

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/17
Date: 1 February 2023

THE APPEALS CHAMBER

Before: Judge Piotr Hofmański, Presiding Judge
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Marc Perrin de Brichambaut
Judge Gocha Lordkipanidze

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

**Public Document
With public Annex 1**

**Submissions on behalf of victims
pursuant to the “Order on filing of observations on the Prosecutor’s notice of
discontinuance of the appeal”
(No. ICC-02/17-208)**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Principal Counsel of the Office of Public Counsel for Victims (the “OPCV” or the “Office”) opposes the Prosecutor’s Notice of Discontinuance of his Appeal (the “Notice of Discontinuance”)¹ against the Pre-Trial Chamber’s “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (the “Impugned Decision”).² She requests the Appeals Chamber to reject said Notice and to rule on the Appeal.

2. As submitted earlier in the proceedings, the Impugned Decision severely limits the scope of the resumed investigation in the Situation in Afghanistan, causing victims to suffer renewed stress, anxiety and concern.³ In particular, the wording of paragraph 59 of the Impugned Decision suggests that the Prosecutor’s investigation may be limited in scope and time, therefore effectively downgrading the nature, as well as the number of crimes to be investigated, and thereby curtailing the real extent of the victimisation suffered.⁴ This will in turn unacceptably prejudice the victims’ rights to truth, justice and reparation and the overall interest of justice.

3. The Principal Counsel submits that the Prosecutor should not be allowed to discontinue his appeal by simply providing a notice. The legislative history of the relevant provisions suggests that the Appeals Chamber retains, in fact, the discretionary power to decline to accept the discontinuance of an appeal - regardless of the appellant’s wish - since it is responsible for all matters related to appeal proceedings. This is specially the case when the issues raised in the appeal are crucial to the interest of justice and the rights of victims.

¹ See the “Notice of discontinuance of the appeal of the Prosecutor against the ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’” (OA5), [No. ICC-02/17-207 OA5](#), 16 January 2023 (the “Notice of Discontinuance”).

² See the “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” (Pre-Trial Chamber II), [No. ICC-02/17-196](#), 31 October 2022 (the “Impugned Decision”).

³ See the “Submissions on behalf of victims pursuant to the ‘Order on the conduct of the appeal proceedings’ (No. ICC-02/17-200)”, [No. ICC-02/17-202 OA5](#), 15 December 2022, para. 4.

⁴ *Ibid.*

4. Accordingly, the Principal Counsel posits that the Appeals Chamber should reject the Notice of Discontinuance and rule on the matter *sub judice* - having due regard to the significance of the issue raised and, in particular, to the prejudice that the lack of judicial determination thereof will cause to the victims' rights to truth, justice and reparation and the overall interest of justice.

II. PROCEDURAL BACKGROUND

5. On 5 March 2020, the Appeals Chamber issued its "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan" (the "Appeals Chamber's Judgment"), authorising the Prosecutor to commence an investigation "*in relation to alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict in Afghanistan and are sufficiently linked to the situation and were committed on the territory of other States Parties in the period since 1 July 2002*".⁵

6. On 15 April 2020, the Prosecutor notified the Pre-Trial Chamber that the Government of the Islamic Republic of Afghanistan requested a deferral of the investigation, pursuant to article 18(2) of the Rome Statute (the "Statute").⁶

7. On 27 September 2021, the Prosecutor requested authorisation to resume his investigation under article 18(2) of the Statute.⁷

8. On 31 October 2022, the Pre-Trial Chamber issued the Impugned Decision.⁸

⁵ See the "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan" (Appeals Chamber), [No. ICC-02/17-138 OA4](#), 5 March 2020 (the "Appeals Chamber's Judgment"), p. 3 and para. 79. See also, the "Public redacted version of 'Request for authorisation of an investigation pursuant to article 15', 20 November 2017, ICC-02/17-7-Conf-Exp", [No. ICC-02/17-7-Red](#), 20 November 2017.

⁶ See "Annex 1 to the Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan's letter concerning article 18(2) of the Statute", [No. ICC-02/17-139-Anx1](#), 15 April 2020.

⁷ See the "Request to authorise resumption of investigation under article 18(2) of the Statute", [No. ICC-02/17-161](#), 27 September 2021.

