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**International
Criminal
Court**

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

Source: Office of the Prosecutor

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

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I. Introduction

1. The Pre-Trial Chamber should dismiss Mongolia's request for reconsideration¹ of the Chamber's Decision on Mongolia's request for leave to appeal, temporary stay of the proceedings, and related matters,² as it fails to meet the threshold conditions for granting such an exceptional remedy. Rather, the request simply disagrees with the Decision.

2. In addition, Mongolia's continued re-litigation of issues in duplicitous filings before the Chamber is impermissible, and borders on abuse of the Court's processes. Moreover, the Prosecution notes with serious concern Mongolia's unsubstantiated allegations of judicial impropriety on the part of the Chamber when it rejected its request for leave to appeal.³ Mongolia's unprofessional approach should be sanctioned by the Chamber.

II. Submissions

A. Mongolia's request for reconsideration is without merit

3. Reconsideration by a Chamber of its own decision is an exceptional remedy that can only be granted in very limited circumstances. They include the existence of a clear error of reasoning on the part of a Chamber and a necessity to prevent injustice.⁴ New facts arising since the impugned decision was rendered may be relevant in assessing whether to grant a reconsideration.⁵

4. Mongolia does not meet any of the requirements above.

Mongolia does not show a clear error of reasoning

5. While Mongolia lists several errors allegedly committed by the Chamber in its Decision on Leave to Appeal – in particular that the Chamber wrongly concluded that an article 87(7) decision is not appealable under article 82(1)(d),⁶ and that the Chamber failed to substantively engage or certify its 16 legal issues⁷ – it ignores that to be granted, a request for leave to appeal

¹ ICC-01/22-112-Anx, 2 December 2024 (“Mongolia’s Reconsideration Request”).

² ICC-01/22-111, 29 November 2024 (“Decision on Leave to Appeal”).

³ See e.g., Mongolia’s Reconsideration Request, paras. 63-67.

⁴ *Ongwen* Decision, [ICC-02/04-01/15-1547](#), para.7; *Ntaganda* Decision, [ICC-01/04-02/06-519](#), para.12; *Ongwen* Decision, [ICC-02/04-01/15-468](#), para.4.

⁵ *Ongwen* Decision, [ICC-02/04-01/15-468](#), para.4; *Ntaganda* Decision, [ICC-01/04-02/06-1049-Red](#), para.12.

⁶ Mongolia’s Reconsideration Request, paras. 16-30; and relatedly, paras. 56-62.

⁷ Mongolia’s Reconsideration Request, paras. 31-33.

under article 82(1)(d) must satisfy all *three* cumulative requirements,⁸ and that a failure to meet any one these requirements is fatal to the request.⁹ Therefore, to succeed, a request for the reconsideration of a decision on leave to appeal must show a clear error of reasoning respecting the impugned decision’s assessment of all article 82(1)(d)’s mandatory requirements. Mongolia fails to do so.

6. In the present case, in dismissing Mongolia’s request for leave to appeal, the Chamber considered that Mongolia had not satisfied article 82(1)(d)’s cumulative requirements. It determined that (i) Mongolia had not identified an appealable issue (given, in its view, that the chamber’s article 87(7) finding was not an appealable judicial decision);¹⁰ (ii) even *arguendo* that the article 87(7) finding was appealable, Mongolia had failed to show how an immediate resolution by the Appeals Chamber would advance the proceedings.¹¹

7. In addition to merely disagreeing with the Chamber’s approach to the appealability of article 87(7) (first mandatory requirement), Mongolia also does not engage with the question of whether any clear error exists in the Chamber’s determination that Mongolia had not substantiated its assertion that immediate appellate intervention was warranted (another mandatory requirement).¹² This is fatal to its request for reconsideration. Indeed, Mongolia does not demonstrate any error in the Chamber’s approach in assessing this additional mandatory requirement for leave to appeal, but as shown below, in fact admits that its submissions were incomplete.¹³ Ultimately, Mongolia cannot show any clear error justifying a reconsideration of the Decision on Leave to Appeal.

8. In concluding that Mongolia had not shown why immediate appellate intervention was warranted, the Chamber correctly considered that Mongolia did not sufficiently substantiate its request for leave to appeal.¹⁴ In particular, besides merely stating that the Appeals Chamber’s

⁸ The request must show 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. See *Said* Decision, [ICC-01/14-01/21-514](#), paras. 13, 18; *DRC* Judgment, [ICC-01/04-168](#), paras. 7-18.

