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No. **ICC-01/22**  
Date: **29 November 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**

Decision on Mongolia's requests for leave to appeal, temporary stay of the proceedings and related matters

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

**The Office of the Prosecutor**

Mr Karim A. A. Khan KC  
Ms Brenda J. Hollis

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparations**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

Competent authorities of Mongolia

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

Presidency  
Assembly of States Parties

**PRE-TRIAL CHAMBER II** of the International Criminal Court, having regard to article 82(1)(d) of the Rome Statute (the ‘Statute’), issues this decision rejecting Mongolia’s requests for leave to appeal, temporary stay of the proceedings and related matters.

## **I. Procedural history and background**

1. On 17 March 2023, further to a request filed by the Prosecution,<sup>1</sup> the Chamber issued a warrant of arrest for Mr Putin (the ‘Warrant of Arrest’).<sup>2</sup>
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’).<sup>3</sup>
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.<sup>4</sup> On the same date, the relevant authorities of Mongolia confirmed receipt of the Request for Cooperation.<sup>5</sup>
4. On 26 and 28 August 2024, acting on the basis of media reports of Mr Putin’s expected travel to Mongolia for the 85<sup>th</sup> 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.<sup>6</sup>
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

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

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

<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> 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.

<sup>5</sup> 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.

<sup>6</sup> 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.

Rome Statute'.<sup>7</sup> 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.<sup>8</sup>

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'.<sup>9</sup>

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,<sup>10</sup> 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 legitimate reason that would impede Mongolia from fulfilling its obligations under the Statute.<sup>11</sup>

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<sup>7</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.

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

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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.

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').<sup>12</sup>

9. On 3 October 2023, Mongolia provided submissions concerning its failure to comply with the Request for Cooperation.<sup>13</sup>

10. On 24 October 2024, the Chamber, pursuant to article 87(7) of the Statute, rendered 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' (the 'Article 87(7) Finding'),<sup>14</sup> finding that Mongolia had failed to cooperate with the Court and thus referring it to the Assembly of State Parties (the 'ASP').<sup>15</sup>

11. On 29 October 2024, the Registry transmitted to the Presidency a *note verbale* from Mongolia, enclosing an application for the disqualification of two judges from the Chamber and the disqualification of two judges from the Presidency in connection with the present request for leave to appeal (the 'Application for Disqualification').<sup>16</sup> On the same date, the Registry transmitted to the Chamber the same *note verbale*, appending (i) a request for a temporary stay of the proceedings pending the resolution of the aforementioned Application for Disqualification (the 'Request for Stay of the Proceedings');<sup>17</sup> and (ii) a request for leave to appeal the Article 87(7) Finding in

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<sup>12</sup> 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.

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

<sup>14</sup> ICC-01/22-90.

<sup>15</sup> Article 87(7) Finding, p. 17.

<sup>16</sup> 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, with Public Annex, ICC-01/22-92 (the 'Registry Transmission to the Presidency'). See also Annex to Registry Transmission to the Presidency, ICC-01/22-92-Anx, pp. 4-8 (under the title 'APPLICATION FOR THE DISQUALIFICATION OF JUDGES').

<sup>17</sup> 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

relation to 16 issues (the ‘Request for Leave to Appeal’), also containing requests to convene a hearing and to invite expressions of interest as *amici curiae* pursuant to rule 103 of the Rules of Procedure and Evidence (the ‘Rules’) in relation to the Request for Leave to Appeal (the ‘Other Requests’).<sup>18</sup>

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Assembly of States Parties’ of 24 October 2024, with Public Annex, ICC-01/22-91 (the ‘Registry Transmission to Pre-Trial Chamber II’). See also Annex to Registry Transmission to Pre-Trial Chamber II, ICC-01/22-91-Anx, pp. 9-10 (under the title ‘REQUEST FOR A TEMPORARY STAY OF PROCEEDINGS’).

