

Internal memorandum
Memorandum interne



To À	Plenary of Judges	From De	Judge Sergio Ugalde
Date	24 December 2024	Through Via	
Ref.	Copies		
Subject Objet	Observations of Judge Ugalde concerning the Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx)		

1. In response to the Order concerning the ‘Request from Mongolia dated 2 December 2024 (ICC-01/22-113-Anx),¹ I, the undersigned, 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. At the outset, it is my submission that the Request for Partial Reconsideration fails to meet the legal standard for reconsideration of judicial decisions at the Court. Reconsideration is not addressed in the Court’s legal framework and has been consistently considered as an exceptional remedy that can only be granted in very limited circumstances, clearly circumscribed to criminal proceedings *per se*. This strict exceptionality is due to the compelling need to ensure the stability and legal certainty of all Court decisions.
3. Consistent with my own observations in an earlier submission,² the Plenary Decision unanimously found that Mongolia had standing to bring its original

¹ Plenary of Judges of the ICC, 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.

² Judge Aitala and Judge Ugalde, Situation in Ukraine, 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), 7 November 2024, ICC-01/22-97-AnxII, para. 2, annexed to Plenary of Judges of the ICC, 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.

disqualification request in the context of proceedings related to cooperation under article 87(7) of the Statute, noting that the interests of Mongolia were engaged.³ Mongolia clearly submitted that its standing was related to the distinctive nature of article 87(7) proceedings⁴ and Mongolia's request for disqualification was limited in scope to the 'specific case and proceedings concerning Mongolia'.⁵

4. However, it is observed that the Request for Partial Reconsideration appears to extend well beyond the scope of the standing of Mongolia to represent its own national interests in the context of article 87(7) proceedings.⁶ It is firmly and respectfully suggested that the considerations of the plenary should remain focussed exclusively on the issues which Mongolia has standing to raise, noting that Mongolia cannot represent the interests of any individual subject to an arrest warrant before the Court.
5. It is further observed that the Request for Partial Reconsideration is practically moot. The original disqualification request was a request, *inter alia*, for the disqualification of two judges of Pre-Trial Chamber II in connection with the proceedings concerning Mongolia arising from article 87(7) of the Statute.⁷ More specifically, the original disqualification request sought to disqualify those two judges from hearing a request for leave to appeal. The decision on the request for leave to appeal in question was rendered by Pre-Trial Chamber II on 29 November 2024,⁸ following the Decision of the Plenary on the Disqualification Request communicated on 15 November and fully rendered on 22 November 2024, thus rendering Mongolia's latest request moot.
6. Concerning the petitions made by the applicant, in its newest application before this Plenary Mongolia makes two requests. First, to partially reconsider the

³ Plenary of Judges of the ICC, 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'), para. 23.

⁴ 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'), paras 3-7, 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.

⁵ 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'), paras 3-7, 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.

⁶ See Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 40, 44.

⁷ Application for the disqualification of Judge of 29 October 2024, ICC-01/22-92-Anx, para. 1.

⁸ Pre-Trial Chamber II, Situation in Ukraine, Decision on Mongolia's requests for leave to appeal, temporary stay of the proceedings and related matters, 29 November 2024, ICC-01/22-111.

Plenary's unanimous rejection of Mongolia's prior application for disqualification; and second, in the alternative, Mongolia introduces a new application for disqualification on the basis of the existence of new facts.⁹

7. With regard to the first request, namely the reconsideration by the Plenary of its prior unanimous decision, Mongolia grounds this request on the existence of new facts as stated in paragraph 3 of its application.¹⁰ However, Mongolia also asserts that there is an apparent error in the reasoning of the Plenary, as stated in paragraph 25 of its application.¹¹ Thus, it is unclear upon what grounds Mongolia is requesting this partial reconsideration. Even if the application were to be construed as Mongolia advancing both the existence of new facts and an error in the reasoning as grounds for the partial reconsideration of the decision, it is noted with regard to the former that Mongolia has not produced any evidence showing new facts that concern me personally.
8. Concerning the purported "error in reasoning",¹² Mongolia's pleadings in this respect do not specify how the Plenary erred in its decision regarding the earlier request for disqualification. Rather, Mongolia states again that the involvement of the Pre-Trial Chamber II judges in making substantive determinations - specifically about the immunity of a Head of State - raises concerns about the impartiality of those judges in subsequent proceedings involving the same issues and the same individual. This assertion merely shows a disagreement with the decision of the Plenary, and, further, it goes beyond the scope of the standing of Mongolia to represent its own national interests in the context of article 87(7) proceedings. Thus, the argument does not constitute a ground for reconsideration.
9. Furthermore, a reconsideration of a decision on the basis of "error in reasoning" must be grounded in one of two conditions that, if established, would have necessarily affected the material outcome of the decision. First, that there is a substantial error in law. Mongolia has not pointed to any such error. Second, that there is a substantial error in the understanding and weight given to the underlying facts giving rise to the decision of the Plenary in this case. Mongolia has not identified such an error either. Therefore, as no support has been provided for the request for reconsideration of the Plenary's decision, there are no grounds to entertain the Mongolian request.
10. With regard to the second request, namely a new application for disqualification, Mongolia argues the existence of new facts. In paragraphs 39 to 50 of its application,¹³ Mongolia addresses the 'new facts' that in Mongolia's view would disqualify me from judicial functions in the present case. Notably, Mongolia neither points to any new fact showing my prior involvement in the case, nor does it establish in any other way how I may have formed an opinion on the substantive issue it is arguing, namely the existence of immunity for Mr. Putin as a Head of

