

ICC-0217 (Situation in Afghanistan)

**ICC-02/17-T-001-ENG RT 04-12-2019 PT OA OA2 OA3 OA4**

1 International Criminal Court

2 Appeals Chamber

3 Situation: Islamic Republic of Afghanistan

4 ICC-02/17

5 Presiding Judge Piotr Hofmanski, Judge Howard Morrison, Judge

6 Luz del Carmen Ibáñez Carranza, Judge Solomy Balungi Bossa and

7 Judge Kimberly Prost

8 Appeals Hearing - Courtroom 1

9 Wednesday, 4 December 2019

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

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

12 The International Criminal Court is now in session.

13 Please be seated.

14 PRESIDING JUDGE HOFMANSKI: [9:32:17] Good morning.

15 Would the court officer please call the case.

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

17 Honours.

18 The situation in the Islamic Republic of Afghanistan, case

19 reference ICC-02/17.

20 And for the record we are in open session.

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

22 I will now ask the participants to briefly please introduce

23 themselves for the record.

24 I will start with the Office of the Prosecutor, please take the

25 floor.

1 MR GUARIGLIA: [9:33:03] Good morning, your Honours. It's

2 Fabricio Guariglia director of prosecutions. Appearing with me

3 today Helen Brady senior appeals counsel, Matthew Cross,

4 Matteo Costi, and Mr Manoj Sachdeva, trial lawyer.

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

6 The Legal Representatives the appealing victims beginning with

7 the group in the first row on my left, please proceed.

8 MR GAYNOR: [9:33:33] Good morning, your Honours. We've been

9 referred to as LRV1. Fergal Gaynor and I appear with Nada

10 Kiswanson. Thank you very much.

11 PRESIDING JUDGE HOFMANSKI: [9:33:43] Thank you. And the LRV2.

12 MS GALLAGHER: [9:33:50] Good morning, your Honours. My name is

13 Katherine Gallagher and through the Centre for Constitutional

14 Rights, I am the legal representative for victims, Sharqawi Al

15 Hajj and Guled Hassan. And for the record I just want to note

16 that Mr Al Hajj and Mr Duran have been represented in

17 long-running proceedings in the United States by counsel from

18 the Centre for Constitutional Rights. My colleagues have

19 security clearances and operate pursuant to applicable statutes,

20 regulations and protective orders. Accordingly habeas counsel

21 for Mr Al Hajj and Mr Duran have no involvement in these

22 proceedings and do not confirm or deny any statement or any

23 other aspect of the case.

24 PRESIDING JUDGE HOFMANSKI: [9:34:33] Thank you very much. And

25 please LRV 3.

1 MS REISCH: [9:34:42] I, together with my colleagues, represent  
2 Mohammed Abdullah Saleh al-Asad, victim number r/00749/18 in  
3 these proceedings. The other members of our legal team include  
4 Sara Robinson, who is on my left and Professor Margaret  
5 Satterthwaite who will be joining us from tomorrow.

6 tomorrow.

7 tomorrow.

8 PRESIDING JUDGE HOFMANSKI: [9:35:06] Thank you.

9 And the LRV 3.

10 MS HIRST: [9:35:13] My name is Megan Hirst. My team and I are  
11 the third component. We represent the final three participating  
12 victims in these proceedings who are part of the US torture  
13 programme and their names Ahmed Rabani (phon) r/00638/18 and two  
14 further victims who name anonymous in these proceedings r/00635  
15 and 636/18 and with me today in court Mr Tim Moloney QC and  
16 Preetha Gopalan from Reprieve.

17 PRESIDING JUDGE HOFMANSKI: [9:35:57] Thank you. And we have  
18 also the representatives of the Cross Border Victims please  
19 introduce yourself for the record.

20 MR PIETRZAK: [9:36:13] If I may, my name is Mikołaj Pietrzak  
21 and along with Nancy Hollander and Maria Radziejowska, we have  
22 the honour of representing of Mr Abd al-Rahim al-al-Nashiri. And  
23 we have been as legal victims representatives number 3. And  
24 perhaps a word of clarification of Ms Hollander's situation and  
25 role for similar reasons because of the security restrains

1 imposed by her government she's limited in statement she may  
2 make today and for that reason I will be presenting most of our  
3 argument and Ms Hollander will only be able to reply to certain  
4 issues and make statements and arguments in a limited scope.

5 PRESIDING JUDGE HOFMANSKI: [9:37:00] Thank you, counsel.

6 Then it time for the representatives of the Cross Border Victims  
7 please proceed.

8 MR POWLES: [9:37:07] Good morning, Mr President and your

9 Honours. My name is Steven Powles and I appear on behalf of the  
10 Cross Border Victims with my learned co-counsel

11 Mr Conor McCarthy. We are instructed by Leigh Day, Rosa Curling

12 and Erin Alcock and we are representing reprieve who are today

13 represented by my learned friend Ms Jennifer Gibson. Thank you.

14 PRESIDING JUDGE HOFMANSKI: [9:37:35] Thank you, counsel.

15 And I would invite representatives of the Islamic Republic of

16 Afghanistan please proceed.

17 MR AZIZI: [9:

18 MR DIXON: [9:37:51] Good morning, Mr President your Honours

19 Rodney Dixon. Instructed by Dr Mohammad Homayoon Azizi the

20 ambassador of Afghanistan to The Hague. With Sanga Siddiqi and

21 assisted by counsel Aidan Ellis and Anne Coulon.

22 PRESIDING JUDGE HOFMANSKI: [9:38:15] Thank you, counsel.

23 And then we proceed with amici curiae beginning with the OPCD.

24 MR KEÏTA: [9:38:26] , (Interpretation) Good morning,

25 Mr President. Ladies and gentlemen my name is Xavier-Jean Keïta

1 lady counsel for the Office of Public Counsel for the Defence I

2 represent OPCD. Thank you.

3 PRESIDING JUDGE HOFMANSKI: [9:38:49] (Overlapping speakers) and

4 then next person.

5 MR WILINSKI: [9:38:53] Good morning Mr President your Honours

6 my name is Pawel Wilinski I am professor of criminal law and

7 international criminal law.

8 PRESIDING JUDGE HOFMANSKI: [9:39:05] Thank you.

9 MR JACOBS: [9:39:12] Good morning, your Honours. I am

10 Dov Jacobs and along with my colleague from 9 Bedford Row

11 Joshua Kern we are hearing representing the Jerusalem Institute

12 of Justice, International Legal Form, My Truth, Simon Wiesenthal

13 Centre, lawfare project and UK lawyers for Israel.

14 Israel.

15 PRESIDING JUDGE HOFMANSKI: [9:39:35] Thank you.

16 MR SEKULOW: [9:39:38] Good morning, Mr President, your Honours.

17 My name is Jay Sekulow, I'm the chief counsel for the European

18 Center for Law and Justice. Thank you for having us today

19 PRESIDING JUDGE HOFMANSKI: [9:39:45] Thank you very much

20 counsel.

21 MR JORDASH: [9:39:49] For Global Rights Compliance my name is

22 Wayne Jordash.

23 MR MILANINIA: [9:39:59] Nema Milaninia here on behalf of 17

24 human rights organisation who work in Afghanistan.

25 PRESIDING JUDGE HOFMANSKI: [9:40:07] Thank you. And you in the

1 second row you are still not presented.

2 MS GARRY: [9:40:13] Good morning, your Honours. It's a

3 pleasure to be here. I am clinical Professor of Law at

4 University of southern California appearing as amicus curiae on

5 behalf of the former UN Special Rapporteurs, Juan Méndez, Pablo

6 De Greiff and Manfred Nowak. Thank you.

7 PRESIDING JUDGE HOFMANSKI: [9:40:31] Thank you very much. And

8 then time for Office of Public Counsel for Victims.

9 MS MASSIDDA: [9:40:41] Good morning, Mr President, your

10 Honours. For the Office of Public Counsel for Victims appearing

11 today Ms Sarah Pellet counsel, Ms Anna Bonini myself

12 Paolina Massidda principal counsel.

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

14 The Appeals Chamber is convened to hear oral submissions in the

15 appeals lodged by appealing victims and the Prosecutor against

16 the decision of the Pre-Trial Chamber II of 12 April 2019

17 entitled decision pursuant to Article 15 of the Rome Statute on

18 the authorisation of investigation into the situation the

19 Islamic Republic of Afghanistan herein after the Impugned

20 Decision.

21 I'm Presiding Judge in these proceedings my name is Piotr

22 Hofmanski. On my right Judge Howard Morrison and Judge Solomy

23 Balungi Bossa. On my left Judge Luz del Carmen Ibáñez Carranza

24 and Judge Kimberly Prost.

25 By way of background and for the benefit of anyone who may not

1 be very familiar with the matter before us or its context, I

2 will briefly recount the relevant events leading up to these

3 proceedings.

4 On 30 October 2017, the Prosecutor informed the Presidency of

5 her decision to request judicial authorisation to commence an

6 investigation to the situation in Afghanistan. On 3

7 November 2017, the situation was assigned by the Presidency to

8 the Pre-Trial Chamber III.

9 On 20 November 2017, the Prosecutor requested Pre-Trial Chamber

10 III to authorise the commencement of investigation into the

11 situation in the Islamic Republic of Afghanistan herein after

12 Afghanistan in relation to alleged crimes committed on the

13 territory of Afghanistan in the period since 1 May 2003 as well

14 as other alleged crimes that have a nexus to the armed conflict

15 in Afghanistan and are sufficiently linked to the situation and

16 were committed on the territory in the other States Parties in

17 the period since 1 July 2002.

18 Throughout the period 20 November 2017 to 31 January 2018, the

19 Court received representations of victims which were transmitted

20 to Trial Chamber III on a rolling basis together with reports

21 containing a preliminary assessment of the representations.

22 On 9 January 2018 following an order of the Pre-Trial Chamber

23 the Prosecutor provided additional information which amounted to

24 806 items of supporting material totals 20,157 pages.

25 On 16 March 2018, the Presidency recomposed the Chambers of the

1 Court and assigned the situation in Afghanistan to the Pre-Trial  
2 Chamber II herein after the Pre-Trial Chamber.

3 On 12 April 2019, the Pre-Trial Chamber rendered the Impugned  
4 Decision finding relevant part I quote "having determined that  
5 both the jurisdiction and the admissibility requirements are  
6 satisfied it remains for the Chamber to determine in accordance  
7 with Article 53(1) (c) of the Statute whether taking into  
8 account the gravity of the crime and the interests of victims,  
9 there are nonetheless substantial reason to believe that  
10 investigation would not serve the interests of justice".

11 In addressing this question the Pre-Trial Chamber found the  
12 following factors to be relevant I quote.

13 The one, the significant time elapsed between the alleged crimes  
14 and the Prosecutor request; number two, the scarce cooperation  
15 obtained by the Prosecutor throughout this time, even for the  
16 limited purposes of a preliminary examination as such based on  
17 information rather than evidence. And number three, the  
18 likelihood that both relevant evidence and potential relevant  
19 suspects might still be available and within reach of the  
20 Prosecution's investigation efforts and activities at this  
21 stage".

22 In consideration these factors, the Pre-Trial Chamber concluded  
23 in relevant part, and I quote:

24 "Thanking the fact that all the relevant requirements are met as  
25 regards both jurisdiction and admissibility the current

1 circumstances of the situation in Afghanistan are such to make  
2 the prospects for a sufficiently investigation and Prosecution  
3 extremely limited. Accordingly it is unlikely that pursuing an  
4 investigation would result in meeting the objectives listed by  
5 the crimes favoring and investigation otherwise positively  
6 contributing to it. It is worth recalling that only victims of  
7 the specific cases ... relevant proceedings and the absence of  
8 any such case, this meaningful role will never materialize in  
9 spite of the investigation having been authorised. Victims'  
10 expectations will not go beyond little more than aspirations.  
11 This far from honoring the victims wishes and aspirations that  
12 justice be done would result in creating frustration and  
13 possibly hostility vis-à-vis the Court and therefore negatively  
14 impact its very ability to pursue credibility the objectives it  
15 was created to serve."

16 On 7 June 2019, the Prosecutor filed a request for leave to  
17 appeal the Impugned Decision. On 10 June 2019, the Legal  
18 Representatives of 82 victims and two organisations who had made  
19 Article 15(3) representations before the Pre-Trial Chamber.  
20 Herein after LRV 1. Also requested leave to appeal the Impugned  
21 Decision. On or about the same day, LRV 1 and the Legal  
22 Representatives of six other victims herein after LRV 2 and  
23 after an individual victim LRV 3 filed notice of the appeal  
24 against the Impugned Decision directly before the Chamber on  
25 17 September Pre-Trial Chamber by majority, Judge Mindua

1 dissenting, rejected the victims requested for leave to appeal  
2 and partially granted the Prosecutor's request respect to the  
3 following issues:  
4 One whether Articles 15(4) and three ( 53(1) (c) require or even permit  
5 the Pre-Trial Chamber to make a positive determination to the  
6 effect that investigations would be in the interests of justice.  
7 Whether the Pre-Trial Chamber properly exercised its discretion  
8 in the factors it took into account in assessing the interests  
9 of justice and whether it properly appreciated those factors.  
10 On 30 September 2019, the Prosecutor filed her appeal brief. On  
11 or about 1 October 2019, the Legal Representatives of Victims  
12 filed their respective appeals briefs.  
13 On 27 September 2019, the Appeals Chamber issued an order  
14 scheduling a hearing today and over the next two days, and  
15 invited the appealing victims, the Office of the Prosecutor and  
16 the Office of Public Counsel for Victims to participate at the  
17 hearing. In addition, interested States, Professors of criminal  
18 law and/or international law, as well as organisations with  
19 specific legal expertise in human rights were invited to express  
20 their interests in participating in these proceedings as  
21 amici curiae in this regard the Appeals Chamber received 15  
22 expressions of interest and permitted the amici to choose to  
23 appear and participant in the hearing or file written  
24 submissions. Later the Office of Public Counsel for the Defence  
25 was also permitted to participate as amici the victims located

1 in Pakistan who have allegedly been affected by drone strikes  
2 launched in Afghanistan and whose position was not included in  
3 the Prosecutor's request for authorisation herein after the  
4 Cross Border Victims were permitted to participate in these  
5 proceedings under rule 93 of the rules.  
6 On 26 November 2019, Afghanistan were permitted to make written  
7 submissions and to be present at the hearing.  
8 Turning now to the conduct of these proceedings, it is recalled  
9 that on 22 November 2019, the Appeals Chamber issued a decision  
10 on the conduct of the proceedings in which it set out questions  
11 by which participants should be guided in making their  
12 submissions. The submissions must be confined to the issues  
13 being raised on appeal.  
14 The Appeals Chamber under lines that it the amici curiae are not  
15 required to address these questions making their submissions.  
16 The order also indicated the time allocation that each  
17 participant would have to make their submissions. The  
18 proceedings will thus be conducted in accordance with that  
19 schedule and the time allocated must be respected by each  
20 participants. Regardless of interruptions by questions from the  
21 Bench. The court officer will be monitoring the time and will  
22 indicate to the participants 5 minutes before the end of the  
23 allocated time.  
24 While some of the participants present in the courtroom today  
25 are quite familiar with the procedure to be followed during our

1 hearings, some may be appearing for the first time. It is  
2 necessary therefore to go over some of the rules that  
3 participants are expected to follow. First, participants are  
4 urged to avoid repetition of arguments already made in the  
5 filing to help us manage time and cover more ground participants  
6 are strongly encouraged to refrain from covering grounds already  
7 covered by those who spoke earlier, unless there is a  
8 substantial disagreement in a way that requires more to be said.  
9 When there is agreement, it will be enough simply to say so and  
10 move on to other topics.

11 The time allocation is based on three Court sessions per day.  
12 Today, we will focus on the issues covered under group A and B  
13 questions which is or will be displayed on the screen.

14 These issues concern number one, the standing of victims to  
15 bring an appeal under Article 82(1) (a) of the Statute and  
16 number two, whether the Impugned Decision may be considered to  
17 be a decision with respect to the jurisdiction within the  
18 meaning of Article 82(1) (a) of the Statute.

19 On Thursday and Friday this week we will focus on hearing  
20 submissions on the merits of the appeals which is covered by  
21 group C questions. This session will proceed until 11 and we  
22 will thereafter break for 30 minutes. We will resume for the  
23 second session on 11.30. And then break for lunch at 1. The  
24 third session will start at 2 until approximately 3.30.

25 The participants are urged to be on time in returning to the

1 courtroom after the breaks.

2 I would ask that when addressing the Court the apartments speak

3 clearly and at a reasonable pace to allow for the interpreters

4 and the transcript recorders to accurately capture what is being

5 said. Please do not forget to turn off your microphones once

6 you have concluded your submissions. With those remarks,

7 I would now invite the Office of the Prosecutor to address the

8 Appeals Chamber. Your 30 minutes begins now. Please proceed.

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

10 will be addressing groups A and B of the questions included in

11 the Chamber's scheduling order. Tomorrow, Ms Brady will be

12 answering the group C questions. We also intend to briefly

13 address the recently filed submissions by the Islamic Republic

14 of Afghanistan ... reverse the orders of groups and deal with

15 the nature of the Pre-Trial Chamber decision first and will do

16 so for a simple reason: If 82(1)(a) does not apply to the

17 Pre-Trial Chamber's ruling then the question of victims'

18 standing to bring an appeal does not even arise.

19 Before I start, however, and in line with the intro words of

20 your Honour I will like to emphasise that the merits of this

21 appeal concern a narrow a tangible issue, namely whether the

22 Pre-Trial Chamber erred in its interpretation of the interests

23 of justice limb in Article 53(1) (c). We shall explore those

24 matters tomorrow and on Friday. Today over we shall be

25 addressing two tech tall points under Article 82(1)(a) of the

1 Statute. While these are important, they are not essential to  
2 the this appeal since the Appeals Chamber is event seized of our  
3 own appeal under Article 82(1)(d) addressing all the same  
4 issues. We would like to stress the Prosecution welcomes and  
5 supports the victims active participation in these and other  
6 proceedings before the Court. This right is guaranteed by the  
7 Statute in various places 68(3), 15(3) and 19(3) and is entirely  
8 distinct to the technical question of standing to appeal. The  
9 Prosecution recognizes that in the context of these proceedings  
10 where we and the participants agree on the merits the question  
11 could be asked as to whether it was really necessary that we  
12 maintain a firm line on the technical matters we discuss today.  
13 But in our submission it is. This is because we regard the  
14 existing law on standing to appeal as essential in maintaining  
15 the fair and expeditious conduct of the Court's proceedings and  
16 this consideration is central to the interests of all the  
17 Court's constituencies, including victims.  
18 For example we have already been reminded in the application  
19 from the Jerusalem Institute of Justice and others to  
20 participate in this hearing that in addition to victims other  
21 persons and entities may also very much regard themselves as  
22 interested parties in Article 15 proceedings of the Court,  
23 including, but not limited to States. But if every person or  
24 entity with an interest in the Court's proceedings had the full  
25 body of procedural rights, then those proceedings might become

1 unworkable.

2 So the drafters of the Statute had to come up with a scheme

3 which would balance these considerations and this was carefully

4 struck mindful of the particular significance of victims'

5 engagement with the Court and other considerations. Indeed the

6 Rome negotiations had the benefit of a very rich exchange

7 between different legal traditions with equally different views

8 as to the scope of victims rights in criminal proceedings.

9 Both for reasons of practicality but also of principle we would

10 urge your Honours to be very cautious in disturbing this

11 balance. We say it is unnecessary to do so for the reasons I

12 will briefly out line in a moment. But we also say with the

13 greatest respect that it would be unwise. While policy

14 arguments may go back and forth and probably will today, it is

15 undeniable that participation in a ... strict reading of the

16 statutory provisions as we propose does not mean restricting in

17 any manner the exercise of the rights afforded to victims by the

18 Statute it simply means remaining within the circle of those

19 rights as established by the legislator. Any amendment to this

20 scheme should therefore be a matter for the Assembly of States

21 Parties not for this Court some of my colleagues may consider

22 their proposed reform to be not only desirable but modest merely

23 expanding on a right recognised by the Statute. However, your

24 Honours it is appears that there may be other invitations to

25 your Honours but moving in a very different direction with the

1 effect of potentially restricting the Court's protective  
2 function and the strength of its judicial authority. Our  
3 request to your Honours is the same in both cases, to decline  
4 those invitations and adhere to the terms of Statute. In any  
5 event, we don't degree that reform in this area is actually  
6 necessary. In our view victims are welcome and vital  
7 participants in the court's proceedings but they do not have  
8 general standing to appeal and they do not need it. Where they  
9 do have it and do need it then the Statute says so Article 82(4)  
10 concerning reparations.

11 The ordinary position however is set out in articling 15(3)  
12 19(3) and 68(3) and which allow victims to make representations  
13 on matters of substance. Indeed for the purposes of Article  
14 15(3) and 19(3) the Statute is clear that victims may always  
15 make representations on these matters if they so choose. At the  
16 same time however these provisions do not grant further  
17 procedural rights to victims such as standing to appeal.

