

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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**No.: ICC-02/17
Date: 3 February 2023**

THE APPEALS CHAMBER

Before:
Judge Piotr Hofmánski
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

Submission on behalf of Victims in accordance with the Appeals Chamber's "Order on the filing of observations on the Prosecutor's notice of discontinuance of the appeal" of 24 January 2023

Source: Legal Representative of Victims a/00001/21 through a/00007/21

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

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I. Introduction

1. This submission is made on behalf of Victims a/00001/21 through a/00007/21 by their instructed Legal Representative for Victims, and in order to submit observations on 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)” filed on 16 January 2023.¹
2. These Observations, concerning the Prosecution’s Notice of Discontinuance, follow the Impugned Decision of the Pre-Trial Chamber on 31 October 2022 which authorised the Prosecution to resume the investigation in the Situation in Afghanistan,² and the Prosecution’s Appeal of the Impugned Decision, whereby Notice of Appeal was submitted on 7 November 2022,³ and the Appeal Brief was submitted on 22 November 2022.⁴ They are made in accordance with the Appeals Chamber’s Order of 24 January 2023 which decided “*to allow the legal representatives of the participating victims*” ... “*to file observations on the Notice of Discontinuance.*”⁵
3. For the following reasons, it is submitted that the Notice of Discontinuance does not meet the requirements of rule 157 and the Appeals Chamber should use its discretion to find the Notice of Discontinuance has no effect. It is further submitted that the Appeals Chamber should consider and decide upon the Prosecution’s Appeal, as being important to protecting the rights and interests of victims participating, and seeking to participate, at this stage of the proceedings, as well as the integrity of the Court.

¹ Situation in the Islamic Republic of Afghanistan, 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), [ICC-02/17-207](#), 16 January 2023 [*hereinafter* ‘Notice of Discontinuance’].

² Situation in the Islamic Republic of Afghanistan, Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, [ICC-02/17-196](#), 31 October 2022 [*hereinafter* Impugned Decision of 31 October 2022].

³ Situation in the Islamic Republic of Afghanistan, Notice of Appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’ (ICC-02/17-196), [ICC-02/17-197](#), 7 November 2022.

⁴ Situation in the Islamic Republic of Afghanistan, 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](#), 22 November 2022 [*hereinafter* “Prosecutor’s Brief Appeal”].

⁵ Situation in the Islamic Republic of Afghanistan, Order on the filing of observations on the Prosecutor’s notice of discontinuance of the appeal, [ICC-02/17-208](#), 24 January 2023, para. 2.

II. Observations on the Prosecution’s Notice of Discontinuation

4. The Prosecution’s Notice of Discontinuance notes that it is made in accordance with Rule 157 of the Rules of Procedure and Evidence.⁶ Rule 157 provides that “*Any party who has filed an appeal*” to “*discontinue the appeal at any time before judgement has been delivered.*”⁷
5. The Appeals Chamber has repeatedly clarified that Rule 157 must be strictly applied to an appeal as a whole and without any conditions, reservations or requests. The Court’s jurisprudence on Rule 157 provides that notice must “*only provide[] for the discontinuance of an appeal in its entirety*”,⁸ that the notice must “*deal exclusively with the discontinuance*” and without proceeding to request adjudication on any matter in the appeal,⁹ and that the notice must be made without reservations or conditions; including “*reservations relevant to the future conduct of the proceedings.*”¹⁰
6. While the Court’s jurisprudence on the application of Rule 157 has indicated that a notice of discontinuance lodged in compliance with the case law above may not require further actions from the Court,¹¹ it has also made clear that the Chamber maintains discretion over a notice of discontinuance which “*does not conform with the requirements of rule 157*” and goes beyond exclusively withdrawing the appeal as a whole and without conditions, reservations or requests.¹² Indeed, the Appeals Chamber has found that for such notices, it is for example “*not vested with discretion to sanction discontinuance of an appeal subject to conditions*”¹³ - with the Appeals Chamber

⁶ [Notice of Discontinuance](#), para. 1.

