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PRE-TRIAL CHAMBER II

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

SITUATION IN UKRAINE

Public

**Prosecution response to Mongolia's request for leave to appeal 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"**

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I. Introduction

1. The Pre-Trial Chamber should dismiss Mongolia's Request for leave to appeal¹ the Chamber's decision referring Mongolia to the Assembly of States Parties² as it fails to meet the threshold conditions for granting leave to appeal set forth under article 82(1)(d) of the Statute and related jurisprudence. Specifically, the Request must set forth *appealable issues* arising from the impugned Decision, and these issues must *both* significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, *and* satisfy the Pre-Trial Chamber that an immediate resolution by the Appeals Chamber may materially advance the proceedings.³
2. In particular, Mongolia fails to show how the issues that it presents are appealable in nature or arise from the Decision. The proposed issues either misread, mischaracterise⁴ or ignore relevant paragraphs of the Decision,⁵ contest matters that did not arise in the Decision,⁶ or relate to matters which are matters of settled law or are already settled by the Appeals Chamber.⁷ On this basis alone, the Request should be dismissed *in limine*.
3. In addition, Mongolia has not shown that any of the proposed issues meets the further requirements of article 82(1)(d): it has not established how these issues significantly affect the fair and expeditious conduct of the proceedings, nor the outcome of the trial. Nor has Mongolia shown that immediate resolution of the proposed issues by the Appeals Chamber might materially advance the proceedings.
4. In these circumstances, the additional relief sought in the Request—such as the convening of oral hearings, and the issue of an invitation for the participation of *amici curiae*⁸—is unjustified and should likewise be dismissed.

¹ ICC-01/22-91-Anx, 29 October 2024 ("Request").

² ICC-01/22-90, 24 October 2024 ("Decision").

³ Statute, art. 82(1)(d) (emphasis added). In this regard, the jurisprudence of the Appeals Chamber requires that leave to appeal under article 82(1)(d) will only be granted if the applicant demonstrates (i) an (appealable) *issue* arising from the decision; (ii) the issue would significantly affect both the fair and expeditious conduct of the proceedings, or the outcome of the trial; and (iii) an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings. See *Said* Decision, [ICC-01/14-01/21-514](#), paras. 13, 18; *DRC Judgment*, [ICC-01/04-168](#), paras. 7-18.

⁴ *Mbarushimana* Decision, [ICC-01/04-01/10-487](#), paras. 32-33; *Gbagbo & Blé Goudé* Decision, [ICC-02/11-01/15-1051](#), paras. 5-7; *Bemba* Decision, [ICC-01/05-01/08-2487-Red](#), para. 19.

⁵ *Mbarushimana* Decision, [ICC-01/04-01/10-487](#), paras. 32-33; *Gbagbo & Blé Goudé* Decision, [ICC-02/11-01/15-1051](#), paras. 5-7; *Bemba* Decision, [ICC-01/05-01/08-2487-Red](#), para. 19.

⁶ *Ongwen* Decision, [ICC-02/04-01/15-1176](#), para. 10; *Bemba* Decision, [ICC-01/05-01/08-75](#), para. 11.

⁷ *Bemba* Decision, [ICC-01/05-01/08-2487-Red](#), para. 28; *Abd-Al-Rahman* Decision, [ICC-02/05-01/20-682](#), para. 7.

⁸ Request, para. 21, and pp. 10-12 (under the heading, "Request for a temporary stay of proceedings", paras. 1-2).

II. Submissions

5. The Request should be denied as it does not establish appealable “issues” which meet the requirements of Article 82(1)(d). As provided expressly, leave to appeal may be granted only with respect to one or more “issues” satisfying the criteria. For this purpose, as the Appeals Chamber has held, an “issue” is a “an identifiable subject or topic requiring a decision for its resolution”, and the resolution of that issue must be “essential for the determination of matters arising under the judicial cause under examination”.⁹ The issue must genuinely “arise from the decision”, and is not constituted by “a question over which there is a mere disagreement or conflicting opinion”.¹⁰ It thus follows from these principles that a party can neither seek leave to appeal a decision in its generality,¹¹ nor can they seek leave to appeal every issue arising from that decision. Rather, it must be shown that the issues presented are ‘appealable’, as well as that they *significantly* affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, *and* that the Appeals Chamber’s intervention may materially advance the proceedings.

