing a novel argument regarding the temporal and contextual scope of Article 41(2), Rule 34(1)(c) and (d), which Mongolia could not have reasonably anticipated. Accordingly, this new issue requires further analysis and clarification to highlight its departure from established legal principles.
20. The Prosecutor argues that Article 41(2), Rule 34(1)(c) and (d) do not apply because the judges' prior involvement does not constitute "prior functions" before taking office, nor have they expressed opinions affecting their impartiality. Mongolia's reply will clarify that these provisions also applies to a judge's prior judicial involvement in related cases, particularly when such involvement could reasonably create a perception of bias.
21. Specifically, Mongolia will provide that the judges' issuance of the warrant of arrest for President Putin, a matter intricately connected to the issues in the current proceedings, objectively creates an appearance of preconceived notions about Head of State Immunity, Mongolia's alleged non-compliance and the related legal issues.
22. In addition, the Prosecution dismisses Mongolia's concerns regarding the judges' previous expression of opinions related to the case. Mongolia's reply will address how judicial opinions formed in closely related matters may reasonably be perceived as prejudicial in subsequent proceedings.
23. Mongolia seeks to clarify that Article 41(2), Rule 34(1)(c), and (d) should not be narrowly construed as limited to pre-ICC functions, specific procedural phases, or internal expressions of opinion. Instead, a broad interpretation must be adopted to encompass any situation where a judge's impartiality might reasonably be questioned on any ground. This includes prior judicial actions that could create an appearance of bias in subsequent related proceedings.

### ***3. Standard for Apparent Bias and Reasonable Observer Test***

24. The Prosecution argues that the high threshold for rebutting the presumption of judicial impartiality has not been met. The Prosecutor's specific application to the circumstances of this case introduces new nuances and interpretations that require a response to clarify Mongolia's position.
25. Mongolia will address that the reasonable observer standard focuses on the appearance of impartiality, and perception of conflict of interest, which does not require evidence of actual bias.
26. In its Reply, Mongolia will expand on why a properly informed, objective observer would reasonably apprehend bias in this case, given the judges' prior roles in issuing a decision with profound legal ramifications.
27. Mongolia emphasizes that failing to address even the appearance of bias could significantly undermine public confidence in the Court's proceedings, particularly in light of the unprecedented nature of this case. Accordingly, Mongolia will expound how, under the specific circumstances of this case, a reasonable and informed observer would perceive bias, given the judges' prior involvement in substantial judicial actions directly related to the matter concerning Mongolia.

### ***4. Prosecutors's Reliance on Precedent***

28. The Prosecutor's response introduces a new argument, asserting that no precedent exists for the disqualification of judges in analogous circumstances. This argument was not reasonably anticipated and necessitates a reply.
29. In its Reply, Mongolia will address that the unique facts of this case—particularly the judges' prior involvement in complex and sensitive legal matters—justify a broader application of disqualification standards. Mongolia seeks to clarify that the unprecedented nature of this case requires heightened scrutiny to ensure judicial impartiality and maintain public confidence in the Court's integrity.

### **B. Necessity of a Reply for Fair Adjudication and Assistance to the Plenary**

30. Beyond introducing new arguments, the Prosecutor's Response includes significant misinterpretations and mischaracterizations of Mongolia's positions, underscoring the need for clarification to maintain a fair and accurate record.
31. To rectify the misrepresentations, Mongolia respectfully submits that a Reply is necessary. This Reply will provide the Plenary of Judges with a clear and accurate understanding of the issues, ensuring that the adjudication process remains just and fair, grounded in an accurate representation of Mongolia's submissions.