<sup>18</sup> Registry Transmission to Pre-Trial Chamber II. See also Annex to Registry Transmission to Pre-Trial Chamber II, ICC-01/22-91-Anx, pp. 4-8 (under the title ‘REQUEST TO LEAVE TO APPEAL’). The issues are as follows: **Issue 1:** Whether Pre-Trial Chamber II erred in fact and law by permitting the participation of Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez of Pre-Trial Chamber II, who issued the original Warrant of Arrest for President Putin and subsequently rendered 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,” thereby creating a reasonable appearance of partiality or perceived conflict of interest that significantly compromised the fairness, integrity, and outcome of the proceedings; **Issue 2:** Whether Pre-Trial Chamber II erred in fact and law in its procedural handling of the non-compliance determination by failing to acknowledge or adequately respond to Mongolia’s request for an oral hearing and by imposing arbitrarily restrictive time limits on Mongolia’s written submissions, which together deprived Mongolia of a fair and reasonable opportunity to present its full position, thereby infringing on its right to be heard and resulting in procedural unfairness that materially affected both the fairness and the expeditious conduct of the proceedings; **Issue 3:** Whether Pre-Trial Chamber II erred in fact and law by expediting the issuance of the non-compliance decision shortly after Mongolia’s preliminary submissions, with an apparent lack of engagement with Mongolia’s arguments—including, inter alia, omission of Article 98(2) and failure to address Mongolia’s bilateral immunity agreement—which reflects a failure to genuinely consider relevant legal arguments, thereby undermining the fairness, credibility, and integrity of the decision-making process by compromising adequate judicial scrutiny and significantly impacting the fairness of the proceedings; **Issue 4:** Whether Pre-Trial Chamber II erred in fact and law by failing to request or consider a certified copy of the bilateral agreement between Mongolia and the Russian Federation, which is essential to determining Mongolia’s obligations regarding immunity and is therefore fundamental to the fair and accurate resolution of the case at hand; **Issue 5:** Whether Pre-Trial Chamber II erred in fact and law by relying on the obiter dictum in the ICJ Arrest Warrant case to conclude that Head of State immunities do not protect individuals from prosecution by international courts, thereby impacting Mongolia’s obligations under international law; **Issue 6:** Whether Pre-Trial Chamber II erred in its interpretation of Article 27(2) of the Rome Statute by extending its provisions to remove any immunities or special procedural rules that may attach to official capacity, including that of Heads of State of non-State Parties, in contravention of customary international law and the Rome Statute, thereby obligating Mongolia to arrest and surrender President Putin beyond its lawful authority (*ultra vires*); **Issue 7:** Whether Pre-Trial Chamber II erred in its interpretation of Article 98(1) of the Rome Statute by deeming it inapplicable to the immunities of Heads of State from non-State Parties, stating that Article 98(1) is a procedural provision that cannot override the fundamental principles established in Article 27, thereby wrongfully rendering the Impugned Decision concluding that Mongolia was obligated to arrest and surrender President Putin without a waiver of immunity from the Russian Federation; **Issue 8:** Whether Pre-Trial Chamber II erred in fact and law by failing to consider Mongolia’s obligations under its bilateral treaty with the Russian Federation, as required by Article 98(2) of the Rome Statute, which may necessitate Russian consent prior to the surrender of a person; **Issue 9:** Whether Pre-Trial Chamber II erred in fact and law by determining that, under international law, Mongolia’s obligations to the ICC (vertical) take precedence over any horizontal (state-to-state) relations, including respecting immunities of officials from non-State Parties; **Issue 10:** Whether Pre-Trial Chamber II erred in fact and law by asserting that under international law the Rome Statute, as a multilateral treaty, prevails over and supersedes all other obligations arising from other sources of international law—such as customary international law and international treaties—

12. On 4 November 2024, the Prosecution responded to the Request for Leave to Appeal, arguing that the Chamber should dismiss it because it fails to meet the requirements under article 82(1)(d) of the Statute (the ‘Prosecution’s Response’).<sup>19</sup>

13. On 13 November 2024, the Registry transmitted a *note verbale* from Mongolia, dated 12 November 2024, whereby it requested leave to reply to the Prosecution’s Response (the ‘Request for Leave to Reply’).<sup>20</sup>