⁹ In addition to the Decision on Leave to Appeal, para. 23, see also *Kushayb* Decision, [ICC-02/05-01/20-517](#), para. 14; *Mbarushimana* Decision, [ICC-01/04-01/10-116](#), para. 7; *Yekatom & Ngaissona* Decision, [ICC-01/14-01/18-161](#), para. 20.

¹⁰ Decision on Leave to Appeal, para. 26.

¹¹ Decision on Leave to Appeal, para. 27.

¹² See also Regulation 65(2) (“an application under article 82, paragraph 1 (d) shall specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue”).

¹³ See below, paras. 9-15 (also showing that Mongolia’s claims for not substantiating its submissions are without merit).

¹⁴ Decision on Leave to Appeal, para. 27.

resolution would advance the proceedings and pointing to the statutory powers of the Appeals Chamber in general terms, Mongolia did not elucidate how an immediate resolution of the Appeals Chamber on any of the 16 proposed issues would advance the proceedings against Putin.¹⁵ Mongolia does not contest nor show that it provided the relevant elucidation of how immediate appellate intervention was warranted. To the contrary, Mongolia admits that it did not provide the relevant substantiation, but generally claims procedural and other limitations allegedly caused by the Chamber on why it did not.¹⁶ However, none of these claims, as shown below,¹⁷ has any merit.

Mongolia does not demonstrate an injustice or a need to prevent one

9. Mongolia does not demonstrate that any injustice flows from the Decision on Leave to Appeal, to necessitate the exceptional remedy of reconsideration of it.

10. In its Reconsideration Request, Mongolia appears to generally base the alleged injustice from procedural and other limitations that hindered it from fully substantiating its request for leave to appeal.¹⁸ None of these claims, however, is meritorious.

11. Mongolia's claim that the Chamber did not grant it sufficient time and opportunity to fully present its case, including by denying its request for an oral hearing,¹⁹ is unfounded. The Court's legal framework requires that a complete request for leave to appeal under article 82(1)(d) is submitted within 5 days of the relevant decision, while a response to such leave to appeal must be filed within 3 days.²⁰ Incomplete or unsubstantiated requests for leave to appeal fail on that basis alone.²¹ In the present case, the Chamber did not undermine Mongolia's ability to present its case in any manner, such as by abridging this time-line. Moreover, as other Chambers have ruled in respect of incomplete and unsubstantiated filings, the Chamber properly rejected Mongolia's request for leave to appeal for its failure to substantiate that immediate appellate intervention was warranted.²² Earlier, the Chamber had correctly rejected Mongolia's request for leave to reply to the Prosecution's response for it to address its failure

¹⁵ Decision on Leave to Appeal, para. 27.

¹⁶ Mongolia's Reconsideration Request, paras. 34-77; see further below, paras. See below, paras. 9-15.

¹⁷ See below, paras. 9-15.

¹⁸ Mongolia's Reconsideration Request, paras. 34-77.

¹⁹ Mongolia's Reconsideration Request, paras. 34-77.

²⁰ See rule 155 of the Rules of Procedure and Evidence; Regulation 65 of the Regulations of the Court.

²¹ See e.g., *Gbagbo & Blé Goudé* Decision, [ICC-02/11-01/15-685-Red](#), paras. 4, 6; *Gbagbo & Blé Goudé* Decision, [ICC-02/11-01/15-612](#), para. 6.

²² Decision on Leave to Appeal, para. 27.

to substantiate its procedural presentations of issues in its request.²³ It correctly concluded that such issues “could have been reasonably foreseen as they are direct responses to those arguments developed by Mongolia in its Request for Leave to Appeal, and do not appear to raise any novel issue.”²⁴

12. Nor does Mongolia demonstrate any error in the Chamber’s rejection of its request for an oral hearing, including as a way to respond to the Prosecution response to its request for leave to appeal. As a general matter, an oral hearing in the context of requests for leave to appeal is not specifically available in the Court’s legal framework but falls within the Chamber’s discretion. This, on its own, justifies the rejection of Mongolia’s claims of error. In any event, the Prosecution also recalls that the Chamber had granted Mongolia’s request to reply in writing to the Prosecution’s response to its leave to appeal by 20 November 2024,²⁵ to enable Mongolia elucidate two issues.²⁶ Moreover, the Chamber had also granted Mongolia a further extension of five days, permitting it to file its reply by 25 November 2024.²⁷

13. Instead of submitting its written reply, exactly on the deadline of 25 November 2024, Mongolia chose to request an oral hearing in lieu of a written reply.²⁸ Such approach is impermissible. Under article 64(2) of the Statute, the Chamber is mandated to conduct proceedings in an expeditious and fair manner. As such, the parties and other participants to the proceedings do not enjoy a right to open-ended timelines or choices of modes by which to make their views before the Court. The mandate of courts to ensure fair and expeditious proceedings is accepted in other jurisdictions the world over, both domestic and international,²⁹ as a means to promote the proper administration of justice and other broader objectives.³⁰

²³ ICC-01/22-103, 14 November 2024, para. 10.