⁸ See the Impugned Decision, *supra* note 2.

9. On 7 November 2022, the Prosecutor submitted his Notice of Appeal of the Impugned Decision.⁹
10. On 22 November 2022, the Prosecutor filed the Appeal Brief.¹⁰
11. On 15 December 2022, pursuant to an order by the Appeals Chamber,¹¹ the legal representatives of the victims filed their observations on the appeal.¹²
12. On 16 January 2023, the Prosecutor filed the Notice of Discontinuance.¹³
13. On 24 January 2023, the Appeals Chamber issued an order on the filing of observations on the Notice of Discontinuance, instructing the legal representatives of the victims to file their observations by 3 February 2023.¹⁴ On the same day, a group of legal representatives of victims filed a response to the Notice of Discontinuance.¹⁵

⁹ See the “Notice of Appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)”, [No. ICC-02/17-197 OA5](#), 7 November 2022 (the “Prosecutor’s Notice of Appeal”).

¹⁰ See the “Prosecution appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)”, [No. ICC-02/17-198 OA5](#), 22 November 2022 (the “Prosecutor’s Appeal”).

¹¹ See the “Order on the conduct of the appeal proceedings”(Appeals Chamber), [No. ICC-02/17-200](#), 23 November 2022.

¹² See the “Submissions on behalf of victims pursuant to the ‘Order on the conduct of the appeal proceedings”, *supra* note 3; the “Victims’ Response to ‘Prosecution appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)’ (ICC-02/17-198)”, [No. ICC-02/17-201 OA5](#), 15 December 2022; and the “Response to ‘Prosecution appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196)’”, [No. ICC-02/17-204 OA5](#), 15 December 2022.

¹³ See the Notice of Discontinuance, *supra* note 1.

¹⁴ See the “Order on the filing of observations on the Prosecutor’s notice of discontinuance of the appeal” (Appeals Chamber), [No. ICC-02/17-208 OA5](#), 24 January 2023.

¹⁵ See the “Response to ‘Notice of discontinuance of the appeal of the Prosecutor against the ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (OA5)’”, [No. ICC-02/17-209 OA5](#), 24 January 2023.

III. SUBMISSIONS

14. The Principal Counsel recalls that Prosecutor’s Appeal concerns paragraph 59 of the Impugned Decision.¹⁶ In particular, the Prosecutor alleged that Pre-Trial Chamber had committed an error of law by limiting the scope of the resumed investigation in the Situation in Afghanistan and disregarding the previous Appeals Chamber’s ruling which had authoritatively disposed of the matter.¹⁷

15. As previously submitted, the lack of clarity on the scope of the authorised investigation is, for the victims, a source of stress, anxiety and concern.¹⁸ In particular, the wording of paragraph 59 of the Impugned Decision suggests that the investigation may be limited in scope and time, therefore effectively downgrading the nature, as well as the number of crimes to be investigated, and thereby minimising the real extent of the victimisation suffered.¹⁹ The scope of the authorised investigation has a clear impact on the victims’ internationally recognised rights to truth, justice and reparation.²⁰

¹⁶ See the Prosecutor’s Notice of Appeal, *supra* note 9, para. 1 and the Prosecutor’s Appeal, *supra* note 10, para. 1.

¹⁷ *Idem*, paras. 14-21.

¹⁸ See the “Submissions on behalf of victims pursuant to the ‘Order on the conduct of the appeal proceedings’”, *supra* note 3, para. 4.

