



Original: English

**No. ICC-02/17 OA5
Date: 16 March 2023**

THE APPEALS CHAMBER

Before:

**Judge Piotr Hofmański, Presiding
Judge Luz del Carmen Ibáñez Carranza
Judge Marc Perrin de Brichambaut
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze**

SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN

Public document

Decision on Prosecutor's notice of discontinuance of the appeal

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 Nazhat Shameem Khan
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

Other

Pre-Trial Chamber II

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),

In light of 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)” of 16 January 2023 (ICC-02/17-207),

Issues the following

DECISION

1. The Prosecutor’s notice of discontinuance of the appeal is invalid.
2. The Appeals Chamber will proceed to address the merits of the appeal.
3. 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)’” not exceeding 10 pages, by 16h00 on 23 March 2023.

REASONS

I. PROCEDURAL HISTORY

1. On 20 November 2017, the Prosecutor filed a request for authorisation to commence an investigation into the situation in Afghanistan “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” (hereinafter: “Article 15 Request”).¹

¹ [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), ICC-02/17-7-Red, para. 376. A confidential redacted *ex parte* version (only available to Prosecution), ICC-02/17-7-Conf-Exp was notified on the same day.

2. On 12 April 2019, Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) rejected the Article 15 Request (hereinafter: “Article 15 Decision”).²
3. On 5 March 2020, the Appeals Chamber amended the Article 15 Decision and authorised the Prosecutor “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’” (hereinafter: “Appeals Judgment”).³
4. On 15 April 2020, the Prosecutor notified the Pre-Trial Chamber of a request by the Government of Afghanistan seeking a deferral of the Prosecutor’s investigation into the Afghanistan situation.⁴
5. On 27 September 2021, the Prosecutor requested authorisation to resume the investigation in accordance with article 18(2) of the Statute.⁵
6. On 31 October 2022, the Pre-Trial Chamber issued its decision pursuant to article 18(2) of the Statute, authorising the resumption of the investigation (hereinafter: “Impugned Decision”).⁶
7. On 7 November 2022, the Prosecutor submitted his notice of appeal.⁷
8. On 22 November 2022, the Prosecutor filed his appeal brief (hereinafter: “Appeal Brief”).⁸ In the Appeal Brief, the Prosecutor raises two grounds of appeal, both challenging paragraph 59 of the Impugned Decision. Under the first ground of appeal, the Prosecutor submits that the Pre-Trial Chamber erred in law by limiting the scope of the Court’s jurisdiction to crimes pre-dating the Article 15 Request or the Appeals

² [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan](#), ICC-02/17-33.

³ [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 (OA), para. 79.

⁴ [Notification to the Pre-Trial Chamber of the Islamic Republic of Afghanistan’s letter concerning article 18\(2\) of the Statute](#), ICC-02/17-139.

⁵ [Request to authorise resumption of investigation under article 18\(2\) of the Statute](#), ICC-02/17-161.

⁶ [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation](#), ICC-02/17-196.

⁷ [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.

⁸ [Prosecution appeal of “Decision pursuant to article 18 \(2\) of the Statute authorising the Prosecution to resume investigation”](#), ICC-02/17-198.

Judgment.⁹ Under the second ground of appeal, the Prosecutor submits that the Pre-Trial Chamber erred in fact by misreading the Prosecutor’s article 15(3) application, and in particular by qualifying the “Islamic State-Khorasan Province” as “a new party to the conflict”.¹⁰

9. On 23 November 2022, the Appeals Chamber issued its “Order on the Conduct of the appeal proceedings”, directing the participating victims, as well as the Islamic Republic of Afghanistan, to submit any responses to the Appeal Brief by 15 December 2022.¹¹

10. On 14 December 2022, victims represented by Ms Spojmie Ahmady Nasiri (hereinafter: “LRV 1”) filed their response.¹²

11. On 15 December 2022, the legal representatives of five victims and cross-border victims (hereinafter: “LRV 2”), the Office of Public Counsel for Victims (hereinafter: “OPCV”) and the Government of Afghanistan filed their respective responses.¹³

12. On 23 December 2022, following a request from the Prosecutor,¹⁴ the Appeals Chamber granted the Prosecutor leave to reply to the response by the LRV 2 (hereinafter: “LRV 2 Response”) by 16 January 2023.¹⁵

⁹ [Appeal Brief](#), paras 6-31.

