International Criminal Court

Appeals Chamber

Situation: Islamic Republic of Afghanistan

ICC-02/17

Presiding Judge Piotr Hofmański, Judge Howard Morrison,

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

Judge Kimberly Prost

Appeals Hearing - Courtroom 1

Friday, 6 December 2019

(The hearing starts in open session at 10.07 a.m.)

THE COURT USHER: [10:07:26] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE HOFMAŃSKI: [10:07:59] Good morning to everybody.

Could the court officer please call the case.

THE COURT OFFICER: [10:08:08] Good morning, Mr President, your Honours.

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

And for the record, we are in open session.

PRESIDING JUDGE HOFMAŃSKI: [10:08:26] Thank you.

May I ask for an indication as to whether any person present in the courtroom today

is appearing for the first time? If so, may this person kindly introduce themselves.

Yes, please.

MR EDWARDS: [10:08:46] Good morning, your Honours.

For Global Rights Compliance, I'm Iain Edwards, replacing Wayne Jordash QC.

PRESIDING JUDGE HOFMAŃSKI: [10:08:54] Thank you very much.

Someone else? Thank you very much.

For the record then I note that all appearances of participants have been placed on the record.

In line with the amended schedule for today's proceedings, the Appeals Chamber will begin this session by continuing to hear the submissions from the remaining *amici curiae* on the merits of the appeal.

Following the late request of the Legal Representatives of Victims yesterday, the Appeals Chamber has decided to permit each group of Legal Representatives of Victims to make final representations in the second session, as indicated in the amended schedule that will be provided to you by the court officer.

In addition, the Chamber has just been notified that Mr Paweł Wiliński, for reason beyond his control, will not be able to attend the hearing today. We regret this circumstance.

The Appeals Chamber notes that the *amici* from the European Centre for Law and Justice filed this morning a request for leave to file a written submission in response to the submissions of the LRVs. The Appeals Chamber does not find it necessary for the proper determination of the issues on appeal to receive further submissions from the *amici*. The request is therefore rejected.

And I now invite the Afghanistan Human Rights Organisation to address the Appeals Chamber on the merits of the appeal.

Your 15 minutes begins now.

MR MILANINIA: [10:10:57] Thank you, Mr President.

Good morning, Mr President. Good morning, your Honours.

The reality is that Afghanistan is still in war. The infrastructure of the country is destroyed. Hundreds of thousands and by some estimates millions, of lives have

been killed. Many more have been wounded and disabled. And many more have been displaced in the country or become refugees.

The reality is that conflict has turned Afghanistan into a breeding ground for fundamentalist and extremist groups, and a battleground for regional and international powers.

The reality is, is that there are no discussions concerning justice and accountability as part of the United States' negotiations with the Taliban.

The reality is, is that in over 40 years of conflict and violence, none of the major leaders of international crimes have ever been investigated or brought to justice.

The reality is that despite the justice initiatives mentioned by the representatives for the Afghan government, only a handful of low-level perpetrators have been prosecuted, the war crimes unit is largely defunct, and perpetrators continue to operate with near impunity in Afghanistan.

The reality is that peace first then justice, has been a promise told to Afghan victims for the past 40 years and has resulted in neither peace nor justice.

Your Honours, when considering the current situation in Afghanistan, it is inconceivable that an investigation into these atrocities would not be in the interests of justice.

Pre-Trial Chamber II drew the opposite conclusion by contorting the notion of justice and speculating on what Afghan victims want. And in doing so, the Pre-Trial Chamber not only erred as a matter of law and fact, it abandoned the Court's mandate towards the Afghan people. And we ask that this Court not make the same mistake.

Today, your Honours, I intend to address how the Pre-Trial Chamber erred by, one, misunderstanding what victims want, two, misconstruing the notion of justice, especially in the context of Afghanistan. And finally, I will comment on the

government's position and why you should not allow it to prevent the opening of an investigation.

As I explained on Wednesday, the Pre-Trial Chamber failed to effectively ensure victim representation. But beyond that, the Chamber also failed to sincerely and genuinely consider the opinion of Afghan victims who did make representations.

