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No. **ICC-01/22**
Date: **24 October 2024**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Sergio Gerardo Ugalde Godínez
Judge Haykel Ben Mahfoudh

SITUATION IN UKRAINE

Public

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

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

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**Victims Participation and
Reparations Section**

Other

Presidency

Assembly of States Parties

PRE-TRIAL CHAMBER II of the International Criminal Court, acting under article 87(7) of the Rome Statute (the ‘Statute’), enters a finding on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin (‘Mr Putin’) and refers the matter to the Assembly of States Parties.

I. Procedural history and background

1. On 17 March 2023, further to a request filed by the Prosecution,¹ the Chamber issued a warrant of arrest for Mr Putin (the ‘Warrant of Arrest’).²
2. On 24 April 2023, the Chamber instructed the Registry, *inter alia*, to prepare and notify a request for provisional arrest pursuant to article 92(1) of the Statute to all States Parties (the ‘Request for Cooperation’).³
3. On 2 May 2023, the Registry communicated to the relevant authorities of Mongolia the Request for Cooperation in relation to the Warrant of Arrest.⁴ On the same date, the relevant authorities of Mongolia confirmed receipt of the Request for Cooperation.⁵
4. On 26 and 28 August 2024, acting on the basis of media reports of Mr Putin’s expected travel to Mongolia for the 85th anniversary of the victory in the Battle of Khalkhin Gol towards the end of August/beginning of September, the Registry transmitted to Mongolia two *notes verbales* inviting it to provide information regarding the visit and renewing the request to cooperate with the Court in the arrest and surrender of Mr Putin.⁶

¹ Prosecution’s application under article 58 for a warrant of arrest against Vladimir Vladimirovich PUTIN, 22 February 2023, ICC-01/22-14-SECRET-Exp.

² Warrant of Arrest for Vladimir Vladimirovich Putin, ICC-01/22-18-SECRET.

³ 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.

⁴ Registry Report on the implementation of Pre-Trial Chamber II’s Decision of 24 April 2023 (ICC-01/22-23-Conf-Exp), 5 May 2023, ICC-01/22-29-Conf-Exp, para. 8, p. 5.

⁵ Annex II 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), 30 August 2024, ICC-01/22-83-Conf-Exp-AnxII.

⁶ 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), 30 August 2024, ICC-01/22-83-Conf-Exp, paras 10-12.

5. On 30 August 2024, the Registry transmitted to the Chamber a *note verbale* from Mongolia requesting ‘consultation with the Court according to the Article 97 of the Rome Statute’.⁷ On the same date, the Chamber instructed the Registry to urgently invite the relevant authorities of Mongolia to provide written submissions explaining the matter requiring consultations and its reasons pursuant to article 97 of the Statute.⁸

6. On 2 September 2024, the Registry transmitted to the Chamber a *note verbale* from Mongolia seeking ‘consultation with the ICC to address the challenges related to the Court’s request for cooperation in the context of the Situation in Ukraine ICC-01/22 dated 26 April 2023’. Mongolia ‘recognize[d] that, under customary international law, President Putin, as a sitting head of state of a third country, is entitled and shall enjoy immunity *ratione personae* and *ratione materiae*’, and that it ‘ha[d] not identified any rule in customary international law that excludes or renders the immunity of heads of state inapplicable when their arrest is sought by an international criminal court’. Mongolia continued by asserting that ‘[t]he person specified in the request enjoys immunity and privileges according to the existing international customary norms and legal principles’ and that ‘proceeding with the request would result in breach of Mongolia’s pre-existing legal obligations’.⁹

7. On the same date, the Chamber issued its response to Mongolia’s submissions noting that, for consultations to be meaningful, they must be timely. The Chamber also recalled its classified response to the submissions of another State Party issued in the context of a prior consultation process under article 97 of the Statute and notified to all States Parties, including Mongolia,¹⁰ whereby it found that ‘personal immunity of officials, including Heads of third States, is not opposable in proceedings before the Court, nor a waiver of immunity is required under article 98 of the Statute’. The Chamber thus found that the submissions presented by Mongolia did not show any

⁷ 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.

⁸ Email from Pre-Trial Chamber II to the Registry, 30 August 2024, at 16h10.

⁹ 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-Exp-AnxI.