14. On 14 November 2024, the Chamber granted the Request for Leave to Reply in relation to two discrete issues only and invited Mongolia to submit its reply by 20 November 2024.<sup>21</sup>

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thereby concluding that Rome Statute obligation supersede Mongolia’s existing legal obligations to non-member states, rendering that, by virtue of the Rome Statute, Mongolia had no obligation to accord and to respect sovereign right of Russian Federation to assert Head of State immunity to President Putin and was required to arrest him, positioning Mongolia to breach its obligations under general international law; **Issue 11:** Whether Pre-Trial Chamber II erred in fact and law by asserting that the Court represents, or has evolved into representing, the international community as a whole, thereby positing that the ICC operates independently in the interests of the international community and by virtue of its nature and mandate the ICC is empowered to remove immunities of Head of State of non-state parties, even at the horizontal level; **Issue 12:** Whether Pre-Trial Chamber II erred in fact and law by interpreting Rome Statute in a way that overrides established international norms or makes determinations on complex issues such as, immunities under general international law, which are beyond its mandate; **Issue 13:** Whether Pre-Trial Chamber II erred in fact and law by failing to consider Mongolia’s obligations under the United Nations Charter and customary international law concerning the maintenance of international and regional peace, security and stability, non-intervention, and respect for state sovereignty, which may conflict with the Pre-Trial Chamber II’s interpretation of Mongolia’s obligations under the Rome Statute, thereby affecting the fairness and legality of expecting Mongolia to comply with the arrest and surrender request that would place Mongolia to breach its international obligations; **Issue 14:** Whether Pre-Trial Chamber II erred in fact and law by misinterpreting the Vienna Convention on the Law of Treaties in a way to enable Articles of Rome Statute to override, supersede and prevail established international norms of general international law; **Issue 15:** Whether Pre-Trial Chamber II erred in fact and law by finding that Mongolia’s request for consultations under Article 97 was untimely and did not suspend its obligation to arrest and surrender President Putin, thereby affecting Mongolia’s right to meaningful consultations; **Issue 16:** Whether Pre-Trial Chamber II erred in fact and law by abusing its discretion in referring Mongolia’s non-compliance to the Assembly of States Parties when the referral was not warranted.

<sup>19</sup> Prosecution response to Mongolia’s request for leave to appeal the 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’, ICC-01/22-93, para. 1.

<sup>20</sup> Registry Transmission of a ‘Request for Leave to Reply’ received from Mongolia in relation to the ‘Prosecution’s response to Mongolia’s request for leave to appeal Pre-Trial Chamber’s 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’ ICC-01/22-93, ICC-01/22-100 (the ‘Registry Transmission of 13 November 2024’); Annex to Registry Transmission of 13 November 2024, ICC-01/22-100-Anx, pp. 4-9 (under the title ‘REQUEST LEAVE TO REPLY’).

<sup>21</sup> Decision on Mongolia’s request for leave to reply, ICC-01/22-103.

15. On 15 November 2024, the Plenary of Judges rejected the Application for Disqualification,<sup>22</sup> and provided its reasons on 22 November 2024.<sup>23</sup>

16. On 19 November 2024, the Registry transmitted a *note verbale* from Mongolia, dated 18 November 2024, whereby it requested an extension of the time and page limits to file a reply to the Prosecution's Response (the 'Request for Extension of Time and Page Limit').<sup>24</sup>

17. On 20 November 2024, the Chamber partly granted the Request for Extension of Time and Page Limit, ordering *inter alia* that the reply be filed by 25 November 2024.<sup>25</sup>

18. On 25 November 2024, Mongolia did not file a reply to the Prosecution's Response. Instead, on 26 November 2024 the Registry transmitted to the Chamber a *note verbale* from Mongolia, dated 25 November 2024, enclosing a 'Request for oral hearing in lieu of written reply', whereby it requests the Chamber to (i) schedule an oral hearing to receive an oral reply in place of submitting a written reply to the Prosecution's Response; and (ii) allow and invite *amici curiae* submissions prior to the oral hearing pursuant to rule 103 of the Rules (the 'Request for Hearing and *Amici Curiae* Submissions').<sup>26</sup>

## II. Preliminary issues

19. At the outset, the Chamber observes that Mongolia seeks the 'suspension of all proceedings related to' the Request for Leave to Appeal 'pending the resolution' of the Application for Disqualification.<sup>27</sup> Considering that the Plenary of Judges has rejected the Application for Disqualification, the Chamber dismisses the Request for Stay of the Proceedings as moot.