6. Where, as here, no or incomplete arguments are presented to support its Request, the Chamber is not obliged, under article 82(1)(d) of the Statute, to entertain such applications. The Request should be rejected on this basis alone.¹² The Request simply lists 16 different issues, which it maintains “arise[] directly” from the Decision and “form the basis of [the Chamber’s] conclusion regarding Mongolia’s alleged non-compliance and referral to the Assembly of States Parties”.¹³ Beyond this, however, the Request makes sweeping assertions and provides no further explanation of how each is appealable, or meets the remainder of the article 82(1)(d) criteria.¹⁴

7. As the following paragraphs show, the Request does not identify any appealable issue, but rather reflects a mere disagreement with the Chamber’s Decision. Even considering the issues presented for the sake of argument, it does not show that any of them meets the further requirements of article 82(1)(d). Moreover, in this context—where the Request warrants

⁹ See e.g. DRC Judgment, [ICC-01/04-168 OA3](#), para. 9.

¹⁰ See e.g. Mbarushimana Decision, [ICC-01/04-01/10-487](#), para. 4.

¹¹ Bemba et al. Decision, [ICC-01/05-01/13-877](#), para. 7.

¹² Gbagbo & Blé Goudé Decision, [ICC-02/11-01/15-685-Red](#), para. 6.

¹³ See Decision, paras. 9-10

¹⁴ Request, paras. 10-17.

dismissal *in limine*—the various interim measures proposed by Mongolia would not be necessary or serve any relevant forensic purpose.

A. The Request should be dismissed *in limine* for lack of elucidation

8. In addition to dismissing the Request based on incomplete arguments, the Request purports to reserve the right “to submit additional written and oral submissions [...] elaborating on each specific issue”.¹⁵ However, no such right exists. A party seeking leave to appeal is required to make its complete application within the time limit under rule 155, and the respondent (in this case, the Prosecution) must respond to the issues as they are presented. The Chamber will ordinarily rule on this basis. Accordingly, because the issues as presented in the Request do not meet the threshold requirements under article 82(1)(d), the Request should be dismissed *in limine*.¹⁶

B. The Request does not raise any appealable issue¹⁷

Issue 1: Whether two Judges of the Chamber should have recused themselves

It does not arise from the Decision

9. This proposed issue does not arise from the Decision. No question about disqualification has been raised by Mongolia at any point until now.¹⁸ As such, the proposed issue did not form part of the Decision and is not appealable under article 82(1)(d).

Issue 2: Whether the Chamber erred by failing to respond adequately to Mongolia’s request for an oral hearing and by imposing time limits on Mongolia’s submissions

It misrepresents the facts and does not arise from the Decision

10. This proposed issue is based on a misrepresentation of the facts and does not arise from the Decision. Mongolia never requested an oral hearing nor substantiated why any such hearing was warranted. Rather, in a cover letter to its submissions, it simply indicated in a single paragraph without further elaboration “its *readiness* to attend [an] oral hearing, should the Court *deem it necessary*” (emphasis added). As such, in the absence of an explicit request, the

¹⁵ Request, para. 3. *See also* paras. 4, 21(i).

¹⁶ *Gbagbo & Blé Goudé* Decision, [ICC-02/11-01/15-685-Red](#), paras. 4, 6.

¹⁷ In order to best assist the Chamber in resolving the issues presented in the Request, the Prosecution has grouped some of the issues that are interrelated, and paraphrased them where appropriate. This is without prejudice to the Chamber’s reference to the precise terms of the proposed issues as they are set out in the Request, para. 9.

