

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: ICC-02/17  
Date: 24 January 2023

**THE APPEALS CHAMBER**

**Before:** Judge Piotr Hofmánski, 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**

**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)’**

**Source:** Legal Representatives of Victims

**Document 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 KC  
Ms Nazhat Shameem Khan  
Ms Helen Brady

**Legal Representatives of the Victims**

Ms Katherine Gallagher  
Mr Tim Moloney KC  
Ms Megan Hirst  
Ms Nancy Hollander  
Mr Mikolaj Pietrzak  
Mr Ahmad Assed  
Mr Conor McCarthy  
Ms Spojmie Ahmady Nasiri  
Ms Haydee Dijkstal

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Islamic Republic of Afghanistan

**REGISTRY**

**Registrar**

Mr Peter Lewis

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

## I. INTRODUCTION

1. This response is by the legal representatives of Ahmed Rabbani (r/00638/18), Abd Al Rahim Hussayn Muhammad Al-Nashiri (r/60009/17), Sharqawi Al Hajj (r/00751/18), Guled Hassan Duran (r/00750/18), Mohammed Abdullah Saleh al-Asad (r/00749/18), Kareem Khan, Rafiq ur Rehman and family, Fahim Qureshi, Noor Khan, Mohammad Ramazan Khan, Abdul Qayyum, Khairullah Jan, Akthar Zaman, Janatullah, and Ahmed Jan (“LRVs”) pursuant to article 68(3) of the Rome Statute and Regulation 24(2) of the Regulations of the Court.<sup>1</sup>

2. On 31 October 2022, Pre-Trial Chamber II rendered its decision authorising the resumption of the Court’s investigation in the situation in Afghanistan, pursuant to the Prosecutor’s request under article 18(2) of the Statute (“the Decision”).<sup>2</sup>

3. On 7 November 2022 the Prosecutor filed a notice of appeal in respect of the Decision (“Notice of Appeal”),<sup>3</sup> and on 22 November 2022 filed an appeal brief (“Appeal Brief”).<sup>4</sup> The Prosecutor’s appeal focused on paragraph 59 of the Decision.<sup>5</sup> He asserted that the Pre-Trial Chamber erred in law by limiting the scope of the Court’s jurisdiction to crimes pre-dating those identified in the Prosecution’s request

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<sup>1</sup> Mr Tim Moloney KC and Ms Megan Hirst represent Ahmed Rabbani; Mr Mikołaj Pietrzak, Ms Nancy Hollander and Mr Ahmad Assed represent Abd Al Rahim Hussayn Muhammad Al-Nashiri; and, Ms Katherine Gallagher represents Sharqawi Al Hajj, Guled Hassan Duran and Mohammed Abdullah Saleh al-Asad; and Mr Steven Powles KC and Conor McCarthy represent Cross Border Victims – Kareem Khan, Rafiq ur Rehman and family, Fahim Qureshi, Noor Khan, Mohammad Ramazan Khan, Abdul Qayyum, Khairullah Jan, Akthar Zaman, Janatullah, and Ahmed Jan on behalf of the Foundation for Fundamental Rights and Reprieve.

<sup>2</sup> [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume the investigation](#), ICC-02/17-196, 31 October 2022 (‘Decision’).

<sup>3</sup> [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 (‘Notice of Appeal’).

<sup>4</sup> [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 (‘Appeal Brief’).

<sup>5</sup> [Appeal Brief](#), paras. 2-3.

for authorisation of an investigation pursuant to article 15 (“Article 15 Request”<sup>6</sup>), such as to impermissibly contravene the Appeals Chamber Judgment which authorised the investigation (“*Afghanistan Appeal Judgment*”)<sup>7</sup> and which is binding on the Pre-Trial Chamber (“Ground 1”)<sup>8</sup>; and, secondly, that the Pre-Trial Chamber erred in fact by misreading the Article 15 Request (“Ground 2”).<sup>9</sup>

4. On 23 November 2022, the Appeals Chamber issued an Order, directing the Registrar to notify the documents in the appeal to the legal representatives of the participating victims and register their filings, and granting the victims until 15 December 2022 to file any responses to the Prosecutor’s appeal brief.<sup>10</sup>