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<sup>22</sup> 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), ICC-01/22-104.

<sup>23</sup> Reasons for the Decision on the 'Application for the Disqualification of Judges' filed on 31 October 2024 (ICC-01/22-92-Anx), ICC-01/22-107.

<sup>24</sup> Request for extension of time and page limit to file a reply, ICC-01/22-106-Anx, annexed to Registry Transmission of a 'Request for extension of time and page limit to file a reply' received from Mongolia, ICC-01/22-106.

<sup>25</sup> Email from the Chamber dated 20 November 2024 at 14:16.

<sup>26</sup> Request for oral hearing in lieu of written reply, ICC-01/22-108-Anx, annexed to Registry Transmission of a 'Request for Oral Hearing in Lieu of Written Reply' received from Mongolia, ICC-01/22-108.

<sup>27</sup> Request for Stay of the Proceedings, para. 1.



20. In addition, the Chamber notes that the content of the Request for Hearing and *Amici Curiae* Submissions, submitted by Mongolia instead of the anticipated reply to the Prosecution's Response, overlaps with the Other Requests already included in Mongolia's Request for Leave to Appeal the Article 87(7) Finding, and shall be addressed together. In this regard, the Chamber recalls the limited purpose of a request for leave to appeal under article 82(1)(d) of the Statute, which shall not be used as a means to relitigate or further address substantive issues relating to the merits of the proceedings at hand, as well as the exceptional nature of a reply under regulation 24(5) of the Regulations, which shall also be limited to replying to new and discrete issues raised in a response.

21. In exercising its discretion to decide whether it may be desirable to hold a hearing in the present case, the Chamber recalls that Mongolia had ample time – almost three months since its first *note verbale* was received by the Chamber on 30 August 2024 – and was afforded several opportunities<sup>28</sup> to express its views and exhaustively elaborate upon the reasons for its failure to comply with the Court's Request for Cooperation and related matters. As a matter of fact, the Chamber, upon Mongolia's request, provided it with an opportunity to address two discrete aspects of the Prosecution's Response, authorised an extension of the page limit, and provided additional time for Mongolia to file its written reply, which ultimately Mongolia decided not to submit, requesting instead an oral hearing. Therefore, and bearing in mind its duty to ensure that proceedings unfold efficiently and expeditiously, the Chamber does not consider it necessary nor appropriate to convene a hearing or invite submissions from *amici curiae* which, in this case, would not assist the Chamber in adjudicating the pending Request for Leave to Appeal. The Request for Hearing and *Amici Curiae* Submissions, as well as the Other Requests included in Mongolia's Request for Leave to Appeal, are therefore rejected.

### **III. Determination of the Chamber**

#### ***a. Applicable law***

22. Article 82(1)(d) of the Statute provides as follows:

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<sup>28</sup> See footnotes 7, 9, 13, 17, 18, 20, 25 and 27 above.

Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

[...]

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. Article 82(1)(d) thus requires (i) that the decision involves an issue that would significantly affect *both* the ‘fair’ and ‘expeditious’ conduct of the proceedings; *or* the outcome of the trial; and (ii) that, in the view of the Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.<sup>29</sup> These requirements are cumulative and, therefore, failure to demonstrate one makes it unnecessary for the Chamber to address the others.<sup>30</sup> Furthermore, there is no prescribed order in which the requirements must be considered.<sup>31</sup> The Chamber recalls

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<sup>29</sup> See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168 (the ‘DRC Appeal Judgment’), paras 7-19; Pre-Trial Chamber III, *The Prosecutor v. Jean Pierre-Bemba Gombo*, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, paras 5-20; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859), 6 September 2013, ICC-01/09-01/11-912, paras 14-22 and n. 22 for further references.

