International Criminal Court

Appeals Chamber

Situation: Islamic Republic of Afghanistan - ICC-02/17

Presiding Judge Piotr Hofmański, Judge Howard Morrison, Judge Luz del Carmen Ibáñez Carranza, Judge Solomy Balungi Bossa and Judge Kimberly Prost

Appeals Hearing - Courtroom 1

Wednesday, 4 December 2019

(The hearing starts in open session at 9.31 a.m.)

THE COURT USHER: [9:31:27] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [9:32:17] Good morning.

Would the court officer please call the case.

THE COURT OFFICER: [9:32:30] Good morning, Mr President, your Honours.

The situation in the Islamic Republic of Afghanistan, situation reference ICC-02/17.

And for the record, we are in open session.

PRESIDING JUDGE HOFMAŃSKI: [9:32:44] Thank you very much.

I will now ask the participants to briefly please introduce themselves for the record.

I will start with the Office of the Prosecutor, please take the floor.

MR GUARIGLIA: [9:33:03] Good morning, your Honours. It's Fabricio Guariglia, director of Prosecutions. And appearing with me today are Ms Helen Brady, senior appeals counsel; Mr Matt Cross, appeals counsel; Mr Matteo Costi, appeals counsel; and Mr Manoj Sachdeva, trial lawyer.

PRESIDING JUDGE HOFMAŃSKI: [9:33:18] Thank you very much.

The Legal Representatives of the appealing victims, beginning with the group in the

first row on my left, please proceed.

MR GAYNOR: [9:33:33] Good morning, your Honours. We've been referred to as LRV1, and my name is Fergal Gaynor and I appear with Nada Kiswanson. Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [9:33:43] Thank you.

And the LRV2.

MS GALLAGHER: [9:33:50] Good morning, your Honours. My name is Katherine Gallagher and through the Center for Constitutional Rights, I am the Legal Representative for victims, Sharqawi Al Hajj and Guled Hassan.

And for the record, I just want to note that Mr Al Hajj and Mr Duran have been represented in long-running proceedings in the United States by counsel from the Center for Constitutional Rights. My colleagues have security clearances and operate pursuant to applicable statutes, regulations and protective orders. Accordingly, habeas counsel for Mr Al Hajj and Mr Duran have no involvement in these proceedings and do not confirm or deny any statement or any other aspect of the case.

PRESIDING JUDGE HOFMAŃSKI: [9:34:33] Thank you very much.

And please, LRV3.

MS REISCH: [9:34:42] Pardon me. Good morning, Mr President, your Honours. My name is Nikki Reisch and I'm also part of LRV2. I, together with my --

PRESIDING JUDGE HOFMAŃSKI: [9:34:44] Okay (Overlapping speakers)

MS REISCH: [9:34:45] Pardon me. I, together with my colleagues, represent Mohammed Abdullah Saleh al-Asad, victim number r/00749/18 in these proceedings. The other members of our legal team include Sara Robinson, who is on my left and Professor Margaret Satterthwaite who will be joining us from tomorrow. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:35:06] Thank you, madam.

And then the LRV3.

MS HIRST: [9:35:13] Excuse me, Mr President. I do apologise.

PRESIDING JUDGE HOFMAŃSKI: [9:35:14] Please.

MS HIRST: [9:35:15] My name is Megan Hirst. My team and I are the third component, the final component of those victims who have been referred to as LRV2 in these proceedings. We represent three -- the final three participating victims in these proceedings who are part of the US torture programme and their names are Ahmed Rabbani, his reference number is r/00638/18, and two further victims who remain anonymous in these proceedings, r/00635 and 636/18.

And with me today in court are Mr Tim Moloney, QC, and our instructing solicitor, Preetha Gopalan from Reprieve.

PRESIDING JUDGE HOFMAŃSKI: [9:35:57] Thank you.

And we have also the representatives of the Cross Border Victims. Please introduce yourself for the record.

MR PIETRZAK: [9:36:13] Mr President, your Honours, if I may, my name is Mikolaj Pietrzak and along with my esteemed colleagues, Nancy Hollander and Maria Radziejowska, we have the honour of representing Mr Abd al-Rahim al-Nashiri, and we have been ascribed as legal victims representatives number 3.

And perhaps a word of clarification also as to Ms Hollander's situation and role. For similar reasons because of security restraints imposed by her government, she's limited in statements she may make today and for that reason I will be presenting most of our arguments and Ms Hollander will only be able to reply to certain issues and make statements and arguments in a limited scope. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:37:00] Thank you, Counsel.

And then it's time for representatives of the Cross Border Victims. Please proceed.

MR POWLES: [9:37:07] Good morning, Mr President and your Honours. My name is Steven Powles and I appear on behalf of the Cross Border Victims with my learned co-counsel, Mr Conor McCarthy. We are instructed by Leigh Day solicitors, and they're represented today by Ms Rosa Curling and Ms Erin Alcock. And we are representing Reprieve, the NGO who are today represented by my learned friend, Ms Jennifer Gibson. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:37:35] Thank you, Counsel.

And I would invite representatives of the Islamic Republic of Afghanistan. Please proceed.

MR DIXON: [9:37:51] Good morning, Mr President, your Honours. Rodney Dixon on behalf of the government of Afghanistan. Instructed by His Excellency, Dr Mohammad Homayoon Azizi, the ambassador of Afghanistan to The Hague, with Sanga Siddiqi also from the embassy, and assisted by counsel Aidan Ellis and Anne Coulon.

PRESIDING JUDGE HOFMAŃSKI: [9:38:15] Thank you, Counsel.

And then we proceed with *amici curiae*, beginning with the Office of Public Counsel for the Defence.

Mr Keïta, please.

MR KEÏTA: [9:38:26] (Interpretation) Good morning, Mr President. Ladies and gentlemen, my name is Xavier-Jean Keïta, lead counsel for the Office of Public Counsel for the Defence. I represent OPCD. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:38:49] (Overlapping speakers) And then the next person I invite *amici curiae*, please.

MR WILIŃSKI: [9:38:53] Good morning, President, Mr President, your Honours.

My name is Paweł Wiliński. I'm a professor of criminal law and international criminal law and I have the honour to serve here as *amici curiae*. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:39:05] Thank you.

MR JACOBS: [9:39:12] Good morning, your Honours. My name is Dov Jacobs and along with my colleague from 9 Bedford Row, Joshua Kern, we are here representing the following organisations: Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, The Lawfare Project and UK Lawyers for Israel. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:39:35] Thank you very much, Counsel. The next one, please.

MR SEKULOW: [9:39:38] Good morning, Mr President, your Honours. My name is Jay Sekulow, I'm the chief counsel for the European Center for Law and Justice. Thank you for having us today.

PRESIDING JUDGE HOFMAŃSKI: [9:39:45] Thank you very much, Counsel. Please.

MR JORDASH: [9:39:49] Good morning, your Honours. For Global Rights Compliance, I appear, my name is Wayne Jordash.

PRESIDING JUDGE HOFMAŃSKI: [9:39:53] Thank you very much.

MR MILANINIA: [9:39:59] Good morning, Mr President. Good morning, your Honours. My name is Nema Milaninia, here on behalf of 17 human rights organisations who work in Afghanistan. Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [9:40:07] Yes, thank you.

And you in the second row, you've still not presented to the Court.

MS GARRY: [9:40:13] Good morning, your Honours. It's a pleasure to be here. My name is Hannah Garry and I am clinical Professor of Law at University of

Southern California appearing as *amicus curiae* on behalf of the former UN Special Rapporteurs, Juan Méndez, Pablo De Greiff and Manfred Nowak. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:40:31] Thank you very much.

And then it's time for Office of Public Counsel for Victims.

MS MASSIDDA: [9:40:41] Good morning, Mr President, your Honours. For the Office of Public Counsel for Victims appearing today, Ms Sarah Pellet, counsel; Ms Anna Bonini, legal officer; and myself, Paolina Massidda, principal counsel.

PRESIDING JUDGE HOFMAŃSKI: [9:40:56] Thank you, Ms Massidda.

The Appeals Chamber is convened to hear oral submissions in the appeals lodged by appealing victims and the Prosecutor against the decision of the Pre-Trial Chamber II of 12 April 2019 entitled, "Decision pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan", hereinafter the "Impugned Decision".

I'm the Presiding Judge in these proceedings. My name is Piotr Hofmański. On my right, Judge Howard Morrison and Judge Solomy Balungi Bossa. On my left, Judge Luz del Carmen Ibáñez Carranza and Judge Kimberly Prost.

By way of background and for the benefit of anyone who may not be very familiar with the matter before us or its context, I will briefly recount the relevant events leading up to these proceedings.

On 30 October 2017, the Prosecutor informed the Presidency of her decision to request judicial authorisation to commence an investigation into the situation in Afghanistan.

On 3 November 2017, the situation was assigned by the Presidency to the Pre-Trial Chamber III.

On 20 November 2017, the Prosecutor requested Pre-Trial Chamber III to authorise the commencement of an investigation into the situation in the Islamic Republic of

Afghanistan (hereinafter "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.

Throughout the period 20 November 2017 to 31 January 2018, the Court received representations of victims, which were transmitted to Pre-Trial Chamber III on a rolling basis, together with reports containing a preliminary assessment of the representations.

On 9 January 2018, following an order of the Pre-Trial Chamber, the Prosecutor provided additional information which amounted to 806 items of supporting material, totalling 20,157 pages.

On 16 March 2018, the Presidency recomposed the Chambers of the Court and assigned the situation in Afghanistan to the Pre-Trial Chamber II (hereinafter the "Pre-Trial Chamber").

On 12 April 2019, the Pre-Trial Chamber rendered the Impugned Decision finding, in relevant part, I quote:

"Having determined that both the jurisdiction and the admissibility requirements are satisfied, it remains for the Chamber to determine, in accordance with article 53(1)(c) of the Statute, whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice." End of quote.

In addressing this question the Pre-Trial Chamber found the following factors to be relevant, I quote: "(i) the significant time elapsed between the alleged crimes and the [Prosecutor's] Request; (ii) the scarce cooperation obtained by the Prosecutor

throughout this time, even for the limited purposes of a preliminary examination, as such based on information rather than evidence; (iii) the likelihood that both relevant evidence and potential relevant suspects might still be available and within reach of the Prosecution's investigative efforts and activities at this stage." End of quote.

In considering these factors the Pre-Trial Chamber concluded, in relevant part, and I quote again:

"... notwithstanding the fact [that] all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favoring the investigation or otherwise positively contributing to it. It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-à-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve." End quote.

On 7 June 2019, the Prosecutor filed a request for leave to appeal the Impugned Decision. On 10 June 2019, the Legal Representatives of 82 victims and two organisations who had made Article 15(3) representations before the Pre-Trial Chamber (hereinafter LRV1) also requested leave to appeal the Impugned Decision. On or about the same day, LRV1 and the Legal Representatives of six other victims

(hereinafter LRV2) and of an individual victim (hereinafter LRV3) filed notices of appeal against the Impugned Decision directly before the Appeals Chamber.

On 17 September 2019, the Pre-Trial Chamber, by majority, Judge Mindua dissenting, rejected the victims' request for leave to appeal and partially granted the Prosecutor's request with respect to the following issues:

Number 1, whether Articles 15(4) and 53(1)(c) require or even permit a Pre-Trial Chamber to make a positive determination to the effect that investigations would be in the interests of justice; number 2, whether the Pre-Trial Chamber properly exercised its discretion in the factors it took into account in assessing the interests of justice, and whether it properly appreciated those factors.

On 30 September 2019, the Prosecutor filed her appeal brief. On or about 1 October 2019, the Legal Representatives of Victims filed their respective appeals briefs.

On 27 September 2019, the Appeals Chamber issued an order scheduling a hearing today and over the next two days, and invited the appealing victims, the Office of the Prosecutor and the Office of Public Counsel for Victims to participate at the hearing. In addition, interested States, professors of criminal law and/or international law, as well as organisations with specific legal expertise in human rights were invited to express their interest in participating at these proceedings as *amici curiae*. In this regard, the Appeals Chamber received 15 expressions of interest and permitted the *amici* to choose to appear and participate at the hearing or to file written submissions. Later the Office of Public Counsel for the Defence was also permitted to participate as *amici*.

The victims located in Pakistan who have allegedly been affected by drone strikes launched from Afghanistan, and whose position was not included in the Prosecutor's

request for authorisation of an investigation (hereinafter the Cross Border Victims) were permitted to participate in these proceedings under Rule 93 of the Rules.

On 26 November 2019, Afghanistan were permitted to make written submissions and to be present at the hearing.

Turning now to the conduct of these proceedings, it is recalled that on 22 November 2019, the Appeals Chamber issued a decision on the conduct of the proceedings in which it set out questions by which participants should be guided in making their submissions. The submissions must, nevertheless, be confined to the issues being raised on appeal.

The Appeals Chamber underlines that the *amici curiae* are not required to address these questions in making their submissions. The order also indicated the time allocation that each participant would have to make their submissions.

The proceedings will thus be conducted in accordance with that schedule and the time allocated must be respected by each participant, regardless of interruptions by questions from the Bench. The court officer will be monitoring the time and will indicate to the participants 5 minutes before the end of the allocated time.

While some of the participants present in the courtroom today are quite familiar with the procedure to be followed during our hearings, some may be appearing for the first time. It is necessary, therefore, to go over some of the rules that participants are expected to follow.

First, participants are urged to avoid repetition of arguments already made in their filings. To help us manage time and to cover more ground, participants are strongly encouraged to refrain from covering grounds already covered by those who spoke earlier, unless there is a substantial disagreement in a way that requires more to be said. When there is agreement, it will be enough simply to say so and move to other

topics.

The time allocation is based on three court sessions per day. Today, we will focus on the issues covered under group A and B questions, which is displayed or will be displayed on the screen. These issues concern, number one, the standing of victims to bring an appeal under Article 82(1)(a) of the Statute; and number two, whether the Impugned Decision may be considered to be a decision with respect to jurisdiction within the meaning of Article 82(1)(a) of the Statute.

On Thursday and Friday this week we will focus on hearing submissions on the merits of the appeals which is covered by group C questions.

This session will proceed until 11 and we will thereafter break for 30 minutes. We will resume for the second session at 11.30 and then break for lunch at 1. The third session will start at 2 until approximately 3.30. The participants are urged to be on time in returning to the courtroom after the breaks.

I would ask that when addressing the Court, the participants speak clearly and at a reasonable pace to allow for the interpreters and the transcript recorders to accurately capture what is being said. Please do not forget to turn off your microphones once you have concluded your submissions.

With those remarks, I would now invite the Office of the Prosecutor to address the Appeals Chamber. Your 30 minutes begins now. Please proceed.

MR GUARIGLIA: [9:55:28] Good morning again, your Honours.

I will be addressing groups A and B of the questions included in the Chamber's scheduling order. Tomorrow, Ms Brady will be answering the group C questions.

We also intend to briefly address the recently filed submissions by the Islamic Republic of Afghanistan, as well as any further arguments brought orally, on Friday.

Turning to the questions, I will, with the Chamber's indulgence, reverse the order of

the groups and deal with the nature of the Pre-Trial Chamber decisions first, and will do so for a simple reason: If 82(1)(a) does not apply to the Pre-Trial Chamber's ruling, then the question of victims' standing to bring an appeal does not even arise. Before I start, however, and in line with the introductory words of your Honour Judge Hofmański, I would like to emphasise that the merits of this appeal concern a narrow and tangible issue, namely, whether the Pre-Trial Chamber erred in its interpretation of the "interests of justice" limb in Article 53(1)(c). We shall explore those matters tomorrow, and on Friday. Today, however, we shall be addressing two technical points of appellate procedure under Article 82(1)(a) of the Statute. While these are important, they are not essential to this appeal, since the Appeals Chamber is in any event seised of our own appeal under Article 82(1)(d), addressing all the same issues.

We would like to stress that the Prosecution welcomes and supports the victims' active participation in these and other proceedings before the Court. This right is guaranteed by the Statute in various places, like Article 68(3), 15(3) and 19(3), and is entirely distinct from the technical question of standing to appeal.

The Prosecution recognises that in the context of these proceedings, where we and most participants agree on the merits, the question could be asked as to whether it was really necessary that we maintained a firm, however respectfully, line on the technical matters that we discuss today. But in our submission it is. This is because we regard the existing law on standing to appeal as essential in maintaining the fair and expeditious conduct of the Court's proceedings. And this consideration is central to the interests of all the Court's constituents, including victims.

For example, we have already been reminded in the application from the Jerusalem Institute of Justice and others to participate in this hearing, that, in addition to victims,

other persons and entities may also very much regard themselves as interested parties in Article 15 proceedings of the Court, including, but not limited to, States. But obviously, if every person or entity with an interest in the Court's proceedings had the full body of procedural rights, then those proceedings might become unworkable. So the drafters of the Statute had to come up with a scheme which would balance these considerations. And this balance was carefully struck, mindful of the particular significance of victims' engagement with the Court, and other considerations. Indeed, the Rome negotiations had the benefit of a very rich exchange between different legal traditions, with equally different views as to the scope of victims' rights in criminal proceedings.

Both for reasons of practicality, but also of principle, we would urge your Honours to be very cautious in disturbing this balance.

We say it is unnecessary to do so, for the reasons I will briefly outline in a moment. But we also say, with the greatest respect, that it would be unwise. While policy arguments may go back and forth, and probably will today, it is undeniable that victim participation is a central and unique aspect of this Court's procedural law. Adhering to a strict reading of the statutory provisions, as we propose, does not mean restricting in any manner the exercise of the rights afforded to victims by the Statute; it simply means remaining within the circle of those rights as established by the legislator. Any amendment to this scheme should therefore be a matter for the Assembly of States Parties, not for this Court.

Now, some of my colleagues may consider their proposed reform to be not only desirable but modest, merely expanding on a right recognised by the Statute. However, your Honours, it appears that there may be other invitations to your Honours to depart from the Statute during the coming days, but moving in a very

different direction, with the effect of potentially restricting the Court's protective function and the strength of its judicial authority. Our request to your Honours is the same in both cases, to decline those invitations and to adhere to the terms of the Statute, as properly interpreted.

In any event, as already said, we don't agree that reform in this area is actually necessary. In our respectful view, victims are welcome and vital participants in the Court's proceedings, but they do not have general standing to appeal, and they do not need it. Where they do have it, and do need it, then the Statute says so, as in the context of Article 82(4) concerning reparations.

The ordinary position, however, is set out in Articles 15(3), 19(3), and 68(3), which we say are materially similar, and which allow victims to make representations on matters of substance. Indeed, for the purposes of Article 15(3) and 19(3), the Statute is clear that victims may always make representations on these matters, if they so choose. At the same time, however, these provisions do not grant further procedural rights to victims, such as standing to appeal.

This compromise may be unique, but it makes sense given the additional complexity, time and expense that would be entailed if all participants were treated as parties. For example, as we have seen in this situation, our colleagues thought it appropriate to trigger one mechanism for appeal, while we in the Prosecution triggered another. We all acted with good intentions, but the fact remains that two Chambers of the Court were seised of the same matter, at the same time. This was unnecessary work for at least one Chamber.

Moreover, since a broad approach has to be taken in qualifying individuals as victims for the purpose of making representations under Article 15(3) - because, at this stage, the situation is defined by broad parameters - there may be a significant risk that the

Court's proceedings could be overwhelmed if all those persons were in a position to exercise the procedural rights of a party. And further, and for obvious reasons, eligible victims under Article 15(3) may be quite diverse and have a wide range of views, interests, and objectives. It cannot be assumed that all these interests would be mutually compatible, or necessarily consistent with the Statute or the mandate of the Court.

Nor, in our submission, is there any good reason to distinguish Article 15 proceedings from the various other proceedings before the Court, in relation to the regime of victim participation. This is a very early stage of the proceedings, prior to any investigation, when in many national systems there wouldn't be any proceedings at all. Indeed, at this stage, and as Ms Brady will discuss tomorrow, the Prosecution has only selected examples of some of the incidents which might form part of its investigation, but many other incidents, in which victims might have an interest, will be known only to the Prosecutor. It must be implicit in this system that the Prosecutor is trusted to manage all aspects of the proceedings at this stage.

Indeed, since the Prosecutor was plainly and deliberately granted exclusive competence to seise the Pre-Trial Chamber of an Article 15(3) request, it might even seem obvious that she has exclusive standing to appeal the resulting decision under Article 15(4). And there is no doubt that the Prosecutor will take this action, where appropriate. That is exactly what she did in this situation. In doing so, she is of course mindful of considerations including the victims' interests, and will act accordingly.

Now turning to your Honours' particular questions and starting with question B(a) in relation to whether the Impugned Decision can be said to be a decision with respect to jurisdiction, our short answer, your Honours, is no. And we do not take this

position lightly, since of course we could have our own interest in seeking to rely on Article 82(1)(a), in appropriate circumstances. But where the Court appears to have adopted consistent jurisprudence on a topic such as this one, it should ordinarily be followed.

It is important to recall that this Chamber has understood the definition of a jurisdictional matter to include any of the four facets of jurisdiction, that is, subject matter, personal, territorial and temporal jurisdiction. Your Honours can see authorities from as early as 2006 in reference 1 of our reference list. And as the first appeal judgment in Ntaganda has affirmed, that's reference 2, this can potentially include legal arguments concerning the definition of the elements of a crime.