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

1 Chamber. Moreover, since a broad approach has to be taken in  
2 qualifying individuals as victims for the purposes of making  
3 representations under Article 15(3) because at this stage the  
4 situation is defined by broad parameters. There may be a  
5 significant risk that the Court's proceedings could be  
6 overwhelmed if all these persons were in a position to exercise  
7 the procedural rights of a party and further for obviously  
8 reasons eligible victims under Article 15(3) might be quite  
9 diverse and have a wide range of views, interests and  
10 objectives. It cannot be assumed that all these interests would  
11 be mutually compatible or necessarily consistent with the  
12 Statute or the mandate of the Court.  
13 Nor in our submission is there any good reason to the division  
14 Article 15 proceedings from the various other proceedings before  
15 the Court. In relation to the regime of victim participation.  
16 This is a very early stage of the proceedings, prior to any  
17 investigation, when in many national systems there wouldn't be  
18 proceeding at all. Indeed at this stage and as Ms Brady will  
19 discuss tomorrow the Prosecution has selected examples of some  
20 of the incidents which might form part of its investigation but  
21 many other interests in which victims might have an interest  
22 will be known only to the Prosecutor. It must be implicit in  
23 this system the Prosecutor is trusted to manage all aspects of  
24 the proceedings at this stage.  
25 Indeed since the Prosecutor was plainly and deliberately granted

1 skew assist competence to seize the Pre-Trial Chamber of Article  
2 15(3) request it might even seem obvious that she has the slough  
3 can I have standing to appeal resulting decision under Article  
4 15(4). In doing so she is of course mindful of considerations  
5 including the victims' interests and will act accordingly.  
6 Now turning your Honours particular questions and starting with  
7 question BA.  
8 Our short answer your Honours is no. We do not take this  
9 position lightly since of course we could have our own interest  
10 in seeking to rely on Article 82(1) (a) inappropriate  
11 circumstances but where the Court appearance to have adopted  
12 consistent injure prudence on the ... it is important to recall  
13 that this Chamber has understood the definition of a judicial  
14 matter to include any of the four facets of the jurisdiction  
15 subject matter, personal, territorial temporal jurisdiction. .  
16 As the first appeal judgment? Ntaganda affirmed that reference  
17 2 this can potentially include legal arguments concerning the  
18 definition of a elements of a crime. But crucially it is not  
19 sufficient that a decision merely considers or refers to matters  
20 which might be described as jurisdictional this is also required  
21 that it the operative part of the decision relates to that  
22 jurisdictional matter.  
23 For these reasons while we agree that some of the Pre-Trial  
24 Chamber's reasoning in this situation relates to jurisdictional  
25 sub matter cheerful scope of investigation and ^ we submit that

1 is it does not constitute a decision on those particular  
2 matters. Specifically the Pre-Trial Chamber determined that the  
3 Prosecutor may not issue nature a investigation into the alleged  
4 crimes in this situation because of its own assessment of the  
5 interests of justice. Which is a matter of prosecutorial  
6 discretion but not on jurisdiction. Quite to the contrary the  
7 decision made positive findings on both jurisdiction and  
8 admissibility. If the decision was a dispositive much the  
9 jurisdictional matter it would be mean that the Prosecutor would  
10 be obliged to refrain from taking further action on the certain  
11 allegations due to existence of a jurisdictional bar. But in  
12 its own terms, decision took the opposite view. It seemed to  
13 allow the Prosecutor could take further action ... should not be  
14 opened a this stage. Indeed under Article 15(5) the Prosecutor  
15 remained able to review her request.

16 As I already said this emphasis on the operative part on the  
17 disposition jurisdiction it's required by it ^.

18 Indeed this Chamber has constantly required a sufficient nexus  
19 between the issue said to be jurisdictional and the operative  
20 part of the decision. The exceptional and automatic right of  
21 interlocutory appeal in Article 82(1) (a) is only justified by  
22 the dispositive effect of a jurisdictional rulings if there was  
23 a right to appeal a decision simply because its reasoning  
24 includes a reference to a jurisdictional matter then the scope  
25 of Article 82(1) (a) would be unworkably broad.

1 We do acknowledge that Judge Eboe-Osuji wrote a separate opinion  
2 which seemed to take a different approach followed by the  
3 Appeals Chamber. Decisions with the potential activate or not  
4 activate the judicial functions of the court are deemed to be  
5 you are jurisdictional in nature. While we wish to bring this  
6 view to your Honours' attention we submit this position should  
7 not be followed. In particular jurisdiction for the purpose of  
8 Article 82(1) (a) cannot mean the competence of one organ of the  
9 Court rather than another. If it did, for example, the  
10 transition from one phase of the proceedings to another the  
11 compensation of one organ of the Chamber to another would be a  
12 jurisdictional matter. Thus, if a Pre-Trial Chamber declined to  
13 confirm a charge, and so prevented that charge from reaching the  
14 Trial Chamber thereby restricting the latter's exercise of  
15 judicial functions this would be a jurisdictional ruling. We  
16 doubt this to be correct.

17 I now turn to question BC because it's linked to question A and  
18 this question refers to the part of the Impugned Decision which  
19 limited the scope of the investigation to incidents specifically  
20 mentioned in the Prosecutor's request and with this aspect of  
21 the considered to be jurisdictional in nature and reason remains  
22 a negative one.

23 For the same reasons that I have just given the fact that the  
24 Pre-Trial Chamber as we submit erred in assessing the scope of  
25 the investigation that might be authorised does not transform

1 the decision into a decision with respect to jurisdiction.

2 To the contrary, your Honours even if the Pre-Trial Chamber did

3 misunderstand the law on the scope of investigations as we say

4 it did, its actual ruling still concerned the interests of

5 justice. For this reason, we do not understand the Pre-Trial

6 Chamber to have actually ruled in a way which would restrict the

7 jurisdiction of the Court. Either as matters presently stand or

8 if an investigation was now authorised.

9 Indeed your Honours the scope of the Prosecution's investigation

10 could not actually have been limited because the Pre-Trial

11 Chamber did not authorise any investigation at all. Its view on

12 the scope of the investigation was merely a step in its

13 reasoning to that conclusion.

14 Nor in any event did the Pre-Trial Chamber determine that the

15 incidents which were not specifically mentioned in the

16 Prosecution's Article 15(3) request were outside the Court's

17 jurisdiction it merely took the view albeit erroneously that

18 they were not sufficiently encompassed by the Article 15(3)

19 request as a matter of procedure. As such even assuming that

20 the majority was right in this regard of course we contest as

21 Ms Brady will address, the ruling was still would still not

22 prevent the Prosecution from bringing a further request under

23 Article 15 with respect to these incidents nor preclude the

24 Pre-Trial Chamber from granting that request.

25 Non-of this means that an Article 15(4) decision can never fall

1 within the scope of Article 82(1) (a). We only say that the  
2 decision under appeal today does not. If a Pre-Trial Chamber  
3 rejected an Article 15(3) request on the basis that there was no  
4 jurisdiction *ratione loci* under Article 12 and 53(1) (a) then  
5 that decision would be jurisdictional. Or if the Pre-Trial  
6 Chamber authorised an investigation but limited its parameters  
7 based on jurisdictional considerations, then that would also be  
8 jurisdictional.

9 I turn now to question B-B your Honours and this refers to  
10 whether in interpreting the wording decision with respect to  
11 jurisdiction would this wording include decisions making  
12 determinations on preconditions to the exercise of Court's  
13 jurisdiction under Article 12 or 13 of the Statute. Our answer  
14 yes but only if the jurisdictional ruling forms part of the  
15 operative part of a decision consistent with our answer to A.  
16 In this context we agree that matters such a preconditions to  
17 the exercise of Court's jurisdiction under Articles 12 and 13  
18 are indeed jurisdictional in the sense of Article 82(1) (a) such  
19 matters may also arise under Articles 5 to 8 bis concerning  
20 subject matter jurisdiction as Appeals Chamber previously ruled  
21 in Ntaganda. Accordingly we concur as we stated in our brief  
22 that the scope of Article 82(1) (a) is not limited simply to  
23 proceeding under Articles or 19. This is consistent with the  
24 practice of the Court. For example, in DRC situation reference  
25 4 the Appeals Chamber allowed an appeal under Article 82(1) (a)

1 with regard to the warrant of arrest for Mr Ntaganda a matter  
2 arising under Article 58 of the Statute not Article 18 or 19.  
3 Likewise when ruling on appeals under Article 82(1) (a) and  
4 inadmissible the Appeals Chamber has looked objectively at the  
5 reasoning and disposition of the Impugned Decision and not  
6 simply excluded that the appeal because it did not arise under  
7 Article 18 or 19.  
8 For example the Appeals Chamber considered whether Article 82(1)  
9 (a) might apply under rule 103 or Article 95 Gaddafi case  
10 Article 93 Katanga reference 6 or Article 53 Comoros reference  
11 7. It's precisely because a variety of legal issues may be said  
12 to be jurisdictional in nature that it is important to maintain  
13 the requirement for the operative part of the decision in order  
14 to trigger Article 82(1) (a). Otherwise the Appeals Chamber  
15 might be directly seized of a wide variety of interlocutory  
16 appeals. In conclusion your Honours while we agree that  
17 jurisdictional matters are addressed in the Pre-Trial Chamber's  
18 decision we do not agree that the operative part of the decision  
19 that part which is dispositive addressed those jurisdictional  
20 matters. And it is for that reason that we did not consider  
21 that Article 82(1) (a) applied to this situation.  
22 Now I will turn now to group A of your Honours questions  
23 regarding standing.  
24 Your first question whether victims should be considered parties  
25 in the proceedings under Article 15 in comparison to other

1 phases of the criminal proceedings.

2 And our answer is no. While victims are expressly given a right

3 to participate in Article 15 proceedings this does not convert

4 them into parties. Indeed with the exception of reparations

5 proceedings owing to the special nature, it is well accepted at

6 that point the Statute provides for a general approach to victim

7 participation which ensures that they have full opportunity to

8 address relevant substantive issues before the Court but does

9 not impose of them the rights or the obligation of the parties.

10 This holds true for criminal trials and appeals which are the

11 main judicial proceedings of this Court. It therefore stands to

12 reason that the same principle would also apply if in those

13 proceedings whereby virtue of their limited and more preliminary

14 nature the concrete interests of particular victims will not yet

15 be manifest such as even before the Prosecution has begun its

16 investigation.

17 Indeed your Honours there is simply nothing to support the view

18 that the drafters of the Statute conceived proceedings under

19 Article 15(3) or 19(3) as establishing broader participatory

20 rights for victims than under the Statute more generally such as

21 under Article 68. Indeed the ordinary meaning of the word

22 representations it consistent with the ability of victims to

23 address the Court on the substantial of the issues at hand which

24 is the essence of the participation regime.

25 This is contrasted with the status of the prosecutor who has

1 exclusive right under Article 15(3) to seize the Pre-Trial  
2 Chamber Chamber. It is consistent with this exclusive right  
3 that the Prosecutor also has exclusive right of appeal. But the  
4 Statute also makes clear in provisions such as Article 42, 54  
5 and 68 that while independent the Prosecutor must be mindful of  
6 the interests of victims at all times and the Office of the  
7 Prosecutor itself has given effect to this principal in its only  
8 internal procedures such as victim participation policy from  
9 2015 and its regulations of the Office of the Prosecutor like  
10 regular 16, 37 and 52.

11 For all these reasons victims should be afforded same status for  
12 the purposes of Article 15 as they enjoy for all other  
13 proceedings before the Court with the exception of reparations  
14 proceedings. That is to say while they do not have the  
15 procedural rights of parties, their participation on substantive  
16 matters is a right afforded to them by the Statute and its  
17 exercise it sob welcomed and supported at all times. Moving to  
18 question (b). ...

19 Also linked to a right to appeal the decision under Article  
20 82(1) (a). Now we have already explained and I will not repeat  
21 myself why a decision under Article 15(4) is not necessarily a  
22 decision with respect to jurisdiction, not this decision.

23 At the same time your Honours Article 82(1) (a) and also  
24 mentioned not necessarily limited to the only to decisions  
25 arising under Articles 18 or 19 of the Statute. So the answer

1 to this question is again no. Article 19(6) limits those  
2 persons who may be considered ... but it does not apply to  
3 appeals under Article 82(1) (a) arising from other kinds of  
4 decision also jurisdictional in nature. As such Article 19(6)  
5 does not resolve the issues arising in this appeal today.  
6 In our view, Article 82(1) (a) forms part of a comprehensive  
7 provision regulating the rights of the parties to appeal  
8 decisions other than convictions, acquittals or sentences.  
9 Victims do not fall within the parameters of the term parties  
10 and therefore cannot invoke this provision.  
11 Article 19(3) defines the circle of potential actors who may  
12 lodge challenges to the jurisdiction of the Court or the  
13 admissibility of the particular matter includes a State that  
14 claims a jurisdiction over a case or a State from which the  
15 acceptance of the jurisdiction is required under Article 12.  
16 Article 19(6) ... 19(6) is therefore *lex specialis* to  
17 Article 82(1) in the sense of the filing actors as parties for  
18 the purpose of such appeals under Article 82(1) (a).  
19 THE COURT OFFICER: [10:20:40] You have five minutes left.  
20 MR GUARIGLIA: [10:20:42] I know. Obviously reasons art 19(6)  
21 does not but which do not originate in Article 19 proceedings.  
22 Turning to question AC your Honours the question to make  
23 represent says under Article 15(3) to appeal a decision under  
24 Article 15(4) of the Statute and again our answer is no I will  
25 very brief here. There is nothing in this Statute that could

1 somehow support the conclusion that victims make a  
2 representations in a confined and self contained process taking  
3 place at the beginning of an investigation can have broader  
4 procedural rights that victims full participation in the  
5 litigation of the case before the Chambers of Court. The Rome  
6 Statute shows a progression in the degrees of participation  
7 victims in proceedings before the Court. Ranging from limited  
8 right to make representations at the inception of an  
9 investigation to a right to fully participate in the case before  
10 the Court to becoming a full party in the context of reparations  
11 proceedings.  
12 I will move to the last point your Honours and the question here  
13 is whether the light of Article 21(3) of the Statute the  
14 international recognised human rights of access to justice and  
15 effective remedy. Entails a right to for victims to appeal a  
16 decision under Article 15(4) of the Statute and here again the  
17 answer your Honours is no.  
18 To begin with your Honours we think that the right as such to  
19 effective remedy have to be properly contextualised to the  
20 framework of Article 21(3) and in this context the right must be  
21 understood to be primarily opposable to states not to this  
22 Court. I reach this conclusion for the following reasons:  
23 First your Honours the Court is not placed in situation  
24 comparable to that of State vis-à-vis its own citizens. This  
25 means that any court of ... ..

1 As well of the a courts unique nature and mandate. And  
2 international law does not indeed recognise that victims a right  
3 to remedy as in the sense recently described by Judge Ibáñez in  
4 Lubanga. Reference 8. And this involves both the right to  
5 petition to the or procedural right and to obtain redress for  
6 the violation --  
7 violation.  
8 violation.  
9 violation.  
10 PRESIDING JUDGE HOFMANSKI: [10:23:29] Excuse me counsel could  
11 you slow down a little bit. Problem with the interpretation.  
12 MR GUARIGLIA: [10:23:35] I will do, your Honours. I apologise.  
13 By contrast this was created by states with a selective mandate.  
14 Unavoidable 53 and 54 and 58 of Statute and this sheer practical  
15 reality of the Court's limited capacity.  
16 So for the cases which fall within the Court's mandate and which  
17 can be properly to trial by the Prosecutor then this may  
18 discharge the states obligations. But when matters are not  
19 addressed by the Court, then the obligation remains with the  
20 State. And as such, the victims right remains opposable to the  
21 State and not to Court. This is the flip side of of  
22 complementarity.  
23 Now in this context if victims do not have enforce annual right  
24 to have a particular investigated at the Court then necessarily  
25 they do not require standing to appeal in order to make sure

1 that such right is effective. But beyond that your Honour again  
2 human rights have recalled a number of time sufficient victims  
3 have effective access cease to the investigated active procedure  
4 for the remedy to be granted and here your Honours they can make  
5 submissions to the Office of the Prosecutor and to the Chamber  
6 and your Honours can find those reference at number 9 of our  
7 list.  
8 So even if your Honours here consider the right of the effective  
9 remedy this right could be satisfied by the exist an the  
10 independent prosecutor before whom victims can make  
11 representations and who is able to bring suitable proceedings on  
12 the basis of those representations. It does not require the  
13 grant of standing to the victims themselves.  
14 This approach your Honour is consistent with the existence human  
15 rights tree tease whereby the competent organs to the adequate  
16 to satisfy the right to remedy. For instance, the ICC PR  
17 recognizes that the remedy may be determined by competent  
18 judicial administrative legislative authorities. According to  
19 this the possibility for the public agency to act or on the  
20 victims' behalf may suffice and the Office of the Prosecutor is  
21 such an agency for the purpose of this Court. The same goes to  
22 the European convention requires a ... and Africa charter which  
23 requires recourse before a competent national organ. This  
24 concludes my submissions for this morning I apologise for the  
25 speed. Thanks, your Honours.

1 PRESIDING JUDGE HOFMANSKI: [10:26:15] Thank you, counsel.

2 I would like to invite the representatives of victims group 1.

3 Your 30 minutes begins now.

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

5 centuries the people of Afghanistan have gathered to administer

6 justice in jirga and shura in accordance with agent traditions

7 and the Holy Quran. Justice as at the core of religious and

8 traditional believes of Afghan. For four decades Afghans have

9 endured unarmed conflict after another. These have left too

10 many Afghans mourning the loss of their mothers, fathers,

11 brothers and sisters. When Afghanistan joined this Court in

12 2003 the Rome Statute system became part of Afghanistan's legal

13 framework. And presented a set of legal remedies that Afghans

14 have a right to access.

15 Today, after a preliminary examination that lasted 11 years,

16 followed by 17 months during which the Pre-Trial Chamber

17 considered the Prosecution's request to start an investigation,

18 the Court is holding its first hearing on the Afghanistan

19 situation.

20 It concerns issues of critical importance not only to the

21 victims that we represent but to all Afghans. It has been a

22 very long journey for the victims until today. But today is an

23 historic day for accountable in Afghanistan.

24 The 82 victims that we represent belong to various Afghan groups

25 they live in diverse parts of Afghanistan and they speak

1 different languages. They are victims of crimes allegedly  
2 involving different actors. Whatever their differences they are  
3 united in their wish for an investigation to begin promptly into  
4 the crimes committed against them.

5 We are here to challenge a decision that has extinguished all of  
6 their rights under the Statute and has caused enormous damage to  
7 any hopes they have for justice and accountability. Many of the  
8 victims we represent are mothers with children. Your Honours'  
9 decision in this case will in no small way define whether those  
10 children grow up in Afghanistan characterised by the rule of law  
11 or by a culture of impunity.

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

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

22 These competing considerations were brought to the forefront by  
23 the Prosecutor herself in an address to the Assembly of States  
24 Parties two days ago on 2 December 2019. She said that "one key  
25 question that my office will need to tackle in the coming period

1 is the reality that a number of preliminary examinations will  
2 likely progress to the investigation stage but we will not have  
3 the operational capacity to absorb them all. As such we are  
4 considering out prioritisation might apply across different  
5 situations." Unquote.

6 In con strategy the interests of the victims are limited to one  
7 situation, the Afghanistan situation. The Legal Representatives  
8 of the victims are under a duty exclusively to represent the  
9 interests of their clients in this situation. They have no  
10 other interest to defend in accordance with their obligations  
11 under the Code of Professional Conduct for counsel. I will now  
12 address your Honours questions under group A and B. I will  
13 begin by addressing. A-A, A-B and C which concerns standing to  
14 appeal. The Rome Statute recognizes the interests views and  
15 concerns of four principal actors. Those are the Prosecutor,  
16 the Defence, whether as suspect, accused or convicted person,  
17 States and victims. The Statute allows these four actors to  
18 defend their interests and to express their views and concerns  
19 through various procedures at different phases of the  
20 proceedings. Interlocutory appeals are regulated by Article 82  
21 and all interlocutory appeals, regardless of whether they fall  
22 under 82(1) (a) or (d) may be appealed by either party. An  
23 ordinary reading of either party does not expressly limit  
24 interlocutory appeals to any particular one of the four parties  
25 identified.

1 Articles 18 and 19 read together with Article 82(1) make it  
2 clear that at least three parties that is to say an accused or  
3 person for whom a warrant or arrest has been issued a State in  
4 certain circumstances and the Prosecutor can be considered a  
5 party for the purposes of 82(1). But the expression either  
6 party is not limited to those three parties nor is Article 82(1)  
7 (a) limited to decisions under Article 18 four and 19(6). ^ the  
8 ... other decisions that potentially appealable under Article  
9 82(1) (a) include for example those under Article 15(4). The  
10 presence or absence of express right to appeal is not  
11 determinative of standing. Some provisions such as Article 18  
12 four expressly provide for a right to appeal for a State Article  
13 87(7) on the other hand does not provide for an express right  
14 for a appeal for UN Security Council or to the Assembly of  
15 States Parties but nevertheless in the Al-Bashir case Jordan  
16 appealed an 87(7) decision on the basis of Article 82(1) (d) and  
17 the Appeals Chamber considered the merits of that appeal.  
18 In determining whether one of the four principal parties in the  
19 Statute have standing to appeal a particular decision where no  
20 express right of appeal exists, I submit that the Appeals  
21 Chamber should consider three factors.  
22 First, whether the Statute recognise the participation of that  
23 applicant at the stage of the criminal proceedings. Second,  
24 whether the Impugned Decision is highly prejudicial to the  
25 interests of the applicant. Whether hearing the appeal will

1 result in unfair prejudice to any other party. All three of  
2 those requirements are satisfied here. First the  
3 preauthorisation stage which is addressed in Article 15 and rule  
4 50 only envisages the participation of the Prosecutor and  
5 victims.  
6 The Appeals Chamber recognised in its decision of  
7 24 October 2019 in this situation that rule 50(3) highlights the  
8 importance of victim participation in the procedure for  
9 authorisation of investigation."  
10 Second, the Impugned Decision was extremely prejudicial for the  
11 victims.  
12 A decision denying authorisation affects every victim of every  
13 crime of every potential case arising out of the situation.  
14 Where victims are denied an investigation they are without  
15 exaggeration denied everything. All of those victims in all  
16 cases in the entire situation are denied the realisation of  
17 their rights, recognised by this Court to truth, justice and  
18 reparations. Mr Guariglia in his submissions made a distinction  
19 between victims of a case and victims of a situation but.  
20 Impugned Decision here is more constable sequential to the ^  
21 victims of a situation than a decision which might for example  
22 acquit all accused in one particular case or a decision to award  
23 no reparations or sum of reparations in a particular case.  
24 Those decisions apply to a specific case. They don't apply to  
25 the entire situation.

1 So in our submission a decision to deny investigation in a  
2 situation is in fact the most consequential decision for  
3 victims. There is no decision which can be more prejudicial to  
4 their rights. There is no unfair prejudice to any other party  
5 should the Appeals Chamber recognise the standing of victims.  
6 In particular, there's no unfair prejudice to the Prosecution.  
7 The Prosecution's submissions concerning its flood gates  
8 arguments have no merit. In its 22 October response to the  
9 appeals by the victims and again today we've heard the  
10 Prosecution refer to the possibility of NGOs States which don't  
11 have an interest in the proceedings potentially even members of  
12 the public with a grievance against a decision of a Pre-Trial  
13 Chamber coming along and clogging up the appeals system and  
14 wasting your Honours time. That is no simply an entirely over  
15 stated and miss conceived argument.  
16 The Prosecution itself in its 2019 to 2021 strategic plan has  
17 restated its position that under the Rome Statute victims are  
18 actors of international justice rather than its passive  
19 subjects".  
20 They fully meet all requirements of a test for standing which  
21 the Prosecution itself asked the Appeals Chamber to consider and  
22 I refer to our submissions on this point in 19 November 2019  
23 response to the amici curiae the victims are not strangers to  
24 these proceedings nor do they suggest that strangers to the  
25 proceedings be allowed to appeal as a right or indeed at all.