¹⁰ [Appeal Brief](#), paras 32-36.

¹¹ [Order on the conduct of the appeal proceedings](#), ICC-02/17-200.

¹² [Victims’ Response to “Prosecution appeal of “Decision pursuant to article 18 \(2\) of the Statute authorising the Prosecution to resume investigation” \(ICC-02/17-196\)” \(ICC-02/17-198\)](#), ICC-02/17-201.

¹³ [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 (hereinafter: “LRV 2 Response”); [Submission on behalf of victims pursuant to the “Order on the conduct of the appeal proceedings” \(No. ICC-02/17-200\)](#), ICC-02/17-202 (hereinafter: “OPCV Response”); [Response to the appeal of the Prosecutor against the decision of the Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation” of 31 October 2022 \(ICC-02/17-196\)](#), ICC-02/17-203.

¹⁴ [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’” \(ICC-02/17-204\)](#), 19 December 2022, ICC-02/17-205.

¹⁵ [Decision on the Prosecutor’s request for leave to reply](#), ICC-02/17-206, p. 3 and para. 10.

13. On 16 January 2023, the Prosecutor filed a notice to discontinue the appeal pursuant to rule 157 of the Rules of Procedure and Evidence (hereinafter: “Rules”) (hereinafter: “Prosecutor’s Notice of Discontinuance”).¹⁶

14. On 24 January 2023, the Appeals Chamber issued an order, inviting observations from the participating victims and Afghanistan on the Prosecutor’s Notice of Discontinuance.¹⁷

15. On 24 January, and 1 and 3 February 2023, the LRV 2,¹⁸ the OPCV, and the legal representative of victims a/00001/21 through a/00007/21 filed their respective observations on the Prosecutor’s Notice of Discontinuance.¹⁹

16. On 15 February 2023, the Appeals Chamber invited the Prosecutor to file submissions in response to the victims’ observations on the Notice of Discontinuance, which the Prosecutor filed on 22 February 2023.²⁰

II. SUMMARY OF THE SUBMISSIONS

1. The Prosecutor’s submissions

17. The Prosecutor submits that “[i]n accordance with the Appeals Chamber’s guidance in *Lubanga*, this right may be exercised at any time prior to the issue of judgment, and effectively disposes of the appeal.”²¹ Noting that “a notice under rule 157 need not provide reasons and must be without reservation”,²² the Prosecutor submits

¹⁶ [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.

¹⁷ [Order on the filing of observations on the Prosecutor’s notice of discontinuance of the appeal](#), 24 January 2023, ICC-02/17-208.

¹⁸ The Appeals Chamber notes that the same group of victims as in the LRV 2 Response are represented by two additional counsel.

¹⁹ [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” \(OA5\)’](#), ICC-02/17-209 (hereinafter: “LRV 2 Observations on Prosecutor’s Notice of Discontinuance”); [Submissions on behalf of victims pursuant to the “Order on filing of observations on the Prosecutor’s notice of discontinuance of the appeal” \(No. ICC-02/17-208\)](#), ICC-02/17-210 (hereinafter: “OPCV Observations on Prosecutor’s Notice of Discontinuance”); [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](#), ICC-02/17-211.

²⁰ [Prosecution’s response to observations of legal representatives of victims concerning discontinuance of the appeal under rule 157 \(ICC-02/17-209, ICC-02/17-210 and ICC-02/17-211\)](#), ICC-02/17-214 (hereinafter: “Prosecutor’s Response to Victims’ Observations”).

²¹ [Prosecutor’s Notice of Discontinuance](#), para. 1.