Fundamentally, your Honours, the Pre-Trial Chamber presumed that victims would be against an ICC investigation due to its belief that an investigation was unlikely to result in the arrest and prosecution of a suspect. In the Chamber's own words, and I quote, "victims' wishes and aspirations that justice be done, would result in creating frustration and possibly hostility vis-à-vis the Court." End quote.

That's paragraph 96 of their judgment.

This passage is uncited. This passage is unreasoned. And this passage amounts to pure speculation. At no point during the victims' representation process were victims ever asked whether they would support an investigation absent high chances of success. And you can see that as a matter of fact in the victim representation form which we have provided you in tab 2 of your binders.

Rather, victims were simply asked whether they would, quote, "want the ICC Prosecutor to investigate the violence associated with the conflict in Afghanistan since May 2003." End quote. And to that question, 680 of the 695 respondents said yes.

There is no doubt that had the Pre-Trial Chamber genuinely asked Afghan victims of war whether they would support an investigation even in the absence of high chances of arrest and prosecution, that the resounding response would have been yes.

And that fact, your Honours, is evidenced in the declarations we have provided you and which are referenced on pages 17 to 20 of our table of authorities. For instance, one civil society leader in Afghanistan explained that he spoke with over 700 Afghan

victims and that, and I quote, "every person I spoke with supported an ICC investigation. They supported an [ICC] investigation even if the prospects of an arrest were low." End quote. And, your Honours, that's tab 6, paragraphs 9 to 10. Nothing in the record justified the Pre-Trial Chamber's speculative assertion that victims would not want an investigation under the circumstances. The record, and, indeed, the evidence points firmly to the contrary.

This leads me to my next point. The Pre-Trial Chamber also erred in its understanding of justice under Article 53(1)(c). Your Honours, my colleagues have very forcefully and very eloquently explained why the notion of justice under Article 53 is broader than effective investigations and subsequent prosecution of cases.

So I will instead focus on how Afghan victims believe that justice includes other dimensions, including truth, public accountability, and reversing a culture of impunity. And for this, again, I draw your attention to the declarations we have submitted to you by former high-level government officials and civil society leaders who collectively have interacted with hundreds of thousands of Afghan war crime victims.

These individuals, your Honour, as you can see for yourselves, uniformly share the conclusion that Afghan victims believe that an investigation would serve the interests of justice even in the absence of arrest and prosecutions.

As noted by one former government official and civil society leader, he and his team spoke to and heard from thousands of Afghan victims of war with regards to the importance of an international investigation into crimes committed in Afghanistan. In his own words, and I quote, "uniformly, Afghan victims of war support an ICC investigation into crimes committed in Afghanistan." End quote.

And among the reasons for that support, he cites that the Afghan judicial system is still developing and Afghan victims see, quote, "[the] ICC as an objective, unbiased form for justice." End quote. And he notes that, and I quote again, "Afghan victims don't anticipate the ICC would solve all their problems, but they do see the ICC as a mechanism that would work on the issue of actually addressing war crimes." End quote. Your Honours, that's in tab 3 of your binders.

Likewise, all of the over 100 individuals surveyed by NGOs on the ground about the Pre-Trial Chamber's decision conveyed that they would support an investigation even absent arrest and prosecution. And while the reasons they gave were varied, I wish to take this time just to highlight a few:

One female victim who had lost her son in a truck bombing by a terrorist group in 2017 told us, and I quote, "I want war crimes to be investigated and it is worth even temporary chaos for bringing peace and security." End quote. Her case, your Honours, was never investigated.

Another mother who lost her son in the same bombing in 2017 told us, and I quote, "Justice means a peace where no mother ever loses a child." End quote. Her case was never investigated.

Another woman who lost her daughter after an attack on the Afghan Supreme Court by the Taliban in 2017 told us, and I quote, "An investigation will show people that their sacrifices and considered and not forgotten." End quote. Her case was never investigated.