¹⁸ *See e.g.* ICC-01/22-89-Conf-Exp-Anx; ICC-01/22-86-Conf.

matter was not the subject of adjudication by the Chamber, and therefore does not arise from the Decision.

11. In any event, questions whether to hold an oral hearing, or to grant more time, concerns matters that are fact-driven, and fall within a Chamber's wide discretion to manage its own proceedings.¹⁹ Therefore, even if the Decision had ruled on these questions, such that they arose from it, the proposed issues fail to disclose anything more than mere disagreements with the Chamber's assessment. As such, they remain unappealable in these circumstances.

Issues 3 and 4: Whether the Chamber erred by means of its alleged failure to consider Mongolia's arguments adequately or to consider adequately the bilateral agreements between Mongolia and the Russian Federation

They are speculative and ignore the Decision

12. These two issues are interrelated to the extent that they both allege that the Decision omitted to address relevant considerations adequately and are thus addressed together. They should be dismissed as they do not meet the applicable standard for leave to appeal.

13. These proposed issues are both speculative and ignore the Decision. As is clear from the extensive reasoning in the 17-page Decision, the Chamber addressed the issues raised by Mongolia, including article 98(2) of the Statute²⁰ and the significance of Mongolia's bilateral agreements.²¹ It did not fail to adequately address the issues raised by Mongolia in its written submissions. To the extent that the Request takes issue with the fact that the Decision did not address Mongolia's submissions in the manner that it would prefer, this underlines the nature of the proposed issues as mere disagreements with the Decision. As such, they are not appealable. It should also be noted that the Chamber was not obliged to request copies of the agreements, as the Request now suggests.

Issue 5: Whether the Chamber erred by relying on the ICJ Arrest Warrant case to conclude that Head of State immunities do not protect individuals from prosecution by international courts

It misreads the Decision and ignores settled law

¹⁹ These matters are not lightly interfered with by appellate bodies, and indeed, are not normally certified for appeal under article 82(1)(d). See e.g. *Al Hassan* Decision, [ICC-01/12-01/18-130-tENG](#), para. 32; *Abu Garda* Decision, [ICC-02/05-02/09-267](#), paras. 4, 11-12

²⁰ See e.g. Decision, para. 20 (noting that Mongolia did not address or engage with the reasons provided by the Chamber in the context of previous consultations under article 97, but nevertheless "consider[ing] 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", (emphasis added).

²¹ Decision, para. 28. See also paras. 33-34.

14. This proposed issue misreads the Decision, and therefore does not constitute an appealable issue under article 82(1)(d). The Decision not only specifically sought to correct Mongolia's own reliance on and partial citation of the ICJ *Arrest Warrant* case,²² but relied on other sources to reach its conclusion, and not solely on this judgment, contrary to Mongolia's assertion.²³ The proposed issue also misunderstands that the competence of an international court to try a head of state for international crimes is now part of established law, embodied in the statutes of this Court,²⁴ the *ad hoc* tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).²⁵

Issues 6-15: Whether the Chamber erred in the Decision

All these issues concern matters already settled by the Appeals Chamber

15. Mongolia's nine further proposed issues are interrelated in the sense that they all challenge the Decision's construction of and/or reliance on article 27 and its interplay with article 98, and the Decision's overall conclusion (that article 27 removes all immunities for proceedings before the Court, and that Mongolia is obliged to cooperate with the Court). The proposed questions also relate to the Chamber's approach to treaty interpretation in general. These proposed issues are therefore addressed together.

16. None of these nine proposed issues constitutes an appealable issue under article 82(1)(d) because they do not require a decision from the Appeals Chamber for their resolution—rather, they concern matters that have already been authoritatively settled by the Appeals Chamber in the *Bashir* case.²⁶

Issue 16: Whether the Chamber abused its discretion in referring Mongolia to the Assembly of States Parties

It is an unsubstantiated disagreement with the Decision

²² Decision, para. 29 (“In its submissions, Mongolia *references* the International Court of Justice’s (“ICJ”) judgement in the Arrest Warrant case. While Mongolia’s Submissions provides *partial quotation*, the Chamber finds it important to consider the full text of the ICJ judgement”, Emphasis added).