### ***1. Correction of misinterpretations and mischaracterizations***

32. The Prosecution inaccurately portrays Mongolia's application as failing to distinguish between actual and apparent bias under Article 41(2) of the Rome Statute. This is a misrepresentation of Mongolia's position, which explicitly addresses the reasonable apprehension of bias, a standard that does not require proof of actual bias but focuses on public perception and the maintenance of judicial integrity.
33. Mongolia must correct this mischaracterization to ensure that the Plenary of Judges does not base its decision on an erroneous understanding of the applicable standard.
34. Furthermore, Mongolia seeks to clarify that the appearance of impartiality must be maintained throughout all stages and aspects of proceedings, not solely between different procedural phases. The judges' prior involvement in issuing the warrant of arrest directly relates to the matter involving Mongolia and reasonably raises doubts about their impartiality in subsequent related proceedings.

### ***2. Dismissal of the Impact of Procedural Determinations***

35. The Prosecution characterizes the Pre-Trial Chamber's role in deciding the Request for Leave to Appeal as a purely procedural determination without substantive implications. This mischaracterization minimizes the significant role such determinations play in shaping the fairness and conduct of proceedings.
36. Mongolia's Reply will correct this misunderstanding and mischaracterizes by highlighting the substantive impact of procedural rulings, particularly in the context of state compliance and general international law.

### ***3. Misapplication of the Presumption of Impartiality***

37. The Prosecution emphasizes the high threshold required to rebut the presumption of impartiality but overlooks the specific circumstances of this case, which objectively give rise to a reasonable appearance of bias.
38. Mongolia's submissions are not a general or broad challenge to judicial impartiality but are instead rooted in specific, factually supported concerns about the judges' prior involvement in related matters. A Reply is necessary to ensure that the Plenary of Judges fully understand the nuanced basis of Mongolia's concerns.

### ***4. Minimization of the Judges' Prior Roles***

39. The Prosecutors's Response downplays the significance of the judges' prior roles in issuing the arrest warrant and their involvement in the referral decision.



40. This mischaracterization obscures the central issue: that these prior decisions create an objectively reasonable appearance of bias when the same judges are tasked with ruling on Mongolia's Request for Leave to Appeal. Mongolia's Reply will provide additional context and support to clarify the implications of this prior involvement.

***5. Prosecutor's Concession Regarding Presiding Judge Rosario Salvatore Aitala's disqualification***

41. While the Prosecution concedes that Presiding Judge Rosario Salvatore Aitala recusal is appropriate in the context of the Presidency and Plenary deliberations, it denies the necessity of broader recusals. Mongolia's reply will argue that the Prosecutors's partial concession underscores the existence of a reasonable perception of bias and that such concerns are equally applicable to Judge Rosario Salvatore Aitala's continued involvement in other adjudicative roles related to this matter.

***6. Ensuring a Complete and Balanced Record***

42. The Prosecutor's Response introduces a narrative that risks overshadowing Mongolia's submission. Without a Reply, critical nuances in Mongolia's position may remain unaddressed, leading to an incomplete or skewed record.
43. A Reply will ensure that the Plenary of Judges has before it a full and balanced understanding of the issues, thereby facilitating a just and fair adjudication.

**V. Relief sought**

44. For the foregoing reasons, Mongolia respectfully submits that (i) the Prosecutor's Response raises new issues that could not have been reasonably anticipated and (ii) that a reply is necessary to assist the Plenary in its adjudication of the Application by ensuring that all relevant legal and factual matters are fully considered. This will promote the fair and just conduct of the proceedings.

45. Mongolia therefore respectfully requests the Plenary of Judges to:

(i) Acknowledge that, for the purposes of Regulation 24(5) of the Regulations of the Court, the Plenary of Judges functions as a or, in the alternative, should be equated as a Chamber and possesses the same discretionary power to permit a reply in the interests of justice;

(ii) Consider that granting leave to reply serves the interests of justice and contributes to the transparency and fairness of the proceedings;

(iii) Grant leave to file a reply to the Prosecutor's Response providing opportunity to address the all specified issues above;

(iv) Grant an extended timetable for the submission of Mongolia's Reply, providing adequate time for thorough preparation and articulation of the issues to support a just and fair adjudication process; and

(v) Defer the convening of the Plenary and the issuance of a final decision on the Application for Disqualification until such time as Mongolia has been granted leave to reply and afforded the opportunity to submit its Reply.

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