And finally, your Honours, another victim told us, and I quote, "We can't bring back our dead, we can't regain what we have lost. But we can raise our voices and preserve the truth so people don't suffer the same in the future. And maybe we can gain some peace from being heard and acknowledged." End quote.

Your Honours, her case was also never investigated.

Overall, the reasons provided in our confidential declarations for why an investigation would serve the interests of justice are many. But at its heart, they concern the reality that Afghanistan has suffered 40 years of active combat, who did what and when is unclear, perpetrators continue to hold high social and governmental positions, amnesty deals are an unfortunate reality, and people of Afghanistan yearn for a neutral, independent investigation.

They reflect the hope of victims to have their suffering be acknowledged, so that the record may be set straight, that perpetrators may be named and shamed, and that a fuller accounting of what has happened in Afghanistan can be brought to light, and so that a culture of accountability can be cultivated.

Your Honours, no one is more sophisticated about the realities of how difficult it will be for individuals to be arrested and prosecuted than Afghan victims themselves. They are the ones who have lived for four decades and have watched amnesty deal after amnesty deal; they know that an arrest and prosecution will be difficult.

But they also know that no action by the only court with jurisdiction other than the Afghan national courts will mean even more impunity where Afghans will continue to be victimised, abused, and killed.

And this takes me to my last point.

The representations from the Afghan government suggest that the ICC not investigate, watch what happens, and then decide later if it should intervene. We propose the inverse.

This Court should immediately authorise an investigation, the Afghan government can identify the specific cases it wishes to challenge under the Statute's admissibility provisions, and the Court can strike from the Prosecution's investigation those cases

that are being genuinely and appropriately pursued.

As it stands right now, however, there is no reason to wait. While the government has recently made legal forms, the written law unenforced is of little practical consequence to Afghan victims who have been suffering from decades and suffer to this day.

Your Honours, we have provided you a declaration by a rule of law expert who specifically focused on precisely the justice sector reforms identified by the government's representatives in their submissions. That's in tab 5 of your binders. She researched the attorney general's war crimes unit, and she concluded that the office is staffed with, and I quote for you, "new graduates who lack experience investigating or prosecuting war crimes". End quote. She was also informed that a United Nations project to help with capacity building of that very office had been cancelled. And that when she had asked why, she was told, and I quote, "that it was no longer a funding priority." End quote. That's tab 5, paragraph 6 to 7. Her statement, your Honours, was from July of this year.

We have also provided you declarations from former high-ranking Afghan government officials, who held their respective possessions in the past five years. That's tabs 3 and 4 of your binders. You know who they are, you see who they are, you see their seniority; you can see how they were focused specifically on the justice sector and are intimately aware of how the judiciary works. Both concluded that the Afghan government is not capable of effectively prosecuting these crimes and that the ICC should open an investigation.

Let me quote from them, your Honours. One states --

THE COURT OFFICER: [10:24:05] Excuse me. You have two minutes left.

MR MILANINIA: [10:24:07] Thank you very much.

One states in his September 2019 statement that, and I quote:

"The Afghan justice system is improving, but it is still very weak and they don't have the capacity to undertake the types of investigations the ICC is capable of. The system is also susceptible to interference by the Afghan government, the Taliban, or outside forces, meaning that justice will not be delivered in an unbiased or objective manner." End quote.

Let me quote from another former government official from his statement just last month. Quote:

"For four decades every sitting Afghan government has failed to provide justice for Afghan victims of war. None of the government investigations have produced any viable and reliable result. The Afghan government will not be able to bring any measure of justice for the Afghan people any time soon, the country is still existing in a political dust storm. If left to [the] authorities alone, the human rights violators and murderers will long be dead by the time the crimes are addressed, and their victims will have lost their chance at justice." End quote.

Finally, you have the statements of civil society leaders who have interacted with tens of thousands of Afghan war victims. All of them tell you that the government is not able to effectively prosecute these crimes for a variety of reasons, not including the government's strength vis-à-vis various armed groups and other interested States.

Your Honours, to conclude, the Afghan people are strong and they will persevere, but part of their path intertwines with this Court. They are in this moment turning to you to provide a path that includes justice and accountability. We ask you to not sacrifice this Court's mandate for politics. We ask you to not sacrifice the hopes of Afghan victims for political expediency.