1 Your Honours I turn now to AD and this question your Honours  
2 referred to the fact that have a internationally recognised  
3 right to an effective remedy and access to justice under Article  
4 21(3) you've asked if this includes a right to appeal the  
5 Impugned Decision.  
6 And we say yes, it does. The Appeals Chamber your Honours are  
7 required by Article 21(3) to interpret and apply every Article  
8 of the Statute including 82(1) (a) in accordance with the rights  
9 which your Honours identified. The victims here would very well  
10 pursue another remedy if they had one.  
11 They don't have one.  
12 Over the course of its 11 year preliminary examination, it  
13 became clear to the Prosecutor that States in a position to  
14 exercise jurisdiction are either unwilling or unable to do so.  
15 The Pre-Trial Chamber reached the same conclusion. We submit  
16 they were right about that. The recent submissions presented by  
17 the Islamic Republic of Afghanistan show only that it remains  
18 unable to effectively investigator Prosecutor this applies even  
19 if your Honours accept that it is willing to do so. The only  
20 jurisdiction in the world without exaggeration that can offer  
21 the victims ... impartial investigations into the brutal crimes  
22 committed against them is this Court. The only way the victims  
23 can exercise the right to an effective remedy is to appeal the  
24 Impugned Decision.  
25 I'd like to address very briefly your point raised by my learned

1 that however desirable victims standing might be we need to  
2 leave that up to the Assembly of States Parties and I would  
3 suggest that that is not well-founded and it is not consistent  
4 with the purpose of approach with the Appeals Chamber taken to  
5 the Statute. Your Honours not necessarily this Bench but the  
6 Appeals Chamber has interpreted the Statute purposes fully. No  
7 case to answer appears nowhere in Statute or Rules of Procedure  
8 and Evidence and now it exists at this Court. The duty to be  
9 present at trial is absolutely clear in the Statute and yet it  
10 has been recognised in Ruto that an accused can be absent for  
11 very large portions of his or her trial. The lack of ability to  
12 issue binding order to ... was one of the great weaknesses of  
13 the Rome Statute and the Appeals Chamber cured that weakness and  
14 absence of the duty on a State to ensure that witness appears to  
15 testify. The stay of proceedings which arose in Lubanga  
16 proceedings that doesn't appear in the Statute either. So there  
17 are many cases where this Appeals Chamber has up held  
18 interpretations of the Statute. The Statute is a living  
19 document. Like the European convention on human rights and it  
20 should be interpreted as a living document intended to provide  
21 real realisation of the rights of those -- of the victims. Now  
22 your Honours I want to turn now to the questions on jurisdiction  
23 B(a) we submit is yes. There is no binding jurisprudence  
24 whether the decision to deny investigation with respect to the  
25 jurisdiction the closest we have some decisions which

1 essentially decisions about admissibility. The Appeals Chamber  
2 decision on Kenya situation emphasises that the right to appeal  
3 a decision on jurisdiction or admissibility is intended to be  
4 limited to rulings specifically on the jurisdiction of the Court  
5 or the admissibility of the case. The Appeals Chamber also  
6 cautioned that it is not sufficient that there is indirect link  
7 between the underlying decision and questions of jurisdiction.  
8 Now, here the Trial Chamber made determinations specifically on  
9 the jurisdiction of the Court the link between the underlying  
10 decision and these questions of jurisdiction is not indirect, it  
11 is not tangential, it is direct. This is for three reasons.  
12 First the decision deprives this Court of the possibility to  
13 exercise jurisdiction over any cases which might arise in the  
14 Afghanistan situation. That's very far-reaching. The  
15 Prosecutor is deprived of investigative jurisdiction into all  
16 crimes in the situation. Second, the decision contains serious  
17 errors concerning the territorial jurisdiction of the Court over  
18 torture and indeed that applies by extension to all war crimes  
19 requiring the Court to find that the conduct took place in the  
20 context of and was associated with an armed conflict. That  
21 applies to every war crime in Article 8. Third the Pre-Trial  
22 Chamber erroneously attempted to impose limits concerning the  
23 scope of the Court's jurisdiction in any authorised  
24 investigation. Its limitation on the scope of the investigation  
25 to incidents specifically mentioned in the Prosecutor's request

1 is a determination with respect to jurisdiction in three ways  
2 temporally, territorial, and matters of substance. Mr Guariglia  
3 referred to the decision of Judge Eboe-Osuji of 2 September 2019  
4 Comoros situation I agree with his analysis there. And it is  
5 important that the Appeals Chamber retains control over what is  
6 and what is not a decision with respect to the jurisdiction.  
7 Your Honours do not have to be totally hung up on what the  
8 operative part of the decision might say whatever that operative  
9 part might be. In this case it certainly deprives the Court of  
10 jurisdiction over every case in the Afghanistan situation.  
11 That's its effect. That's the nature of the decision. Judge  
12 Eboe-Osuji has emphasised that the deciding Chamber can't be  
13 that one which decides whether it's a decision on the exercise of  
14 jurisdiction. It can't control of the Appeals Chamber's ability  
15 to consider that decision a really being with respect to  
16 jurisdiction. That cannot be right he says. And we respectfully  
17 agree.  
18 A decision with respect to jurisdiction is on a common sense  
19 application the kind of decision which should be subject to  
20 appeal as of right it is an incredibly consequential decision  
21 for the Prosecutor for the victims it is something which should  
22 be subject to appellant scrutiny. It's not minor whether the  
23 parties should have to produce analysis chart or something like  
24 that.  
25 I turn now to B-B. In response we submit that determinations

1 regarding the territorial or personal jurisdiction over Article  
2 12 or decisions regarding the exercise of Court's jurisdiction  
3 under Article 13 or indeed decisions with respect to  
4 jurisdiction Articles 12, 13 and 15 all fall within part 2 of  
5 the Statute headed jurisdiction admissibility and applicable law  
6 they all fall within chapter 3 of Rules of Procedure and  
7 Evidence the heading the chapter 3 is jurisdiction and  
8 admissibility. I submit that was chosen deliberately. One the  
9 sections of that Chamber relates to initiations of  
10 investigations and under Article 15 covers Articles 12 and 13  
11 using those as sources we can see decisions with respect to  
12 jurisdiction and admissibility should cover decision under 12,  
13 13 and 15. It's important that Appeals Chamber and I'm sure  
14 there will be no dispute about this always must retain a  
15 discretion to reject an appeal which is an abuse of process even  
16 if it might technically fall within Article 12, 14, 15 or any  
17 other Article. An appeal filed for frivolous or vexatious  
18 reasons such as one of negligible prejudice to the applicants or  
19 one which is unfairly prejudicial to another party can and  
20 should be rejected in limine on a case-by-case basis. In my  
21 submissions the has always had that power and over the years  
22 since Court became operational over 15 years ago there really  
23 has been a very low level of vexatious ... to deal with them and  
24 it should use those tools.  
25 Correcting errors concerning the Court's jurisdiction over Rome

1 Statute crimes at an early stage of the proceedings is  
2 consistent of the approach of the Appeals Chamber in Ntaganda on  
3 22 March 2016 where it twice emphasised that issues as to the  
4 Court's jurisdiction should be resolved as early as possible in  
5 the proceedings. That's absolutely correct for the Appeals  
6 Chamber here to let States the extent of the territorial  
7 situation in the Afghanistan situation. It's pragmatically the  
8 right thing to do, to clear the air for all states in relation  
9 to major questions of jurisdiction at an early stage in the  
10 situation. There are let's face it not going to be very many  
11 appeals against decisions to deny authorisation to the  
12 Prosecutor to initiate an investigation. We're here in 2019  
13 this is first time how many times is it going to happen in the  
14 future probably not that many. Kind of thing which should be  
15 subject to appeal as of right. It would be a error to limit  
16 appeals on jurisdiction to decisions in relation to Articles 18  
17 and 19 only.

18 I turn now to question B-(c). Our response to this this is my  
19 final submission, is that when the Pre-Trial Chamber limited the  
20 scope of the investigations this was a determination with  
21 respect to the jurisdiction.

22 Each Article 15(4) authorisation decision is required to examine  
23 jurisdiction in two ways first it's required to examine the  
24 courts temporal territorial and substantive jurisdiction over  
25 the alleged crimes, the admissibility of the situation is

1 another analysis and second it has to re-enter the

2 jurisdictional debate and satisfy itself that it is ordering an

3 investigation on suitable temporal territorial and substantialal

4 jurisdictional areas.

5 THE COURT OFFICER: [10:51:53] Excuse me counsel you have five

6 minutes.

7 MR GAYNOR: [10:51:58] Those are two ... each of which requires

8 jurisdiction which must be carried out in each decision on an

9 application for authorisation to investigate a situation. A

10 perfect illustration of this is the Article 15 decision

11 concerning Myanmar of 14 November 2019 where that Pre-Trial

12 Chamber strikingly took a very different approach to the

13 Afghanistan Pre-Trial Chamber in their decision the two decision

14 sections on jurisdiction took up about 60 per cent of the pages

15 of the decision itself. It plainly was a decision with respect

16 to jurisdiction. Nobody can reasonably insist that it was not.

17 And if the Myanmar Bangladesh decision was a decision with

18 respect to jurisdiction so is every other Pre-Trial Chamber

19 decision authorises or refuses to authorise the commencement of

20 an investigation.

21 That ends my submissions thank you very much, your Honours.

22 PRESIDING JUDGE HOFMANSKI: [10:53:16] Thank you, counsel.

23 We are on time and I think we will adjourn for 30 minutes break

24 now and resume at 11.30. Which time we will hear from the

25 counsel from the Legal Representatives of Victims group 3, three

1 teams representing LRV 2 and counsels you can of course share

2 time allocated to you. You will do everything after the break.

3 Thank you.

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

5 (Recess taken at 10.53 a.m.)

6 (Upon resuming in open session at 11.31 a.m.)

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

8 Please be seated.

9 PRESIDING JUDGE HOFMANSKI: [11:32:26] Thank you.

10 We will continue with the submissions of the Legal

11 Representatives of Victims and now it's time for LRV 2. I

12 understand that you decide to share your time allocated to you

13 for three parts and the first Ms Gallagher you have 10 minutes

14 according to your internal agreement.

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

16 Honours. It is my privilege to appear today as Legal

17 Representatives for Sharqawi Al Hajj and Guled Hassan Duran.

18 Mr Al Hajj and Mr Duran are currently detained at the US naval

19 detention centre at Guantanamo Bay where they have been held

20 without charge since August 2004 and September 2006

21 respectively.

22 After being detained by or at the detection of the United States

23 on the territory of a number of ICC member states, including

24 Afghanistan.

25 Because of their ongoing detention the victims have not been

1 able to assist in the preparation of these submissions to the

2 Court.

3 As you have noted, the three legal teams under LRV 2 will be

4 equally splitting the time to address questions in group A and

5 B. In the limited time available to me this morning, I will set

6 out a frame through which victims arguments on standing and

7 jurisdiction as well as tomorrow's arguments on the merits must

8 be understood. My focus is limited to the third dimension of

9 the requested investigation in the situation of Afghanistan

10 namely the investigation of US actors for torture and related

11 crimes.

12 Like the other Legal Representatives in today's appeal I

13 submitted victims representation forms for both men in

14 January 2018 which I supplemented with a 55 page legal analysis

15 that was transmitted to the Pre-Trial Chamber ICC0217-38 annex 1

16 Both Mr Al Hajj and Mr Duran express their full and unqualified

17 support for the opening of an investigation into what they

18 assert are extremely grave criminal acts by US actors arising

19 out of the operation of global network of prisons by the CIA and

20 the US department of defence, including on the territory of

21 Afghanistan Poland, Lithuania and Romania.

22 Network of prisons began in 2002... torture and other forms of

23 cruel treatment including widespread acts of the sexual violence

24 were part and particles of the detention and interrogation

25 programme from the moment of capture or kidnapping and

1 continuing through ones detention. Both Mr Al Hajj and Mr Duran  
2 are discussed in the US senate ... commonly known as the senate  
3 torture report which was released five years ago next week. The  
4 harms they suffered and continue to suffer are not however  
5 unique to them. They are result of a planned and organised  
6 policy that caused widespread and around the global often  
7 through member states airports and aerospace for detention  
8 without charge by the DOD and the CIA Afghanistan epicentre of  
9 the US torture programme. I detail for the Pre-Trial Chamber  
10 why these acts warranted and full fledged investigation into war  
11 crimes and crimes against humanity by senior US officials.  
12 As the Pre-Trial Chamber correctly found under a three excessive  
13 administrations the United States has been unwilling to properly  
14 investigate let alone prosecute those US senior officials who  
15 ordered authorised and furthered the torture programme.  
16 Unless there be confusion it's indeed those who bear the  
17 greatest responsibility for the torture programme the as well as  
18 CIA contractors who the ICC should investigate not the foot  
19 soldiers nor the many facilitators regardless of how integral  
20 their criminal contributions might have been.  
21 As was conveyed to the Pre-Trial Chamber in victims  
22 representations the opening of the an investigation into the US  
23 torture programme would make clear that no one is above the law  
24 regardless of power or position that those who bear the greatest  
25 responsibility for serious international crimes will be held to

1 account and will not enjoy global impunity and that all victims  
2 of serious crimes deserve to and can have their claims heard and  
3 adjudicated by an impartial tribunal.

4 Unfortunately the reality has proven to be the opposite. As is  
5 well documented after the Prosecutor sought authorisation to  
6 open an investigation into the situation of Afghanistan senior  
7 members of the current US administration concluding the  
8 president himself the threat of sanctions the institution the  
9 Prosecution of its officials and saw the US visa for the  
10 Prosecutor revoked ^.

11 Nearly 16 months after receiving the Prosecutor's request which  
12 is more than four times the length of consideration of any  
13 former Article 15 request, in a decision that was light  
14

15 unprecedent the Pre-Trial Chamber denied investigation. This  
16 came less than two weeks after the US revoked Prosecutor's  
17 Bensouda's visa. Whether they are related is unknown but for  
18 many victims the timing appeared more than coincidental. Indeed  
19 the US sect of state issued a statement following the Pre-Trial  
20 Chamber decision in which he credited the US campaign against  
21 the Court for ensuing rejection of the investigation request.

22 The victims do appreciate that in the face of such threats  
23 inaction by the United States the Prosecutor sought to appeal  
24 the decision and appears to continue at least for to open all  
25 three admissions of the investigation.

1 Respectfully, however, the Prosecution cannot capture the full  
2 import of the denial of the investigation on victims. The  
3 victims saw their calls for justice not only unanswered but  
4 disregarded?  
5 A. [11:40:  
6 disregard as we will be addressed tomorrow victims submissions  
7 on the scope of the investigation were Holy ignored in the  
8 Pre-Trial Chamber final assessment. Fundamental errors of law  
9 regarding the nexus required to an armed conflict by the  
10 Pre-Trial Chamber appear to have written my clients out of any  
11 investigation.  
12 With growing despair only his indefinite detention and little  
13 prospect or accountability and redress Mr Al Hajj tried to  
14 commit suicide in August. In recent weeks it has been reported  
15 that the president who promised during his campaign to bringing  
16 back a hell of a lot worse than water border. Selected the  
17 current ... .. not despite to the running a CIA where  
18 individuals were tortured but because of this experience. War  
19 criminals have been pardoned against the advice of military  
20 leadership.  
21 Reoccurrence is the price paid for impunity and impunity for  
22 those deemed too powerful to prosecute sends a message to  
23 leaders, dictators everywhere that they too can get away with  
24 it. Finally a few brief remarks and standing and jurisdiction  
25 on behalf of Mr Al Hajj and Mr Duran before Ms Hirst address

1 these issues in more detail.

2 With regard to standing, victims Al Hajj and Duran submit that

3 standing to appeal stems the exercise of the unqualified and

4 statutorily recognised procedural and substantive rights granted

5 to them in Article 15 proceedings much Pre-Trial Chamber failure

6 to substance of their representations including in regards to

7 interests of justice and the direct negative impact on their

8 fundamental rights and interests resulting from the denial of

9 the authorisation. They endorsed the three factors put forward

10 by the victims which at a minute victims that made

11 representations are entitled to appeal auto decision to pursuant

12 to Article 15(4) when that authorisation has been denied.

13 With regard to jurisdiction victims Al Hajj and Duran fully

14 endorsed the conclusion that will be elaborated upon by

15 Ms Reisch -- regard to jurisdiction under 82(1)(a) because it

16 divests the prosecution the power to investigative jurisdiction

17 as set forth if Article 15 and 53 of the Statute and specific

18 errors regarding the scope and nexus and disposition of the

19 ruling the denial of the Prosecutor's request to investigate

20 places conduct which is squarely falls with the temporal,

21 territorial and subject matters jurisdiction of the ICC as set

22 forth in the Rome Statute beyond the reach of the Court.

23 PRESIDING JUDGE HOFMANSKI: [11:43:55] Sorry, counsel the time

24 is 10 minutes it up.

25 MS GALLAGHER: [11:44:00] Thank you, and I stand ready to

1 address questions later today.

2 PRESIDING JUDGE HOFMANSKI: [11:44:06] Thanks.

3 MS HIRST: [11:44:17] Your Honours, I will address some core

4 points relating to victims substantial and then turn to the

5 first ... I will not be addressing question D covered by

6 Mr Pietrzak and we agree with the submissions which he will

7 make.

8 On the question of victims standing provision which must be

9 construed is Article 82(1) and in particular the words either

10 party. The question for your Honours is whether victims can

11 ever fall within that phrase. The difficulty appears to be that

12 it has now become received wisdom in this Court that victims can

13 never be described as a party to proceedings. And yet, the

14 Statute says this nowhere. The rules say this nowhere. And in

15 fact it has become normal at this Court for victims to take some

16 procedural steps which the Statute or the rules reserve for

17 parties. In our filing of 19 June which is document number 50

18 in this case we gave the example of Articles 64 and 69 which

19 relate to the conduct of trial and the submission of challenges

20 of evidence. But elsewhere in the text other examples can be

21 found where the word party is clearly intended we say to

22 encompass victims.

23 For example, Article 70(1)(b) creates an offence where a party

24 knowingly presents false evidence. Surely there can be no

25 dispute that the term party in this context includes

1 participating victims and their lawyers. Your Honours we say it  
2 cannot be right that the term party includes victims where it  
3 imposes obligations but can never include them where it grants  
4 standing.

5 In the specific context of Article 82(1) appeals the ICC case  
6 law already demonstrates that the word party is not limited to  
7 the Prosecution and Defence. As already mentioned by Mr Gaynor,  
8 the Al-Bashir case allowed a State Party Jordan to appeal  
9 pursuant to Article 82(1). In the present proceedings the  
10 Prosecution has made submissions about the risk of Jean Knees  
11 being let out of bottles leading to proceedings which are  
12 overwhelmed by intervenors including states yet in the Al-Bashir  
13 case the Prosecution made no obligation to Jordan's standing to  
14 appeal under Article 82(1).

15 In paragraph 39 of their response to the victims' appeal briefs,  
16 the Prosecution accepts that States can be parties with standing  
17 to appeal where this is "consistent with the broader procedural  
18 scheme of the Statute".

19 But they say that this approach is applicable only to States.  
20 No reason is given as to why victims standing is not likewise to  
21 be assessed in manner consistent with the broader procedural  
22 scheme of the Statute. With this submission the Prosecution  
23 implies that the Rome Statute intends to give a greater voice to  
24 States than it gives to victims.

25 The Jordan referral appeal shows that no weight can be put on

1 the word either in Article 82(1). Included the Prosecution and  
2 the Defence the Chamber effectively recognised what is already  
3 clear from the language of the rules namely proceedings can  
4 include more than two parties with standing to appeal.  
5 All of this serves to show your Honours there is no imagine  
6 magic to the words either party.  
7 And this was the approach taken by the Appeals Chamber in the  
8 Lubanga case when it held that victims can lead evidence and  
9 challenge the admissibility of evidence despite the fact that  
10 the relevant provisions in the Statute refer to parties.  
11 That's decision 1432 in the Lubanga case.  
12 The Chamber held that Article 69 which refers to parties must be  
13 understood in context namely together with Article 68(3) which  
14 envisages a role for victims at any stage of the proceedings  
15 considered by a Chamber to be appropriate. That he is paragraph  
16 98 and the Chamber went on to interpret the relevant provisions  
17 in light of the spirit and intention of the Statute which it  
18 said is for victims to have a role which is meaningful and not  
19 ineffect actual and your Honours this goes back to Mr Gaynor's  
20 point regarding the need to interpret the Statute purposes fully  
21 demonstrates that has already been done by this Court in respect  
22 of victims' role.  
23 In the present instance there is a further crucial piece of  
24 context in addition to those which existed in the Lubanga appeal  
25 that is that Article 15 proceedings are the gate way to every

1 form of participation at this Court has Mr Gaynor has plained.

2 The Prosecution says that recognising victim's standing would

3 have consequences for the conduct of proceedings. Mr Gaynor has

4 already respond to suggestions made about the risk of a flood of

5 appeals. We will add one additional point and that is to say

6 that the Prosecution's concern about the risk of parallel

7 proceedings being launched by different parties in an proceeding

8 that concern is not specific and has no relation to the question

9 of victims' standing as such. The possibility for parallel

10 appeals proceedings exists in a proceeding which only involves

11 the Prosecution and the Defence, both would be able to appeal a

12 decision and it would be possible that one would use paragraph D

13 of Article 82(1) and one would use another legal basis.

14 I turn now to the Chamber's questions on which we make two

15 points. Regarding question A we agree with the three factors

16 which Mr Gaynor identified. These are relevant in deciding

17 whether victims can appeal in a given stance. One of those

18 factors is the stage of proceedings and the role which victims

19 are given at that stage.

20 This will be a particularly compelling factor in Article 15

21 proceedings given the role that Article 15 proceedings play in

22 determining whether any further subsequent proceedings can occur

23 at the Court. So we don't rule out the possibility of victims'

24 standing in other phases but we say there is no clearer example

25 of a decision which fundamentally affects victims' interest than

1 in Article 15(4) decision. Some brief comments on the  
2 relationship between appellant standing and standing at first  
3 instance.  
4 THE COURT OFFICER: [11:52:24] Counsel you have two minutes I  
5 MS HIRST: [11:52:28] Both questions B and C in group A and the  
6 Prosecution has today submitted that one of the reasons that  
7 they say the Prosecutor only can appeal in Article 15  
8 proceedings is because only the Prosecutor can initiate such  
9 proceedings. However, standing to appeal is not limited to  
10 parties who could have initiated proceedings at first instance,  
11 no such limitation is found in the Statute or the rules or  
12 comparative law. To give one very clear example only the  
13 Prosecutor can request an arrest warrant. Nobody can testings  
14 that the Defence may appeal a decision which issued once. The  
15 Jordan referral appeal provides another example. A state party  
16 cannot initiate Article 70 proceedings, nonetheless a State  
17 Party was permitted to appeal the resulting referral. This is  
18 not to say that first instance standing rights are irrelevant  
19 rather to say that the role of a party at first instance is one  
20 factor which can be considered in determining that party  
21 subsequently has rights of appeal as plained by Mr Gaynor.  
22 Your Honours, the creators of this Court intended to leaded way  
23 in giving victims a real voice in international criminal  
24 proceedings. Since then two international criminal courts have  
25 recognise this real voice entails allowing victims a right to

1 appeal in some circumstances at least.