²² [Prosecutor’s Notice of Discontinuance](#), para. 2.

that he has decided to discontinue the appeal “in the interests of judicial economy, and mindful of the Court’s limited resources”.²³

18. The Prosecutor, however, “maintains [his] position that the investigation is not limited in the way described in paragraph 59 of the Decision – in light of the fact that the issue was definitively settled by the Appeals Chamber in its judgment of 5 March 2020”.²⁴ Recalling paragraph 79 of the Appeals Judgment,²⁵ the Prosecutor submits:

[s]ince the Pre-Trial Chamber authorised the resumption of the Prosecutor’s investigation on 31 October 2022, the Prosecutor has proceeded with the investigation on the basis of these parameters. The investigation therefore encompasses alleged conduct by the ‘Islamic State – Khorasan Province’, to which specific reference had been made in the Prosecutor’s article 15(3) application as an anti-government armed group which was party to the ongoing conflict and allegedly responsible for the commission of crimes under the Statute. It also encompasses alleged conduct subsequent to the Prosecution’s Article 15(3) Request that falls within the parameters set by the Appeals Chamber.²⁶

19. The Prosecutor further submits that “while [he] considers it appropriate to discontinue the appeal, this is without prejudice to further litigation of this matter, on the basis described above, if the parameters of the situation and the scope of the Court’s jurisdiction were to be put in issue in the future”.²⁷

2. *Victims’ Observations*

(a) **LRV 2 Observations**

20. The LRV 2 submit that the Prosecutor’s Notice of Discontinuance does not comply with rule 157 of the Rules, as it contains reservations.²⁸ They argue that “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”.²⁹ The LRV 2 further contend that “[i]nstead 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

²³ [Prosecutor’s Notice of Discontinuance](#), para. 3.

²⁴ [Prosecutor’s Notice of Discontinuance](#), para. 3, referring to [Appeals Judgment](#).

²⁵ [Prosecutor’s Notice of Discontinuance](#), para. 4.

²⁶ [Prosecutor’s Notice of Discontinuance](#), para. 5.

²⁷ [Prosecutor’s Notice of Discontinuance](#), para. 6.

²⁸ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 9.

²⁹ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 18.

the Appeals Chamber to adjudicate on the appeal.”³⁰ In effect, according to the LRV 2, 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”.³¹ They submit that the use of rule 157 of the Rules in this manner is not foreseen either in the Statute or the Rules.³²

21. The LRV 2 state that they “agree with the Prosecutor that the Decision contains errors, but they consider that the appropriate course is to challenge the errors on appeal”.³³ They do not consider it appropriate for the Prosecutor “merely to withdraw the appeal and disregard the Pre-Trial Chamber’s Decision”, and submit that doing so “would arguably set a terrible precedent of disregard for rulings of the Court”.³⁴ To ensure that such conduct is not considered “acceptable” by the Prosecutor nor any other parties before the Court, the LRV 2 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.”³⁵

22. In light of the foregoing, the LRV 2 request that the Appeals Chamber find the Prosecutor’s Notice of Discontinuance to be invalid, proceed to determine the appeal, and rule that the Prosecutor may not refuse to comply with a decision of the Pre-Trial Chamber which has not been successfully appealed.³⁶

(b) OPCV Observations

23. The OPCV submits that the Prosecutor should not be allowed to discontinue his appeal by simply providing a notice. According to the OPCV, the legislative history of the relevant provisions suggests that the Appeals Chamber retains the discretionary power to decline to accept the discontinuance of an appeal – regardless of the appellant’s wish – since it is responsible for all matters related to appeals proceedings.³⁷

³⁰ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 18.

³¹ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 18.

³² [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 18.

³³ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 22.

³⁴ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 22.

³⁵ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 24.

³⁶ [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 25

³⁷ [OPCV Observations on Prosecutor’s Notice of Discontinuance](#), paras 3, 16-23.

This is especially the case, in their view, when the issues raised in the appeal are “crucial to the interest of justice and the rights of victims”.³⁸

**(c) Observations of the legal representative of victims
a/00001/21 through a/00007/21**

24. The legal representative of victims a/00001/21 through a/00007/21 submits that the Prosecutor’s Notice of Discontinuance does not meet the requirements of rule 157 of the Rules, and that the Appeals Chamber should use its discretion to find that the notice has no effect.³⁹ He further submits that the Appeals Chamber should consider and decide upon the Prosecution’s appeal, as it is “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.”⁴⁰