<sup>30</sup> See, for example, Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiïssona*, Consolidated Decision on filings ICC-01/14-01/18-524-Corr and ICC-01/14-01/18-545 (Prosecutor’s requests for leave to appeal the decisions pursuant to article 61(9) of the Rome Statute dated 14 May 2020 and 1 June 2020), 19 June 2020, ICC-01/14-01/18-560, para. 55; Pre-Trial Chamber II, *Situation in the Republic of Kenya*, Decision on a Request for Leave to Appeal, 11 February 2011, ICC-01/09-43, para. 12; Pre-Trial Chamber I, *Situation in Democratic Republic of the Congo*, Decision on the Prosecution’s Application for Leave to Appeal the Chamber’s Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 31 March 2006, ICC-01/04-135-tEN, para. 28; Trial Chamber I, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Decision on the Defence request for leave to appeal the Decision on the Prosecution’s applications to add witnesses and items to its List of Witnesses and List of Evidence and to rely on recently collected evidence, 4 May 2022, ICC-02/05-01/20-682, para. 4; Trial Chamber I, *Prosecutor v. Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims’ Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 10 (the ‘Lubanga Decision’); Trial Chamber II, *Prosecutor v. Yekatom and Ngaiïssona*, Decision on the ‘Ngaiïssona Defence Request for Leave to Appeal the Second Decision on Disclosure and Related Matters’, 24 May 2019, ICC-01/14-01/18-206, para. 11; Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for leave to appeal the ‘Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU’, 2 December 2022, ICC-01/12-01/18-2430, para. 10.

<sup>31</sup> Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Decision on requests for reconsideration, leave to appeal the confirmation decision and related matters (ICC-02/05-01/20-438, ICC-02/05-01/20-448, ICC-02/05-01/20-457, ICC-02/05-01/20-465, ICC-02/05-01/20-466), 15 November 2021, ICC-02/05-01/20-517, para. 14.

the ‘limited nature of the remedy foreseen by article 82(1)(d) of the Statute’, and highlights that ‘[i]n the system of the Statute, interlocutory appeals are meant to be admissible only under limited and very specific circumstances’.<sup>32</sup>

24. Regarding the subject matter of requests for leave to appeal, the Appeals Chamber has held that

[o]nly an “issue” may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.<sup>33</sup>

25. Furthermore, as previously stated by the Chamber,

[m]aterially advancing the proceedings does not simply entail having the Appeals Chamber provide its interpretation of the relevant legal provision. If that were the case, all issues would automatically trigger an interlocutory appeal. Instead, it is necessary to show that the alleged error(s), unless soon remedied on appeal, ‘will be a setback to the proceedings in that they will leave a decision fraught with error to cloud or unravel the judicial process’.<sup>34</sup>

### *b. Analysis*

26. In order to determine whether the Article 87(7) Finding could amount to an appealable decision within the meaning of article 82(1)(d) of the Statute, the Chamber finds it important to examine the nature of such finding. Under article 87(7) of the Statute, if a State Party fails to comply with a request to cooperate with the Court, including requests to cooperate in the arrest and surrender of suspects, contrary to the

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<sup>32</sup> Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor’s Applications for Leave to Appeal Dated the 15<sup>th</sup> day of March 2006 and to suspend or stay consideration of leave to appeal dated the 11<sup>th</sup> day of May 2006, 10 July 2006, ICC-02/04-01/05-90, para. 17; Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on the Defence Request for Leave to Appeal the Order Setting a Deadline for the Filing of the Applications, 10 May 2019, ICC-01/12-01/18-342-Red-tENG, para. 25.

<sup>33</sup> DRC Appeal Judgment, para. 9.