⁹ See Request for Partial Reconsideration, ICC-01/22-113-Anx, para 1.

¹⁰ See Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 3..

¹¹ See Request for Partial Reconsideration, ICC-01/22-113-Anx, para 25.

¹² See Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 25-30.

¹³ See Request for Partial Reconsideration, ICC-01/22-113-Anx, paras 39-50.

State prior to being assigned to Pre-Trial Chamber II. Instead, Mongolia merely restates its prior position concerning its legal standing on the immunity of the Head of State.

11. Even if it were true that a new fact had arisen in my case, Mongolia ought to have specified to the Plenary how this alleged new fact is new at all. For information that predates the relevant decision to give grounds for reconsideration or to be entertained in a new application, the information must have come to light after the relevant decision and have been wholly unavailable to the applicant at the time the original application for disqualification was submitted. Discovering information after the first Plenary's decision was rendered, which was generally available before the first application for disqualification was filed, does not make the fact "new" for the purposes of a request for reconsideration or for a new application for disqualification to be granted; and the information would need to be unquestionably related to Mongolia directly and concern article 87(7) proceedings.
12. At any rate, no new fact has been presented in my case which could serve as a basis to disqualify me from discharging my duties in relation to article 87(7) proceedings in the situation of Ukraine.
13. I observe that the request for partial reconsideration shows that Mongolia intends to continue to litigate the question of immunity of Mr. Putin as a Head of State. As I stated earlier, Mongolia does not appear to have standing insofar as what concerns Mongolia directly is the article 87(7) proceedings. In this regard, Mongolia does not advance substantive arguments concerning Pre-Trial Chamber II's finding of non-cooperation of Mongolia with the Court. Mongolia's assertion that the question of the immunity of Mr. Putin is directly tied to Mongolia's legal proceedings, has no procedural nexus to the Chamber's finding, since this finding concerns Mongolia and not Mr. Putin. Mongolia has not stated any reason why I should be disqualified due to an alleged bias against Mongolia as such. To be sure, I have no bias (nor have I exhibited any apparent bias) against Mongolia, a State that I respect; as I respect all other States Parties to the Rome Statute and non-States Parties.
14. Even if the Plenary decided that it is permissible for Mongolia to further engage the question of the immunity of Mr. Putin as Head of State as grounds for reconsideration, the fact is that my actions concern specifically the discharge of my duties under the Statute, including upholding the interpretation made by the Appeals Chamber on the question of immunities of Heads of State. This jurisprudence was adopted by the Appeals Chamber several years ago and must be considered by all chambers engaged with the same legal issues. As the case is, the Chamber's decisions in the situation in Ukraine were rendered upon the request of the Prosecutor. The Chamber has not done so on its own volition.
15. Notwithstanding the fact that all judges enjoy the presumption of judicial impartiality, for the sake of transparency, I hereby state that I have not authored texts, made comments, or in any other way taken any personal standing on Mongolia and article 87(7) proceedings, or on the question of the immunity of heads of state in proceedings before the Court, outside my duties as Judge in Pre-Trial Chamber II.

16. Finally, I do make decisions, sometimes the most difficult ones, because that is what being a judge entails. I have made a pledge to uphold the values enshrined in international law and in the Rome Statute, and I do so independently and conscientiously.
17. I respectfully request the Plenary to decide this matter promptly and to provide a final decision, in line with the Judiciary's duty to undertake proceedings, all proceedings, in an effective and efficient manner.