¹⁰ Response to submissions of a State Party under article 97 of the Rome Statute in relation to the Requests for provisional arrest of 26 April 2023 pursuant to the Order on the Requests for provisional arrest of 24 April 2023, 17 July 2023, ICC-01/22-42-Conf.

legitimate reason that would impede Mongolia from fulfilling its obligations under the Statute.¹¹

8. Following Mr Putin's travel to Mongolia and Mongolia's failure to arrest and surrender him to the Court, on 10 September 2024 the Chamber invited Mongolia to provide submissions concerning its failure to comply with the Request for Cooperation pursuant to regulation 109(3) of the Regulations of the Court (the 'Regulations').¹²

9. On 3 October 2023, Mongolia provided submissions concerning its failure to comply with the Request for Cooperation, requesting the Chamber 'to find that Mongolia has complied with its obligations under international law, including the Rome Statute, and has not failed to execute the request for cooperation of the Court in a manner contrary to the provisions of this Statute', and to 'decline to refer this matter to the Assembly of States Parties' ('Mongolia's Submissions').¹³

II. Analysis

10. Article 87(7) of the Statute reads as follows:

Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties [...].

11. In interpreting this provision, the Appeals Chamber has held that:

[t]he first clause of article 87(7) of the Statute consists of two cumulative conditions, namely, (i) that the State concerned failed to comply with a request to cooperate; and (ii) that this non-compliance is grave enough to prevent the Court from exercising its functions and powers under the Statute. It is only when the Chamber has established that both conditions are met that it may proceed to

¹¹ Response to submissions of a State Party under article 97 of the Rome Statute in relation to the Requests for provisional arrest of 26 April 2023 pursuant to the Order on the Requests for provisional arrest of 24 April 2023, ICC-01/22-85-Conf, paras 9-10, 12 (the '2 September 2024 Response').

¹² Decision inviting Mongolia to provide any further submissions on its failure to arrest and surrender Vladimir Vladimirovich Putin, 10 September 2024, ICC-01/22-86-Conf, para. 9 (the '10 September 2024 Decision').

¹³ 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-Conf-Exp-Anx (dated 4 October 2024 and notified on 7 October 2024).

consider whether to refer the State to the Assembly of States Parties [...] following a finding of non-compliance.¹⁴

12. The Chamber also recalls that the scope of a Chamber's discretion under article 87(7) of the Statute comprises both (i) whether to make a finding of failure to comply with a request for cooperation by a State, which prevents the Court from exercising its powers and functions under the Statute; and (ii) whether it is appropriate to refer the matter to the Assembly of States Parties in order to seek external assistance to obtain cooperation with the request at issue or to otherwise address the lack of cooperation by the requested State.¹⁵

13. In light of the above, the Chamber will address in turn the following questions: (i) whether Mongolia failed to comply with the request to cooperate in the arrest and surrender of Mr Putin contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute; and (ii) whether a referral of the matter to the Assembly of States Parties is warranted.

A. Whether Mongolia failed to comply with the Request for Cooperation contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute

14. At the outset, the Chamber recalls that States Parties must operate in all circumstances in good faith, consistently with the object and the purpose of the Statute and with the expectation that each and all signatories will meaningfully fulfil the obligations agreed in the Statute for the benefit of humanity. In this regard, pursuant to article 86 of the Statute, Mongolia, as a State Party, 'shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court'. Article 87 of the Statute provides that '[t]he Court shall have the authority to make requests to States Parties for cooperation', including notably requests for the arrest and surrender of a person pursuant to article 89 of the Statute as in the present case. In this regard, the Chamber also notes article 59 of the Statute, according to which '[a] State Party which has

¹⁴ Appeals Chamber, *Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, ICC-02/05-01/09-397-Corr, para. 8 (the 'Jordan Appeal Judgment').

¹⁵ Appeals Chamber, *Prosecutor v. Uhuru Muigai Kenyatta*, Judgment on the Prosecutor's appeal against Trial Chamber V(B)'s 'Decision on Prosecution's application for a finding of non-compliance under Article 87(7) of the Statute', 19 August 2015, ICC-01/09-02/11-1032, para. 1 (the 'Kenyatta Appeal Judgment').

received a request for provisional arrest or arrest and surrender *shall* immediately take steps to arrest the person’ (emphasis added). This provision describes a fundamental obligation of the requested State, not a discretion.