5. On 15 December 2022, the LRVs filed a response to the Prosecutor’s appeal.<sup>11</sup> In relation to Ground 1, the LRVs endorsed the submissions made by the Prosecutor to the effect that: the Pre-Trial Chamber had unduly limited the scope of the investigation, including its temporal scope, and that the Pre-Trial Chambers was bound by the Appeals Chamber’s prior determination in this regard.<sup>12</sup> However, in light of the Prosecutor’s Statement of intention to “deprioritise” some aspects of the investigation, LRVs requested that the Appeals Chamber clarify and confirm the Prosecutor’s duty to investigate the entire situation.<sup>13</sup>

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<sup>6</sup> [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), 20 November 2017, ICC-02/17-7-Red, 20 November 2017 (‘Article 15 Request’).

<sup>7</sup> [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 (‘*Afghanistan Appeal Judgment*’).

<sup>8</sup> [Appeal Brief](#), paras. 11-31.

<sup>9</sup> [Appeal Brief](#), paras. 32-36.

<sup>10</sup> [Order on the conduct of the appeal proceedings](#), ICC-02/17-200, 23 November 2022 (‘Order’), para. 2.

<sup>11</sup> [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 (15 December 2022) (‘LRVs Response to Prosecutor’s Appeal’)

<sup>12</sup> *Ibid.*, paras.10-11.

<sup>13</sup> [LRVs Response to the Prosecutor’s Appeal](#), paras.12 – 42.

6. On 19 December 2022, the Prosecutor requested leave to reply to the LRVs response to his appeal.<sup>14</sup> The Appeals Chamber granted this request on 23 December 2022 and directed that the Prosecutor file his reply by 16 January 2023.<sup>15</sup>

7. On 16 January 2023, the Prosecutor instead filed a notice of discontinuance of the appeal pursuant to rule 157 of the Rules of Procedure and Evidence (“the Notice”).<sup>16</sup> Within this, the Prosecutor ‘maintains the position that the investigation is not limited in the way described in paragraph 59 of the Pre-Trial Chamber’s decision as “the issue was definitively settled by the Appeals Chamber in its judgment of 5 March 2020”.<sup>17</sup> He concludes that, he consequently no longer feels it necessary to seek a ruling from the Appeals Chamber on the issue and, despite initiating the appeal, withdraws it *“in the interests of judicial economy, and mindful of the Court’s limited resources”*<sup>18</sup> (emphasis added).

8. On 24 January 2023, the Appeals Chamber issued an Order granting victims leave to file observations on the Notice by 3 February 2023.<sup>19</sup>

9. The LRVs submit that the Notice does not comply with rule 157, as it contains reservations. The Appeals Chamber has previously held that it may not permit discontinuance of an appeal subject to conditions. Accordingly, the LRVs request that the Chamber rules that the Notice is invalid, and that it proceeds to issue a judgment on the appeal. In addition, as the Prosecutor has evinced a clear intention in the Notice to disregard the Pre-Trial Chamber’s Decision, the LRVs request that the Chamber

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<sup>14</sup> [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 (19 December 2022).

<sup>15</sup> [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206 (23 December 2022).

<sup>16</sup> [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 (‘Notice of Discontinuance’).

<sup>17</sup> *Ibid.*, para.3.

<sup>18</sup> [Notice of Discontinuance](#), para.3.

<sup>19</sup> 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 (‘Order on Notice’).

consider whether the Prosecutor's failure to comply with that Decision would be permissible.

## II. VICTIMS' STANDING TO FILE A RESPONSE TO THE PROSECUTOR'S NOTICE OF DISCONTINUANCE

10. Regulation 24(2) of the Regulations of the Court permits victims to respond to a filing subject to the requirements of article 68(3) of the Rome Statute. Article 68(3) permits victims to participate where their "personal interests ... are affected".