2 This Court is now in danger of falling behind. Your Honours

3 have a chance now to correct that and to ensure that justice as

4 the drafters intended, victims can be heard on the issues which

5 matter most to them.

6 Thank you.

7 PRESIDING JUDGE HOFMANSKI: [11:54:28] Thank you. Then we have

8 Ms Reisch will conclude. Good morning Mr President your Honours

9 the great privilege to appear before you today. As my

10 colleagues indicated I will focus on group B questions. Before

11 I do so I would like to tell you briefly about our client, a

12 victim of the US torture programme whom we represent by and

13 through his surviving family and on whose behalf my colleagues

14 appear today. Our client one of many victims of the coordinated

15 global torture rendition programme run by the United States with

16 a hub its epicentre in Afghanistan which targeted individuals

17 suspected often wrongfully in the case of our client Al Qaeda,

18 the Taliban or other groups. Our client's horrific experience of

19 torture and secret, incommunicado detention is emblematic of why

20 this calculated, systematic abuse should be the subject of a

21 criminal investigation by this Court. In December 2003

22 Mr al-Asad, successful businessman living in Tanzania was seized

23 from his home in front of his family by Tanzanian officials and

24 secretly flown to Djibouti. Djibouti, a State Party to the Rome

25 Statute held our client for two weeks in one of their local

1 facilities where he was interrogated by an American official and  
2 threatened with death. He was handed over to US custody on the  
3 tarmac where he was subject to capture shock, constituting  
4 torture to deployed by the CIA to foster what it termed learned  
5 helplessness a sense of total subjection to U.S. control. Mr.  
6 al-Asad was stripped naked, sexually assaulted, diapered,  
7 chained, and strapped down to the floor of an airplane... flown  
8 to Afghanistan he was held in three different facilities.  
9 While there his American captor subjected him to dietary  
10 manipulation, prevented him from sleeping and blocked him from  
11 sunlight. And a half he was released to custody. Since then  
12 Mr al-Asad and his family tried to vain to seek justice.  
13 Tragically Mr al-Asad passed way three years ago. Our client  
14 family, like many of the victims represented here today turned  
15 to the ICC as a last resort after unsuccessfully seeking  
16 accountability to numerous channels for more than a dozen years.  
17 The Pre-Trial Chamber decision shuts the door of this Court on  
18 our client and other victims similarly situated by finding that  
19 the crimes which they suffered fall outside of the Court's  
20 jurisdiction and by foreclosing any investigation let alone  
21 Prosecution.  
22 Turning now to your questions all of which we answer in the  
23 affirmative the LRV submit the Impugned Decision is a decision  
24 with respect to jurisdiction within the meaning of Article  
25 82(1)(a) the Impugned Decision ... Kenya appeal because the

1 Pre-Trial Chamber as Mr Gaynor said issued a ruling specifically  
2 on the jurisdiction of the Court.  
3 First it is that a decision that denies authorisation to  
4 exercise jurisdiction is by nature a decision with respect to  
5 jurisdiction. In Article 15(4) decision determines whether the  
6 Prosecutor may exercise jurisdiction pursuant to Article 13(c)  
7 and if so confirms the scope of that exercise. In no way can  
8 such a decision be said to have merely an indirect link to  
9 jurisdiction.  
10 Second, here the Pre-Trial Chamber made expressed jurisdictional  
11 finding set out in heading jurisdiction and ratio.  
12 PRESIDING JUDGE HOFMANSKI: [11:58:50] Excuse me counsel please  
13 slow down.  
14 MS REISCH: [11:58:58] ... .. exclude from the Court  
15 jurisdiction certain categories of crimes and victims  
16 encompassed by it Prosecutor's request based on concepts set out  
17 in Article 5 is 12 of the Statute. In paragraph 55 of the  
18 decision the Pre-Trial Chamber states in no uncertain terms and  
19 I quote the alleged war crimes whose victims were captured  
20 outside Afghanistan fall out of the Court's jurisdiction." In  
21 ruling placed many of the crimes committed against victims of  
22 the torture programme represented by the LRV outside any  
23 investigation or eventual Prosecution. These specific  
24 jurisdictional findings were not merely unrelated to the  
25 operative part of the decision. As Mr Guariglia said they were

1 necessary steps to reach the analysis of the interests of  
2 justice but they were not merely steps as even the Prosecution  
3 acknowledges they materially affected and are linked to the  
4 Pre-Trial Chamber's understanding of the scope of the  
5 investigation and its subsequent appreciation of whether that  
6 investigation would serve the interest of justice.  
7 The operative part of a decision and its nature are defined by  
8 the substance of the issue determined not the Chamber's  
9 subjective characterization of its disposition.  
10 Here the substance of the decision and indeed of the interests  
11 of justice analysis is the refusal to authorise the Prosecutor's  
12 exercise of jurisdiction under Article 13(c) despite having  
13 found the relevant requirements were met as regards to both  
14 jurisdiction and admissibility.  
15 Moreover if this Chamber were to reverse or vacate the Pre-Trial  
16 Chamber justice analysis these erroneous determinations with  
17 respect to jurisdiction would stand unless corrected.  
18 Concluding that the decision was one with respect to  
19 jurisdiction is entirely consistent with prior jurisprudence of  
20 this Chamber. First, the decision is fundamentally different in  
21 nature from other decisions that this Chamber has held to be too  
22 indirectly linked to admissibility or jurisdiction. As  
23 elaborated in footnote 68 of our September 30 appeal brief those  
24 other decisions involved matters falling outside of part 2 of  
25 the Statute ranging from the states request for assist tons

1 postponement of the Court's competency to release witnesses.

2 The Impugned Decision here which rules on the permitted scope of

3 the investigation and excludes per se certain alleged criminal

4 conduct and categories of victims is more like the

5 26 October 2011 Mbarushimana and the 22 March 2016 Ntaganda

6 appeals. In those appeals this Chamber recognised as

7 jurisdictional in nature a decision regarding the scope of a

8 situation referred to the Court by a State Party and issue that

9 goes to exercise of jurisdiction under Article 13 and a decision

10 regarding the exclusion of categories ... ..

11 The 6 November 2015 Comoros appeal decision does not require a

12 contrary result here.

13 THE COURT OFFICER: [12:02:51] You have two minutes left.

14 MS REISCH: [12:02:55] ... only requested the Prosecutor

15 reconsider whether there was a reasonable basis to open an

16 investigation it does not make any determination about

17 jurisdiction or admissibility.

18 Second, in evaluating the nature of the decision the Appeals

19 Chamber looked to the power that the Pre-Trial Chamber exercised

20 under the Statute. Doing so highlights the difference between

21 that decision and the decision at issue here. Under Article 53A

22 a Pre-Trial Chamber is limited to requesting that the Prosecutor

23 reconsider her decision. It does not have authority to make its

24 own decision. In contrast under 15(4) the Pre-Trial Chamber is

25 mandated to whether to grant authorisation. The Pre-Trial

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

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

17 PRESIDING JUDGE HOFMANSKI: [12:04:55] Excuse me counsel to  
18 interrupt you. Please conclude your time is up. Reach.

19 MS REISCH: [12:05:02] I'm concluding your final question  
20 turning to question C the scope of the investigation is a  
21 decision with respect to jurisdiction ^ confining the  
22 investigation to only those incidents specifically included in  
23 the Prosecutor's request and incidents closely linked to them  
24 not only defeats the very purpose of an investigation but also  
25 places criminal conduct which squarely falls under the Statute

1 beyond the reach of the Prosecutor and the Court. ... .. in

2 way most certainly a decision with respect to jurisdiction and

3 thus appealable under Article 82(1) (a). Thank you.

4 PRESIDING JUDGE HOFMANSKI: [12:05:45] Thank you very much. For

5 your submission of LRV 2. Then we proceed with submissions of

6 LRV 3 there are two speakers please proceed of course it's up to

7 you how you share the time allocated to group 3.

8 SPEAKER: [12:06:29] Mr President, your Honours, I will begin

9 talking about the facts involving our client and then

10 Mr Pietrzak will continue. I met Abd al-Rahim al-al-Nashiri in

11 2008 in Guantanamo Bay prison. I was first lawyer and the first

12 to visit him since his capture six years earlier in 2002. On

13 that initial visit he told me about the torture he had received.

14 I was shocked. But everything he says is classified so I could

15 not repeat it, not even his memories. When we finally received

16 the 500 page executive summary of the senate armed services --

17 many years later I was able to tell some of this publicly. I

18 still cannot and will not confirm or deny where he was because

19 my country has kept the names of those countries classified.

20 Therefore and because I have a security clearance I must

21 maintain that.

22 I will use the code names for the countries and I can only

23 discuss the torture that the US has already disclosed. But that

24 torture I can tell you here today is horrendous. From the

25 beginning in 2002 when Mr al-al-Nashiri in Dubai he was not allowed

1 to sleep regularly beaten. After one month he was transferred  
2 to custody and taken to a location code named cobalt. In  
3 transit to cobalt ice was put down his shirt to use the travel  
4 time to and induce anxiety. The torture began to the forced  
5 kidnapping of terror of not knowing. Virtually no documentation  
6 exists of Mr al-al-Nashiri time in cobalt however we know that  
7 operated in total darkness and the guards wore headlamps... ..  
8 subjected to loud continuous noise, total isolation and dietary  
9 manipulation. The prison was essentially a dungeon. According  
10 to one CIA interrogators, the prisoners a cobalt literally  
11 looked like dogs that had been kennelled. When doors were  
12 opened they cowered. The prisoners fed one meal one day, meals  
13 another day. They were kept naked and given buckets for their  
14 waist. ... .. and not given food for three days. To induce  
15 sleep deprivation the prisoners were shackeled to a bar in the  
16 ceiling forcing them this to stand with arms above their heads.  
17 One of the interrogation methods was water dowsing where  
18 prisoner douse with cold water, rolled in a carpet and soaked in  
19 water to induce sophistication. What is public he was kept  
20 naked and the temperature tour was kept as cold as ice cream.  
21 He was shackled hooded and taken on another airplane adding to  
22 his fear uncertainty and increasing what the government wanted  
23 was his helpless ... .. as far as we know only three prisoners  
24 were water boarded. Destroyed all the tapes of the torture at  
25 --

1 Being water boarded involves being tied to slanted table, a rag  
2 was placed over his forehead and eyes, water poured into his  
3 mouth and nose inducing choking and water aspiration,  
4 sophisticating him eventually the rag was lifted allowing him to  
5 take three or four breaths and then the procedure began  
6 again. To prevent his untimely death, a doctor was ordered to  
7 be in attendance to resuscitate him if necessary. That was not  
8 enough. Suddenly without warning he was transported to next  
9 place of detention named Bliw. He was kept continuously hooded  
10 shackled and naked. He was strung up on the wall overnight  
11 forced into stressed positions, prompting an assistant's concerns  
12 that his arms might be dislocated.

13 The CIA headquarters sent an untrained, unqualified, uncertified  
14 and unapproved officer to be his next interrogator. This  
15 unqualified interrogator with a handgun in other words  
16 chambering a bullet close to his head while he remained hooded.  
17 He also threatened to get your mother in there and dialect  
18 implying that he was from a country which was common to rape  
19 family members in front of prisoner. These were threats to  
20 coupled forced bathing with a wire brush there's also evidence  
21 that Mr al-Nashiri was in fact forcibly sodomised possibly under  
22 the pretext of a cavity search. Although the government of the  
23 United States later admitted that some of this unqualified  
24 interrogators' methods were improper he was never prosecuted. He  
25 was later transferred under the same ... bright light pour black

1 there is no he was held in basement composed prefabricated cells  
2 on springs to keep him off balance and disorient him. During  
3 his stay he was subjected to torture similar to the scheme in  
4 blew. In addition he was subjected to prolonged stressed  
5 standing positions hands being shackled to ceiling ^ he was  
6 confined in box where he had to stand for several hours and then  
7 beaten by the use of the walling technique. The walling  
8 technique involves putting a towel around his neck and while he  
9 was hooded he doesn't know when it will happen suddenly swinging  
10 him into a wall that fabricated to be flexible.  
11 Throughout the detention he was also exposed to continuous sleep  
12 deprivation, cold and forced nudity. He was transported to yet  
13 another country code named violet. Little it known about the  
14 conditions for ill treatment there or at the other prisons where  
15 he was held during this time. However at a minimum we know that  
16 Mr match was held in each isolation in each isolation and by  
17 that time had suffered severe psychological and physical ill  
18 treatment after having been in prison for over three years  
19 loaded into numerous air plans transported like a package bound  
20 and hooded even animals are not transported in these conditions.  
21 And now we know that not one shred of actionable intelligence  
22 was learned from the torture and interrogation of any of the  
23 prisoners held in black sites all over the world. Not one piece  
24 of actionable intelligence. No one from any country ever  
25 stepped in to stop the torture. No country has investigated

1 what happened or sought to prosecute anyone involved in or  
2 knowing about the torture. No country stepped in to stop  
3 Mr al-al-Nashiri from being transported to the Guantanamo Bay  
4 prison where Mr al-al-Nashiri is still held in solitary confinement  
5 yet to have a trial now almost 18 years later yet the torture  
6 and deprivation of rights continues to this day. He has charged  
7 with numerous crimes charged in 2008. He face the the death  
8 penalty if he is convicted. In many ways his torture has not  
9 ever ended.

10 Thank you I will now turn this over to Mr Pietrzak to it our  
11 argument.

12 MR PIETRZAK: [12:15:55] Thank you very much.

13 PRESIDING JUDGE HOFMANSKI: [12:16:01] Thank you very much

14 Ms Hollander. Mr Pietrzak you have still 15 minutes.

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

16 It is demonstrative of the obstacles that Mr al-Nashiri is  
17 seeking justice that my steamed colleague Ms Nancy Hollander for  
18 bid into say the names this detained even after they have  
19 expressed named in European Court of human rights judgments and  
20 many public reports. These detention facilities sometimes refer  
21 to as black sites operated with the secrecy of these states  
22 which Ms Hollander did not name. In these sites prisoners  
23 suspected of terrorism among them Mr al-Nashiri were subjected  
24 to brutal interrogation techniques developed by the CIA under  
25 what is referred to as the enhanced interrogation programme or

1 techniques programme and also to other forms of torture  
2 unauthorised even by this enhanced interrogation technique  
3 programme. Mr al-Nashiri was captured in late October 2002 he  
4 was then transferred to CIA custody by November 2002. Since his  
5 abduction Mr al-Nashiri was imprisoned in detention facilities  
6 in the following states I am fortunate enough to be in different  
7 position I can actually name these states. First of all  
8 Afghanistan, then Thailand, then ^ intelligence base in Poland,  
9 next Rabat in Morocco, then briefly to Guantanamo Bay military  
10 prisoner where he was flown to Bucarest in Romania and then  
11 Lithuania From there he was taken to Afghanistan and as of  
12 6 September 2006 Mr al-Nashiri remains a prisoner in Guantanamo  
13 Bay military prison. All these states including democracy such  
14 a Poland Lithuania Romania and the United States have the duty  
15 to investigate these crimes. Yet, none have done so. This is  
16 why Mr al-Nashiri welcomed and supported the Prosecutor's  
17 request to authorise an investigation of the crimes committed in  
18 the context of the situation in Afghanistan and wanted very much  
19 to play a relevant role in this investigation.  
20 Mr al-al-Nashiri is undeniably a victim of crimes which fall under  
21 this Court's jurisdiction. He is still suffering today. He  
22 remains imprisoned without access to any affect active remedy to  
23 seek justice for what happened to him since he was abducted in  
24 October 2002. The ICC has been established specifically for  
25 setting and prosecuting situations like this one. Which no

1 State wishes or is able to pursue. This Court has been created  
2 also with the objective to give victims such as Mr al-al-Nashiri  
3 greater recognition through the opportunity to fulfil the  
4 procedural aspect of their rights and freedoms by participating  
5 meaningfully in proceedings aiming at establishing the truth  
6 what happened to them. To give victims such as Mr al-al-Nashiri a  
7 voice in this process to vindicate their rights by giving a  
8 public platform to their trauma and stories and ultimately by  
9 providing the prospect of an ability of the perpetrators of  
10 these crimes. The fulfilment of these proceedings requires the  
11 acknowledgment of Mr al-al-Nashiri first as a victim and party  
12 under the Article 15 legal standing and ability to appeal this  
13 specific Impugned Decision in this context.  
14 The Pre-Trial Chamber's decision effectively deprives this Court  
15 of the possibility to exercise its jurisdiction over the crimes  
16 committed in the context of the situation in Afghanistan. As a  
17 result, the Impugned Decision deprives the victims of those  
18 crimes including Mr al-al-Nashiri of their right to access justice  
19 of all the procedural rights and possibilities that the Rome  
20 Statute intends for them to have.  
21 The possibility to participate in proceedings present their  
22 views and concerns and ultimately to obtain redress and  
23 reparations if the perpetrators are identified, prosecuted and  
24 convicted.  
25 But the first condition for any of these rights to become real

1 and effective is that this investigation is authorised. As  
2 regards the status of victims as parties under Article 15  
3 proceedings and their right to appeal the Pre-Trial Chamber's  
4 decision we fully support the arguments made in our earlier  
5 written joint filings and by our colleagues by our colleagues  
6 before the Court today.

7 I cannot have or leave without comment said by Mr Guariglia.  
8 Mr Guariglia used the term technical points to refer to the  
9 issue of the procedural standing of victims under Article 15  
10 proceedings and the rights of victims as parties to appeal the  
11 Impugned Decision.

12 This comment, this term illustrates exactly why victims require  
13 separate representation and the individual right to submit  
14 appeals on their own behalf. What the Office of the Prosecutor  
15 refers to a technical point lies at the heart of the interests  
16 and rights of victims. There is no issue less technical today  
17 from the perspective of victims such as Mr al-al-Nashiri who is  
18 very suffering is the reason why we are all here. Why the  
19 Office of the Prosecutor indeed sought authorisation for an  
20 investigation. It is this difference of optics that shows that  
21 the Office of the Prosecutor is not always in line with the  
22 justified interests of victims and in Article 15 proceedings.

23 I would like to now present several comments on the relevance of  
24 the fact that the Rome Statute does not contain a provision  
25 which would explicitly state that victims have the right to

1 appeal a decision of the Pre-Trial Chamber pursuant to Article  
2 15(4) of the Statute.

3 Giving victims even the widest range of rights in proceedings at  
4 a later stage before the International Criminal Court while  
5 depriving them of the possibility of securing the rights at this  
6 stage would make victim participation before the ICC illusory.

7 There is no point in granting a wide range of rights if the  
8 victim doesn't have the possibility of appealing a decision  
9 which ends the case before it has even started.

10 According to Article 21 of the Statute it is not only provisions  
11 of the Court's core legal text but also international treaties  
12 recognised human rights and relevant national state laws which  
13 should be taken into account in making a decision regarding  
14 victims' standing to appeal the Impugned Decision. Many of the  
15 criminal law jurisdictions in the world, including those  
16 relevant to this case, vest victims with rights in criminal  
17 proceedings. Most notably Poland, Lithuania and Romania all  
18 grant victims the right to appeal a decision in criminal  
19 proceedings which results in the refusal to open or close an  
20 The same principles under lie the creation of the ICC. I would  
21 like to focus in particular on human rights stands referred to  
22 ... all human rights and fundamental freedoms enshrined in  
23 interlaw and recognised ... ... the crimes committed against  
24 Mr al-Nashiri constituted a violation of the substantive aspects  
25 of rights right to life, his personal liberty, his fair trial

1 rights, the right to respect personal life and privacy and most  
2 notably the right to an effective remedy with respect to all of  
3 these violations. Each of these rights also has a procedural  
4 aspect which requires that effective legal and procedural  
5 mechanisms be in place to allow for protection against the  
6 violation and if the substantive violations have already  
7 occurred that effective measures allow for the redress,  
8 rehabilitation and accountability. This must include access to  
9 an effective criminal investigation and an effective procedural  
10 remedy such as an appeal against a decision not to investigate.  
11 The European Court of human rights has repeatedly stated  
12 including in the case of Mr al-Nashiri, that victims of  
13 violations of rights to life or the prohibition of torture have  
14 the right to a "thorough and effective investigation capable of  
15 leading to the investigation and punishment of those responsible  
16 and effective access for the complainant to the investigatory  
17 procedure". Since none of the States which played a part of  
18 crime committed against Mr al-Nashiri have conducted an  
19 effective investigation, some only creating a if a sad of an ^  
20 investigation while others have outright refused to investigate  
21 the procedural aspects of his rights and freedoms have not been  
22 respected.  
23 The vindication of these rights and freedoms requires that the  
24 ICC acting within the boundaries of the complementarity  
25 principle authorise the investigation. Now where a decision

1 entirely precludes an investigation by the Court of last resort  
2 such as this one and when it does so contrary to victims  
3 interests and based on interests of justice interests  
4 considerations human rights law require affording the victims  
5 standing to review of such assert their rights through an  
6 appeal. In these proceedings under Article 15 in which victims  
7 apart from submitting their representations had no real ability  
8 to access proceedings up to the moment the Impugned Decision was  
9 issued, the only opportunity for them to materialize the right  
10 to a thorough and effective investigation capable of leading to  
11 the identification and punishment of those responsible and  
12 including effective access to the investigatory procedure, is to  
13 appeal and to request a review of the Impugned Decision.  
14 Your Honours, I fully support the arguments made by my  
15 colleagues today regarding the arguments of jurisdiction I will  
16 not repeat these.  
17 I would just like to subpoena rise summarise that issue the issue of  
18 jurisdictional nature because it makes find ... .. over the  
19 alleged crimes in had the Prosecutor's request secondly the  
20 decision makes the determination on whether the Court and the  
21 Prosecutor may exercise jurisdiction over incidents and crimes  
22 referred to in the Prosecutor's request.  
23 Mr President, your Honours, in conclusion to my knowledge, this  
24 is the first time the International Criminal Court is put in a  
25 situation in which the Pre-Trial Chamber rejected the request to

1 authorise an investigation at the proprio motu initiative of the  
2 Prosecutor. This is the first time that such a decision of the  
3 Pre-Trial Chamber is based on a completely new assessment of  
4 interests of justice inconsistent with the Court's previous  
5 practice.