²³ See Decision, paras. 26-27.

²⁴ See Decision, paras. 26-27.

²⁵ See ICTY Statute, article 7(2); ICTR Statute, article 6(2); SCSL Statute, article 6(2); ECCC, article 29 of Law establishing the ECCC; [Prosecutor v. Slobodan Milošević, Decision on Preliminary Motions](#), 8 November 2001, paras. 26-28; [Furundžija Trial Judgement](#), para. 140; [Prosecutor v. Taylor, Decision on Immunity from Jurisdiction](#), para. 52.

²⁶ *Bashir* Appeal Judgment, [ICC-02/05-01/09-397-Corr.](#)

17. While this issue arguably arises from the Decision to the extent that it was addressed in the Decision, the Request merely asserts without further explanation that this was “not warranted”, and as such is no more than a disagreement with the Decision. For this reason, it does not constitute an appealable issue. Nothing in the Request explains the basis for the alleged error in this respect, and therefore presents no identifiable topic requiring a decision for its resolution.

C. The Request fails to meet the criteria under article 82(1)(d) of the ICC Statute

18. Even assuming for the sake of argument that any of the proposed issues may be considered as an appealable issue genuinely arising from the Decision, the Request fails to show that they significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, or that appellate intervention may materially advance the proceedings.

19. Since the Request advances no argument with respect to the outcome of the trial, the Prosecution will consider only the submissions concerning the fair and expeditious conduct of the proceedings, and the potential impact of any intervention by the Appeals Chamber.

20. The Request makes two arguments in its attempt to show that one or more of the proposed issues will significantly affect the fair and expeditious conduct of the proceedings. Neither makes the necessary showing.

21. In the first respect, the Request states that that the Decision “imposes obligations on Mongolia that may conflict with its rights and obligations under international law, including *inter alia* customary international law and international treaties.”²⁷ For all the reasons discussed above, this is not an appealable issue and as a matter settled by the Appeals Chamber, does not affect fairness of this ancillary matter.

22. In the second respect, the Request further argues that one or more of the proposed issues: [...] raise[] fundamental questions about the equitable treatment of States Parties and respect for international legal principles. The findings of non-compliance and the referral to the Assembly of States Parties carry serious implications for Mongolia, potentially resulting in reputational harm, and other potential adverse effects on its standing within the international community.²⁸

²⁷ Request, para. 11.

²⁸ Request, para. 12.

23. However, the Request fails to identify any aspect of the Decision which is not “equitable” vis-à-vis States Parties. To the contrary, as the Decision notes, the response provided to Mongolia was the same as that provided “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”.²⁹

24. Neither of these arguments, moreover, addresses the second aspect of the applicable criterion, which is that the proposed issue must also significantly affect the *expeditious* conduct of the proceedings. In principle, for failing to address this criterion, the Request could be dismissed on this basis alone.

25. Likewise, none of the six arguments presented in the Request sufficiently establishes that immediate resolution by the Appeals Chamber of one or more of the proposed issues “would materially advance the proceedings”.³⁰

26. First, the Request makes arguments of a generalised nature that they cannot satisfy the criterion. This applies for example to the abstract and theoretical claim that the Appeals Chamber might potentially reverse the Decision.³¹

27. Second, some arguments are purely speculative. For example, while the Request posits that the potential grant of an “interim order suspending the effects” of the Decision may materially advance the proceedings, this depends entirely on the (unfounded) assumption that the Decision will be overturned. To the contrary, if the Decision is upheld, the grant of suspensive effect would delay the proceedings rather than materially advance them.³² Properly understood, suspensive effect is a means of preserving rights and obligations pending the outcome of an appeal, but as an interim measure it cannot in principle be considered a means of materially advancing the proceedings.

