International Criminal Court

Appeals Chamber

Situation: Islamic Republic of Afghanistan

ICC-02/17

Presiding Judge Piotr Hofmański, Judge Howard Morrison,

Judge Luz de Carmen Ibáñez Carranza, Judge Solomy Balungi Bossa and

Judge Kimberly Prost

Appeals Hearing - Courtroom 1

Thursday, 5 December 2019

(The hearing starts in open session at 9.33 a.m.)

THE COURT USHER: [9:33:34] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [9:34:22] Good morning.

Would the court officer please call the case.

THE COURT OFFICER: [9:34:31] Good morning, Mr President and 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: [9:34:52] I note with regard to appearances that all participants present today were already placed on the record yesterday. Unless I'm mistaken, we can dispense with placing appearances on the record.

Yes.

MR SCHEFFER: [9:35:24] Your Honours, David Scheffer, Northwestern University Pritzker School of Law as an *amicus*.

PRESIDING JUDGE HOFMAŃSKI: [9:35:38] Thank you, Mr Scheffer.

Yes, please proceed to introduce yourself for the record.

MR KERN: [9:35:40] Good morning, your Honours. My name is Joshua Kern of 9 Bedford Row Chambers. I appear for the Lawfare Project, the Jerusalem Institute of Justice, UK Lawyers for Israel, My Truth, the Simon Wiesenthal Centre and the International Legal Forum. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:36:05] Thank you very much.

We can proceed now.

MR DIXON: [9:36:08] Your Honour, if I could add on behalf of the government of Afghanistan as well, Mr Said Mohammad Alemi from the embassy who has joined us for the hearing today, so an additional member of our team, for the record.

Thank you, Mr President.

PRESIDING JUDGE HOFMAŃSKI: [9:36:23] Thank you, Counsel.

Well --

MS SATTERTHWAITE: [9:36:30] My name is Margaret Satterthwaite and I appear before you today, along with my colleague Nikki Reisch, on behalf of Mohammed al-Asad, one of the victims, number r/00749/18 in these proceedings. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [9:36:46] Thank you, Counsel.

Thank you very much, we can proceed.

Before proceeding with the schedule for the hearing of submissions on the merits of the appeals, and the question posed by the Appeals Chamber under group C of the list, the Appeals Chamber deems it appropriate, at this stage of the proceedings, to render an interlocutory decision on the question of whether the appeals brought by the victims LRV1, LRV2 and LRV3 against the decision of the Pre-Trial Chamber rejecting the authorisation of an investigation into the situation of Afghanistan are admissible.

The Appeals Chamber has had the benefit of receiving submissions both in writing and orally by the participants on this very important procedural question arising within the context of the Rome Statute system. Having carefully considered these submissions, the Appeals Chamber decides by majority, Judge Ibáñez dissenting both in respect of ruling orally on this matter and the substance, that the appeals brought by LRV1, LRV2 and LRV3 are inadmissible and must be dismissed as such.

The Appeals Chamber finds that LRV1, LRV2 and LRV3 may participate in respect of the Prosecutor's appeal by making representations before the Appeals Chamber pursuant to Article 15(3) of the Statute. In particular, the Appeals Chamber accepts the submissions by LRV1, LRV2 and LRV3 made in their respective appeals briefs, as well as the submissions for the remainder of the present hearing as representations under that provision.

While the Appeals Chamber's full reasoning will be contained in the eventual judgment on the appeals, in brief, the reasons of the majority in broad terms concern:

Number (i), the question as to victims' standing is to be resolved by reference to the *chapeau* of Article 82(1) of the Statute, and, more specifically, the provision that "either party" may appeal certain decisions.

Number (ii), in the view of the Appeals Chamber, who qualifies as a "party" in terms of Article 82(1) of the Statute must be determined taking into account the type of decision that is the subject of the appeal; the meaning of the term "either party" thus depends on the procedural context.

Number (iii), the decision that is the object of the appeal at hand is a decision under Article 15(4) of the Statute, issued in response to the request by the Prosecutor seeking authorisation of the investigation *proprio motu*.

Number (iv), victims may participate in the proceedings before the Pre-Trial Chamber,

pursuant to Article 15(3) of the Statute, by submitting representations. Victims, however, do not have the right to trigger proceedings under Article 15. The right is reserved for the Prosecutor and is clearly set out under Article 15(1) of the Statute. Number (v), in these circumstances, it cannot be sustained that the term "party" in Article 82(1) of the Statute, in appeals against a decision of a Pre-Trial Chamber under Article 15(4) of the Statute, includes victims who have made representations under Article 15(3). There is no reason to assume that, while their participatory rights before the Pre-Trial Chamber amount to the making of representation before that Chamber, their rights are amplified to that of a potential appellant once the Pre-Trial Chamber has issued a decision on the Prosecutor's request.

Number (vi), the Appeals Chamber does not consider that internationally recognised human rights mandate a different interpretation of Article 82(1) of the Statute. The right to an effective remedy arises, in the first place, with regard to a State that has violated the human rights of an individual. It cannot be a basis for finding that, before this Court, victims have procedural rights that go beyond those set out in the Court's legal framework.

Number (vii), having determined that LRV1, LRV2, LRV3 are not parties under in terms of Article 82(1) of the Statute, they cannot bring appeals against the Impugned Decision. In these circumstances, the Appeals Chamber sees no need to determine whether the Pre-Trial Chamber's decision not to authorise an investigation into the situation in Afghanistan amounts to a decision with respect to jurisdiction or admissibility in terms of Article 82(1)(a) of the Statute.

And (viii), Judge Ibáñez does not consider that this is an interlocutory decision, but that it's a judgment that should have been issued in writing, fully reasoned under Article 83(4) of the Statute. She considers that the Statute and internationally

recognised human rights grant the victims standing to appeal a decision issued by a Pre-Trial Chamber against the interests of victims, denying a request for authorisation to investigate by the Prosecutor under Article 15(3) of the Statute.

Judge Ibáñez will file her preliminary reasons in the course of the day.

Having rendered our decision, the Appeals Chamber will continue with the schedule for today. As a result of the oral decision just rendered, the schedule for day 3 of the hearing is amended to the effect that the victims will not be permitted to make final submissions as originally planned.

Nevertheless, the time allocated for LRV1, LRV2 and LRV3 at today's hearing remains unchanged. The court officer will provide you with copies of the amended schedule for Friday, 6 December 2019.

I would now invite the Office of the Prosecutor to address the Appeals Chamber on the merits of the appeals. Your 40 minutes begins now.

MS BRADY: [9:44:50] Thank you, your Honours, and good morning to you and to everybody in the courtroom.

I will be presenting the Prosecution's submissions on the merits of this appeal.

Pre-Trial Chamber II found that there is a reasonable basis to believe that crimes against humanity and war crimes were committed in Afghanistan. It recognised the scale and magnitude of these events. In the period 2009 to 2016 alone, it found that there were more than 50,000 civilian casualties, including 17,700 deaths.

The Chamber described what it called brutal and gruesome violence that resulted in, and I quote, "devastating and unfinished systemic consequences on the life of innocent people", end of quote, and recurrent targeting of women and "very young, and vulnerable civilians." That was at Decision paragraph 84.

It also found that various potential cases arising from these allegations would be

admissible at this Court.

Yet, despite these findings, the Chamber concluded that there were substantial reasons to believe that an investigation would not serve the interests of justice. Why? Because in its view the prospects for a successful investigation and prosecution were extremely limited; in so deciding, the Pre-Trial Chamber, in our submission, erred both legally and factually.

In her request the Prosecutor had found that there were no substantial reasons to believe that opening an investigation would not serve the interests of justice. Virtually every victim application received by the Chamber supported this view. But rather than asking the Prosecutor for her view about the prospects of investigation, and how this might affect her negative assessment of the interests of justice, in just a few pages and with no express reference to any supporting material, the Chamber unilaterally substituted its own view for the Prosecutor's informed, independent and discretionary determination.

This is the first time that a Pre-Trial Chamber has formed its own independent interests of justice assessment under Article 53(1)(c). And it erred in doing so.

Under ground one, we say that it erred in law by requiring a positive assessment that an investigation would be in the interests of justice, based on factors that were not considered by the Prosecution. This is contrary to the plain disposition of Article 53(1)(c) and consistent judicial practice.

And under ground two of our appeal, we submit that, in any event, the Chamber abused its discretion in assessing the interests of justice. It did not properly appreciate the factors it considered, that is, time elapsed since the crimes, the prospects of State cooperation, and the likelihood of access to evidence and suspects. It considered the Prosecution's allocation of resources, which it was not entitled to do.

And it gave inadequate consideration to the gravity of the crimes and the interests of victims, both of which are mandatory factors under Article 53(1)(c).

Your Honours, these errors flowed from a misunderstanding of the Chamber's role under Article 15. To compensate for the absence of a State or a Security Council referral when the Prosecutor acts *proprio motu*, the Chamber's role under Article 15 is limited to making an independent assessment that the Prosecutor's proposed investigation has a genuine and proper basis. In this way, it serves only to prevent abuses of power or unwarranted frivolous or politically motivated investigations.

And I point your Honours in that respect to the decision, recent decision in the Bangladesh/Myanmar Article 15 decision at paragraph 127, referring to other Article 15 decisions.

In practice, therefore, it's a check by the PTC, by the Pre-Trial Chamber, to confirm that the Prosecutor has a reasonable basis to proceed, in the sense of a reasonable basis to believe that at least one Article 5 crime has been committed, and that at least one potential case would be admissible in terms of complementarity and gravity.

It does not require the Pre-Trial Chamber to substitute itself for the Prosecutor in exercising her limited discretion under Article 53(1)(c). And it certainly does not justify the Chamber going further than the Prosecutor, in looking for additional, external reasons to justify the commencement of an investigation.

And indeed, in our submission, by overriding the Prosecutor's limited discretion under Article 53(1)(c), by speculating about the best allocation of the Prosecutor's resources, and by misinterpreting the scope of an investigation, the Chamber exceeded its role under Article 15. The drafters of the Statute did not intend that the Pre-Trial Chamber would manage, much less micromanage, the Prosecutor when carrying out independent parts of her mandate. Nor did they intend that

investigations authorised under Article 15 be carried out in any different way than investigations resulting from a State or Security Council referral under Articles 13 and 14.

I'll now turn directly to answer the questions that you posed in group C of the scheduling order, and in your first question, question (a), it asks whether the Pre-Trial Chamber has the power to consider for itself the factors under Article 53(1)(c), when the Prosecutor has requested authorisation for an investigation. The answer is yes, to this extent: When the Pre-Trial Chamber receives a request from the Prosecutor under Article 15(3), a request to authorise an investigation, it must decide whether to do so under Article 15(4). In this exercise, the Chamber must determine, and has the power to determine, whether it agrees, or not, with the Prosecutor's assessment under Article 15(3) and Rule 48 that there is a reasonable basis to proceed with an investigation. And, in our submission, this includes all three requirements in paragraph 1 of Article 53, namely subparagraphs (a), (b) and (c).

Now we recognise that opinions on this question vary to some extent, and that indeed a good argument can be made, as the Legal Representatives for the Victims and some *amici* have done, that the Pre-Trial Chamber can only consider interests of justice in Article 53(1)(c) if it's conducting a review of the Prosecutor's negative decision not to proceed under Article 53(3)(b). That is, when reviewing the Prosecutor's decision not to proceed with an investigation into a situation which has been referred by a State Party or the Security Council based solely on interests of justice reasons in 53(1)(c).

Now, we do see some merit in this narrow view of the Pre-Trial Chamber's powers in relation to Article 53(1)(c). However, this has not been and we are mindful of the

practice to date of the Pre-Trial Chamber in the so far five other Article 15 decisions, in the Kenya case, or in Kenya situation, in Côte d'Ivoire, in Georgia, in Burundi, and more recently in the Bangladesh/Myanmar situation. In those decisions the Pre-Trial Chamber considered that all of the factors in Article 53(1)(a) to (c) fell within the purview of the Pre-Trial Chamber's judicial scrutiny.

And in addition, if you take such a narrow interpretation of the Pre-Trial Chamber's powers under Article 15(4), we believe this would lead to a tension between the content of the Chamber's assessment, its assessment under Article 15(4), and the Prosecutor's own assessment under Article 15(3) and Rule 48. And this would hardly seem logical given the clear link between those two assessments, both of which are based on the same reasonable basis to proceed standard.

In any event, your Honours, whichever approach you take in this case, whichever one you prefer, it will lead to the same conclusion in this matter. And this is because when the Pre-Trial Chamber considers the interests of justice when it makes its Article 15(4) decision, it does not have the power to go beyond the factors which were considered by the Prosecutor in making her Article 53(1)(c) determination. In other words, it must confine its assessment of the interests of justice to the contours of the assessment conducted by the Prosecutor.

And please allow me what I mean -- to explain what I mean by this in practice.

It means that if the Prosecutor has identified a matter as potentially raising a concern that opening an investigation would not serve the interests of justice, and then weighed that factor against other relevant factors such as the gravity of the crimes and the interests of the victims, then the Pre-Trial Chamber when making its Article 15(4) decision can decide whether it agrees or not with the Prosecutor's assessment. I should say that that scenario has never occurred yet at the Court.

But if, as more typically occurs, and as has occurred here, the Prosecutor has found that there is no specific matter raising interests of justice concerns, the Pre-Trial Chamber can then decide whether it agrees with that conclusion. And in this scenario, the Prosecutor can't -- cannot be expected to have given reasons because, as a matter of commonsense, she can't prove a negative. However, the Prosecutor can address any particular matter of concern that may arise, if she's asked.

So, as such, the Pre-Trial Chamber's role in this scenario remains a real one.

For example, although it's clearly not relevant in this situation, the Pre-Trial Chamber might raise a matter which has been identified by the victims under Article 15(3) if, for argument's sake, they had raised concerns that an investigation would not serve the interests of justice. If the Pre-Trial Chamber shares those concerns, or indeed has another well-founded concern, then it must inform the Prosecutor and, in accordance with Rule 50(4), request additional information and ask for her reasoned view as to whether that concern affects her interests of justice assessment. And once she then provides that assessment, and within a suitable margin of appreciation given the discretionary nature of the Prosecutor's assessment, the Pre-Trial Chamber can decide whether it agrees, or not, with the Prosecutor's concrete conclusion.

So, in other words, when making its Article 15(4) decision, the Pre-Trial Chamber cannot take into account considerations that were not part of the Prosecutor's analysis in relation to the interests of justice. And on a separate but related note, the Chamber is not required nor even permitted, as it did here, to condition the commencement of an investigation on its own positive determination that this would be in the interests of justice.

Your Honours, our position is supported by the texts of the Statute and the Rules. Firstly, it comes from a proper understanding of the purpose of Article 15, and the

distinct mandates of the Pre-Trial Chamber and the Prosecutor.

Her Honour Judge Fernández made this point in her opinion in the Côte d'Ivoire Article 15 decision. She held that, because of the limited purpose of the procedure under Article 15 of the Statute, and the distinct mandates and competences of the Chamber and the Prosecutor respectively, and I quote from her separate opinions at paragraph 16:

"... the examination to be undertaken by the Chamber, in exercising its supervisory role, is solely a review of the request and material presented by the Prosecutor."

Rule 48 is also important. This rule, as your Honours will know, puts the Prosecutor's decision-making for *proprio motu* situations on an equivalent basis as that for referred situations.

So when the Prosecutor decides whether there is a reasonable basis to proceed, she must consider the factors in Article 53(1)(a) through (c). Now it's true that Rule 48 does not expressly, in its terms, apply to the Pre-Trial Chamber's decision such as to explicitly link the Chamber's assessment to the same factors considered by the Prosecutor. But, in our submission, it's implicit from this rule, especially when it's read in light of the reasonable basis to proceed standard which appears in both 15(3) and 15(4) that the Pre-Trial Chamber's assessment should not exceed the matters considered by the Prosecutor. And Rule 50(5) also supports this interpretation.

And this is a point which was also made by the Pre-Trial Chamber in the Kenya Article 15 decision at paragraph 21.

Our position is also based on a proper consideration of the particular characteristics of Article 53(1) itself, in particular, the presumption of investigation, the negative character of the assessment in Article 53(1)(c), and the function of that provision as a key repository of prosecutorial discretion.

And your Honours need no reminding of the wording of Article 53(1)(c). As you know, it says, quote:

"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."

So this expression of prosecutorial discretion clearly envisages a negative and not a positive assessment by the Prosecutor.

If the Pre-Trial Chamber were to consider the factors for Article 53(1)(c) which were not referred to in the Prosecutor's Article 15(3) request or later, when asked, effectively it would be substituting the Prosecutor's discretion for its own, which would be impermissible. And if it were to insist on making a positive assessment of this factor, this would conflict with the presumption of investigation in Article 53(1) and the negative formulation of subparagraph (c). And both of these were deliberate choices made by States when drafting the Statute.

I'll turn now to question (b), your second question. This asks whether the factors considered by the Pre-Trial Chamber in its decision at paragraphs 91 to 95 are appropriate factors for an interests of justice determination.

For its interests of justice assessment, the Chamber considered factors which it called or found particularly relevant to whether the investigation prospectively appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.

It considered firstly, the time elapsed between the alleged crimes and the request, which it assessed as significant. That's at paragraphs 91 to 93. It assessed the prospects of securing meaningful cooperation from relevant authorities in the future, which it gauged as, quote, "even trickier", end of quote, than the already what it

called scarce cooperation obtained by the Prosecutor in the preliminary examination phase. That's at paragraphs 91 to 94. And thirdly, it considered the likelihood that relevant evidence and potential suspects or potential relevant suspects might be available and within reach of the Prosecutor's investigative efforts and activities, something it found wanting. This was at paragraphs 91 and 94.

And finally, it considered that an investigation would result in what, in its view, the Prosecutor, the Prosecution having to reallocate its financial and human resources which, in its view, would compromise the Prosecutor's other preliminary examinations, investigations and cases with more realistic prospects to lead to trials. That's at paragraph 95.

And you've asked whether it was appropriate for the Pre-Trial Chamber to consider these factors. Our primary position is that since the Prosecutor did not consider these factors to be relevant for her interests of justice assessment in her Article 15(3) request, and since the Chamber did not seek to ascertain the Prosecutor's views on these matters, any positive assessment in this regard was inappropriate no matter the circumstances.

But in any event, the factors taken into account were, in our submission, inappropriate given the facts of this situation.

Now, in its Policy Paper on the Interests of Justice, the Office of the Prosecutor has stated that it considers that the only factors which, as a matter of law, must be taken into account for Article 53(1)(c) are those expressly set out in the provision: the gravity of the crimes and the interests of the victims. Beyond these, and exceptionally, on a case-by-case basis, the Prosecutor may in her discretion consider other factors, provided they arise concretely from the facts of the situation. But the interests of justice cannot be transformed into a catch-all provision requiring

the Prosecutor to be satisfied about an indefinite number of additional matters before an investigation can be launched.

The situation, the situation is quite different once an investigation is opened. Once this happens, a host of evidentiary, normative and operational factors will require the Prosecutor to select and prioritise the particular incidents, suspects and charges she wishes to focus on for the purpose of bringing cases before the Court.

At that stage, factors relevant to the feasibility of an investigation and operational issues, such as prospects for cooperation and access to evidence and suspects, or even the Office's budgetary resources, may be highly relevant. And I point your Honours to the Office of the Prosecutor Policy Paper on Case Selection and Prioritisation, in particular, paragraphs 13 and 51. But these factors should not be, as it were, front-loaded into the preliminary question of whether an investigation should even be commenced.

Now the Prosecution need not take a position in the abstract on whether the first three factors considered by the Pre-Trial Chamber were appropriate or not. What we can say is that when considered in light of the concrete facts of this situation, they were not appropriate. In other words, the Chamber should not have taken into account what it understood to be the lengthy time elapsed since the crime or its view of the limited prospects for State cooperation or access to evidence and suspects.

That's because these factors did not genuinely arise from the facts of the situation, when properly understood, in light of the applicable law. And we have explained this in our appeal brief at some length, taking up quite a few paragraphs, at paragraphs 111 to 138. And I won't repeat those submissions, save to say that, in particular, the Chamber's view of their relevance -- of their relevance of these factors apparently focused on just one of the three potential lines of inquiry in the situation,

overlooked the Statute's legal framework for cooperation once an investigation is authorised, and speculated about the prospects of securing evidence and suspects without an adequate factual basis. And, as such, the Pre-Trial Chamber should not have considered those matters.

Finally, as for its consideration of its view of how the Prosecutor should allocate her financial and human resources: First, while the Prosecutor must indeed consider her human and financial resources when prioritising which cases to pursue, that's something that appears in our case selection policy, paragraphs 11 to 12, it is unclear whether she can ever validly consider resource considerations when making her decision under Article 53(1)(c).