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

13 This is an opportunity for the Court to acknowledge the trauma  
14 of Mr al-al-Nashiri and other victims to vindicate their rights and  
15 freedoms by allowing them to appeal. This is in line with the  
16 principles on which the International Criminal Court was  
17 established. To put an end to impunity for the most grievous  
18 crimes and give recognition to the victims of these crimes.

19 Thank you.

20 PRESIDING JUDGE HOFMANSKI: [12:31:24] Thank you counsel.

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

23 MS MASSIDDA: [12:31:45] Thank you very much your Honour. My  
24 learned colleague representing the border should go first but I  
25 will be ready to start if you consider changing the order.

1 (Appeals Chamber confers)

2 MS MASSIDDA: [12:32:23] In the scheduling order your Honour at

3 page 5 you indicate that the Cross Border Victims should speak

4 after Legal Representatives of Victims number 3 and that the

5 Office of Public Counsel for Victims will immediately follow.

6 Now but if you consider the changing the order I'm ready to

7 oblige.

8 PRESIDING JUDGE HOFMANSKI: [12:32:46] Thank you counsel. Of

9 course we will keep the order. Then if you are ready, please

10 the representatives of the Cross Border Victims you have the

11 floor for 15 minutes.

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

13 PRESIDING JUDGE HOFMANSKI: [12:33:00] Excuse me for the

14 misunderstanding.

15 MR POWLES: [12:33:03] Thank you very much to Ms Massidda for

16 pointing that out. Mr President your Honours we appear today on

17 behalf of the group of victims from Pakistan we say are victims

18 of the crimes within the jurisdiction of this Court.

19 Cross-examination victims. In February 2014 the Cross Border

20 Victims submitted a dossier to the Office of the Prosecutor

21 which contained clear evidence of serious crimes within the

22 jurisdiction of the ICC committed in Pakistan but launched from

23 Afghanistan. The evidence was gathered by two well respected

24 and highly regarded NGOs, Reprieve based in the United Kingdom

25 and the foundation for human rights a Pakistani human rights

1 NGO. The evidence presented to the OTP and the human suffering  
2 detailed therein no doubt like much of the evidence that Court  
3 considers day in and day out is simply heart breaking.  
4 If I may, I will very briefly highlight some of the most  
5 compelling aspects of that evidence.  
6 It is estimated that from 2004 to 2013 2 and a half to 3 and a  
7 half thousand people were killed in Pakistan as a result of  
8 aerial bombings launched from Afghanistan. Between 416 and 951  
9 of those were civilians. In one incident alone in 2006, 81  
10 civilians were killed in single drone strike at a school in  
11 Chinagi 80 children and one adult presumably their teacher at  
12 dead. We make submissions today on behalf of 32 victims from  
13 eight separate drone strikes. They are representative of ...  
14 launched from Afghanistan into Pakistan.  
15 The dossier we provided to the OTP ran to around 300 pages  
16 consisting of witness statements, press reports, government  
17 documents including statistics prepared by the government of  
18 Pakistan and detailed submissions on the legal basis for the  
19 jurisdiction of this Court.  
20 We respectfully submit that the evidence gathered and provided  
21 to the OTP make crystal clear that the requirements for Article  
22 53(1) of the Statute were satisfied. There was a reasonable basis  
23 to believe that crimes within the jurisdiction of the Court had  
24 been committed the case would be admissible under Article 17 and  
25 the gravity of the crimes and the interests of victims were

1 such that an investigation would be in the interests of justice.

2 On the conclusion of negotiations on the Statute for this Court

3 in Rome in July 1998 the late Kofi Annan the then secretary

4 general of the United Nations described the establishment of the

5 International Criminal Court as a gift of hope for future

6 generations and a giant step forward in the march towards

7 universal human rights and the rule of law.

8 To date, the victims we represent have been unable to secure any

9 form of justice in any domestic jurisdiction around the world.

10 This Honourable court represents their best and only hope of

11 seeing justice done.

12 So it is for that reason that we on their behalf humbly turn to

13 the OTP and to Appeals Chamber in the hope of persuading you of

14 the need for the full and proper investigation into the crimes

15 we say they are the victim of.

16 And we say persuade the OTP because did he did he say might having

17 committed very ^ detailed and evidence to them in 2014 the OTP

18 did not include or mention our victim clients in its

19 November 2017 request for the authorisation from the Pre-Trial

20 Chamber.

21 In our written submissions in this appeal filed on 1

22 5 November 2019 we expressed genuine gratitude on behalf of the

23 Cross Border Victims to the OTP for its first public

24 acknowledgment of them. On 19 July 2019 in its reply to our

25 response to the OTP's request for leave to appeal the OTP

1 mentioned our clients in these terms they stated that the  
2 interests of the Cross Border Victims are protected and the  
3 Article 15(3) requests for the authorisation were filed on the  
4 basis that it could potentially include base us that it could  
5 potentially include allegations falling within its degree  
6 graphic temporal or other material parameters if sufficient  
7 grave well-founded and within the jurisdiction of the Court ^.  
8 Again while grateful for this indication by the OTP, we  
9 respectfully submit on behalf of our victim clients that their  
10 situation perfectly illustrates first just why victims should in  
11 and of their own right be considered parties under Article 15 of  
12 the Statute and second, just why victims should in and of their  
13 own right be entitled to appeal pursuant to Article 15(4) of the  
14 Statute.  
15 Because as I stand here today, it is still not clear what the  
16 OTP's attitude is as to whether it can, should or indeed  
17 will investigate the crimes we say our clients are victim of.  
18 The OTP have only indicated that the crimes our clients have  
19 suffered potentially fall for consideration as part of the OTP's  
20 intended investigations and then only if sufficiently grave.  
21 And in the same way that the OTP's attitude towards our victim  
22 clients is still unknown today it was certainly certainly not  
23 known at the time of the OTP request for authorisation back in  
24 November 2017.  
25 As a result and by not including a substantial group of victims

1 within that request for authorisation the OTP leave a multiple  
2 number of questions unanswered. Is it accepted that the crimes  
3 that they sustained fall within the jurisdiction of this Court.  
4 Is it accepted that the matter is admissible pursuant to Article  
5 17. Is it accepted that the crimes are sufficiently grave. Do  
6 the OTP believe it to be in the interests of justice for the crimes  
7 to be investigated or perhaps more to point has the OTP  
8 concluded that an investigation would not serve the interests of  
9 justice pursuant to Article 53(1) (c). By remaining silent  
10 about a particular category of victims, the OTP effectively  
11 deprives the Pre-Trial Chamber from playing the supervisory role  
12 expressly contemplated by Article 15 of the Statute.  
13 That situation ameliorated by Article 15(3) of the Statute with  
14 the express provision where the Prosecutor has submitted a  
15 request for authorisation victims may make representation to the  
16 Pre-Trial Chamber.  
17 We submit that one of the reasons why victims must be able to  
18 make such representations at the time of any request for  
19 authorisation is to remedy and/or address any shortcomings in  
20 the request for authorisation. That is precisely what the Cross  
21 Border Victims did in response to the OTP's November 2017  
22 request for the authorisation. On 31 January 2018 the Cross  
23 Border Victims made submissions via the VPRS to the Pre-Trial  
24 Chamber which asked the Pre-Trial Chamber to ask the Prosecutor  
25 to confirm one whether the allegations had been considered, two,

1 the OTP's position in respect of them, including three, when the  
2 OTP had formed a view on whether the allegations fell inside or  
3 outside the jurisdiction of this Court.

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

16 So the Cross Border Victims made clear representations to the  
17 VPRS in the form of submissions to the Pre-Trial Chamber  
18 regarding their concerns about the adequacy of the OTP's request  
19 for authorisation.

20 Specifically the OTP's failing you're to include details of the  
21 crimes they had sustained within their request. This we  
22 respectful submit effectively made them a party to the  
23 proceedings before the Pre-Trial Chamber and as a party to those  
24 proceedings we say unequivocally the Cross Border Victims like  
25 the OTP were permitted to appeal as a party pursuant to Article

1 82(1). In the interests of time we adopt and support the  
2 submissions made by other victim groups and whether a decision  
3 under Article 15(4) is decision with respect to jurisdiction but  
4 plainly issues of jurisdiction did arise via submissions made to  
5 the Pre-Trial Chamber issues of jurisdiction plainly arose  
6 within the context of this case. We adopt and support the  
7 submissions whether Article 21(3) provides victims with the  
8 freestanding right to appeal. But what we do say because of the  
9 OTP's failure to acknowledge our victim clients we say that  
10 their position is even starker perhaps than those of other  
11 victim groups because they unlike the other victims groups have  
12 not got their interests being taken into account in any way  
13 shape or form by the Office of the Prosecutor. As already  
14 prefaced in our written submissions the Cross Border Victims  
15 received no communication --  
16 THE COURT OFFICER: [12:45:09] You have three minutes left.  
17 MR POWLES: [12:45:13] I'm very grateful. Cross Border Victims  
18 have received no indication from the OTP either publicly or  
19 privately as to OTP's attitude as to the material provided.  
20 While grateful to the Office of the Prosecutor that the crimes  
21 sustained may potentially fall within the scope of investigation  
22 the OTP has not indicated a definitive view as to whether or not  
23 the crimes sustained by the Cross Border Victims will be  
24 investigated as part of any subsequent investigation if this  
25 appeal is successful.

1 We say that cannot be right or fair.

2 We are grateful to the Legal Representatives of the for draw  
3 paragraph 42 to 43 in their consolidated response to the  
4 observations filed by the Cross Border Victims. They draw the  
5 Appeals Chamber's attention to the OTP's own strategic plan of  
6 2019 to 2021. In that strategic plan the OTP recognised a  
7 paragraph 47 the need and I quote to effectively communicate  
8 with its stakeholders with the victims and effective communities  
9 and the general public. The office recognizes the importance of  
10 timely and clear communications so as to maximise transparency  
11 and ensure the stakeholders including the victims and affected  
12 communities and the general public have an accurate and up to  
13 date picture of the office's actions and the decisions including  
14 the progress of its investigations and Prosecutions when  
15 appropriate.

16 For whatever reason, that did not occur with regards to our  
17 Cross Border Victims. Not only were they not referred to or  
18 included in the OTP's November 2017 request, but nor have they  
19 received any indication from the OTP as to whether it intends to  
20 pick up the cajoles and fight on their behalf. In the absence  
21 of any such indication, we respectfully submit that they must  
22 have standing with clear right of appeal in their own right.

23 Natural justice demands no more but certainly no less. Thank  
24 you very much.

25 PRESIDING JUDGE HOFMANSKI: [12:47:50] Thank you counsel for

1 intervention.

2 Then the counsel for the Office of Public Counsel for Victims

3 you have 15 minutes, please proceed.

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

5 Mr President, your Honours the Office of Public Counsel for

6 Victims appears today in these proceedings to represent the

7 general interest of victims. We advocate for the interpretation

8 of the Court's legal framework that takes fully into account

9 their rights to truth and justice and bridges any gap in the

10 pursuit of accountability.

11 Having filed written submissions before both the Pre-Trial

12 Chamber and the Appeals Chamber I shall focus today only on the

13 key arguments arising from the question posed by the Chamber. I

14 will do so in an organic way rather than addressing the

15 questions. Starting with the question in group A on the

16 victims' standing to bring an appeal under Article 82(1)(a) of

17 the Statute your Honours will recall the office's long standing

18 position in that inappropriate (i) is victims may fall within

19 the ambit of Article 82(1) as recalled in our submission number

20 93 at paragraph 23 the Appeals Chamber is only called at this

21 juncture to rule on the victims' standing to appeal in relation

22 to the Impugned Decision denying authorisation to open an

23 investigation pursuant to Article 15(4).

24 In our submission the particular characteristics of Article 15

25 proceedings mean that the position of victims' standing to

1 appeal is justified and indeed required a fortiori in this  
2 particular context compared to other phases of criminal  
3 proceedings.  
4 In this respect, we concur with submissions advanced by other  
5 participants to the effect that Article 15 proceedings are  
6 exceptional in nature. This is clear from the special role and  
7 status vested in victims in the context of Article 15(4)  
8 proceedings by the Statute, including their rights to make  
9 representations expressly recognised by Article 15(3).  
10 The Court's legal framework clearly indicates that the role of  
11 those victims who engage with the Court by making  
12 representations does not cease once such representations are  
13 submitted.  
14 Rule 50(4) of the Rules of Procedure and Evidence empowers the  
15 Trial Chamber to request additional information from any of the  
16 victims who have made representations as well as from the  
17 Prosecutor and, if appropriate, to hold a hearing.  
18 Further, rule 50(5) requires the Pre-Trial Chamber to give  
19 notice of its authorisation decision to victims who have made  
20 representations. Victims may therefore qualify as parties to  
21 those proceedings for all intents and purposes justifying the  
22 recognition of a standing to appeal. It would be paradoxical  
23 for the Statute and the rules to grant victims a specific place  
24 in proceedings under Article 15(4) with an independent voice and  
25 role, but then deprive them of any recourse against decisions

1 resulting from said proceedings, leaving them entirely dependent

2 on the Prosecutor's decision whether to file an appeal or not.

3 In addition to the specific participatory rights granted to

4 victims by the Statute in the context of Article 15 proceedings,

5 there are in our submission at least three other grounds

6 rendering the present proceedings exceptional, and therefore

7 warranting the recognition of victims standing to appeal in this

8 context at the very least.

9 First, proceedings under Article 15(4) such as the present one

10 do not involve any parties for the purposes of Article 82(1)

11 other than the Prosecution and the victims who made

12 representations. The reference to either party in Article 82(1)

13 should therefore be read as encompassing both.

14 Second, the impact of decisions denying authorisation on

15 victims' rights is exceptionally significance arguably more than

16 any other decision adopted by this Court. Indeed, the interest

17 in seeing that the Court is seized with a matter and that an

18 investigation proceedings has been regarded as the most

19 essential of all victims' interests. Decisions denying

20 authorisation preclude the opening of an entire investigation

21 with dramatic and pervasive effects on the rights to truth,

22 justice and reparation of all victims of a potential situation.

23 It is therefore particularly important to recognition the

24 victims' standing to appeal in this context.

25 Third, in the present case, unlike other decisions adopted under

1 Article 15(4) to date, the Pre-Trial Chamber's interpretation on  
2 the interests of victims formed a key element of the  
3 ratio decidendi of Impugned Decision. The Pre-Trial Chamber  
4 denied authorisations on the basis that the anticipated  
5 challenges investigations would face made it as stated in  
6 paragraph 96 of Impugned Decision and I quote "unlikely that  
7 pursuing an investigation would result in meeting the objectives  
8 listed by victims favoring the investigation or otherwise  
9 positively contributing to it." End of quote.

10 In these very specific circumstances, it is fundamentally  
11 important for the victims who made representations under Article  
12 15(3) to be granted standing to challenge a decision purportedly  
13 adopted effectively contrary to the representations they made  
14 ^.

15 ^.

16 The office and some of the amici submitted arguments to the  
17 effect that the recognition victims standing to appeal would be  
18 in line with international human rights law and with  
19

20 internationally recognised rights to truth justice and  
21 reparation. I will not repeat said submissions suffice it to  
22 mention that provides that favour to carry out prompt impartial  
23 and effective investigation amounts to a violation of the  
24 victims' human rights. The European Court of human rights has  
25 recognised that the possibility for victims I quote of appealing

1 to a Court against investigation refusal to open criminal  
2 proceeding constitutes a substantial safeguard against the  
3 arbitrary exercise of power by the investigating authorities.  
4 The reference for the record is application number  
5 59334/0018 January 2007 paragraph 139.  
6 The European directive on victims rights of 2012 specifically  
7 provides Article 11 victims of serious crimes being granted a  
8 right to decision not to prosecute be it a decision taken by  
9 Prosecutor or by investigative Judges. The recognitions of the  
10 victims standing to appeal in the present proceedings consistent  
11 with the international human rights law and with Article 21(3)  
12 of the Statute.  
13 It would also be in line with a general framework of the  
14 Statute.  
15 We disagree with the OTP's submissions that recognising victims  
16 standings to appeal in this context would require a statutory  
17 amendment. The absence of the ... challenge denying  
18 authorisation is not determinative. For instance, as already  
19 recalled the absence of the provision the in the Statute  
20 empowering affected states to appeal decision under Article  
21 87(7) did not preclude the Appeals Chamber from entertaining the  
22 appeal filed by Jordan in the Al-Bashir case. Further while the  
23 general principle of the ... enshrined in the Statute the  
24 modalities of the implementation of said rights have largely  
25 been left for jurisprudence development. From a ... ... before

1 this Court and before other international fora pointing towards  
2 the increased recognition of victims prerogative and rights in  
3 the context international criminal proceedings including on  
4 appeal. It was recalled also by Ms Hirst early this morning.  
5 This Appeals Chamber has also been increasingly willing to  
6 entertain appeals from entities other than those traditionally  
7 considered as parties under 82(1) of the Statute. Recognising  
8 that the victims standing to appeal in the present circumstances  
9 would be fully consistent with these developments. As a final  
10 note on this topic before I turn to issues on group B I would  
11 posit your Honours that victims in the present proceedings  
12 should not be penalized due to the novel nature of the issues  
13 currently before the Court and uncertainty surrounding their  
14 prerogative in the present circumstances. The Chamber has been  
15 prepared in the past to take exceptional measures in similarly  
16 novel circumstances to ensure that victims are not unfairly  
17 deprived of an opportunity to participate for reasons beyond  
18 their control.  
19 Therefore, should the victims' standing to appeal in the present  
20 proceedings not be recognised I would respectfully invite the  
21 Chamber to nevertheless consider and rule on the arguments put  
22 forward by victims pursuant to its broad discretion as well as  
23 its general powers under rule 93.  
24 THE COURT OFFICER: [13:00:21] You have three minutes left.  
25 MS MASSIDDA: [13:00:23] How many.

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

2 MS MASSIDDA: [13:00:26] Moving on to group B the reference to

3 jurisdiction in Article 82(1) (a) covers not only the existence

4 of jurisdiction pursuant to Articles 5 and 11 of the Statute but

5 also the exercise of such jurisdiction regulated by Articles 12

6 and 13 of the Statute. As recently noted by Judge Eboe-Osuji in

7 the context of a Comoros proceedings whenever a decision has as

8 its outcome an equal potential than not that the Court may not

9 exercise jurisdiction it should be then be beyond dispute that

10 such a decision is a decision with respect to jurisdiction

11 within the meaning of Article 82(1) (a), end of quote.

12 For Article 82(1) (a) to applied to operative part of the

13 decision itself must pertain directly to a question on the

14 jurisdiction of the Court encompassing in our submission the

15 existence or exercise of such jurisdiction against this

16 background we submit that the Impugned Decision is indeed one

17 with respect to jurisdiction. The Pre-Trial Chamber's key

18 finding concerned the absence of a reasonable basis to proceed

19 with an investigation under Article 15(4) based on the interests

20 of justice. The Impugned Decision is a ruling that the Court

21 may not exercise its jurisdiction over the proposed situation.

22 And I will recall for the time paragraph 19 of Judge

23 Eboe-Osuji's dissenting opinion in the Comoros appeal.

24 It's our submission that the Impugned Decision as a whole is to

25 be considered a determination with respect to jurisdiction

1 subject to appeal pursuant to Article 82(1) (a). Your Honours  
2 we recall that appearing before the Pre-Trial Chamber we  
3 supported the prosecutor's request for leave to appeal this was  
4 the case because that was at the time the procedural avenue  
5 chosen by the Prosecution for challenging the Impugned Decision  
6 in the circumstances. However, we insist that we are facing an  
7 issue of jurisdiction eye peeling under Article 82(1) (a) and  
8 a fortiori I will take 30 seconds.

9 PRESIDING JUDGE HOFMANSKI: [13:03:30] Thank you very much  
10 please conclude.

11 MS MASSIDDA: [13:03:32] Thank you. And that a fortiori the  
12 Impugned Decision also the issue subject to appeal also fulfil  
13 the requirements set out in Article 82(1)(d). The four  
14 paragraph of 82(1) are not necessarily the mutually exclusive  
15 nothing in the preparatory working states as such. The wording  
16 of Article 82(1) confirms in our submission this reading which  
17 is also consistent with the object and purpose of the provision.  
18 Finally, your Honour I would like to draw the attention of the  
19 Chamber on the fact that the two issues certified by the  
20 Pre-Trial Chamber do not fully cover the issue raised by the  
21 Legal Representatives in their respective appeal however, the  
22 Appeals Chamber has has inherent powers to consider arguments  
23 that are linked to issues on appeal and to clarify to amend  
24 issues on certified for appeal by relevant Chamber a quo.  
25 Consequently we respectfully invite the Chamber to consider all

1 arguments put forward regardless of its conclusion on the

2 appropriate legal basis for appeal. Thank you.

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

4 We will now adjourn for one hour lunch break and resume at 2

5 p.m. At which time we will hear observation by the

6 amici curiae.

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

8 (Recess taken at 1.05 p.m.)

9 (upon resuming in open session at 2.02 p.m.)

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

11 Please be seated.

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

13 We will resume the hearing with the observations from

14 amici curiae, first, Mr Pawel Wilinski. Sir, you have

15 10 minutes, starts now.

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

17 I am very honoured to be here not representing victims or any

18 party of the proceeding, but being here as amici curiae.

19 I just want to say at the very beginning that professors were my

20 faculty were members of police delegation to the Nuremberg

21 trial. ^They were presenting victims' testimony of grievous

22 atrocities and that time victims had very limited rights. And

23 being mostly source of information for the trial. Many have

24 changed from that time. We made tremendous steps forward.

25 But today we are here again and I believe we are here to answer

1 how important victims are. And that's the reason that I  
2 requested for standing here as amici curiae.

3 This is in fact the he essence of today's hearing, as I see it, and  
4 reason of my presence. Why victims stand for right to appeal in  
5 this case, one can say that as far as Prosecutor already launch  
6 an appeal and it was granted, there is no need for that.

7 And why tomorrow's allies, I mean Thursday and Friday, on the  
8 merits of appeal, this is the Prosecution and victims argue  
9 against each other today, why victims want to stand for the  
10 right to appeal?