This concludes our submissions. We thank you for your time.

PRESIDING JUDGE HOFMAŃSKI: [10:26:08] Thank you, Counsel, very much. Now I invite the former UN Special Rapporteurs, Ms Garry. You are invited to address the Chamber, your 15 minutes begins now. Please proceed.

MS GARRY: [10:26:28] Good morning, Mr President, your Honours. Thank you for the privilege of making these *amici curiae* submissions before you today.

These submissions are made in my personal capacity and on behalf of the former UN Special Rapporteurs on Torture and Other Cruel, Inhumane and Degrading Treatment or Punishment, namely Professor Manfred Nowak at the University of Vienna and Juan Méndez at American University Washington College of Law, who himself is a torture survivor and named prisoner of conscience by Amnesty International; as well as the former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Professor Pablo De Greiff, at New York University School of Law. The former UN Special Rapporteurs deeply regret that prior commitments prevent them from appearing in person before you today.

By way of overview, *amici* contend that Pre-Trial Chamber II erred on the merits of its decision of 12 April 2019 when it failed to authorise the Prosecutor's Article 15 request for authorisation of an investigation into the situation in Afghanistan. This is because its interpretation and application of law therein was inconsistent with internationally recognised standards of human rights law in violation of Article 21(3) of the Rome Statute. For the specific reasons that follow, *amici* urge this Chamber to reverse, thereby authorising an investigation without further delay.

First, in the Impugned Decision, Pre-Trial Chamber II was satisfied that there is a reasonable basis to believe that, as of 1 May 2003, Afghan National Security Forces

widely practiced torture in Afghan government detention facilities and members of the US armed forces and the CIA committed the war crimes of torture and cruel treatment, outrageous upon personal dignity, and rape and other forms of sexual violence pursuant to a policy approved by US authorities. The Chamber correctly found that these incidents fall within the subject-matter jurisdiction of this Court as a war crime, and *amici* contend that they may also qualify as crimes against humanity under Article 7 of the Rome Statute.

In addition, the Chamber rightly found that these incidents are admissible because of, quote, "the gravity per se of the crime of torture ... and the circumstance[s] that the conducts have allegedly been committed by public officials in their functions." Unquote.

Amici underscore the Pre-Trial Chamber's statement that torture is, quote, "radically banned by international law", unquote, and that no derogation is permitted, even in times of armed conflict or terrorist attacks. This absolute prohibition is necessary for protecting the inherent dignity and integrity of all human beings, victims as well as potential perpetrators. Afghanistan and the United States are bound to abide by this *jus cogens* prohibition under customary and treaty law, specifically the United Nations Convention against Torture, the CAT, the International Covenant on Civil and Political Rights, the ICCPR, and common Article 3 of the 1949 Geneva Conventions.

As a *jus cogens* prohibition, no State may enter into agreements for contracting around it, given the fundamental values it upholds.

Second, under articles 5 through 8 of the CAT, all States have an obligation to criminalise, investigate, prosecute and punish torture wherever it occurs under the principle of *aut dedere aut judicare*. Similarly, under the Rome Statute, where torture amounts to a war crime or crime against humanity, it is the duty of every State to

exercise criminal jurisdiction over those responsible for international crimes under this Statute. There is no discretion to address the breach otherwise.

Here, as found by the Pre-Trial Chamber, not one State with criminal jurisdiction over the incidents alleged in the Prosecutor's request since 2003 has been able to exercise it, and therefore the investigation is admissible under the complementarity principle. While it is true that this finding was made on the basis of information available at the time of the Prosecutor's request in 2017, the further information provided by the government of Afghanistan in these proceedings does not call the Chamber's conclusion into question. It still remains, as noted by the Chamber, that no national investigations had been initiated with respect to the Prosecutor's request because, I emphasise, the request pertains to those who appear most responsible for alleged crimes. The same is true for the United States and, as noted by the Pre-Trial Chamber, both countries have focused thus far on cases limited to direct perpetrators or their immediate superiors.

