

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/17
Date: 17 March 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 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)**

Source: Office of the Prosecutor

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Court to:

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Introduction

1. With leave of the Appeals Chamber,¹ the Prosecution replies to some aspects of the observations of victims represented by Mr Moloney *et al.*² The Prosecution respectfully submits that observations by Mr Moloney *et al.* concerning the Prosecution’s exercise of discretion in managing investigations³ fall outside the confined scope of these appeal proceedings—which solely relates to the Pre-Trial Chamber’s apparent redefinition of the scope of the Court’s jurisdiction in the *Afghanistan* situation. As such, they are inadmissible and should be summarily dismissed. Moreover, these observations are incorrect because they misunderstand the Court’s legal framework and, in particular, the Prosecution’s duties and prerogatives in the conduct of investigations and prosecutions. By contrast, the remainder of the observations—which agree that the Pre-Trial Chamber erred to any extent it limited the parameters of the situation beyond those set by the Appeals Chamber—are admissible and, in the Prosecution’s view, well founded.⁴

Submission

2. The Prosecution—the sole party that has appealed the Decision—has appealed it in part only.⁵ Specifically, the Prosecution confined its appeal to the Pre-Trial Chamber’s apparent errors of law and fact in paragraph 59 of the Decision, where the Pre-Trial Chamber seemingly redefined the parameters of the situation from those previously set by the Appeals Chamber.⁶ Because the Pre-Trial Chamber erred in law⁷ and in fact,⁸ the Prosecution has requested the Appeals Chamber to correct these errors, reverse and amend paragraph 59 and confirm the scope of the Court’s jurisdiction in this situation in the terms previously articulated in the *Afghanistan* Appeal Judgment of 5 March 2020. The Prosecution appeal seeks to clarify the precise scope of the Court’s jurisdiction in this situation.

¹ [ICC-02/17-206 OA5](#) (“Leave to Reply”) and [ICC-02/17-216 OA5](#) (“Discontinuance Decision”); [ICC-02/17-205 OA5](#) (“Prosecution Request for Leave to Reply”).

² See [ICC-02/17-204 OA5](#) (“LRV Submissions by Mr Moloney *et al.*”).

³ [LRV Submissions by Mr Moloney *et al.*](#), paras. 8, 12-43.

⁴ [LRV Submissions by Mr Moloney *et al.*](#), paras. 7, 11, 43.

⁵ See e.g. [ICC-02/17-197 OA5](#) (“Notice of Appeal”), paras. 1-2, 8, 22; [ICC-02/17-198 OA5](#) (“Appeal Brief”), paras. 1, 5, 7, 11, 37.

⁶ [ICC-02/17-196](#) (“Decision”), para. 59. See further [Appeal Brief](#), paras. 2-4, 10-37.

⁷ By disregarding and/or misinterpreting the scope of the Court’s jurisdiction in this situation, which was definitively settled by the Appeals Chamber in its judgment of 5 March 2020. See [Appeal Brief](#), paras. 11-31.

⁸ By misreading the Prosecution’s article 15(3) request, in which the Prosecution explicitly referred to the ‘Islamic State – Khorasan Province’ as a party to the ongoing conflict which was allegedly responsible for crimes under the Statute. See [Appeal Brief](#), paras. 32-37.

3. Yet a significant part of the observations by Mr Moloney *et al.* is directed to a different matter, that is the exercise of the Prosecution’s lawful discretion in managing investigations and determining its priorities.⁹ Mr Moloney *et al.* themselves acknowledge that these aspects of their observations do not seek to correct any error in paragraph 59, but rather seek to obtain an order from the Appeals Chamber directing the Prosecution to carry out its investigation in the way that they prefer.¹⁰

4. The lack of any material link between the Prosecution’s appeal and these submissions is further apparent from the structure and reasoning of the Decision. While the Pre-Trial Chamber addressed the scope of the Court’s jurisdiction in paragraph 59 of the Decision, it referred to matters related to the Prosecution’s discretion elsewhere in the Decision (in paragraph 36)—in a passage not only structurally distinct from paragraph 59 but also based on different legal reasoning.¹¹ This is logical since questions about the Court’s jurisdiction are wholly distinct from those about prosecutorial discretion in carrying out an investigation. There was—and is—no need to enter into the latter in order to determine the former. Accordingly, Mr Moloney *et al.*’s observations are largely unrelated to the appeal and those aspects should be summarily dismissed.¹²

5. In addition, these aspects of Mr Moloney *et al.*’s observations are incorrect because they misunderstand the Court’s legal framework and, in particular, the Prosecution’s investigative duties and prerogatives under the Statute. Mr Moloney *et al.* disregard that, pursuant to articles 42, 54 and 58 of the Statute, the Prosecution is responsible, independently and objectively, for exercising discretion in the conduct of investigations and prosecutions.¹³ Further, and as the Chamber held in its Decision, investigations commenced pursuant to

⁹ [LRV Submissions by Mr Moloney et al.](#), paras. 8, 12-43.

¹⁰ See e.g. [LRV Submissions by Mr Moloney et al.](#), paras. 29, 31, 33, 35, 39-43.

¹¹ See further [Decision](#), paras. 33-36; see also para. 58.

¹² [LRV Submissions by Mr Moloney et al.](#), paras. 8, 12-43.

¹³ See [ICC-01/09-01/11-49](#), para. 12 (“according to articles 42(1) and 54 of the Statute, the Prosecutor enjoys discretion, entailing the power to select and investigate cases, which is a matter that falls within the mandate of the Prosecutor; this is not dealt with by the Chamber, except to the extent provided for in article 53(3) of the Statute”); [ICC-01/05-01/08-453](#), para. 10; see also [ICC-02/17-138 OA4](#) (“Afghanistan Appeal Judgment”), para. 63 (“the Appeals Chamber notes that article 42(1) recognises the independence of the Prosecutor and her responsibility for the conduct of investigations”); [ICC-01/05-01/13-2275-Red A A2 A3 A4 A5](#), para. 484 (“it is the Prosecutor who, unless disqualified in accordance with the Statute, is responsible for investigations under article 54 of the Statute”); [ICC-01/04-01/06-2205 OA15 OA16](#), para. 94 (“it is the Prosecutor who, pursuant to article 54 (1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61 (1) and (3) of the Statute, proffers charges against suspects. To give the Trial Chamber the power to extend *proprio motu* the scope of a trial to facts and circumstances not alleged by the Prosecutor would be contrary to the distribution of powers under the Statute”).

article 15 of the Statute are not subject to the types of judicial review contemplated in article 53 of the Statute.¹⁴

Conclusion

6. For the reasons above, the Prosecution respectfully requests the Appeals Chamber to dismiss the unrelated portions of Mr Moloney *et al.*'s observations¹⁵ and to grant the appeal for the reasons and in the terms previously requested.



Karim A.A. Khan KC, Prosecutor

Dated this 17th day of March 2023

At The Hague, The Netherlands

¹⁴ See [Decision](#), para. 36; see also [Afghanistan Appeal Judgment](#), para. 31, [ICC-RoC46\(3\)-01/22-6](#), paras. 6-7.

¹⁵ [LRV Submissions by Mr Moloney et al.](#), paras. 8, 12-43.