3. *Prosecutor’s submissions in response to the victims’ observations*

25. The Prosecutor first submits that the drafting history of rules 152 and 157 of the Rules does not suggest any consensus among the drafters that the Appeals Chamber may continue with an appeal *proprio motu* when an appellant has filed a notice of discontinuance; rather, the question was consciously left for the Court to decide.⁴¹ According to the Prosecutor, the Appeals Chamber had the opportunity to decide the issue in the *Lubanga* case, and has since then consistently determined that the discontinuance of an appeal is not subject to approval or acknowledgement from the Court, as long as the notice complies with the applicable procedural requirements.⁴² The Prosecutor submits that the Appeals Chamber’s interpretation of rules 152 and 157 of the Rules is “consonant with their plain terms, read in context, and in light of the overall object and purpose”, and it “accords with the party-driven nature of appellate procedure, where the Appeals Chamber has disclaimed any jurisdiction to issue

³⁸ [OPCV Observations on Prosecutor’s Notice of Discontinuance](#), paras 3, 23.

³⁹ [Legal representative of victims a/00001/21 through a/00007/21 Observations on Prosecutor’s Notice of Discontinuance](#), paras 3-11, 21.

⁴⁰ [Legal representative of victims a/00001/21 through a/00007/21 Observations on Prosecutor’s Notice of Discontinuance](#), paras 3, 12-21.

⁴¹ [Prosecutor’s Response to Victims’ Observations](#), para. 3.

⁴² [Prosecutor’s Response to Victims’ Observations](#), paras 3-4, referring to *Prosecutor v. Thomas Lubanga Dyilo*, [Decision on Thomas Lubanga Dyilo’s Brief relative to Discontinuance of Appeal](#), 3 July 2006, ICC-01/04-01/06-176 (hereinafter: “*Lubanga* Decision”), para. 8; [Decision on Thomas Lubanga Dyilo’s Application for Referral to the Pre-Trial Chamber / In the Alternative Discontinuance of the Appeal](#), 6 September 2006, ICC-01/04-01/06-393 (hereinafter: “*Lubanga* Second Decision”), para. 12; *Prosecutor v. Germain Katanga*, [Decision on the victims’ requests to participate in the appeal proceedings](#), 24 July 2014, ICC-01/04-01/07-3505 (hereinafter: “*Katanga* Decision”), para. 13.

advisory opinions or to rule on matters of general importance which are not inextricably linked to the errors alleged by an appellant”.⁴³

26. Secondly, the Prosecutor submits that the Notice of Discontinuance was not conditional nor made with reservations, and that paragraphs 2 to 6 of the notice contain only “remarks to explain” the Prosecutor’s discontinuance “while respecting the requirements of rule 157” of the Rules.⁴⁴ Furthermore, he argues that, contrary to the situation in the *Lubanga* case, where “the [a]ppellant was equivocal in his intention to discontinue the appeal”,⁴⁵ in the Notice of Discontinuance, the Prosecutor “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”.⁴⁶ The Prosecutor argues that “[n]either the Rules nor the jurisprudence require that a party must resile from the position it had adopted in order to discontinue an appeal”, and that “[t]here may be other factors, such as in this case, that call for the withdrawal of an appeal.”⁴⁷

27. Thirdly, the Prosecutor submits that for the same reasons, his “remarks” should not be taken to suggest any intention to refuse to comply with an order of the Court.⁴⁸ Rather, the Notice of Discontinuance “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.⁴⁹

III. MERITS

28. Rule 157 of the Rules provides that

[a]ny party who has filed an appeal under rule 154 or who has obtained the leave of a Chamber to appeal a decision under rule 155 may discontinue the appeal at any time before judgement has been delivered. In such case, the

⁴³ [Prosecutor’s Response to Victims’ Observations](#), para. 6.

⁴⁴ [Prosecutor’s Response to Victims’ Observations](#), para. 7.

⁴⁵ [Prosecutor’s Response to Victims’ Observations](#), para. 8.

⁴⁶ [Prosecutor’s Response to Victims’ Observations](#), para. 9.

⁴⁷ [Prosecutor’s Response to Victims’ Observations](#), para. 9.

⁴⁸ [Prosecutor’s Response to Victims’ Observations](#), para. 10.

⁴⁹ [Prosecutor’s Response to Victims’ Observations](#), para. 10.

party shall file with the Registrar a written notice of discontinuance of appeal. The Registrar shall inform the other parties that such a notice has been filed.