11. In the Order on 23 November 2022, the Appeals Chamber provided victims with an opportunity to respond to the Prosecutor's appeal and made the necessary directions to facilitate this.<sup>20</sup> In a further Order on 24 January 2023, the Appeals Chamber provided victims with the opportunity to respond to the Prosecutor's Notice.<sup>21</sup>

12. The LRVs supported the Prosecutor's appeal on Ground 1 in part, as well as the request that the Appeals Chamber reverse and amend the Pre-Trial Chamber's decision in part.<sup>22</sup> They did so on the basis that a party is bound by a judicial decision, including any errors within it, unless and until the decision is corrected by the Appeals Chamber on appeal. The victims have an interest in seeing the Decision corrected on appeal because the Decision wrongly limits the scope of the Prosecutor's investigation to "as it existed at the time of the decision authorising the investigation and based on the request to open it". The victims also have an interest in receiving clarity from the Appeals Chamber regarding the scope of the Prosecutor's investigation in light of the differences between the Pre-Trial Chamber's Decision and the *Afghanistan* Appeal Judgment.

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<sup>20</sup> [Order](#), paras.2-3.

<sup>21</sup> Order on Notice, para. 2.

<sup>22</sup> [LRVs Response to the Prosecutor's Appeal](#), paras.10-11, 30-42.

13. The Prosecutor now seeks to discontinue the appeal proceedings. The result of a discontinuance would be that the Appeals Chamber would be unable to rule on either of these matters, both of which directly affect the victims' interests in the investigation. Moreover, the Prosecutor's express reservations indicated in his Notice could also have the effect of undermining the proper functioning of the Court for the reasons elaborated below. The victims' have an interest in seeing that the Court functions properly, and that the Prosecutor complies with his duties under the Statute.

### III. THE PROSECUTOR'S NOTICE IS INVALID AS IT IS SUBJECT TO CONDITIONS

14. Rule 157 of the Rules of Procedure and Evidence allows a party who has filed an appeal under rules 154 or 155 to discontinue that appeal at any time before judgment has been delivered.

15. The Appeals Chamber held in *Lubanga* that "discontinuance of an appeal subject to reservations is not foreseen in either the Statute or the Rules of Procedure and Evidence and that includes reservations relevant to the future conduct of proceedings".<sup>23</sup> The Appeals Chamber therefore ruled it is "not vested with the discretion to sanction discontinuance of an appeal subject to conditions".<sup>24</sup>

16. Despite expressly recognizing that jurisprudence and deploying it in support of his purported discontinuance of the appeal,<sup>25</sup> the Prosecutor makes an unambiguous statement that he maintains the position set out in his appeal.<sup>26</sup> As such, he continues to assert that the Pre-Trial Chamber erred in law by limiting the scope of the Court's jurisdiction to crimes pre-dating those identified in the Article 15 Request,

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<sup>23</sup> [Decision on Thomas Lubanga Dyilo's Brief Relative to Discontinuance of Appeal](#), ICC-01/04-01/06-176 (3 July 2006) ('*Lubanga* Discontinuance Appeal Decision'), para.9.

<sup>24</sup> *Ibid.*

<sup>25</sup> [Notice of Discontinuance](#), para.2.

<sup>26</sup> [Notice of Discontinuance](#), para.3.

such as to impermissibly contravene the *Afghanistan* Appeal Judgment<sup>27</sup> which is binding on the Pre-Trial Chamber (“Ground 1”);<sup>28</sup> and, secondly, that the Pre-Trial Chamber erred in fact by misreading the Article 15 Request (“Ground 2”).<sup>29</sup>

17. The Notice withdraws the appeal against the decisions of the Pre-Trial Chamber from the Appeals Chamber. It therefore follows that the Prosecutor remains bound by the Pre-Trial Chamber’s decision. Despite this, the Prosecutor states that:

- (A) He does not consider himself bound by the Pre-Trial Chamber’s decision;<sup>30</sup> and,
- (B) The investigation will proceed on the basis of the parameters set by the Appeal Chamber in its judgment of 5 March 2020.<sup>31</sup>

18. A notice of discontinuance is not valid if it is subject to conditions. In the present instance, the appeal is being discontinued on the basis that the future proceedings will be conducted how the Prosecutor decides, rather than by the legal parameters set by the Pre-Trial Chamber decision. Instead of the Prosecutor pursuing his arguments before the Appeals Chamber, the appeal has been withdrawn on the condition that his arguments are correct and, consequently, he does not require the Appeals Chamber to adjudicate on the appeal. In effect, the Prosecutor has empowered himself to reverse and amend paragraph 59 of the Pre-Trial Chamber decision and confirm the scope of the Court’s jurisdiction. The use of rule 157 in this manner is not foreseen either in the Statute or the Rules of Procedure and Evidence.