28. Third, more generally, other arguments in the Request depend entirely on the assumption that the Decision is flawed and erroneous.³³ Yet there is no objective basis on which to ground such an assumption, and this is insufficient for the purpose of article 82(1)(d)—otherwise, such arguments might be made in support of every application for leave to appeal. Moreover, the

²⁹ Decision, para. 7.

³⁰ *Contra* Request, para. 13 (emphasis added).

³¹ *Contra* Request, para. 13.

³² *Contra* Request, para. 14.

³³ See Request, paras. 15-16 (suggesting that the Appeals Chamber’s intervention will “ensure that all relevant evidence is considered”, contribute to a more “just and informed decision-making process”, or “prevent the Assembly of States Parties from engaging in proceedings based on potentially flawed conclusions”).

Request overlooks that the Appeals Chamber has already ruled on many of the matters raised in the proposed issues in its *Bashir* judgment.³⁴ As noted by the Pre-Trial Chamber in that case, certification was granted precisely in the interest of obtaining an “authoritative” judgment which “would provide clarity and finality on these matters”.³⁵ Since such a judgment now exists, the present proceedings would not be materially advanced by returning to the Appeals Chamber.

D. The interim measures sought in the Request are not justified

29. In addition to seeking leave for appeal, the Request seeks three interim measures from the Chamber, namely:

- the convening of “an oral hearing in relation to this request with the purpose to provide Mongolia with the opportunity to elaborate and clarify on critical issues thereof”,³⁶
- the issue of an order under rule 103 “inviting expressions of interest as *amici curiae* in the judicial proceedings of this Chamber”,³⁷ and
- “a temporary stay of proceedings [...] pending the resolution of Mongolia’s separate Application for Disqualification of Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugaldó Godínez, currently submitted to the Presidency”, and a further “oral hearing” regarding this specific request “with the purpose of elaborating and providing additional submission[s] and clarification on critical issues thereof.”³⁸

30. These interim measures are not justified in the circumstances of these proceedings, and do not serve any relevant purpose. They should be dismissed.

31. First, the Chamber has discretion whether to order an oral hearing, and the Request fails to show the necessity for such a hearing in this case. As explained above, an application for leave to appeal should in principle be a self-contained document. This is consistent with the summary nature of these proceedings, which are not intended to enter into the substantive merits of the issues under consideration, but rather to identify in a fashion consistent with judicial economy whether any such issue meets the requirements for interlocutory appeal.

³⁴ See Request, paras. 16-17 (suggesting that the intervention of the Appeals Chamber will “provide authoritative guidance”, or “ensure that the ICC operates within its mandate”).

³⁵ See e.g. *Bashir* Decision, [ICC-02/05-01/09-319](#), para. 15.

³⁶ Request, para. 21(i).

³⁷ Request, para. 21(ii).

³⁸ Request, pp. 10-11 (paras. 1, 13-14).

Accordingly, there is no need to convene a hearing in order to decide the Request, nor may such a hearing be used to supplement the arguments presented in the Request.

32. Second, and likewise, the issuance of an order under rule 103 is a matter for the discretion of the Chamber. Nothing in this Request warrants exercise of this discretion as the submissions of *amici curiae* are not likely to assist the Chamber to properly determine the matters raised by the Request, which do not go into the substantive merits of the issues under consideration. Rather, the Chamber itself is best placed to rule on the question of certification for appeal under article 82(1)(d).

33. Third, it will be for the Presidency to address the additional matters identified by Mongolia, and it is to be expected that the Chamber will act consistently with the measures taken by the Presidency. Yet, to the extent that the Request anticipates any measures beyond that—such as convening a further oral hearing for arguments specifically in this respect—it would be neither necessary nor appropriate for the Chamber to do so. This is particular the case in light of the very limited basis advanced by Mongolia in support of its request to the Presidency. Rather, as soon as it considers it is in a position to do so, the Chamber should proceed to render a decision on the Request expeditiously.

III. Conclusion

34. For the reasons set out above, Mongolia's Request should be denied.



Karim A. A. Khan KC, Prosecutor

Dated this 4th of November 2024

At The Hague, The Netherlands