But, crucially, it is not sufficient that a decision merely considers or refers to matters which might be described as jurisdictional. It is also required that the operative part of the decision relates to that jurisdictional matter.

For these reasons, while we agree that some of the Pre-Trial Chamber's reasoning in this situation relates to jurisdictional subject matter, chiefly scope of investigation and required nexus, we submit that it does not constitute a decision on those particular matters.

Specifically, your Honours, the Pre-Trial Chamber determined that the Prosecutor may not initiate an investigation into the alleged crimes in this situation because of its own assessment of the interests of justice, which is a matter of prosecutorial discretion, but not of jurisdiction. Quite to the contrary, the decision made positive findings on both jurisdiction and admissibility.

Indeed, if the decision was dispositive of a jurisdictional matter, it would mean that the Prosecutor, who is an organ of the Court, would be obliged to refrain from taking further action on certain allegations due to the existence of a jurisdictional bar. But

in its own terms, the decision took the opposite view. It seemed to allow that the Prosecutor could take further action, insofar as it decided that an investigation should not be opened at this stage. And indeed under Article 15(5), the Prosecutor remained able to renew her request.

As already said, this emphasis on the operative part or disposition of the decision is not only consistent with existing Appeals Chamber jurisprudence, it is required by it. Indeed, this Chamber has constantly required a sufficient nexus between the issue said to be jurisdictional and the operative part of the decision. The exceptional and automatic right of interlocutory appeal in Article 82(1)(a) is only justified by the dispositive effect of the jurisdictional ruling. If there was a right to appeal a decision simply because its reasoning includes a reference to a jurisdictional matter, then the scope of Article 82(1)(a) would be unworkably broad.

Now we do acknowledge that, in the second Comoros appeal judgment, Judge Eboe-Osuji wrote a separate opinion which seemed to take a different approach to the traditional approach followed by the Appeals Chamber. And according to this approach, decisions with the potential to activate or not activate the judicial functions of the Court, are deemed to be jurisdictional in nature. While we wish to bring this view to your Honours' attention, respectfully, we submit that this position should not be followed.

In particular, jurisdiction for the purpose of Article 82(1)(a) cannot mean the competence of one organ of the Court rather than another. If it did, for example, then the transition from one phase of proceedings to another, and from there from the competence of one organ or Chamber to another organ or Chamber, would be a jurisdictional matter.

Thus, if a Pre-Trial Chamber declined to confirm a charge, and so prevented that

charge from reaching the Trial Chamber, thereby restricting the latter's exercise of judicial functions, this would be a jurisdictional ruling. We doubt this to be correct.

I now turn to question B(c), your Honours, because it's directly linked to question (a), and this question refers to the part of the Impugned Decision which limited the scope of the investigation to incidents specifically mentioned in the Prosecutor's request, and whether this aspect of the decision could be considered to be jurisdictional in nature.

And our reason remains -- our response remains a negative one.

Now, for the same reasons that I have just given, the fact that the Pre-Trial Chamber, as we submit, erred in assessing the scope of the investigation that might be authorised does not transform the decision into a decision with respect to jurisdiction.

To the contrary, your Honours, even if the Pre-Trial Chamber did misunderstand the law on the scope of investigations, as we say it did, its actual ruling still concerned the interests of justice. For this reason, we do not understand the Pre-Trial Chamber to have actually ruled in a way which would restrict the jurisdiction of the Court, either as matters presently stand or if an investigation was now authorised.

Indeed, your Honours, the scope of the Prosecution's investigation could not actually have been limited, because the Pre-Trial Chamber did not authorise any investigation at all. Its view on the scope of the investigation was merely a step in its reasoning to that conclusion.

Nor, in any event, did the Pre-Trial Chamber determine that the incidents which were not specifically mentioned in the Prosecution's Article 15(3) request were outside the Court's jurisdiction. It merely took the view, albeit erroneously, that they were not sufficiently encompassed by the Article 15(3) request, as a matter of procedure. As such, even assuming that the majority was right in this regard, which of course we

contest, as Ms Brady will address, the ruling would still not prevent the Prosecution from bringing a further request under Article 15 with respect to these incidents, nor prelude the Pre-Trial Chamber from granting that request.

None of this means that an Article 15(4) decision can never fall within the scope of Article 82(1)(a). We only say that the decision under appeal today does not. If the Pre-Trial Chamber rejected an Article 15(3) request on the basis that there was no jurisdiction *ratione loci* under Articles 12 and 53(1)(a), then that decision would be jurisdictional. Or if the Pre-Trial Chamber authorised an investigation, but limited its parameters based on jurisdictional considerations, then that would also be jurisdictional.

I turn now to question B(b), your Honours, and this refers to whether, in interpreting the wording "decision with respect to jurisdiction", would this wording include decisions making determinations on the preconditions to the exercise of the Court's jurisdiction under Article 12 or the exercise of the Court's jurisdiction under Article 13 of the Statute?

And our answer here is yes, but only if the jurisdictional ruling forms part of the operative part of a decision, consistent with our answer to question (a).

In this context, we agree that matters such as the preconditions to the exercise of the Court's jurisdiction under Articles 12 and 13 are indeed jurisdictional in the sense of Article 82(1)(a). Such matters may also arise under Articles 5 to 8*bis*, concerning subject-matter jurisdiction, as the Appeals Chamber has previously ruled in Ntaganda. That's reference 3 in our reference list, your Honours.

Accordingly, we concur, as we stated in our brief, that the scope of Article 82(1)(a) is not limited simply to proceedings under Articles 18 or 19. And this is consistent with the practice of the Court. For example, in the DRC situation, reference 4, the

Appeals Chamber allowed an appeal under Article 82(1)(a) with regard to the warrant of arrest for Mr Ntaganda, a matter arising under Article 58 of the Statute, not Article 18 or 19.

Likewise, when ruling on appeals under Article 82(1)(a) and deeming those appeals to be inadmissible, the Appeals Chamber has looked objectively at the reasoning and disposition of the challenged decision and not simply excluded the appeal because it did not arise under Article 18 or 19. For example, the Appeals Chamber considered whether Article 82(1)(a) could apply in the context of matters brought under Rule 103 or Article 95; that is, the Gaddafi case in reference 5; Article 93, the Katanga case in reference 6; or Article 53, Comoros, reference 7.

And it is precisely because a variety of legal issues may be said to be jurisdictional in nature that it is important to maintain the requirement for the operative part of a decision to rule on that jurisdictional issue in order to trigger Article 82(1)(a). Otherwise, the Appeals Chamber might be directly seised of a wide variety of interlocutory appeals.

In conclusion, your Honours, while we agree that jurisdictional matters are addressed in the Pre-Trial Chamber's decision, we do not agree that the operative part of the decision, that part which is dispositive, addressed those jurisdictional matters. And it is for that reason that we did not consider that Article 82(1)(a) applied to this situation.

Now I will turn now to group A of your Honours' questions, regarding standing.

Your first question in this group, question (a), is whether victims should be considered parties in the proceedings under Article 15 in comparison to other phases of the criminal proceedings.

And our answer, your Honours, here is no. While victims are expressly given a right

to participate in Article 15 proceedings, this does not convert them into parties. Indeed, with the exception of reparation proceedings, owing to their special nature, it is well accepted that the Statute provides for a general approach to victim participation which ensures that they have full opportunity to address relevant substantive issues before the Court, but does not impose on them the rights or the obligation of the parties.

This holds true for criminal trials and appeals, which are the main judicial proceedings of this Court. It therefore stands to reason that the same principle would also apply in those proceedings where, by virtue of their limited and more preliminary nature, the concrete interests of particular victims will not yet be manifest, such as even before the Prosecution has begun its investigation.

Indeed, your Honours, there is simply nothing to support the view that the drafters of the Statute conceived proceedings under Article 15(3) or 19(3) as establishing broader participatory rights for victims than under the Statute more generally, such as under Article 68. And indeed the ordinary meaning of the word "representations" is consistent with the ability of victims to address the Court on the substance of the issues at hand, which is the essence of the participation regime.

This is contrasted with the status of the Prosecutor, who has exclusive right under Article 15(3) to seise the Pre-Trial Chamber, based on her own independent preliminary examination. It is consistent with this exclusive right, as already said, that the Prosecutor also has exclusive right of appeal. But the Statute also makes clear in provisions such as Articles 42, 54, and 68 that, while independent, the Prosecutor must be mindful of the interests of victims at all times. And the Office of the Prosecutor itself has given effect to this principle in its own internal procedures, such as its Victims Participation Policy from 2010, and its regulations of

the Office of the Prosecutor like Regulation 16, 37, and 52.

For all these reasons, victims should be afforded the same status for the purpose of Article 15 as they enjoy for all other proceedings before the Court, with the exception of reparations proceedings. That is to say that, while they do not have the procedural rights of the parties, their participation on substantive matters is a right afforded to them by the Statute, and its exercise is to be welcomed and supported at all times.

Moving to question (b), your Honours, and here the question links to whether the existence of a limited group of people who can challenge, or actors who can challenge the jurisdiction of the Court under Article 19(6) or seek a ruling on jurisdiction is also linked to a right to appeal the decision under Article 82(1)(a).

Now, we have already explained, and I will not repeat myself, why a decision under Article 15(4) is not necessarily a decision with respect to jurisdiction, not this decision.

At the same time, your Honours, Article 82(1)(a), and as I also have mentioned, is not necessarily limited only to decisions arising under Articles 18 or 19 of the Statute.

So the answer to this question is again no.

Article 19(6) limits those persons who may be considered as parties to appeals arising from an Article 19 decision, but it does not apply to appeals under Article 82(1)(a) arising from other kinds of decisions that also are jurisdictional in nature. So, as such, Article 19(6) does not resolve the issues arising in this appeal today.

In our view, Article 82(1)(a) forms part of a comprehensive provision, regulating the rights of the parties to appeal decisions other than convictions, acquittals or sentences. Victims, as already said, do not fall within the parameters of the term "parties", and therefore cannot invoke this provision.

Article 19(3) defines the circle of potential actors who may lodge challenges to the

jurisdiction of the Court, or the admissibility of a particular matter. And this includes a State that claims to have jurisdiction over a case, or a State from which acceptance of jurisdiction is required under Article 12. And Article 19(6) makes clear that these actors may appeal such decisions, which would fall under Article 82(1)(a), so Article 19(6) is therefore *lex specialis* to Article 82(1) in the sense of defining these actors as parties for the purpose of such appeals under Article 82(1)(a).

THE COURT OFFICER: [10:20:40] Excuse me, Counsel, you have 5 minutes left.

MR GUARIGLIA: [10:20:42] I know.

But for obvious reasons, Article 19(6) has no effect on appeals under Article 82(1)(a) but which do not originate in Article 19 proceedings.

Turning to question A(c), your Honours, the question here is whether the right to make representations under Article 15(3) entitle victims to appeal a decision under Article 15(4) of the Statute.

And again our answer is no, and I will be very brief here.

There is nothing in the Statute that could somehow support the conclusion that victims making representations in a confined and self-contained process, taking place at the beginning of an investigation, can have broader procedural rights than victims fully participating in the litigation of a case before Chambers of the Court. On the contrary, your Honours, the architecture of the Rome Statute shows a progression in the degrees of participation of victims in proceedings before the Court, ranging from a limited right to make representations at the inception of an investigation, to a right to fully participate in the context of a case being litigated before the Court, to becoming a full party in the context of reparations proceedings.

I will move to the last point, your Honours, and the question here is whether in light of Article 21(3) of the Statute, does the internationally recognised human rights of

access to justice and to an effective remedy entail a right for victims to appeal a decision under Article 15(4) of the Statute?

And here again the answer, your Honours, is no.

To begin with, your Honours, we think that the right, as such, to an effective remedy has to be properly contextualised to the situation of this Court within the framework of Article 21(3), and in this context the right must be understood to be primarily opposable to States, not to this Court.

And we reach this conclusion for the following reasons:

First, your Honours, and this is, and this should seem obvious, the Court is not placed in a situation comparable to that of a State vis-à-vis its own citizens. This means that any importation into the context of the Court of positive duties placed by human rights law on States should be mindful of this crucial difference, as well as of the Court's unique nature and mandate.

And international law does indeed recognise that victims have a right to a remedy, as in the sense recently described by Judge Ibáñez in Lubanga. That's reference 8 in our reference list. And this involves both the right to petition to the authorities or the procedural right, and a right to obtain redress for the violation, a substantive aspect of the right.

PRESIDING JUDGE HOFMAŃSKI: [10:23:29] Excuse me, Counsel, could you slow down a little bit because there is a problem with the interpretation.

MR GUARIGLIA: [10:23:35] I will do, your Honours. I apologise.

But by contrast, your Honours, this Court was created by States as a mechanism with a selective mandate. This is an unavoidable fact, both as a consequence of the legal regime in Articles 11 to 17, 53 and 54, and 58 of Statute, and the sheer practical reality of the Court's limited capacity.

So for the cases which fall within the Court's mandate, and which can be properly brought to trial by the Prosecutor, then this may discharge the States' obligations. But when matters are not addressed by the Court, then the obligation remains with the State. And, as such, the victims' right remains opposable to the State, and not to Court. This is the flip side of complementarity.

Now, in this context, if victims do not have an enforceable right to have a particular case investigated at the Court, then necessarily they do not require standing to appeal in order to make sure that such right is effective.

But beyond that, your Honour, again, human rights bodies have recalled a number of times that it is sufficient that victims have effective access to the investigative procedure for the remedy to be granted. And here, your Honours, they can make submissions to the Office of the Prosecutor and to the Chamber, and your Honours can find those references at number 9 of our list.

So even if your Honours here consider that the right to an effective remedy is opposable to the Court, this right could be satisfied by the existence of an independent prosecutor before whom victims can make representations and who is able to bring suitable proceedings on the basis of those representations. It does not require the grant of standing to the victims themselves.

This approach, your Honour, is consistent with existing human rights treaties, whereby the ability to bring the matter to a competent organ for action is adequate to satisfy the right to a remedy. For instance, the ICCPR recognises that the remedy may be determined by competent judicial, administrative or legislative authorities. According to this, the possibility for a public agency to act on the victims' behalf may suffice, and the Office of the Prosecutor is precisely such an agency for the purpose of this Court. The same goes for the European Convention, which requires a remedy

before a national authority, and the Africa Charter, which requires recourse before a competent national organ.

Your Honours, this concludes my submissions for this morning. I apologise for the speed. Thanks, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [10:26:15] Thank you, Counsel.

I would like to invite the representatives of victims group 1, LRV1. Your 30 minutes begins now.

MR GAYNOR: [10:26:34] Thank you very much, Mr President.

For centuries, the people of Afghanistan have gathered to administer justice in *jirga* and *shura* in accordance with ancient traditions and the Holy Koran. Justice is at the core of religious and traditional beliefs of Afghans.

For four decades, Afghans have endured one armed conflict after another. These have left too many Afghans mourning the loss of their mothers, fathers, brothers and sisters.

When Afghanistan joined this Court in 2003, the Rome Statute system became part of Afghanistan's legal framework and presented a set of legal remedies that Afghans have a right to access.

Today, after a preliminary examination that lasted 11 years, followed by 17 months during which the Pre-Trial Chamber considered the Prosecutor's request to start an investigation, the Court is holding its first hearing on the Afghanistan situation. It concerns issues of critical importance, not only to the victims that we represent, but to all Afghans. It has been a very long journey for the victims until today, but today is a historic day for accountability in Afghanistan.

The 82 victims that we represent belong to various Afghan groups, they live in diverse parts of Afghanistan, and they speak different languages. They are victims

of crimes allegedly involving different actors. Whatever their differences, they are united in their wish for an investigation to begin promptly into the crimes committed against them.

We are here to challenge a decision that has extinguished all of their rights under the Statute and has caused enormous damage to any hopes they have for justice and accountability.

Many of the victims we represent are mothers with children. Your Honours' decision in this case will in no small way define whether those children grow up in an Afghanistan characterised by the rule of law or by a culture of impunity.

The interests of the victims and the Prosecution do not always coincide, we're all agreed on that. It is critically important that victims have an independent right to appeal a decision that presents a clear and extreme danger to their rights. It is also important that the victims can present their own grounds of appeal when appealing such a decision.

The Prosecutor has many issues to consider. The resources available to it and its position in other situations. It has to balance its obligations to different groups of victims within and across situations.

These competing considerations were brought to the forefront by the Prosecutor herself in an address to the Assembly of States Parties two days ago on 2 December 2019.

She said that, quote:

"One key question [that] my Office will need to tackle in the coming period is the reality that a number of preliminary examinations will likely progress to the investigation stage, but we will not have the operational capacity to absorb them all. As such, we are considering how prioritisation might apply across different

situations ..." Unquote.

In contrast, the interests of the victims are limited to one situation, the Afghanistan situation. The Legal Representatives of the Victims are under a duty exclusively to represent the interests of their clients in this situation. They have no other interest to defend in accordance with their obligations under the Code of Professional Conduct for counsel.

I will now address your Honours' questions under groups A and B. I will begin by addressing together questions A(a), A(b) and A(c) which concerns standing to appeal the decision.

The Rome Statute recognises the interests, views and concerns of four principal actors. Those are the Prosecutor, the Defence - whether as suspect, accused or convicted person - States and victims. The Statute allows these four actors to defend their interests and to express their views and concerns through various procedures at different phases of the proceedings. Interlocutory appeals are of course regulated by Article 82 and all interlocutory appeals, regardless of whether they fall under 82(1)(a) or 82(1)(d) may be appealed by, quote, "either party", unquote.

An ordinary reading of either party does not expressly limit interlocutory appeals to any particular one of the four parties identified. Articles 18 and 19, read together with Article 82(1), make it clear that at least three parties - that is to say, an accused or a person for whom a warrant of arrest or summons has been issued, a State, in certain circumstances, and the Prosecutor can be considered a party for the purposes of 82(1). But the expression "either party" is not limited to those three parties, nor is Article 82(1)(a) limited to decisions under Article 18(4) and 19(6).

The Triffterer commentary recognises that, quote: Other decisions ... that are potentially appealable under Article 82(1)(a) include, for example, those under

Article 15(4). Close quote.

The presence or absence of an express right to appeal is not determinative of standing. Some provisions, such as Article 18(4), expressly provide for a right to appeal for a State. Article 87(7), on the other hand, does not provide for an express right of appeal for a State referred to the UN Security Council or to the Assembly of States Parties. But nevertheless in the Al-Bashir case, Jordan appealed an 87(7) decision on the basis of Article 82(1)(d) and the Appeals Chamber quite properly, if I may say so, considered the merits of that appeal.

In determining whether one of the four principal parties in the Statute have standing to appeal a particular decision where no express right of appeal exists, I submit that the Appeals Chamber should consider three factors.

First, whether the Statute recognises the participation of the applicant at that stage of the criminal proceedings.

Second, whether the Impugned Decision is highly prejudicial to the interests of the applicant.

Third, whether hearing the appeal will result in unfair prejudice to any other party.

All three of those requirements are satisfied here.

First, the pre-authorisation stage, which is addressed in Article 15 and Rule 50, only envisages the participation of the Prosecutor and victims. The Appeals Chamber recognised in its decision of 24 October 2019 in this situation that Rule 50(3), quote: "[...] 'highlights the importance of victim participation in the procedure for authorisation of investigations'." Close quote.

Second, the Impugned Decision was extremely prejudicial for the victims. A decision denying authorisation affects every victim of every crime of every potential case arising out of the situation.

Where victims are denied an investigation, they are, without exaggeration, denied everything. All of those victims in all cases in the entire situation are denied the realisation of their rights recognised by this Court to truth, justice and reparation. And Mr Guariglia in his submissions made a distinction between victims of a case and victims of a situation. But the Impugned Decision here is more consequential to the victims of a situation than a decision which might, for example, acquit all accused in one particular case or a decision to award no reparations or a derisory sum of reparations in a particular case. Those decisions apply to a specific case. They don't apply to the entire situation.

So in our submission, a decision to deny investigation in a situation is in fact the most consequential decision for victims. There's no decision which can be more prejudicial to their rights.

Third, there is no unfair prejudice to any other party should the Appeals Chamber recognise the standing of victims. In particular, there's no unfair prejudice to the Prosecution. The Prosecution's submissions concerning its floodgates argument have no merit.

In its 22 October response to the appeals by the victims and again today, we've heard the Prosecution refer to the possibility of NGOs - States which don't have an interest in the proceedings - potentially even members of the public with a grievance against a decision of a Pre-Trial Chamber coming along and clogging up the appeals system and wasting your Honours' time. That is simply an entirely overstated and misconceived argument.

The Prosecution itself in its 2019-2021 Strategic Plan has restated its position that, quote: "Under the Rome Statute, victims are actors of international justice rather than its passive subjects." Close quote.

They fully meet all requirements of a test for standing which the Prosecution itself asked the Appeals Chamber to consider, and I refer to our submissions on this point in our 29 November 2019 response to the *amici curiae*.

The victims are not strangers to these proceedings. Nor do they suggest that strangers to the proceedings be allowed to appeal as a right or indeed at all.

Your Honours, I turn now to question A(d). And this question, your Honours, refers to the fact that victims have an internationally recognised right to an effective remedy and access to justice under Article 21(3). You've asked if this includes a right to appeal the Impugned Decision.

And we say yes, it does.

The Appeals Chamber, your Honours, are required by Article 21(3) to interpret and apply every article of the Statute, including 82(1)(a) in accordance with the rights which your Honours identified. The victims here would very well pursue another remedy if they had one.