15. Mongolia submits that the Chamber should not interpret its request to hold consultations pursuant to article 97 of the Statute ‘as a refusal to comply’ with the Request for Cooperation, but rather to consider its actions ‘as being fully consistent with the cooperative framework established by the Rome Statute, reaffirming its commitment to uphold its duties in accordance with international law’.¹⁶

16. The Chamber notes that Mongolia has stated its commitment ‘to upholding the principles of international justice and peace’ and has sought guidance from the Court pursuant to article 97 of the Statute by engaging in consultations ‘regarding perceived legal and practical impediments to compliance with the [Request for Cooperation]’ in order to ‘resolve the matter in a cooperative manner’.¹⁷

17. As previously recalled by the Chamber, ‘for consultations to be meaningful pursuant to article 97 of the Statute, they must be timely’,¹⁸ because ‘the fundamental objective of consultations under article 97 of the Statute is to resolve a problem that the concerned State Party has identified which may impede or prevent the execution of the request for cooperation’.¹⁹ The Chamber has already found that, ‘[g]iven that Mongolia requested consultations with the Court without allowing sufficient time to properly address the matter’, namely only a few days before the planned visit of Mr Putin on its territory, ‘the request does not appear to have aimed at meaningfully resolving the problem allegedly obstructing the execution of the cooperation request, as required by article 97 [of the Statute]’.²⁰ In addition, as held by Pre-Trial Chamber II in a previous composition, ‘[c]onsultations (whether requested or ongoing) between a State and the Court do not, as such, suspend or otherwise affect the validity of the Court’s request for

¹⁶ Mongolia’s Submissions, para. 169.

¹⁷ Mongolia’s Submissions, paras 1, 167.

¹⁸ 2 September 2024 Response, para. 9, referring to Jordan Appeal Judgment, para. 202 (‘the phrase “without delay” in article 97 signifies that the intention to consult must be communicated to the Court timeously, so as not to frustrate the object of the request for cooperation or defeat the purpose of the consultation process’).

¹⁹ 10 September 2024 Decision, para. 9.

²⁰ 10 September 2024 Decision, para. 9.

cooperation’,²¹ nor the duty of the State to abide by its obligations of cooperation under the Statute.

18. In its submissions, observing that the Russian Federation is not a State Party to the Statute, Mongolia (i) ‘notes that, unlike in previous cases of a similar nature before the ICC, there is no United Nations Security Council [...] referral or resolution [...] imposing an obligation to cooperate fully with the ICC in relation to the current situation’; (ii) ‘affirms that [Mr Putin] is the incumbent Head of State of the Russian Federation’ who, ‘under international law, [...] is entitled to immunity *ratione personae* as well as immunity *ratione materiae*’ and therefore ‘enjoys absolute immunity from criminal jurisdiction and inviolability’; (iii) ‘asserts that this immunity extends to proceedings before international courts, including the ICC, unless the Russian Federation explicitly waives the immunity of its Head of State’; and (iv) ‘observes that the Rome Statute is an international multilateral treaty and, under international law, it does not prevail over or supersede other obligations stemming from customary international law’.²² In developing these arguments, Mongolia dedicates several pages to question the findings and reasoning of the Appeals Chamber in the Jordan Appeals Judgment.

19. The Chamber notes that the issue under consideration is neither whether there exists immunity for Heads of State under customary international law *vis-à-vis* an international court, nor whether non-States Parties are bound by the provisions of the Statute. With regard to the latter issue, the Chamber recalls that article 34 of the Vienna Convention on the Law of Treaties, providing that ‘[a] treaty does not create either obligations or rights for a third State without its consent’, is irrelevant to the matter at hand, since the Court is not aiming to impose obligations contained in the Statute to non-States Parties, but is rather seeking the cooperation of States Parties in cases against individuals who allegedly committed crimes under article 5 of the Statute on the territory of a State where the Court has jurisdiction.

20. The question that the Chamber has to answer in the present case is whether States Parties, including Mongolia, and States that have accepted the jurisdiction of the Court

²¹ Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, para. 119; 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 [of] Omar Al-Bashir, ICC-02/05-01/09-309, para. 48.

²² Mongolia’s Submissions, paras 5-9.

under article 12(3) of the Statute alike, have an obligation to execute an arrest warrant regarding the Head of a non-State Party in compliance with article 27 of the Statute. It is noted that Mongolia does not appear to address or engage with the reasons provided by this Chamber in the context of previous consultations under article 97 of the Statute held with another State Party in these proceedings,²³ which directly relate to the matter at hand and which were transmitted to Mongolia on two occasions.²⁴ This notwithstanding, the Chamber deems it appropriate to consider Mongolia's arguments to the extent that they directly relate to the relevant question of whether article 98 of the Statute is applicable in the present case and, consequently, whether a request for provisional arrest could have been issued without first obtaining a waiver of Mr Putin's immunity. This requires the Chamber to address the overarching interpretation of article 27 and article 98 of the Statute.

