

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/17
Date: **22 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

**Prosecution's response to observations of legal representatives of victims
concerning discontinuance of the appeal under rule 157
(ICC-02/17-209, ICC-02/17-210 and ICC-02/17-211)**

Source: Office of the Prosecutor

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Court to:

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Introduction

1. On 16 January 2023, the Prosecution filed a written notice of discontinuance of appeal under rule 157.¹ At the invitation of the Appeals Chamber,² the Prosecution hereby responds to observations made in this respect by some of the legal representatives of the victims participating in these proceedings.³

Submissions

2. The Prosecution addresses the following issues arising from the legal representatives' observations. In all other respects, it relies on the sufficiency of the Notice.

3. *First*, the drafting history of rules 152 and 157 does not suggest any consensus among the drafters of the Rules that the Appeals Chamber may continue with an appeal *proprio motu* when an appellant has filed a notice of discontinuance.⁴ Rather—and precisely because there was no consensus on this issue—the drafters consciously left this question for the Court to decide.⁵ The text quoted by the OPCV reflects one view of one possible outcome of that decision,⁶ formed before the Court was established, and several years before the Appeals Chamber had the opportunity to decide the issue—as it did in cases such as *Lubanga*.

4. The Appeals Chamber has since then consistently determined that the discontinuance of an appeal is not subject to approval or acknowledgement from the Court⁷—as long as the notice complies with the applicable procedural requirements.

¹ [ICC-02/17-207 OA5](#) (“Notice”). See further e.g. [ICC-02/17-198 OA5](#) (“Appeal”); [ICC-02/17-196](#) (“Impugned Decision”).

² [ICC-02/17-212](#) (“Order”).

³ [ICC-02/17-209](#) (“Moloney et al. Observations”), [ICC-02/17-210](#) (“OPCV Observations”), [ICC-02/17-211](#) (“Dijkstal Observations”).

⁴ *Contra* [OPCV Observations](#), paras. 17-22.

⁵ [OPCV Observations](#), paras. 21-22, fns. 27-30.

⁶ [OPCV Observations](#), para. 22.

⁷ [ICC-01/04-01/06-176 OA2](#) (“*Lubanga* First Discontinuance AD”), para. 8 (“The Appellant need not provide reasons for discontinuing and may exercise this right at any time before judgment is delivered. A notice of

In this respect, the Appeals Chamber has clarified that discontinuance of an appeal: (i) must be unreserved,⁸ and (ii) must relate to the entirety of the appeal.⁹ As long as these requirements are met, an appellant's notice discontinuing the appeal disposes of the matter without further intervention from the Appeals Chamber. Consequently, while the drafters of the rules were content to allow the Court to determine the most appropriate interpretation, the Appeals Chamber has consistently adopted that interpretation in subsequent decisions.¹⁰

5. Further, and in support of this approach, it should be recalled that the drafting history of a provision is only a supplementary means of interpretation of that provision.¹¹ If the text of a treaty provision, read in context (including any relevant subsequent practice) and in light of the overall object and purpose, provides a sufficient basis for interpretation this should prevail.¹²

6. The interpretation of rules 152 and 157 consistently adopted by the Appeals Chamber is indeed consonant with their plain terms, read in context, and in light of the overall object and purpose. In particular, "notice" means "to provide information" or "to announce" or "to warn" someone about something without requiring further endorsement or action from the person being informed.¹³ The same term is used in other provisions of the Court's legal framework with similar meaning: to inform persons or organisations of certain decisions, positions or

discontinuance is neither subject to approval by nor acknowledgement from the Court"); [ICC-01/04-01/06-393 OA2](#) ("*Lubanga* Second Discontinuance AD"), para. 12 ("A notice under rule 157 does not require any action by the Chamber and should deal exclusively with the discontinuance"); [ICC-01/04-01/07-3505 A A2](#) ("*Katanga* Discontinuance AD"), para. 13 ("the Appeals Chamber notes that it is within the party's discretion to discontinue an appeal and that the Court's legal framework does not provide for a role of the Appeals Chamber therein").

⁸ [Lubanga First Discontinuance AD](#), para. 9 ("Discontinuance of an appeal subject to reservations is not foreseen in either the Statute or the Rules and that includes reservations relevant to the future conduct of the proceedings").

⁹ [ICC-01/04-01/06-1486 OA13](#), para. 16 (finding that rule 157 "on its face, only provides for the discontinuance of an appeal in its entirety, and not for the discontinuance of certain grounds of appeal").

¹⁰ See e.g. [Lubanga First Discontinuance AD](#), para. 8; [Lubanga Second Discontinuance AD](#), paras. 12-14; [Katanga Discontinuance AD](#), para. 13.

¹¹ [VCLT](#), art. 32.

¹² [VCLT](#), arts. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"), 31(3)(b) ("There shall be taken into account, together with the context": [...] "any subsequent practice in the application of the treaty").

