

ANNEX
Public



**EMBASSY OF MONGOLIA
BRUSSELS**

No A/24-095

The Embassy of Mongolia in Brussels presents its compliments to the Registry of the International Criminal Court and with reference to the latter's Note Verbal REG-JCSS-2024-122 dated 25 October 2024, has the honour to forward a Note Verbal No A/24-1568 from the Ministry of Foreign Affairs of Mongolia on asking the Registry's kind assistance in transmitting the attached document to its relevant destination.

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

Enclosed: 13 pages

Brussels, 29 October 2024



THE REGISTRY OF THE INTERNATIONAL CRIMINAL COURT
The Hague

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MONGOLIA
MINISTRY OF FOREIGN AFFAIRS

A/24 - 1588

The Ministry of Foreign Affairs of Mongolia presents its compliments to the Registry of International Criminal Court and has the honor to request the Registry to deliver Mongolia's Request to Leave to Appeal and Request for a temporary stay of proceedings to the Pre-Trial Chamber II attached herein. In this regard, the Ministry requests the Registry to deliver Mongolia's Application of disqualification of judges attached herein to the Presidency for its consideration.

The Ministry of Foreign Affairs of Mongolia further has the honor to request the Pre-Trial Chamber II to convene an oral hearing regarding the Request for a temporary stay of proceedings and the Request to Leave to Appeal respectively with the purpose of elaborating and providing additional submission and clarification on critical issues thereof, and requests the Chamber to hold a hearing regarding the Request for a temporary stay of proceedings before the Chamber considers the Request to Leave to Appeal.

In this regard, Mongolia requests the Chamber to convene hearing regarding the Request to Leave to Appeal after the Application of Disqualification of Judges has been fully resolved.

In addition, the Ministry requests the Pre-Trial Chamber II, pursuant to Rule 103 of the Rules of Procedure and Evidence, to issue order inviting expressions of interest as *amici curiae* in judicial proceedings of this Chamber.

Furthermore, the Ministry notes that Mongolia's submission delivered on 03 October 2024 has not been published on the website of the International Criminal Court, resulting in lack of transparency and accessibility, which undermines procedural fairness. Thus, the Ministry requests the Registry to urgently publish these requests, the application of Mongolia and its submission dated 03 October 2024 along with the Pre-Trial Chamber II's decision rendered on 24 October 2024 "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) on the official website of the International Criminal Court.

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



THE REGISTRY OF
INTERNATIONAL CRIMINAL COURT

The Hague

REQUEST TO LEAVE TO APPEAL

I. Introduction

1. Mongolia respectfully requests Pre-Trial Chamber II to grant leave to appeal the Decision dated 24 October 2024 "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" ("Impugned Decision"), ICC-01/22, pursuant to Article 82(1)(d) of the Rome Statute of the International Criminal Court (the "Rome Statute") on the grounds articulated herein.
2. This Request addresses specific issues arising from the Impugned Decision that significantly affect the fair and expeditious conduct of the proceedings and the outcome of the proceedings. Immediate resolution of these issues by the Appeals Chamber will materially advance the proceedings.
3. Without prejudice to this request, Mongolia expresses its intent to submit additional written and oral submissions to this Chamber elaborating on each specific issue addressed herein.
4. The issues addressed herein are as to explain the purpose of the request to leave to appeal, Mongolia intends and retains its right provide more detailed factual and legal submissions to the Appeals Chamber, and will seek an opportunity to do so in both in writing and at an oral hearing.

II. Legal Basis for the Request

5. Article 82(1)(d) of the Statute permits appeal:

"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."

6. Rule 155 of the Rules of Procedure and Evidence provides:

1. When a party wishes to appeal a decision under article 82, paragraph 1 (d), or article 82, paragraph 2, that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

7. The Appeals Chamber has established that for leave to appeal to be granted under Article 82(1)(d), the applicant must demonstrate that: (i) The matter is an appealable issue arising from the decision; (ii) The issue significantly affects the fair and expeditious conduct of the proceedings or the outcome of the trial;

and (iii) An immediate resolution by the Appeals Chamber may materially advance the proceedings.¹

8. Mongolia submits that all three criteria are satisfied for each of the issues identified below.

III. Identified Issues for Appeal

9. Mongolia identifies the following issues arising from the Impugned Decision that meet the criteria under Article 82(1)(d):

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

¹ Prosecutor v. Said, ICC-01/14-01/21-514, Decision on the Admissibility of the Appeal (Appeals Chamber, 25 October 2022).

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-States 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—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 impowered 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.

IV. Issues meet the Article 82(1)(d) Criteria

10. Each of the issues identified arises directly from the Impugned Decision, specifically from the Pre-Trial Chamber II's legal findings and interpretations, which form the basis of its conclusion regarding Mongolia's alleged non-compliance and referral to the Assembly of States Parties.
11. These issues significantly impact the fairness and expeditious conduct of the proceedings and the outcome of such proceedings. The Impugned 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.
12. This raises 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.
13. Immediate resolution by the Appeals Chamber would materially advance the proceedings. The Appeals Chamber has the authority to reverse or modify the Impugned Decision if legal errors are found, which could potentially lead to the nullification of the Assembly of States Parties referral or rectification of legal misinterpretations.
14. Even the interim resolutions, such as interim order suspending the effects of Impugned Decision, of the Appeals Chamber would significantly safeguard the fairness of proceedings.
15. Therefore, an immediate resolution by the Appeals Chamber would ensure that all relevant evidence is considered, and the legal analysis is conducted on a complete factual basis. This would materially advance the proceedings by promoting a just and informed decision-making process.
16. Furthermore, immediate appellate review could prevent the Assembly of States Parties from engaging in proceedings based on potentially flawed conclusions. Addressing the legal issues promptly would provide authoritative guidance on Articles 27(2), 98(1), and 98(2), promoting consistency and legal certainty for States Parties and enhancing cooperation with the Court.