21. The Chamber recalls that article 31 of the Vienna Convention on the Law of Treaties defines the functional or teleological interpretation of a treaty as follows:

1. A treaty shall be interpreted *in good faith* in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*. [...] (emphasis added)

22. The object and purpose of the Statute is to be derived in part from its Preamble, which specifically acknowledges the following:

[...] Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished and that their effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation,

Determined to put an *end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, [...]

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over *the most serious crimes of concern to the international community as a whole*,

²³ See footnote 10 above.

²⁴ See above 'Procedural history and background'.

Resolved to guarantee *lasting respect for and the enforcement of international justice* [...] (emphasis added)

23. The Chamber also recalls article 1 of the Statute ('The Court'):

An International Criminal Court ('The Court') is hereby established. It shall be a permanent institution and *shall have the power to exercise its jurisdiction* over persons *for the most serious crimes of international concern* [...]. (emphasis added)

24. The Chamber notes article 27 of the Statute, pursuant to which:

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a *Head of State* or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, *shall not bar the Court from exercising its jurisdiction over such a person*. (emphasis added)

25. Finally, article 98(1) of the Statute reads as follows:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

26. Article 27 is placed in the third part of the Statute titled 'General principles of criminal law', lays down the fundamental principle of irrelevance of official capacity, and represents a primary obligation within the statutory framework, which must be considered together with the Preamble of the Statute when engaging in the interpretation of the Statute in light of its content and purpose. The importance of article 27 is highlighted by its critical role in promoting accountability for serious crimes. This provision creates a binding legal obligation for States Parties to uphold its tenets in both domestic and international contexts, ensuring that the objectives of the Statute are fully achieved. By mandating accountability without exception, article 27 strengthens the integrity of the international legal framework and reinforces the commitment of States Parties to combat impunity for the most serious crimes of concern to the international community.

27. Consequently, article 27 of the Statute has the effect of removing any and all international law immunities of officials, including Heads of State, and binds to that effect States Parties, as well as States that have accepted the Court's jurisdiction, not to recognise any kind of immunity or apply special procedural rules that they may attach to any persons. Whether these persons are nationals of States Parties or nationals of non-States Parties is irrelevant. The Statute, in any case, does not make any distinction in this regard. States Parties and States that have accepted the Court's jurisdiction have therefore the obligation to arrest and surrender any person for whom the Court has issued a warrant of arrest, irrespective of their official capacity and nationality. The obligation to arrest and surrender is one of the means to 'give effect' to the obligation to cooperate with the Court in the execution of its mandate.

28. Therefore, any arguable bilateral obligation that Mongolia may owe to the Russian Federation to respect any applicable immunity that international law may allow to Heads of State is not capable of displacing the obligation that Mongolia owes to the Court, which is tasked with exercising its jurisdiction on grave crimes of international concern that threaten the peace and the security of the States Parties to the Statute, and even of the international community as a whole. Given its nature and purpose, such a multilateral obligation cannot be altered or superseded by any bilateral commitments that may conflict with the Rome Statute's objectives.

29. In its submissions, Mongolia references the International Court of Justice's ('ICJ') judgment in the *Arrest Warrant* case.²⁵ While Mongolia's Submissions provide a partial quotation, the Chamber finds it important to consider the full context of the ICJ judgment for reference, as follows:

[...] an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, [...] *and the future International Criminal Court created by the 1998 Rome Convention*. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, *shall not bar the Court from exercising its jurisdiction over such a person*."²⁶ (emphasis added)

²⁵ Mongolia's Submissions, paras 60-62.

²⁶ International Court of Justice, Judgment of 14 February 2002 in the *Arrest Warrant* case, para. 61.

30. Hence, while personal immunities operate in relations between States, they do not protect individuals, including Heads of State, from prosecution by international criminal courts. The Chamber recalls that the rationale for foreign state officials being entitled to raise personal ('diplomatic') immunity consistent with the 1961 Vienna Convention on Diplomatic Relations is preventing the use of prosecutions by national authorities to unduly interfere and limit the free exercise of the functions of State organs mandated with operating on the territory of another State and, therefore, impede the concerned State's ability to freely engage in international action. However, this situation does not arise with the International Criminal Court which is inherently independent of States, strictly impartial and acts in the general interests of the international community.