But more pertinently to this appeal, the management and administration of the Prosecutor's resources is exclusively a matter for the Prosecutor under Article 42 and, as such, the Chamber's consideration of this matter was not just inappropriate, it was *ultra vires*.

Finally, your Honours, I turn to your last question, question (c), which asks if a Pre-Trial Chamber, in deciding whether to authorise an investigation, may limit the scope of the investigation to incidents specifically mentioned in the Prosecutor's request and authorised by it.

And the answer, in our submission, is no. The purpose of an Article 15 decision is to set out the parameters of the authorised investigation, its outer scope, not to define the specific incidents within it. The scope of an investigation is delimited by suitable temporal, geographic or other material parameters. A decision by the Pre-Trial Chamber to limit the scope of the authorised investigation to incidents specifically mentioned in the Prosecutor's request would inevitably and improperly intrude into the Prosecutor's independent duty to conduct an objective, evidence-led

investigation and to select cases for prosecution. And I also note that this approach departs from how all other Pre-Trial Chambers in the other Article 15 decisions have approached the issue, in Kenya, in Côte d'Ivoire, in Georgia, in Burundi, and most recently in Bangladesh/Myanmar.

And there are several reasons for this:

First, the preliminary examination procedure is not intended to identify exhaustively every crime which might form part of an investigation. Limiting the scope of the investigation to the specific incidents in the Prosecutor's Article 15(3) request would conflict with Article 53(1)(a), which requires that the Prosecution, the Prosecutor find a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed. Indeed, it's sufficient to show that at least one crime, at least one Article 5 crime has been committed. The Prosecution, the Prosecutor may of course choose to provide multiple examples to illustrate that the standard has been met, but her early and non-comprehensive identification of incidents should not be seen as setting the parameters of the situation.

And this brings me to a matter raised by counsel for the cross- border victims yesterday. Mr Powles raised as problematic the fact that the Prosecution did not include a reference to crimes against cross-border victims in her Article 15(3) request, and nor has she formed, his words, a definitive view about them.

And his concern in fact raises precisely why the scope of an investigation cannot be limited to the specific incidents in the Article 15 application.

We have explained this in our response to the *amicus curiae* brief at paragraphs 17 to 21, and Mr Guariglia yesterday touched on this when he responded to Judge Hofmański's question. We did not, we cannot and we're not required to exhaustively identify all possible criminal incidents in our Article 15 request. The

cross-border victims are not the only victims of alleged crimes who were not specifically addressed in our request. Indeed in the application itself, in the Article 15 request, we expressly reserved our position in relation to other potential incidents. That's in paragraph 38 of our request. But this does not mean that these incidents cannot potentially be included, so long as they fall within the scope of the investigation based on temporal, geographic or other material parameters.

And, indeed, any decision on whether -- by the Prosecutor now on whether the Prosecution will investigate and prosecute them will depend on several factors and can only be decided based on our independent, evidence-led investigation and other matters relevant to case selection. In fact, to do so now would be akin to making an Article 53(2) determination, which would clearly be premature.

If a chamber, if the Pre-Trial Chamber were allowed to limit the scope of the investigation to the specific incidents, it would essentially require the Prosecutor to prove each incident to the Article 53(1) standard, and this would raise several practical concerns:

For example, some crimes that require more intensive investigative methods in order to establish them would be less likely to be investigated and prosecuted. This could include, for example, crimes with more complicated elements or even conduct of hostilities crimes. The Prosecution doesn't have the same investigative powers in a preliminary examination as it has once an investigation proceeds, so, for some crimes, it would be harder to meet the standard in Article 15(3) and Article 53(1).

Also, if the Prosecutor were restricted to incident-focused investigations, when she inevitably, as she will, come across evidence about other criminal incidents, she would have to go back to the Pre-Trial Chamber with a new Article 15 request in order to investigate them.

Your Honours, I asked you to think about a situation: What if the first witness the Prosecution comes across mentions a mass atrocity which was not known before? It can happen. It happens often in criminal investigations. The Prosecution would have to go back to the Pre-Trial Chamber for a new authorisation. This would be an overly burdensome procedure, it would apply only for *proprio motu* situations and it would be impractical, and it could lead to partial or incomplete investigations. And, in the meantime evidence could be lost. It could also potentially compromise the Prosecutor's ability to effectively identify and pursue exculpatory evidence. Secondly, limiting investigations to specific incidents would, in the majority of cases, collapse the distinction between situations and cases. The Pre-Trial Chamber would not only play a role in authorising an investigation into a situation but effectively would be directing the Prosecution to certain incidents and preventing it from pursuing and selecting a particular case. In other words, the Chamber would effectively be directing the investigation and the case selection. This would undermine the Prosecutor's independence, her obligation in Article 54(1)(a) to investigate incriminating and exonerating circumstances equally, and her discretion and duty to conduct evidence-led investigations to decide which incidents and which persons to proceed against.

Finally, your Honours, it would lead to the untenable outcome that different standards apply to investigations for referred situations and for *proprio motu* ones. For the referred situations, the State or the State Party or the Security Council refers the situation as a whole to the Prosecutor for her to decide which cases to pursue. But for *proprio motu* situations, if this were the case of incident-specific investigations, the Pre-Trial Chamber would effectively direct and guide the investigation and the case selection.

THE COURT OFFICER: [10:20:09] Excuse me counsel, you have 5 minutes left.

MS BRADY: [10:20:12] Thank you.

This dichotomy has no basis in the Statute. And it would give the Pre-Trial Chamber a role in supervising the investigation, something the drafters expressly rejected when crafting the model for this Court. The safeguard, rather, lies in the Prosecutor's duty under Article 54 to conduct objective, evidence-led investigations. And this duty is always applicable, no matter the trigger which led to the opening of the investigation.

Your Honours, this concludes my submissions. I thank you for listening.

PRESIDING JUDGE HOFMAŃSKI: [10:20:54] Thank you, Ms Brady.

And then I will ask the representative of the Islamic State of Afghanistan, you are invited to address the Appeals Chamber. Your 40 minutes begins now. Please proceed.

MR AZIZI: [10:21:20] Thank you.

Mr President, your Honours, the government of the Islamic Republic of Afghanistan is honoured for the opportunity to address the Appeals Chamber on these very important matters for the future of our country and all of our people.

Our nation has tragically been engulfed by armed conflicts and violence for far too long. In recent years they have been particularly bloody and divisive, as extremist terrorist and repressive groups have sought to tear our great country apart, from the Soviet Communist regime, to the Taliban, and now ISIS as well. The scars from these conflicts run very deep. Every family, every child in our country has been harmed by the hundreds of thousands of gratuitous attacks on civilians; so many ordinary lives have been wrecked forever. It is a truly sad and distressing human story.

This is our daily experience and one that we as the government are more determined than ever to change and to stamp out the criminality that is rife in our society. We wholeheartedly share with the ICC, the Prosecutor and with all of the victims the commitment to end impunity and achieve justice. We especially welcome the strong participation of the victims in these proceedings.

The decades of conflicts have devastated our country and its economy, and we remain a country still at war. In its last quarterly report, the United Nations Assistance Mission in Afghanistan recorded that for the sixth year in a row it had recorded more than 8,000 civilian casualties in the first nine months of this year. We are fighting adversaries in the Taliban and other terrorist groups who do not hesitate to target civilians and to target anyone connected with the government, including the police, the prosecutors and the judges going about their work.

It's a grim picture in which each day is a struggle to control our country and protect our children for the future.

Despite all the subversive efforts of our adversaries, no one can take away our belief and resolve to hold those most responsible to account. The government of Afghanistan is positively pressing ahead with ambitious reforms and our commitment to criminal justice is at its heart. We ask the Court to look at what we have achieved in the area of criminal justice for international and terrorist crimes.

We have reformed our national criminal laws so that torture and other international crimes are properly addressed. We have built up the institutional capacity of the courts and prosecutors. We have established a dedicated international crimes office. We have many thousands of investigations and prosecutions underway. We are engaging fully with international human rights mechanisms.

My government is doing all this while prioritising peace building to end the current

violence and suffering and for the long-term national interests for our country. Peace and justice are certainly not contradictory and, as the UN has recognised, Afghanistan must be given some latitude to achieve peace first and foremost for the victims of the violence, and in order to allow for justice and reparation to follow. These considerations must be taken into account by the ICC because the authorisation of an ICC investigation, which we oppose, would jeopardise both national and international efforts to forge peace. Our national investigation will continue and be expanded.

Your Honours, the government of Afghanistan has cooperated constructively with this Court and with the Prosecutor in particular. We have provided documents and information. We have invited the Office of the Prosecutor to come to Afghanistan. In 2017, the Office declined our invitation, citing security concerns. That is relevant to your Honours because many Afghans, including those who have suffered profoundly as victims, will ask how this Court could investigate these crimes better than my government if the Prosecutor is unable to visit Afghanistan to carry out those investigations. We can undertake the necessary investigations in our own country. We are doing it right now against the odds.

My government, my country implore the Court to look at what Afghanistan has achieved. Look at our starting position similarly weakened by decades of conflicts. Look at the immense challenges after the first democratic transfer of power in our history. Look at how far we have already advanced in a short period of time in spite of all these obstacles.

We are acutely aware that there is a distance left to travel. We know that we need to do much more. But considering where we started after the removal of Taliban, considering the impediment we continue to face, no one can say that the government

of Afghanistan is not genuinely seeking to bring justice to the victims by investigating and prosecuting these matters in our own country. We urge the Court to recognise and encourage our good faith and fearless efforts. That would truly benefit our country and the alleviation of the misery our people endure. It would serve the interests of justice.

I will now hand over to my counsel for the government to set out our legal submissions. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [10:29:28] Thank you very much.

Please, Counsel, you can continue.

MR DIXON: [10:29:45] Mr President, your Honours, when the decision of the Pre-Trial Chamber to refuse the Prosecutor's application to open an investigation was handed down, it is no secret that it was greeted with widespread howls of criticism, especially given the timing when it was delivered.

It was hard to find too many, particularly in the international justice community, who thought the decision was justified.

What was, however, perhaps most surprising was that it was equally hard to find too many asking about the current ability of the national criminal justice system in Afghanistan to investigate the most serious international crimes, or what could be done to help the national jurisdiction. The chorus of criticism deflected attention away from the present steps that are being taken within the country itself.

It was simply assumed by many without any scrutiny, and wrongly, we say, that Afghanistan is a failed state, unable to act and to be written off as an unreliable partner. A view that is totally unfounded and unwarranted.

The submission on behalf of the government of Afghanistan in this appeal is thus to set the record straight. And to ensure that the focus of many of those outside

Afghanistan who peer momentarily into it should not be all about how the Pre-Trial Chamber got it wrong, but on what the State Party itself is doing and its true potential to do more in the future, especially if it is supported by the ICC and the Prosecutor.

Your Honours, the government's submission rests on two key propositions:

The first is that the scope and quality of the national investigations and prosecutions is clearly a relevant factor to be taken into consideration when assessing whether there are substantial reasons to believe that an investigation would not serve the interests of justice.

And, secondly, that in the present circumstances, there is no need to authorise an ICC investigation at this stage - and I underline at this stage - in light of the investigations being undertaken by Afghanistan under its new laws and new criminal justice bodies and mechanisms put in place precisely to investigate the same crimes that could come before the ICC. That would far from undermining the interests of justice, we say, promote these vital interests and in particular those of the countless traumatised victims. And we heard yesterday from the NGOs from Afghanistan, very helpfully, who informed us that it is at least 69 per cent of a population of 35 million people.

The plea of Afghanistan is for the fundamental principle of complementarity to be given full effect. The nation must be given the opportunity to continue its investigations, and strengthen them, in light of the severe obstacles that are faced on the ground, with the support of the Court.

And very importantly in that regard, to be, as Afghanistan, reporting back to the Court on its progress each step of the way so that the position can be constantly assessed.

Afghanistan wishes to embark on this course hand in hand with the Court. It is not

in any sense a competition.

Instead of authorising an investigation that could be open for many years, realistically, without any major movements, and I say this recalling that the preliminary examination has itself lasted 11 years, rather focus all the attention and resources on the national initiatives that are already underway which would benefit from the Court's support, of course always with the backstop of being able to refer the matter back to the ICC if that were necessary.

We submit it would send a very powerful message to the country that the national justice system was legitimate, in the face of some of the very worst terrorist attacks the world currently has to confront, that it was worthy of promotion, and thus possessing the force of genuine deterrence as part of rebuilding the nation.

I will deal, your Honours, with each of these arguments, and then I have a few submissions, lastly, about the scope of the Pre-Trial Chamber's powers.

Firstly, the interests of justice. This is obviously a core concept that arises throughout the work of the ICC, and indeed in all of our national legal systems.

In the present context the specific issue that arises is whether there are substantial reasons to believe that an ICC investigation would not serve the interests of justice.

Now, your Honours, to make that determination whether there are substantial reasons, logically, we need to know what are the interests of justice. It is a negative definition, but really what we focused on here is, are there substantial reasons? That's a very clear and positive matter that has to be addressed.

Now, a typical definition of the interests of justice which emerges in both national and international systems is that it is the proper view of what is fair and right.

It's not susceptible to a precise definition. It can't be applied mechanically. It requires a very broad evaluation based on an assessment of the particular

circumstances of individual cases.

That is what defines it. It is extremely broad, all-encompassing. Perhaps the apt word is "all-inclusive", which is a positive characteristic, we highlight.

Now, given that manifest breadth, and by their very nature, the actions of the national criminal justice system must be a consideration to take into account when evaluating the interests of justice, and whether there are then substantial reasons that it would not be in the interests of justice to proceed.

The Prosecutor's own Policy Paper on the Interests of Justice of 2007 says that other potential considerations include other justice mechanisms. And the paper endorses the complementary role played by domestic systems, rightly so, at pages 7 and 8.

Also in the preliminary examination report of 2017 on Afghanistan in respect of the interests of justice, at paragraph 275 the OTP takes into account, and I quote, "the limited prospects for accountability at the national level" as a factor weighing in favour of an ICC investigation. Now, we say the reverse must obviously also be true.

Furthermore, the obstacles faced in an investigation also must be a relevant factor. There is hardly a day, your Honours, that goes by when national police forces around the world do not consider whether they have lines of inquiry that would reasonably permit an effective investigation that could lead to a prosecution, especially in the context of extraterritorial and universal jurisdiction cases. And if there are not such leads, then they could be entitled to investigate no further.

And we all know that in all States, in prosecutor's offices around the world, they consider the public and national interests in deciding whether to proceed to bring a case or not, and in exceptional circumstances they may decide not to prosecute.

These considerations are magnified in conflict and post-conflict scenarios like

Afghanistan. But it does not mean - and I must stress this - for a minute that Afghanistan is not committed to bringing justice. They are simply vital interests of peace that must be prioritised and then taken into account by your Honours because immediate civilian life must be saved, and to create the conditions to allow justice to take its course.

Afghanistan notes that the Pre-Trial Chamber rightly identified certain fundamental hurdles in any investigation. And similar outreach problems were identified yesterday by the NGOs from Afghanistan, no presence of the Registry and services on the ground was mentioned. As the government, we know better than most about these hurdles, as the government faces them in their harshest form each day. The government's submission, however, is that it is taking them on. They are finding ways at the coalface to overcome them, and that should be acknowledged as it provides the best chance of justice here and for the victims.

And further, as the OTP submitted repeatedly yesterday, Article 15(5) allows the OTP to apply at any time to authorise an investigation. It is not game over if Afghanistan was allowed their rightful opportunity.

That leads me into the second proposition in relation to our national investigations. Our submission today, Mr President, your Honours, is not a complementarity challenge per se whether preliminary under Article 18 or under the specific provisions of Article 19.

Now your Honours may well be thinking, well, why don't you go ahead and make such an application, if you wish to? And the government certainly reserves such a right, but we are where we are today and it is thus entirely appropriate for the government to be urging your Honours not to authorise an ICC investigation for now. Why authorise it, even if there are errors below, when the State Party comes before

you submitting that it is genuinely investigating?
Why rush in when the national jurisdiction is already taking on the immense challenges, as they certainly are in Afghanistan, of investigating and prosecuting international crimes?
And it is for all these reasons that the government has elaborated in its written submissions what the national system is actually doing and we are ready to provide further details, whether publicly or confidentially, if it concerns sensitive matters that could assist the Court.
And I highlight here, just by way of illustration, the special and dedicated international crimes office established in May of 2018 to specifically investigate the same potential crimes that could come before the ICC. It is an office consisting of 20 prosecutors under a chief prosecutor and 20 other staff members that report directly to the attorney general.
It applies the newly amended Afghan Penal Code which came into force in February 2018, which covers all ICC crimes and incorporates as well command responsibility, thus further permitting the investigation of those most responsible.
The international crimes office is actually in the past year investigating both Afghan and Taliban cases involving international crimes. One example being the notorious Zurmat case in which 11 civilians were killed by Afghan security forces, allegedly, in the southern province of Paktia. There are many other cases in other provinces where the office is able to gain access and investigate.
Alongside that, the office of prosecution for internal and external crimes of the attorney general's office has in the past year referred over 1,500 cases involving international and terrorism crimes to the national courts, and there are many other thousands of cases being investigated. And we also highlight in our submission the

commission on the prohibition of torture body that was formed in April 2017 following the new law.

And, your Honours, there is certainly no blanket amnesty for international crimes in Afghanistan. The Pre-Trial Chamber simply got this wrong when they referred to amnesty laws to find the case admissible before the ICC. The Prosecutor had rightly pointed out that victims can bring cases in their submission. That was at paragraph 272. The Pre-Trial Chamber completely overlooked that and simply highlighted the amnesty law in finding the case had to come before the ICC. That's paragraph 74.

In any event, your Honours, what we are submitting here is new information. Bearing in mind that the OTP applied to open an investigation in November of 2017 and the Pre-Trial Chamber's decision is based on that information going back. Much, we say, has advanced since then. And if this is all new evidence we have an alternative submission, which is that it can be sent back to the Pre-Trial Chamber which I will address your Honours on briefly at the end.

And what's more, Article 15(4) says any findings on jurisdiction and admissibility are preliminary in any event, and such findings are without prejudice to future determinations, thus taking into account the evolving assessment that the Court must undertake of national investigations when it comes to complementarity. It's not fixed in time forever.

The United Nations in the past year has given considerable credit to the Afghan authorities, which we would urge your Honours to take into account.

The UN in April of this year welcomed the concerted efforts of the government and took note of the progress made in the implementation of its national plan and the elimination of torture.

And the UN Human Rights Council as well in the Universal Periodic Review for Afghanistan noted the solid commitment of Afghanistan to promote and protect human rights. These are just some examples.

The victims are, with respect, thus wrong to say that Afghanistan is unable to investigate and just to bat it aside as though none of this evidence has any effect, and that it is open to question whether the government is even willing. In fact, it is quite remarkable that in all the submissions we have heard no one has made any submissions about what the State has been doing, particularly in the last year, given it any recognition or credence at all.

Alternatively, your Honours, the government submits that if the Appeals Chamber is not inclined to follow this course, if there are errors to be addressed from below, or if there are any other reasons, then we ask that the matter alternatively is remitted back to the Pre-Trial Chamber to consider in light of all the government's information and submissions. In that way, your Honours' decision can then be applied through usual rules of precedent by the Pre-Trial Chamber in light of all the new relevant submissions, as also in light of hearing from the victims further. We noted the complaints yesterday about victims not having sufficient time to engage with the Pre-Trial Chamber in the first instance. And also to address the interests of justice, test itself on the available evidence, the OTP this morning highlighting that particular problem that they had not been given a chance to be heard. Well, this would be the opportunity to be heard alongside the State most directly affected and that's why we put it forward as an alternative, practical solution to the problem.

Your Honour, on the subject of the powers, very briefly, of the Pre-Trial Chamber, the government submits that under the express terms of Article 15(4) the Chamber absolutely has the power to consider and decide to open an investigation if there is

a reasonable basis to proceed and, equally, to decline the Prosecutor's application if there is no such basis. That means if there are substantial reasons not to investigate these must be matters the Chamber can examine and decide on, in the same way that it considers jurisdiction, admissibility, the interests of victims, and any other relevant matter. The Kenya decision has been cited, paragraph 21, the standard under 15(4) is exactly the same as that under 53(1).

And this is what Pre-Trial Chambers have done in all situations: They have considered the OTP's position. They have looked at the interests and submissions of the victims and then decided whether or not there are any substantial reasons nevertheless not to proceed. There is no detailed analysis in many other cases because in those cases the Chamber found that there were no substantial reasons. If they had, there's no doubt would have been much more discussion of the issue.