That said, *amici* recall under the jurisprudence of this Court, that admissibility is an ambulatory process. *Amici* welcome both of Afghanistan and the United States, or any other State, informing the Prosecutor as soon as possible of any progress made by national authorities initiating an investigation against those most responsible for torture in Afghanistan, given that the Prosecutor will have to continue revisiting the issue. Because no such information has been made available at this stage however, this Appeals Chamber should not find that the Pre-Trial Chamber erred in the Impugned Decision with respect to its finding that an investigation by the Prosecutor would be admissible under complementarity.

Third --

PRESIDING JUDGE HOFMAŃSKI: [10:32:49] Excuse me, Counsel, I would like to

ask you to slow down a little bit because of the interpretation.

MS GARRY: [10:32:55] Yes. Thank you, your Honour.

PRESIDING JUDGE HOFMAŃSKI: [10:32:56] Thank you.

MS GARRY: [10:32:56] Third, failure by States to initiate a prompt criminal investigation as is the case here, is itself a *de facto* denial of the rights to an effective remedy, reparations and redress to victims of torture under the CAT and the ICCPR, as well as customary international law.

Further, as stated by the UN High Commissioner for Human Rights and the Human Rights Council, it is a denial of the related rights to seek truth and accountability in the face of gross and systematic violations of human rights, available to victims and society in the face of institutional policies enabling their occurrence.

Criminal investigation is a necessary means to guarantee these rights and avoid recurrence of torture. As noted by the UN General Assembly, prompt initiation of a criminal investigation into allegations of torture, particularly where there is access by victims to the investigatory process, in and of itself, provides an effective remedy, reparations and redress. Failure by States to do so results in further injury to victims, eviscerates the prohibition against torture, and may itself constitute a violation of the prohibition as has been found by the European Court of Human Rights and the Inter-American Court of Human Rights.

Fourth, by extension, failure by the Pre-Trial Chamber to authorise investigation into this situation, as the Court of last resort, because it found substantial reasons that it would not be in the interests of justice to do so, results in further injury to victims of torture. In this respect, regarding question C(a) of this Chamber's decision on the conduct of proceedings, *amici* agree with the submissions made by OPCV and LRV 1 and 2 that the Pre-Trial Chamber acted *ultra vires* in giving itself the power to look for

such reasons under Article 53(1)(c) of the Rome Statute.

Regarding question C(b), *amici* contend that if this Chamber nevertheless finds that the Pre-Trial Chamber may consider such reasons, then the Chamber erred in its consideration of the factor at paras 91 through 95 of the Impugned Decision. For the reasons stated by the Prosecution and LRV2, those factors were inappropriate because they impinge upon prosecutorial discretion and are in violation of the human right of non-discrimination codified under Article 21(3) of the Rome Statute.

Amici add that the Pre-Trial Chamber erred in that section as well because it failed to properly weigh, quote, "the gravity of the crime and the interests of victims", unquote, as required under Article 53(1)(c). Indeed, there is no reference at all to the per se gravity of torture therein. Further, the Chamber's reference to the interests of victims at para 96 as a basis for its conclusion not to authorise an investigation is incorrect as a matter of law. This is because the Chamber omitted consideration of the rights of victims of torture to an effective remedy, reparations and redress, as well as to seeking truth and accountability under international human rights law.

Initiation of a criminal investigation into allegations of torture is an international legal obligation and, in and of itself, has reparative effect for victims. Blocking such investigation, on the other hand, purportedly on the basis of victims' own interests, has grave negative effect on torture victims, adding insult and further injury to that which they've already suffered.

Consequently, the Pre-Trial Chamber effectively closed off the only available avenue for justice left to victims of incidents of torture in the Prosecution's request.

The Chamber did so, even though, as it acknowledged, all jurisdictional and admissibility requirements under the Statute are met. Declining to authorise an investigation because the relevant States refuse to cooperate is not in the interests of

justice but rather supports impunity. In fact, allowing States to get away with not investigating torture and other international crimes by those most responsible turns complementarity on its head. It is precisely for situations like this that the ICC exists.