⁷ [ICC Rules of Procedure and Evidence](#), Rule 157.

⁸ Prosecutor v Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’, [ICC-01/04-01/06-1486](#), 21 October 2008, para. 16.

⁹ Prosecutor v Lubanga, Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal, [ICC-01/04-01/06-393](#), 6 September 2006, para. 12.

¹⁰ Prosecutor v Lubana, Decision on Thomas Lubanga Dyilo’s Brief Relative to Discontinuance of Appeal, [ICC-01/04-01/06-176](#), 3 July 2006, para. 9.

¹¹ See, for example, Prosecutor v Lubana, Decision on Thomas Lubanga Dyilo’s Brief Relative to Discontinuance of Appeal, [ICC-01/04-01/06-176](#), 3 July 2006, para. 8.

¹² See, Prosecutor v Lubanga, Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal, [ICC-01/04-01/06-393](#), 6 September 2006, para. 12.

¹³ Prosecutor v Lubana, Decision on Thomas Lubanga Dyilo’s Brief Relative to Discontinuance of Appeal, [ICC-01/04-01/06-176](#), 3 July 2006, para. 9.

demonstrating this discretion in practice and finding that a notice of discontinuance is not properly constituted under Rule 157 and is therefore without effect.¹⁴

7. To this, these observations raise that the Prosecution’s Notice of Discontinuance seeks to withdraw its “*appeal against paragraph 59 of Pre-Trial Chamber II’s decision of 31 October 2022*”, while also “*maintain[ing] its position that the investigation is not limited in the way described in paragraph 59 of the Decision.*”¹⁵
8. Although the Prosecution seeks to characterise this as “*remarks to explain this procedural step, while respecting the requirements of rule 157,*”¹⁶ this must be recognised as a reservation or condition to the Prosecution’s notice of discontinuance. Despite acknowledging the Court’s case law on the requirements of Rule 157 – that the notice “*must be without reservation*”¹⁷ – the Prosecution is ‘reserving’ its position on the issues on appeal after seeking to withdraw the Appeal, and moving forward with the investigation on basis of this reservation.
9. In addition, it is noted that the Prosecution explains that it maintains and reserves its position on the scope of the investigation “*in light of the fact that the issue was definitively settled by the Appeals Chamber in its judgment of 5 March 2020*”,¹⁸ and instead of continuing its Appeal of the Impugned Decision to get resolution from the Appeals Chamber on whether the Pre-Trial Chamber erred, has withdrawn the Appeal and “*proceeded with the investigation on the basis of*” the parameters the Appeals Chamber’s 5 March 2020 decision.¹⁹
10. It is difficult to simply view the Prosecution’s submissions as only remarks to explain its notice under Rule 157, and not as the basis for concrete further steps, when the Prosecution’s Notice seeks to withdraw its Appeal and the Appeals Chamber’s consideration on the errors raised, while unilaterally maintaining and reserving its position on these raised errors without resolution, and with the impact of resuming the

¹⁴ See, Prosecutor v Lubana, Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, [ICC-01/04-01/06-176](#), 3 July 2006, paras. 9, 10. See also, See, Prosecutor v Lubanga, Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / In the Alternative, Discontinuance of Appeal, [ICC-01/04-01/06-393](#), 6 September 2006, para. 12.

¹⁵ [Notice of Discontinuance](#), paras. 1, 3.

¹⁶ [Notice of Discontinuance](#), para. 2.

¹⁷ [Notice of Discontinuance](#), para. 2.

¹⁸ [Notice of Discontinuance](#), para. 3.

¹⁹ [Notice of Discontinuance](#), paras. 4, 5.

investigation on the basis of the reservation's parameters for the scope of the investigation. Instead, these submissions by the Prosecution support a conclusion that the Prosecution has lodged its Notice of Discontinuance of its Appeal with a reservation, and importantly, a reservation "*relevant to the future conduct of the proceedings*"²⁰ – the resumed investigation with which the Prosecution has proceeded.