We say this is a straightforward matter. It is an application process by the OTP in which the Chamber decides like in any other application whether the requirements are met. It should not be confused with the Chamber's separate and specific powers of judicial review of a decision by the OTP when the OTP has decided not to investigate in the interests of justice. This particular review power provides an additional check on the OTP when it refuses to investigate.

In our submission, the OTP this morning has overcomplicated the position entirely in trying to carve out some test that would allow for the Chamber only to confine its assessment to that assessment conducted by the OTP. If they got the issues on the interests of justice wrong, then the Chamber is fully within its right to say that.

In exactly the same way, if they got admissibility wrong, or jurisdiction wrong, the Chamber makes a ruling on the application that is made. And this is very effectively highlighted in the recent Bangladesh decision, paragraph 113, where

the Court says that the Prosecutor has identified no reasons not to investigate and the Chamber has no reason to disagree with this assessment. So it takes what the Prosecutor says, it takes what the victims say. It looks at the matter and says there is no reason to disagree. If the Prosecutor has overlooked something, as if it had happened in admissibility or jurisdiction, the Chamber would be fully within its right to say, "sorry, guys, you overlooked this point", and that is a matter, therefore, that means you cannot proceed. It is no different to any other application that comes before your Honours. The Prosecutor has to satisfy the requirements, the Court is empowered to assess whether they have done that or not.

Your Honours, my concluding remarks and relief:

There is at the heart of the Pre-Trial Chamber's decision a sincere concern about how long these proceedings have gone on for with no end in sight, like many others at the ICC. Eleven years just to decide whether even to investigate. On any view, your Honours, this must suck away the hope and belief of any victim, so there is an understandable very real anxiety here that the Pre-Trial Chamber has placed its finger on, whatever view is taken on how it has expressed that.

Our request is that the Appeals Chamber engage fully with this crux issue. It will hopefully be evident to your Honours that what Afghanistan places before you in its main request or alternative, is a very sensible and appealing practical solution.

We must emphasise that this approach to the problem can also provide the foundation for the ICC to engage with other States who have been specifically mentioned in this hearing, under complementarity. The Court would be clearly seen to reach out the long and respectful arm of complementarity, and thus encourage national action as partners with the ICC, of course, always with a caveat that the ICC can return to the frame in full.

You may be able to find reassurance in the often quoted statement that the absence of trials before the ICC would be a major success, thus implying that national investigations and trials were taking place in the jurisdictions concerned.

It is time, we say, to bravely grasp the nettle, and decline to authorise an ICC investigation, contrary to what the ICC is probably now expected to do, and instead unleash the authentic potential of Afghanistan's national institutions with the assistance of the ICC. Help the country, don't question it, don't denounce it. In this way, the hundreds of thousands of victims will have their own police inquiring into their cases now, appear before their own courts now, and see and test justice happening before their very own eyes now. And they will know the ICC stands in steadfast support and always as a safety net for international justice.

Afghanistan, as a State Party wholly dedicated to the ICC, urges for a sound and prudent approach and one that, we say, lies at the very centre of the ICC's existence and future.

Thank you, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [10:55:44] Thank you very much. Thank you for being on time.

We will adjourn now for 30 minutes and resume at 11.30, which time we will hear from counsel from the Legal Representative of Victims, beginning with group 1.

Thank you very much.

THE COURT USHER: [10:56:09] All rise.

(Recess taken at 10.56 a.m.)

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

THE COURT USHER: [11:32:51] All rise.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [11:33:29] We'll continue with submissions of Legal Representatives of Victims, group 1. As I understand, Counsel Gaynor will start. Please, you have together 40 minutes for your intervention.

MS KISWANSON VAN HOOYDONK: [11:33:54] Thank you, your Honours.

I will address the group C questions today.

In answer to question C(a), we submit that the answer is no.

On a literal reading of Article 53(1) the Pre-Trial Chamber can carry out an interests of justice assessment where the Prosecutor decides not to proceed with an investigation where there are substantial reasons to believe that it would not be in the interests of justice.

Article 53(1) does not, therefore, grant the Pre-Trial Chamber the power to undertake an interests of justice assessment where the Prosecutor decides to proceed. The Pre-Trial Chamber here acted *ultra vires*.

The Legal Representative of Victims, the OPCV, and the *amici* have provided compelling arguments for why this Chamber should find that the Pre-Trial Chamber acted *ultra vires*. We also understand that LRV2 will address this question in more detail today. I will not therefore make any further submissions on this point.

I now turn to question C(b): should your Honours determine that the Pre-Trial Chamber nevertheless acted within the remit of the Statute in carrying out an interests of justice assessment, then we submit that the factors that it considered, the passing of time, cooperation, feasibility, and the resources available to Prosecutor, were inappropriate at this stage of the proceedings. The reasons for why these factors are erroneous are explained on pages 30 to 39 and 45 to 46 in our appeal brief.

If the four factors of passing of time, cooperation, feasibility, and resources are to be considered appropriate, then the Pre-Trial Chamber failed to properly carry out the

balancing exercise required under Article 53(1)(c).

A proper interests of justice assessment must balance those four factors against the factors mentioned in Article 53(1)(c); the gravity of the crimes and the interests of the victims.

In our submission, a proper interests of justice assessment must be informed, comprehensive and holistic, and it must genuinely appreciate the interests of the victims and the gravity of the crimes. It must also recognise the presumption for an investigation.

A proper assessment would have taken into consideration the impact of the alleged criminal conduct of the anti-government forces, the Afghan government forces, US forces, and other international forces, on the victims, but on their interests. And it would have weighed their interests against the four factors considered by the Pre-Trial Chamber.

These interests include in a broader sphere: access to education, the practice of religion, access to health care and access to justice.

For millions of Afghans, the crimes under consideration have had a devastating impact on these interests.

Furthermore, a proper assessment that genuinely considered the interests of victims and the gravity would have reflected the physical and psychological impact of the crimes, in particular sexual and gender-based violence, on an unknown number, but very likely hundreds of thousands of Afghans.

Almost every Afghan is a Muslim. Salah, prayer, is a physical, mental, and spiritual obligatory act of worship and a key pillar of Islam. In particular, Salat al-jama'ah, pair in congregation, is looked upon by Allah favourably and it is rewarded.

Attending mosque to participate in prayer in joint congregation is sacred to millions

of Afghans, but their ability to attend mosque has been devastated by attacks against mosques and other places of worship. These have become a regular feature of the conflict in Afghanistan.

One of the victims that we represent lost her 14-year-old brother in a suicide attack on a mosque, allegedly involving *Daesh*. She, her father and two brothers, were peacefully exercising their right to worship. Another victim that we represent has said that she cannot forget the loss of her husband, the father of their four small children. He was killed also in a suicide attack on a mosque. She has explained that they are in need of food, shelter, and access to education. The father was their breadwinner.

As has been well documented, the Taliban systematically oppressed Afghanistan's women and girls. One of the most destructive abuses of women under the Taliban was the denial of education. The consequences of that denial is felt today. The female literacy rate today is approximately 30 per cent only. The effort made to enrol girls into schools has not been easy. Insecurity and violence, stemming from both the ongoing conflict and general lawlessness, is resulting in low attendance and poor education. The bombing of schools and the occupation of the schools by the Taliban and Afghan government forces is a regular occurrence.

Afghans' access to health care is also severely hampered by the commission of the alleged crimes before this Court.

Hospitals, clinics, and other health care facilities are systematically attacked. According to the World Health Organisation, in the first six months of 2019, 68 attacks on health care were reported, resulting in the closure of 101 health facilities. As of August 2019, only 27 of those have been re-opened. There are already not enough health care facilities accessible for Afghans in need.

The destruction and closure of health care facilities put Afghan lives at risk. This includes women in need of maternal care and childcare. In 2018, UNICEF stated that newborns in Afghanistan faced the worst odds. According to UNICEF, Afghanistan has the third highest newborn mortality rate in the world.

The Chief Executive of Afghanistan, Abdullah Abdullah, a medical doctor himself, said recently, quote, "With what we spend on a single day of war, we could build a state-of-the-art hospital." End of quote.

The crimes against Afghans are not only having disastrous consequences on the physical health of Afghans and their access to physical health care. The mass victimisation of Afghans is resulting in a mentally unwell population. It is estimated that half of the population of Afghanistan suffer from depression, anxiety, or post-traumatic stress. The impact of this on the general well-being of an individual Afghan, but also on their relatives, friends, communities, and the country of Afghanistan as a whole, cannot and should not be underestimated.

In 2010, the family of several victims that we represent were celebrating the birth of a baby boy in accordance with Afghan tradition. Everyone was enjoying themselves, when they heard someone yell outside, "Raise your hands". One of the men at the party, a police investigator himself, went outside and was shot on the spot.

His 16-year-old son, upon hearing the scream of his father, ran outside. He was also shot. The brother of the police investigator was in the house. He was a prosecutor. He tried to run outside to rescue his relatives. The female relatives held him back, tried to stop him from leaving the house, but he pulled away from their grip and made his way to the doorway. He was then shot himself, as were the women.

Two pregnant women and one teenage girl, as well as two brothers and one teenage boy were seriously injured when international special operations forces entered the

gate of the home. For hours special forces searched the house meticulously, as the pregnant women, teenage girl, teenage boy and brothers lay wounded. The two pregnant women, the teenage girl and the brothers one by one succumbed to their wounds, as the armed forces refused to let their family members seek medical help. Immediately thereafter the international special operations force issued a statement in which they claimed to be doing a raid on the house and during the raid had found the women and the girl already dead.

They explained that the girl and the women had been killed in an honour killing before their entrance to the house.

Investigative reports on those present compelled the international special forces to admit that the women had actually died during the operation.

These victims are to this day waiting for justice to be served.

Generations of Afghans are unwell. They are brutalised by a multitude of actors, in many different ways. In one night, in this incident, surviving mothers, brothers, sisters, daughters, and sons were irreparably traumatised, some of which had watched the pregnant women, the brothers and the teenage girl die, and pleaded with the special forces to get them help.

But also, after they had deceased, they had pleaded for their bodies to be treated with respect. This did not happen.

A proper assessment that considers the interests of the victims would also consider the killings of judges, police officers and prosecutors. Deliberate attacks against these civilians that uphold the law have been presented by the government of Afghanistan in their submission of 2 December 2019.

These attacks are a clear reason for why this Chamber should reverse the Impugned Decision.

No matter how willing Afghanistan is to investigate and prosecute war crimes and crimes against humanity, it is simply unable to do so.

Human Rights Watch has confirmed this in its 2018 report on civilian airstrike deaths.

Quote:

"The Afghan government has developed almost no capacity to investigate civilian casualties arising from its military operations." End of quote.

As we have submitted in our appeal brief, the Pre-Trial Chamber's assessment of the resources available to the Prosecutor was erroneous. The Pre-Trial Chamber's assessment of the Prosecutor's resources represents an unwarranted invasion of the Prosecutor's competence to determine how best to allocate the resources available to her office.

However, if your Honours find that it is within the powers of the Pre-Trial Chamber to carry out an interests of justice assessment, and that as part of that assess the resources made available by the States Parties, the assessment that was carried out was partial and incomplete.

A proper holistic assessment would have taken into account the resources which have been invested in Afghanistan since 2001 to seek a military solution to the conflict and reconstruction of the country.

Conservative estimates suggest that the US alone has spent $975 billion on the war in Afghanistan since 2001. Despite the colossal resources that have been deployed into Afghanistan seeking a military solution, the results have fallen short of any expectations.

A United States government agency, the Special Inspector General for Afghan Reconstruction, also known as SIGAR, stated in late 2018 that, quote, "the Taliban now controls more territory than at any time since 2001." End quote.

In January 2018, BBC estimated that the Taliban had an active and open presence in 70 per cent of the country.

SIGAR has also estimated that, since 2001, the US has invested approximately 113.1 billion US dollars in Afghanistan reconstruction. Adjusted for inflation, that is 10 billion US dollars more than what the US committed in civilian assistance to help rebuild Western Europe after World War II.

Despite these huge investments, insecurity reigns, as we see from the submissions by the government of Afghanistan.

According to UNAMA, more than 27,000 Afghan civilians have been killed over the last 10 years. And more than 51,000 Afghan civilians have been injured in hostilities.

In the first nine months of this year alone, 2,563 Afghan civilians were killed, and a shocking 41 per cent of these were women and children.

A proper and holistic interests of justice assessment would have addressed ways in which the State Parties can devote more sums to international justice.

The Prosecutor can at any time submit a supplementary request for resources to the Assembly of States Parties.

And as Mr Scheffer suggested in his 15 November *amici curiae* observations to this Chamber, the Appeals Chamber is also in a position to call upon the States Parties to make available the necessary resources.

To conclude, your Honours, rigorous investigation and prosecution of crimes is one step to ensure greater respect for the rule of law in Afghanistan. A strengthened rule of law is surely likely to, in turn, ensure a more genuine realisation of the victims' interests.

Thank you, your Honours. I will now give the floor to Mr Gaynor.

MR GAYNOR: [11:51:18] Thank you very much.

Your Honours, I will not address in very great detail the question as to whether the Pre-Trial Chamber erred in restricting the scope of the Prosecutor's investigation, in light of Ms Brady's submissions today. We agree really with almost everything that she said.

We would add to what she said that both the Prosecutor and the Chambers have truth-seeking duties under the Statute, and the ability to seek the truth is obviously easier to carry out when the remit of the investigation is broad than when the remit of the investigation is narrow.

We add to that the fact that the Prosecutor is obliged to uncover both incriminating and exonerating evidence. And again, it's easier to find and identify witnesses and to pick up documentary evidence, and all other kinds of relevant evidence, where the remit of the investigation is broad rather than narrow.

I would like to take this opportunity to address some of the submissions made by my learned friend Mr Dixon on behalf of the government of Afghanistan, and some of the submissions made in the written submissions of the government of Afghanistan.

Mr Dixon gives the impression, if I might suggest, that the government of Afghanistan has been shut out of the preliminary investigation and nobody wants to listen to what they have to say.

Well, my understanding from reading the Prosecutor's preliminary examination reports, which are released about this time every year, is that the government of Afghanistan has in fact been in constant contact with the Prosecutor, and the Prosecutor has very properly asked the government of Afghanistan to let it know what it has been doing in respect of the investigation and prosecution of crimes within Afghanistan. And so there really has been every opportunity.

The Preliminary Examinations report for 2016, for example, refers to the Office of the

Prosecutor said that the government has not provided any information of national proceedings to the office against Afghan government forces, despite, quote, "multiple requests for such information from the OTP since 2008". End of quote. That's the Preliminary Examination report of 2016.

So really the government of Afghanistan has had every opportunity to bring before the Office of the Prosecutor and, in turn, through them to the Pre-Trial Chamber its information concerning the investigations and prosecutions that it's carrying out in respect of alleged crimes by its own forces, by international forces, by Taliban and associated groups, and by ISIS.

Now, Mr Dixon would like us not to get into the detail of Article 17(2) and (3), but frankly we have no option, given that in particular our ability to respond to these issues tomorrow has recently been ordered by your Honours off the calendar, so I have no option but to respond today.

Now, 17(2) of the Statute concerns where there has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person to justice. That is absolutely relevant. Mr Dixon refers to the 11-year period of the preliminary examination and says, "Well, too much time has passed, it's now time to move on." Well, that's absolutely contrary to the victims' interests. There is to statute of limitations in respect of war crimes, crimes against humanity and genocide. It is absolutely in the victims' interests that the investigation and prosecution of these matters should take place.

Another question to be considered here is the willing -- I'm still on willingness, the willingness, is Afghanistan willing to carry out investigations and prosecutions? This is particularly important in respect of two groups of people, the first is Afghan government forces, and the second is international forces for crimes against Afghan

civilians on the territory of Afghanistan itself.

In respect of the Afghan government forces, these are paid by the government of Afghanistan, they are fed by the government of Afghanistan, they are housed by the government of Afghanistan. Government of Afghanistan certainly has access to these individuals. It has its own military justice system. And, yet, in all of the oral and written submissions by Mr Dixon and by His Excellency the representative for the government of Afghanistan, we see one reference to one prosecution of one case against one member of the Afghan government forces, and that relates to the murder and rape of a boy.

Now that single example, absolutely fine, it's good that that took place, but that is not indicative of a genuine willingness to investigate and prosecute crimes by Afghanistan government forces, generally.

Second, we have seen no indication from the government of Afghanistan of a willingness to investigate crimes allegedly committed by international forces on the territory of Afghanistan against Afghanistan citizens.

Then we have to move to 17(3) and this concerns inability. Mr Dixon essentially characterised the 17(3) test as is Afghanistan a failed state or not? And, with respect, that is not the test set out in 17(3).

17(3), the first part of it, I will read it verbatim, quote:

"In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system,"

and I will stop there for a moment, what we do have in Afghanistan is a substantial collapse or unavailability of the national system. And that's absolutely clear from the submissions made on the government's behalf today, and it's also clear from some of the submissions which were made in the report of the government of Afghanistan

itself.

The government said, for example, at paragraph 24 of its submission of 2 December 2019, it said, quote:

"... the reality is that Afghanistan remains in the middle of a brutal armed conflict, marked by guerrilla warfare and suicide bombing."

They go on to say:

"Attacks by the Taliban and other armed groups continue to cause heavy casualties. As a result, there are many parts of Afghanistan in which it is simply not safe to conduct investigations." Close quote.

Now the government has referred many times, and my colleague Ms Kiswanson earlier referred to the murder of police, prosecutors, and judges in Afghanistan.

So all of these factors must be taken into account, and I think the conclusion which we must all with great regret reach, is that there has been a substantial collapse and unavailability of the national judicial system.

Now, I just want to carry on reading from the test set out in Article 17(3) of the Statute. The test goes on to read, quote:

"... the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."

And again I would refer to the written submissions of the government of Afghanistan, and in those written submissions - I don't have the precise quotations to hand - but it is quite clear that the government of Afghanistan, its own position is that it is not able to access suspects and accused on its own territory for the very reason, as has been pointed out by many, is that the Taliban itself controls a significant proportion of the territory of Afghanistan.

This, the non-control of a significant proportion of the territory of the State Party in

this question, when assessed in combination with the systematic attacks on police, prosecutors, and judges, means, in essence, inevitably and very regretfully, that the necessary evidence and testimony is simply not available to the government of Afghanistan in order to carry out its proceedings.

Now, what is the procedural remedy for all this?

The procedural remedy is for Afghanistan to bring an admissibility challenge at the correct moment. We can then have a full hearing. I am not asking your Honours to conduct an admissibility challenge right now. But the right thing to do is for your Honours to authorise the commencement of the investigation on the basis of the findings by the Prosecutor that Afghanistan is both unable and unwilling to effectively investigate and prosecute, and then Afghanistan can bring a proper admissibility challenge. It can bring to the Court clear evidence of a genuine, not just willingness, but an ability to investigate and prosecute its own forces for crimes committed against Afghan civilians.

It can also bring evidence, which has been absolutely absent so far, of its own willingness and ability to investigate and prosecute international forces for crimes against Afghan civilians, and it can also made full and informed submissions concerning whatever proportion of the territory of Afghanistan is at that time under Taliban control or under the control of other anti-government forces.

So I would suggest that that is the proper procedure to be followed. Mr Dixon and the representatives of the government of Afghanistan can then come back before the Pre-Trial Chamber and make full submissions on admissibility.

I don't believe I have anything else to add. Thank you very much, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [12:02:25] Thank you very much, Counsel.

We move to Legal Representative of Victims, group 2. And, as I understand, there

are three speakers and you will share the time allocated to the group, it's together 40 minutes. Please proceed.

MR MOLONEY: [12:02:46] Mr President, your Honours, as my colleague for Legal Representative of Victims 1 indicated, I intend to focus on the question C(a), the first question under C, namely, when the Prosecutor requests authorisation to initiate an investigation having considered Article 53(1)(c) of the Statute, does the Pre-Trial Chamber have the power to consider the factors under Article 53(1)(c) of the Statute itself?

It's submitted that the Pre-Trial Chamber erred when denying the request for the Prosecutor by concluding at paragraph 35 that the scrutiny mandated to the Pre-Trial Chamber in the proceedings under Article 15 is not limited in determining whether there is a reasonable basis to believe that crimes under the Court's jurisdiction have been committed, but must include a positive determination to the effect that investigations would be in the interests of justice.

And it is submitted that the Statute does not empower a Pre-Trial Chamber to decide that an investigation is contrary to the interests of justice when the Prosecutor has not made that assessment. Instead, a Pre-Trial Chamber is only ever at most empowered to review a Prosecutor's decision not to initiate an investigation because it would not be in the interests of justice.