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

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

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

25 First, that decision of non-authorisation of investigation

1 influences their interest, and I call it prove of the merits in  
2 this case, and the second, that the Statute give them the floor  
3 for an appeal, and that's the proof of procedure.  
4 Before I will refer to both, one comment. I want to bring your  
5 attention to this stage of proceedings that we are, because it  
6 matters. The subject of the hearing in this case is the  
7 situation in Afghanistan. It is the preliminary procedure.  
8 Only if there will be an investigation and then successful  
9 confirmation of charges, there will be a case or many cases. We  
10 will have parties, with their rights to fair trial. With right  
11 to compensation for victims.  
12 But now we are at the stage of situation in Afghanistan, will  
13 they have this right if the investigation will not be open?  
14 Will they have this right for compensation? Probably not.  
15 We have to understand and we have to remember that victims are  
16 actors of the situation and they are parties of the conflict  
17 arising from the crime. Therefore, they have good standing to  
18 represent their interest already at this stage. As the decision  
19 is likely to determine further existence of proceeding itself.  
20 Person become a victim long before the criminal investigation is  
21 initiated. It is very -- it is very important to understand  
22 that. For this reason, it is not consistent with the  
23 commonsense of justice depriving him or her of the probability  
24 to participate the procedure of controlling the decision not to  
25 initiate proceeding, if such procedure exists.

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

7 What about the proof the procedure? It is not a surprise that  
8 the Statute and Rules of Procedure and Evidence give not  
9 a detailed description answering all procedural questions and  
10 situations, but gives us rules, as its name, gives us rules that  
11 we have to follow, that we have to interpret in the interest of  
12 justice to bring justice at international level. We can read  
13 about these even in the preamble to the Statute. And that is  
14 the essence of the Court's existence, in my understanding.

15 Misunderstanding of interest of justice, based on arguments used  
16 by Pre-Trial Chamber gives floor to follow wide understanding of  
17 Article 82(1)(a) or maybe also (d), on admissible and  
18 jurisprudence.

19 What victims have to prove here and today, the evidence of C  
20 ourt's decision based on revision of the appeal will focus on  
21 that if the Court will execute its jurisdiction or not.

22 It will execute its jurisdiction in Afghanistan or not. It is  
23 then a question of jurisdiction and can be understood and read  
24 in this way, and I believe that for that reason the proof of  
25 procedure is therefore, in this case, met.

1 When we take all arguments, and reduce all raised today

2 arguments and issues to its essence --

3 THE COURT OFFICER: [14:11:44] Excuse me, you have two minutes

4 left,

5 MR WILINSKI: [14:11:50] Then we have one question, how

6 important victims are. I believe they are. Thank you,

7 PRESIDING JUDGE HOFMANSKI: [14:11:57] Thank you very much

8 Mr Wilinski

9 Now the Jerusalem Institute of Justice, the International Legal

10 Form, My Truth, the Simon Wiesenthal Centre, the Lawfare

11 Project, and UK Lawyers for Israel, you have 10 minutes. It

12 starts now, please proceed. ^^

13 MR JACOBS: [14:12:20] Good afternoon, Mr President,

14 your Honours. The organisation we represent today, Steven Kay,

15 Joshua Kern and myself, which you have just mentioned, are

16 aware, as human rights organisations supporting affected

17 communities rights in reality and Jewish communes in the

18 diaspora of the importance of the ICC to hear concerns and views

19 of victims and affected communities.

20 Concerning issue A, if the Court were to consider interpreting

21 the notion of parties in Article 82(1) broadly, we would suggest

22 adopting a purposive concept of interests affected by the

23 decision which would in turn justify considering taking as a

24 starting point affected communities rather than simply v

25 ictims.

1 In that sense, we note that the submissions made by the  
2 representative of victims this morning all support our position  
3 and, particularly, the conditions put forward by the  
4 representative of LRV1 also apply to affected communities. We  
5 also note that the concept of affected communities is a regular  
6 feature of the ICC's work. For example, in the context of the  
7 mandate of the Trust Fund and Outreach activities, appears both  
8 in ASP documents, judicial decisions, it appears six times in  
9 the OTP strategic plan for 2019-2021 and also in the regulations  
10 of the registry.

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

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

20 If one looks at the language of the Statute, the only provisions  
21 relating to jurisdiction in the strict sense are Article 5 on  
22 material jurisdiction, Article 11, on temporal jurisdiction,  
23 Article 25(1) ^unnatural persons, and Article 26 on the age of  
24 the defendants. ^^.

25 Indeed, article 13 concerns, as has been mentioned, the exercise

1 of jurisdiction, while Article 12 relates to the preconditions  
2 of the exercise of jurisdiction so can be considered as not  
3 strictly speaking a jurisdiction provision in this sense.  
4 Under the strict view, only issues pertaining to Article 5, 11,  
5 25(1) and 26 would fall under jurisdiction as per  
6 Article 82(1)(a).  
7 Should the Appeals Chamber decide to adopt a broader  
8 understanding, it remains to be determined what it would cover.  
9 Particularly when it comes to Articles 12, 13, and interests of  
10 justice under Article 53.  
11 Regarding Article 12, understanding how it should be applied  
12 from a jurisdictional perspective requires distinguishing  
13 between at least two levels of relationship. The first level is  
14 the relationship between the Court and state parties. This  
15 perhaps is the easiest one to deal with, as that relationship  
16 can be conceptually understood as being based on consented  
17 delegated authority from state parties to the Court to exercise  
18 jurisdiction in a certain situation.  
19 The second relationship is maybe more complex, that is between  
20 the Court and not State Parties, which by definition have not  
21 given their general consent to the court exercising  
22 jurisdiction, for example, over their nationals. It is argued  
23 by some that such a situation is not problematic, because if  
24 individual states are able to exercise jurisdiction in their  
25 domestic courts, over nationals of other States, why could they

1 not delegate such jurisdiction to the ICC?  
2 These matters should, in our view, be dealt with in a more  
3 nuanced fashion, indeed the rule of general international law  
4 that allows States to exercise territorial jurisdiction over  
5 nationals of other states does not about ex-nihilo, it is a rule  
6 of international law that has developed over time as an accepted  
7 principle in the particular context of interstate relations, as  
8 crystallised in the lotus case in the PCIJ. It cannot be  
9 assumed that such a rule can be automatically transposed to the  
10 relationship between the ICC and not state parties, which  
11 requires identification of specific rules of customary law that  
12 applies to such circumstances.  
13 In relation to this, we note that this reasoning follows  
14 naturally from the case law of the court itself. The  
15 Appeals Chamber in its 6 May 2019 judgment relating to head of  
16 state immunities found that an international court and therefore  
17 the ICC had, and I quote paragraph 116, "a fundamentally  
18 different nature than a domestic court."  
19 ^what is interesting here is the consequence that the  
20 Appeals Chamber drew at the time, that the ICC was not bound by  
21 interstate rules of immunity and that the specific and distinct  
22 rule of immunity had to be identified in the context of the  
23 relationship between the ICC as an international court, and  
24 third states. If we apply this logic here, this means that the  
25 ICC C is not permitted to exercise jurisdiction over the nations

1 of non-consenting third states without identifying a permissive  
2 rule of international law allowing such exercise of  
3 jurisdiction. Yet, there is currently little evidence that such  
4 a rule exists, absent a blessing of the Security Council acting  
5 under chapter 7.

6 Moving on to article 13, a question that arises is whether the  
7 opening of an investigation should be considered an exercise of  
8 jurisdiction by the Court. In that respect, a plain reading of  
9 article 13c actually suggests that the exercise of jurisdiction  
10 would only take place after the Prosecutor has initiated an  
11 investigation under Article 15, and that therefore, technically,  
12 the opening of an investigation would not be an exercise of  
13 jurisdiction within the meaning of Article 13, even if each and  
14 every act that follows is, such as cooperation requests or  
15 arrest warrants.

16 However, a broader approach is possible. To consider that any  
17 issue which ultimately is material to the capacity of the court  
18 to exercise jurisdiction, should be considered jurisdictional in  
19 nature. And we have heard examples of this today.

20 There is logic to this argument, and it would mean, in the  
21 present situation, that the decision authorising the opening of  
22 an investigation, could --

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

24 MR JACOBS: [14:20:43] -- in a broad sense fall under  
25 Article 82(1)(a). Yet, as a consequence, a great number of icc

1 decisions would have to be considered jurisdictional in nature  
2 because they might have an impact on the Court as capacity to  
3 exercise jurisdiction. To give but a few examples, a decision  
4 on state cooperation, a decision on the confirmation of charges,  
5 or a decision to issue an arrest warrant. If the  
6 Appeals Chamber follows this logic it must therefore be ready to  
7 extend Article 82(1)(a) to all matters which have some material  
8 impact on the Court's exercise of jurisdiction.  
9 Finally, there is a question of whether a decision on the  
10 interests of justice is jurisdictional in nature. In that  
11 respect, one could argue that because Article 53 of the Statute  
12 explicitly distinguishes three criteria, jurisdiction,  
13 admissibility and interests of justice and that Article 82(1)(a)  
14 only mentions two of those, jurisdiction and admissibility,  
15 there is not much room to read interests of justice into  
16 Article 82(1)(a), the only way around that is to adopt a broad  
17 interpretation of the interests of justice-- of the jurisdiction  
18 and the exercise of jurisdiction ^^.  
19 This needs to be addressed specifically, because even if other  
20 respects of the decision are deemed to be jurisdictional it has  
21 to be proven that interests of justice is jurisdictional for an  
22 appeal to be possible on that specific point.  
23 point.  
24 point.  
25 We stand ready to develop any of these points further, orally or

1 in writing, at the where of the Appeals Chamber. Thank you.

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

3 The European Centre for Law and Justice, you have 10 minutes

4 please proceed.

5 MR SEKULOW: [14:22:42] Thank you, Mr President, your Honours,

6 and may it please the Chamber. I'm here today on behalf of the

7 European Centre for Law and Justice. The ECLJ has been

8 participating in making submissions to this court and to the

9 Office of the Prosecutor for a decade. As I said earlier, my

10 name is Jay Alan Sekulow, I have the privilege of appearing

11 before you today but also the privilege observing as the ECLJs

12 chief counsel during this time of cooperation with this court

13 and with the Office of the Prosecutor. The first question

14 before this Chamber is whether the Pre-Trial Chamber's

15 assessments under Article 53(1)(c) ... are jurisdictional for

16 the purpose of Article 82(1)(a).

17 The answer to that question is yes, for several reasons.

18 First, when the Prosecutor submits a request for authorisation

19 to investigate, she triggers a jurisdictional analysis because

20 the Pre-Trial Chamber is required to engage in the same

21 reasonable basis analysis under Article 15(4) as the Prosecutor

22 does under Article 15(3). Thus, pursuant to Article 53(1)(a),

23 that reasonable basis analysis includes addressing any questions

24 concerning jurisdiction.

25 Second, it is jurisdictional precisely because a decision with

1 respect to jurisdiction and admissibility must include when and  
2 how the Court may exercise jurisdiction. A decision with  
3 respect to jurisdiction includes one preventing the exercise of  
4 jurisdiction.

5 Third, while determining the existence of a reasonable basis to  
6 proceed, the Pre-Trial Chamber reviewed the various requirements  
7 for jurisdiction and admissibility.

8 In section 5 of the opinion it looked at the questions of  
9 subject matter and territorial jurisdiction. In section 6, it  
10 looked at whether the case was admissible under the  
11 complementarity threshold and the gravity threshold and section  
12 7, it looked at the decision whether the decision to investigate  
13 would serve the interest of justice.

14 All of these are important determinations with respect to  
15 jurisdiction and admissibility and for the Pre-Trial Chamber's  
16 filtering role to be effective it must review all of them.

17 As described in paragraphs had 4 and 894 of its decision the  
18 Pre-Trial Chamber's rationale to not exercise jurisdiction is  
19 largely founded on the expectation that an investigation will  
20 encounter, at best, noncooperation and, at worst, active  
21 resistance from non-party states. That is why, as indicated in  
22 our request for leave to appear before this Chamber, we advocate  
23 a cautionary approach with respect to adopting an expansive view  
24 of the Court's jurisdiction.

25 The Pre-Trial Chamber's acknowledgment of this resistance is not

1 only about efficiency it also recognises that such resistance is  
2 foreseeable and not a matter of speculation. This is especially  
3 true given the widely held legal positions disputing the Court's  
4 jurisdiction based on well established principles of  
5 customary international law.

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

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

13 Article 15(4) provides that the Pre-Trial Chamber's decision  
14 does not prejudice future findings on jurisdiction or  
15 admissibility. However, in accordance with the spirit and  
16 purpose of Article 19, questions relating to jurisdiction should  
17 be raised at the earliest opportunity. This would obviate  
18 unnecessary proceedings which are a severe infringement of an  
19 accused person's rights. It would also be a massive drain on  
20 court's resources. As the Trial Chamber noted in paragraph 40  
21 of its decision on the motion for declaration on unlawful detention  
22 and stay of proceedings in the situation in the Democratic  
23 Republic of the Congo, and I quote, "it is in the interests of  
24 law and primarily of the suspects who have been deprived of  
25 their liberty that the issue of possible unlawfulness of their

1 detention be raised and addressed as early as possible during  
2 the pretrial phase. Such a requirement is justified by the need  
3 to settle at the start of the proceedings any issues that could  
4 delay or obstruct the fair conduct therefore. The availability  
5 of a separate appeal procedure on preliminary issues such as  
6 jurisdiction and admissibility, as distinct from appeals on  
7 convictions or acquittals is, in our view, crucial to the  
8 efficient functioning of this court, as well as the interest of  
9 justice as highlighted in this very case. The Prosecutor here  
10 was attempting to press ahead against nationals of  
11 a non-cooperative, non-state party ex parte without any  
12 opportunity for that state's legitimate objections to  
13 jurisdiction to be considered. And the Pre-Trial Chamber  
14 reached the impugned decision on relevant matters under article  
15 15, including the interests of justice without fully considering  
16 the critical information about jurisdiction and admissibility."  
17 ^In the case of the United States, for example, these threshold  
18 observations would include, first, the principle of customary  
19 international law whereby a treaty does not create either  
20 obligations or rights for a third state without its consent.  
21 Second, the existence of specific treaties between the  
22 United States and the Islamic Republic of Afghanistan giving the  
23 United States exclusive jurisdiction over its personnel and,  
24 finally, the principle of complementarity, because the United  
25 States is demonstrably both willing and able to investigate and

1 prosecute its own casings.

2 As noted in paragraph 17 and 18 of the Pre-Trial Chamber's

3 Kenya's article 15 decision, when the Rome Statute was being

4 debated, there was a deep fear that, and I quote from the

5 opinion, "that providing the Prosecutor with such excessive

6 powers to trigger the jurisdiction of the Court's might result

7 in abuse." The drafters sought to answer these concerns, and

8 again quoting from the opinion, "through the current text of

9 Article 15 of the Statute, which subjects the Prosecutor's

10 conclusion that a reasonable basis to proceed proprio motu with

11 an investigation exists to review of the Pre-Trial Chamber at

12 a very early stage of the proceedings, namely, before

13 the Prosecutor may start an investigation into a situation."

14 ^doc.

15 ^doc.

16 ^doc.

17 ^doc.

18 ^doc.

19 ^doc.

20 ^doc.

21 ^doc.

22 That is why the Pre-Trial Chamber is statutorily required n our

23 view to consider these issues as part of its reasonable basis

24 analysis and that why these issues should be subject to appeal

25 under Article 82(1)(a).

1 If it please, the the Court, thank you.

2 PRESIDING JUDGE HOFMANSKI: [14:30:09] Thank you Mr Chairman M

3 r Sekulow. The Global Rights Compliance, your 10 minutes

4 begins now, please proceed.

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

6 As indicated in paragraphs 8 to 11 of our request for leave to

7 submit observations, we submit the victims have standing to

8 initiate an appeal.

9 Our arguments are in the alternative, first, we argue that

10 victims have standing as a party to initiate an appeal pursuant

11 to 82(1), in the context of these proceedings, that they qualify

12 as parties in circumstances such as these where their legal

13 interests are so affected and where the outcome of these

14 proceedings define whether victims have access to justice at

15 all. And we adopt the victim submissions on these issues.

16 In case the Appeals Chamber doesn't find these arguments

17 persuasive, we argue in the alternative, that victims have

18 standing pursuant to Article 68(3). In sum, that where victims'

19 interests are affected, Article 68(3) provides victims with the

20 right to express their views and concerns at any stage of the

21 proceedings determined appropriate.

22 Moreover over,, it obliges the Court to determine the precise manner

23 in which this shall occur, constrained only by the requirement

24 that any modality must not be prejudicial or inconsistent with

25 the rights of the accused, and a fair and impartial trial.

1 As recognised by Judge Mindua in his partially dissenting  
2 decision, dated 17 September 2019 at paragraph 28, it is through  
3 Articles 68(3), ^ that the judges must determine the  
4 participatory rights of victims.  
5 We submit that that determination must involve designing  
6 appropriate modalities to endure the full expression of those  
7 views and concerns and in a manner that gives full effect to the  
8 relevant provisions and the purpose of the victim-centred  
9 Statute.  
10 In the silence or ambiguity of the Rome Statute, the manner in  
11 which views and concerns are presented and considered must be  
12 interpreted to ensure meaningful victim participation.  
13 Meaningful, effective and independent. It follows, we submit  
14 that the more compelling the interest the more those modalities  
15 must empower. In the prevailing circumstances, Article 68(3),  
16 in our submission, dictates that victim express or be allowed to  
17 express their views or concerns by way of initiating an appeal.  
18 We submit that Judge Mindua's approach to Article 68(3) is  
19 correct and is also pored by supported by the ICC's injures prudential  
20 history. The ICC has recognised that designing specific  
21 modalities may, according to the circumstances, be essential to  
22 ensure effective participation.  
23 As Ms Hirst touched upon this morning, this has already  
24 effectively occurred. Even in circumstances where the text of  
25 the Rome Statute or the rules appear on their face to limit

1 participation to only the Prosecution and defence, both ICC  
2 trial and Appeals Chambers have shown a willingness pursuant to  
3 Article 68(3) to design modalities that allow victims to express  
4 their views and concerns in a manner that provides them with  
5 competencies that appear to be reserved for parties.  
6 Specifically, this can be most clearly seen in relation to the  
7 submission of evidence, the challenging of the admissibility of  
8 evidence and the inspection of evidence. In relation to the  
9 submission of evidence, Article 6(4), ^8(b) and 69(3), ^ state  
10 that only parties have that right.  
11 In relation to challenging the admissibility or relevance of  
12 evidence, Article ^64(9) provides that this right only vests in  
13 a party.  
14 Finally in relation to the inspection of evidence, Rule 77, 78,  
15 81 and 82 expressly provides rights to only the Prosecutor and  
16 the defence.  
17 However, in each instance and in opposition to the Prosecutor's  
18 arguments and floodgate fears both trial and Appeals Chambers  
19 have concluded that Article 68(3) empowers them to determine to  
20 decide on modalities that provides rights reflective of those  
21 apparently vested in only the parties.  
22 Hence the decision on victims' participation rendered in the  
23 Lubanga case on 18 January 2008, victims along with the parties  
24 were permitted to submit challenge and inspect evidence. In  
25 each instance the Chamber considered that the victims' interest

1 was sufficiently affected, Article 68(3) was engaged, in light  
2 of those interests, the victims ought to be able to express  
3 their views and concerns in the same way as the parties.  
4 Of course, in each instance the Chamber was concerned to ensure  
5 that modalities was consistent with the object and purpose of  
6 the statutory PRAEUPL framework. In relation to submitting evidence the  
7 Trial Chamber concluded that this modality was congruent with  
8 the Trial Chamber's authority to request the submission of all  
9 evidence that it required for the determination of truth under  
10 Article 69(3) of the Statute. In relation to challenging  
11 evidence, a right, as I say reserved apparent plea for parties,  
12 the Chamber decided that victims could express their concerns  
13 through challenging the evidence on a case-by-case basis in  
14 circumstances which were, as the Chamber found p commensurate  
15 with the fair trial rights that were engaged in Article 69(4).  
16 Similarly, in relation to inspecting evidence, the Trial Chamber  
17 in Lubanga found it consistent with the overall thrust of the  
18 procedural framework.  
19 Numerous Trial Chambers have adopted this approach in relation  
20 to inspection.  
21 The Appeals Chamber in the Lubanga case also endorsed such an  
22 approach. The Appeals Chamber examined article 67 three and the  
23 relevant statutory and rel will a tory framework and concluded  
24 that victims could indeed exercise modalities of submitting and  
25 challenging evidence. Indeed, they were necessary in the

1 circumstances to ensure affective examine meaningful

2 participation.

3 The approach we urge as an alternative corresponds, it seems,

4 with the Prosecutor's position in the current proceedings. At

5 paragraph 34 of the consolidated response to the victims they

6 appear to accept, at least in the case of states, that the

7 critical question concerning who might be considered a party for

8 the purpose of initiating appeals rests upon two threshold

9 questions, one, whether the actor in question has sufficient

10 interest in the specific proceedings.

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

12 MR JORDASH: [14:38:30] Thank you. And two, whether the

13 modality envisaged is consistent with the broader procedural

14 scheme of the Statute.

15 of the Statute.

16 of the Statute.

17 of the Statute.

18 As for question one, it is difficult to envisage a situation

19 where the victims' interests are more compelling. We adopt the

20 victim submissions on threes issues.

21 As regards question two, we submit that the broader procedural

22 scheme of the Statute designed to provide proactive victims'

23 rights as contained in Articles 153, 53(1)(c), 19(3), 21(3) and

24 Rules 50, 59 and 93 is wholly consist be tent with recognising

25 victims' rights to be able to express their concerns and

1 interest by initiating an appeal.

2 In our submission, the combination of these aspects of the

3 procedural scheme tend inexorably towards the right of

4 initiating an appeal. First. Victims have a right to

5 participate in the article 15 proceedings, second,

6 Article 53(1)(c) obligates the Prosecutor to consider the

7 interests of victims in deciding whether to initiate an

8 investigation into a given situation.

9 Third, as we have heard from the victims and we adopt those

10 submissions, victims have specific rights in proceedings

11 relating to jurisdictional and admissibility. Four, rule 93

12 allows the Chambers of the court to seek the views of victims on

13 any issue.

14 Fifth, the right of victims to initiate proceedings, for

15 instance, by filing applications applications and requests through 68(3) has

16 already been recognised in the Court's jurisprudence.

17 Sixth, and finally, Article 21(3) requires the Court to

18 interpret its provisions in line with international human rights

19 law.

20 At a minimum, this requires acknowledgment that a victims' right

21 to remedy is fundamental and requires corresponding protection.

22 In our submission there can be no question of any floodgate

23 fears. The victims would need to demonstrate on a case-by-case

24 basis, whilst in the present circumstances such an application

25 would be difficult to resist, if not impossible to resist, it

1 would nevertheless ensure even greater control by the Court.