19. Given the qualified nature of the Notice, the LRVs submit that the Appeals Chamber should find the Notice invalid and proceed to determine the appeal.

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<sup>27</sup> [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 (*Afghanistan* Appeal Judgment’).

<sup>28</sup> [Appeal Brief](#), paras. 11-31.

<sup>29</sup> [Appeal Brief](#), paras. 32-36.

<sup>30</sup> [Notice of Discontinuance](#), para.3.

<sup>31</sup> [Notice of Discontinuance](#), paras.4-5.



**IV. THE NOTICE DEMONSTRATES THE PROSECUTOR'S INTENTION TO PROCEED IN A WAY THAT IS CONTRARY TO THE PRE-TRIAL CHAMBER'S RULING WITHOUT APPEALING IT**

20. Parties remain bound by a decision of the Court unless, and until, it is amended or overturned on appeal.<sup>32</sup> The Statute expressly identifies the procedure that must be followed by a party seeking to appeal against a decision.<sup>33</sup> It also includes sanctions which may be imposed where a party – including the Prosecutor - refuses to follow the orders of a Chamber.<sup>34</sup>

21. That the parties abide by the decisions of the Chambers of the Court is fundamental to its proper functioning.<sup>35</sup> It is the same for any judicial system anywhere in the world and essential for the rule of law. Article 71 of the Statute provides that the Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions. The LRVs are concerned to ensure that the Prosecutor does not inadvertently fall foul of Article 71 nor, even, Rule 24 or 25 of the Rules of Procedure and Evidence: all of which are designed to maintain the integrity of the Court, and that the investigation in this case can proceed in accordance with the *Afghanistan* Appeal Judgment without further delay, and free from a cloud of uncertainty.

22. The LRVs agree with the Prosecutor that the Decision contains errors, but they consider that the appropriate course is to challenge the errors on appeal. They do not consider it appropriate for the Prosecutor merely to withdraw the appeal and disregard the Pre-Trial Chamber's Decision. Not only would doing so arguably harm

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<sup>32</sup> [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU"](#), ICC-01/04-01/06-2582 (8 October 2010), para.48 (*Lubanga Stay Judgment*).

<sup>33</sup> Statute, Part 8, articles 81 – 83.

<sup>34</sup> [Lubanga Stay Judgment](#), para.59; Statute, article 71.

<sup>35</sup> [Lubanga Stay Judgment](#), paras.58-61.

the proper administration of justice and neglect the proper internal functioning of the Court, it would arguably set a terrible precedent of disregard for rulings of the Court.

23. Indeed, it is of note that the Prosecutor explains that the investigation has proceeded on the basis of the parameters set by the Appeals Chamber in the 5 March 2020 judgment even subsequent to the Pre-Trial Chamber Decision of 31 October 2022.<sup>36</sup> It is of concern that this may mean that the Prosecution has been disregarding the Pre-Trial Chamber's Decision for months, despite having an extant appeal against the decision of the Pre-Trial Chamber.

24. To ensure that such conduct is not deemed acceptable by the Prosecutor nor any other parties before the Court, the LRVs respectfully request that the Appeals Chamber explicitly determine that the Prosecutor may not refuse to comply with a decision of the Pre-Trial Chamber unless and until it has been successfully appealed.

## **V. RELIEF SOUGHT**

25. The LRVs respectfully request the Appeals Chamber to:

(A) Rule that the Notice is invalid;

(B) Proceed to determine the appeal; and

(C) Rule that the Prosecutor may not refuse to comply with a decision of the Pre-Trial Chamber which has not been successfully appealed.

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<sup>36</sup> [Notice of Discontinuance](#), para.5.



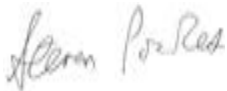
**Tim Moloney KC and Megan Hirst**



**Mikołaj Pietrzak, Nancy Hollander and Ahmad Assed**



**Katherine Gallagher**



**Steven Powles KC and Conor McCarthy**

**Dated this 24 January 2023**

**At London, United Kingdom; The Hague, Netherlands; New York, United States;**

**Warsaw, Poland**