They don't have one. Over the course of its 11-year preliminary examination, it became clear to the Prosecutor that States in a position to exercise jurisdiction are either unwilling or unable to do so. The Pre-Trial Chamber reached the same conclusion. We submit they were right about that. The recent submissions presented by the government of the Islamic Republic of Afghanistan show only that it remains unable to effectively investigate or prosecute. This applies even if your Honours accept that it is willing to do so, which is an open question. The only jurisdiction in the world - without exaggeration - that can offer the victims a prompt and impartial investigation into the brutal crimes committed against them is this Court. The only way the victims can exercise the right to an effective remedy is to appeal the Impugned Decision.

I'd like to address very briefly a point raised by my learned friend, Mr Guariglia, that however desirable victims' standing might be, we need to leave that up to the Assembly of States Parties. And I would suggest that that is not well-founded and it is not consistent with the purpose of approach which this Appeals Chamber has taken to the Statute.

Your Honours, not necessarily this Bench, but the Appeals Chamber has interpreted the Statute purposively on many cases. The no case to answer procedure appears nowhere in the Statute or Rules of Procedure and Evidence and yet it now exists at this Court.

The duty to be present at trial is absolutely clear in the Statute and yet it has been recognised in Ruto that an accused can actually be absent for very large portions of his or her trial.

The lack of ability to issue a binding order to a witness to appear to testify was one of the great weaknesses of the Rome Statute and the Appeals Chamber cured that weakness. And it also cured the absence of a duty on a State to ensure that a witness appears to testify. The stay of proceedings, which arose in the Lubanga proceedings, that doesn't appear in the Statute either.

So there are many cases where this Appeals Chamber has upheld purposive interpretations of the Statute. The Statute is a living document, like the European Convention on Human Rights, and it should be interpreted as a living document intended to provide real realisation of the rights of those -- of the victims.

Now, your Honours, I want to turn now to the questions on jurisdiction. In response to question B(a), the answer, we submit, is a yes. There is no binding jurisprudence obviously on the question of whether a decision to deny investigation is a decision with respect to jurisdiction. The closest we have are some decisions which are

essentially decisions about admissibility. The Appeals Chamber's decision on the Kenya situation emphasises that the right to appeal a decision on jurisdiction or admissibility is intended to be limited to rulings specifically on the jurisdiction of the Court or the admissibility of the case.

The Appeals Chamber also cautions that it's not sufficient that there is an indirect or tangential link between the underlying decision and questions of jurisdiction.

Now here, the Trial Chamber made determinations specifically on the jurisdiction of the Court. The link between the underlying decision and these questions of jurisdiction is not indirect. It is not tangential. It is direct.

This is for three reasons.

First, the decision deprives this Court of the possibility to exercise jurisdiction over any cases which might arise in the Afghanistan situation. That's very far-reaching. Every Chamber of this Court is deprived its jurisdiction. The Prosecutor is deprived of investigative jurisdiction into all crimes in the situation.

Second, the decision contains serious errors concerning the territorial jurisdiction of the Court over torture, and indeed that applies by extension to all war crimes requiring the Court to find that the conduct, quote, "took place in the context of and was associated with" unquote, an armed conflict. And that applies, of course, to every war crime in Article 8.

Third, the Pre-Trial Chamber erroneously attempted to impose limits concerning the scope of the Court's jurisdiction in any authorised investigation. Its limitation on the scope of the investigation to incidents specifically mentioned in the Prosecutor's request is a determination with respect to jurisdiction in three ways: temporally, territorially and in matters of substance.

Mr Guariglia referred to the decision of Judge Eboe-Osuji of 2 September 2019, the

Comoros situation. I respectfully agree with Judge Eboe-Osuji's analysis there. It's important that the Appeals Chamber retains control over what is and is not a decision with respect to the jurisdiction. Your Honours do not have to be totally hung up on exactly what the operative part of the decision might say, whatever that operative part might be.

In this case the operative part certainly deprives, as I submitted, the Court of jurisdiction over every case in the Afghanistan situation. That's its effect, that's the nature of the decision.

Now, Judge Eboe-Osuji has emphasised that the deciding Chamber can't be that one which decides whether it's a decision on the exercise of jurisdiction. It can't control the Appeals Chamber's ability to consider that decision as really being with respect to jurisdiction. That cannot be right, he says, and we respectfully agree.

A decision with respect to jurisdiction is, on a common sense application, the kind of decision which should be subject to appeal as of right. It is an incredibly consequential decision for the Prosecutor, for the victims. It is something which should be subject to appellant scrutiny. It's not something minor such as whether the parties should have to produce an in-depth analysis chart, or something like that, which has taken up appellate scrutiny.

I turn now to question B(b).

In response, we submit that determinations regarding territorial or personal jurisdiction over Article 12, or decisions regarding the exercise of the Court's jurisdiction under Article 13, are indeed decisions with respect to jurisdiction. Articles 12, 13 and 15 all fall within Part 2 of the Statute, headed "Jurisdiction, Admissibility and Applicable Law". They all fall within Chapter 3 of the Rules of Procedure and Evidence. The heading of Chapter 3 is "Jurisdiction and

admissibility". I submit that that header was chosen deliberately. One the sections of that chapter relates exclusively to initiations of investigation under Article 15. The chapter also covers Articles 12 and 13. So at least if, using those as sources, we can see that decisions with respect to jurisdiction and admissibility should cover decisions under 12, 13 and 15.

Now, it's important that the Appeals Chamber - and I'm sure there will be no dispute about this - always does and always must retain a discretion to reject an appeal which is an abuse of process, even if it might technically fall within Articles 12, 14, 15, or any other article. An appeal filed for frivolous or vexatious reasons, such as one of negligible prejudice to the applicant, or one which is unfairly prejudicial to another party, can and should be rejected *in limine*, on a case-by-case basis. In my submission, your Honours and every appeals chamber has always had that power. And over the years since this Court became operational over 15 years ago, there really has been a very low level of vexatious applicants, and the Court has tools at its disposal to deal with vexatious applicants and it should use those tools.

Correcting errors concerning the Court's jurisdiction over Rome Statute crimes at an early stage of the proceedings is consistent with the approach of the Appeals Chamber in Ntaganda on 22 March 2016, where it twice emphasised that, quote, "issues as to the Court's jurisdiction should be resolved as early as possible in the proceedings".

It's absolutely correct for the Appeals Chamber here to let States Parties understand from an early stage the extent of the Court's territorial jurisdiction in the Afghan situation, the Afghanistan situation. It's pragmatically the right thing to do, to clear the air for all parties, for all States, in relation to major questions of jurisdiction at an early stage in the situation. There are, let's face it, not going to be very many appeals

against decisions to deny authorisation to the Prosecutor to initiate an investigation. We're here in 2019, this is the first time this has actually arisen. How many times is it going to happen in the future? Probably not that many. It's the kind of thing which should be subject to appeal as of right. It would be a tremendous error to limit appeals on jurisdiction to decisions in relation to Articles 18 and 19 only.

I turn now to question B(c).

Our response to this, and this is my final submission, is that when the Pre-Trial Chamber limited the scope of the investigation, this was a determination with respect to jurisdiction.

Each Article 15(4) authorisation decision is required to examine jurisdiction in two ways: First, it's required to examine the Court's temporal, territorial and substantive jurisdiction over the alleged crimes. The admissibility of the situation is another analysis. And then, second, it has to re-enter the jurisdictional debate and satisfy itself that it is ordering an investigation on suitable temporal, territorial and substantial jurisdictional areas.

THE COURT OFFICER: [10:51:53] Excuse me, Counsel, you have 5 minutes left.

MR GAYNOR: [10:51:58] Thank you very much, indeed.

So those are two major areas of jurisdictional analysis, each of which requires analysis of temporal, territorial and substantive jurisdiction which must be carried out in each decision on an application for authorisation to investigate a situation.

A perfect illustration of this is the Article 15 decision concerning Myanmar of 14 November 2019, where that Pre-Trial Chamber strikingly took a very different approach to the Afghanistan Pre-Trial Chamber. In their decision, the two sections on jurisdiction took up about 60 per cent of the pages of the decision itself. It plainly was a decision with respect to jurisdiction. Nobody can reasonably insist that it was

not. And if the Myanmar/Bangladesh decision was a decision with respect to jurisdiction, so is every other Pre-Trial Chamber decision which authorises or refuses to authorise the commencement of an investigation.

That ends my submissions. Thank you very much, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [10:53:16] Thank you, Counsel.

We are on time and I think we will adjourn for 30 minutes' break now and resume at 11.30, which time we will hear from the counsel from the Legal Representatives of Victims group 2. As I understand, there are three teams representing LRV2.

And, Counsels, you can of course share time allocated to you, dealing everything after the break. Thank you.

THE COURT USHER: [10:53:54] All rise.

(Recess taken at 10.53 a.m.)

(Upon resuming in open session at 11.32 a.m.)

THE COURT USHER: [11:32:00] All rise.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [11:32:26] Thank you.

We will continue with the submissions of the Legal Representatives of the victims.

And now it's time for LRV2. I understand that you decide to share your time allocated to you for three parts. And the first, Ms Gallagher, you have 10 minutes according to your internal agreements. Please proceed.

MS GALLAGHER: [11:33:01] Good morning. Thank you, your Honours.

It is my privilege to appear today as Legal Representative for Sharqawi Al Hajj and Guled Hassan Duran.

Mr Al Hajj and Mr Duran are currently detained at the US naval detention centre at Guantanamo Bay where they have been held without charge since August 2004 and

September 2006 respectively, after being detained by or at the direction of the United States on the territory of a number of ICC member States, including Afghanistan.

Because of their ongoing detention at Guantanamo, the victims have not been able to assist in the preparation of these submissions to the Court.

As you have noted, the three legal teams under LRV2 will be equally splitting the time to address questions in group A and B. In the limited time available to me this morning, I will set out a frame through which victims' arguments on standing and jurisdiction as well as tomorrow's arguments on the merits must be understood.

My focus is limited to the third dimension of the requested investigation in the situation of Afghanistan; namely, the investigation of US actors for torture and related crimes.

Like the other Legal Representatives in today's appeal, I submitted victims' representation forms for both men in January 2018, which I supplemented with a 55-page factual and legal analysis that was transmitted to the Pre-Trial Chamber. That's ICC-02/17-38, Annex I.

Both Mr Al Hajj and Mr Duran express their full and unqualified support for the opening of an investigation into what they assert are extremely grave criminal acts by US actors, arising out of the operation of a global network of prisons by the CIA and the US Department of Defence, including on the territory of Afghanistan and other States Parties, namely, Poland, Lithuania and Romania.

The network of prisons began in 2002 and thus coincided with the activation of ICC jurisdiction. Torture and other forms of cruel treatment, including widespread acts of sexual violence, were part and parcel of the US rendition, detention and interrogation programme from the moment of, quote, "capture" or kidnapping and

continuing through one's detention.

Both Mr Al Hajj and Mr Duran are discussed in the US Senate Select Committee on Intelligence's executive summary on the CIA detention and interrogation programme, commonly known as the Senate Torture Report, which was released five years ago next week.

The harms they suffered and continue to suffer are not, however, unique to them. They are a result of a planned and organised policy that caused widespread and systematic harms to many other individuals secretly transported around the globe, often through member States' airports and aerospace, for detention without charge by the DOD and the CIA.

Afghanistan, with both DOD and CIA detention centres on its territory, was the epicentre of the US torture programme. I detailed for the Pre-Trial Chamber why these acts warrant a full-fledged investigation into war crimes and crimes against humanity by senior US officials.

As the Pre-Trial Chamber correctly found, under three successive administrations the United States has been wholly unwilling to properly investigate let alone prosecute those US senior officials who ordered, authorised and furthered the torture programme.

Unless there be confusion, it is, indeed, those who bear the greatest responsibility for the torture programme, the US civilian and military leadership as well as CIA contractors who the ICC should investigate. Not the foot soldiers nor the many facilitators, regardless of how integral their criminal contributions might have been.

As was conveyed to the Pre-Trial Chamber in victims' representations, the opening of an investigation into the US torture programme would make clear that no one is above the law, regardless of power or position. That those who bear the greatest

responsibility for serious international crimes will be held to account and will not enjoy global impunity and that all victims of serious crimes deserve to and can have their claims heard and adjudicated by an independent and impartial tribunal.

Unfortunately, the reality has proven to be the opposite. As is well documented, after the Prosecutor sought authorisation to open an investigation into the situation of Afghanistan, senior members of the current US administration, including the president himself, launched an attack against the ICC that included the threat of sanctions against the institution, the prosecution of its officials and saw the US visa for the Prosecutor revoked.

Nearly 16 months after receiving the Prosecutor's request, which is more than four times the length of consideration of any former Article 15 request, in a decision that was conspicuously light on precedent or support, the Pre-Trial Chamber denied the investigation.

This came less than two weeks after the US revoked Prosecutor's Bensouda's visa. Whether the two events are, in fact, related is unknown, but for many victims as well commentators the timing appeared more than coincidental.

Indeed, the US Secretary of State issued a statement following the Pre-Trial Chamber's decision in which he explicitly credited the US campaign against the Court for the ensuing rejection of the investigation request.

The victims do appreciate that in the face of such threats in action by the United States, the Prosecutor sought to appeal the decision and appears to continue at least for now to seek authorisation to open all three dimensions of the investigation.

Respectfully, however, the Prosecution cannot capture the full import of the denial of the investigation on victims.

The victims saw their calls for justice not only unanswered, but disregarded. As will

be addressed tomorrow, victims' submissions on the scope of the investigation as well as their unqualified support for the investigation were wholly ignored in the Pre-Trial Chamber's final assessment.

Fundamental errors of law regarding the nexus required to an armed conflict by the Pre-Trial Chamber appear to have written my clients out of any investigation.

With growing despair over his indefinite detention and little prospect for accountability and redress, Mr Al Hajj tried to commit suicide in August.

In recent weeks it has been reported that the current US president - who promised during his campaign to, quote, "Bring back a helluva lot worse than waterboarding" - selected the current head of the CIA, Gina Haspel, not despite her history of running a CIA black site, where individuals were tortured, but because of this experience. War criminals have been pardoned against the advice of military leadership.

Reoccurrence is the price paid for impunity. And impunity for those deemed too powerful to prosecute sends a message to leaders, dictators, would-be *genocidaires* everywhere that they too can get away with it.

Finally, a few brief remarks on standing and jurisdiction on behalf of Mr Al Hajj and Mr Duran before Ms Hirst and Ms Reisch address these issues in more detail.

With regard to standing, victims Al Hajj and Duran submit that their standing to appeal stems from the exercise of their unqualified and statutorily recognised procedural and substantive rights granted to them in Article 15 proceedings; the pre-trial's failure to engage at all with the substance of their representations, including in regards to the interests of justice and the direct negative impact on their fundamental rights and interests resulting from the denial of the authorisation.

They endorse the three factors put forward by the Afghan victims which, at a

minimum, posit that victims who made representations are entitled to appeal a decision pursuant to Article 15(4) when that authorisation has been denied. With regard to jurisdiction, victims Al Hajj and Duran fully endorse the conclusion that will be elaborated upon by Ms Reisch. The decision is one with regard to jurisdiction under 82(1)(a) because it divests the Prosecution of the power to exercise investigative jurisdiction as set forth in Articles 15 and 53 of the Statute and both because the specific errors regarding the scope and nexus - and because the disposition, the ruling, the denial of the Prosecutor's request to investigate - places conduct which squarely falls within the temporal, territorial and subject matter jurisdiction of the ICC as set forth in the Rome Statute beyond the reach of the Court. Thank you (Overlapping speakers)

PRESIDING JUDGE HOFMAŃSKI: [11:43:55] Sorry, Counsel, the time is, the 10 minutes is up. Of course, it's up to you to continue (Overlapping speakers)

MS GALLAGHER: [11:44:00] Thank you, and I stand ready to address questions later today.

PRESIDING JUDGE HOFMAŃSKI: [11:44:06] Thanks.

MS HIRST: [11:44:17] Your Honours, I will address some core points relating to victims' standing and then turn to the first three of the Chamber's group A questions. I will not be addressing question D in that section. It will be covered by Mr Pietrzak, and we agree with the submissions which he will make.

On the question of victims' standing, the provision which must be construed is Article 82(1) and in particular, the words "either party". The question for your Honours is whether victims can ever fall within that phrase. The difficulty appears to be that it has now become received wisdom in this Court that victims can never be described as a party to proceedings. And yet, the Statute says this nowhere. The

Rules say this nowhere. And in fact it has become normal at this Court for victims to take some procedural steps which the Statute or the Rules reserve for parties. In our filing of 19 June, which is document number 50 in this case, we gave the example of Articles 64 and 69 which relate to the conduct of trial and the submission and challenging of evidence.

But elsewhere in the text other examples can be found where the word "party" is clearly intended, we say, to encompass victims. For example, Article 70(1)(b) creates an offence where a party knowingly presents false evidence. Surely there can be no dispute that the term "party" in this context includes participating victims and their lawyers.

Your Honours, we say it cannot be right that the term "party" includes victims where it imposes obligations but can never include them where it grants standing.

In the specific context of Article 82(1) appeals the ICC case law already demonstrates that the word "party" is not limited to the Prosecution and Defence.

As already mentioned by Mr Gaynor, the Al-Bashir case allowed a State Party, Jordan, to appeal pursuant to Article 82(1). In the present proceedings the Prosecution has made submissions about the risk of genies being let out of bottles, leading to proceedings which are overwhelmed by interveners, including States. And yet in the Bashir case the Prosecution made no obligation to Jordan's standing to appeal under Article 82(1). In paragraph 39 of their response to the victims' appeal briefs, the Prosecution accepts that States can be parties with standing to appeal where this is, quote, "consistent with the broader procedural scheme of the Statute".

But they say that this approach is applicable only to States. No reason is given as to why victims' standing is not likewise to be assessed in a manner, quote, "consistent with the broader procedural scheme of the Statute." With this submission the

Prosecution implies incredibly that the Rome Statute intends to give a greater voice to States than it gives to victims.

The Jordan Referral appeal also shows that no weight can be put on the word "either" in Article 82(1). In that case the proceedings included the Prosecution and the Defence and the Chamber effectively recognised what is already clear from the language of the Rules, namely, proceedings can include more than two parties with standing to appeal.

All of this serves to show, your Honours, that there is no magic to the words "either party". The meaning of those words must be established based on their context and on the Statute's object and purpose.

And this was the approach taken by the Appeals Chamber in the Lubanga case when it held that victims can lead evidence and challenge the admissibility of evidence despite the fact that the relevant provisions in the Statute refer to "parties". That's decision 1432 in the Lubanga case.

The Chamber held that Article 69, which refers to "parties" must be understood in context, namely, together with Article 68(3) which envisages a role for victims at any stage of the proceedings considered by a Chamber to be appropriate. That's paragraph 98. And the Chamber went on to interpret the relevant provisions in light of the spirit and intention of the Statute which it said is for victims to have a role which is meaningful and not ineffectual.

And, your Honours, this goes back to Mr Gaynor's point regarding the need to interpret the Statute purposively and it demonstrates not only that this should be done, but that it has already been done by this Court in respect of victims' role.

In the present instance there is a further crucial piece of context in addition to those which existed in the Lubanga appeal.

And that is that Article 15 proceedings are the gateway to every form of participation at this Court, as Mr Gaynor has already explained.

Your Honours, the Prosecution says that recognising victims' standing would have disastrous consequences for the conduct of proceedings.

Mr Gaynor has already responded to the suggestions made about the risk of a flood of appeals. We will add one additional point and that is to say that the Prosecution's concern about the risk of parallel proceedings being launched by different participants, different parties in a proceeding, that concern is not specific and has no relation to question of victims' standing as such. The possibility for parallel appeal proceedings to be initiated exists even in a proceedings which only involves the Prosecution and the Defence. Both would be able to appeal a decision and it would be possible that one would use paragraph (d) of Article 82(1) and one would use another legal basis.

I turn now to the Chamber's questions on which we make two points. Regarding question A, we agree with the three factors which Mr Gaynor identified. These are relevant in deciding whether victims can appeal in a given instance. One of those factors is the stage of proceedings and the role which victims are given at that stage. This will be a particularly compelling factor in Article 15 proceedings given the role that Article 15 proceedings play in determining whether any further subsequent proceedings can occur at the Court. So we don't rule out the possibility of victims' standing in other phases, but we say there is no clearer example of a decision which fundamentally affects victims' interest than an Article 15(4) decision.

Some brief comments on the relationship between appellate standing and standing at first instance --

THE COURT OFFICER: [11:52:24] Counsel, you have 2 minutes left.

MS HIRST: [11:52:28] -- which is the question raised by both questions (b) and (c) in group A. And the Prosecution has today submitted that one of the reasons that they say the Prosecutor only can appeal in Article 15 proceedings is because only the Prosecutor can initiate such proceedings. However, standing to appeal is not limited to parties who could have initiated proceedings at first instance. No such limitation is found in comparative law, no such limitation is found in the Statute or the Rules. To give one very clear example, only the Prosecutor can request an arrest warrant. Nobody contests that the Defence may appeal a decision which issues one.

The Jordan Referral appeal provides another example. A State Party cannot initial Article 70 proceedings, nonetheless a State Party was permitted to appeal the resulting referral. This is not to say that first instance standing rights are irrelevant, rather to say that the role of a party at first instance is one factor which can be considered in determining whether that party subsequently has rights of appeal, as explained by Mr Gaynor.