2 PRESIDING JUDGE HOFMANSKI: [14:40:55] Excuse me, counsel, the

3 time is over doosh doosh those are our submissions. Thank you,

4 thank you, your Honour.

5 PRESIDING JUDGE HOFMANSKI: [14:41:03] Thank you very much,

6 counsel.

7 The of a Afghanistan human rights organisation is the last

8 amici curiae that asked for making submissions related to the

9 preliminary questions. considered today. ^.

10 You have 10 minutes. Now please proceed.

11 MR MILANINIA: [14:41:23] Good afternoon, your Honours, good

12 afternoon, it is my honour and privilege to appear before you

13 today on behalf of the 17 human rights organisations based in

14 Afghanistan. These are organisations that have spent the last

15 two decades enduring conflict and violence, to services war

16 victims and human rights victims in Afghanistan. These are

17 organisations that are truly on the front lines, having helped

18 thousands of Afghans over the past years and in the past three

19 months alone have surveyed and interviewed hundreds of Afghans,

20 so that you can benefit from direct voices on the ground in

21 Afghanistan.

22 Based on our os and our communications with victims, moneyed

23 mentally what victims want is to be taken seriously, to have

24 their voices heard. To be genuinely understood and to know that

25 their opinions and hopes will not be sacrificed, marginalised or

1 abused for political purposes.

2 Your Honours, it is our contention that the Pre-Trial Chamber

3 failed in all of these respects and we believe that the outcry

4 that you hear today, including questions concerning this court's

5 will be the result of those failures. Our

6 submissions today and/or Friday are intended to aid you in

7 remedying those mistakes.

8 Your Honours, in relation to your group A questions we agree

9 with our colleagues that victims have standing to enforce their

10 rights during the pre-investigative stage. But where we differ

11 from our colleagues is the scope of that standing. We submit

12 that the standing victims enjoy is coextensive or coterminous

13 with the rights or obligations victims enjoy under the Statute

14 or the Court's legal text under Article 15(3) is to make

15 representations under any oral decision here our

16 submission is the right of denial and it is essential for

17 the Chamber to address that denial, regardless but particularly

18 if this Chamber chooses to deny victims a right to appeal

19 decisions made under Article 53.

20 Absent appellate guidance on Article 15(3) which is currently

21 lacking, your Honours, future chambers of this court risk

22 alienating victims the same way Pre-Trial Chamber II did in this

23 Your Honours, as you well know, the Statute guarantees victims

24 the right to make representations under Article 15(3), those

25 representations are also necessary for any Article 53(1)(c)

1 inquiry which specifically requires an assessment as to the  
2 victims' interests and there is simply no substitute in that  
3 assessment than the opinion of the victims themselves.  
4 The right to make representations however, has to be effectively  
5 enabled. This means that victims must be notified and have  
6 sufficient information concerning their rights and be given  
7 a reasonable opportunity to make representations considering  
8 their specific circumstances.  
9 Because without these requirements, the process of soliciting  
10 the opinion of victims would be reduced to a formalistic  
11 exercise that gives the appearance, but not the reality of  
12 meaningful victim input. It is, your Honours, reasonable,  
13 timely, and accurate notice in particular that allows victims to  
14 assert their rights and facilitates their participation. It is  
15 the door through which all other rights for victims are  
16 afforded.  
17 The fact that representations must be effectively enabled is  
18 supported by statements by the assembly of state parties,  
19 international human rights instruments and national laws  
20 concerning victim participation, the authorities of which,  
21 your Honours, I point to in pages 3 to 9 of our table of  
22 authorities which you can find in tab 1 of the binder we have  
23 provided you.  
24 In this case, however, Pre-Trial Chamber II failed to e  
25 ffectively enable victim representations, especially by Afghan

1 women and Afghan children.

2 And the evidence for that is summarised on pages 14 to 16 of our

3 table of authorities, which reference sworn declarations of

4 leaders of civil society organisations who worked with

5 the Registry in the victim outreach process and who are

6 eyewitnesses to the victim representation process.

7 As those victims detail, the outreach process in this case was

8 flawed to such an extent as to bring into question the sincerity

9 of the pre-Trial Chamber's invitation to victims. For example,

10 victim input was solicited via an on line intake process, even

11 though only 15 per cent of of a gabs had internet access and

12 only approximately 30 per cent are literate. The representation

13 period was only open in the months of December and January.

14 Even though those are the coldest and least traversable months

15 in Afghanistan.

16 The Registry had no presence in Afghanistan and had no outreach

17 or public information activities in the country to try to reach

18 victims directory. The Pre-Trial Chamber failed to order a mass

19 media campaign using Pushtu or Dari speaking radio or television

20 and the Pre-Trial Chamber failed to provide victims sufficient

21 time.

22 The they provided victims two months, a period wholly

23 insufficient for a country where information about the ICC was

24 scarf, where the Court lacks a physical presence, where ongoing

25 conflict hampers access to many of the areas, where many people

1 are illiterate and do not have internet access or stable  
2 electricity and where, your Honours, for very good reason the  
3 population has learned to be careful about sharing information  
4 that may subject them to harm.

5 These errors had a clear and discernible impact on the ability  
6 of Afghan victims to make representations. In a country of over  
7 35 million people suffering four decades of war where  
8 69 per cent of the population believed to be victims of war  
9 related violence, only 699 victim representations were received  
10 by the Registry, only 165 from you individuals and for that,  
11 your Honours, I refer you to paragraph 23 of the registry's  
12 report, annex to filing 29. But equally TKWRAEUFB is the fact  
13 the Pre-Trial Chamber took into measure to enable representations  
14 by women or children who are victims of crimes, as required  
15 under international human rights law the authorities of which  
16 you can find on pages 10 to 14 of our table of authorities.

17 For example, with regards to child victims of which there are  
18 hundreds and thousands in Afghanistan, the Pre-Trial Chamber and  
19 the Registry failed to provide child sensitive materials and  
20 information ... to attempt or accommodate Afghan women and girls  
21 who are faced with systematic violence and human rights  
22 violations, including sexual violence, abuse and trauma.

23 As your Honours are aware, many Afghan women, female victims,  
24 feel an acute sense of stigma and shame in sharing their s  
25 tories. They often also face the additional hurdle of having

1 to seek permission to leave home or need to be accompanied by a

2 male relative.

3 Yet nothing was done --

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

5 MR MILANINIA: [14:49:31] Thank you very much. Yet nothing was

6 done to ensure these women were properly informed of proceedings

7 and how they could participate and instead all efforts and all

8 appears by leading womens' rights groups in Afghanistan for more

9 time to ensure that women were properly represented were i

10 gnored.

11 And your Honours n support of this this I draw your attention to

12 tab 7 of the binder, of our binders which contains a declaration

13 by one of Afghanistan's leading women rights figures SW-Z ... on

14 precisely this issue.

15 Your Honours, this deliberate disregard for the situation of

16 women and children had a considerable impact. Only 10

17 representations were made on or behalf of women, and only 9

18 representations were made on or behalf of children.

19 And I refer you to pages 10 to 12 of the Registry's report,

20 annex to filing 29.

21 And when the Pre-Trial Chamber was informed of these massive

22 deficiencies, no corrective action was taken in the over 420 d

23 ays between the end of the representation period and

24 the Chamber's Article 53 decision.

25 Your Honours, in a separate opinion, Judge Mindua claimed the

1 ICC to be a victim-centred court. In our opinion, approximate  
2 however, the errors that we have just described, ebb specially  
3 when you consider them collectively demonstrate that the  
4 Pre-Trial Chamber did not sincerely or genuinely solicit the  
5 opinion of Afghan victims and the victims now turn to you to  
6 right that course.

7 Thank you for your time.

8 PRESIDING JUDGE HOFMANSKI: [14:51:17] Thank you very much,  
9 Counsel.

10 Office of the Prosecutor, you may briefly respond, if you wish,  
11 the observation of the amici curiae. I would like to ask you to  
12 keep the five minute time limit.

13 MR GUARIGLIA: [14:51:32] And I certainly intend to do so,  
14 your Honours. I will first make clear that I will only be pond  
15 anding to the issues that fairlily fall within the parameters of  
16 this appeal and accordingly I will not be touching on the issue  
17 of ... non-state parties which is not before you. Your Honours,  
18 this has been a very important hearing, I think we will all  
19 agree on that, and we have heard some powerful stories that  
20 remind us of the wisdom behind the decision of making victim  
21 participation a central feature of the Rome Statute. But,  
22 your Honour, there was no need for standing for this. All of  
23 submissions that you heard today, all the stories that victims  
24 presented to you today were stories and submissions that could  
25 have been made and probably may have been made, even in the

1 context of the order approximate TPHAEUR participatory rights  
2 afforded by the stat the Statute. So in this sense for thus is this is  
3 proof that the Rome Statute system works. There is no need for  
4 you to create a next Russ remedy for the independent voice to be  
5 heard they have had that right already and they have exercised  
6 that right today ^^.

7 In this sense, your Honours, we agree with OPCV that the  
8 Appeals Chamber is in a position to decide on all the issues,  
9 all the critical issues, regardless of whether you decide to go  
10 via the Article 82(1)(a) or (d) route and it was in this sense  
11 we referred to the issue of standing as technical issues not in  
12 the sentence of diminishing somehow their importance.

13 In general, I will rely prim PHARLly or our written submissions  
14 in response, but perhaps a couple of points to be made. First  
15 one is there may be some degree of confusion as to what decision  
16 under Article 15(4) denying commencement of the investigation  
17 under the interests of justice lim be actually means. There is  
18 no he estoppel or obstacle ... on the basis of new facts and new  
19 evidence.

20 So the possibility of returning to the Pre-Trial Chamber and  
21 starting again the process, so to speak, always exists and  
22 actually it may be that in certain circumstances the Prosecutor  
23 concludes that it is preferable to do that than to embark on a  
24 lengthy appellate proceedings, for instance if slow \*\*\* PLEASE SLOW  
25 DOWN FOR THE INTERPRETERS AND COURT REPORTERS \*\*\*.

1 And that choice must be respected. That is the regime of the

2 Rome Statute.

3 This also under secures why, in our view, this decision, the

4 decision that is under challenge was not a decision in relation

5 to jurisdiction.

6 But as we say, your Honours, and it is true what Mr Gaynor and

7 others have said in the responses, that there are elements in

8 the decision that are jurisdictional in nature but to our, in ow

9 viewer the decision doesn't turn on those elements or those

10 aspects. It's not that the situation that the Pre-Trial Chamber

11 said in relation to this cluster of crimes I do not awed rise

12 commencement of the investigation because they do fall outside

13 the jurisdiction of the court and in relation to those that I

14 conclude fall within the jurisdiction of the court interests of

15 justice applies. No.

16 They applied interests of justice across the board. So those

17 jurisdictional elements were ultimately absorbed by the umbrella

18 conclusion that the interests of justice applied to the

19 situation as a whole and it was on this basis that we decided

20 that the proper way to bring this matter to your Honours'

21 attention was via Article 82(1) d and not via 82(1)(a).

22 ^.

23 Now, your Honours, we have heard some ... invitations to engage

24 ... we purposive invitations, there is a element to them and I

25 think in this sense we would suggest that you approach with care

1 of some of the examples that have been given to you as instances

2 the Appeals Chamber went beyond the terms of the Statute. In

3 our reading of the same examples the exam better also staid

4 within the express terms of the Statute. For instance,

5 the Chamber did not create an ex-stat ... it merely said that

6 under Article 68(3) victims can petition the Trial Chamber to

7 exercise its authority to Article 69(3) ... to call for a

8 dditional evidence. It always stayed within the brownedris of

9 the strict letter of at no time statute.

10 Finally, your Honours, we have heard with interest the

11 submissions made by Mr Paul from Pawel from the cross-border

12 victims. One point I have to make here is this appeal is not

13 case selection, it is not about the criteria the Prosecution may

14 use to determine when to investigation and what to investigate.

15 This is not before you. This is not the matter in this appeal.

16 And indeed it is the Prosecutor's prerogative to determine which

17 incidents and which suspects it will bring to investigation.

18 Having said this, we have recognised that if the

19 Pre-Trial Chamber's findings are reversed in the manner we wish

20 them to be reversed, the incidents included in the petition of

21 the cross-border victims may properly be captured within the

22 parameters of any future investigation.

23 This concludes my submissions, your Honours.

24 PRESIDING JUDGE HOFMANSKI: [14:57:11] Thank you, counsel, very

25 much.

1 Now I will turn to Legal Representative of Victims group 1, you  
2 also may briefly respond, if you wish.

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

4 PRESIDING JUDGE HOFMANSKI: [14:57:26] Please.

5 MR GAYNOR: [14:57:27] I am going to respond to submissions made  
6 by Mr Jay jobs and Mr secretary low and Mr Gauger only. I think  
7 in Mr Ajobs' submissions he subjected we support an  
8 interpretation of the at that time TAOUT which would give a  
9 fected communities the right to be recognised as victims and  
10 therefore the right to launch an appeal that . That is not our  
11 position. We do not support that interpretation of rule 85 of  
12 the Rules of Procedure and Evidence, rule 85 clarifies that  
13 victims are natural persons who STPRUFRD a crime within  
14 the Court's jurisdiction. And rule 85b goes on to include  
15 organisations or institutions that have sustained direct harm to  
16 any of their property which is dedicated to religion, education,  
17 art t science or characterrable purposes. And it goes on to  
18 define that exhaustively. Those, those institutions can  
19 participate if they can establish that they fall within that  
20 definition. We do not support an ex-passion of the term victim  
21 to cover affected communities.

22 Secondly, my learned friend Mr Secretary low referred to the  
23 existence of ^ cope gent legal arguments. That should be  
24 enough to PREB vent the Court exercising jurisdiction. It's the  
25 job of counsel to present cogent legal arguments either for or

1 against the exercise of jurisdiction, whether one is a  
2 Prosecutor, whether one is a defence lawyer, whether one is a  
3 victims' lawyer, cogent legal arguments themselves are never  
4 enough to prevent the exercise of jurisdiction.  
5 In respect of the standing of the United States to launch a  
6 challenge against an exercise of jurisdiction under  
7 United States nationals, I would point out that Article 19(2) b  
8 does present a remedy for that. Article 19(2) b is not limited  
9 to states parties, any state may make a challenge under 19(2) b,  
10 if it can -- the United States would be more than welcome, I am  
11 sure, to present evidence evidence that it is begin WEUPBLly  
12 investigating or prosecuting cases against United States  
13 nationals, that remedy exists for the United States and they can  
14 start that, as far as I know, as soon as they like.  
15 And as part of that, they could present evidence and arguments  
16 concerning agreements between the government of Afghanistan and  
17 the government of the United States and they can be ruled upon  
18 in the ordinary proceedings. That process is stated to apply to  
19  
20 cases but nevertheless it would not necessarily prevent  
21 the Court from considering a challenge in relation to a  
22 situation.  
23 We agree with the Office of the Prosecutor and the OPCV that  
24 whatever you decide about the Article 82(1)(a) versus  
25 Article 82(1)(d) route to get here to this appeal, we do believe

1 it's well within your jurisdiction to consider all issues which  
2 have been raised by the parties and to rule on all of them.  
3 Now, returning to the Pre-Trial Chamber, which was an option  
4 suggested by Mr Gauger and others is from the victims'  
5 perspective not an acceptable solution. It is not an acceptable  
6 solution for several reasons, there is nothing in the  
7 Impugned Decision to give us any reason to believe that the  
8 Pre-Trial Chamber will take a different view on three questions,  
9 the first is the interests of justice question, the second is  
10 the territorial scope of the war crime of torture and  
11 associated war crimes, and the third question is the  
12 territorial and temporal and substantive scope of any  
13 investigation which it might be minded to conduct. We PWHAOEFB  
14 they made very serious errors on each of those issues and  
15 your Honours must correct them returning to the  
16 Pre-Trial Chamber is not an acceptable remedy from the victims'  
17 perspective.  
18 Now, finally, Mr Guariglia I think when he was talking  
19 about the ways in which the Court has purposively interpreted  
20 the Statute, he said they were all issues concerning matters  
21 which were quite clear under the Statute already. Well one  
22 thing that is quite clear under the Statute already is the  
23 requirement in Article 63 that the accused shall be present  
24 at trial. Nothing could be clearer. On those -- on the clear  
25 understanding of those words the accused shall be present in

1 trial. No now, in the Ruto case the accused was permitted to be  
2 absent for well over half of the trial days I think it was  
3 considerably in excess of that percentages of 50 per cent and  
4 that has been upheld both by the Trial Chamber in the Ruto case  
5 and the Appeals Chamber that is in the instance where the Court  
6 took the view that the purposive interpretation of the Statute  
7 actually meant reading Article 63 top mean that the accused may  
8 be absent from trial. Those are all of the arguments I have at  
9 this point. Thank you very much. Mr President.

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

11 Then legal representatives of victims group 2 can also briefly  
12 respond. ^speaker thank you, your Honours, particularly in  
13 light of the comments just made on behalf of LRV one we will  
14 give back our five minutes and stand ready to answer any  
15 questions from the bench, thank you.

16 Thank you very much. , counsel.

17 And the same question to LRV group 3, you mass also respond to  
18 observations of the amici curiae please.

19 NEW SPEAKER: [15:03:43] Mr President, your Honours, I a  
20 pologise, I did not hear the last, the last several words you  
21 said.

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

24 NEW SPEAKER: [15:04:02] if it pleases the Court, a short answer  
25 to two statements made today. One by professor Pawel Wilinski

1 acting as amici curiae and secondly to the statement made by the  
2 Office of the Prosecutor.

3 Firstly, with regard to the opinion presented by professor  
4 Pawel Wilinski, we agree absolutely that the standard  
5 established today will establish whether victims in the future,  
6 on a case-by-case basis, granted, will have the chance to appeal  
7 a refusal to award an investigation and, perhaps most  
8 importantly, in a situation where the Office of the Prosecutor  
9 refuses to do so. I think it needs to be stressed that  
10 the Prosecutor has many factors she takes into account  
11 legitimately in deciding whether to appeal such as a decision  
12 refusing to award such an investigation, including public  
13 interest, follow-up issues. In the Prosecutor's view these  
14 factors may outweigh the criteria which are essential from the  
15 PROEUF of the victims, the justified interests of the victims  
16 and their rights to an effective remedy under the Rome Statute.

17 With regard to the comments made by the Office of the Prosecutor  
18 just now, regarding the possibility of returning by the Office  
19 of the Prosecutor to the Pre-Trial Chamber with a renewed  
20 subsequent request for authorisation of an investigation,  
21 perhaps with new evidence, new facts, new argumentation, as a  
22 sort of substitute for an appeal against the decision refusing  
23 to allow, award an investigation. This, while it may be an  
24 interesting avenue for the office of the prosecutor to explore, is not an effective remedy available to victims. This

1 is a course of action which is at the role discretion

2 of the Prosecutor who, as mentioned earlier, is not just the

3 representative of the interests of the victims, but makes her

4 decisions taking into account the other criteria and factors

5 which I have just mentioned.

6 If the Office of the Prosecutor seeks authorisation a second

7 time to investigate, the victim will be once again in a

8 situation with no voice and no effective remedy if the

9 Pre-Trial Chamber once again refuses to allow the investigation

10 to go forward.

11 So this scenario does not address the problem raised by the

12 victims' legal representatives today, the lack of an effective

13 remedy to a decision blocking the vective investigation, which

14 is necessary in order to vindicate procedurally the rights and

15 freedoms of the victims represented before the Court.

16 Are

17 Thank you.

18 PRESIDING JUDGE HOFMANSKI: [15:07:14] Thank you, counsel.

19 And now we will have questions from the bench. I would like to

20 invite Judge Howard Morrison to ask the first question for M

21 r Gaynor, I understand. Please.

22 JUDGE MORRISON: [15:07:31] just one question for Mr Gaynor.

23 Under Article 60 three, what's your view of the proposition

24 that an accused may be present through counsel?

25 MR GAYNOR: [15:07:51] Well, your Honour, it's not an argument I

1 had actually prepared myself for.

2 The term "the accused" in the context of presence at trial, I

3 would read to mean the physical presence of the accused person

4 in the courtroom.

5 At other parties of the proceedings the interests of the accused

6 are of course presented by his or her counsel, but ^ the reason

7 why the presence at trial requirement was included in the

8 Rome Statute was to do with having the accused present to hear

9 the evidence against him as part of the process of justice and

10 not merely to put the accused on notice and to give the accused

11 an opportunity to respond to the arguments made by

12 the Prosecutor. So the physical presence of the accused in the

13 courtroom is an integral part of a fair trial from the

14 perspective of victims. So I would read the presence of the

15 accused in the courtroom to apply to the physical presence of

16 the accused.

17 JUDGE MORRISON: [15:09:11] you said you hadn't accepted or

18 prepared the question. What else would you have said if you h

19 ad -- I think you? That's an observation, not a question.

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

21 There is also question from my learned colleague Judge

22 Luz del Carmen Ibáñez Carranza. Please, Judge Ibáñez.

23 JUDGE IBÁÑEZ CARRANZA: [15:09:50] Thank you,

24 Mr Presiding Judge.

25 The question is for the OTP, about standing. By interpreting

1 the word in "either party of Article 82(1) as either  
2 of the Prosecutor or the Defence, excluding victims from those  
3 who can appeal a decision specifically at the Article 15 stage  
4 could, the the Defence be entitled to ... the respondent of the  
5 appealing Prosecutor, and if the response is yes, if the  
6 Appeals Chamber interprets it as such, limiting the wording  
7 "either party" to a Prosecutor and defence, could it contradict  
8 its 24 October 2019 decision recognising the OPCV as  
9 amicus curiae and not a party in this appeals? It's clear?  
10 Thank you.

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

14 The point -- the use of the term "either party" in the context  
15 of Article 28 one a is, as I hope I made clear one I made my  
16 submissions is 82(1)(a) deals with a wide range of decisions  
17 involving jurisdictional or admissibility issues.