17. Finally, immediate resolution would ensure that the ICC operates within its mandate, respecting international legal principles and preserving its credibility, legitimacy and integrity of its proceedings.
18. If the specified issues are left unaddressed, it would undermine the credibility and legitimacy of the Impugned Decision and negatively affect the outcome by imposing obligations on the State that may not be legally justified, undermining the fairness and integrity of the proceedings of the Court.

V. Relief Sought

19. The identified issues satisfy the criteria under Article 82(1)(d) of the Rome Statute, as they arise directly from the Impugned Decision and Appeals Chamber resolution would provide clarity and finality on these matters that concerns the credibility, legitimacy, integrity and fairness of the proceedings.
20. Given these grounds, Mongolia respectfully submits that appellate review is warranted to address critical legal errors, ensure fairness, and uphold the administration of justice.
21. For the foregoing reasons, Mongolia respectfully requests Pre-Trial Chamber II to:
 - i. Convene 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;
 - ii. Issue order, pursuant to Rule 103 of the Rules of Procedure and Evidence, inviting expressions of interest as *amici curiae* in the judicial proceedings of this Chamber;
 - iii. Grant leave to appeal the decision dated 24 October 2024, "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," on the identified issues under Article 82(1)(d) of the Rome Statute; and
 - iv. Certify the appeal on the specified issues to the Appeals Chamber for immediate resolution.

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REQUEST FOR A TEMPORARY STAY OF PROCEEDINGS

I. Introduction

1. Mongolia respectfully submits this request for a temporary stay of proceedings to the Pre-Trial Chamber II, seeking suspension of all proceedings related to Mongolia's Request for Leave to Appeal pursuant to Article 82(1)(d) of the Rome Statute, pending the resolution of Mongolia's separate Application for Disqualification of Presiding Judge Rosario Salvatore Aitala and Judge Sergio Gerardo Ugalde Godínez, currently submitted to the Presidency.
2. This request is made in the interest of preserving the integrity of judicial proceedings and ensuring that the adjudication of Mongolia's Request for Leave to Appeal is conducted without any appearance of partiality or conflict of interest.

II. Procedural Background

3. On 29 October 2024, Mongolia submitted the Request for Leave to Appeal concerning the decision, dated 24 October 2024, "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 Pre-Trial Chamber II.
4. On the same date, Mongolia filed an *Application for Disqualification* of Presiding Judge Rosario Salvatore Aitala and Sergio Gerardo Ugalde Godínez due to concerns regarding doubt to appearance of impartiality and perceived conflicts of interest, which undermines the integrity and fairness of proceedings in this matter.
5. In light of the pending resolution of the disqualification application, Mongolia respectfully submits that any further consideration of its *Request for Leave to Appeal* by the Pre-Trial Chamber II may inadvertently compromise judicial integrity or give rise to an appearance of bias.

III. Rationale for Stay

6. Under Article 41(2)(a) of the Rome Statute, it is imperative that judges refrain from participating in cases where their impartiality might reasonably be doubted.
7. To uphold this principle, Mongolia contends that suspending consideration of the Mongolia's Request for Leave to Appeal until the Presidency notifies about the decision of the Plenary of Judges on the disqualification application is necessary and consistent with procedural fairness.
8. Given the unresolved disqualification application, the continuation of proceedings involving Presiding Judge Rosario Salvatore Aitala and Judge

Sergio Gerardo Ugalde Godínez may not only affect the perception of fairness but also risk compromising the integrity of the ICC's judicial process.

9. The ICC has recognized the importance of maintaining judicial impartiality in the face of pending disqualification applications. In previous cases, similar measures have been taken to uphold judicial neutrality and public confidence in ICC decisions. A temporary stay of proceedings would align with such established practice.
10. Granting this stay does not prejudice the proceedings but merely pauses consideration of the Mongolia's Request for Leave to Appeal until the disqualification matter is resolved. This ensures that the appeal process, if granted, proceeds under conditions of unequivocal impartiality.
11. A stay in this instance would provide ample opportunity for the plenary of judges to address and resolve the disqualification matter, without undue pressure or perceived partiality affecting the decisions on Mongolia's application for Leave to Appeal.
12. Proceeding with a decision on Mongolia's request for leave to appeal in advance of a determination on the disqualification matter could lead to outcomes that may be undermined should the disqualification be granted. A stay of proceedings, therefore, serves to prevent potentially prejudicial determinations and upholds the fairness and integrity of the judicial process.

IV. Relief Sought

13. For the foregoing reasons, Mongolia respectfully requests that the Pre-Trial Chamber II grant a stay of proceedings with respect to the consideration of Mongolia's Request for Leave to Appeal until such time as the Plenary of Judges has made a final determination on the application for disqualification.
14. In addition, Mongolia respectfully requests the Pre-Trial Chamber II to convene an oral hearing regarding this Request with the purpose of elaborating and providing additional submission and clarification on critical issues thereof.

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