Your Honours, the creators of this Court intended to lead the way in giving victims a real voice in international criminal proceedings. Since then two international criminal courts, the STL and the ECCC, have recognised that this real voice entails allowing victims a right to appeal in some circumstances at least.

This Court is now in danger of falling behind. Your Honours have a chance now to correct that and to ensure that just as the drafters intended, victims can be heard on the issues which matter most to them. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [11:54:28] Thank you, Ms Hirst.

Then we have Ms Reisch will conclude submissions of LRV2. Please proceed.

MS REISCH: [11:54:42] Thank you. Good morning again, Mr President, your Honours.

It is a great privilege to appear before you today. As my colleagues indicated, I will focus my remarks on your group B questions. Before I do so, I would like to tell you briefly about our client Mohammed Abdullah Saleh al-Asad, a victim of the US torture programme whom we represent by and through his surviving family and on whose behalf my colleagues and I appear today.

Our client is one of many victims of the coordinated global torture and extraordinary rendition programme run by the United States with a hub or, as Ms Gallagher said, its epicentre in Afghanistan, which targeted individuals suspected, often wrongfully, as in the case of our client, of ties to Al Qaeda, the Taliban or other groups. Our client's horrific experience of torture and secret incommunicado detention is emblematic of why this calculated, systematic abuse should be the subject of a criminal investigation by this Court.

In December 2003 Mr al-Asad, a Yemeni national and successful businessman living in Tanzania, was seized from his home, in front of his family, by Tanzanian officials and secretly flown to Djibouti. Djibouti, a State Party to the Rome Statute, held our client incommunicado for two weeks in one of their local facilities, where he was interrogated by an American official and threatened with death. He was then handed over to US custody on the airport tarmac where he was subjected to capture shock, a brutal procedure constituting torture that was systematically deployed by the CIA to foster what it termed "learned helplessness" a sense of total subjection to US control. Mr al-Asad was stripped naked, sexually assaulted, diapered, chained, and strapped down to the floor of an aeroplane. He was then flown to Afghanistan where he was held incommunicado in three different facilities.

While there, his American captors subjected him to sensory deprivation and dietary manipulation, shackled him in painful positions, prevented him from sleeping, held

him in isolation, and blocked him from sunlight. After a year and a half, he was released to Yemeni custody.

Since then Mr al-Asad and his family have tried in vain to seek justice. Tragically Mr al-Asad passed away three years ago.

Our client's surviving family, like many of the victims represented here today, has turned to the ICC as a last resort after unsuccessfully seeking accountability through numerous channels for more than a dozen years. The Pre-Trial Chamber's decision shuts the door of this Court on our client and other victims similarly situated by erroneously finding that the crimes which they suffered fall outside of the Court's jurisdiction and by completely foreclosing any investigation, let alone prosecution.

Turning now to your questions, all of which we answer in the affirmative, the LRVs submit that the Impugned Decision is unequivocally a decision with respect to jurisdiction within the meaning of Article 82(1)(a).

The Impugned Decision satisfies the standard articulated in this Chamber's 2011 decision in the Kenya appeal because the Pre-Trial Chamber, as Mr Gaynor said, issued a ruling specifically on the jurisdiction of the Court.

First, it is axiomatic that a decision that denies authorisation to exercise jurisdiction is by nature a decision with respect to jurisdiction. An Article 15(4) decision determines whether the Prosecutor may exercise jurisdiction pursuant to Article 13(c) and, if so, confirms the scope of that exercise. In no way can such a decision be said to have merely an indirect or tangential link to jurisdiction.

Second, here the Pre-Trial Chamber made express jurisdictional findings which it set out under headings of jurisdiction *ratione loci* and *ratione materiae*.

PRESIDING JUDGE HOFMAŃSKI: [11:58:50] Excuse me, Counsel. Please slow down a little.

MS REISCH: [11:58:58] Thank you. Excuse me.

PRESIDING JUDGE HOFMAŃSKI: Thank you.

MS REISCH: [11:59:00] These findings are unequivocally jurisdictional. As Mr Gaynor mentioned, they erroneously and prematurely exclude from the Court's jurisdiction certain categories of crimes and victims encompassed by the Prosecutor's request based on concepts set out in Articles 5 and 12 of the Statute.

For example, in paragraph 55 of the decision, the Pre-Trial Chamber states in no uncertain terms, and I quote, "... the alleged war crimes whose victims were captured outside Afghanistan fall out of the Court's jurisdiction ..." End quote. This ruling placed many of the crimes committed against victims of the US torture programme represented by the LRVs outside any investigation or eventual prosecution.

These specific jurisdictional findings are not merely dicta or unrelated to the operative part of the decision. As Mr Guariglia said, they were necessary steps to reach the analysis of the interests of justice, but they were not merely steps. As even the Prosecution acknowledges, they materially affected and are inextricably linked to the Pre-Trial Chamber's understanding of the scope of the investigation and its subsequent appreciation of whether that investigation would serve the interests of justice.

The operative part of a decision and its nature are defined by the substance of the issue determined, not the Chamber's subjective characterisation of its disposition.

Here, the substance of the decision and indeed of the interests of justice analysis is the refusal to authorise the Prosecutor's exercise of jurisdiction under Article 13(c), despite having found the relevant requirements were met as regards to both jurisdiction and admissibility.

Moreover, if this Chamber were to reverse or vacate the Pre-Trial Chamber's interests

of justice analysis, as all appellants argue it should, these erroneous determinations with respect to jurisdiction would stand unless corrected.

Concluding that the decision was one with respect to jurisdiction is entirely consistent with prior jurisprudence of this Chamber. First, the decision is fundamentally different in nature from other decisions that this Chamber has held to be too indirectly or tangentially linked to admissibility or jurisdiction. As elaborated in footnote 68 of our September 30 appeal brief, those other decisions involved matters falling outside of Part 2 of the Statute, ranging from a State's request for assistance in its investigation to the postponement of surrender and the Court's competency to release witnesses.

The Impugned Decision here, which rules on the permitted scope of the investigation and excludes per se certain alleged criminal conduct and categories of victims, is more like, we submit, the 26 October 2011 Mbarushimana and the 22 March 2016 Ntaganda appeals. In those appeals this Chamber recognised as jurisdictional in nature a decision regarding the scope of a situation referred to the Court by a State Party, an issue that goes to the exercise of jurisdiction under Article 13, and a decision regarding the exclusion of categories of acts and victims from the ambit of the Court or its subject matter jurisdiction.

The 6 November 2015 Comoros appeal decision does not require a contrary result here for several reasons.

THE COURT OFFICER: [12:02:51] Counsel, you have 2 minutes left.

MS REISCH: [12:02:55] Thank you.

First, by its plain language, the decision appealed in Comoros only requested the Prosecutor reconsider whether there was a reasonable basis to open an investigation. It did not make any determination about jurisdiction or admissibility.

Second, in evaluating the nature of the decision at issue in Comoros the Appeals Chamber looked to the power that the Pre-Trial Chamber exercised under the Statute. Doing so highlights the difference between that decision and the decision at issue here. Under Article 53(a), a Pre-Trial Chamber is limited to requesting that the Prosecutor reconsider her decision. It does not have authority to make its own decision. In contrast, under 15(4) the Pre-Trial Chamber is expressly mandated to decide whether to grant authorisation.

Third, the Pre-Trial Chamber decision at issue in the Comoros appeal was explicitly not the last word on the matter. It was a request to the Prosecutor to take further action. In contrast, the decision here purports to be final as to whether or not the Prosecution may exercise jurisdiction to investigate the facts put forward in its request. Article 15(5) does not change that. A subsequent request under Article 15(5), based on new facts or evidence, would be an entirely new and separate request from that which the Pre-Trial Chamber disposed of.

Moreover, the Prosecutor has expressly said in paragraph 18 of her October 22 response to victims' appeal briefs, quote, "...if the Pre-Trial Chamber had ruled certain matters to be out of the Court's jurisdiction, then it would manifestly not be proper for the Prosecutor to return to that same chamber with those same matters." That is precisely what the Pre-Trial Chamber did here with respect to crimes committed against our clients and others who were captured outside of Afghanistan.

Finally --

PRESIDING JUDGE HOFMAŃSKI: [12:04:55] Excuse me, Counsel, to interrupt you. Please conclude. Your time is up.

MS REISCH: [12:05:02] Thank you. With Mr President's permission, I'm concluding on your final question, turning to question C, the Pre-Trial Chamber's

limitation of the scope of the investigation is a decision with respect to jurisdiction. Confining the investigation to only those incidents specifically included in the Prosecutor's request and incidents closely linked to them not only defeats the very purpose of an investigation, but also places criminal conduct which squarely falls under the Statute beyond the reach of the Prosecutor and, by extension, the Court. Circumscribing the Prosecutor's investigative jurisdiction in this way is most certainly a decision with respect to jurisdiction and thus appealable under Article 82(1)(a). Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:05:45] Thank you very much, Counsel. This concludes submissions of LRV group 2.

Then we will proceed with submissions of LRV group 3 and there are two speakers. Please proceed. Of course it's up to you how you share the time allocated to LRV3. Ms Hollander, please.

MS HOLLANDER: [12:06:29] Mr President, your Honours, I will begin talking about the facts involving our client and then Mr Pietrzak will continue.

I met Abd al-Rahim al-Nashiri in 2008 in Guantanamo Bay prison. I was his first lawyer and the first to visit him since his capture six years earlier in 2002.

On that initial visit he told me about the torture he had received. I was shocked. But everything he says is classified so I could not repeat it, not even his memories. When we finally received the 500-page executive summary of the senate armed services committee report many years later, I was able to tell some of it publicly. I still cannot and will not confirm or deny where he was because my country has kept the names of those countries classified. Therefore, and because I have a security clearance, I must maintain that.

I will use the code names for the countries and I can only discuss the torture that the

US has already disclosed, but that torture that I can tell you here today is horrendous. From the beginning in 2002 when Mr al-Nashiri was seized in Dubai, he was not allowed to sleep, was regularly beaten and hung by his hands. After one month he was transferred to CIA custody and taken to a location code named Cobalt. In transit to Cobalt ice was put down his shirt to use the travel time to induce anxiety and hopelessness. The torture began with the forced kidnapping and the utter terror of not knowing where he was going or what would happen next. Virtually no documentation exists of Mr al-Nashiri's time in Cobalt. However, we know that it operated in total darkness and the guards wore headlamps. The prisoners were subjected to loud continuous noise, total isolation and dietary manipulation. The prison was essentially a dungeon.

According to one CIA interrogator, whose statements have been declassified, the prisoners at Cobalt, and I quote, "literally looked like [dogs] that had been kennelled. When doors to their cells were opened, they cowered." The prisoners were fed on an alternating schedule, one meal one day, two meals another day. They were kept naked, shackled to the wall, and given buckets for their waste. On one occasion Mr Nashiri was forced to keep his hands on the wall and not given food for three days. To induce sleep deprivation, the prisoners were shackled to a bar on the ceiling, forcing them to stand with their arms above their heads.

One of the interrogation methods was water dousing where a prisoner is doused with cold water, rolled in a carpet, then soaked in water to induce sophistication.

According to what Mr Nashiri has said that is public, he was kept continually naked and the temperature was kept, in his words, as cold as ice cream. But that was not enough. Again, he was shackled, hooded and taken on another aeroplane, adding to his fear and uncertainty and increasing what the government wanted was his

helplessness.

In his next prison, code named Cat's Eye, we know that Mr Nashiri was waterboarded. As far as we know, only three prisoners were waterboarded. The current CIA head, Gina Haspel, destroyed all the tapes of the torture at Cat's Eye. Being waterboarded involves being tied to a slanted table with his feet elevated. A rag was placed over his forehead and eyes, water poured into his mouth and nose, inducing choking and water aspiration. The rag was then lowered, sophisticating him with water still in his throat and sinuses. Eventually the rag was lifted, allowing him to take three or four breaths and then the procedure began again. To prevent his untimely death, a doctor was ordered to be in attendance to resuscitate him if necessary.

But that too was not enough. Suddenly, without warning, he was again shackled, hooded and transported to his next place of detention code named Blue. There he was kept continuously hooded, shackled and naked. He was regularly strung up on the wall overnight forced into stress positions, prompting a physician's assistant to express concerns that his arms might be dislocated.

The CIA headquarters sent an untrained, unqualified, uncertified, and unapproved officer to be his next interrogator. This unqualified interrogator menaced Mr al-Nashiri with a handgun by racking the handgun, in other words, chambering a bullet close to his head while he remained hooded. He also threatened to, quote, "get your mother in there" in an Arabic dialect, implying that he was from a country which was common to rape family members in front of prisoner. These threats were coupled with forced bathing with a wire brush to abrade his skin. There is also evidence that Mr Nashiri was in fact forcibly sodomised, possibly under the pretext of a cavity search.

Although the government of the United States later admitted that some of this unqualified interrogator's methods were improper, he was never prosecuted.

Mr al-Nashiri was later transferred under the same horrifying conditions to the prison code named Bright Light or Black. There he was held in a prison basement composed of six prefabricated cells on springs to keep him and the other prisoners slightly off balance and to disorient him. During his stay in Bright Light he was subjected to torture similar to the scheme in Blue. In addition, he was subjected to prolonged stress standing positions, including his hands being shackled to the ceiling for up to three days. He was confined in a very small box where he had to stand for several hours and then beaten by the use of the walling technique. The walling technique involves putting a towel around his neck and while he is hooded so he doesn't know when it will happen, suddenly swinging him into a wall that has been fabricated to be flexible. Throughout the detention he was also exposed to continuous sleep deprivation, cold and forced nudity.

He was transported to yet another country code named Violet. Little is known about the specific conditions or ill-treatment there or at the other prisons where he was held during this time. However, at a minimum we know that Mr al-Nashiri was held in each isolation -- in each in isolation and by that time had suffered severe psychological and physical ill-treatment after having been imprisoned for over three years, loaded into numerous aeroplanes, transported like a package, bound and hooded. Even animals are not transported in these conditions.

And now we know that not one shred of actionable intelligence was learned from the torture and interrogation of any of the prisoners held in the Black sites all over the world. Not one piece of actionable intelligence. No one from any country ever stepped in to stop the torture. No country has investigated what happened or

sought to prosecute anyone involved in or knowing about the torture.

No country stepped in to stop Mr al-Nashiri from being transported to the Guantanamo Bay prison where Mr al-Nashiri is still held in solitary confinement and has yet to have a trial now almost 18 years later.

Yet the torture, imprisonment, and deprivation of rights continues to this day. He has been charged with numerous crimes. He was first charged in 2008. He faces the death penalty if he is convicted. In many ways his torture has not ever ended.

Thank you. I will now turn this over to Mr Pietrzak to continue our argument.

PRESIDING JUDGE HOFMAŃSKI: [12:16:01] Thank you very much, Ms Hollander. I understand, Mr Pietrzak, you have still 15 minutes to address the Court. Please proceed.

MR PIETRZAK: [12:16:08] Thank you, Mr President.

Your Honours, it is demonstrative of the obstacles that Mr al-Nashiri faces in seeking justice that my esteemed colleague, Ms Nancy Hollander is forbidden by her own government to say the names of these countries in which he was detained, even after they have been expressly named in European Court of Human Rights judgments and many public reports.

These detention facilities, sometimes referred to as Black sites, operated with the acquiescence and secret connivance of these States which Ms Hollander cannot name.

In these Black sites, prisoners suspected of terrorism, among them Mr al-Nashiri, were subjected to brutal interrogation techniques developed by the CIA, under what is euphemistically referred to as the enhanced interrogation programme or enhanced interrogation techniques programme, and also to other forms of torture, unauthorised even by this enhanced interrogation techniques programme.

Mr al-Nashiri was captured in late October 2002 in Dubai. He was then transferred

to CIA custody in Dubai by November 2002. Since his abduction, Mr al-Nashiri was imprisoned in detention facilities in the following States.

I am fortunate enough to be in a different position than Ms Hollander and can actually name these States.

First of all, Afghanistan. Then Bangkok, Thailand. Then Stare Kiejkuty, an intelligence base in Poland. Next, Rabat in Morocco. Then briefly to Guantanamo Bay military prison from where he was flown to Bucharest in Romania and then Antaviliai in Lithuania.

From there, he was taken to Afghanistan and as of 6 September 2006, Mr al-Nashiri remains a prisoner in Guantanamo Bay military prison. All these States, including democracies such as Poland, Lithuania, Romania and the United States, have the duty to effectively investigate these crimes.

Yet, none have done so.

This is why Mr al-Nashiri welcomed and supported the Prosecutor's request to authorise an investigation of the crimes committed in the context of the situation in Afghanistan and wanted very much to play a relevant role in this investigation.

Mr al-Nashiri is undeniably a victim of crimes which fall under this Court's jurisdiction. He is still suffering from the consequences of these crimes today. He remains imprisoned in Guantanamo Bay without access to any effective remedy to seek justice for what happened to him since he was abducted in October 2002.

The ICC has been established specifically for investigating and prosecuting situations like this one, to prosecute the most grievous crimes which no State wishes or is able to pursue. This Court has been created also with the objective to give victims such as Mr al-Nashiri greater recognition through the opportunity to fulfil the procedural aspect of their rights and freedoms by participating meaningfully in proceedings

aimed at establishing the truth of what happened to them. To give victims such as Mr al-Nashiri a voice in this process, to vindicate their rights by giving a public platform to their trauma, to their stories and ultimately by providing the prospect of accountability of the perpetrators of these grievous crimes.

The fulfilment of these rights in ICC proceedings requires the acknowledgment of Mr al-Nashiri, first as a victim, also as a party to the proceedings under Article 15, and of his legal standing and ability to appeal this specific Impugned Decision in this context.

The Pre-Trial Chamber's decision effectively deprives this Court of the possibility to exercise its jurisdiction over the crimes committed in the context of the situation in Afghanistan. As a result, the Impugned Decision deprives the victims of those crimes, including Mr al-Nashiri, of their right to access justice, of all the procedural rights and possibilities that the Rome Statute intends for them to have, the possibility to participate in proceedings, to present their views and concerns, and ultimately to obtain redress and reparations if the perpetrators are identified, prosecuted and convicted.

But the first and sine qua non condition for any of these rights to become real and effective, not just illusory, is that this investigation is authorised.

As regards the status of victims as parties under Article 15 proceedings and their right to appeal the Pre-Trial Chamber's decision, we fully support the arguments made in our earlier written joint filings and by our esteemed colleagues -- by our esteemed colleagues before the Court today.

I cannot have or leave without comment one term used today by Mr Guariglia on behalf of the Office of the Prosecutor. Mr Guariglia used the term "technical points" to refer to the issue of the procedural standing of victims under Article 15

proceedings and the rights of victims as parties to appeal the Impugned Decision. This comment, this term illustrates exactly why victims require separate representation and the individual right to submit appeals on their own behalf. What the Office of the Prosecutor refers to as a technical point lies at the heart of the interests and rights of victims.

There is no issue less technical today from the perspective of victims, such as Mr Abd al-Rahim al-Nashiri, whose very suffering is the reason why we are all here, why the Office of the Prosecutor indeed sought authorisation for an investigation. It is this difference of optics that shows that the Office of the Prosecutor is not always in line with the justified interests of victims and in Article 15 proceedings.

I would like to now present several comments on the irrelevance of the fact that the Rome Statute does not contain a provision which would explicitly state that victims have the right to appeal a decision of the Pre-Trial Chamber pursuant to Article 15(4) of the Statute.

Giving victims even the widest range of rights in proceedings at a later stage before the International Criminal Court, while depriving them of the possibility of securing the rights at this stage, would make victim participation before the ICC illusory. There is no point in granting a wide range of rights if the victim does not have the possibility of appealing a decision which ends the case before it has even started.

According to Article 21 of the Statute, it is not only provisions of the Court's core legal text, but also international treaties, recognised human rights under *jus cogens*, and relevant national state laws which should be taken into account in making a decision regarding victims' standing to appeal the Impugned Decision.

Many of the criminal law jurisdictions in the world, including those relevant to this case, vest victims with rights in criminal proceedings. Most notably Poland,

Lithuania and Romania all grant victims the right to appeal a decision in criminal proceedings which results in the refusal to open or close an investigation.

The same principles underlie the creation of the ICC. I would like to focus in particular on human rights standards referred to in Article 21 of the Statute. All human rights and fundamental freedoms enshrined in international law, treaties and conventions and recognised as *jus cogens* have a material and a procedural aspect.

The crimes committed against Mr al-Nashiri constituted a violation of the substantive aspects of many of his rights and freedoms, including the right to life, personal safety and health, the prohibition of torture, his personal liberty, his fair trial rights, the right to respect of personal life and privacy, religious freedom and, most notably, the right to an effective remedy with respect to all of these violations.

Each of these rights also has a procedural aspect which requires that effective legal and procedural mechanisms be in place to allow for protection against the violations and, if the substantive violations have already occurred, that effective measures allow for redress, rehabilitation and accountability. This must include access to an effective criminal investigation and an effective procedural remedy, such as an appeal against a decision not to investigate.

The European Court of Human Rights has repeatedly stated, including in the case of Mr al-Nashiri, that victims of violations of rights to life or the prohibition of torture have the right to a, I quote, "... thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure ..."