As a basic starting point, we say that that is clear from the plain words of the Statute. When one looks at Article 53(3)(a) dealing with the request by a State under Article 14 or the Security Council under Article 13, it reads that the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.

There's a slightly different mechanism within 3(b), where it reads that, in addition, the

Pre-Trial Chamber may on its own initiative review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). And it differs in saying that, in such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

So we say that the Statute is ambiguous -- unambiguous, rather, and explicit in only providing the power to the Pre-Trial Chamber to review a decision of the Prosecutor not to proceed. And to expand on that submission very briefly, the Statute does not accord to the Pre-Trial Chamber the power to review a decision of the Prosecutor to proceed or not to proceed. It is only not to proceed. And moreover, there is no room, we respectfully submit, for the Statute to be reasonably read as being silent as to whether the Pre-Trial Chamber has the power to review a decision of the Prosecutor to proceed.

And that much goes both in relation to 53(3)(a), the referral, and 53(3)(b), the *proprio motu*.

Moreover, whilst it is recognised the Appeals Chamber has not decided question C(a) before, we say that the consistent view taken by other Pre-Trial Chambers on Article 15 decisions, where there is reasoning as to the basis for taking the decision, is to conclude that the Court may only review the Prosecution decision on interests of justice where the Prosecutor has declined to prosecute on that basis. And we submit that the reasoning supporting such a conclusion in those previous Article 15 decisions of the Pre-Trial Chamber is compelling and unassailable.

We say, with the greatest respect to Ms Brady, that we need to significantly qualify the assertion that all previous decisions of the Pre-Trial Chambers in relation to Article 15 look to all the 53(1)(a) to (c) considerations.

So far as the Kenya decision was concerned in 2010, we note that the Kenya reasoning

was rigorous and thoroughgoing, it analysed the history of Articles 15 and 53, and the interrelationship between Articles 15 and 53. It recognised the importance of the Vienna Convention, and it recognised the review standard that the Pre-Trial Chamber is required to apply in relation to Article 15 decisions, but said at footnotes 35 and paragraph 63:

"As for the assessment of 'interests of justice' under Article 53(1)(c), the Chamber considers that its review is only triggered when the Prosecutor decides not to proceed on the basis of this clause.

Indeed, unlike the assessment to be made in accordance with Article 53(1)(a) and (b), the Prosecutor is not required to positively determine that an investigation is in the interests of justice and" - then crucially, we say - "does not have to present reasons or supporting material in this respect."

It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she must notify the Chamber that the reasons for such a decision not to proceed, therefore triggering the review power of the Chamber."

The Côte d'Ivoire case in 2011, we say, builds on the analysis in the Kenyan case and, in effect, repeats the findings of the Kenyan Pre-Trial Chamber.

At paragraph 207 it reads:

"Unlike subparagraphs (a) and (b) of Article 53(1) of the Statute, which require an affirmative finding, subparagraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect. It is only when the Prosecutor decides that an investigation would not be in the interests of justice that he or she is under an obligation to notify the Chamber of the reasons for the decision," and again, "to enable the Chamber to exercise its power" --

PRESIDING JUDGE HOFMAŃSKI: [12:08:43] Excuse me. Excuse me, Counsel, a little bit slower, please --

MR MOLONEY: [12:08:47] I am sorry. I am sorry, Mr President. (Overlapping speakers)

PRESIDING JUDGE HOFMAŃSKI: (Overlapping speakers) the translation.

MR MOLONEY: [12:08:49](Overlapping speakers) -- reading from the authority. I am so sorry.

PRESIDING JUDGE HOFMAŃSKI: [12:08:52] Thank you very much.

MR MOLONEY: [12:08:53] "... to enable the Chamber to exercise its power of review in accordance with Article 53(3)(b) of the Statute."

And we say that the importance of that passage is that it elaborates that the Prosecution does not have to provide material or reasons to justify the investigation as being in the interests of justice.

And therefore the Pre-Trial Chamber does not conduct a review unless it is a review of the decision to not proceed, and that would follow because there are no reasons to review and there is no material upon which the review can be based unless there is a decision to not proceed because of Article 53(1)(c).

We also draw some support from the Darfur situation, document 185.

We see that the principle was established in a different context before -- this precedes both the Kenya and Côte d'Ivoire decisions in the Darfur case, because that case was primarily concerned with the issue of whether an arrest warrant should be issued.

The Pre-Trial Chamber observed at paragraph 18 that the Prosecutor had been given by the States Parties the discretion to decide whether or not to request the initiation of a case and one of the factors it must consider is whether or not it would be detrimental to the interests of justice to do so.

At paragraph 19, the Court then assessed the extent to which the States Parties have provided the Chamber with the power to review the Prosecution's exercise of its discretion.

And at paragraphs 20 and 21, the Pre-Trial Chamber said:

"The Chamber observes that Article 53(3)(b) of the Statute expressly provides for the Chamber's *proprio motu* review of any Prosecutor's decision not to proceed which is based solely on the interests of justice."

And it goes on at paragraph 21:

"No matter whether the Chamber's review power under this provision is only applicable in relation to the Prosecution's decision to put an end to the investigation of a given situation, or whether it is also applicable in relation to each Prosecution's decision not to prosecute a specific individual, the Chamber emphasises that Article 53(3)(b) of the Statute only confers upon the Chamber the power to review the Prosecution's exercise of its discretion when it results in a decision not to proceed."

And that approach reflects practicalities, we say, of the operation of the Statute because there is no mechanism for the Prosecution to be required to give reasons as to why an investigation is in the interests of justice. All that exists is that duty in a negative position.

And, therefore, the mechanism for the review of the decision, the review of the decision that "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe than an investigation would not serve the interests of justice" is only created by virtue of the Prosecution making the negative decision and informing the Pre-Trial Chamber of it.

So it's framed in that negative way in the Statute, and on a practical level in this case

there was nothing on which a review might be based because the Pre-Trial Chamber in this case did not require any interests of justice justification from the Prosecutor for initiating the investigation.

And, consequently, we say that the Pre-Trial Chamber in this case did not carry out a review, there was nothing to review, we say that the Pre-Trial Chamber simply made a *de novo* decision about the interests of justice.

And one final point in just this section, and then I will just come to conclude on the review function.

The importance of -- and on the importance of the negative assessment of interests of justice, it's demonstrated really by what we say is the final sentence of Article 53(3), which reads:

"In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."

The process is one of confirming a decision not to commence an investigation. The whole of this part of the article speaks of the decision of the Prosecution to not proceed on the basis of 1(c) or 2(c) and links the last sentence by saying, in effect, and in reality:

"In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1(c) or 2(c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Trial Chamber."

There is that, thus the decision to not proceed is only effective if confirmed by the Pre-Trial Chamber. It does not stipulate that the decision to proceed shall only be effective if confirmed by the Pre-Trial Chamber.

And finally, just to return to the question of what review means, there must be

a review of the decision, it isn't simply a *de novo* decision-making process.
And if I may say with respect, paragraph 16 of the opinion of Her Honour Judge Fernández in the Côte d'Ivoire case, and indeed paragraph 18, makes that point.
Mr Dixon referred to reviewing by domestic states. The standard of review of the prosecutorial discretion in some domestic states is very strict, and rightly so. And just to take the example of England and Wales, the threshold for judicial review of a prosecution decision even to not prosecute is extremely high and the Courts do not take the view that the consideration of the interests of justice is for them, let alone that it can only ever be for the Courts.
There has never been a successful judicial review of a Crown Prosecution Service decision to prosecute in England and Wales.
And indeed, the Crown Prosecution Service guidance on judicial review of prosecutorial discretion in England and Wales says the following:
"The authorities are now clear: in the absence of exceptional circumstances, the decision to prosecute will not be amenable to judicial review in the High Court as the arguments can be dealt with within the criminal trial in the magistrates' court or Crown Court. Such exceptional circumstances might be dishonesty or mala fides on the part of the prosecutor, but one might argue that the law on abuse of process is sufficiently developed to deal even with those circumstances."
So we therefore submit, in conclusion, that by assuming a power to assess the interests of justice in circumstances other than to review the Prosecutor's discretionary decision not to investigate, the Pre-Trial Chamber has acted *ultra vires* in this case.
MS GALLAGHER: [12:16:09] Good afternoon, your Honours.

To respond to question C(b) asking whether the Pre-Trial Chamber considered appropriate factors and drew appropriate conclusions about those factors in determining that an investigation would not be in the interests of justice, an assessment I fully join my colleague in arguing is one a Pre-Trial Chamber cannot carry out when the Prosecutor has found an investigation serves the interests of justice.

The answer is clearly no.

Beyond this legal conclusion that the factors are inappropriate for the Pre-Trial Chamber to consider, I would like to explain why these factors in this situation, and indeed possibly in future cases should the investigation be authorised, I will go through each of them and give our reactions to them. And that is from the perspective of the victims' interests.

First, regarding the purported significant time elapsed, the US torture victims certainly would have preferred that the request was filed much sooner than it was. Likewise, they would have preferred not to have waited nearly a year and a half for the Pre-Trial Chamber to issue its 30-page decision denying the request to open an investigation.

As for the delay being cause to forego an investigation, I respectfully submit that this issue has been adequately addressed in the briefing by the parties, by the legal representatives for the victims, and by *amicus* briefing.

Successful investigations and prosecutions in which the rights of all parties are respected have been conducted with a far larger time gap than exists with the US torture programme.

But it is also a mistake to consider that the US torture programme is fully over.

Forty men who went through the global detention network remain in prison today at

Guantanamo Bay.

My clients, like many others, have never been charged with a crime and so remain in the same indefinite detention they endured on the territory of States Parties.

For Mr Al Hajj that includes 23 months on the territory of Jordan in proxy detention in 2002 and 2003, before being transferred to Afghanistan where his enforced disappearance continued for eight months until he was transferred to Guantanamo in August 2002.

For Mr Duran, he was seized by Djiboutian security forces while transiting through Djibouti in 2004, turned over to the CIA, and at some point between March 2004 and September 2006, that information is classified, he was detained and tortured in Afghanistan.

Furthermore, my clients and other prisoners are not on the territory of a State Party now. While they are not on the territory of a State Party now, the severe mental harm, if not also the physical harm, that they endured on the territory of Afghanistan, or Poland, or Lithuania, or Jordan, or Djibouti, as well as other State Parties, has been continuous.

I pause to note briefly here that, contrary to the Pre-Trial Chamber's focus on, quote, "capture" as somehow separate and apart from torture in its flawed nexus analysis in paragraphs 53 and 54, the capture and abduction, the kidnapping and enforced disappearance are part of the criminal conduct including torture, not merely antecedence to it.

Must fundamentally, however, the gap in time has not eliminated either the need or the yearning for accountability and justice for these victims and for so many others.

Regarding state cooperation, the parties have also fully briefed why the Pre-Trial Chamber was wrong to speculate about the extent of State cooperation

before an investigation was authorised.

Three further points for the Chamber to consider:

Cooperation from the United States, a non-State Party, is not necessary for a successful investigation of US torture.

US government reports, including the Senate torture report, memoranda, legal memos, and statements by former US officials in the public domain, provide ample investigatory leads, if not evidence.

As stated yesterday, the US torture programme was global in nature. The sad and disturbing reality is that far too many countries, including dozens of ICC Member States, provided assistance to the United States, allowing use of airspace, refuelling stations, sharing of intelligence, holding victims in proxy detentions, or hosting secret black sites.

We know this in large part because of investigations done by Dick Marty for the Council of Europe, or the 2010 joint study on global practices in counterterrorism operations by former UN Special Rapporteurs Manfred Nowak and Martin Scheinin, or with the work of the Open Society Justice Initiative and the Rendition Project.

The Prosecutor might be starting this investigation late, but she certainly wouldn't be starting at step one.

Unlike the United States, Member States do have an obligation to cooperate with an ICC investigation and, as a result of their own involvement, are a rich source of information. Memos, cables, fight plans, meeting readouts, satellite imagery, just to name a few.

And respectfully, I submit most critical for the legitimacy and success of the International Criminal Court, the perception, the widely held perception that the Pre-Trial Chamber foreclosed the investigation because of US bullying, that in no

small part by the timing of the decision after such a long delay, as well as the Pre-Trial Chamber's own reference to, quote, "the political landscape", or, quote, "the political climate" sends a dangerous message that the easiest way to kill an investigation or a case at the ICC is obstruction and threats.

The Impugned Decision stands in stark contrast to the decision by the Pre-Trail Chamber considering whether to permit an investigation in Burundi. There, despite the Prosecution's assertion that the government of Burundi had, quote, "interfered with, intimidated or harmed victims and witnesses" the Pre-Trial Chamber proceeded to authorise the investigation.

Regarding the availability of evidence and suspects during the investigative phase, I touch on this part in discussing Member States cooperation briefly. I would only add that the victims of CIA and DOD detention themselves are key sources of potential evidence for the Prosecution.

Indeed, today's New York Times has sketches newly cleared for release from Abu Zubaydah, one of the CIA detainees, detailing his own torture.

As for suspects, and I use that term carefully, many key figures in the US torture programme continue to maintain a public presence or even a public role, public official function.

It might be surprising for the Court to hear that some speak without reservation about their role in the torture programme, such is the reality when impunity reigns.

The sworn testimony of some participants in the torture programme is also available as a result of proceedings in US courts. For example, the ACLU civil case Salim v Mitchell led to the sworn testimony of CIA contractors James Mitchell and Bruce Jessen, two psychologists contracted by the CIA to design and implement its torture programme, as well as that of two former CIA officials, John Rizzo and

Jose Rodriguez. Notably, Mitchell and Jessen have been called to testify before the US Military Commissions at Guantanamo in January, in the context of a defence motion to suppress evidence alleged to have been obtained under torture. That examination and cross-examination could well be available to the Prosecution.

Finally, on resources, I will only highlight that the Statute requires compliance with the fundamental human right of nondiscrimination. It's recalled that all of the individuals in the US torture programme were Muslim or perceived to be Muslim. Victims should not be denied justice because of their religion, national or ethnic origin, race, or other status and, likewise, potential defendants should not escape liability because of theirs.

It's important to note that the factors the Pre-Trial -- it's important to note the factors the Pre-Trial Chamber did not include.

First and foremost, there is no discussion on the object and purpose of the ICC and the Rome Statute system. To end impunity for grave crimes and thus to contribute to the prevention of such crimes, that is the purpose of this system.

As I said yesterday and will repeat today, because there were questions raised, the United States has been wholly unwilling to hold any senior US official accountable for the US torture programme. No one member of the CIA has been prosecuted for the serious crimes you heard about yesterday and the United States has not taken up this Chamber's invitation to appear in these proceedings and confirm its commitment to accountability.

Moreover, the United States has often intervened in even civil lawsuits to try and block victims for redress. And, as we learned a number of years ago through WikiLeaks cables, actively interfered with criminal investigations brought in other countries under universal jurisdiction.

Quite simply, if the United States doesn't want to come before the ICC, it has two choices: Prevent its citizens, and especially members of its military intelligence services and senior officials, from committing serious violations of international law on the territory of 122 Member States of the ICC; or hold those citizens, including senior officials, accountable if such violations have occurred, and cease the harm to the victims, provide an apology, and redress.

But the choice of factors was not the only error by the Pre-Trial Chamber. If the Pre-Trial Chamber was going to step into the role of the Prosecutor and make a determination as to whether an investigation would not serve the interests of justice, which again we submit was a legal error, then it should at least have to follow the weighing of gravity in victims' interests on the one side versus interests of justice on the other, as set forth in Article 53(1)(c).

And, in order to foreclose the investigation, conclude that its interests of justice factors, quote, "nonetheless constitute", quote, "substantial reasons to override victims' interests and the gravity of crimes".

The Pre-Trial Chamber engaged in no such assessment. If it had, I submit, the Pre-Trial Chamber's interests of justice factors would carry very little weight and certainly not constitute substantial reasons to believe an investigation supported by the victims into US torture would not serve justice.

Yesterday you heard in some detail the specific conduct which victims of the US torture programme were subjected. Those facts were not presented for shock value, but rather to inform your Honours about the gravity of the crimes. They also demonstrate that the torture programme was not the product of a few bad apples or mere excesses by some soldiers, they constitute war crimes and crimes against humanity, which is what we put forward in our victims' representations.

Had the Pre-Trial Chamber examined the gravity of the crimes without the legal error regarding nexus to the armed conflict, which colleagues will discuss, it would have concluded that the scale of the criminal activity in the situation, the length of time over which it occurred, the level of depravity employed, and the widespread and systematic manner in which this criminal enterprise was carried out, warrant the attention of the investigation by the International Criminal Court.

As the OPCV rightly explained yesterday, the Pre-Trial Chamber did not take victims' interest into its interests of justice assessment. Rather, in paragraph 96 it flipped victims' interest on their head and, again, inappropriately replaced the views of another group, here the victims, with the own opinions.

Thank you very much, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [12:30:08] Yes, thank you very much.

As I understand, you have still 10 minutes to make submissions.

Please proceed.

MS REISCH: [12:30:16] Mr President, your Honours, good afternoon.

My remarks focus on a dimension of the merits of this appeal, glaring legal errors, which were omitted by the Prosecution in its oral submissions today but thoroughly covered in its appeal brief at pages 44 through 53, which with LRVs concur, and which are not directly mentioned in your Honours' questions but which we respectfully submit demand this Chamber's attention because of their dangerous implications and premature exclusion of crimes within the jurisdiction of the Court from any investigation that may be authorised.

The Impugned Decision includes egregious errors of law regarding the Court's subject matter and territorial jurisdiction over the war crime of torture. The Decision replaces sound and accepted analysis consistently applied in this Court's prior

jurisprudence with distortions of international humanitarian law. As we said yesterday, these errors have the effect of writing our client, and many other victims of the US torture programme, out of the scope of any investigation by the Prosecutor. Moreover, if uncorrected, these errors would have the perverse and, we posit, unintended effect of endorsing the repugnant logic that form the basis for the US torture and extraordinary rendition programme.

Among the most glaring errors was the Pre-Trial Chamber's misinterpretation of the Court's territorial jurisdiction over the war crime of torture, when that crime occurred in part on the territory of a non-State Party. The issues are complex, and, with all due respect, are made more confusing by the Pre-Trial Chamber's muddled approach to its analysis. We will not repeat here the extensive discussion of these issues in the filings before the Chamber, but will try to restate in simple terms what we submit the Pre-Trial Chamber got so terribly wrong.

But let's start first with what the Pre-Trial Chamber got right. In paragraph 50 of the Decision, the Pre-Trial Chamber correctly stated that if any part of a crime is committed on the territory of a State Party, whether it commences, continues or concludes there, the Court has jurisdiction under Article 12. But the Pre-Trial Chamber then plainly failed to apply that understanding of the law when reviewing the aspects of the Prosecutor's request concerning torture committed by US actors.

This was largely because the Pre-Trial Chamber misconstrued the conduct at issue, that is, the elements of the crime of torture, and how it was committed under the US torture programme.

As my colleagues in LRV3 will elaborate, the Impugned Decision abandoned long-accepted, fact-specific criteria under international humanitarian law concerning

the nexus between given criminal conduct and armed conflict, criteria clearly set out in the June 15, 2017 Ntaganda appeal, decision 1962.

We submit that had these well-established criteria been applied to the facts relevant to our client, and many other victims of the US torture programme, the Pre-Trial Chamber would have found a reasonable basis to conclude that a nexus to the armed conflict existed. Instead, it focused on the locus of capture as the sole determinant of the requisite nexus.

To restate in plain language the Pre-Trial Chamber's erroneous conclusions in paragraph 54 and 55 of the decision:

On the one hand, the Chamber said that if a person was captured outside of Afghanistan and then brought to Afghanistan and tortured, the crimes committed against him cannot amount to war crimes within the Court's subject-matter jurisdiction because it's the locus of capture alone that determines the nexus.

On the other hand, it held that if a person was instead captured in Afghanistan but sent to the territory of a non-State Party to be tortured, the crimes committed against him would not be within the territorial jurisdiction of the Court.

This dangerous conclusion appears to have rested on a fundamental misunderstanding of the facts and operation of the US torture programme. As I described yesterday in presenting the abuse suffered by our client, capture in the torture programme systematically entailed kidnapping, sexual assault, and incommunicado detention before transfer to a secret location for interrogation under further torture. As Ms Gallagher emphasised, cleaving off capture from subsequent acts of torture and referring to it as a mere antecedent misunderstands the continuous nature of the crimes, which were part of a coordinated, orchestrated transnational programme or, to use Ms Gallagher's words, a criminal enterprise.