11. It is submitted that due to this reservation, and the Prosecution's expressed intention to proceed with the resumed investigation on the basis of the reservation, the Notice of Discontinuance '*does not conform with the requirements of rule 157*' as set out in the Court's case law. Consequently, the Appeals Chamber should find that it '*is not vested with discretion to sanction discontinuance*' of the Prosecutor's Appeal; rejecting the Notice of Discontinuance as being without effect.

III. Observations on the Potential Impact of the Notice of Discontinuances and Importance of Resolving the Prosecution's Appeal to the Rights and Interests of Victims

12. In addition to submitting that the Appeals Chamber maintains the discretion to find that the Notice of Discontinuance is without effect, and should find so in this instance due to the Notice's failure to conform with the requirements of Rule 157, these Observations are also submitted in order to highlight the importance of the Appeals Chamber resolving the Prosecution's appeal as to the scope of the investigation at this time.

13. As noted above, central to the Prosecution's Appeal and subsequent Notice of Discontinuance is the Pre-Trial Chamber's decision to authorize the resumption of the investigation, and its finding that "*any authorisation decision also has a limiting function, because only the crimes falling within the situation and the conflict, as it existed at the time of the decision authorising the investigation and based on the request to open it, can be the object of its investigation.*"²¹ Focusing on the impact of this passage on the scope of the Court's jurisdiction in the Situation, the Prosecution's Appeal raised errors of law and fact, and that the Pre-Trial Chamber's position impermissibly "*excluded the possibility that an authorised investigation in this situation might encompass: (i) any crime occurring after 20 November 2017 (the date of the*

²⁰ Prosecutor v Lubana, Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal, [ICC-01/04-01/06-176](#), 3 July 2006, para. 9.

²¹ [Impugned Decision of 31 October 2022](#), para. 59.

request) or 5 March 2020 (the date of the Afghanistan Appeals Judgment authorising the investigation); and (ii) any crime committed by “new parties”, including ‘Islamic State – Khorasan Province’²² alleging that the Pre-Trial Chamber took this position in direct contravention of the Appeals Chamber’s authoritative finding to this point.²³

14. To this, these Observations raise the importance of resolving the Prosecution’s Appeal for gaining clarity on the scope of the investigation following the Pre-Trial Chamber’s authorisation for resumption of the investigation by the Office of the Prosecutor. While submissions were not made on behalf of Victims a/00001/21 through a/00007/21 in response to the Prosecution’s Appeal,²⁴ concern is shared as to the Pre-Trial Chamber’s limitation of the scope of the resumed investigation, particularly on the temporal scope of the investigation. Finding resolution of the issue through the Prosecution’s Appeal is supported to achieve certainty and clarity on the scope of the investigation at this time.
15. The reason stated for the Prosecution’s decision to withdraw the Appeal is noted with interest; namely that the “Prosecutor has decided not to proceed with the appeal in the interests of judicial economy, and mindful of the Court’s limited resources.”²⁵ While the Prosecution suggests that judicial resources and economy are saved by not seeing through the appeal proceedings, concern is raised about the risk that the Prosecution will instead invest time and resources into steps to “proceed[] with the investigation on the basis of” the parameters of the Appeals Chamber’s 5 March 2020 decision,²⁶ only to be confronted by the same question on scope at a later time when the Prosecution will be required, as the Pre-Trial Chamber stated, “to submit a request under article 15 of the Statute to either broaden an investigation or open a new one.”²⁷ The possibility that victims’ cases, which after the investigation’s resumption might already have gone through investigative steps, could require additional authorisation to investigate a new, or that appeals proceedings on the issue of scope might be revived at an unknown later date, leaves all victims impacted by the Impugned Decision’s limitation in paragraph 59

²² [Prosecutor’s Appeal Brief](#), paras. 7-10.