Since none of the States which played a part in the crimes committed against Mr al-Nashiri have conducted an effective investigation - some only creating a facade of an investigation, while others have outright refused to investigate - the procedural

aspects of his rights and freedoms have not been respected.

The vindication of these rights and freedoms requires that the ICC, acting within the boundaries of the complementarity principle, authorise the investigation.

Now where a decision entirely precludes an investigation by the court of last resort, such as this one, and when it does so contrary to victims' interests and based on interests of justice considerations, human rights law requires affording these victims standing to require -- to request review of such a decision and assert their rights through an appeal.

In these proceedings under Article 15 in which victims, apart from submitting their representations, had no real ability to access proceedings up until the moment the Impugned Decision was issued, the only opportunity for them to materialise the right to, I quote again the European Court of Human Rights, "... a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access ... to the investigatory procedure ..." is to appeal and to request a review of the Impugned Decision.

Your Honours, I fully support the arguments made by my esteemed colleagues earlier today regarding the issue of jurisdiction and will not repeat these arguments.

I would just like to summarise that issue by saying that, first, the decision is of a jurisdictional nature because it makes findings concerning the Court's territorial, material and temporal jurisdiction over the alleged crimes in the Prosecutor's request; secondly, the decision makes the determination on whether the Court and the Prosecutor may exercise jurisdiction over incidents and crimes referred to in the Prosecutor's request.

Mr President, your Honours, in conclusion, to my knowledge this is the first time the International Criminal Court is put in a situation in which the Pre-Trial Chamber

rejected the request to authorise an investigation at the *proprio motu* initiative of the Prosecutor. This is the first time that such a decision of the Pre-Trial Chamber is based on a completely new assessment of interests of justice, inconsistent with the Court's previous practice.

This assessment of the interests of justice was conducted with complete disregard for the justified interests and views of victims who expressed support for the investigation, and this is the first time that, acting independently from the Prosecutor, victims have requested a review of a decision of the Pre-Trial Chamber, rejecting the Prosecutor's request to authorise an investigation.

This is an opportunity for the Court to acknowledge the trauma of Mr al-Nashiri and other victims to vindicate their rights and freedoms by allowing them to appeal.

This is in line with the principles on which the International Criminal Court was established, to put an end to impunity for the most grievous crimes and to give recognition to the victims of these crimes. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:31:24] Thank you, Counsel.

Counsel from the Office of Public Counsel for Victims, you may now address the Court. Your 15 minutes starts now.

MS MASSIDDA: [12:31:45] Thank you very much, your Honour. Respectfully, in the conduct of the proceedings, my learned colleague representing the border - it's a very long name, sorry - should go first, but I will be ready to start if you consider changing the order.

(Appeals Chamber confers)

MS MASSIDDA: [12:32:23] In the scheduling order, your Honour, at page 5 you indicate that the Cross Border Victims should speak after Legal Representatives of Victims number 3 and that the Office of Public Counsel for Victims will immediately

follow. But if you consider changing the order, I'm ready to oblige.

PRESIDING JUDGE HOFMAŃSKI: [12:32:46] Thank you, Counsel. Of course we will keep the order.

Then if you are ready, please, the representative of the Cross Border Victims, you have the floor for 15 minutes.

MR POWLES: [12:32:58] Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [12:33:00] Please proceed. Excuse me for the misunderstanding.

MR POWLES: [12:33:03] Not at all. Thank you very much, Mr President and your Honours. And thank you very much to Ms Massidda for pointing that out.

Mr President, your Honours, we appear today on behalf of a group of victims from Pakistan who we say are the victims of crimes within the jurisdiction of this Court, the Cross Border Victims.

In February 2014 the Cross Border Victims submitted a substantial dossier to the Office of the Prosecutor which contained clear evidence of serious crimes within the jurisdiction of the ICC committed in Pakistan but launched from Afghanistan.

The evidence was gathered by two well respected and highly regarded NGOs: Reprieve, based in the United Kingdom, and the Foundation for Human Rights, a Pakistani human rights NGO based in Islamabad.

The evidence presented to the OTP and the human suffering detailed therein, no doubt like much of the evidence that this Court considers day in day out, is simply heartbreaking.

If I may, I will very briefly highlight some of the most compelling aspects of that evidence.

It is estimated that from 2004 to 2013, two and a half to three and a half thousand

people were killed in Pakistan as a result of aerial bombings launched from Afghanistan. Between 416 and 951 of those were civilians. In one incident alone in 2006, 81 civilians were killed in a single drone strike at a school in Chinagi. The Pakistan government recorded 80 children and one adult, presumably their teacher, as dead.

We make submissions today on behalf of 32 victims from eight separate drone strikes in which 73 civilians were killed or injured. They are, we respectfully submit, representative of many hundreds of other civilians in Pakistan killed or injured by cross-border air strikes launched from Afghanistan into Pakistan.

The dossier we provided to the OTP ran to around 300 pages, consisting of witness statements, NGO reports, press reports from reputable agencies, government documents, including statistics prepared by the government of Pakistan, and detailed submissions on the legal basis for the jurisdiction of this Court.

We respectfully submit that the evidence gathered and provided to the OTP makes crystal clear that the requirements for Article 53(1) of the Statute were satisfied: There was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed; the case would be admissible under Article 17; and the gravity of the crimes and the interests of victims were such that an investigation would plainly be in the interests of justice.

On the conclusion of negotiations on the Statute for this Court in Rome in July 1998, the late Kofi Annan, the then Secretary-General of the United Nations, described the establishment of the International Criminal Court as "a gift of hope for future generations, and a giant step forward in the march towards universal human rights and the rule of law".

To date, the victims we represent have been unable to secure any form of justice in

any domestic jurisdiction around the world. This honourable Court represents their best and, in many ways, their only hope of seeing justice done.

So it is for that reason that we on their behalf humbly turn to the OTP and to this honourable Appeals Chamber in the hope of persuading you of the need for a full and proper investigation into the crimes we say they are the victim of.

And we say persuade the OTP because despite having submitted such very detailed and comprehensive evidence to them in 2014, the OTP did not include or mention our victim clients in its November 2017 request for authorisation from the Pre-Trial Chamber.

In our written submissions in this appeal filed on 15 November 2019 we expressed genuine gratitude on behalf of the Cross Border Victims to the OTP for its first public acknowledgment of them. On 19 July 2019 in its reply to our response to the OTP's request for leave to appeal, the OTP mentioned our clients in these terms. They stated that the interests of the Cross Border Victims are protected and that the Article 15(3) requests for authorisation was filed on the basis that it could potentially include allegations falling within its geographical, temporal or other material parameters and this could potentially include the allegations by the Cross Border Victims if sufficiently grave, well-founded and within the jurisdiction of the Court.

Again, while genuinely grateful for this indication by the OTP, we respectfully submit on behalf of our victim clients that their situation perfectly illustrates first just why victims should, in and of their own right, be considered parties under Article 15 of the Statute; and second, just why victims should, in and of their own right, be entitled to appeal pursuant to Article 15(4) of the Statute.

Because, as I stand here today, it is still not clear what the OTP's attitude is as to whether it can, should or indeed will investigate the crimes we say our clients are

victim of. The OTP have only indicated that the crimes our clients have suffered potentially fall for consideration as part of the OTP's intended investigation and then only if sufficiently grave.

And in the same way that the OTP's attitude towards our victim clients is still unknown today, it was certainly, certainly not known at the time of the OTP request for authorisation back in November 2017.

As a result and by not including a substantial group of victims within that request for authorisation, the OTP leave a multiple number of questions unanswered:

Is it accepted that the crimes that they have sustained fall within the jurisdiction of this Court?

Is it accepted that the matter is admissible pursuant to Article 17?

Is it accepted that the crimes are sufficiently grave?

And do the OTP believe it to be in the interests of justice for the crimes to be investigated? Or perhaps more to point, has the OTP concluded that an investigation would not serve the interests of justice pursuant to Article 53(1)(c)?

By remaining silent about a particular category of victims, the OTP effectively deprives the Pre-Trial Chamber from playing the supervisory role expressly contemplated by Article 15 of the Statute.

That situation is ameliorated to some extent by Article 15(3) of the Statute, which, with the express provision that where the Prosecutor has submitted a request for authorisation, victims may make representations to the Pre-Trial Chamber.

We respectfully submit that one of the reasons why victims must be able to make such representations at the time of any request for authorisation is to remedy and/or address any shortcomings in the request for authorisation.

And that is precisely what the Cross Border Victims did in response to the OTP's

November 2017 request for the authorisation. On 31 January 2018 the Cross Border Victims made submissions via the VPRS to the Pre-Trial Chamber, which asked the Pre-Trial Chamber to ask the Prosecutor to confirm, one, whether the allegations had been considered; two, the OTP's position in respect of them, including; three, whether the OTP had formed a view on whether the allegations fell inside or outside the jurisdiction of this Court.

The Pre-Trial Chamber was expressly asked to play a supervisory role by the Cross Border Victims. At paragraph 28 of the January 2018 submissions we said, "The self-evident reason for victims being able to make representations to the Pre-Trial Chamber under Article 15(3) must be so that the Pre-Trial Chamber can pass some comment on the scope of the Prosecutor's request and her assessment of whether the victims are victims of crimes within the jurisdiction of this Court. In order to perform this function (and to assess whether the Prosecutor has discharged her duties under Article 15) it is of course necessary for the Prosecutor to explain her position adequately." And that is what we ask the Pre-Trial Chamber to address.

So the Cross Border Victims made clear representations to the VPRS in the form of submissions to the Pre-Trial Chamber regarding their concerns about the adequacy of the OTP's request for authorisation, specifically the OTP's failure to include details of the crimes they had sustained within their request. This we respectfully submit effectively made them a party to the proceedings before the Pre-Trial Chamber.

And as a party to those proceedings, we respectfully say unequivocally the Cross Border Victims, like the OTP, were permitted to appeal as a party pursuant to Article 82(1).

In the interests of time, we adopt and support the submissions made by other victim groups on whether a decision under Article 15(4) is a decision with respect to

jurisdiction, but plainly issues of jurisdiction did arise via the submissions that we made to the Pre-Trial Chamber, so therefore, issues of jurisdiction plainly arose within the context of this case.

We similarly adopt and support the submissions made on whether Article 21(3) and internationally recognised human rights provides victims with the freestanding right to appeal.

But what we do say, because of the OTP's failure to even acknowledge our victim clients, we respectfully say that their position is even starker perhaps than those of other victim groups because they, unlike the other victims groups, have not got their interests being taken into account in any way, shape or form by the Office of the Prosecutor.

As already prefaced in our written submissions of 15 November of this year, the Cross Border Victims received no communication --

THE COURT OFFICER: [12:45:09] Excuse me, Counsel, you have 3 minutes left.

MR POWLES: [12:45:13] I'm very grateful. Thank you very much.

The Cross Border Victims have received no communication or indication from the OTP, either publicly or privately, as to the OTP's attitude as to the material they have provided.

And again, while grateful to the OTP for the OTP's indication that the crimes they have sustained might potentially fall within the scope of any investigation, the OTP, even as of today, has not indicated a definitive view, a definitive view as to whether or not the crimes sustained by the Cross Border Victims will be investigated as part of any subsequent investigation if this appeal is successful. We say that cannot be right or fair.

We are grateful to the Legal Representatives of the Afghan victims, Mr Gaynor and

Ms van Hooydonk, for drawing the Appeals Chamber's attention at paragraphs 42 to 43 in their consolidated response to the observations filed by the Cross Border Victims and *amici curiae*, they draw the Appeals Chamber's attention to the OTP's own Strategic Plan for 2019-2021. In that Strategic Plan the OTP recognised at paragraph 47 the need, and I quote, "... to effectively communicate with its stakeholders, with the victims and effective communities, and the general public. The Office recognises the importance of timely and clear communications so as to maximise transparency and ensure that its stakeholders", including the victims and affected communities "and the [general] public have an accurate and up-to-date picture of the Office's actions and decisions," and decisions "including the progress of its investigations and prosecutions when appropriate."

For whatever reason, that did not occur with regards to our Cross Border Victims. Not only were they not referred to or included in the OTP's November 2017 request, but nor have they received any indication from the OTP as to whether it intends to pick up the cudgels and fight on their behalf.

In the absence of any such indication, we respectfully submit that they must have standing with a clear right of appeal in and of their own right. Natural justice demands no more, but certainly no less. Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [12:47:50] Thank you, Counsel, for your intervention.

Then the counsel for the Office of Public Counsel for Victims, you have 15 minutes. Please proceed.

MS MASSIDDA: [12:48:03] Thank you very much, your Honour.

Mr President, your Honours, the Office of Public Counsel for Victims appears today in these proceedings to represent the general interests of victims. We advocate for

an interpretation of the Court's legal framework that takes fully into account the rights of victims to truth and justice and bridges any gap in the pursuit of accountability.

Having filed extensive written submissions before both the Pre-Trial Chamber and the Appeals Chamber, I shall focus today only on the key arguments arising from the question posed by the Chamber. I will do so in an organic way, rather than addressing the questions sequentially.

Starting with the question in group A on the victims' standing to bring an appeal under Article 82(1)(a) of the Statute, your Honours will recall the Office's longstanding position that in appropriate circumstances victims may fall within the ambit of Article 82(1), as recalled in our submission number 93 at paragraph 28.

The Appeals Chamber is only called at this juncture to rule on the victims' standing to appeal in relation to the Impugned Decision denying authorisation to open an investigation pursuant to Article 15(4).

In our submission, the particular characteristics of Article 15 proceedings mean that the recognition of victims' standing to appeal is justified, and indeed required, *a fortiori* in this particular context compared to other phases of criminal proceedings.

In this respect, we concur with submissions advanced by other participants to the effect that Article 15 proceedings are exceptional in nature. This is clear from the special role and status vested in victims in the context of Article 15(4) proceedings by the Statute, including their rights to make representations expressly recognised by Article 15(3).

The Court's legal framework clearly indicates that the role of those victims who engage with the Court by making representations does not cease once such representations are submitted.

Rule 50(4) of the Rules of Procedure and Evidence empowers the Pre-Trial Chamber to request additional information from any of the victims who have made representations as well as from the Prosecutor and, if appropriate, to hold a hearing. Further, Rule 50(5) requires the Pre-Trial Chamber to give notice of its authorisation decision to victims who have made representations. Victims may therefore qualify as parties to those proceedings for all intents and purposes, justifying the recognition of a standing to appeal.

It would be paradoxical for the Statute and the Rules to grant victims a specific place in proceedings under Article 15(4) with an independent voice and role, but then deprive them of any recourse against decisions resulting from said proceedings, leaving them entirely dependent on the Prosecutor's decision whether to file an appeal or not.

In addition to the specific participatory rights granted to victims by the Statute in the context of Article 15 proceedings, there are, in our submission, at least three other grounds rendering the present proceedings exceptional, and therefore warranting the recognition of victims' standing to appeal in this context at the very least.

First, proceedings under Article 15(4) such as the present one do not involve any parties for the purposes of Article 82(1) other than the Prosecution and the victims who made representations. The reference to "either party" in Article 82(1) should therefore be read as encompassing both.

Second, the impact of decisions denying authorisation on victims' rights is exceptionally significant, arguably more than any other decision adopted by this Court. Indeed, the interest in seeing that the Court is seised with a matter and that an investigation proceeds has been regarded as the most essential of all victims' interests. Decisions denying authorisation preclude the opening of an entire

investigation with dramatic and pervasive effects on the rights to truth, justice and reparation of all victims of a potential situation. It is therefore particularly important to recognise the victims' standing to appeal in this context.

Third, in the present case, unlike other decisions adopted under Article 15(4) to date, the Pre-Trial Chamber's interpretation on the interests of victims formed a key element of the *ratio decidendi* of Impugned Decision. The Pre-Trial Chamber denied authorisations on the basis that the anticipated challenges the investigator would face made it, as stated in paragraph 96 of Impugned Decision, and I quote, "... unlikely that pursuing an investigation would result in meeting the objectives listed by victims favoring the investigation, or otherwise positively contributing to it." End of quote.

In these very specific circumstances, it is fundamentally important for the victims who made representations under Article 15(3) to be granted standing to challenge a decision purportedly adopted in pursuance of their interest, but effectively contrary to the representations they made.

The office and some of the *amici* in their written observations submitted arguments to the effect that the recognition victims' standing to appeal would be in line with international human rights law and with internationally recognised rights to truth, justice and reparation.

I will not repeat said submissions. Suffice it to mention that international human rights law provides that failure to carry out a prompt, impartial and effective investigation amounts to a violation of the victims' human rights. The European Court of Human Rights has consistently recognised that the possibility for victims, I quote, of "appealing to a court against the investigating authorities' refusal to open criminal proceedings," constitutes a "substantial safeguard against the arbitrary exercise of power by the investigating authority".

The reference for the record is application number 59334/00, 18 January 2007, paragraph 139.

The European Union directive on victims' rights of 2012 specifically provides in its article 11 that victims of serious crimes be granted the right to a review of a decision not to prosecute, be it a decision taken by prosecutors or by investigative judges.

The recognitions of the victims' standing to appeal in the present proceedings would be consistent with international human rights law and with Article 21(3) of the Statute. It would also be in line with the general framework of the Statute.

We disagree with the OTP's submissions that recognising victims' standing to appeal in this context would require a statutory amendment. The absence of a specific statutory procedure for victims to challenge decisions denying authorisation is not per se determinative. For instance, as already recalled, the absence of a dedicated provision in the Statute empowering affected States to appeal decisions under Article 87(7) did not preclude the Appeals Chamber from entertaining the appeal filed by Jordan in the Al-Bashir case.

Further, while the general principle of victims' participation in the proceedings are enshrined in the Statute, the modalities of implementation of said rights have largely been left for jurisprudential development.

From a jurisprudence perspective, I would like to note the evolving practice before this Court and before other international fora, pointing towards the increased recognition of victims' prerogatives and participatory rights in the context of international criminal proceedings, including on appeal. It was recalled also by Ms Hirst early this morning.

This Appeals Chamber has also been increasingly willing to entertain appeals from entities other than those traditionally considered as parties under 82(1) of the Statute.

Recognising the victims' standing to appeal in the present circumstances would be fully consistent with these developments.

As a final note on this topic, before I rapidly turn to issues on group B, I would posit, your Honours, that victims in the present proceedings should not be penalised to the novel nature of the issues currently before the Court and the uncertainties surrounding their prerogative in the present exceptional circumstances. The Chamber has been prepared in the past to take exceptional measures in similarly novel circumstances to ensure that victims are not unfairly deprived of an opportunity to participate for reasons beyond their control.

Therefore, should the victims' standing to appeal in the present proceedings not be recognised, I would respectfully invite the Chamber to nevertheless consider and rule on the arguments put forward by victims pursuant to its broad discretion as well as its general powers under Rule 93.

THE COURT OFFICER: [13:00:21] You have 3 minutes left.

MS MASSIDDA: [13:00:23] How many?

THE COURT OFFICER: [13:00:25] Three.

MS MASSIDDA: [13:00:26] Moving on to group B questions, the issue of jurisdiction. The reference to jurisdiction in Article 82(1)(a) covers not only the existence of jurisdiction pursuant to Articles 5 and 11 of the Statute, but also the exercise of such jurisdiction, regulated by Articles 12 and 13 of the Statute.

As recently noted by Judge Eboe-Osuji in the context of the Comoros proceedings, whenever a decision, and I quote, "has, as its outcome, an equal potential than not that the Court may not 'exercise jurisdiction' ... it should then be beyond dispute that such a decision ... is a 'decision with respect to jurisdiction' within the meaning of Article 82(1)(a)". End of quote.

For Article 82(1)(a) to apply, the operative part of the decision itself must pertain directly to a question on the jurisdiction of the Court encompassing, in our submission, the existence or exercise of such jurisdiction. Against this background, we submit that the Impugned Decision is indeed one with respect to jurisdiction. The Pre-Trial Chamber's key finding concerned the absence of a reasonable basis to proceed with an investigation under Article 15(4) based on the interests of justice. The Impugned Decision is a ruling that the Court may not exercise its jurisdiction over the proposed situation.

And I will recall for the time paragraph 19 of Judge Eboe-Osuji's dissenting opinion in the Comoros appeal.

It's our submission that the Impugned Decision as a whole is to be considered a determination with respect to jurisdiction subject to appeal pursuant to Article 82(1)(a).

Your Honours, we recall that appearing before the Pre-Trial Chamber we supported the Prosecution request for leave to appeal. This was the case because that was at the time the procedural avenue chosen by the Prosecution for challenging the Impugned Decision in the circumstances. However, we insist that we are facing an issue of jurisdiction appealable under Article 82(1)(a) and that *a fortiori* -- I will take only 30 seconds, your Honour.

PRESIDING JUDGE HOFMAŃSKI: [13:03:30] Thank you very much. Please conclude.

MS MASSIDDA: [13:03:32] Thank you.

And that *a fortiori* the Impugned appeal also -- the issue subject to appeal also fulfilled the requirements set out in Article 82(1)(d). The four paragraphs, subparagraphs of Article 82(1) are not necessarily alternative or mutually exclusive. Nothing in the

preparatory works state as such. The wording of Article 82(1) confirms, in our submission, this reading, which is also consistent with the object and purpose of the provision.