²⁴ ICC-01/22-103, 14 November 2024, para. 10.

²⁵ ICC-01/22-103, 14 November 2024.

²⁶ ICC-01/22-103, 14 November 2024, para. 10.

²⁷ Decision on Leave to Appeal, fn. 25 (referring to an email from the Chamber dated 20 November 2024).

²⁸ ICC-01/22-108.

²⁹ See e.g., Patrick Robinson, [Ensuring fair and expeditious trials at the International Criminal Tribunal for the Former Yugoslavia](#), EJIL 2000.

³⁰ See e.g., *Katanga* Appeal Decision, [ICC-01/04-01/07-2259 OA10](#), para. 47 (underlining that the principle of expeditiousness is more than a fair trial right, but “[a]n independent and important value in the Statute to ensure the proper administration of justice”). Moreover, expeditiousness promotes, among others, the sustenance of public interest and public support for, and cooperation with the Court. Indeed, “[u]nreasonable delay [in commencing or finalising a trial] may also diminish public interest and public support for, and cooperation with, the Court. Without such support and cooperation the Court would find it difficult to have its decisions and orders respected or enforced”. *Id.*, para. 46.

14. Therefore, in the totality of these circumstances above, Mongolia cannot fault the Chamber for finding that its pleadings on whether immediate appellate intervention was warranted, were unsubstantiated.

15. Furthermore, Mongolia's claim of "procedural injustice" based on alleged "haste" on the Chamber in issuing the Decision on Leave to Appeal, is baseless.³¹ Not only was the Chamber entitled to issue the Decision as soon as it was ready, but also Mongolia's claim of judicial impropriety on the part of the Chamber is both unsubstantiated and a grave insult to the Chamber that merits judicial reprimand, as shown below.³²

B. Mongolia's re-litigation of issues and its unsubstantiated allegations of judicial misconduct on the part of the Chamber are impermissible

16. *First*, the Prosecution notes that, following its response to Mongolia's request for leave to appeal, Mongolia has filed several submissions that are replete with re-litigation of certain issues, including those already pleaded in its request for leave to appeal. In those submission, as well as in the present Request for Reconsideration, Mongolia continues to re-litigate similar requests or remedies, such as an oral hearing, invitation of *amicus curiae* submissions and request for leave to reply to the Prosecution's response to its leave to appeal.³³ In the Prosecution's view, Mongolia, like any other party or participant to the proceedings, should avoid duplicative litigations, some of which may constitute an impermissible use of the Court's processes.

17. *Second*, and most concerning, is Mongolia's unsubstantiated allegations of judicial impropriety on the part of the Chamber. In a nutshell, Mongolia makes unsubstantiated and grave allegation that the Chamber issued the Decision on Leave to Appeal in "apparent haste,"³⁴ "seemingly driven by an arbitrary desire to decide the matter before the ASP session,"³⁵ and that "this undue haste suggests that factors external to the legal merits of the case may have influenced the Chamber's decision-making process, which is inappropriate, undermines the integrity of the judicial proceedings, and erodes trust in the judicial system."³⁶ These

³¹ Mongolia's Reconsideration Request, paras. 63-67.

³² See below, para. 17.

³³ See e.g., Mongolia's Reconsideration Request, paras. 68-90. See also Decision on Leave to Appeal, para. 20 (finding 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") (emphasis added).

³⁴ Mongolia's Reconsideration Request, para. 63.

³⁵ Mongolia's Reconsideration Request, para. 64.

³⁶ Mongolia's Reconsideration Request, para. 66.

unsubstantiated allegations are unprofessional; they are a grave insult to the Court.

IV. Conclusion

18. For the reasons set out above, Mongolia's Reconsideration Request should be denied. In addition, the Chamber should find that Mongolia's re-litigation of issues is impermissible and that its unsubstantiated allegations of judicial impropriety on the part of the Chamber are unprofessional and unacceptable.

A handwritten signature in blue ink, appearing to be 'K.A.K.', with a horizontal line underneath it.

Karim A. A. Khan KC, Prosecutor

Dated this 6th day of December 2024

At The Hague, The Netherlands.