<sup>34</sup> Pre-Trial Chamber II, *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (‘Ali Kushayb’)*, Decision on the Defence Request for Leave to Appeal the Decision ICC-02/05-01/20-198, 12 January 2021, ICC-02/05-01/20-254, para. 7, referring to Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Joint Decision on the applications for leave to appeal the ‘Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 23 January 2015, ICC-01/15-01/13-801, para.17, quoting DRC Appeal Judgment, para. 16.

provisions of the Statute, thereby preventing the Court from exercising its functions and powers under the Statute, the Court may make a finding to this effect and refer the matter to the Assembly of States Parties. The primary aim of these referrals is not to enforce a sanction against the non-complying State but rather to notify the relevant bodies of the breach to the Statute, which in turn prevents the Court from exercising its functions. It follows that a chamber's determination under article 87(7) does not involve a judicial decision in the procedural sense, but rather constitutes a determination of a failure to comply with the statutory obligation to, in this case, cooperate in the arrest and surrender of a suspect. This determination does not constitute a formal ruling on the merits or on a procedural matter of the case, but rather a compliance assessment concerning the duty to cooperate with the Court. In other words, this notification does not concern a procedural issue that would directly impact the rights of the parties or the outcome of the trial. In this regard, since the notification to the States Parties neither affects the fair and expeditious conduct of the proceedings against the person sought by the Court, nor the outcome of the trial, the Chamber's finding under article 87(7) of the Statute does not amount to an appealable decision within the meaning of article 82(1)(d) of the Statute.

27. In any event, even if *arguendo* the Article 87(7) Finding could be considered as a decision capable of becoming the subject of an appeal, the Chamber notes with regard to the latter requirement of article 82(1)(d) of the Statute – *i.e.*, that an immediate resolution by the Appeals Chamber would materially advance the proceedings – that Mongolia fails to sufficiently substantiate its Request for Leave to Appeal. Besides merely stating that the Appeals Chamber's resolution would advance the proceedings and pointing out to the statutory powers of the Appeals Chamber in general terms, Mongolia fails to show how an immediate resolution by the Appeals Chamber on any of the 16 proposed issues would advance the proceedings against the person sought by the Court, namely Mr Putin. The Chamber recalls that 'under the statutory framework, leave to appeal cannot be granted based on arguments addressing proceedings before

the Court in general or broader effects on the jurisprudence, as opposed to the impact of an immediate resolution on the specific trial proceedings at issue'.<sup>35</sup>

28. The Chamber understands Mongolia to argue that 'the proceedings' in article 82(1)(d) of the Statute concern the Chamber's discrete finding under article 87(7) of the Statute. In contrast, as the Appeals Chamber has previously indicated, the 'term "proceedings" in the second part of article 82(1)(d) of the Statute can have no different meaning from the one ascribed in the first part of the paragraph, encompassing the proceedings in their entirety'.<sup>36</sup> In the present case, the proceedings are those related to the case against Mr Putin only. The finding by the Court concerning Mongolia's failure to comply with the cooperation request is discrete in nature, has no procedural consequence in relation to the proceedings against Mr Putin and is not capable of affecting his fair trial rights under the Statute. Therefore, Mongolia's understanding of 'the proceedings' fails to meet the threshold for leave to appeal to be granted.

29. In light of the above considerations, the Request for Leave to Appeal is rejected.

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<sup>35</sup> Trial Chamber X, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Decision on Defence request for leave to appeal the 'Decision on Defence request for disclosure of *ex parte* communication between the Chamber and the VWU', 2 December 2022, ICC-01/12-01/18-2430, para. 9.

<sup>36</sup> DRC Appeal Judgment, para. 17.

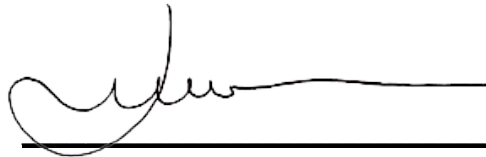
**FOR THESE REASONS, THE CHAMBER HEREBY**

**DISMISSES** Mongolia's Request for Stay of the Proceedings;

**REJECTS** Mongolia's Request for Hearing and *Amici Curiae* Submissions; and

**REJECTS** Mongolia's Request for Leave to Appeal and the Other Requests contained therein.

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 Friday, 29 November 2024

At The Hague, The Netherlands