Finally, your Honour, I would like to draw the attention of the Chamber on the fact that two issues certified for appeal by the Pre-Trial Chamber do not fully cover the issues raised by the Legal Representatives in their respective appeal. However, the Appeals Chamber has inherent powers to consider arguments that are intrinsically linked to the issues on appeal and clarify or amend issues certified for appeal by the relevant Chamber *a quo*. Consequently, we respectfully invite the Chamber to consider all arguments put forward in this important appeal, regardless of its conclusion on the appropriate legal basis for appeal. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [13:04:52] Thank you, Ms Massidda.

We will now adjourn for a one-hour lunch break and resume at 2 p.m., at which time we will hear observation of the *amici curiae*.

THE COURT USHER: [13:05:08] All rise.

(Recess taken at 1.05 p.m.)

(Upon resuming in open session at 2.02 p.m.)

THE COURT USHER: [14:02:42] All rise.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [14:03:11] Thank you very much.

We will resume the hearing with the observations from *amici curiae*. First, Mr Paweł Wiliński.

Sir, you have 10 minutes. Starts now.

MR WILIŃSKI: [14:03:29] Thank you, Mr President, your Honours.

I am very honoured to be here not representing victims or any party of the

proceeding, but being here as *amicus curiae*.

I just want to say at the very beginning that professors from my faculty were members of Polish delegation to the Nuremberg trial. They were presenting victims' testimonies of grievous atrocities, and that time victims had very limited rights, and being mostly source of information for the trial. Many have changed from that time. We made tremendous steps forward.

But today we are here again and I believe we are here to answer how important victims are. And that's the reason that I requested for standing here as *amicus curiae*. This is in fact the essence of today's hearing, as I see it, and reason of my presence.

Why victims stand for right to appeal in this case? One can say that as far as Prosecutor already launched an appeal and it was granted, there is no need for that. And why tomorrow's allies, I mean Thursday and Friday, on the merits of appeal, this is Prosecution and victims argue against each other today, why victims want to stand for the right to appeal?

I understand that it is because victims' standing, it will be denied next time or any other time if Prosecution will not find an interest or will find no reason to appeal against such decision of non-authorisation of investigation, there will be no one to appeal. There will be no appeal. And the victims' path to bring justice and compensation to victims will be closed.

It is therefore, from my point of view, not true that victims have no interest here. This is probably also the reason why it would be most desirable to have this clearance about victims' position before Thursday and Friday hearing, if they will represent their interest as parties to the proceeding, or not.

So, what victims, as I believe have to prove here and today, I believe, and having restricted time, that they have to prove two things:

First, that decision of non-authorisation of investigation influences their interest, and I call this like proof of the merits in this case; and the second, that the Statute gives them the floor for an appeal, and that's the proof of procedure.

Before I will refer to both, one comment. I want to bring your attention to this stage of proceedings that we are, because it matters. The subject of the hearing in this case is the situation in Afghanistan. It is the preliminary procedure. Only if there will be an investigation and then successful confirmation of charges, there will be a case or many cases. We will have parties, with their rights to fair trial, with right to compensation for victims.

But now we are at the stage of situation in Afghanistan, will they have this right if the investigation will not be open? Will they have this right for compensation? Probably not.

We have to understand and we have to remember that victims are actors of the situation and they are parties of the conflict arising from the crime. Therefore, they have good standing to represent their interest already at this stage as the decision is likely to determine further existence of proceeding itself. Person become a victim long before the criminal investigation is initiated. It is very -- it is very important to understand that. For this reason, it is not consistent with the common sense of justice depriving him or her of the possibility to participate the procedure of controlling the decision not to initiate proceeding, if such procedure exists.

So victims have, more than any other actor, interest to question denial of investigation, not as an element of fair trial, but as right to effective legal remedy, or we can name this any other way, against decision that deprives victims' right to justice and compensation. For these reasons, I believe that proof of merits is, therefore, in this case met.

What about the proof of procedure? It is not a surprise that the Statute and Rules of Procedure and Evidence give not a detailed description answering all procedural questions and situations, but gives us rules, as its name, gives us rules that we have to follow, that we have to interpret in the interest of justice to bring justice at international level. We can read about these even in the preamble to the Statute. And that is the essence of the Court's existence, in my understanding. Misunderstanding of interest of justice, based on arguments used by Pre-Trial Chamber, gives floor to follow wide understanding of Article 82(1)(a) or maybe also (d), on admissibility and jurisprudence. What victims have to prove here and today, the essence of Court's decision based on revision of the appeal will focus on that if the Court will execute its jurisdiction or not. It will execute its jurisdiction in Afghanistan or not. It is then a question of jurisdiction and can be understood and read in this way, and I believe that for that reason the proof of procedure is, therefore, in this case, met. When we take all arguments, and reduce all raised today arguments and issues to its essence --

THE COURT OFFICER: [14:11:44] Excuse me, you have 2 minutes left.

MR WILIŃSKI: [14:11:50] -- then we have just one question, how important victims are. I believe they are.

Thank you, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [14:11:57] Thank you very much, Mr Wiliński. And now the Jerusalem Institute of Justice, the International Legal Forum, My Truth, the Simon Wiesenthal Centre, the Lawfare Project, and UK Lawyers for Israel, you have 10 minutes. It starts now, please proceed.

MR JACOBS: [14:12:20] Good afternoon, Mr President, your Honours.

The organisations we represent today, Steven Kay, Joshua Kern and myself, which you have just mentioned, are aware, as human rights organisations supporting affected communities' rights in Israel and Jewish communities in the diaspora, of the importance for the ICC to hear the concerns and views of victims and affected communities.

Concerning issue A, if the Court were to consider interpreting the notion of "parties" in Article 82(1) broadly, we would suggest adopting a purposive concept of interests affected by the decision, which would in turn justify considering taking as a starting point affected communities rather than simply victims.

In that sense, we note that the submissions made by the representative of victims this morning all support our position and, particularly, the conditions put forward by the representative of LRV1 also apply to affected communities.

We also note that the concept of affected communities is a regular feature of the ICC's work, for example, in the context of the mandate of the Trust Fund and outreach activities, appears both in ASP documents, judicial decisions, it appears six times in the OTP Strategic Plan for 2019-2021, and also in the Regulations of the Registry.

Using the concept of affected communities on whose interests a decision impacts in order to recognise certain procedural rights, including, in some instances, rights of appeal, will support the capacity of the Judges to take into account at all stages of the proceedings, including Article 15 proceedings, all the elements required to reach an informed decision.

In relation to group B issues, the central question is how narrowly or broadly one understands the notion of jurisdiction under the Rome Statute.

If one looks at the language of the Statute, the only provisions relating to jurisdiction in a strict sense are Article 5 on material jurisdiction, Article 11 on temporal

jurisdiction, Article 25(1) on natural persons, and Article 26 on the age of the defendants.

Indeed, Article 13 concerns, as has been mentioned, the exercise of jurisdiction, while Article 12 relates to the preconditions to the exercise of jurisdiction, so can be considered as not strictly speaking a jurisdiction provision in this sense.

Under the strict view, only issues pertaining to Articles 5, 11, 25(1) and 26 would fall under jurisdiction as per Article 82(1)(a).

Should the Appeals Chamber decide to adopt a broader understanding, it remains to be determined what it would cover, particularly when it comes to Articles 12, 13 and interests of justice under Article 53.

Regarding Article 12, understanding how it should be applied from a jurisdictional perspective requires distinguishing between at least two levels of relationship.

The first level is the relationship between the Court and State Parties. This perhaps is the easiest one to deal with, as that relationship can be conceptually understood as being based on consented delegated authority from State Parties, to the Court, to exercise jurisdiction in a certain situation.

The second relationship is maybe more complex, that is between the Court and non-State Parties, which, by definition, have not given their general consent to the Court exercising jurisdiction, for example, over their nationals.

It is argued by some that such a situation is not problematic, because if individual States are able to exercise jurisdiction, in their domestic courts, over nationals of other States, why could they not delegate such jurisdiction to the ICC?

These matters should, in our view, be dealt with in a more nuanced fashion. Indeed, the rule of general international law that allows States to exercise territorial jurisdiction over nationals of other States did not come about *ex nihilo*. It is

a permissive rule of international law that has developed over time as an accepted principle in the particular context of interstate relations, as crystallised in the Lotus case at the PCIJ. It cannot be assumed that such a rule can be automatically transposed to the relationship between the ICC and non-State Parties which requires identification of specific rules of customary law that apply to such circumstances. In relation to this, we note that this reasoning follows naturally from the case law of the Court itself.

The Appeals Chamber, in its 6 May 2019 judgment relating to head of State immunities, found that an international court, and therefore the ICC, had, and I quote paragraph 116, a "fundamentally different nature" than a domestic court.

What is interesting here is the consequence that the Appeals Chamber drew at the time: That the ICC was not bound by interstate rules of immunity and that a specific and distinct rule of immunity had to be identified in the context of the relationship between the ICC, as an international court, and third States.

If we apply this logic here, this means that the ICC is not permitted to exercise jurisdiction over the nationals of non-consenting third States, without identifying a permissive rule of international law allowing such exercise of jurisdiction. Yet, there is currently little evidence that such a rule exists, absent a blessing from the Security Council acting under Chapter VII.

Moving on to Article 13, a question that arises is whether the opening of an investigation should be considered an exercise of jurisdiction by the Court. In that respect, a plain reading of Article 13(c) actually suggests that the exercise of jurisdiction would only take place after the Prosecutor has initiated an investigation under Article 15, and that therefore, technically, the opening of an investigation would not be an exercise of jurisdiction within the meaning of Article 13, even if each

and every act that follows is, such as cooperation requests or arrest warrants. However, a broader approach is possible: To consider that any issue which ultimately is material to the capacity of the Court to exercise jurisdiction should be considered jurisdictional in nature. And we have heard examples of this today. There is logic to this argument, and it would mean, in the present situation, that the decision authorising the opening of an investigation, could --

THE COURT OFFICER: [14:20:41] You have 2 minutes left.

MR JACOBS: [14:20:43] Thank you -- in a broad sense, fall under Article 82(1)(a). Yet, as a consequence, a great number of ICC decisions would have to be considered jurisdictional in nature, because they might have an impact on the Court's capacity to exercise jurisdiction. To give but a few examples: A decision on State cooperation, a decision on the confirmation of charges, or a decision to issue an arrest warrant. If the Appeals Chamber follows this logic, it must therefore be ready to extend Article 82(1)(a) to all matters which have some material impact on the Court's exercise of jurisdiction.

Finally, there is the question of whether a decision on the interests of justice is jurisdictional in nature. In that respect, one could argue that because Article 53 of the Statute explicitly distinguishes three criteria, jurisdiction, admissibility, and interests of justice, and that Article 82(1)(a) only mentions two of those, jurisdiction and admissibility, there is not much room to read interests of justice into Article 82(1)(a). The only way around that is again to adopt a broad interpretation of the interests of justice-- of the jurisdiction and the exercise of jurisdiction.

This needs to be addressed specifically, because, even if other aspects of the decision are deemed to be jurisdictional, it has to be proven that interests of justice is jurisdictional for an appeal to be possible on that specific point.

We stand ready to develop any of these points further, orally or in writing, at the request of the Appeals Chamber. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [14:22:31] Thank you very much.

The European Centre for Law and Justice, you have 10 minutes. Please proceed.

MR SEKULOW: [14:22:42] Thank you, Mr President, your Honours, and may it please the Chamber.

I am here today on behalf of the European Centre for Law and Justice. The ECLJ has been participating in making submissions to this Court and to the Office of the Prosecutor for a decade. As I said earlier, my name is Jay Sekulow, I have the privilege of appearing before you today, but also the privilege of serving as the ECLJ's Chief Counsel during this time of cooperation with this Court and with the Office of the Prosecutor.

The first question before this Chamber is whether the Pre-Trial Chamber's assessments under Article 53(1)(c) are jurisdictional for the purpose of Article 82(1)(a). The answer to that question is yes, for several reasons.

First, when the Prosecutor submits a request for authorisation to investigate, she triggers a jurisdictional analysis because the Pre-Trial Chamber is required to engage in the same reasonable basis analysis under Article 15(4) as the Prosecutor does under Article 15(3). Thus, pursuant to Article 53(1)(a), that reasonable basis analysis includes addressing any questions concerning jurisdiction.

Second, it is jurisdictional precisely because a decision with respect to jurisdiction and admissibility must include when and how the Court may exercise jurisdiction.

A decision with respect to jurisdiction includes one preventing the exercise of jurisdiction.

Third, while determining the existence of a reasonable basis to proceed, the

Pre-Trial Chamber reviewed the various requirements for jurisdiction and admissibility. In Section V of the opinion it looked at the questions of subject matter and territorial jurisdiction. In Section VI it looked at whether the case was admissible under the complementarity threshold and the gravity threshold. And in Section VII it looked at the decision -- whether the decision to investigate would serve the interests of justice. All of these are important determinations with respect to jurisdiction and admissibility, and for the Pre-Trial Chamber's filtering role to be effective, it must review all of them.

As described in paragraphs 44 and 94 of its decision, the Pre-Trial Chamber's rationale to not exercise jurisdiction is largely founded on the expectation that an investigation will encounter at best, non-cooperation and, at worst, active resistance from non-party States. That is why as indicated in our request for leave to appear before this Chamber, we advocate a cautionary approach with respect to adopting an expansive view of the Court's jurisdiction.

The Pre-Trial Chamber's acknowledgment of this resistance is not only about efficiency, it also recognises that such resistance is foreseeable and not a matter of speculation. This is especially true given the widely held legal positions disputing the Court's jurisdiction based on well-established principles of customary international law.

Indeed, the very existence of cogent legal arguments disputing jurisdiction is itself a substantial reason to believe that an investigation would not serve the interests of justice.

Among the broader considerations that we urge this Chamber to review while addressing the question before us is the necessity of allowing proper consideration of jurisdictional issues in a timely manner.

Article 15(4) provides that the Pre-Trial Chamber's decision does not prejudice future findings on jurisdiction or admissibility. However, in accordance with the spirit and purpose of Article 19, questions relating to jurisdiction should be raised at the earliest opportunity. This would obviate unnecessary proceedings which are a severe infringement of an accused person's rights, it would also be a massive drain on Court's resources.

As the Trial Chamber noted in paragraph 40 of its Decision on the Motion for a Declaration on Unlawful Detention and Stay of Proceedings in the situation in the Democratic Republic of Congo, and I quote, "it is in the interests of law, and primarily of the suspects who have been deprived of their liberty, that the issue of possible unlawfulness of their detention be raised and addressed as early as possible during the pretrial phase. Such a requirement is justified by the need to settle at the start of the proceedings any issue that could delay or obstruct the fair conduct thereof".

The availability of a separate appeal procedure on preliminary issues such as jurisdiction and admissibility, as distinct from appeals on convictions or acquittals is, in our view, crucial to the efficient functioning of this Court as well as the interests of justice as highlighted by this very case. The Prosecutor here was attempting to press ahead against nationals of a non-cooperative, non-State Party, ex parte, without any opportunity for that State's legitimate objections to jurisdiction to be considered, and the Pre-Trial Chamber reached the Impugned Decision on relevant matters under Article 15, including the interests of justice, without fully considering the critical information about jurisdiction and admissibility.

In the case of the United States, for example, these threshold objections would include: First, the principle of customary international law whereby a treaty does not create either obligations or rights for a third State without its consent; second, the existence

of specific treaties between the United States and the Islamic Republic of Afghanistan giving the United States exclusive jurisdiction over its personnel; and finally, the principle of complementarity, because the United States is demonstrably both willing and able to investigate and prosecute its own cases.

As noted in paragraphs 17 and 18 of the Pre-Trial Chamber's Kenya Article 15 decision, when the Rome Statute was being debated there was a deep fear that, and I quote from the opinion, that "providing the Prosecutor with such 'excessive powers' to trigger the jurisdiction of the Court might result in abuse". The drafters sought to answer these concerns, and again quoting from the opinion, "through the current text of Article 15 of the Statute, which subjects the Prosecutor's conclusion that a reasonable basis to proceed *proprio motu* with an investigation exists to the review of the Pre-Trial Chamber at a very early stage of the proceedings, namely before the Prosecutor may start an investigation into a situation".

That is why the Pre-Trial Chamber is statutorily required, in our view, to consider these issues as part of its reasonable basis analysis, and that is why these issues should be subject to appeal under Article 82(1)(a).

If it please the Court, thank you.

PRESIDING JUDGE HOFMAŃSKI: [14:30:09] Thank you very much, Mr Sekulow. The Global Rights Compliance, your 10 minutes begins now. Please proceed.

MR JORDASH: [14:30:20] Thank you, your Honours.

As indicated in paragraphs 8 to 11 of our request for leave to submit observations, we submit the victims have standing to initiate an appeal.

Our arguments are in the alternative. First, we argue that victims have standing as a party to initiate an appeal pursuant to 82(1), in the context of these proceedings, that they qualify as parties in circumstances such as these where their legal interests are so

affected and where the outcome of these proceedings define whether victims have access to justice at all. And we adopt the victim submissions on these issues.

In case the Appeals Chamber doesn't find these arguments persuasive, we argue in the alternative, that victims have standing pursuant to Article 68(3). In sum, that where victims' interests are affected, Article 68(3) provides victims with the right to express their views and concerns at any stage of the proceedings determined appropriate.

Moreover, it obliges the Court to determine the precise manner in which this shall occur, constrained only by the requirement that any modality must not be prejudicial or inconsistent with the rights of the accused, and a fair and impartial trial.

As recognised by Judge Mindua in his partially dissenting decision, dated 17 September 2019 at paragraph 27, it is through Articles 68(3) that the Judges must determine the participatory rights of victims.

We submit that that determination must involve designing appropriate modalities to ensure the full expression of those views and concerns and in a manner that gives full effect to the relevant provisions and the purpose of the victim-centred Statute.

In the silence or ambiguity of the Rome Statute, the manner in which views and concerns are presented and considered must be interpreted to ensure meaningful victim participation. Meaningful, effective and independent.

It follows, we submit, that the more compelling the interest the more those modalities must empower. In the prevailing circumstances, Article 68(3), in our submission, dictates that victims express or be allowed to express their views and concerns by way of initiating an appeal.

We submit that Judge Mindua's approach to Article 68(3) is correct and is also supported by the ICC's jurisprudential history. The ICC has recognised that

designing specific modalities may, according to the circumstances, be essential to ensure effective participation.

As Ms Hirst touched upon this morning, this has already effectively occurred. Even in circumstances where the text of the Rome Statute or the Rules appear on their face to limit participation to only the Prosecution and Defence, both ICC Trial and Appeals Chambers have shown a willingness pursuant to Article 68(3) to design modalities that allow victims to express their views and concerns in a manner that provides them with competencies that appear to be reserved for parties.

Specifically, this can be most clearly seen in relation to the submission of evidence, the challenging of the admissibility of evidence and the inspection of evidence. In relation to the submission of evidence, Article 64(8)(b) and Article 69(3) state that only parties have that right.

In relation to challenging the admissibility or relevance of evidence, Article 64(9) provides that this right only vests in a party.

Finally in relation to the inspection of evidence, Rule 77, 78, 81 and 82 expressly provides rights to only the Prosecutor and the Defence.

However, in each instance and in opposition to the Prosecutor's arguments and floodgate fears, both Trial and Appeals Chambers have concluded that Article 68(3) empowers them to determine to decide on modalities that provides rights reflective of those apparently vested in only the parties.

Hence the decision on victims' participation rendered in the Lubanga case on 18 January 2008, victims, along with the parties, were permitted to submit, challenge and inspect evidence. In each instance the Chamber considered that the victims' interests were sufficiently affected, Article 68(3) was engaged. In light of those interests, the victims ought to be able to express their views and concerns in the same

way as the parties. Of course, in each instance the Chamber was concerned to ensure that modalities were consistent with the object and purpose of the statutory framework.

In relation to submitting evidence, the Trial Chamber concluded that this modality was congruent with the Trial Chamber's authority to request the submission of all evidence that it required for the determination of truth under Article 69(3) of the Statute.

In relation to challenging evidence, a right, as I say, reserved apparently for parties, the Chamber decided that victims could express their concerns through challenging the evidence on a case-by-case basis in circumstances which were, as the Chamber found, commensurate with the fair trial rights that were engaged in Article 69(4).

Similarly, in relation to inspecting evidence, the Trial Chamber in Lubanga found it consistent with the overall thrust of the procedural framework. Numerous Trial Chambers have adopted this approach in relation to inspection.

The Appeals Chamber in the Lubanga case also endorsed such an approach. The Appeals Chamber examined Article 68(3) and the relevant statutory and regulatory framework and concluded that victims could indeed exercise the modalities of submitting and challenging evidence. Indeed, they were necessary in the circumstances to ensure affective and meaningful participation.

The approach we urge as an alternative corresponds, it seems, with the Prosecutor's position in the current proceedings. At paragraph 34 of the consolidated response to the victims, they appear to accept, at least in the case of States, that the critical question concerning who might be considered a party for the purposes of initiating appeals rests upon two threshold questions: One, whether the actor in question has sufficient interest in the specific proceedings.

THE COURT OFFICER: [14:38:26] You have 2 minutes left.

MR JORDASH: [14:38:30] Thank you.

And two, whether the modality envisaged is consistent with the broader procedural scheme of the Statute.

As for question one, it is difficult to envisage a situation where the victims' interests are more compelling. We adopt the victims' submissions on these issues.

As regards question two, we submit that the broader procedural scheme of the Statute designed to provide proactive victims' rights as contained in Articles 15(3), 53(1)(c), 19(3), 21(3) and Rules 50, 59, and 93 is wholly consistent with recognising victims' rights to be able to express their concerns and interests by initiating an appeal.