31. The Chamber holds the view that the International Criminal Court is not only indisputably international in nature but also inherently independent of State influence. It performs functions that align with the general interests of the international community by exercising jurisdiction over the most serious international crimes, which include grave breaches of fundamental norms of international law. As recognised in the Statute's Preamble, the crimes falling within the Court's jurisdiction are 'of concern to the international community as a whole' since they 'threaten the peace, security and well-being of the world'. This high aim is shared and upheld by the 124 States that have ratified the Rome Statute, a number that represents about two-thirds of the international community. This confirms the commitment to prosecute the most serious crimes of concern to the international community and, in doing so, putting an end to impunity for the perpetrators of these crimes.

32. The Chamber further notes that, since the moment the Statute was signed and came into force, the Court has progressively evolved to the effect that it acts in the interests of the international community as a whole. In this respect, it is to be noted that the United Nations Security Council ('UNSC'), which is entrusted with the primary responsibility for the maintenance of international peace and security, has recognised the role of the Court in different instances, particularly in the resolutions referring the situations in Darfur and Libya to the Court. The Chamber also recalls that the Prosecutor reports regularly to the members of the UNSC on the situations in Darfur and Libya, with none of them objecting to the role of the Court, its mandate, or its international character.

33. When the Court, as part of its mandate to investigate, prosecute, and adjudicate ‘the most serious crimes of concern to the international community as a whole’, including as in the present situation alleged violations of the Geneva Conventions of 1949, which are universally ratified, requests the cooperation for arrest of an individual who is suspected of having committed such crimes, the duties a State Party has, both towards the Court and other States Parties, pursuant to the Statute supersede its horizontal relation with the State of the nationality of the sought person, regardless of whether that State is or not a State Party. This creates a system of variable legal obligations. While at the interstate horizontal level personal immunity operates according to the *par in parem non habet jurisdictionem* principle, it does not operate in the vertical relation between the Court and States Parties. The vertical nature of the obligations towards the Court supersedes traditional interstate immunity principles, meaning that States Parties must act in accordance with their obligations under the Statute, even if it conflicts with horizontal relations with non-States Parties.

34. When the Court discharges its judicial functions in order to realise the purposes and objectives of the Statute, it must address any actual or apparent incongruities between the different provisions in the statutory framework according to a literal and a contextual interpretation, in light of and consistently with the object and purpose of the Statute. It clearly stems from a systematic interpretation of the Statute that article 98 does not and could not undermine the fundamental principles codified in article 27, on which the entire Court’s system stands. Article 98(1) neither supplements, modifies, nor provides exceptions to article 27(2). Any other interpretation would fatally render the obligations of States Parties senseless and the overall Court’s system futile, contrary to the principle of effectiveness (*ut res magis valeat quam pereat*), stemming from article 31 of the Vienna Convention on the Law of Treaties, according to which treaties should be interpreted so as to ensure their effective implementation.

35. Unlike article 27(1), article 98(1) does not make reference to Heads of State. The latter is a purely procedural provision according to which the Court may take into account certain State’s pre-existing obligations in the context of requests for cooperation. The wording and the context of article 98(1) suggests that it refers only to acts of government activities which are typically conducted abroad and are protected by the safeguards on diplomatic immunity for certain officials and buildings. Moreover, when the provision mentions State immunity, it does not address the immunity of the

Head of State, but that of the State *per se*, with reference to diplomatic premises, property, documents or other assets belonging to the State of whom the sought person is a national, which may be linked to the investigation and may not be seized without the consent of that State.

36. In the view of the Chamber, personal immunity of officials, including Heads of third States, is therefore not opposable in proceedings before the Court, nor a waiver of immunity is required under article 98 of the Statute.²⁷ The principle under article 27 of the Statute means that a State Party would not be acting ‘inconsistently with its obligations under international law’ by arresting and surrendering State officials, including Heads of State, irrespective of their nationality, where the Court finds to have jurisdiction. To the contrary, in the present circumstances should a State Party grant personal immunity to the President of the Russian Federation for the purposes of the implementation of the Request for Cooperation, it would be acting inconsistently with its international obligations under the Statute, which may, under specific conditions, amount to a violation of international law.

37. In the present circumstances, by granting personal immunity to Mr Putin for the purposes of the implementation of the Request for Cooperation, Mongolia has acted inconsistently with its international obligations under the Statute, thereby preventing the Court from exercising its functions and powers under the Statute. Indeed, in the Court’s system, the presence of the suspect is required for a trial to take place and any bar to the execution of an arrest warrant – which is ‘one of the means to ensure the presence of the suspect before the Court and is therefore an important power and fundamental function of the Court’²⁸ – would inevitably convert into the paralysis of the proceedings and therefore into impunity, undermining the ability of the Court to ensure that the most serious crimes of concern to the international community as a whole do not go unpunished. These circumstances render Mongolia’s failure to cooperate with the Court in the arrest and surrender of Mr Putin particularly serious.

