



Original: English

**No. ICC-02/17 OA5
Date: 23 December 2022**

THE APPEALS CHAMBER

Before: Judge Piotr Hofmánski, Presiding
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

Decision on the Prosecutor's request for leave to reply

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor
Ms Helen Brady

Legal Representatives of Victims

Ms Nada Kiswanson van Hooydonk
Ms Katherine Gallagher
Ms Margaret L. Satterthwaite
Ms Nikki Reisch
Mr Tim Moloney
Ms Megan Hirst
Ms Nancy Hollander
Mr Mikołaj Pietrzak
Mr Steven Powles
Mr Conor McCarthy
Ms Spojmie Ahmady Nasiri
Mr Nema Milaninia
Ms Haydee Dijkstal

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Sarah Pellet

States Representatives

Islamic Republic of Afghanistan

REGISTRY

Registrar

Mr Peter Lewis

**Victims Participation and Reparations
Section**

Mr Philipp Ambach

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation” of 31 October 2022 (ICC-02/17-196),

Having before it the “Prosecution request for leave to reply to “Response to ‘Prosecution appeal of ‘Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation’”” (ICC-02/17-204)” of 19 December 2022 (ICC-02/17-205),

Pursuant to regulation 24(5) of the Regulations of the Court,

Renders the following

DECISION

The Prosecutor may file a reply to 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)”” by 16h00 on Monday, 16 January 2023. The reply shall not exceed 3 pages.

REASONS

I. PROCEDURAL HISTORY

1. On 31 October 2022, Pre-Trial Chamber II issued its decision authorising the Prosecutor to resume his investigation in the *Situation in the Islamic Republic of Afghanistan*, pursuant to article 18(2) of the Statute (hereinafter: “Impugned Decision”).¹

¹ Pre-Trial Chamber II, *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.

2. On 7 November 2022, the Prosecutor filed a notice of appeal of the Impugned Decision (hereinafter: “Notice of Appeal”),² and on 22 November 2022, filed his appeal brief (hereinafter: “Appeal Brief”).³

3. On 23 November 2022, the Appeals Chamber issued the “Order on the conduct of the appeal proceedings”.⁴

4. On 15 December 2022, Mr Moloney *et al.*, the Legal Representatives of victims participating in the present proceedings (hereinafter: “LRVs”), filed their observations in response to the Appeal Brief (hereinafter: “LRVs Observations”).⁵

5. On 19 December 2022, the Prosecutor filed his request for leave to reply to the LRVs Observations (hereinafter: “Request”).⁶

II. MERITS

6. The Prosecutor submits that certain aspects of the LRVs Observations “appear to be inadmissible” and “misunderstand the Court’s legal framework”.⁷ Referring to the Notice of Appeal and Appeal Brief,⁸ the Prosecutor argues that the present appeal only concerns paragraph 59 of the Impugned Decision, and therefore, the LRVs Observations “address matters [that go] beyond the scope” of the appeal.⁹ The Prosecutor adds that he “could not reasonably have anticipated these arguments in [his] Appeal Brief”.¹⁰

7. Regulation 24(5) of the Regulations of the Court provides that

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted

² [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.

³ [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.

⁴ [Order on the conduct of the appeal proceedings](#), ICC-02/17-200.

⁵ [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-02/17-204.

⁶ [Prosecution request for leave to reply to “Response to ‘Prosecution appeal of ‘Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation’” \(ICC-02/17-204\)](#), ICC-02/17-205.

⁷ [Request](#), paras 2-3.

⁸ [Request](#), fn. 7.

⁹ [Request](#), paras 2-3 (footnote omitted), *referring to* [LRVs Observations](#), paras 8, 12-43.

¹⁰ [Request](#), para. 2.


by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

8. The Appeals Chamber recalls that it may grant a request for leave to reply if the above-mentioned conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.¹¹

9. The Appeals Chamber notes that in his appeal, the Prosecutor is challenging paragraph 59 of the Impugned Decision which, the Prosecutor submits, concerns the issue of the “scope of the Court’s jurisdiction” in the *Situation in the Islamic Republic of Afghanistan*.¹² The Appeals Chamber further notes that in their observations, the LRVs request that “the Appeals Chamber clarify and confirm the Prosecutor’s duty to investigate the entire situation”.¹³ They also submit arguments in relation to the “uncertainty” caused by a statement made by the Prosecutor on 27 September 2021 in which he announced his decision to focus on “crimes allegedly committed by the Taliban and Islamic-State – Khorasan Province [...] and to *deprioritise other aspects of [the] investigation*”.¹⁴

10. The Appeals Chamber considers that the above-mentioned issues raised in the LRVs Observations constitute new issues, and thus finds it appropriate to grant the Prosecutor leave to file a reply to the issues identified in the Request, as set out above. The reply shall be filed by 16h00 on Monday, 16 January 2023, and shall not exceed 3 pages.

Done in both English and French, the English version being authoritative.



Judge Piotr Hofmánski
Presiding

Dated this 23rd day of December 2022

At The Hague, The Netherlands

¹¹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda’s request for leave to reply](#), 3 March 2017, ICC-01/04-02/06-1813 (OA5), para. 8. *See also* Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda’s request for leave to reply](#), 17 July 2017, ICC-01/04-02/06-1994 (OA6), paras 13-14.

¹² [Appeal Brief](#), para. 7. *See also* [Request](#), para. 2.

¹³ [LRVs Observations](#), para. 8.

¹⁴ [LRVs Observations](#), paras 8, 16 (emphasis in original). *See also* paras 12-15, 17-43.