The Pre-Trial Chamber's confusion on this point is especially troubling since the US torture programme was designed to exploit purported lacunae in human rights and humanitarian law and to avoid the jurisdiction of courts, whether domestic, foreign or international, that might otherwise shut the programme down. Through misguided interpretations of international law, the United States sought to place detainees in a legal black hole while also physically moving them to prisons chosen or constructed to avoid the jurisdiction of courts that might view the law differently. Particularly relevant to the Impugned Decision here, the US maintain that the protections of Common Article 3 of the Geneva Conventions did not apply to armed conflicts that were "international in scope".

We will not repeat what is well known. These legal arguments have been roundly rejected by courts that have had the opportunity to review them since the US launched its torture programme many years ago. The US Supreme Court, the European Court of Human Rights, the UN human rights treaty bodies, and the Inter-American Commission on Human Rights have all determined that no legal black hole ever existed, that the protections of Common Article 3 apply to detainees held by the United States in its secret prisons, and that they unquestionably had the right to be free from ill-treatment and torture.

The Pre-Trial Chamber's mistaken conclusions regarding the war crime of torture are not only legally unfounded and grossly under-protective, they also resuscitate condemned legal arguments precisely at the time in the United States when there is a manifest risk of recurrence. Allowing these aspects of the Impugned Decision to go uncorrected would put the ICC's imprimatur on the very logic underpinning the infamous torture programme.

We respectfully request that the Chamber correct these legal errors in its decision on

this appeal, reverse the Impugned Decision and authorise the commencement of an investigation into the situation in the Islamic Republic of Afghanistan that encompasses the severe violations our client and other victims of the US torture programme suffered.

With all due respect, we note the conspicuous absence from the remarks by the representatives of Afghanistan of any evidence of efforts to investigate or prosecute crimes committed by US actors in Afghanistan.

Our client has been denied justice for nearly 15 years, since his release from US custody in Afghanistan. We ask this Chamber to carry out its role as a victim-centred court of last resort and authorise the investigation into the situation in the Islamic Republic of Afghanistan.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:38:55] Thank you very much, Counsel.

We move to legal representative group 3. They have two speakers, I understand.

Please proceed, your 40 minutes begins now.

MS RADZIEJOWSKA: [12:39:17] Thank you, your Honours.

Mr President, your Honours, as legal representatives -- excuse me.

Your Honours, as legal representatives of Mr Al-Nashiri, referred to by the Court as LRV3, we have been filing our written submissions together with three other legal representative teams who have been referred to by the Court as LRV2. We maintain our position presented in these submissions and we join the arguments presented by our colleagues during today's hearing.

I wish, however, to make a few remarks concerning ground 4 of the LRV's joint appeal concerning the Pre-Trial Chamber's determinations of the Court's jurisdiction over the crimes committed as part of the US torture programme.

I will try not to repeat the submissions that have been already made before the Chamber today, however, I will try to focus on specific aspects that are of particular importance to our client.

Mr President, your Honours, we submit that the Pre-Trial Chamber prematurely and erroneously excluded from the Court's jurisdiction criminal acts arising out of the US torture programme, including crimes committed against Mr Al-Nashiri.

We submit that these determinations should not only be considered as affecting factors that the Pre-Trial Chamber took into account in assessing the interests of justice. Neither can they be described as mere *obiter dicta*. Had the Pre-Trial Chamber decided that the investigation would serve the interests of justice, its remaining determinations on jurisdiction and admissibility would remain valid.

Your Honours, the Pre-Trial Chamber's erroneous determinations that were clarified to you from a reading by my colleague, Ms Reisch, were categorised by the Pre-Trial Chamber as determinations concerning territorial jurisdiction of the Court. However, the reasoning of the Pre-Trial Chamber shows that in reaching these conclusions it had conflated material with territorial jurisdiction.

As noted by Ms Reisch, it erroneously restricted the scope of the application of Common Article 3 of the Geneva Conventions to the non-international armed conflict in Afghanistan by limiting its application only to the territory of Afghanistan.

The appeal brief of Office of the Prosecutor explains in detail these failures of the Pre-Trial Chamber and we join this argument and support it.

The Pre-Trial Chamber disregarded the fact that the crimes in question have a cross border and continuous nature, that their individual elements cannot be considered separately, in isolation, without warping the picture of the crimes and victimisation of Mr Al-Nashiri and many other victims of the US torture programme.

Your Honours, I will focus my further remarks on the Pre-Trial Chamber's determinations concerning the link between the crimes committed as part of the US torture programme and the conflict in Afghanistan, as well as on the continuous and cross-border nature of these crimes.

Your Honours, the Pre-Trial Chamber made its determination on the link between the crimes committed as part of the US torture programme and the conflict in Afghanistan in part of the Impugned Decision titled territorial jurisdiction.

The Pre-Trial Chamber found that the link between the crimes of the US torture programme and the armed conflict in Afghanistan can be determined based only on the location of the acts of capture. This means, according to the Pre-Trial Chamber, that torture of Mr Al-Nashiri does not fall under the Court's territorial jurisdiction because he was captured in Dubai. For the Pre-Trial Chamber it is irrelevant that he was then transferred to and tortured in multiple State Parties to the Rome Statute, specifically Afghanistan, Poland, Romania and Lithuania. This determination is legally erroneous.

The link to an armed conflict is one of the material elements of the war crime of torture. The factors that are to be taken into account in assessing this link have been explained in the jurisprudence of the Appeals Chamber in the Ntaganda case, in the judgment referred to by my colleague Ms Reisch. This judgment refers to the well-established factors that were noted in the ICTY judgment in the Kunarac case.

Your Honours, these factors include whether a perpetrator is a combatant; they include assessment of whether the victim is a member of opposing party or a non-combatant; they include and necessitate assessment of whether the act which was committed serve the ultimate goal of military campaign. These factors include also assessment of whether the armed conflict played a substantial role in the

perpetrator's ability to commit the crime.

These factors do not include location of the crime or of its mere antecedents, as the acts of capture are referred to by the Pre-Trial Chamber.

Your Honours, interestingly, the Pre-Trial Chamber makes reference to the paragraph of the judgment in the Ntaganda case which lists those factors. However, it fails to take them into account.

Your Honours, we submit that, had the Pre-Trial Chamber applied the correct factors to determine the nexus element it would have determined that there is a reasonable basis that acts of torture in question fall under the scope of the Court's jurisdiction. It would have determined that the acts of torture committed under the US torture programme towards Mr Al-Nashiri and other victims would fall under this Court's jurisdiction.

Your Honours, I will turn now to the Pre-Trial Chamber's limited and erroneous understanding of acts of torture committed as part of the US programme.

Your Honours, it is unclear why the Pre-Trial Chamber in its assessment of the Court's jurisdiction over the crimes of torture we focus on, why the Pre-Trial Chamber focuses only on the location of the act of capture, the mere antecedents as the Chamber refers to this act of the crime of torture.

As I noted earlier, it is not a factor based on which one can determine whether a nexus between acts of torture and the armed conflict in question exists.

If singled out, it is also irrelevant when assessing territorial jurisdiction of the Court over the acts of torture. This is because the acts of torture committed as part of the US torture programme are not single, separate acts.

Yesterday and today we have heard detailed descriptions about the acts of torture that the Pre-Trial Chamber excluded from the Court's jurisdiction. These are acts

which are continuous crimes. Mr Al-Nashiri was captured, transported multiple times to different locations, not knowing where he is going, for what purpose and for how long. In each of these locations he was held in incommunicado isolation. His torture started with his capture in late October 2002 in Dubai and continued for almost four years, through Afghanistan, Thailand, Poland, Morocco, Cuba, Romania, Lithuania, Afghanistan again.

Since September 2006 he remains a prisoner in Guantanamo Bay military prison, without access to any effective remedy to seek justice. His torture, illegal and incommunicado detention continued for years and crossed multiple borders along with his forced and extralegal transfer across those borders.

To understand the complex continuous nature of torture and ill-treatment committed as part of the US torture programme, it is important to refer here to the Background Paper on CIA's Combined Use of Interrogation Techniques of 30 December 2004.

We refer to this paper in our joint brief in footnote 201.

The paper explains that effective interrogation is based on the concept of using both physical and psychological pressures in a comprehensive, systemic, and cumulative manner to influence high value detainees' behaviour, to overcome a detainee's resistance posture. The goal of interrogation is to create a state of learned helplessness and dependence.

The paper explains that interrogation process is broken into three separate phases: initial conditions, transition to interrogation, and interrogation.

Initial conditions phase consists of capture shock, rendition and reception at black site.

The paper states that capture is designed to contribute to the physical and psychological condition of the high value detainees prior to the start of interrogation.

Your Honours, based on these descriptions it is clear that the US torture programme

was designed, was intended to conduct continuous torture over the detainees.
A correct assessment of the Court's jurisdiction requires taking into account the entire system of abuse and crimes, as an organised and connected set of criminal actions, conducted against Mr Al-Nashiri but also against many other victims, over many years and across many borders.
Your Honours, the Pre-Trial Chamber in the Bangladesh situation has determined in its recent decision on the Prosecution's request for a ruling on jurisdiction under Article 19(3) of the Statute that the Court's jurisdiction is engaged where at least one element of a crime occurs within the territory of a State Party.
It is our submission that the Chamber erred in its determination of the Court's jurisdiction over these crimes completely disregarding the continuous character of the crimes in question.
As noted by my colleagues, the US torture programme was designed in a way to avoid any jurisdiction, to avoid accountability. The Pre-Trial Chamber's muddled determinations with regard to the Court's jurisdiction over the crimes committed as part of the US torture programme are not only unclear but they are also legally flawed. Unless corrected they will result in impunity.
Thank you, your Honours. And with your permission my colleague, Mr Mikołaj Pietrzak, will take the floor. Thank you.
MR PIETRZAK: [12:51:45] Mr President, your Honours, as my esteemed colleague Maria Radziejowska explained, failure to change the decision of the Pre-Trial Chamber, not merely with regard to the interests of justice argument, may leave Mr Al-Nashiri and other victims of the extraordinary rendition and enhanced interrogation techniques torture programmes outside of the scope of the investigation, with no remedy, no effective investigation, no accountability.

We reject the idea that any effective investigation could have, can be or will be conducted by the United States of America authorities.

As counsel for LRV2, Ms Katherine Gallagher, has just said, the identity of the perpetrators of these crimes is well known.

We know who created and administered the torture programme to Mr Al-Nashiri and other victims. They are Mr Jessen and Mr Mitchell and others. If there was any will on the part of the US State, they could have already been arrested and charged. They could be arrested today. This has not taken place and it is painfully obvious that it will not take place, unless this Court authorises an investigation encompassing these crimes.

The issues raised by the Impugned Decision and connected with the group C questions, in particular regarding nexus related issues which have already been addressed today, and the potential to leave behind victims of the extraordinary rendition and enhanced interrogation technique or otherwise torture programmes, require that we address the statement made today by the representatives of the Afghan State.

Even though there are no grounds to do so, if we do in a gesture of sheer optimism believe that the Afghan State which has failed for so long to investigate effectively, can and will now investigate, failure to authorise an investigation by the Appeals Chamber to be conducted by the Office of the Prosecutor, on the grounds of complementarity would lead, at best, to an investigation regarding only a limited group of victims represented before this Court: those who were victimised only in Afghanistan in the very narrow territorial scope of the conflict in Afghanistan. However, any investigation by the State of Afghanistan would not and could not address the crimes committed by the victims of the torture programme created by

Mr Jessen, Mr Mitchell and the CIA. This would leave behind Mr Al-Nashiri and other victims of the kidnapping, rendition, illegal multiyear imprisonment and torture at the hands of the CIA and actors of all the States, including Rome party States who cooperated with this agency.

We ask that the Appeals Chamber change the decision of the Pre-Trial Chamber and authorise the investigation.

We ask that the Appeals Chamber do so in a way that leaves no doubt that the grievous crimes committed against Mr Al-Nashiri do not fall outside the scope of the investigation.

Any other decision will leave Mr Al-Nashiri without justice, the truth of his suffering untold, his rights and freedoms unvindicated, with no chance of an effective investigation and no perspective of accountability for the perpetrators of the terrible crimes he suffered.

The decision of the Pre-Trial Chamber is legally flawed, unjust and if left unchanged will result in impunity and injustice.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:56:33] Thank you very much, Counsel.

Because we have saved some time, we will adjourn for the lunch break now. And I propose to meet again at 2 p.m. to continue the hearing.

THE COURT USHER: [12:56:52] All rise.

(Recess taken at 12.56 p.m.)

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

THE COURT USHER: [14:02:13] All rise.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [14:02:51] We will continue the submissions of

Legal Representatives of Cross Border Victims. Your 20 minutes begins now. Please proceed.

MR POWLES: [14:03:03] Thank you very much, Mr President and your Honours. May we please start today in the same spirit as our submissions of yesterday and to again express our genuine gratitude on behalf of our Cross Border Victim clients for the OTP's indication in their reply yesterday, that in the event of the Pre-Trial Chamber's decision being reversed, the incidents that the Cross Border Victims complain of may, to quote the Prosecution, may properly be captured in the parameters of any future investigation.

While that is encouraging, we note that the OTP limit themselves to stating that the incidents may be captured in a future investigation. Our concern is that for as long as the OTP hold back from making a decision one way or another about the distinct category of victimisation that our clients fall within, and the potentially different jurisdictional issues that arise, the Cross Border Victims are effectively denied either the comfort of knowing that the crimes that they complain of will be investigated, or an opportunity to make meaningful representations pursuant to Article 15(3) of the Statute.

And importantly, they are denied the knowledge that the OTP's decision, if negative on the interests of justice, will be and must be reviewed by the Pre-Trial Chamber pursuant to Article 53(3)(b).

Article 53(3)(b) provides that a decision by the Prosecutor pursuant to Article 53(1)(c) or (2)(c) that an investigation would not serve the interests of justice shall be effective only if confirmed by the Pre-Trial Chamber.

Moreover, it is noteworthy that Article 53(1) provides that the Prosecutor shall, having evaluated the information made available to her, initiate an investigation

unless she determines that there is no reasonable basis to proceed under this Statute. In determining whether to initiate an investigation, the Prosecutor shall consider, (a), whether the crime is within the jurisdiction of the Court, has been committed; whether the case would be admissible under Article 17; and (c), whether an investigation would not serve the interests of justice.

We respectfully submit that these are considerations that the Prosecutor is obliged to take into account in relation to information made available to her.

The Cross Border Victims have made information available to the OTP. We therefore submit that the OTP is obliged to make a decision on it one way or another. The concern we have is that no decision is, in many ways, worse than a negative decision because it leaves the victims who have provided information to the OTP in effective limbo: Not able to have the comfort of an investigation, but also not able to make and properly comment upon or challenge it.

That, we respectfully submit, cannot be right.

This is why we highlighted yesterday the vital need and importance of transparency by the OTP because if neither the victims nor the Pre-Trial Chamber have a clear understanding of the OTP's view about a particular group or category of victims and the crimes they have suffered, how can the Pre-Trial Chamber make an informed decision, such as on the interests of justice, or whether the particular crimes fall within the jurisdiction of the Court as the Pre-Trial Chamber is obliged to consider pursuant to Article 15(4).

Turning to the group C questions and question (a), the interests of justice.

We respectfully support the submissions made by the Prosecutor and other groups of victims on this issue as we have set out in our written submissions of 15 November 2019. It is obvious and a plain reading of Article 53(1)(c) demonstrates

the determination of whether an investigation would not serve the interests of justice is a matter solely for the Prosecutor.

The Pre-Trial Chamber does not itself have the power to consider factors under Article 53(1)(c) as justification for refusing to authorise an investigation. Article 53(3)(b) only provides the Pre-Trial Chamber power to review a decision of the Prosecutor not to proceed solely on the basis of either 53(1)(c) or (2)(c). It does not give the Pre-Trial Chamber power to make the decision itself, and it is very clear, we respectfully submit, why this should be so.

The Prosecutor is plainly best placed to evaluate the future availability of evidence and the prospects of future cooperation. And plainly, the Prosecutor is best placed to determine the impact of an investigation on finances, on human resources, taking into account and evaluating the prospects of all other potential situations and investigations that she may well have exclusive knowledge of.

It is the Prosecutor who receives communications regarding potential crimes and situations within the jurisdiction of the Court. Thus, it is the Prosecutor who is in a unique position to determine the resource implications proceeding with one case over another.

It is therefore obvious, we respectfully submit, that it should fall first to the Prosecutor to determine whether or not it is in the interests of justice for an investigation to proceed.

But - and it's an important but - this is not to say that the Pre-Trial Chamber has no role to play. Far from it. We submit that the Statute makes clear that where the Prosecutor decides not to proceed with an investigation on the basis that it is not in the interests of justice, Article 53(3)(b) gives the Pre-Trial Chamber a supervisory role. The Prosecutor's decision not to proceed can only be effective if confirmed by the

Pre-Trial Chamber.

The OTP in this case was completely silent on its position regarding the Cross Border Victims in the November 2017 request for authorisation from the Pre-Trial Chamber. And notwithstanding the OTP's helpful indication yesterday, it is still unclear as to whether the OTP considers the alleged crimes to fall within the Afghan situation, the crimes that we presented in relation to the Cross Border Victims. We submit obviously they plainly do, but the OTP is silent as to whether a prosecution is not in the interests of justice pursuant to Article 53(2)(c).

And in not setting out the position, the Pre-Trial Chamber is denied the possibility of exercising the important supervisory role that is entrusted to it under Article 53(3)(b). That said, we readily acknowledge that there may be circumstances when it may be appropriate for the OTP to protect the confidentiality of those who provide information to it and refrain from making public activities under Article 15 of the Statute.

That, however, is not the case here. The Cross Border Victims made public the information they have provided to the OTP. It is referred to in a hyperlink at footnote 21 of 15 November 2019 submissions that we made to the Appeals Chamber. Those were the submissions that were publicly available and were also given to the OTP in 2014.

There was, therefore, no compelling reason for the Prosecutor not to identify them and the distinct category of crimes and victimisation that they have suffered in the November 2017 request to the Pre-Trial Chamber.

Turning then to question (b) in the group C questions.

The Pre-Trial Chamber plainly exercised its discretion improperly in holding that it was not in the interests of justice to allow the Prosecutor's request.

We make three short points.

First, and most obviously, the Statute and Article 53 does not give the Pre-Trial Chamber the power to refuse investigation on the grounds that it would not be in the interests of justice.

Second, the factors taken into consideration by the Pre-Trial Chamber, the availability of evidence, the prospects of securing meaningful cooperation from relevant authorities and the adverse impact on the Court's resources, both financial and human, are all matters upon which the Pre-Trial Chamber had not been fully addressed. How could it therefore make an informed decision?

Third, with regards to the Cross Border Victims, we submit that the position is even more profound. In the absence of any information about their situation, the availability of evidence, which is substantial, the prospects of securing meaningful cooperation, which is not inconceivable in relation to the Cross Border Victims, some of the States allegedly complicit in the cross-border drone strikes are State Parties to the ICC Statute. At least three of them are identified in the 2014 submissions that were made to the Office of the Prosecutor. It follows then that the Pre-Trial Chamber made its decision in the absence of and without considering their position at all, let alone did the Pre-Trial Chamber fully and properly make a decision because it could not do so. The information was not fully before it.

Without the OTP's input on whether or not it would be in the interests of justice to proceed with an investigation to the crimes alleged by the Cross Border Victims, it was impossible for the Pre-Trial Chamber to fully and properly consider the matters it was obliged to consider pursuant to both Article 15(4) and Article 15(3)(b) of the Statute.

Group C questions, question (c) on scope.

The Cross Border Victims agree with and respectively adopt the submissions of the Prosecutor and other victim representatives that the Pre-Trial Chamber may not limit the scope of an investigation to incidents specifically mentioned in the Prosecutor's request.

In this regard, may we please correct a significant typo at paragraph 39 of our written submissions, dated 15 November to the Appeals Chamber.

The first sentence should read: "The Appeals Chamber should not" -- "The Appeals Chambers should further hold Article 15 of the Statute does not" -- we missed out "not" -- "restrict the scope of an authorised investigation to the incidents expressly identified."

Nothing in Article 15 requires the Pre-Trial Chamber to assess specific incidents and approve them for investigation. An investigation will inevitably develop over time. The approval sought for an investigation by the Prosecutor under Article 15 will be at a preliminary stage. The specific incidents referred to by the Prosecutor will most likely be illustrative or exemplary of a broader category of victimisation. The investigation must be able to develop and progress without any artificial restriction placed upon it by the Pre-Trial Chamber.

But the Prosecution in their consolidated response to the written observations of the Cross Border Victims and *amici curiae*, dated 25 November 2019, state at paragraph 18 that it is inconsistent for us, on behalf of the Cross Border Victims, to accept that the scope of an investigation is not limited, but also suggests that the Prosecutor is nonetheless obliged to identify or make findings about alleged crimes concerning authors of all publicly known Article 15 communications.