In our submission, the combination of these aspects of the procedural scheme tend inexorably towards the right to initiate an appeal. First, victims have a specific and independent right to participate in the Article 15 proceedings.

Second, Article 53(1)(c) obligates the Prosecutor to consider the interests of victims in deciding whether to initiate an investigation into a given situation.

Third, as we have heard from the victims, and we adopt those submissions, victims have specific rights in proceedings relating to jurisdiction and admissibility.

Four, Rule 93 allows the Chambers of the Court to seek the views of victims on any issue.

Fifth, the right of victims to initiate proceedings, for instance, by filing applications and requests through 68(3) has already been recognised in the Court's jurisprudence.

Sixth, and finally, Article 21(3) requires the Court to interpret its provisions in line with international human rights law. At a minimum, this requires acknowledgment that a victims' right to remedy is fundamental and requires corresponding protection.

In our submission there can be no question of any floodgate fears. The victims

would need to demonstrate on a case-by-case basis. Whilst in the present circumstances such an application would be difficult to resist, if not impossible to resist, it would nevertheless ensure even greater control by the Court.

PRESIDING JUDGE HOFMAŃSKI: [14:40:55] Excuse me, Counsel, the time is over.

MR JORDASH: [14:40:59] Those are our submissions. Thank you. Thank you, your Honour.

PRESIDING JUDGE HOFMAŃSKI: [14:41:03] Thank you. Thank you very much, Counsel.

The Afghanistan Human Rights Organisation is the last of *amici curiae* that asked for making submissions related to the preliminary questions considered today.

You have 10 minutes now. Please proceed.

MR MILANINIA: [14:41:23] Good afternoon, your Honours. Good afternoon, Mr President.

It is my honour and privilege to appear before you today on behalf of 17 human rights organisations based in Afghanistan. These are organisations that have spent the last two decades enduring conflict and violence, to service war victims and human rights victims in Afghanistan. These are organisations that are truly on the front lines, having helped thousands of Afghans over the past years, and in the past three months alone have surveyed and interviewed hundreds of Afghans so that you can benefit from direct voices on the ground in Afghanistan.

Based on our observations and our communications with victims, fundamentally what victims want is to be taken seriously, to have their voices heard, to be genuinely understood, and to know that their opinions and hopes will not be sacrificed, marginalised, or abused for political purposes.

Your Honours, it is our contention that the Pre-Trial Chamber failed in all of these

respects and we believe that the outcry that you hear today, including questions concerning this Court's legitimacy is a result of those failures. Our submissions today and on Friday are intended to aid you in remedying those mistakes.

Your Honours, in relation to your group A questions, we agree with our colleagues that victims have standing to enforce their rights during the pre-investigative stage. But where we differ from our colleagues is the scope of that standing. We submit that the standing victims enjoy is coextensive or coterminous with the rights or obligations victims enjoy under the Statute or the Court's legal text, which under Article 15(3) is to make representations before any Article 53 decision. Here, our submission is that right was denied and that it is essential for this Chamber to address that denial, regardless but particularly if this Chamber chooses to deny victims a right to appeal decisions made under Article 53.

Absent appellate guidance on Article 15(3), which is currently lacking, your Honours, future Chambers of this Court risk alienating victims the same way Pre-Trial Chamber II did in this situation.

Your Honours, as you well know, the Statute guarantees victims the right to make representations under Article 15(3). Those representations are also necessary for any Article 53(1)(c) inquiry which explicitly requires an assessment as to the victims' interests. And there is simply no substitute for that assessment than the opinion of the victims themselves.

The right to make representations, however, has to be effectively enabled. This means that victims must be notified and have sufficient information concerning their rights and be given a reasonable opportunity to make representations considering their specific circumstances.

Because without these requirements, the process of soliciting the opinion of victims

would be reduced to a formalistic exercise that gives the appearance, but not the reality of meaningful victim input. It is, your Honours, reasonable, timely, and accurate notice in particular that allows victims to assert their rights and facilitates their participation. It is the door through which all other rights for victims are afforded.

The fact that representations must be affectively enabled is supported by statements by the Assembly of State Parties, international human rights instruments, and national laws concerning victim participation, the authorities of which, your Honours, I point to in pages 3 to 9 of our table of authorities which you can find in tab 1 of the binder that we have provided you.

In this case, however, Pre-Trial Chamber II failed to effectively enable victim representations, especially by Afghan women and Afghan children. And the evidence for that is summarised on pages 14 to 16 of our table of authorities, which reference sworn declarations by leaders of civil society organisations who worked with the Registry in the victim outreach process and who are eyewitnesses to the victim representation process. As those victims detail, the outreach process in this case was flawed to such an extent as to bring into question the sincerity of the Pre-Trial Chamber's invitation to victims.

For example, victim input was solicited via an online intake process, even though only 15 per cent of Afghans had internet access and only approximately 30 per cent are literate.

The representation period was only open in the months of December and January, even though those are the coldest and least traversable months in Afghanistan.

The Registry had no presence in Afghanistan and had no outreach or public information activities in the country to try to reach victims directly.

The Pre-Trial Chamber failed to order a mass media campaign using Pushtu or Dari speaking radio or television, the primary means through which Afghans obtain information.

And the Pre-Trial Chamber failed to provide victims sufficient time. They provided victims two months, a period wholly insufficient for a country where information about the ICC was scarce, where the Court lacks a physical presence, where ongoing conflict hampers access to many of the areas, where many people are illiterate and do not have internet access or stable electricity, and where, your Honours, for very good reason, the population has learned to be careful about sharing information that may subject them to harm.

These errors had a clear and discernible impact on the ability of Afghan victims to make representations. In a country of over 35 million people suffering four decades of war where 69 per cent of the population are believed to be victims of war-related violence, only 699 victim representations were received by the Registry, only 165 from individuals. And for that, your Honours, I refer you to paragraph 23 of the Registry's report, annexed to filing 29.

But equally grave is the fact that the Pre-Trial Chamber took no measure to enable representations by women or children who are victims of crimes, as required under international human rights law, the authorities of which you can find on pages 10 to 14 of our table of authorities.

For example, with regards to child victims, of which there are hundreds of thousands in Afghanistan, the Pre-Trial Chamber and the Registry failed to provide child-sensitive materials and information services.

Further, no efforts were made by the Pre-Trial Chamber or the Registry to target or accommodate Afghan women and girls who are faced with systematic violence and

human rights violations, including sexual violence, abuse and trauma.

As your Honours are aware, many Afghan women, female victims, feel an acute sense of stigma and shame in sharing their stories. They often also face the additional hurdle of having to seek permission to leave home or needing to be accompanied by a male relative. Yet nothing was done --

THE COURT OFFICER: [14:49:28] You have 2 minutes left.

MR MILANINIA: [14:49:31] Thank you very much.

Yet nothing was done to ensure that these women were properly informed of proceedings and how they could participate. And instead, all efforts and all appeals by leading women's rights groups in Afghanistan for more time to ensure that women were properly represented were ignored.

And, your Honours, in support of this, I draw your attention to tab 7 of the binder, of your binders, which contains a declaration by one of Afghanistan's leading women's rights figures, as well as copies of her communications with the Registry on precisely this issue.

Your Honours, this deliberate disregard for the situation of women and children had a considerable impact. Only 10 representations were made on or behalf of women, and only 9 representations were made on or behalf of children. And I refer you to pages 10 to 12 of the Registry's report, annexed to filing 29.

And when the Pre-Trial Chamber was informed of these massive deficiencies, no corrective action was taken in the over 420 days between the end of the representation period and the Chamber's Article 53 decision.

Your Honours, in his separate opinion, Judge Mindua claimed the ICC to be a victim-centred court. In our opinion, however, the errors that we have just described, especially when you consider them collectively, demonstrate that the

Pre-Trial Chamber did not sincerely or genuinely solicit the opinion of Afghan victims. And the victims now turn to you to right that course.

Thank you for your time.

PRESIDING JUDGE HOFMAŃSKI: [14:51:17] Thank you very much, Counsel. Office of the Prosecutor, you may briefly respond, if you wish, to the observations of the *amici curiae*. I would like to ask you to keep the five-minute time limit.

MR GUARIGLIA: [14:51:32] And I certainly intend to do so, your Honours. I will first make clear that I will only be responding to the issues that squarely fall within the parameters of this appeal, and accordingly, I will not be touching on the issue of whether this Court can exercise jurisdiction over nationals of non-State Parties, which is not an issue before you.

Your Honours, this has been a very important hearing, I think we will all agree on that, and we have heard some powerful stories that remind us of the wisdom behind the decision of making victim participation a central feature of the Rome Statute.

But, your Honours, there was no need for standing for this. All the submissions that you heard today, all the stories that victims presented to you today were stories and submissions that could have been made, and probably may have been made even, in the context of the ordinary participatory rights afforded by the Statute.

So in this sense, for us, this is proof that the Rome Statute system works. There is no need for you to create a nexus statutory remedy to provide victims for their independent voice to be heard. They have that right already and they have exercised that right today.

In this sense, your Honours, we agree with OPCV that the Appeals Chamber is in a position to decide on all the issues, all the critical issues, regardless of whether you decide to go via the Article 82(1)(a) route or the Article 82(1)(d) route. And it was in

this sense that we referred to the issues of standing and jurisdiction as technical issues, not in the sense of diminishing somehow their importance.

In general, I will rely primarily on our written submissions in response, but perhaps a couple of points to be made. First one is there may be some degree of confusion as to what decision under Article 15(4) denying commencement of an investigation under the interests of justice limb actually means. There is no estoppel or obstacle preventing the Prosecutor from renewing an application even on the same subject matter on the basis of new facts and new evidence.

So the possibility of returning to the Pre-Trial Chamber and starting again the process, so to speak, always exists. And actually, it may be that in certain circumstances the Prosecutor concludes that it is preferable to do that than to embark in a lengthy appellate proceedings. For instance, if there is a short window of opportunity to investigate and collect evidence, that is the Prosecutor's choice and that choice must be respected. That is the regime of the Rome Statute.

This also underscores why, in our view, this decision, the decision that is under challenge, was not a decision in relation to jurisdiction.

But as we say, your Honours, and it is true what Mr Gaynor and others have said in their responses, that there are elements in the decision that are jurisdictional in nature. But to our, in our view, the decision doesn't turn on those elements or those aspects. It's not that the situation that the Pre-Trial Chamber said in relation to this cluster of crimes: I do not authorise the commencement of the investigation because they do fall outside the jurisdiction of the Court and in relation to those that I conclude fall within the jurisdiction of the Court interests of justice applies. No.

They applied interests of justice across the board. So those jurisdictional elements were ultimately absorbed by the umbrella conclusion that the interests of justice

applied to the situation as a whole, and it was on this basis that we decided that the proper way to bring this matter to your Honours' attention was via Article 82(1)(d) and not via 82(1)(a).

Now, your Honours, we have heard some invitations to engage in a purposive interpretation of the Statute. We all like purposive interpretations. There is a limit to them. And I think in this, in this sense we would suggest that you approach with care some of the examples that have been given to you as instances in which the Appeals Chamber went beyond the terms of the Statute.

Actually, in our reading of the same examples the Chamber always stayed within the express terms of the Statute. For instance, the Chamber did not create an extra-statutory right for victims to lead evidence. It merely said that under Article 68(3) victims can petition the Trial Chamber to exercise its authority to Article 69(3) to present evidence or to call for additional evidence. It always stayed within the boundaries of the strict letter of the Statute.

Finally, your Honours, we have heard with interest the submissions made by Mr Powles from the Cross Border Victims. One point that I have to make here is this appeal is not case selection, it's not about the criteria the Prosecution may use to determine when to investigate and what to investigate. This is not before you. This is not the matter in this appeal. And indeed, it is the Prosecutor's prerogative to determine which incidents and which suspects it will bring to investigation.

Having said this, we have recognised that if the Pre-Trial Chamber's findings are reversed in the manner we wish them to be reversed, the incidents included in the petition of the Cross Border Victims may properly be captured within the parameters of any future investigation.

This concludes my submissions, your Honour.

PRESIDING JUDGE HOFMAŃSKI: [14:57:11] Thank you, Counsel, very much. Now I will turn to Legal Representative of Victims group 1, you also may briefly respond, if you wish.

MR GAYNOR: [14:57:25] Thank you, Mr President.

PRESIDING JUDGE HOFMAŃSKI: [14:57:26] Please.

MR GAYNOR: [14:57:27] I am going to respond to submissions made by Mr Jacobs and Mr Sekulow and Mr Guariglia only.

I think in Mr Jacobs' submissions he suggested that we support an interpretation of the Statute which would give affected communities the right to be recognised as victims and therefore the right to launch an appeal. That is not our position. We do not support that interpretation of Rule 85 of the Rules of Procedure and Evidence. Rule 85 clarifies that victims are natural persons who suffered from a crime within the Court's jurisdiction. And Rule 85(b) goes on to include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art, science or charitable purposes. And it goes on to define that exhaustively. Those, those institutions can participate if they can establish that they fall within that definition. We do not support an expansion of the term "victim" to cover affected communities.

Secondly, my learned friend Mr Sekulow referred to the existence of cogent legal arguments. That should be enough to prevent the Court exercising jurisdiction. It's the job of counsel to present cogent legal arguments either for or against the exercise of jurisdiction, whether one is a Prosecutor, whether one is a Defence lawyer, whether one is a victims' lawyer. Cogent legal arguments themselves are never enough to prevent the exercise of jurisdiction.

In respect of the standing of the United States to launch a challenge against an

exercise of jurisdiction over United States nationals, I would point out that Article 19(2)(b) does present a remedy for that. Article 19(2)(b) is not limited to States Parties. Any state may make a challenge under 19(2)(b) if it can -- the United States would be more than welcome, I'm sure, to present evidence that it is genuinely investigating or prosecuting cases against United States nationals. That remedy exists for the United States and they can start that, as far as I know, as soon as they like. And as part of that, they could present evidence and arguments concerning agreements between the government of Afghanistan and the government of the United States and they can be ruled upon in the ordinary proceedings. That process is stated to apply to cases, but nevertheless it would not necessarily prevent the Court from considering a challenge in relation to a situation.

We agree with the Office of the Prosecutor and the OPCV that whatever you decide about the Article 82(1)(a) versus Article 82(1)(d) route to get here to this appeal, we do believe it's well within your jurisdiction to consider all issues which have been raised by the parties and to rule on all of them.

Now, returning to the Pre-Trial Chamber, which was an option suggested by Mr Guariglia and others, is from the victims' perspective not an acceptable solution. It is not an acceptable solution for several reasons. There is nothing in the Impugned Decision to give us any reason to believe that the Pre-Trial Chamber will take a different view on three questions: The first is the interests of justice question, the second is the territorial scope of the war crime of torture and any associated war crimes, and the third question is the territorial and temporal and substantive scope of any investigation which it might be minded to authorise. We believe they made very serious errors on all of those issues and your Honours must correct them. And returning to the Pre-Trial Chamber is not an acceptable remedy from the victims'

perspective.

Now, finally, Mr Guariglia I think when he was talking about the ways in which the Court has purposively interpreted the Statute, he said that they were all issues concerning matters which were quite clear under the Statute already. Well, one thing that is quite clear under the Statute already is the requirement in Article 63 that had the accused shall be present at trial. Nothing could be clearer. On those -- on the clear understanding of those words, the accused shall be present at trial.

Now, in the Ruto case the accused was permitted to be absent for well over half of the trial days. I think it was considerably in excess of that percentage of 50 per cent, and that has been upheld both by the Trial Chamber in the Ruto case and by the Appeals Chamber. That's in the instance where the Court took the view that a purposive interpretation of the Statute actually meant reading Article 63 to mean that the accused may be absent from trial.

Those are all of the arguments I have at this point. Thank you very much, Mr President.

PRESIDING JUDGE HOFMAŃSKI: [15:02:56] Thank you, Mr Gaynor.

Then also the Legal Representatives of Victims group 2 may also briefly respond. You choose the person to speak.

MS GALLAGHER: [15:03:11] Thank you, your Honours. Particularly in light of the comments just made on behalf of LRV1, we will give back our five minutes and stand ready to answer any questions from the Bench. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:03:25]Thank you very much, Counsel.

And the same question to Legal Representatives Victims group 3, you may also briefly respond to the observations of the *amici curiae*, please. Mr Pietrzak.

MR PIETRZAK: [15:03:43] Mr President, your Honours, I apologise, I did not hear

the last, the last several words you said.

PRESIDING JUDGE HOFMAŃSKI: [15:03:55] Excuse me, I simply ask whether you would like to use your right to respond.

MR PIETRZAK: [15:04:02] If it pleases the Court, a short answer to two statements made today, one by Professor Paweł Wiliński, acting as *amici curiae*, and secondly, to the statement made by the Office of the Prosecutor.

Firstly, with regard to the opinion presented by Professor Paweł Wiliński, we agree absolutely that the standard established today will establish whether victims in the future, on a case-by-case basis, granted, will have the chance to appeal a refusal to authorise an investigation and, perhaps most importantly, in a situation when the Office of the Prosecutor refuses to do so.

I think it needs to be stressed that the Prosecutor has many factors she takes into account legitimately in deciding whether to appeal such a decision refusing to authorise such an investigation, including public interest, policy issues. In the Prosecutor's views, these factors may outbalance the criteria which are essential from the point of view of the victims, the justified interests of the victims and their rights to an effective remedy under the Rome Statute.

With regard to the comments made by the Office of the Prosecutor just now, regarding the possibility of returning by the Office of the Prosecutor to the Pre-Trial Chamber with a renewed subsequent request for authorisation of an investigation, perhaps with new evidence, new facts, new argumentation, as a sort of substitute for an appeal against the decision refusing to allow to authorise an investigation. This, while it may be an interesting avenue for the Office of the Prosecutor to explore, is not an effective remedy available to victims. This is a course of action which is at the sole discretion of the Prosecutor who, as mentioned

earlier, is not just the representative of the interests of the victims, but makes her decisions taking into account the other criteria and factors which I have just mentioned.

If the Office of the Prosecutor seeks authorisation a second time to investigate, the victim will be once again in a situation with no voice and no effective remedy if the Pre-Trial Chamber once again refuses to allow the investigation to go forward.

So this scenario does not address the problem raised by the victims' Legal Representatives today, the lack of an effective remedy to a decision blocking the effective investigation, which is necessary in order to vindicate procedurally the rights and freedoms of the victims represented before the Court.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:07:14] Thank you, Counsel.

And now we will have questions from the Bench. I would like to invite Judge Howard Morrison to ask the first question for Mr Gaynor, I understand.

Please.

JUDGE MORRISON: [15:07:31] Just one question for Mr Gaynor. Under Article 63, what's your view of the proposition that an accused may be present through counsel?

MR GAYNOR: [15:07:51] Well, your Honour, it's not an argument I had actually prepared myself for.

The term "the accused" in the context of presence at trial I would read to mean the physical presence of the accused person in the courtroom.

At other parts of the proceedings the interests of the accused are of course presented by his or her counsel, but the reason why the presence at trial requirement was included in the Rome Statute was to do with having the accused present to hear the evidence against him as part of the process of justice and not merely to put the

accused on notice and to give the accused an opportunity to respond to the arguments made by the Prosecutor. So the physical presence of the accused in the courtroom is an integral part of a fair trial from the perspective of victims. So I would read the presence of the accused in the courtroom to apply to the physical presence of the accused.

JUDGE MORRISON: [15:09:11] You said you hadn't anticipated or prepared the question. What else would you have said if you had? I think you -- that's an observation, not a question.

PRESIDING JUDGE HOFMAŃSKI: [15:09:27] Thank you, Counsel.

There is also a question from my learned colleague Judge Luz del Carmen Ibáñez Carranza.

Please, Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [15:09:50] Thank you, Mr Presiding Judge.

The question is for the OTP, about standing. By interpreting the wording "either party" of Article 82(1) as either of the Prosecutor or the Defence, excluding victims from those who can appeal a decision specifically at the Article 15 stage, could the Defence be entitled to be the respondent of the appealing Prosecutor? And if the response is yes, if the Appeals Chamber interprets it as such, limiting the wording "either party" to a Prosecutor and Defence, could it contradict its 24 October 2019 decision recognising the OPCV as *amicus curiae* and not a party in this appeals? It's clear? Thank you very much.

MR GUARIGLIA: [15:11:02] Thank you, your Honours. Yes, I think the question is clear and I will try to answer it within my limited abilities.

The point -- the use of the term "either party" in the context of Article 82(1)(a) is, as I think or I hope I made clear when I made my submissions, is because 82(1)(a) deals

with a wide range of decisions involving jurisdictional or admissibility issues.
Now, some of those decisions will take place in the context of inter partes proceedings, in which case the Defence and -- both the Defence and the Prosecutor may appeal. Some of those decisions may take place in the context of ex parte proceedings. For instance, going back to the Ntaganda appeal, the first appeal ever heard by this Chamber, there was a matter of admissibility raised ex parte by the Prosecutor in the context of an Article 58 proceeding, a proceeding relating to the issuance of a warrant of arrest against Mr Ntaganda. So there, there was no Defence because it was an ex parte proceeding.
Article 15, I think this same Chamber has recognised that, it's an ex parte proceeding *par excellence*. It is a proceeding triggered by the Prosecution and the only exception to that ex parte nature is the fact that the Statute correctly allows victims to make representations in order for the Pre-Trial Chamber to have a more informed view of the request for authorisation.
But that doesn't turn the proceeding into an inter partes proceeding. It isn't. It remains an ex parte proceeding. So in that context there is no "either party", there is only one party and that is the Prosecutor, as would happen in the context of any ex parte proceeding.
And I do not see any contradiction. OPCD is not here as a party. He's here, if I understand his status correctly, as an *amicus curiae*, someone making representations to assist the Chamber in reaching the right result. So, on the contrary, I think that there is a logic that connects all those elements.
JUDGE IBÁÑEZ CARRANZA: [15:13:06] So just to be clear, for you, for the OTP in this concrete appeal there is only one party, the OTP?
MR GUARIGLIA: [15:13:15] Yes, that is correct.