29. In its decision on the discontinuance of the appeal in the *Lubanga* case, the Appeals Chamber held that

[rule 157 of the Rules] confers a right on an Appellant to discontinue his/her appeal by lodging the notice envisaged therein with the Registrar. The Appellant need not provide reasons for discontinuing and may exercise this right at any time before judgement is delivered. A notice of discontinuance is neither subject to approval by nor acknowledgement from the Court. If the Appellant is minded to discontinue the appeal he may do so by complying with the provisions of rule 157 of the Rules [...].⁵⁰

30. In the same decision, the Appeals Chamber, however, also held that the

[d]iscontinuance 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. As such the Appeals Chamber is not vested with discretion to sanction discontinuance of an appeal subject to conditions.⁵¹

31. The Appeals Chamber observes that in that case, the appellant purported to discontinue the appeal, “without however waiving his right to challenge the admissibility of this case before the Court”, and he, therefore, requested a formal acknowledgement from the Appeals Chamber “of his discontinuance [of the appeal], subject to his retaining the right to challenge the admissibility of the case before the ICC”.⁵² The Appeals Chamber found that “the Appellant’s Brief [did] not constitute a notice of discontinuance under rule 157 of the [Rules]”,⁵³ and consequently, considered the appellant’s notice “invalid”.⁵⁴

⁵⁰ [Lubanga Decision](#), para. 8. See also [Katanga Decision](#), paras 12-13 (recalling the notices of discontinuance by the Defence and the Prosecutor of their respective appeals against the conviction decision ([Defence Notice of Discontinuance of Appeal against the ‘Jugement rendu en application de l’article 74 du Statut’ rendered by Trial Chamber II on 7 April 2014](#), 25 June 2014, ICC-01/04-01/07-3497 and [Notice of Discontinuance of the Prosecution’s Appeal against the Article 74 Judgment of Conviction of Trial Chamber II dated 7 March 2014 in relation to Germain Katanga](#), 25 June 2014, ICC-01/04-01/07-3498), the Appeals Chamber noted 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.”).

⁵¹ [Lubanga Decision](#), para. 9.

⁵² [Lubanga Decision](#), para. 2, referring to [Brief Relative to Discontinuance of Appeal](#), 12 June 2006, ICC-01/04-01/06-146-tEN.

⁵³ [Lubanga Decision](#), para. 10.

⁵⁴ [Lubanga Decision](#), p. 2, para. (i).

32. In a subsequent decision in the *Lubanga* case, the Appeals Chamber found that the appellant's second notice of discontinuance "once again [did] not conform with the requirements of rule 157 of the Rules [...] to the extent that the withdrawal of the appeal [was] preceded by a request to adjudicate upon a matter".⁵⁵ Based on regulation 29(1) of the Regulations of the Court, the Appeals Chamber dismissed the Defence's appeal "in the interests of justice", concluding that the "[A]ppellant has abandoned the appeal".⁵⁶

33. In light of the foregoing, the Appeals Chamber notes that a notice of discontinuance may be considered valid and have the effect of terminating the appellate proceedings,⁵⁷ only if it complies with certain requirements, namely that it does not contain reservations or conditions and it concerns the appeal in its entirety.⁵⁸

34. The Appeals Chamber further notes that while the initiation of appellate proceedings under article 82 of the Statute is party-driven,⁵⁹ when a party files an appeal, it triggers the jurisdiction of the Appeals Chamber. Once the Appeals Chamber is seised of an appeal, it is for the Appeals Chamber to decide whether the proceedings may be considered to be terminated as a result of the appellant's notice of discontinuance of his or her appeal. Accordingly, the Appeals Chamber, while taking note of the appellant's intention to withdraw his or her appeal, shall verify the validity of the notice of discontinuance. In case the notice does not conform with the aforementioned requirements, the notice is invalid.

35. In the present case, the Appeals Chamber notes the Prosecutor's submission that his discontinuance of the appeal "is without prejudice to further litigation of this matter,

⁵⁵ [Lubanga Second Decision](#), para. 12.

⁵⁶ [Lubanga Second Decision](#), para. 13; *see also* paras 12, 14.

⁵⁷ *See, for example,* [Lubanga Decision](#), para. 8; [Katanga Decision](#), paras 13-14.