18 Now, some of the decisions will take place in the context of  
19 inter partes proceedings, in which case the Defence and, both  
20 the Defence and the Prosecutors may appeal. Some of those  
21 procedures may take place in the context of ex parte p  
22 roceedings, for instance, going back to the Ntaganda appeal,  
23 the first appeal ever heard by this Chamber there was a matter  
24 of admissibility raised ex parte by the Prosecutor in the  
25 context of Article 28 proceed willing, relating to the issue of

1 warrant of arrest against Mr Ntaganda. So there there was no  
2 defence because it was an ex- -- there was no defence because it  
3 was an ex parte proceedings.  
4 Article 15 I think this same chamber has recognised that, it is  
5 an ex parte proceeding, ... it is a proceeding triggered by  
6 the Prosecution and the only TKPOEPGS that ex parte nature is  
7 the fact that the Statute correctly allows the victims to make  
8 representations in order for the Pre-Trial Chamber to have  
9 a more informed view of the request for authorisation. But that  
10 doesn't doesn't turn the proceedings into an inter partes  
11 proceeding, it remains an ex parte proceedings ... in that  
12 context there is only one party and it is the PROTS security, as  
13 would happen in the context of any ex parte proceedings, and I  
14 do not see any contradiction, OPVD is not here as a party, is  
15 here as I understand as an amici curiae, making representations  
16 to assist the Chamber in reaching the right re-summit. So, on  
17 the contrary, I think that there is a logic that KEBGZ all those  
18 elements.

19 JUDGE IBÁÑEZ CARRANZA: [15:13:06] So just to be clear for you,  
20 for the OTP ^^ in this appeal there is only one party the.

21 MR GUARIGLIA: [15:13:15] There is one party and there is a ...  
22 of participants, some are victim some are Rule 103 amici and all  
23 ...cy sissing the Chamber to reach a condition Crete result.

24 JUDGE IBÁÑEZ CARRANZA: [15:13:32] A second question for the  
25 OTP, it is about jurisdiction, the scope of the

1 Impugned Decision on dur SKWR\*EUBGS.

2 Whiled the impunned deSAOEUGS noted in paragraph 25 that

3 the Prosecutor has indicated in her SKW that they had not

4 reached a determination regarding the representation that

5 individuals were attacked by airstrike drones, has been any

6 decision SPW, that but nevertheless the Impugned Decision in its

7 paragraph 40 limited the scope of this investigation or the

8 investigation to this incident. Do you think does this

9 limitation amount to a finding of the lack of jurisdiction over

10 such alleged attacks or admissibility of a potential case e

11 merging from those attacks? And, also in the same vein, the

12 Impugned Decision has made in its paragraph 54 regarding -- and

13 in others -- regarding the crimes that allegedly commenced in

14 Afghanistan.

15 MR GUARIGLIA: [15:14:51] Yes car KPAR and were com summated

16 outside Afghanistan this is cross bodder victims and have made

17 determinations regarding the crimes allegedly commenced in

18 Afghanistan and some summated outside and vice versa, does the

19 OTP think or not that those determinations amount to an

20 admissibility or junction diction question.

21 MR GUARIGLIA: [15:15:15] I think, your Honour, there are two

22

23 clusters of incidents, so to speak that the Chamber, in our v

24 iew, in both instances errorroously dealt with. The first

25 clusters of incidents that the OTP did not include in its

1 request for authorisation, and pursuant to the long established  
2 practice of this institution, we did so in the assumption that  
3 once authorisation was granted we could expand the investigation  
4 into other incidents that had not included in the questions but  
5 fell within the temporal and territorial parameters of the  
6 situation. Right.  
7 In relation THO those, the Chamber came back and said, no,  
8 actually I am only authorising those incidents that you included  
9 in your request and those you did not include in your request  
10 are not authorised and you have to come back with a new request  
11 for ... so it is a bit of an anomaly in the case law of ... os  
12 only a procedural matter. We could conceivably come back and  
13 say now we want you authorise for an investigation, these are  
14 the 50 incidents that are not clued in the ... now there is a  
15 second cluster of incidents and there there is a jurisdictional  
16 connotation of the Chamber's findings, those are those incidents  
17 the Chamber said because they start in one part of the Terry or  
18 they continue in another or they are somehow ... ..  
19 Afghanistan they fall outside the scope of the Court's  
20 jurisdiction.  
21 Now, as I think -- well, as I tried imperfectly to explain in  
22 our reply, had the Chamber then said in the dispositive part in  
23 relation THO these incidents there is no TKEURS ... .. and  
24 relation to all the rest interests of justice he would have had  
25 a jurisdictional ruling coming from the Pre-Trial Chamber and

1 maybe that's what the pre-TROEURL should have done, it didn't.

2 It said in relation THO all these incidents regarded ... so, in

3 our view, the analysis of the Pre-Trial Chamber of those

4 incidents, even if it has jurisdictional connotations is simply

5 is step in its defective reasoning leading to its blanket

6 interest of justice determination so to speak. It is a tricky

7 situation in a, what we thought about this. We decided that

8 they need clear and appropriate rally appropriate avenue to

9 bring this before you was to bring the totality of the decision

10 via Article 82(1)(d) because we concluded there was no

11 jurisdictional connotation. If there was one it is confined to

12 those cluster of incidents a TAOEUPBLly component within a wider

13 decision we think you should look into that because it is

14 a defective finding of the Pre-Trial Chamber you should look

15 into that as part of the wider, he fallly effective in our

16 humble submission decision on interest of justice. I hope I

17 have dealt with your question, your Honour.

18 JUDGE IBÁÑEZ CARRANZA: [15:18:29] Just a follow-up question,

19 doesn't you think that this limitation put by the

20 Pre-Trial Chamber is a limitation to the Prosecutor proprio motu

21 power to exercise the Court's jurisdiction under Article 13o

22 of the Statute? Don't you think it's a limitation?

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

24 JUDGE IBÁÑEZ CARRANZA: [15:18:51] The determination of the

25 Pre-Trial Chamber on the last incidents ^.

1 MR GUARIGLIA: [15:18:58] Well, it's difficult to tell,  
2 your Honours. At the end of the day, ultimately it should have  
3 been a jurisdictional approximate finding saying you have  
4 requested authorisation to deal with all these incidents, but I  
5 consider that actually these incidents I cannot award  
6 because they are manifestly outside of the scope of the  
7 jurisdiction so it would have been actually ultimately  
8 a decision under Article 15 simply saying authorisation is not  
9 granted because jurisdiction is not present in relation to this.  
10 I don't think Article 13 applies here so much. I think it is an  
11 article 15 determination and within the universe of article 15  
12 determination there is a jurisdictional element to that. The  
13 problem is at the end of the day the Chamber did not rule on  
14 that basis, it ruled on the basis of interests of justice. So  
15 it is a bit of a confusing situation, problem for everybody, but  
16 this is the way we have analysed it.

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

19 JUDGE IBÁÑEZ CARRANZA: [15:20:02] A lot of work today. A final  
20 question I think for the OTP. I think that may this last  
21 question could be responded also for one of the representative  
22 of victims. I don't know who would like. It's about your  
23 submission this morning. According one of your submissions this  
24 morning regard to go the international human rights of victims  
25 to access to justice and to the right to an effective remedy.

1 You said that this -- the question of the recommend initial or  
2 enforcement of this, of this rights, human rights is for the  
3 states and not for the Court. Maybe I am wrong, but I think I  
4 heard that.  
5 Regarding that, I would like to ask you, if it's like that, then  
6 why or what is the purpose of Article 21(3) in the Statute? And  
7 why, regarding also the wording, the concrete wording of the  
8 Article that reads Article 21 three the application and  
9 interpretation of law pursuant to this must consistent with  
10 international human rights. Regarding this wording it is not  
11 may, it is not even "shall", it is "must". What are then the  
12 duties for judges regarding the wording of this article?  
13 MR GUARIGLIA: [15:21:37] Contrary to Mr Gaynor a moment ago, I  
14 thought this question could come, which doesn't mean that I am  
15 prepared for it. But I will try to give you my best answer,  
16 your Honour. I think that our position has been -- I was  
17 refreshing at that point of my submission this is mourning so I  
18 may have not been clear and I apologise for that. It's not that  
19 the right as such has no application in the context of the  
20 court. Lets that as all positive obligations of the human rights  
21 law they are perceived for states vis-à-vis that I own citizens  
22 which requires this court to exercise a level of customisation  
23 so to speak of those rights into the context of the Rome Statute  
24 in order to make those rights meaningful but also, at the same  
25 time, compatible with the nature of the Court and unique

1 functions.

2 And your Honour, if I could draw a comparable example

3 your Honour will be familiar under the case law of the American

4 court of human rights and the bar I don't alto's case, there is

5 an unfettered do you tell of all states, parties to the

6 convention to investigate and Prosecutor EFRP single instance of

7 human rights violations, it is an unfettered duties, there is no

8 discretion there, it states have to act and have to investigate

9 and prosecute and there has been a consistent ... .. Rodriguez

10 to barrous at barrous at os and beyond. This court could not have identify

11 duty apply without derailing completely its applicant to deliver

12 justice. If we is had to investigate and Prosecutor every

13 single you be crime in situation counts ... ever to be

14 communicated to this court at the expense of other situations

15 and other victims. So a right that makes perfect sense in the

16 context of states and states positive duties towards its own

17 citizens collusion the duties to deliver you justice has to be

18 turned, has to be modified has to be adjusted to the particular

19 structure of the court otherwise doesn't make sense and leads to

20 absurd results. In that sense we are not saying there is no

21 such thing as right to effective remedy via Article 21(3), what

22 we are saying that that right has to be adjusted to the

23 particular structure of the of the Statute and existent provisions of

24 the

25 of the Statute. ... .. and basically in that

1 context that right, we submit is respected, victims have a right  
2 to petition to you, they are doing it, they have a right to  
3 petition to the Pre-Trial Chamber they have done it t they have  
4 a right to at ... .. I think that's our position.

5 PRESIDING JUDGE HOFMANSKI: [15:24:41] ...

6 MR GAYNOR: [15:24:45] Yes, I would be happy to and I don't want  
7 to prevent anyone else from doing so, I would just like to point  
8 out a couple of things. It's clear from the Statute itself, the  
9 preamble that it is the duty of every state to exercise its  
10 criminal jurisdiction over those responsible for international  
11 crimes and it is the failure of states so often to exercise  
12 their jurisdiction over those responsible for international  
13 KRAO\*EUPLS, that is the reason why the International Criminal  
14 Court exists, that is the reason why we have an admissibility  
15 and jurisdictional process to filter ow outside cases where the  
16 state is providing access to justice, where the state is p  
17 roviding a remedy to its citizens. It is only where the state  
18 is not providing those internationally-recognised human rights  
19 that can be is can come confer this court.  
20 come before this court.

21 So answer your Honour's question, I believe that 21(3) 1 very  
22 clear in its term, your Honours are obliged to interpret  
23 82(1)(a) in accordance with internationally recognised human  
24 rights to a hem TKAOE and to justice. And the modification  
25 which must take place of that right once an application arrives

1 at the International Criminal Court TAEUS place, as Prof saluter  
2 and as indicate mackintosh have pointed out in their very well  
3 reserve ad submission that takes place through admissibility and  
4 jurisdiction approximately filters, so we do argue that the idea  
5 that for victims coming before this court to be told n essence  
6 that your, your right to all of these human rights has got to be  
7 addressed to your home jurisdiction is actually misconceived T  
8 completely misses the point of the Rome Statute.  
9 Thank you.

10 PRESIDING JUDGE HOFMANSKI: [15:26:41] Thank you Mr Gaynor. As  
11 I understand, also the legal representatives of group 3 victims  
12 would like to take a position.

13 NEW SPEAKER: [15:26:53] Mr President, your Honours, it was my  
14 intent to say a few -RZ words, but following Mr Gaynor's  
15 intervention I cannot possibly say anything clearer or better  
16 than he already has, thank you.

17 PRESIDING JUDGE HOFMANSKI: [15:27:09] Thank you, Counsel. And  
18 LRV2, briefly.

19 MS GALLAGHER: [15:27:15] Yes, and I don't process to say  
20 ^speaker to adjust to add a gloss to what he said, I think to  
21 the extent to there is a question that international human  
22 rights are to be interpreted incorporated by the Court itself, one need look  
23 back at the debate around the definition of gender and how  
24 the Court would apply gender to see that it was the ICC that was  
25 to itself incorporate international human rights obligations.

1 That's one brief point. And the second is, not only does 21(3)

2

3 include, in our submissions the right to remedy truth and not

4 repetition, it also clues the right to nondiscrimination and I

5 think it's important to take that into account when looking at

6 the factors which we will discuss tomorrow, that the

7 Pre-Trial Chamber put forward recognising that there were crimes

8 within this court and then looking at the relative power

9 dynamics between the parties -- between the victims and the

10 potential future defendants. Thaw. Thank you.

11 PRESIDING JUDGE HOFMANSKI: [15:28:28] Thank you very much,

12 Counsel.

13 And also question from Judge Prost, please.

14 JUDGE PROST: [15:28:33] Thank you. I am going to direct this

15 to Ms Hirst, albeit if other legal legal Legal Representative of

16 Victims have a comment on it, because it relates to the argument

17 that you made. I understand your argument with respect to the

18 chapeau of 82(1) and your position that victims can be clued in

19 the term "party" in the chapeau. And accepting for the purposes

20 of argument that position, what I would like to know from is

21 what makes the victims in this particular instance a party?

22 MS HIRST: [15:29:08] I am grateful for the question,

23 your Honour, because it does touch upon some of the points which

24 I would have liked to elaborate further but for the restrictions

25 on time.

1 And we are very much in agreement with the submissions which  
2 were made by Mr Gaynor relating to the matters which the Chamber  
3 should look at in deciding whether in a specific instance where  
4 victim request to appeal to seek legal to appeal or attempt to  
5 direct appeal whether that should be granted and we agree with  
6 him it is not a blanket invitation for victims to appeal in  
7 every single decision of this court. Which the submissions of  
8 the Prosecution at times has made it sound as though we are  
9 taking that position. In fact, we are saying that there is a  
10 limited range of factors which the judges in a particular case  
11 should look at in order to decide whether the victims' interests  
12 are so moneyed mentally affected. In this case the two key  
13 things which we have been focusing on are the nature of the  
14 Article 15 proceedings, and be I don't need to repeat, I think  
15 the submission which has been made by several participants in  
16 this hearing that the Article 15 proceedings are a gateway to  
17 all subsequent proceeding,,s ... participatory opportunity or  
18 indeed reparations. But on top of of that there is an a  
19 dditional factor in this particular Article 15(4) decision and  
20 that is the Pre-Trial Chamber made its decision based largely,  
21 not exclusively, but largely on the interests of justice and  
22 Article 53(1)(c) expressly links to victims' interests.  
23 So in effect, what the Pre-Trial Chamber did was it closed the  
24 door for victims to have any access to justice, truth or a  
25 remedy through this court and it purported to do so,

1 ironically, based on the very consideration in respect of which  
2 it was required to take into account victims' interests and I  
3 think the very compelling observations which were made by the  
4 amicus on behalf of Afghani human rights organisations made the  
5 point very clearly that actually the Pre-Trial Chamber doesn't  
6 appear to have taken into account victims interests at all in  
7 deciding on the interests of justice so we say those are the two  
8 primary factors but we do also agree with the other factors  
9 which were put forward by Mr Gaynor and we agree, for example,  
10 that it would be possible for the Chamber to take into account  
11 other factors, for example, whether there is any prejudice which  
12 might result.

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

20 MS HIRST: [15:32:15] Your Honour, I think there are two  
21 possible pathways here in terms of statutory construction and  
22 different positions of the court in granting additional parties  
23 at a timely ... avenues and on this the Prosecution is right  
24 that the Chambers have not always said in terms the victims are  
25 parties. In some instances what they have said is the term

1 parties is not meant to exclude others who also have this right.

2 And had in this instance the Chamber could go either way. In

3 our submission we are talking about a purposive interpretation.

4 The Chamber can either say victims are parties or article 82(1)

5 is not intended to be exclusively for use by parties, the

6 purposive basis of either of those conclusions would be consist

7 be tent, we say.

8 consistent, we say.

9 JUDGE PROST: [15:33:13] One more question and it is directed to

10 OPVV.

11 OPCV, please.

12 I understand your argument was framed very much on the

13 particular -- as have been others, but injures most directly as

14 of the right of the standing here particularly on the features

15 of article 15 and I just want to pursue that a little further

16 with you so I fully understand.

17 If this decision had been a decision of the Prosecutor not to

18 proceed on the basis of the interests of justice and the

19 Pre-Trial Chamber had declined to exercise its jurisdiction to

20 review that decision, is it your position that the victims would

21 have a right of appeal in those circumstances?

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

23 would depend on the decision. When I was focusing on my

24 submission this morning, I made it clear I -- two things, the

25 first one is that by the have I vir virtue of the very nature of article 15

1 proceedings we could not conclude that article 15 proceedings in  
2 this specific case can only deal with prosecution and victims,  
3 because the moment victims trigger an intervention in making a  
4 submission to the Court they become, to some extent, party to  
5 that proceedings. This was the first argument. The second was  
6 that in this specific case we need to take into account the  
7 context in which that decision was taken.

8 So on one side we interpret the fact that victims are authorised  
9 to make submissions as a sort of participatory, into brackets,  
10 if I can put that way, participatory rights which trigger to  
11 some extent their possibility to become parties.

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

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

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

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

25 PRESIDING JUDGE HOFMANSKI: [15:36:20] thank you very much. As

1 I understand, Judge Bossa has an additional question.

2 boss my

3 JUDGE BOSSA: My question just to the representatives of the

4 victims. ^^ and I am confining which question to this

5 particular case. Under Article 15(3), victims have a right to

6 make representations, the Chamber may allow them to do so. And

7 I presume that even on appeal it would be the same case.

8 The Prosecutor has appealed in this case, and so my question is:

9 Why would you want the role of victims to be elevated to that of

10 a party when you have a right to make representations in this

11 particular case. Thank you.

12 MR GAYNOR: [15:37:30] Thank you --

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

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

15 Thank you for your question.

16 In, in this particular appeal there is a great deal of overlap

17 between the arguments presented by the Prosecutor and by the

18 various victims' groups. However, there are certain areas where

19 the emphasis has been somewhat different. There has been

20 a difference of view as to the correct procedural route to get

21 here. The Prosecution presented three grounds to the

22 Pre-Trial Chamber for certification. The Pre-Trial Chamber

23 certified two of those three grounds. The third ground, which

24 was not certified, concerned the scope of any investigation that

25 the Pre-Trial Chamber might be minded to authorise. To us, that

1 is a critically important issue and it would have been better  
2 had that been clearly on appeal.  
3 Now, at the same time we are arguing that your Honours should  
4 consider that ground on appeal, but in the instance of this  
5 particular appeal there has been some divergence in the emphasis  
6 of the victims and the Prosecutor.  
7 But I would invite your Honours, and I know I will do this  
8 anyway, to consider the broader view, there are going to be many  
9 situation where is the interests of the victims and the  
10 interests of the Prosecutor are going to diverge for very  
11 principled reasons. In the Kenya situation, the Prosecutor has  
12 decided to suspend active investigation in Kenya against the  
13 express wishes of the victims of Kenya 2, and that has been  
14 subject to litigation.  
15 In the Lubanga case, the Prosecutor chose again for the best of  
16 reasons to focus on the nonfatal offence of recruitment of child  
17 soldiers. In Mali they has to initially to focus on the  
18 nonfatal offences concerning destruction of cultural property.  
19 In those circumstances the victims might or they might not agree  
20 with the Prosecutor's if focus on nonfatal offences. They might  
21 believe that the investigations should cover fatal offences.  
22 I am giving those of some examples of some areas and I am not  
23 suggesting bad faith bad faith bad faith ... in my submissions I talked about  
24 the Prosecutor's address to the assembly of states parties and  
25 she very properly raised the probably of resources is she going

1 to have enough resources ... will she in the future decide that  
2 Afghanistan should go the way of Kenya and it should not be  
3 actively investigated? That's the kind of decision where the  
4 interest of the victims and the interest of the Prosecutor will  
5 diverge, so I would encourage your Honours not only in the -- to  
6 consider this particular appeal but to consider broader areas  
7 where the interests of the Prosecutor and the victims will  
8 diverge. Thank you.

9 PRESIDING JUDGE HOFMANSKI: [15:41:00] Thank you, counsel.

10 I will maybe the last question to Mr Guariglia, it's related to  
11 the answer to you one of the questions of Judge Ibáñez. The  
12 question is do you think it is correct for the Pre-Trial Chamber  
13 to limit the scope of the investigation to the incidents in the  
14 authorisation decision? I ask this question, because this  
15 decision is to be issued before the investigation starts. It of  
16 course could have some implication. And the question related,  
17 linked to the first one would what be the value of the PTC's  
18 determination in relation to the incidents, covered or not  
19 covered by the jurisdiction of the court, in particular when the  
20 PTC refuses to authorise the investigation.

21 MR GUARIGLIA: [15:42:01] Thank you your Honour for this very  
22 important question.

23 As you know, we completely disagree with that approach by the  
24 Pre-Trial Chamber and it is indeed part of our appeal, where we  
25 think this was one of the building blocks of the decision in the

1 sense that it led to a narrow, a tunnel view of the  
2 Pre-Trial Chamber as to how the situation was, was composed,  
3 which in turn informed its its erroneous interests of justice  
4 decision. We also note it is an anomaly as I said earlier in  
5 the case law of this court, ... the reason your Honour suggested  
6 we haven't started an investigation, there is a preliminary  
7 examination, some incidents, illustrative incidents are proposed  
8 to the Pre-Trial Chamber for the purposes of guiding the Chamber  
9 in its assessment, but it is necessarily a non-exhaustive list  
10 of incidents that is being initially presented for the purposes  
11 of the article 15 scrutiny and all Pre-Trial Chambers to date  
12 have interpreted the system working in that way, even recently  
13 the Myanmar Bangladesh goes back to the good jurisprudence and  
14 basically makes clear that it takes the sample incidents as such  
15 presented by the Prosecutor and authorises a broad investigation  
16 where basically, other, other incidents may be, may be  
17 incorporated. It is an anomaly, it is an anomaly that basically  
18 conspires against basic principles of efficiency of  
19 investigation, of judicial economy and creates problems for  
20 everybody, including victims, in the sense that every time that  
21 the Prosecutor wants to add a single incident to its  
22 investigation plan it has to get summity authorises of the  
23 Pre-Trial Chamber.  
24 And ultimately, your Honours t intrudes into the independence  
25 of the Prosecutor to executively select what to investigate, how

1 to investigate it and how to move forward. So in this sense we  
2 urge your Honours, actually, to reverse that component of the  
3 decision.

4 PRESIDING JUDGE HOFMANSKI: [15:44:13] Thank you. (Microphone  
5 not activated) thank you very much.

6 The schedule for the day, or the hearing is now complete. The  
7 hearing will resume tomorrow at 9.30. I would like to thank  
8 everyone, especially all the court officers, interpreters,  
9 reporters, as well as technicians and security for assisting  
10 with today's proceedings. I thank you. The hearing is now  
11 adjourned.

12 THE COURT USHER: [15:45:06] All rise.

13 (The hearing ends in open session at 3.45 p.m.)