We respectfully disagree. We accept obviously that there may be reasons why certain incidents are included in a request while others are not. But where, as here,

the OTP is provided with clear and compelling evidence of a distinct category of victimisation potentially raising different jurisdictional questions, the OTP should express some view as to whether it intends to proceed with an investigation into such matters or not.

In the OTP's consolidated response, again at paragraph 18, they state that identifying situations or making findings about all publicly known communications "... might also be counter-protective in requiring [it] to make initial 'negative' findings about certain allegations when she may for various reasons consider neutral silence to be the more appropriate course."

We can see the force of that submission in cases where there has been an active and ongoing dialogue between the OTP and a group of victims. And where, for example, the OTP has expressed concern about the sufficiency of evidence regarding particular offences and given the victims an opportunity to address such concern. Or where perhaps the OTP has explained in the spirit of transparency whatever concerns it may have about pursuing a particular line of investigation in relation to that category of victims.

But in this case, and in relation to the Cross Border Victims, there has been no such dialogue. Since providing the comprehensive dossier of information to the OTP in 2014, the Cross Border Victims have received no communication from the OTP setting out its attitude to a very serious category of victimisation and the matters raised on behalf of the Cross Border Victims. Serious matters relating to a distinct category of victims with potentially different jurisdictional and admissibility questions arising from them and other victim groups that may be presented and contained within a request for authorisation.

If there had been such communication or dialogue, the Cross Border Victims would

have been better placed to decide what representations, if any, to make to the Pre-Trial Chamber pursuant to Article 15(3).

In the absence of any communication or transparency in the approach to be adopted by the OTP, it was impossible, and to an extent still is difficult for the Cross Border Victims to know whether and what consideration has been given to the position of thousands of Pakistan-based victims by the OTP in its preliminary inquiry.

In our representations via the VPRS to the Pre-Trial Chamber on 31 January 2018 - so after the Prosecutor's November 2017 request for authorisation, but before the Pre-Trial Chamber's decision on 12 April 2019 - we expressly invited the Pre-Trial Chamber to require the Prosecutor to provide further information pursuant to Rule 50(4) of the Rules of Procedure and Evidence, and to clarify the position with regards to the Cross Border Victims.

In our written submissions to the Appeals Chamber on 15 November 2019, at paragraph 36, we again highlighted the particular importance of the Pre-Trial Chamber proactively and robustly using its powers under Rule 50(4) to request additional information from the Prosecutor and from any of the victims who have made representations.

That plainly did not happen in this case. And as a result, the Cross Border Victims were and remain in the dark as to the approach the OTP will take in relation to them going forward. We respectfully submit that is unfair and cannot be right.

So to sum up, we agree that a Pre-Trial Chamber may not limit the scope of an investigation to incidents specifically mentioned in the Prosecutor's request. But where, as here, there is a large and easily identifiable group of victims who have presented clear and compelling evidence of a distinct category of crimes and victimisation by alleged victims in relation to the crimes they have suffered, the

Prosecutor should, having decided not to include them within any request, at the very least --

THE COURT OFFICER: [14:21:24] You have two minutes left.

MR POWLES: [14:21:26] Two minutes?

THE COURT OFFICER: [14:21:27] Two minutes.

MR POWLES: [14:21:28] I'm very grateful. Thank you very much.

We respectfully submit that in those circumstances the Prosecutor should, at the very least, indicate to them what the position is going forward. It will be preferable though in the interests of transparency for the view of the Prosecutor to be expressly set out within a request for authorisation. If the victims are to be included within an investigation, that should be stated. If inquiries are ongoing, that should be stated. Alternatively, if the OTP has decided not to take the investigation, that should be similarly set out and stated, allowing, if necessary, the Pre-Trial Chamber to exercise its powers pursuant to Article 53(3)(b) if the Prosecution's decision is that a prosecution would not be in the interests of justice.

Finally, in relation to the relief:

In conclusion, we respectfully urge the Appeals Chamber to reverse the Pre-Trial Chamber's finding on Article 15(4) and Article 53(1)(c) and make its own finding pursuant to Article 83(2) and authorise the investigation pursuant to Article 15(4).

Additionally, we respectfully invite the Appeals Chamber to direct the Prosecutor to provide clarity as to the intended approach to the complaints of the Cross Border Victims. The crimes they have suffered, we say, are so serious that they warrant an investigation or at the very least an indication as to why not.

As ever, those representing the Cross Border Victims stand ready to assist the Prosecutor with her efforts to ensure that the crimes that the Cross Border Victims

have suffered are fully and properly investigated.

Thank you very much, Mr President, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [14:23:16] Thank you, Counsel, very much.

I would now invite the Office of Public Counsel for Victims to take the floor to now address the Appeals Chambers for the next 20 minutes. Please proceed.

MS MASSIDDA: [14:23:32] Thank you very much, Mr President.

Your Honours, our submissions on the merit of the present appeal are largely in line with the ones presented earlier by the Prosecution and counsel for victims.

In the interest of time, I will focus on what we consider to be the most salient points arising from your Honours' group C questions.

With regard to question C(a), we submit - and it will not come as a surprise at this time of the afternoon - that the Pre-Trial Chamber did not have the power to consider the factors under Article 53(1)(c) of the Statute as part of its decision under Article 15(4).

As detailed in our written submissions, the Pre-Trial Chamber acted *ultra vires* in denying authorisation based on its assessment that the proposed investigation would not serve the interests of justice.

The decision authorising an investigation into the situation in the Republic of Kenya, endorsed in subsequent proceedings, unambiguously confirms that only the Prosecutor's assessment that an investigation should not be pursued as it would not serve the interests of justice can be subject to judicial review pursuant to Article 53(3)(b).

By contrast, whenever the Prosecution concludes that there are no substantial reasons to believe that the proposed investigation would not serve the interests of justice and proceeds to seek authorisation under Article 15(3), a review of that interests of justice

assessment by the Pre-Trial Chamber is considered - to use the words of other Pre-Trial Chambers in Article 15 proceedings - unwarranted.

The Statute as a whole makes the fight against impunity the Court's very *raison d'être*. Accordingly, the Court's legal framework is based on a presumption that the investigation and prosecution of international crimes are ipso facto in the interests of justice and should be pursued whenever the applicable jurisdictional and admissibility requirements are met, subject to one narrow exception. Indeed, Article 53(1)(c) allows the Prosecutor, in highly exceptional circumstances, to refrain from initiating an investigation where there are substantial reasons to believe it would not serve the interests of justice.

Given the overall presumption in favour of accountability, the drafters of the Statute were careful to subject this narrow exception to judicial review, to ensure the Prosecution's limited discretion not to commence an investigation would not be abused. Hence, the dedicated procedure set out in Article 53(3)(b).

By contrast, the Statute contains no provision empowering a Pre-Trial Chamber to review the Prosecution's negative determination that there are no substantial reasons to believe an investigation would not serve the interests of justice. Since this is the default presumption position, rather than the exception, and fully in line with the Court's ultimate objectives, no judicial review of said assessment by the Prosecutor is necessary.

The wording of the relevant provisions in the Statute also reflects this approach. Article 15(4) confirms that a Pre-Trial Chamber shall, without any room for discretion, authorise the investigation whenever there is a reasonable basis to proceed.

Divergent views have been expressed in this appeal as to the meaning to be given to the expression "reasonable basis to proceed" in the context of Article 15(4), and

whether it covers each of the requirements set out in Article 53(1), including, in particular, the interests of justice.

Given the extensive submissions already heard by the Chamber, I wish only to underline that the wording of Article 15(4) is far from clear and leaves significant room for ambiguity.

Interpreting the "reasonable basis to proceed" in Article 15(4) as covering each of the three subparagraphs in Article 53(1), jurisdiction, evidentiary basis, admissibility and interests of justice, would render the subsequent sentence, that the case appears to fall within the jurisdiction of the Court, superfluous.

Further, while the same English expression "reasonable basis to proceed with an investigation" appears in both Article 15(4) and Article 53(1), the Spanish and French version use different wording in each of these provisions. And while Rule 48 of the Rules of Procedure and Evidence creates a link between said articles, prominent commentators involved in the negotiations of the Rules have noted that the reference in Rule 48 was, and I quote:

"... carefully drafted in order not to capture the last sentence of article 53, paragraph 1 which pointed to judicial reviews of the Prosecutor's determination that an investigation would not serve the interests of justice." End of quote.

The reference is to Friman, in the Lee commentary of Rules of Procedure and Evidence, Chapter 7, page 496.

Accordingly, while the Court's legal framework undoubtedly indicates that interests of justice are a consideration to be taken into account by the Prosecution in deciding whether to request authorisation to open an investigation, this does not necessarily entail a corresponding power of a Pre-Trial Chamber under Article 15(4) to review the Prosecutor's assessment of this element.

Even assuming arguendo that the Pre-Trial Chamber was entitled to do so, the standard it applied in its review amounted to an error of law and an abuse of discretion.

At most, the Pre-Trial Chamber should have simply ensured that the requirement in Article 53(1)(c) was met to the prescribed standard. Instead, the Pre-Trial Chamber required a positive determination to the effect that the investigation would be in the interests of justice and relied on notions such as reasonableness and likelihood as opposed to the much more stringent "substantial reasons to believe" standard.

Further, the Pre-Trial Chamber engaged in a *de novo* review rather than treating the Prosecution's assessment of the interests of justice with the level of deference appropriate to any review of an exercise of prosecutorial discretion.

Moving on to question C(b), we contend that the factors taken into account by the Pre-Trial Chamber when determining that the proposed investigation would not be in the interests of justice were not appropriate.

Let me address first the Pre-Trial Chamber's treatment of the interests of victims and the views they expressed in the representations submitted under Article 15 proceedings. The Pre-Trial Chamber erred in adopting an unreasonably narrow reading of the interests of victims and in giving insufficient weight to the representations they made, particularly by the overwhelming majority of victims who clearly favour the opening of investigation.

The Impugned Decision wrongly interprets the interests of victims as effectively limited to and conditional on their participation in specific trials before the Court.

In fact, the interests of victims in the present proceeding and also more generally are much broader in scope and nature than mere participation at trial. Victims making representations before the Pre-Trial Chamber referred for instance to ending the

climate of impunity prevailing in relation to the relevant crimes, deterring further crimes, allowing victims' voices to be heard, and uncovering the truth.

And empirical surveys conducted in different war-torn regions, including Afghanistan, confirm that the prevalent purpose for victims of taking actions against the perpetrators is to reveal the truth about the past.

Logically, these interests can be pursued by the opening of an investigation regardless of whether it ultimately results in trials against specific individuals and their conviction.

The Pre-Trial Chamber decided however that given, and I quote, the "extremely limited" prospects of successful investigation and prosecution, pursuing an investigation would not contribute to achieving victims' interests.

I note, your Honours, with concern the Pre-Trial Chamber's readiness to depart from the views expressed by victims as part of a process of victim representation and to substitute its own assessment to said views. Effectively, the Pre-Trial Chamber assumed that victims making representations were oblivious to the challenges the Prosecution could face in the course of a potential investigation concerning Afghanistan. It decided accordingly that, contrary to the own representations, the victims' interests militate against the opening of an investigation which may not lead to conviction, in the words of the Pre-Trial Chamber, creating frustration and possibly hostility vis-à-vis the Court.

The Office rejects said paternalistic approach, which instrumentalises the role of victims, oversimplifies their experiences and expectations, and underestimates their understanding of a justice process and of a broader geopolitical context.

The Pre-Trial Chamber also erred in finding that the interests of victims were either nullified our outweighed by competing non-legal factors, such as the feasibility of

investigation and the proper allocation of the Prosecution's resources.

From the perspective of a general interest of victims, the Chamber's reliance on the anticipated feasibility of investigation based on the passage of time since the crimes, the prospects for State cooperation and the expected of availability of evidence and suspects is erroneous, as the Pre-Trial Chamber itself recognised in its subsequent decision granting leave, and I quote, "According to the Statute, the Prosecutor is meant to act as the driving engine of ... investigations, enjoying exclusive responsibility when it comes to assess the feasibility of investigations". It's paragraph 24 of decision 62.

The Impugned Decision's approach to the issue of feasibility is also deeply concerning for a variety of reasons.

First, said approach signals to victims that, for the Court, the rights to truth, justice and reparation are only worth pursuing where justice is within easy reach. On the contrary, we submit that the Court's intervention is all the more fundamental in challenging geopolitical, security and humanitarian situations where the Court effectively represents the victims' only hope to obtain justice.

While on this topic, allow me to briefly address the submission made by the government of Afghanistan earlier this week and reiterated this morning. Said submissions concern primarily issues of complementarity which are not at stake in the present appeal and will be more appropriately addressed at a later stage of the proceedings. The government of Afghanistan addresses in detail a number of domestic reforms designed, in its words, to "facilitate the investigation and prosecution of international crimes" at the national level. To date, said reforms do not appear to have led to tangible results or meaningful progress in the achievement of the rights to victim, who continue to look at the ICC as their only hope for justice.

Second, the Pre-Trial Chamber's reliance on the prospects for State cooperation as a factor in the assessment of the interests of justice giving credence to criticism of the Court as a politically-driven institution. For victims, it means that their hopes of seeing justice before the Court are effectively dependent on whether or not they happen to have been victimised by perpetrators supported by powerful States. Further, the Pre-Trial Chamber's approach makes the opening of an investigation conditional on the Prosecution's demonstration that the prospect of success in a given situation are higher than in other situations before or potentially before the Court. The interests of victims in the proposed Afghanistan situation and their rights to truth, justice, and reparation would thus need to be weighed against those of other victims of all other existing or potential situations before the Court, placing victims of relevant crimes in competition with one another, contrary to the fundamental values enshrined in the Statute.

Finally the Pre-Trial Chamber's approach ignores that the international criminal justice framework as a whole is based on the premise that a given State's unwillingness to bring to justice the perpetrators of the most serious crimes does not mean that the victims' rights to truth, justice, and reparation for the said crimes should be infringed. On the contrary, international and hybrid tribunals established since Nuremberg have proved that it is possible, and indeed necessary, to respect victims' rights and hold accountable the perpetrators of the most serious crimes of concern to the international community even where relevant States resist these efforts.

As for the appropriate allocation of the Prosecution's resources, we agree with the views already expressed by the Prosecution and counsel for victims to the effect that the Pre-Trial Chamber abused its discretion in pronouncing of matter which falls under the Prosecution's authority. Budget constraints and the exigencies of case

prioritisations are concerns the Court shares with other international and hybrid courts and with many domestic legal systems. These concerns do not however justify the wholesale denial of authorisation by the Pre-Trial Chamber.

Finally, turning to question (c) concerning the Pre-Trial Chamber's position on the scope of any authorised investigation.

We submit that the majority of the Pre-Trial Chamber erred in law in conducting its scrutiny of the interests of justice on the basis that an authorisation to commence an investigation pursuant to Article 15(4) would be limited in scope to the events or categories of events identified by the Prosecution in its request as well as to those closely linked.

The approach adopted by the Pre-Trial Chamber in this respect is contrary to the requirements of efficiency, expeditiousness and judicial economy, and precludes the Prosecution from fulfilling its duties under the Statute, including to establish the truth by extending investigation to cover all facts and evidence. It also marks a significant departure from the carefully designed balance of powers between the Prosecutor and Pre-Trial Chamber negotiated by the State Parties and set out in the Statute.

From the victims' perspective --

THE COURT OFFICER: [14:41:41] Ms Massidda, you have 2 minutes left.

MS MASSIDDA: [14:41:43] Thank you.

From the victims' perspective, there is of course a substantial interest in broad-scope authorisation allowing for an investigation that duly encompasses the full extent of their victimisation and the impact of the crimes on individuals and affected communities.

The Pre-Trial Chamber's ruling on this point is at variance with well-established jurisprudence of the Court in all Article 15(4) decisions adopted to date, including

most recently in the context of the Bangladesh/Myanmar situation where Pre-Trial Chamber categorically rejected the approach adopted in the Impugned Decision as being contrary to, among other things, the object and purpose of Article 15 proceedings. According to the Pre-Trial Chamber in Bangladesh/Myanmar, the process of judicial authorisation set out in Article 15(4) was intended to prevent unwarranted, frivolous or politically motivated investigations.

This objective is achieved as soon as there is a reasonable basis to believe that at least one crime meeting the relevant jurisdictional and admissibility requirements has been committed.

To conclude, the Office's principal submission is that the Pre-Trial Chamber acted *ultra vires* in reviewing the Prosecutor's negative assessment of the interests of justice.

In the alternative, the Office posits that the Pre-Trial Chamber applied an incorrect standard in carrying out said review, took into account irrelevant factors, and misinterpreted and failed to have due regard to the interests of victims.

Consequently, the Appeals Chamber should reverse the Impugned Decision and authorise the opening of an investigation or remand the matter back to the Pre-Trial Chamber for it to authorise the opening of investigation in the situation in the Islamic Republic of Afghanistan.

This concludes, your Honour, my submission in the general interests of the victims.

I thank you.

PRESIDING JUDGE HOFMAŃSKI: [14:43:56] Thank you very much, Ms Massidda.

We will now hear submissions from the *amici curiae*, beginning with the Office of Public Counsel for Defence. Your 15 minutes begins now. Please proceed.

MR KEÏTA: [14:44:32] Mr President, your Honours, please permit me to address you in French.

(Interpretation) Your Honours, may it please the Court, I stand before the International Criminal Court, created with the purpose of determining individual criminal responsibility through judicial proceedings. In such a context, underpinning such criminal proceedings must always be the rights of those individuals it will try in any situation it authorises. Rather than be applied at the later stages of the process, fair trial rights, as derived from human rights instruments, are one of the fundamental components of justice, and the principles derived therefrom shall remain the golden thread of the Prosecution's obligation to see any alleged criminal liability through beyond a reasonable doubt.

The ICC is not a commission of inquiry, nor is it an independent investigations mission or even an international human rights organisation. While a court of last resort, it should not be considered a court of last hope.

It is a body tasked by the international community to try only those who are the most responsible for the gravest crimes against humanity, of war and aggression and of genocide. It is one that lives in complementarity with other regimes. It is one that lives in complementarity with other regimes and only remains seised of matters that it can properly try within the confines of its jurisdiction and ability.

The OPCD has provided lengthy written submissions that go to the fundamental core of what our Office believes in, that is to say, fair trials for all defendants at whatever stage of the case. In the present matter we have no agenda whatsoever and in the present matter, looking at one of the earliest phases of the ICC, i.e., that of the opening an investigation, the standards can be nonetheless -- or no less. Especially in that there are suspects who are known at this time, even some of them were referred to this morning by the Legal Representatives, LRV 2 and 3.

Now, to outline our submissions briefly today, the Appeals Chamber has invited the

OPCD to provide *amicus curiae* to the Court on the merits of the appeal and we thank you for this opportunity.

I will therefore reference the questions the Chamber has put to us before the hearing. I will begin with question B, relating to the factors considered, and then move on to question A, and where related, question C, on the powers of the Pre-Trial Chamber to consider such factors.

Firstly, it is important to consider that the three factors listed by the Pre-Trial Chamber as considerations that are against the interests of justice in opening an investigation in Afghanistan, that is to say time, cooperation and evidence, are essentially those that go to the heart of whether defendants later appearing before this Court will be able to receive a fair trial.

More generally, the Prosecutor's recent report on the Kenya situation even goes so far as to recommend the core of these three factors as part of a consideration of the Prosecutor's office in the preliminary examination process under a framework of what could be called a feasibility analysis. That report states that the OTP should consider the feasibility of investigating in the situation country, resources, witness protection, ability to operate on the ground. The stated purpose of the study was to, quote, "learn from the experience", unquote, at the handling of cases. And with respect to these proposals, the OTP notes that, quote, "OTP policy until now has been to not include the feasibility of investigating as a factor to consider at the stage of seeking authorisation to open", unquote, but only much later at the stages of case selection and prioritisation.

What's been shown in that situation and others is that without such proper analysis, there is great potential to compound the harm in trying to achieve justice at all costs where it is not feasible given a substantial lack of evidence.

Contrary to the Prosecution's assertion that passage of time was considered on its own, it is evident that the Pre-Trial Chamber assessed this factor in conjunction with the availability of evidence and cooperation, essentially concluding that a lacking on all three indicated that proper investigations would not be realistic.

Without proper investigations into both incriminating and exonerating evidence pursuant to Article 54(1)(e), fair trials can never be held. Essentially, without access to evidence, there will be no trials. Without trials, no justice.

These considerations were confirmed only this week by the Afghan government which gave alarming detail of the complexity and volatility of the current situation in Afghanistan, which poses real and substantial problems to any investigation, citing specifically the ICC Prosecution's failure to travel to Afghanistan and investigate activities itself, despite being invited to do so based on the difficulties cited by the PTC.