²³ Situation in the Islamic Republic of Afghanistan, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, [ICC-02/17-138](#), 5 March 2020, para. 79.

²⁴ [Prosecutor’s Appeal Brief](#). See also, Situation in the Islamic Republic of Afghanistan, Order on the conduct of the appeal proceedings, [ICC-02/17-200](#), 23 November 2022.

²⁵ [Notice of Discontinuance](#), para. 3.

²⁶ [Notice of Discontinuance](#), paras. 4, 5.

²⁷ [Impugned Decision of 31 October 2022](#), para. 59.

vulnerable and unable to fully understand the extent of their rights when participating before the Court.

16. Similarly, concern is raised as to the Prosecution’s implied intention to disregard the Pre-Trial Chamber’s conclusions, regardless of whether it is asserted by the Prosecution that the “*limiting function*” of the authorisation decision set out in paragraph 59 of the Pre-Trial Chamber’s Impugned Decision was “*definitively settled*” by the Appeals Chamber and in contradiction to this precedent.²⁸ While the Prosecution’s disregard of the Pre-Trial Chamber decision is in theory temporary given that it reserves the right to “*further litigate*” if the “*parameters of the situation and the scope of the Court’s jurisdiction were to be put in issue in the future*”,²⁹ these Observations look to the impact on the integrity of the proceedings and to the precedent the Prosecution’s actions might set as to disregarding any Chamber’s decision.
17. These Observations question whether judicial economy is served by delaying the questions raised to the Appeals Chamber within the Prosecution’s Appeal to a later period after time and resources are spent on the Prosecution’s investigation efforts – and when victims expectations and hopes have been heightened – only to risk the possibility of an adverse outcome to litigation at a more advanced stage.
18. As to the interests and well-being of victims, the Court has previously acknowledged that a lack of clarity as to the early stages of the proceedings maintains “*a state of uncertainty which is prejudicial*”, and impacts “*the rights of victims to know the truth, to have access to justice and to request reparations,*” and “*it is therefore necessary for the victims to be informed promptly as to whether or not they will be in a position to exercise their rights before this Court.*”³⁰
19. Yet, the Prosecution’s expressed steps to move forward with resuming the investigation without judicial clarity and certainty as to the scope of the investigation, impacts this very protection set out within the Court’s jurisprudence which seeks to ensure victims

²⁸ [Notice of Discontinuance](#), paras. 3-5.

²⁹ [Notice of Discontinuance](#), para. 6.

³⁰ Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the ‘Application for Judicial Review by the Government of the Union of the Comoros’, [ICC-01/13-68](#), 15 November 2018, para. 120.

are promptly informed about their status at the Court, whether they can exercise their rights at the Court and whether to plan for further and future participation – insights which further attend to victims’ well-being in the process by addressing expectations, understanding, and feelings of transparency in the proceedings. Resuming the investigation without first gaining resolution of the Prosecution’s Appeal would detrimentally effect victims who are unsure which position concerning the scope of the investigation is currently authoritative; and thus whether their case falls within the jurisdiction of the Court at this time, or whether this will change upon potential further litigation. This state of uncertainty unfairly prejudices victims’ ability to assert their rights before the Court in a planned and foreseeable manner, while causing confusion and anxiety.

20. In supporting the Prosecution’s appeal of the Pre-Trial Chamber’s limitation on the scope of the resumed investigation, these Observations nevertheless express concern with the Prosecution’s subsequent move to withdraw the Appeal from proceeding to consideration and resolution. Instead, these Observations see value in resolving the issue of the investigation’s scope now by way of the Appeals Chamber’s present consideration and decision of the Prosecution’s Appeal. This route would provide certainty and predictability to victims already participating before the Court, and to victims seeking to participate.

IV. Conclusion

21. For the reasons set out above, these Observations request that the Appeals Chamber use its discretion under Rule 157 to reject the Notice of Discontinuance as having no effect, and proceed with considering and deciding upon the Prosecution’s Appeal.



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London