¹³ See e.g. [Oxford English Dictionary](#); [Cambridge Dictionary](#); [Merriam Webster](#); [Collins Dictionary](#).

actions.¹⁴ It also accords with the party-driven nature of appellate procedure, where the Appeals Chamber has disclaimed any jurisdiction to issue advisory opinions or to rule on matters of general importance which are not inextricably linked to the errors alleged by an appellant.¹⁵

7. *Second*, the Notice was not conditional nor made with reservations, and thus met the requirements of the Court's jurisprudence.¹⁶ It was the Prosecution which expressly referred to the *Lubanga* precedent, acknowledging that a notice of discontinuance must be unreserved.¹⁷ Precisely to avoid any confusion between the content of the Notice and impermissible reservations, it was stated that paragraphs 2 to 6 only contained "*remarks to explain*" the Prosecutor's discontinuance "while respecting the requirements of rule 157".¹⁸

8. The Prosecution further submits that the present situation is distinguishable from *Lubanga*, where the Appellant made his notice of discontinuance contingent on a further request for the Appeals Chamber *to approve* his interpretation of the legal framework and his right to challenge the issue again before the Court.¹⁹ In this way, the Appellant was equivocal in his intention to discontinue the appeal.²⁰

9. By contrast, in the Notice, the Prosecution sought no further approval by, or intervention from, the Appeals Chamber. In particular, the Prosecution neither

¹⁴ See e.g. Statute, arts. 61(4)(9), 64(5), 103(2a), 121(6); [Rules](#), rules 16(1)(a), 37(2), 49(1)(2), 50(1)(5), 54(2), 79, 99(2). *But see* rule 80 where the Chamber will decide whether an accused can raise a ground under art. 31(3).

¹⁵ [ICC-01/14-01/21-514 OA5](#), para. 23, citing [ICC-02/11-01/11-572 OA5](#), paras 54, 65; [ICC-01/04-01/07-1497 OA8](#), para. 38; [ICC-01/04-01/10-514 OA4](#), para. 68.

¹⁶ *Contra* [Moloney et al. Observations](#), paras. 14-19; [Dijkstal Observations](#), paras. 4-11.

¹⁷ [Notice](#), paras. 1-2.

¹⁸ [Notice](#), para. 2 (emphasis added).

¹⁹ [Lubanga First Discontinuance AD](#), para. 2; [ICC-01/04-01/06-146-tEN](#), paras. 12-14, and p. 4 ("For these reasons May it please the Court to Provide formal acknowledgement to the Appellant of his discontinuance, subject to his retaining the right to challenge the admissibility of the case before the ICC").

²⁰ It should also be noted that the *Lubanga* Appeals Chamber ultimately discontinued the Defence's appeal in the interests of justice pursuant to regulation 29 of the Regulations of the Court, even though it was made with reservations, stating "it is evident that the Appellant is disinclined to proceed with his appeal [and] [t]he Appellant's conduct leads to the irresistible conclusion that the Appellant has abandoned the appeal": see [Lubanga Second Discontinuance AD](#), paras. 13-14. The Appeals Chamber discontinued the appeal after Mr Lubanga filed a second notice of discontinuance, which was also in contravention of rule 157 because he again requested the Appeals Chamber to adjudicate a matter. The Appeals Chamber referred to the two notices filed and the Appellant's failure to define the appealable issues and clarify his submissions in support of them and discontinued the appeal.

requested the Appeals Chamber to confirm the correctness of its remarks nor did it ask the Appeals Chamber to approve its right to challenge the issue again. The Prosecution merely sought to explain that the Notice should not be (mis)understood to imply that the Prosecution had retracted from its understanding of the scope of the Court's jurisdiction in this situation, as previously expressed in the Appeal. Neither the Rules nor the jurisprudence require that a party must resile from the position it had adopted in order to discontinue an appeal. There may be other factors, such as in this case, that call for the withdrawal of an appeal.

10. *Third*, for the same reasons, the Prosecution's remarks should not be taken to suggest any intention not to comply with an order of the Court.²¹ Rather, the Notice reflected the Prosecution's view as to the most appropriate disposition of the current proceedings while explaining that the investigation would be conducted within the parameters of the binding Court decision issued pursuant to article 15(4) in this situation—that is the Appeals Judgment of 5 March 2020.²²

11. *Finally*, the Notice did not state in paragraph 6 that the Prosecution reserved any future right to appeal or directly challenge the *Impugned Decision*, as appears to be suggested.²³

²¹ *Contra* [Moloney et al. Observations](#), paras. 20-24.

²² [ICC-02/17-138](#) (“Afghanistan Appeal Judgment”), para. 79 (“the Appeals Chamber considers it appropriate to amend the Impugned Decision to the effect that the Prosecutor is authorised 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’”).

²³ *Contra* [OPCV Observations](#), para. 23 (“In fact, contrary to the Prosecutor's submissions in this regard, his Notice of Discontinuance is with prejudice. The Prosecutor will be barred from challenging *the Impugned Decision in the future*, to the effect that the scope of his investigations would be unduly limited thereby critically affecting the victims' rights”, emphasis added). *Compare with* Notice, para. 6, where the Prosecution confirmed its own view that discontinuing the present appeal proceedings would not preclude any appeal, if necessary, against *any future decision*—if such a decision were to narrow the parameters of the Court's jurisdiction in this situation inconsistently with the Appeals Chamber's prior judgment in this situation.

Conclusion

12. The Prosecution thus respectfully requests the Appeals Chamber to consider the Notice in light of this response.



Karim A.A. Khan KC, Prosecutor

Dated this 22nd day of February 2023

At The Hague, The Netherlands