38. The Chamber concludes that, by failing to arrest Mr Putin while he was on its territory and by not promptly informing the Court of its intentions in this regard,

²⁷ Jordan Appeal Judgment, para. 5 (‘Article 98(1) of the Statute does not itself stipulate, recognise or preserve any immunities. It is a *procedural* rule that determines how the Court is to proceed where any immunity exists such that it could stand in the way of a request for cooperation’). See also 2 September 2024 Response, para. 10.

²⁸ Jordan Appeal Judgment, para. 9.

Mongolia has failed to comply with the Court's Request for Cooperation to arrest and surrender Mr Putin contrary to the provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute within the meaning of article 87(7) of the Statute.

B. Whether a referral of the matter to the Assembly of States Parties is warranted

39. At the time of Mr Putin's presence in Mongolia, the Chamber had already expressed in unequivocal terms that another State Party had, in analogous circumstances, the obligation to arrest and surrender Mr Putin to the Court based on the reasons recalled above. Pursuant to the Chamber's instruction, at the time of the article 97 consultations with that other State Party, Mongolia was notified of such reasons,²⁹ which were further recalled in the Chamber's 2 September 2024 Response, to which they were also attached in full.³⁰

40. In light of the above, the Chamber considers that it was sufficiently clear to Mongolia that it was under an international obligation to execute the Request for Cooperation. Despite the foregoing, Mongolia failed to fulfil its international obligation towards the Court and towards the international community as a whole to cooperate in the arrest and surrender of Mr Putin. In its submissions, Mongolia does not advance any valid justifications for this breach of its statutory obligations and, most importantly for present purposes, does not indicate that it will in the future cooperate with the Court should the same situation arise. Accordingly, in view of the seriousness of Mongolia's failure to cooperate with the Court, the Chamber considers it appropriate to refer the matter of Mongolia's non-compliance to the Assembly of States Parties.

41. As found by the Appeals Chamber, article 87(7) of the Statute 'aims at enhancing the effectiveness of the cooperation regime under Part IX of the Statute, by providing the Court with the possibility of engaging certain external actors to remedy cases of non-compliance'.³¹ Since the object and purpose of article 87(7) of the Statute is therefore to 'foster cooperation', a referral under that provision is 'not intended to be

²⁹ See footnote 10 above (the Chamber had ordered for that response to be notified to all States Parties 'as relevant to their duties of cooperation').

³⁰ See 2 September 2024 Response, para 10.

³¹ Kenyatta Appeal Judgment, para. 51.

the standard response to each instance of non-compliance, but only one that may be sought when the Chamber concludes that it is the most effective way of obtaining cooperation in the concrete circumstances at hand'.³² The Chamber highlights that cooperation in the arrest and surrender of suspects is indeed vital for the functioning of the Court and must be lent to it in a timely manner, with due diligence and making use of all reasonable means available, with a view to fulfilling the solemn pledge of justice that States have undertaken in the Statute's Preamble for 'millions of children, women and men [who] have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.³³

³² Kenyatta Appeal Judgment, para. 51.

³³ 2 September 2024 Response, para. 11.

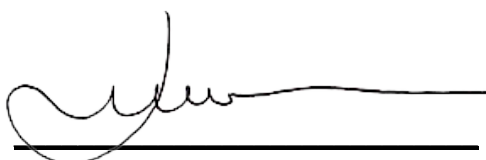
FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that Mongolia failed to comply with its international obligations under the Statute by not executing the Court's request for the arrest and surrender of Mr Putin while he was on Mongolian territory;

REFERS the matter of Mongolia's non-compliance with the request for arrest and surrender of Mr Putin to the Assembly of States Parties through the President of the Court in accordance with regulation 109(4) of the Regulations; and

ORDERS the Registry to reclassify filings ICC-01/22-89-Conf-Exp and ICC-01/22-89-Conf-Exp-Anx as public.

Done in English. A French translation will follow. The English version remains authoritative.



Judge Rosario Salvatore Aitala,
Presiding Judge



Judge Sergio Gerardo Ugalde
Godínez



Judge Haykel Ben Mahfoudh

Dated this Thursday, 24 October 2024

At The Hague, The Netherlands