When a case falls apart or a whole situation appears to be destined for that route, it is neither in the defendants' nor the victims' interests, let alone that of justice. While the Prosecution's submissions note that it is not only about convictions for the victims, recent history has demonstrated the real harm caused to victims when the wrong defendants are tried. And the Court is incapable of bringing the proper suspects to justice based on an inability to collect proper evidence. Named defendants suffer harm merely for being summoned by the Court. The lives of defendants are stopped short by virtue of being unjustly prosecuted. And the lives of victims are ruined without access to reparations from properly identified charged and tried defendants.

Those of us in the courtroom who are not in possession of the full confidential underlying facts or evidence of the request, like the OPCD, must defer to the assessment of Pre-Trial Chamber II. In so doing, it came to that rare but possible

conclusion, as outlined in the response, the LRV2/3 response, quote:
(Speaks English) "To refuse an entire investigation" on the basis that it was "shown that a fair trial was impossible for any conceivable case within the proposed investigation." End of quote.
(Interpretation) Given the operational standard of proof of the this Court, the burden remains on the appellants to demonstrate that somehow the Pre-Trial Chamber abused its discretion in assessing these relevant factors.
Secondly, the Pre-Trial Chamber has power to consider factors itself. In a court of law a chamber hearing the case is the ultimate guardian of fair trial rights, as the Afghanistan -- as the State of Afghanistan submissions eloquently outline in paragraph 8.
In the matter at hand, the Pre-Trial Chamber is the gatekeeper of *proprio motu* prosecutions by the Prosecution. It is important to recall that during the discussions in Rome, because of the inability to agree on an investigating judge function as suggested by France, this Pre-Trial Chamber was the compromise to create a stopgap measure on the possibility of an overreaching Prosecutor. This is the only interpretation that is consistent with human rights law and the preservation of the Chamber's powers to ensure fair proceedings before the Court.
Several *amici* in the proceedings have emphasised the need to consider international human rights law via Rome Statute Article 21(3), and the OPCD would like to express its agreement, whilst underscoring that human rights law belongs to all humans and therefore such considerations must also take into account the human rights, especially in the context of a fair trial of those who will face charges.
LRVs 2 and 3 as much as agree with the need for fair trial rights in the consideration of Article 21(3) in this context. Therefore, it is within the remit of the Pre-Trial

Chamber to make such considerations in reviewing a request of the Prosecution, having in mind the human rights implicated in its decision.

Furthermore, the ICC, being a court that has the power to even evaluate the fairness of other due process proceedings in the context of war crimes, must present itself as a model of justice for the defendants it itself tries.

Even if the Appeals Chamber finds that the Rome Statute grants sole power to the Prosecutor to make an Article 15 interest of justice assessment, such human rights must underpin any such review of these requests by the Pre-Trial Chamber. In many requests the Prosecution's submissions on interest of justice considerations are light, granting the Pre-Trial Chamber alone the power of assuming proper analysis was done. However, in an effort at transparency and for a proper review, the Chamber must have the details of this analysis --

THE COURT OFFICER: [14:57:40] Excuse me, Counsel, you have two minutes left.

MR KEÏTA: [14:57:41] (Interpretation) Thank you.

The details of the analysis so as not to substitute its own. This is supported also by the recent Kenya report which advises the Prosecutor against assuming that a situation will be granted and asks the Prosecution to anticipate all legal and jurisdictional issues. For this, the Prosecution must provide a clear iteration of its interest of justice analysis, including the human rights of suspects, for the Pre-Trial Chamber to be able to make a proper review and take an informed decision. To say otherwise would strip the Chamber of its power to ensure fair proceedings are brought before the Court and make it, as noted by State Party Afghanistan, a mere rubber stamp on the Prosecution's *proprio motu* investigatory powers.

For the foregoing considerations and respecting the standard of appeal in play, if the Appeals Chamber does overturn the Impugned Decision, it should be remanded back

to the Pre-Trial Chamber for new determination based on the Appeals Chamber's holdings that, in this case: One, the opening of a situation in accordance with Article 15 of the Rome Statute must consider the right to a fair trial and the human rights of any future defendants; and two, these considerations must be clearly listed in the request of the Office of the Prosecutor and the decisions of the Pre-Trial Chamber for a full accounting of transparent justice. Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [14:59:39] Thank you, Mr Keïta.

And now I would like to invite counsel of Jerusalem Institute of Justice, the International Legal Forum, My Truth, Simon Wiesenthal Centre, The Lawfare Project, and UK Lawyers for Israel. You have also 15 minutes. Please.

MR KERN: [15:00:08] Your Honours, since its genesis, the interests of justice provision under Article 53(1)(c) of the Rome Statute, as properly construed, has related to whether the commencement of an investigation would be counter-productive. So understood, it encompasses broader considerations than simply criminal justice.

Your Honours, it is not in the interests of justice, so understood, for the ICC to investigate the conduct of nationals of non-States Parties absent a Security Council referral authorising the investigation. This, your Honours, is the golden thread which underpins our answers to questions (b) and (c) of the Chamber's questions in group C.

Your Honours, yesterday the Prosecution suggested that the issue of whether the Court is permitted to exercise jurisdiction over nationals of non-States Parties absent a Security Council referral is not an issue that fairly falls within the parameters of this appeal and accordingly, quote, the Prosecution "will not be touching on the issue of non-States Parties". End quote.

In light of the Prosecution's submission, I will turn to issue C(c) first in order to explain why we respectfully submit that Mr Guariglia was wrong. It was noted that Mr Guariglia yesterday specifically acknowledged in response to a question from her Honour Judge Ibáñez Carranza that this issue has a, quote, "jurisdictional connotation", end quote, and it has specifically been raised as such by the Legal Representatives of the Victims.

Your Honours, not only does the issue of non-States Parties squarely fall within the parameters of this appeal, it is also germane to question C(c) posed in the decision on the conduct of the proceedings.

This question contemplates whether the Prosecutor is permitted to investigate incidents *proprio motu* which a Pre-Trial Chamber has not specifically authorised. It follows that with respect to such incidents, that the Pre-Trial Chamber has not made a specific determination that they fall within the material jurisdiction of this Court.

The Prosecutor's appeal is also premised on the argument that the Pre-Trial Chamber's findings with respect to the scope of the investigation impacted its finding that there are substantial reasons to believe that commencing an investigation would not serve the interests of justice.

Your Honours, this demonstrates that the scope of the permissible exercise of the Court's jurisdiction is in issue in this appeal.

No participant disputed that proposition yesterday and indeed it was echoed by LRV2 and LRV3 this morning with respect to the scope of the investigation of the crime of torture. Ms Reisch submitted that among the most, quote, "glaring errors", end quote, of the PTC was its misinterpretation of territorial jurisdiction.

We therefore agree with LRV1 that it would be, quote, "highly problematic" if the Appeals Chamber were not to correct the Pre-Trial Chamber's errors with respect to

jurisdictional scope and that, and I quote from the consolidated response of LRV1 to the *amici* at paragraph 30, "issues as to the Court's jurisdiction should be resolved as early as possible in the proceedings". End quote.

LRV2 and 3 in their joint brief also explicitly invite the Appeals Chamber to address all jurisdictional questions which arise from the decision in the current appeal for reasons of judicial economy. Yesterday the Prosecution agreed with the OPCV that the Appeals Chamber is in a position to decide, quote, all the critical issues, regardless of whether your Honours decided to go via the 82(1)(a) or the 82(1)(d) route. In our submission, the permissible scope of the exercise of personal jurisdiction is a critical issue, and the correctness of paragraph 50 of the Impugned Decision where the Pre-Trial Chamber found that conducts that have allegedly occurred in full or in part on the territory of Afghanistan or of other States Parties fall under the Court's jurisdiction irrespective of the nationality of the offender is critical too.

As my learned friend Mr Jacobs submitted yesterday, this finding is disputed. We submit that it was wrong, indeed a glaring error, as put by Ms Reisch.

If in error, it too would materially impact upon the scope of the proposed investigation and the assessment of factors which the Pre-Trial Chamber considered relevant to the interests of justice, including the prospects of State cooperation and for securing evidence and suspects.

However, given that the issue was not fully raised on appeal by the Prosecution, and it has not been nor has ever been properly litigated in an adversarial setting before this Court, we submit that the Appeals Chamber is by no means in a position finally to determine this issue now.

Your Honours, turning to issue C(b), were the factors considered in paragraphs 91 to 95 of the Impugned Decision appropriate?

We disagree that the Pre-Trial Chamber abused its discretion in paragraphs 91 to 95 of the Impugned Decision. On the contrary, the Pre-Trial Chamber was right to ground its analysis of the interests of justice in the overarching objectives underlying the Statute contained in its preamble.

Moreover, in addition to the objective identified in the preamble's recital 5, expressly relied on by LRV2, we submit that it was also open to the Pre-Trial Chamber to consider recitals 7 and 8 in the context of its Article 53(1)(c) analysis. These reaffirm that the purposes and principles derived from the UN Charter, including the principle of non-interference, and emphasise that nothing in the Rome Statute shall be taken as authorising any State Party to intervene in the internal affairs of any State, may be considered in this context too.

It was therefore open to the Pre-Trial Chamber to find that an investigation can hardly be said to be in the interests of justice if the relevant circumstances are such as to make such an investigation not feasible and inevitably doomed to failure.

Your Honours, We do not agree that the Pre-Trial Chamber's concerns with respect to the availability of evidence and the limited prospects of State cooperation were speculative or premature. Given the public statements of senior United States government officials, taken together with the obstacles to investigating in Afghanistan raised both by the government of Afghanistan and LRV1, we respectfully disagree with Ms Brady that this was a decision, quote, "made in the abstract" end quote.

This also flows from the position that the proposed investigation contemplates the alleged conduct of nationals of non-States Parties, which has not consented to the exercise of ICC jurisdiction, which has made clear that it has no intention to cooperate, and which is under and would be under no obligation to do so should an investigation be authorised.

Your Honours, it was therefore open to the Pre-Trial Chamber to find that the prospects of a successful investigation and prosecution, particularly of US nationals' conduct, were, quote, "extremely limited".

It is striking how the Prosecution and the Legal Representatives for Victims have dismissed this cold reality as mere speculation, but it was by no means *ultra vires* unreasonable or otherwise an abuse of discretion for the Pre-Trial Chamber to be guided by operational and therefore resource allocation considerations when undertaking an interests of justice analysis pursuant to Article 53(1)(c).

To illustrate the point, in paragraph 126 of its appeal brief, the Prosecution arguably misconstrues the nature of State Parties' cooperation obligations with respect to the arrest of suspects which may arise upon the commencement of an investigation by suggesting that a State Party would be in breach of its legal obligations if it declines to surrender a suspect pursuant to an ICC warrant. Articles 59(1) and 59(2) and Article 89(1) require specific consideration of the relationship between the Rome Statute system and national legal systems. This is because States Parties' cooperation obligations remain subject to a residual discretion which the Statute affords to them to determine whether an ICC arrest request is made in accordance with national law.

In the UK, for example, common law writs of habeas corpus and abuse of process are reserved and will arguably ultimately override the effectiveness of Rome Statute cooperation obligations. The legal effect of the Rome Statute's cooperation obligations may therefore be considered as part of an assessment of whether an investigation would not be in the interests of justice and it cannot be assumed that State Parties, which ultimately do not surrender a national of a non-State Party to the Court, is acting in breach of them.

We nevertheless agree with the Prosecution that the materiality of any considerations

other than the gravity of the crime and the interests of victims is to be determined on a case-by-case basis. In this situation, the principle of comity is, for example, an important principle of justice safeguarding the interests of peace and security in international relations. The Chamber may agree that the, quote, "delicate mosaic", referred to in recital 1 of the preamble, considered in the context of the complementarity principle enshrined in recital 10, incorporates this principle of justice into the Rome Statute system. The principle of complementarity is, after all, not confined to Article 17 and is regulated by the interplay of the preamble, Articles 1, 12, 15, 18, 19, 20, 53 and 95 of the Statute.

We therefore support the Islamic Republic of Afghanistan's core submission that the term "the interests of justice" should be interpreted in light of the importance of effective national investigations and Prosecutions.

Domestic investigations in non-States Parties such as the United States which may not strictly fall within a narrowly interpreted Article 17 may nevertheless reflect an exercise of jurisdiction by that State pursuant to its obligations under customary international law. As a matter of comity, should a qualified deference not be afforded to decisions of national courts in an interests of justice analysis pursuant to Article 53(1)(c) if made under, for example, an administrative or public law framework through which the legality of public bodies' acts is adjudicated genuinely by reference to obligations under customary international law.

Considering the value, your Honours, of systemic integration of international law whilst remaining mindful of the plurality of the world's legal systems, as well as the aspirational nature of the ICC's universalist ambitions --

THE COURT OFFICER: [15:13:15] You have two minutes left.

MR KERN: [15:13:19] Thank you.

-- we would argue that it is not in the interests of justice for the ICC to assert that ICC jurisdiction has hierarchical superiority or is even *lex specialis* over national law decisions pronouncing on the legality of executive acts of State in the absence of any grounding for this proposition under general international law.

The interests of justice oblige the Court to be mindful that whereas between its relationship with States Parties, framed in terms of the delegation model yesterday by my learned friend Mr Jacobs, the system of cooperation under Part 9 of the Statute is a self-contained regime. As Mr Jacobs submitted, between the Court and non-States Parties we must identify the specific rules of customary law that apply to that separate circumstance. And the ICC does not operate in a legal vacuum.

For the record, your Honours, to be absolutely clear, the position of the human rights organisation that we represent is that it would be a flagrant breach of natural justice were the Court to allow this appeal based simply on the material before it. We therefore invite the Appeals Chamber, if minded to do so, to remit the issue of jurisdiction to the Pre-Trial Chamber or adjourn these proceedings before permitting argument from participants on the critical issue of whether the exercise of ICC jurisdiction over nationals of non-States Parties is permitted.

Indeed, in and of itself, this is a ground to believe that it would not be in the interests of justice to authorise an investigation in a situation which engages the right of a non-consenting State absence Security Council *imprimatur*. Taken together with those factors properly identified by the Pre-Trial Chamber, as well as the government of Afghanistan, there are substantial grounds to believe that it would not presently be in the interests of justice to authorise an ICC investigation pursuant to the Prosecutor's November 2017 request.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:15:32] Thank you, Counsel.

Now I would like to invite counsel of the European Centre for Law and Justice.

You have 15 minutes, please.

MR SEKULOW: [15:15:47] Thank you, Mr President, your Honours, and it's again a pleasure to appear before you today.

The Pre-Trial Chamber's decision that it was not in the interests of justice to authorise an investigation in the situation in the Islamic Republic of Afghanistan was based on the following three considerations, amongst some others, but these are the main three: The fact that significant time had elapsed between the alleged crimes and the request; the likelihood that relevant evidence and suspects would no longer be available; and the lack of cooperation obtained by the Prosecutor.

The Prosecutor argued that these are broader considerations that did not need to be analysed in this instance. We disagree because the lack of cooperation in this case was actually based on general principles of customary international law and specific treaties between the United States and the Islamic Republic of Afghanistan.

In her appeal brief the Prosecutor argued that the Pre-Trial Chamber was wrong in prejudging or speculating about the prospects for State cooperation.

In paragraph 126 of her appeal brief the Prosecutor contends that some evolution over time may occur concerning the cooperation of State Parties which are not parties to the Statute. That is simply not the case regarding the United States. The United States has repeatedly and forcefully explained why it will not cooperate.

As early as 2002 the United States Congress passed explicit legislation with wide bipartisan support, the American Service-Members' Protection Act, codifying into law that it will not participate under section 7423(b) of the act, and I will quote:

"... no United States Court, and no agency or entity of State or local government,

including any court, may cooperate with the International Criminal Court in response to a request for cooperation submitted by the International Criminal Court pursuant to the Rome Statute."

There is no room to speculate that this will suddenly change. Non-cooperation by non-State Parties -- non-party States is firmly grounded in customary international law. Article 12(2)(a), which purports to establish this Court's jurisdiction over nationals of non-party States, does not comport with the customary rule reflected in Article 34 of the Vienna Convention on the Law of Treaties, which states that "A treaty does not create either obligations or rights for a third [party] without its consent."

This Court's jurisdiction is based on the delegation of authority by State Parties. However, there is no customary norm whereby States can delegate their criminal jurisdiction over foreign nationals to a third party. In fact, the customary norm is just the opposite. Such delegation is unacceptable. A State's criminal jurisdiction over foreign nationals is a bilateral issue between the State and the accused person's State of nationality. A State cannot delegate that jurisdiction to another State without the consent of the accused's State of nationality.

A State also cannot delegate its criminal jurisdiction over foreign nationals to a tribunal whose jurisdiction has been rejected by the accused person's State of nationality. For such a delegation to be recognised as a customary norm, it would require a widespread consensus of States. No such consensus exists. In fact, approximately one third of all States do not accept this Court's jurisdiction over their nationals. Hence, by definition, this is not a customary norm and the State Parties to this Court have no authority to impose it upon the rest of the world.

Consequently, Article 12(2)(a) of the Rome Statute is either *ultra vires* and void or in

the alternative it must be interpreted as being consistent with the existing international law, which is to say that a prerequisite for jurisdiction over nationals of non-party States is the consent of the individual state of nationality or a referral by the UN Security Council. Certainly the exercise of jurisdiction over nationals of non-consenting, non-cooperating States is a legitimately contested issue, and an attempt to impose the Court's will against States that are acting according to customary norms does not accord with the interests of justice.

We further submit that it is not in the interests of justice to proceed against United States nationals in this matter because Afghanistan has no jurisdiction to delegate to this Court as it relates to the United States, having previously ceded that jurisdiction in a series of international instruments known as status of force agreements. They're also known as SOFAs.

The Legal Representatives for Victims 2 stated that the Islamic Republic of Afghanistan in their submissions has made no representation about taking legal actions against US military personnel. The truth is under these bilateral agreements, multilateral agreements, the interim security force agreements to Afghanistan, that jurisdiction rests with the nationals. In this case in talking about the United States, of course it would be the United States.

On January 4, 2002, the interim security force to Afghanistan, commonly known as ISAF, signed a comprehensive agreement with the interim government in Afghanistan. Section 1.3 of the agreement's annex states that ISAF and supporting personnel, including associated liaison personnel, will under all circumstances and at all times be subject to the exclusive jurisdiction of their respective national elements in respect of any criminal or disciplinary offences which may be committed by them on the territory of Afghanistan. The United States was a member of that group.

Afghanistan also entered into bilateral State-to-State agreements with the United States affirming that Afghanistan ceded exclusive jurisdiction over United States forces to the United States.

The first agreement was a series of bilateral diplomatic notes that took effect on September 26, 2003.

Second, Afghanistan entered into a bilateral security agreement, known as a BSA, with the United States in September of 2014 that effectively continued the ISAF agreement's terms. Notably, the Pre-Trial Chamber failed to even mention the ISAF agreement. In paragraph 59 of its decision, the Pre-Trial Chamber also incorrectly labelled the entire bilateral security agreement as an agreement pursuant to Article 98. This was incorrect. Article 98 agreements only cover the surrender of persons to this Court.

Both the ISAF and the BSA are much broader in scope because they also gave again exclusive jurisdiction over United States personnel to the United States.

For the record, Afghanistan also has had - has had - Article 98 agreements with the United States which went into force on August 23rd of 2003. So there was also an additional Article 98 agreement.

Notably, the ISAF agreement predates the Court's jurisdiction in Afghanistan. When Afghanistan joined the Court in May of 2003, it did not possess jurisdiction over ISAF personnel, including United States forces, and hence could not have delegated such jurisdiction to this Court.

In paragraph 46, footnote 47 of the Prosecutor's request for authorisation of an investigation, the Prosecutor asserted that whilst a SOFA might constitute a decision by a State not to exercise enforcement jurisdiction, such an agreement does not extinguish a State's prescriptive and adjudicative jurisdiction. This claim by the

Prosecutor is entirely unfounded.

The agreements are explicit in granting exclusive jurisdiction. Regardless, it is neither the place of the Prosecutor nor this Court to interpret how much jurisdiction the Afghan government ceded to the United States. The authority to determine such issues is limited to the parties to the agreement.

Article 30(4)(b) of the Vienna Convention expressly provides the default rule for situations such as this one, the attempt to impose a multilateral treaty obligation on non-party States. And I quote, "... the treaty to which both States are parties governs their mutual rights And obligations."

This provision embodies the bedrock principle of *lex specialis* and in this instance the bilateral jurisdictional agreements between Afghanistan and the United States are the *lex specialis* that govern their relationship.