⁵⁸ *See* [Lubanga Decision](#), paras 8-9. *See also* [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"](#), para. 16 (in which the Appeals Chamber noted, *inter alia*, that "[rule 157 of the Rules], on its face, only provides for the discontinuance of an appeal in its entirety, and not for the discontinuance of certain grounds of appeal.").

⁵⁹ *See The Prosecutor v. Mahamat Said Abdel Kani*, [Decision on the admissibility of the appeal](#), 25 October 2022, ICC-01/14-01/21-514, para. 22. *See also The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Decision on the admissibility of the appeal](#), 27 September 2022, ICC-01/14-01/22-91, para. 18.

on the basis described above, if the parameters of the situation and the scope of the Court’s jurisdiction were to be put in issue in the future”.⁶⁰

36. The Appeals Chamber further notes that, as pointed out by the LRV 2, the Prosecutor’s withdrawal of the appeal is premised on the condition that the arguments that he raised in his appeal are correct, and as a result, his office can proceed to conduct the investigation on the basis of his understanding of the scope of the Court’s jurisdiction in the Afghanistan situation, without the Appeals Chamber’s adjudication of the appeal.⁶¹ Indeed, as recalled above, in his Notice of Discontinuance, the Prosecutor indicated that he “maintains [his] position that the investigation is not limited in the way described in paragraph 59 of the Decision – in light of the fact that the issue was definitively settled by the Appeals Chamber in its judgment of 5 March 2020”,⁶² and that “[s]ince the Pre-Trial Chamber authorised the resumption of the Prosecutor’s investigation on 31 October 2022, the Prosecutor has proceeded with the investigation on the basis of these parameters”.⁶³ The Prosecutor argues that “[n]either the Rules nor the jurisprudence require that a party must resile from the position it had adopted in order to discontinue an appeal”.⁶⁴

37. In this regard, the Appeals Chamber recalls that parties to the proceedings are bound by the decisions issued by chambers of first instance unless these decisions are amended or reversed on appeal.⁶⁵ Should a party consider there to be an error in a decision issued by a first-instance chamber, it may challenge the alleged error on appeal. In this regard, the Appeals Chamber notes that the Statute expressly identifies the procedure that a party seeking to file an appeal must follow. However, the appellant cannot subsequently withdraw the appeal in a manner that in essence disregards the decision of a chamber or part thereof. Such a reading of rule 157 of the Rules would be at odds with the correct functioning of the Court, and, more generally, would run contrary to the proper administration of justice.⁶⁶

⁶⁰ [Prosecutor’s Notice of Discontinuance](#), para. 6.

⁶¹ *See* [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 18.

⁶² [Prosecutor’s Notice of Discontinuance](#), para. 3, *referring to Appeals Judgment*.

⁶³ [Prosecutor’s Notice of Discontinuance](#), para. 5.

⁶⁴ [Prosecutor’s Response to Victims’ Observations](#), para. 9.

⁶⁵ *See also* [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 20; *see also* para. 22.

⁶⁶ *See also* [LRV 2 Observations on Prosecutor’s Notice of Discontinuance](#), para. 22.


38. Accordingly, the Appeals Chamber considers that the Prosecutor's Notice of Discontinuance does not comply with rule 157 of the Rules, as it contains reservations or conditions, and appears to suggest, erroneously so, that decisions issued by this Court are not of a binding nature.

39. For the foregoing reasons, the Appeals Chamber finds the Prosecutor's Notice of Discontinuance to be invalid, and considers that the appellate proceedings in this situation shall continue. Consequently, the Appeals Chamber will proceed to address the merits of the appeal.

IV. THE PROSECUTOR'S REPLY

40. Recalling its decision of 23 December 2022, granting the Prosecutor leave to reply to the LRV 2 Response,⁶⁷ the Appeals Chamber invites the Prosecutor, if he so wishes, to file a reply to the LRV 2 Response, not exceeding 10 pages, by 16h00 on 23 March 2023.

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



Judge Piotr Hofmański
Presiding

Dated this 16th day of March 2023

At The Hague, The Netherlands

⁶⁷ [Decision on the Prosecutor's request for leave to reply](#), ICC-02/17-206, p. 3 and para. 10.