JUDGE IBÁÑEZ CARRANZA: [15:13:15] (Overlapping speakers) In this concrete appeal.

MR GUARIGLIA: [15:13:17] There is one party and there is a plurality of participants. Some of them are victim participants, some are Rule 103 *amici*, and all of them sharing the goal of assisting the Chamber to reach a concrete result.

JUDGE IBÁÑEZ CARRANZA: [15:13:32] Okay. A second question, please, for the OTP. It is about jurisdiction, the scope of the Impugned Decision on jurisdiction. While the Impugned Decision noted in paragraph 25 that the Prosecutor had indicated in her request that she had not reached a determination regarding the representation that individuals were attacked by air strike drones, there hasn't been any decision about that, but nevertheless, the Impugned Decision in its paragraph 40 limited the scope of this investigation or the investigation to this incident. Don't you think, does this limitation amount to a finding of the lack of jurisdiction over such alleged attacks or admissibility of a potential case emerging from those attacks? And, also in the same vein, the Impugned Decision has made in its paragraph 54 and in others regarding the crimes that allegedly commenced in Afghanistan.

MR GUARIGLIA: [15:14:51] Yes.

JUDGE IBÁÑEZ CARRANZA: [15:14:52] And were consummated outside Afghanistan. This is Cross Border Victims and then have made determinations regarding the crimes allegedly commenced in Afghanistan and consummated outside and vice versa. Does the OTP think or not that those determinations amount to an admissibility or jurisdiction question?

MR GUARIGLIA: [15:15:15] I think, your Honour, there are two clusters of incidents, so to speak, that the Chamber, in our view, in both cases erroneously dealt with.

The first cluster are incidents that the OTP did not include in its request for authorisation. And pursuant to the long established practice of this institution, we did so in the assumption that once authorisation was granted, we could expand the investigation into other incidents that had not been included in the request but fell within the temporal and territorial parameters of the situation. Right.

In relation to those, the Chamber came back and said: Well, no, actually I'm only authorising those incidents that you included in your request, and those that you did not include in your request are not authorised and you have to come back with a new request for authorisation.

So it's a bit of an anomaly in the case law of this institution. But there, there is no jurisdictional element at all. It's only a procedural matter. We could conceivably come back and say, well, now we want you to authorise for an investigation, these are the 50 incidents that are not included in the original authorisation.

Now there is a second cluster of incidents and there, there is a jurisdictional connotation of the Chamber's findings. Those are those incidents that the Chamber said because they start in one part of the territory or they continue in another or because they are somehow connected to the conflict but we don't think the nexus is sufficient and they happen outside the territory of Afghanistan, they fall outside the scope of the Court's jurisdiction.

Now, as I think -- well, as I tried imperfectly to explain in our reply, had the Chamber then said in the dispositive part, in relation to these incidents there is no jurisdiction, therefore there can be no authorisation, and in relation to all the rest interests of justice we would have had a jurisdictional ruling coming from the Pre-Trial Chamber. And maybe that's what the Pre-Trial Chamber should have done, but it didn't. What it did was to say in relation to all these incidents, regardless of where they are

committed or not, is an interests of justice determination.

So, in our view, the analysis of the Pre-Trial Chamber of those incidents, even if it has jurisdictional connotations, is simply a step in its defective reasoning leading to its blanket interests of justice determination, so to speak.

It is a tricky situation in a way. I mean, we thought about this. We decided that they need clear and procedurally appropriate avenue to bring this appeal before you was to bring the totality of the decision via Article 82(1)(d) because we concluded that there was no jurisdictional connotation.

If there was one, it's confined to those cluster of incidents, which is a tiny component within a wider decision. So we think that you should look into that because it is a defective finding by the Pre-Trial Chamber, but you should look into that as part of the wider, equally defective, in our humble submission, decision on interests of justice.

I hope that I have dealt with your question, your Honour.

JUDGE IBÁÑEZ CARRANZA: [15:18:29] Just a follow-up question. Don't you think that this limitation put by the Pre-Trial Chamber is a limitation to the Prosecutor's *proprio motu* power to exercise the Court's jurisdiction under Article 13(c) of the Statute? Don't you think it's a limitation?

MR GUARIGLIA: [15:18:48] Which one? The determination?

JUDGE IBÁÑEZ CARRANZA: [15:18:51] The determination of the Pre-Trial Chamber on these last incidents.

MR GUARIGLIA: [15:18:58] Well, it's difficult to tell, your Honours. At the end of the day, ultimately it should have been a jurisdictional finding, saying: You have requested authorisation to deal with all these incidents, but I consider that actually these incidents I cannot authorise because they are manifestly outside of the scope of

the Court's territorial jurisdiction.

So it would have been actually ultimately a decision under Article 15 simply saying authorisation is not granted because jurisdiction is not present in relation to this.

I don't think Article 13 applies here so much. I think it's an Article 15 determination, and within the universe of Article 15 determination there is a jurisdictional element to that. The problem is at the end of the day the Chamber did not rule on that basis, it ruled on the basis of interests of justice. So it's a bit of a confusing situation, probably for everybody, but this is the way we have analysed it.

JUDGE IBÁÑEZ CARRANZA: [15:19:56] (Microphone not activated)

MR GUARIGLIA: I can't hear you, your Honour.

JUDGE IBÁÑEZ CARRANZA: [15:20:02] (Microphone not activated) had a lot of work today. A final question, please, for the OTP. I'm sorry, I think that maybe this last question could be responded also for one of the representative of victims. I don't know who would like.

It's about your submission this morning, according to one of your submissions this morning regarding to the international human rights of victims to access to justice and to the right to an effective remedy.

You said that the question of the recognition or enforcement of this, of these rights, human rights is for the States and not for the Court. Maybe I am wrong, but I think I heard that.

Regarding that, I would like to ask you, if it's like that, then why or what is the purpose of Article 21(3) in the Statute? And why, regarding also the wording, the concrete wording of the article that reads Article 21(3) "The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights", regarding this wording it is not "may", it is not even "shall",

it is "must". What are then the duties for Judges regarding the wording of this article?

MR GUARIGLIA: [15:21:37] Contrary to Mr Gaynor a moment ago, I thought this question could come, which doesn't mean that I am prepared for it. But I will try to give you my best answer, your Honour.

I think that our position has been that -- I was rushing at that point of my submissions this morning, so I may have not been clear and then I apologise for that.

It's not that the right as such has no application in the context of the Court. It's that, as all positive obligations of the human rights law, they are conceived primarily as obligations for States vis-à-vis their own citizens, which requires this Court to exercise a level of customisation, so to speak, of those rights into the context of the Rome Statute in order to make those rights meaningful but also, at the same time, compatible with the nature of the Court and its unique functions.

And perhaps, your Honour, if I can draw a parallel example that your Honour will be familiar with under the case law of the Inter-American Court of Human Rights and chiefly the Barrios Altos case, with which your Honour is much more familiar than I am, there is an unfettered duty of all States parties to the Inter-American convention to investigate and prosecute every single instance of human rights violations. It's an unfettered duty. There is not much discretion there. I mean basically States have to act and have to investigate and prosecute. And that has been a consistent jurisprudence of the Inter-American Human Rights system since the last case Rodriguez to Barrios Altos and beyond.

Now, this Court could not have an identical duty applied to it without derailing completely its ability to deliver justice. If we had to investigate and prosecute every single crime under situation countries, we will still be dealing with the first situation

ever to be communicated to this Court at the expense of other situations and other victims.

So a right that makes perfect sense in the context of States and State's positive duties towards its own citizens, including the duty to deliver justice, has to be turned, has to be modified, has to be adjusted to the particular structure of the Court, otherwise it doesn't make sense and it leads to absurd results.

So in that sense, your Honours, we were not saying that there is no such thing as right to an effective remedy via Article 21(3). What we say is that that right has to be adjusted to the particular structure of the Statute and to the existent provisions of the Statute, including Article 68(3), including Article 19(3), including Article 15, and basically in that context that right, we submit, is respected. Victims have a right to petition to you, they are doing it. They have a right to petition to the Pre-Trial Chamber, they have done it. They have a right to petition to us, they do it on an regular basis.

So that recourse is recognised by the Rome Statute system. I think that's our position.

JUDGE IBÁÑEZ CARRANZA: [15:24:41] Thank you.

I don't know if there is someone from victims who would like to respond.

MR GAYNOR: [15:24:45] Yes, I would be happy to, and I don't want to prevent anyone else from doing so, but I would just like to point out a couple of things.

It's clear from the Statute itself, from the preamble, that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes. And it is the failure of States so often to exercise their jurisdiction over those responsible for international crimes, that is the reason why the International Criminal Court exists, that is the reason why we have an admissibility and jurisdictional process to filter out

cases where the State is providing access to justice, where the State is providing a remedy to its citizens. It is only where the State is not providing those internationally recognised human rights that somebody can come before this Court. So to answer your Honour's question, I believe that 21(3) is very clear in its terms. Your Honours are obliged to interpret 82(1)(a) in accordance with the internationally recognised human rights to a remedy and to justice. And the modification which must take place of that right once an applicant arrives at the International Criminal Court takes place, as Professor Sluiter and as Kate Mackintosh have pointed out in their very well researched submission, that takes place through the admissibility and jurisdictional filters.

So we do argue that the idea that for victims coming before this Court to be told, in essence, that your right to all of these human rights has got to be addressed to your home jurisdiction is actually misconceived. It completely misses the point of the Rome Statute. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:26:41] Thank you, Mr Gaynor.

As I understand, also the Legal Representatives of group 3 victims would like to take a position.

MR PIETRZAK: [15:26:53] Mr President, your Honours, it was my intent to say a few words, but following Mr Gaynor's intervention, I cannot possibly say anything clearer or better than he already has. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:27:09] Thank you, Counsel.

And LRV2, please, briefly your response.

MS GALLAGHER: [15:27:15] Yes. And I don't profess to say much better than Mr Gaynor already did, just to add a gloss to what he said. I think to the extent that there is a question that international human rights are to be incorporated by the Court

itself, one need look back at the debate around the definition of gender and how the Court would apply gender to see that it was the ICC that was to itself incorporate international human rights obligations. That's one brief point.

And the second is, not only does 21(3) include, in our submissions, the right to remedy truth and non-repetition, it also includes the right to nondiscrimination. And I think it's important to take that into account when looking at the factors which we'll discuss tomorrow, that the Pre-Trial Chamber put forward, recognising that there were crimes within this Court and then looking at the relative power dynamics between the parties -- between the victims and the potential future defendants.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:28:28] Thank you very much, Counsel.

And also a question from Judge Prost, please.

JUDGE PROST: [15:28:33] Thank you. I am going to direct this to Ms Hirst, albeit if other Legal Representatives of Victims have a comment on it, because it relates to the argument that you made. I understand your argument with respect to the chapeau of 82(1) and your position that victims can be included in the term "party" in the chapeau. And accepting for the purposes of argument that position, what I would like to know from you is what makes the victims in this particular instance a party?

MS HIRST: [15:29:08] I am grateful for the question, your Honour, because it does touch upon some of the points which I would have liked to elaborate further but for the restrictions on time.

And we are very much in agreement with the submissions which were made by Mr Gaynor relating to the matters which the Chamber should look at in deciding whether in a specific instance where victims request to appeal, seek leave to appeal or attempt a direct appeal, whether that should be granted. And we agree with him

that it's not a blanket invitation for victims to appeal in every single decision of this Court, which the submissions of the Prosecution at times has made it sound as though we are taking that position.

In fact, we are saying that there are a limited range of factors which the Judges in a particular case should look at in order to decide whether the victims' interests are so fundamentally affected.

Now, in this case the two key things which we have been focusing on are the nature of the Article 15 proceedings, and I don't need to repeat, I think the submission which has been made by several participants in this hearing that the Article 15 proceedings are a gateway to all subsequent proceeding, every other opportunity for victims to access either a participatory opportunity or indeed reparations. But on top of that, there is an additional factor in this particular Article 15(4) decision and that is that the Pre-Trial Chamber made its decision based largely, not exclusively, but largely on the interests of justice and Article 53(1)(c) expressly links to victims' interests.

So, in effect, what the Pre-Trial Chamber did was it closed the door for victims to have any access to justice, truth or a remedy through this Court and it purported to do so, ironically, based on the very consideration in respect of which it was required to take into account victims' interests. And I think the very compelling observations which were made by the amicus on behalf of Afghani human rights organisations made the point very clearly that actually the Pre-Trial Chamber doesn't appear to have taken into account victims' interests at all in deciding on the interests of justice.

So we say those are the two primary factors, but we do also agree with the other factors which were put forward by Mr Gaynor. And we agree, for example, that it would be possible for the Chamber to take into account other factors, for example, whether there is any prejudice which might result.

JUDGE PROST: [15:31:47] And just so that I am clear, you are saying that those criteria bring the victims in this instance into the definition of "party", because I read -- interpreted Mr Gaynor's submissions on this point, that those were criteria which compelled why they might be allowed to appeal, but I did not read them as particular factors that would make the victims a party under the chapeau of 82(1).

MS HIRST: [15:32:15] Your Honour, I think there are two possible pathways here in terms of statutory construction and different decisions of the Court in granting additional participatory rights, additional standing rights to victims before the Court have taken different avenues and on this, the Prosecution is right that the Chambers have not always said in terms the victims are parties. In some instances what they have said is the term "parties" is not meant to exclude others who also have this right. And in this instance the Chamber could go either way. In our submission we are talking about a purposive interpretation. The Chamber can either say victims are parties or Article 82(1) is not intended to be exclusively for use by parties. The purposive basis of either of those conclusions would be consistent, we say.

JUDGE PROST: [15:33:13] One more question and it is directed to OPCV, please. I understand your argument was framed very much on the particular -- as have been others, but yours most directly on the right of standing existing here by virtue of the particular features of Article 15, and I just want to pursue that a little further with you so I fully understand.

If this decision had been a decision of the Prosecutor not to proceed on the basis of the interests of justice and the Pre-Trial Chamber had declined to exercise its jurisdiction to review that decision, is it your position that the victims would have a right of appeal in those circumstances?

MS MASSIDDA: [15:34:00] Your Honour, I think I would -- that would depend on

the decision. When I was focusing on my submission this morning, I made it clear, I hope, two things. The first one is that by the virtue of the very nature of Article 15 proceedings we could not but conclude that Article 15 proceedings for in this specific case can only deal with Prosecution and victims, because the moment victims trigger an intervention in making submissions to the Court, they become, to some extent, party to that proceedings. This was the first argument.

The second was that in this specific case we need to take into account the context in which that decision was taken. So on one side we interpret the fact that victims are authorised to make submissions as a sort of participatory, into brackets, if I can put that that way, participatory rights which trigger to some extent their possibility to become parties.

On the other side, if this is considered by the Chamber not, let's say, sufficient enough to interpret the term "either party" in Article 82(1)(a) in this sense, we say there are at least other three grounds in this specific context which render victims party to that specific proceedings.

JUDGE PROST: [15:35:47] And just a brief follow-up on that. If this had been a decision of the Pre-Trial Chamber confirming a decision of the Prosecutor not to proceed in the interests of justice, where there is no explicit submission of observations in the statutory provisions, again, do you say there would be a right of appeal in those circumstances?

MS MASSIDDA: [15:36:14] I would say yes.

JUDGE PROST: [15:36:18] Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:36:20] Thank you very much.

As I understand, Judge Bossa has an additional question.

Please.

JUDGE BOSSA: [15:36:32] Thank you, Mr President, and good evening, everyone. My question goes to the representatives of the victims and I am confining which question to this particular case.

Under Article 15(3), victims have a right to make representations, the Chamber may allow them to do so. And I presume that even on appeal it would be the same case. The Prosecutor has appealed in this case, and so my question is: Why would you want the role of victims to be elevated to that of a party when you have a right to make representations in this particular case? Thank you.

MR GAYNOR: [15:37:30] Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:37:31] Mr Gaynor, please.

MR GAYNOR: [15:37:33] Thank you, Mr President, your Honours. Thank you for your question.

In, in this particular appeal there is a great deal of overlap between the arguments presented by the Prosecutor and by the various victims' groups. However, there are certain areas where the emphasis has been somewhat different. There has been a difference of view as to the correct procedural route to get here. The Prosecution presented three grounds to the Pre-Trial Chamber for certification. The Pre-Trial Chamber certified two of those three grounds. The third ground, which was not certified, concerned the scope of any investigation that the Pre-Trial Chamber might be minded to authorise. To us, that is a critically important issue and it would have been better had that been clearly on appeal. Now, at the same time, we are arguing that your Honours should consider that ground on appeal. But in the instance of this particular appeal there has been some divergence in the emphasis of the victims and the Prosecutor.

But I would invite your Honours, and I know you will do this anyway, to consider

the broader view. There are going to be many situations where the interests of the victims and the interests of the Prosecutor are going to diverge for very principled reasons. In the Kenya situation, the Prosecutor has decided to suspend active investigation in Kenya against the express wishes of the victims of Kenya 2, and that has been subject to litigation.

In the Lubanga case, the Prosecutor chose again, for the best of reasons, to focus on the nonfatal offence of recruitment of child soldiers. In Mali they chose initially to focus on the nonfatal offences concerning destruction of cultural property. In those situations the victims might or they might not agree with the Prosecutor's focus on nonfatal offences. They might believe that the investigations should cover fatal offences.

I am giving those as some examples of some areas, and I'm not suggesting bad faith on the part of the Prosecutor in any way, but there are going to be differences in emphasis. And furthermore, as the Prosecutor has -- in my submissions I talked about the Prosecutor's address to the Assembly of States Parties, and she very properly raised the problem of resources. Is she going to have enough resources to properly investigate all situations? Will she in the future decide that Afghanistan should go the way of Kenya and it should not be actively investigated? That's the kind of decision where the interests of the victims and the interests of the Prosecutor will diverge. So I would encourage your Honours not only to consider this particular appeal but to consider broader areas where the interests of the Prosecutor and the victims will diverge. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:41:00] Thank you, Counsel.

I have maybe the last question to Mr Guariglia. It's related to your answer to one of the questions of Judge Ibáñez.

The question is do you think that it is correct for the Pre-Trial Chamber to limit the scope of the investigation to the incidents in the authorisation decision?

I ask this question, because this decision is to be issued before the investigation starts. So of course it could have some implication.

And the question related, linked to the first one is what would be the value in the PTC's determinations related to the incidents, covered or not covered by the jurisdiction of the Court, in particular when the PTC refuses to authorise the investigation?

MR GUARIGLIA: [15:42:01] Thank you, your Honour, for this very important question.

As you know, we completely disagree with that approach by the Pre-Trial Chamber and it's indeed part of our appeal, where we think it's basically -- this was one of the building blocks of the decision in the sense that it led to a narrow, a tunnel view of the Pre-Trial Chamber as to how the situation was composed, which in turn informed its erroneous interests of justice decision.

We also note that it is an anomaly, as I said earlier, within the consistent case law of this Court, that has always, precisely for you, the reason that your Honour suggested, we haven't even started an investigation. There is a preliminary examination, some incidents, illustrative incidents are proposed to the Pre-Trial Chamber for the purposes of guiding the Chamber in its assessment, but it is necessarily a non-exhaustive list of incidents that is being initially presented for the purposes of the Article 15 scrutiny. And all Pre-Trial Chambers to date have interpreted the system working in that way. Even recently the Myanmar/Bangladesh decision goes back to the good jurisprudence, so to speak, and basically makes clear that it takes the sample incidents as such presented by the Prosecutor and authorises a broad

investigation where basically, other, other incidents may be, may be incorporated. It is an anomaly, it is an anomaly that basically conspires against basic principles of efficiency of investigation, of judicial economy, and creates problems for everybody, including victims, in the sense that basically every time that the Prosecutor wants to add a single incident to its investigation plan it has to go and get supplementary authorisation of the Pre-Trial Chamber.

And ultimately, your Honours, it intrudes into the independence of the Prosecutor to effectively select what to investigate, how to investigate it, and how to move forward. So in this sense we urge your Honours, actually, to reverse that component of the decision.

PRESIDING JUDGE HOFMAŃSKI: [15:44:13](Microphone not activated)

(Appeals Chamber confers)

PRESIDING JUDGE HOFMAŃSKI: [15:44:35] Thank you very much.

The schedule for the day of the hearing is now complete. The hearing will resume tomorrow at 9.30.

I would like to thank everyone, especially all the court officers, interpreters, reporters, as well as the technicians and security for assisting with today's proceedings. I thank all of you.

The hearing is now adjourned.

THE COURT USHER: [15:45:06] All rise.

(The hearing ends in open session at 3.45 p.m.)