To conclude, the Prosecutor wants this Chamber to overturn the Pre-Trial Chamber's interest of justice analysis in part because she thinks the United States may yet decide to cooperate. We submit that this ignores the history of principled non-cooperation under multiple administrations of multiple parties in the United States, as well as explicit official public statements and long-standing legislative acts which say that the United States is not going to cooperate based on customary international law and specific bilateral agreements.

This analysis is relevant because the Impugned Decision was made and based on the interests of justice. It is not in the interests of justice to ignore customary international norms. It is not in the interests of justice to override explicit agreements between sovereign States. And it is not in the interests of justice to waste the Court's resources while ignoring the reality of principled non-cooperation.

Thank you again for granting me leave to appear, your Honour.

PRESIDING JUDGE HOFMAŃSKI: [15:26:47] Thank you very much, Counsel. We will now hear questions from the Bench. I will now give the floor to my learned colleagues, beginning with Judge Howard Morrison who would like to ask a question to Mr Dixon. Please.

JUDGE MORRISON: [15:27:06] Mr Dixon, would you propose that the aspirations underlying the complementarity provisions envisage a stark and perhaps mutually exclusive choice between the ICC and national investigations and/or prosecutions?

MR DIXON: [15:27:31] (Microphone not activated)

Thank you, your Honour. The submission of the government is exactly not that. If the national jurisdiction is investigating, which we say is going on, and we've presented evidence of that, specifically of what's happening in the last two years, the period since the Prosecution applied, then it is for the Court to step back under the principle of complementarity. But that doesn't mean that the government then goes off on a tangent.

What we are specifically saying, and this is highlighted in our submissions, is that given the point we are at, the government would undertake to continue to report to the Court, in particular the Prosecutor, on the steps that it's taking akin to the procedure that is in Article 18. We're not there yet, but there's a procedure there where through deferral the State, certainly after the first six months and thereafter, would report to the Prosecutor so that the Prosecutor can consider whether or not genuine progress has been made. And if such progress hasn't been made, then it's as always open to the Prosecutor, as was highlighted yesterday, to make an application to authorise as is provided for in Article 18 as well.

Now we're not at that stage yet, but what we are saying is it can readily and it should be applied right now that those investigations that are ongoing should be allowed to

continue with proper reporting and cooperation with the Office of the Prosecutor. If there's any deficiency which requires the intervention of the Court following consultation with the State, there are then procedures whereby the Prosecutor can apply and bring it back to the ICC.

So it is one where the State and the ICC are in harmony, as I emphasised, working hand in hand.

If of course the ICC has to take over the cases, then it will have primacy. That doesn't prevent the State from at a later stage applying to take the cases back. But what we are saying is that's far down the line, it's speculative. In our submission it should never arise because the national jurisdiction is investigating, will do so, and what we are asking for is more recognition and support for that from the Court and from the Office of the Prosecutor.

Hence, the application that we are making or the submission we are making which is to not authorise or, in the alternative, revert it back to the Pre-Trial Chamber to consider these matters, taking into account all the new information and submissions that we have made together with all the other parties in the proceedings.

JUDGE MORRISON: [15:30:43] Thank you. Even absent complementarity, can we not consider the way the ICTR and the Rwandan courts, including the *gacaca* courts, operated in parallel at the same time?

MR DIXON: [15:31:00] In the context of the ICTR, which was a Chapter VII Security Council mandated court, which had primacy, it didn't have a complementarity regime, that court continued to exercise its primary role throughout. And yes, the national alternative justice proceedings continued.

But we submit we're not in that paradigm here. We're in a genuine complementarity regime where the State must be given the first and full opportunity to investigate and

prosecute. As I say, not going out on a limb, working in tandem with the Court. But the Court can only take over if, upon a proper application from the Prosecutor, an investigation is then authorised. But we are saying we are not there yet. Let's not do that now. When further down the line that might still be possible. Give the State an opportunity, particularly in light of the evidence that we've submitted to your Honours.

JUDGE MORRISON: [15:32:07] And one question for Mr Sekulow.

You've confined your arguments and remarks for the main part to the position of the United States and particularly the bilateral treaties. What of States other than United States of America who have security forces in Afghanistan, some of whom are signatories to the Rome Statute?

MR SEKULOW: [15:32:39] Well, first there are, there are governments that are signatories to the Rome Statute that are also part of the interim security force agreements. If there was a conflict between those, that would be different than in a situation in the United States.

The jurisdictional grants or the ceding of jurisdiction was a negotiated issue and there was additional -- that's why I'm saying it's not just the international security force agreements, we had bilateral, in the United States had bilateral, and other governments may well have too. But in the situation that we have, it's clear that there was no jurisdiction for Afghanistan to cede to this Court. If they were in fact parties to -- it would be almost the opposite of *lex specialis* if in fact they were bound to a multi-treaty, multilateral treaty, like the Rome Statute. But that's not case for the United States. And I should add that the annexes to the agreements are different for some of the various countries. So that's why I was speaking specifically, your Honour, towards the United States.

JUDGE MORRISON: [15:33:48] I understood that, but there is of course for the Court the dichotomy that there are some States who are not in exactly the same position as the United States. And the arguments of the United States might well be made theoretically if there was a prosecution and the United States citizens were indicted, then those arguments would be no doubt raised very thoroughly by the United States again. But the Court has to recognise that we are dealing with a multiplicity of players and not simply one country.

MR SEKULOW: [15:34:33] That's correct. The -- but the agreements themselves specify this ceding of jurisdiction. For instance, as it relates again - and to not belabour the point - as it relates to the United States, it is an exclusive grant of jurisdiction from Afghanistan. Other countries it may not be. So if there is a conflict, customary international norms would -- you would determine, based on interpretation statutes of treaties, how to handle that. In this case *lex specialis* would be clear, but it's also clear that the ceded -- Afghanistan did cede exclusive jurisdiction to the United States. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:35:11] Thank you very much.

Now please, Judge Ibáñez, your questions.

JUDGE IBÁÑEZ CARRANZA: [15:35:17] Thank you, Mr President.

My first question goes to the representative of the Islamic Republic of Afghanistan, please. In your submissions, in your written submissions of 2 December this year you stated in paragraph 7 that "... Afghanistan is also in a unique position to verify the Pre-Trial Chamber's conclusion that the 'complexity and volatility' of the current situation [of] Afghanistan poses real and substantial problems to any investigation." Then in paragraph 29 you state also that "Indeed, the attacks against judges, prosecutors and police have continued and worsened. The UN Secretary-General

noted that on 7 August 2019, there was a complex attack by anti-government forces to police headquarters ..." You also noted that on 7 September 2019 there was a killing of an appellate judge and also that there are a lot of Taliban attacks against judges, police killings, and so on and so forth.

If it is the current situation of Afghanistan, how can you say that the State has the ability to investigate and prosecute the crimes of the case at stake? Please. Thank you.

MR DIXON: [15:37:00] Thank you, your Honour.

JUDGE IBÁÑEZ CARRANZA: [15:37:06] The representative maybe because this is political -- if you want, you can answer.

MR DIXON: [15:37:09] If I could give an initial response and then I'll ask the ambassador if he wishes to add. I'm sure he may wish to.

To reiterate what the meaning of our submission in writing was, and hopefully which I've clarified today, what we are making clear is those realities on the ground. In the various efforts to go into areas in particular that are volatile or may not be under the control of the government, as was highlighted by the victims, these kinds of problems have been experienced. But what we are saying is the genuine and fearless efforts of the government to do that should be recognised, that they are trying to, however difficult it is, ensure that there are investigations and prosecutions within the country. And we shouldn't overlook that there have been successful prosecutions and convictions. The establishment of the international crimes office in May 2018 is now seised of a number of cases that are being investigated where in those cases most of them are proceeding. They haven't been incidents where investigators have been killed or prosecutors or judges killed. So there are success stories as well.

There is a recent report which we've also referred to from the UN in June of this year

where they indicate because of certain convictions that have taken place, there is a willingness on the part of the government to investigate and prosecute. So it's not one or the other. There have been success stories.

There are bound to be difficulties nevertheless, but what we are trying to set out is the means that we are using to counter that and that's where the plea for assistance is coming from, recognise that and assist, because that is happening. There's going to be no delay in these proceedings going on and whether we're going to have another investigation at the ICC that might be open for a long time before something happens. These cases are going on right now. So support those cases is the plea that we are making.

And I think it should also be emphasised in addition to that that the same difficulties that are faced by the government will certainly be faced by the ICC as well. If they haven't been prepared, the Office of the Prosecutor recently since 2017, to go there, how is it going to be possible to take on those investigations?

Many have submitted today that that's the solution, but they haven't actually explained, well, how are they going to do that. We're doing it at the moment.

These are the problems we're facing. I don't see how the ICC could be in a better position. And our submission is that the government can do it quicker, it can do it now, no need to delay any longer. And it can be monitored. If there are problems, well, then the Prosecutor can come back is our submission.

I hope that assists. I'll see if the ambassador wants to make any further submissions. Thank you, your Honour.

JUDGE IBÁÑEZ CARRANZA: [15:40:10] Before that, maybe I would like to complement with a follow-up question. But this is for the Legal Representative as well, yes. Could you assure that Islamic State of Afghanistan is prepared or is able

to cover the broad scope of the crimes that are at stake in this case before the ICC? Is this State able to reach all the perpetrators or possible suspects of all the crimes that are at stake on this case before ICC now?

MR AZIZI: [15:40:52] Thank you very much. First of all, I want to emphasise that what we submit in our submission we have tried to project the reality of Afghanistan situation. Because the people who are abroad and we are sitting in our very nice offices, warm, no obstacle for our security, then it is easy to talk about those places which we never be there.

In our submission and the reality of Afghanistan is that it is two decades that we struggle with all of these obstacles and problems, but it is -- and I should mention that fearless efforts, this is the Afghan nation that inside the conflicts and the proxy war of many countries, still we live and the ambition is to bring peace and he have ambitions to work for our people and to develop the country.

In these circumstances, besides all the responsibility that our government has, we also bring, as we committed to ICC and to international treaties, we bring reforms to our judiciary system. Since 2016 when our delegation had the meet the Prosecutor here in The Hague, they work on a road map of cooperation. Based on this work, road map to bring the reforming judiciary system to amend the criminal laws, to approve the torture laws in Afghanistan, which all of these new laws addresses the international crimes.

In this situation if there is no ICC, we as a State, we have responsibility for our people and we do what we can do. We already do, we -- already we have thousands of cases under investigation. If you look at the presence throughout Afghanistan, there are many people that are now in the present who have committed war crimes or other kind of terroristic crimes.

So it means that, in case of ICC investigation, it is the State that work with ICC. If the ICC could not visit this country and cede the Security Council in case of a certain investigation, it will take four decades more to have the results. So it is better to support the national judiciary system and it is much on the benefit of the victims and the benefit of our national interests that because we know our situation much better, the peace-building, peace talks is much important for us.

If we cut the current conflict to bring in the peace, as I mentioned in my speech, in the nine months of this year the number of civilian casualties was 8,000. At least we can save the life of these people. And mostly the justice can come properly in a country not in conflict time but in post-conflict.

Because of this in current stage, we prefer that our national judiciary system continue what we can do, because on those areas that we cannot do anything, ICC also cannot do anything.

We should talk what is the reality on the ground? One is what we dream, what we wish, but what is the reality? And if we increase the expectation together with ICC and we cannot do anything for the victims, then what -- how we can answer for those people after spending time? So because of this in our oral submission, in our written submission we emphasise that national Afghanistan judiciary system is much useful and better for this State to continue and investigate all those cases which is under the jurisdiction of ICC. Thank you very much.

JUDGE IBÁÑEZ CARRANZA: [15:46:30] There is a question for --

MR MILANINIA: [15:46:42] Yes, Mr President. I actually have some brief remarks with regards to this subject. I can wait until tomorrow obviously. However, if it benefits the Court, and given the fact that the subject has been raised and it does relate to the two questions that were just asked by Judge Carranza and Judge

Morrison, I can make a brief remark with regards to the comments made by the government now.

(Appeals Chamber confers)

PRESIDING JUDGE HOFMAŃSKI: [15:47:11] Tomorrow the same subject will be considered by the Court and I think it would be the time to address the Court tomorrow according to the schedule we have. Thank you.

JUDGE IBÁÑEZ CARRANZA: [15:47:24] Thank you.

This question goes for Mr Sekulow.

MR SEKULOW: [15:47:31] Yes, your Honour.

JUDGE IBÁÑEZ CARRANZA: [15:47:33] You have talked about a principle coming from customary law, the principle of non-cooperation. In light of that and in light that the prohibition of torture is a *jus cogens* norm, which under the provisions of the Vienna Convention on treaties has the highest hierarchy and it's mandatory for all the countries and these kind of norms cannot be disregarded and of course, coming from this hierarchy, emerges a lot of obligations *erga omnes* to investigate and to prosecute. That said, do you think it is possible to reconcile this hierarchy positioned norm *jus cogens* to prohibition of torture with a so-called principle of non-cooperation of States? Of course I will need maybe a kind of academic response because you are not the representative of any State.

MR SEKULOW: [15:48:45] I am not.

JUDGE IBÁÑEZ CARRANZA: [15:48:49] Okay, thank you. Thank you.

MR SEKULOW: [15:48:49] I am not, to be clear, thank you.

What we're saying, first of all, is that the -- it's not a principle of non-cooperation, it's principled non-cooperation. In other words, that the United States through its many administrations, through its policy statements, through the issues that have been

raised even recently have expressed consistently concern over jurisdiction of this Court over non-Member States, that would include nationals.

I also think it's important, and I didn't want to spend time on it today because I'm conscious of the Court's time, that the United States has a very comprehensive military justice system and a very comprehensive criminal justice system, and these cases that do arise from time to time, and it's interesting because the Office of the Prosecutor relied primarily on published documents from the senate oversight committee, house oversight committee that have reviewed when there's been issues. So I'm not saying that the United States or any other country is immune from something not going as planned or for something to take place that would be a violation of international law, but I'm not willing to concede that the only way to handle that would be for jurisdiction of this Court for a non-party State, which is in the situation of the United States.

But I do need to say again I am not representing the interests of United States here. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:50:23] Thank you very much.

Judge Kim Prost, please.

JUDGE PROST: [15:50:31] Thank you.

My questions are for the OTP, Ms Brady. And they're interrelated to the argument advanced today and in your brief starting at paragraph 35, this argument on the mandate of the Pre-Trial Chamber, even obligation, as you express it in your brief, to consider interests of justice.

And my first question relates, this argument seems to be premised on some form of intentional cross-reference between the chapeau of 53(1) and Article 15(4) and I would be interested in your comments on two points in relation to that argument: First, to

the one already identified by OPCV which is the blatant inconsistency between the wording of Article 15(4) and 53(1); and secondly, the drafting history, with which you are well familiar and is the subject of many commentaries, which supports that the articles were in different parts and negotiated in completely separated fashion.

So I would appreciate your comments on how your argument is in any way reconcilable with those two factors.

MS BRADY: 15:51:49] Well, your Honour, our answer in relation to -- I think I was making the point in relation to Rule 48 and Rule 48 is clearly for the OTP and Rule 48 says that the OTP, the Prosecutor must consider all the factors in 53(1)(a) through (c). That was a clear link. And my submission was in effect that article -- it would be rather illogical if the Prosecutor's assessment in Article 15 -- for Article 15(3) for her request were to be based on those three factors and yet when it comes to the Pre-Trial Chamber's assessment in Article 15(4) it was not based on those same factors when they're connected. I think the point I was saying is that when they're connected by the term "reasonable basis to proceed", which appears in both Article 15(3) and Article 15(4).

Now, I do realise, as you point out, that the drafting of Article 15 was quite separate to that which was going on in part -- in the part of the Statute on Article 53. And I don't want to say never the two shall have met, but they were drafted by different parts of delegations, and clearly when drafting the Article 53 the decision was taken in relation to when there is a State Party or a Security Council referral, then how would that work in terms of the negative decision.

So the question really arose, and I'm going back into my memory cells here, in the drafting of the Rules and how that connect would be made. And to the best of my recollection, the link was made through Rule 48 on Article 15(3). But I was reminded

when I heard the submission made by Ms Massidda and Håkan Friman has said that the reason why there is no express -- if I understand her correctly, and I haven't read that chapter for a while, but from what I understood, the reason why 48 does not actually have an express reference to 15(4) is to keep them separate.

Your Honour, that is not within my memory and I am just approaching it as a point of view of interpreting on its face the standard which is in 15(3), the standard which is in 15(4), they're both on reasonable basis to proceed and therefore, and looking at the case law, the consistent practice where the Pre-Trial Chambers have looked at factor number (c), that putting that together it would suggest to me that they have some oversight role on the Prosecutor's discretion. But as I said, it is a limited role, and that's very key to our submission. It's not that they can willy-nilly take into -- pluck out a concern that they have not -- that has not been raised by the Prosecutor, and that's why we made the submission that it must go back to the Prosecutor for her assessment because it's fundamentally her discretionary decision which is oversighted by the Pre-Trial Chamber. Thank you.

JUDGE PROST: [15:55:31] The second aspect of your argument I understand completely, but just one follow-up question then with respect to, and I'm glad you raised Rule 48 because I'm also a little unclear on that because this is a rule that was drafted after the Statute was completed, so the two sections were well known, the content of them. It is in Part 3, so it is not in any way restricted to the Prosecutor, it applies to Article 15 as a whole. It is clearly, I would suggest, identifying a lacuna which is that there was no cross-reference between 53 and 15, and in those circumstances, if the intent of the drafters was to give a mandate to the Pre-Trial Chamber to look at interests of justice, why didn't they say it? Why didn't they refer to paragraph 4 and why didn't they refer to the Pre-Trial Chamber? That's where I

don't understand why you're using 48 to support that it was intended to import interests of justice to the Pre-Trial Chamber.

MS BRADY: [15:56:42] Your Honour, I'm not sure whether I can take the answer much further because you're right, there is no explicit -- we don't have Rule 48*bis* which says the determination of a reasonable basis to proceed under Article 15(4), so you could say that that -- by its exclusion, the drafters felt that it was sufficiently covered, the field was covered, so to speak, by Article 15. And that's why at the end of the day the Prosecution actually sees merit in the position put by the Legal Representatives for Victims.

And we've been very guided, I'll have to say, in our position, yes, by the Rules, by the Statute, by what we see as the wording of the Statute, by what we look at in terms of the history of that drafting, what we can still sometimes vaguely remember about that, or better still. But we are particularly guided by the fact that you have five Pre-Trial Chamber decisions, and I think there is not quite the -- the Kenya decision is -- could be interpreted either way, I have to disagree with Mr Molomby that there are certain paragraphs in the Kenya decision that would suggest that all three paragraphs would have to be looked at, while there is another paragraph which suggests the opposite, and then there is a dissenting opinion of Judge Kaul which says, while I agree with the majority, all three subparagraphs have to be looked at. So looking at this as a whole, we put together, from what the Pre-Trial Chambers have decided, together with our understanding of the rule. But you're right, the rule happened after the Statute so the Statute would have to reign supreme.

JUDGE PROST: [15:58:44] Thank you.

PRESIDING JUDGE HOFMAŃSKI: [15:58:45] Thank you very much, Ms Brady. The schedule for day two of the hearing is now complete. The hearing will resume

tomorrow at 10 not 9.30 as planned before. Although the Legal Representatives of Victims will not address the Court tomorrow, all the counsels are invited to join us tomorrow in the courtroom.

MR GAYNOR: [15:59:15] Thank you. Mr President, could I make one oral request, please. Previously your Honours' order, before you amended it today, provided for each of the LRV teams to have 20 minutes to respond followed by final submissions of 10 minutes. I understand that you had vacated the final submissions of 10 minutes, but I did want to ask that if you have decided to vacate the response of 20 minutes also, we do have certain submissions to make in response to the submissions of the government of Afghanistan, as well as some submissions made by Mr Sekulow and Mr Kern.

PRESIDING JUDGE HOFMAŃSKI: [16:00:00] Thank you, Counsel.

(Appeals Chamber confers)

PRESIDING JUDGE HOFMAŃSKI: [16:00:24] Thank you, Counsel, for your intervention. The decision is positive, but of course the details will be expressed in the morning before we start to hear submissions.

MR GAYNOR: [16:00:38] I'm very grateful, Mr President. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [16:00:41] Thank you very much.

Last but not least, I would like to thank you all participants, of course all the court officers, interpreters, reporters, as well as the technicians, several security for assisting us today. Thank you, all of you.

The hearing is now adjourned.

THE COURT USHER: [16:01:07] All rise.

(The hearing ends in open session at 4.01 p.m.)