¹⁹ *Ibid.*

²⁰ See the “Separate opinion of Judge Sang-Hyun Song” appended to the “Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the ‘Directions and Decision of the Appeals Chamber’ of 2 February 2007” (Appeals Chamber), [No. ICC-01/04-01/06-925](#), 13 June 2007, para. 16: “*victims of serious crimes have a special interest that perpetrators responsible for their suffering be brought to justice, and this interest is protected by human rights norms*”. See also, the “Decision on the Set of Procedural Rights Attached to Procedural Status of Victims at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), [No. ICC-01/04-01/07-474](#), 13 May 2008, stating that “*the latest empirical studies conducted amongst victims of serious violations of human rights [...] show that the main reason why victims decide to resort to those judicial mechanisms which are available to them against those who victimised them is to have a declaration of the truth by the competent body*” (para. 31) and acknowledged that “*when this right is to be satisfied through criminal proceedings, victims have a central interest in [...] the outcome of such proceedings*” (para. 34). See also, the “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008” (Appeals Chamber), [No. ICC-01/04-01/06-1432 OA9 OA10](#), 11 July 2008, para. 97; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-01/11-460](#), 3 October 2012, para. 10; the “Decision on victims’ representation and participation” (Trial Chamber V), [No. ICC-01/09-02/11-498](#), 3 October 2012, para. 9; and the “Decision on common legal representation of victims for the purpose of trial” (Trial Chamber III), [No. ICC-01/05-01/08-1005](#), 10 November 2010, para. 9(a).

16. Therefore, the victims oppose the Prosecutor's decision to discontinue his Appeal on such an important matter for all victims before this Court and for all future determinations on the proper scope of an investigation which is in line with the spirit and letter of the Statute. In fact – as also noted by the Prosecutor in his Appeal²¹ – judicial certainty is particularly important with regard to matters such as the scope of the Court's jurisdiction, which not only affect the Court as a whole but also external actors with whom the Court interacts. In the victims' view, the reasons provided by the Prosecutor for discontinuing his appeal fail to take into account their interests and the interest of justice, as provided for in article 53(1)(c) of the Statute.

17. Moreover, the Prosecutor attempts to unilaterally and conclusively dispose of the Appeal by simply providing a notice of discontinuance.²² Yet, the legislative history of rule 157 of the Rules of Procedure and Evidence (the "Rules") suggests that the Appeals Chamber retains discretion to accept such a notice.

18. The current formulation of rule 157 is the result of a long drafting process which started in 1996. At the time, Australia and The Netherlands submitted a working paper addressing the notion of discontinuance of appeals. The text read as follows:

"Rule 130 Discontinuance of appeal

An Appellant, including the party deemed to be the Respondent under rule 129, may at any time file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other party that the notice has been filed. Upon filing of the notice, the appeal shall be abandoned".²³

²¹ See the Prosecutor's Appeal, *supra* note 10, para. 26.

²² See the Notice of Discontinuance, *supra* note 1, paras. 1-2.

²³ See the Draft Set of Rules of Procedure and Evidence for the International Criminal Court, Working paper submitted by Australia and the Netherlands, [UN Doc. A/AC.249/L.2](#), 26 July 1996, p. 59 (emphasis added). See also, the Report of the Informal Group on Procedural Questions, Fair Trial and Rights of the Accused Preparatory Committee on the Establishment of an International Criminal Court, [UN Doc. A/AC.249/CRP.14](#), 27 August 1996, p. 127; and Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of proposals), [UN Doc. A/51/22\[VOL.II\]\(SUPP\)](#), 13 September 1996, p. 240.

19. Subsequently, at the Preparatory Commission, Australia presented another proposal which slightly modified the wording of the one jointly submitted with The Netherlands. Said proposal stated:

“Rule 112 Discontinuance of an appeal

(a) The Appellant, or the party deemed to be the Respondent under rule 111, may at any time file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other party that the notice has been filed.

*(b) The notice shall take effect on the date it is filed”.*²⁴

20. France also supported Australia’s position in a joint proposal.²⁵ However, during the negotiations of the Preparatory Commission, some commentators noted that the wording - to the effect that the discontinuance would take effect on the date of the filing of the notice - was intentionally deleted after discussion among the drafters.²⁶

21. No Peace Without Justice, a NGO which closely monitored the debates, observed that “[one of the issues on which the drafters actively debated was] *the role of the Appeals Chamber, in case a notice of discontinuance will be filed. Should the discontinuance be automatic or should the Appeals Chamber have a final say, as Chamber responsible for the all matters related to appeals procedures? No agreement was reached on the matter and no mention of any such competence for the Appeals Chamber is now in the rules*”.²⁷ A striking example of such a debate is a comment made by Niger which advocated a

²⁴ See the Draft Rules of Procedure and Evidence of the International Criminal Court - Proposal submitted by Australia, [UN Doc. PCNICC/1999/DP.1](#), 26 January 1999, p. 55 (emphasis added).

²⁵ See the Proposal submitted by Australia and France on rules to govern the appeal, [UN Doc. PCNICC/1999/WGRPE/DP.26](#), 29 July 1999, p. 2.

²⁶ See BRADY (H.), “Appeal and Revision”, in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 587. See also, the Proceedings of the Preparatory Commission at its second session (26 July–13 August 1999), [UN Doc. PCNICC/1999/L.4/Rev.1](#), 18 August 1999, p. 56; and Working Group on Rules of Procedure and Evidence related to Part 8 of the Statute, Preparatory Commission for the International Criminal Court, [UN Doc. PCNICC/2000/WGRPE\(8\)/RT.1](#), 17 March 2000, pp. 2-3.

²⁷ See Annex 1, NO PEACE WITHOUT JUSTICE, Issue No. 2, 4 June 2000, pp. 7-8.

position to the effect that the Appeals Chamber should have the power to confirm discontinuance of appeals.²⁸

22. In the same vein, a commentator also noted that “[t]here may be cases where the Appeals Chamber decides to press ahead *proprio motu* with the appeal, notwithstanding one party’s desire to discontinue. While filing a notice of discontinuance will in most cases abandon the appeal, the Appeals Chamber should retain the power to continue appellate proceedings in appropriate cases. In exercising this power, the Appeals Chamber is likely to look at the stage of the appeal proceedings and whether discontinuance would cause any prejudice, in particular to the accused”.²⁹ In fact, the current wording of rule 157 of the Rules remained “fairly open” as to whether such discontinuance take effect upon simply filing the notice or, alternatively, whether the Appeals Chamber has a discretion to decline to accept it.³⁰ Allowing for such discretion is also in line with the relevant jurisprudence of the *ad hoc* tribunals – where the Appeals Chamber has in fact *to accept* the notice of appeal withdrawal before declaring that the appeal proceedings before it are concluded.³¹

23. Accordingly, the Principal Counsel argues that the Appeals Chamber has a discretionary power to accept the notice of discontinuance or, if necessary, decline to do so, regardless of the appellant’s wish – since it retains the responsibility for all matters related to appeal proceedings. This is specially the case where the issues raised in an appeal are crucial to the interest of justice and the rights of victims, who, incidentally, do not have any remedy to oppose such a decision. In fact, contrary to the Prosecutor’s submissions in this regard,³² his Notice of Discontinuance is with prejudice. The Prosecutor will be barred from challenging the Impugned Decision in

²⁸ See [Comments made to document PCNICC/1999/WGRPE/RT.5](#), Working Group on Rules of Procedure and Evidence, Preparatory Commission for the International Criminal Court, 6 August 1999, p. 29.

²⁹ See BRADY (H.), *op. cit.*, *supra* note 26, p. 587.

³⁰ *Idem*, p. 593.

³¹ See, *inter alia*, ICTY, *Prosecutor v. Strugar*, “Final Decision on ‘Defence notice of withdrawing appeal’ and ‘Withdrawal of Prosecution’s appeal against the judgment of the Trial Chamber II dated 31 January 2005’”, [IT-01-42-A](#), 20 September 2006.

³² See the Notice of Discontinuance, *supra* note 1, para. 6.

the future, to the effect that the scope of his investigations would be unduly limited - thereby critically affecting the victims' rights.

24. On the merits, the Principal Counsel submits that the Appeals Chamber should reject the Notice of Discontinuance and rule on the issue *sub judice* given the importance of the issues raised in the appeal as argued *supra*³³ and due to, in particular, the prejudice that the lack of determination thereof will cause to the victims' rights to truth, justice and reparation and the overall interest of justice.

IV. CONCLUSION

25. For the foregoing reasons, the Principal Counsel respectfully requests the Appeals Chamber to reject the Notice of Discontinuance and to rule on the Prosecutor's Appeal against the Impugned Decision.



Paolina Massidda
Principal Counsel

Dated this 1st day of February 2023

At The Hague, The Netherlands

³³ See *supra* paras. 15-16 and the "Submissions on behalf of victims pursuant to the 'Order on the conduct of the appeal proceedings'", *supra* note 3, para. 4.