The Impugned Decision also dangerously signals that power is not bound by law. When it comes to torture, impunity simply cannot be tolerated, particularly with respect to the most powerful countries. The practice of such countries has ripple effects, leading to more torture and undermining of rule of law.

As noted previously, when investigating alleged torture in Afghanistan, the Prosecutor's strategy would be focused on those most responsible, those officials and policymakers with the power to effect widespread and systematic abuse. This is in line with the Court's deterrence and prevention mandates, which are critical for the safety of the dedicated rank and file in militaries and intelligence agencies around the world. Where high-ranking superiors have complete disregard for international law's prohibition against torture and its underlying principle of reciprocity, they put their subordinates at great risk of torture upon capture.

Finally, initiation of an investigation by the Prosecutor here is substantially in the interests of justice for victims. In response to question C(c), this Chamber should correct the Pre-Trial Chamber's error in limiting the scope of the investigation to incidents specifically mentioned in the Prosecutor's request and authorised by the Chamber, not only because of the reasons stated by the Prosecutor and LRV2, but also because this would uphold victims' rights to an effective remedy, which requires a thorough investigatory process capable of leading to identification and punishment of those most responsible.

Such investigation will, at last, take cognisance of the claims of numerous torture

victims denied and silenced over 16 years. It will also be a critical step towards restoration of their dignity as rights holders. The victims well understand that there is no specific outcome guaranteed by an investigation by the Prosecutor. Nevertheless, they overwhelmingly support one. What they have without question interested in, and entitled to, is a just process, one which States and this Pre-Trial Chamber have denied.

THE COURT OFFICER: [10:40:35] Professor Garry, you have one minute left.

MS GARRY: [10:40:39] Thank you.

For the foregoing reasons, *amici* respectfully request that the Appeals Chamber reverse the Impugned Decision and authorise the Prosecutor's investigation into the situation in Afghanistan without delay.

In so doing, to paraphrase the words of former US Supreme Court Justice Robert Jackson as prosecutor before the Nuremberg Tribunal: The ICC will, by meeting violent acts of torture with an impartial, thorough, and just investigation into those most responsible for international crimes in Afghanistan, help prevent future such acts by cutting short a cycle of violence that was birth following the tragic events of September 11, 2001. As a citizen of the United States who cares deeply for its leadership role in upholding rule of international law, not undermining it, I implore the ICC to step in and fulfil its mandate where States have failed to address this vicious cycle. By doing so, the Court will play an important role in moving all parties in the seemingly endless conflict in Afghanistan toward a future of healing, peace and reconciliation.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [10:42:04] Thank you very much, Ms Garry.

The Global Rights Compliance, Mr Jordash -- you are invited to address the Chamber

now for the next 15 minutes. Please begin.

MR EDWARDS: [10:42:20] Thank you, your Honour.

We submit, firstly, that the Pre-Trial Chamber unjustifiably violated the strong presumption for the initiation of an investigation embedded in Articles 15(3) and 15(4) of the Statute.

And secondly, we submit that the Pre-Trial Chamber's approach impermissibly intruded into the Prosecutor's broad discretion under Article 53(1)(c), and went above and beyond its limited scope to review the exercise of that discretion.

We submit that an examination of relevant general principles of law derived from national laws, to which your Honours may have recourse pursuant to Article 21(1)(c), further serves to demonstrate the Pre-Trial Chamber's errors.

In order to assist the Appeals Chamber in its deliberations, Global Rights Compliance conducted an analysis of the relevant laws and procedures of 51 national jurisdictions. These include both States Parties and non-States Parties, a range of civil and common law jurisdictions, countries that span every continent.

Your Honours have received this morning Annexes I and II to our submissions. These outline aspects of the laws and procedures that have been assessed.

In deference to Article 21(1)(c), we have included those States that would normally exercise jurisdiction over the crimes highlighted in the Article 15 request for authorisation, namely, the United States, Afghanistan, Lithuania, Romania and Bulgaria. All these States, all the States we analysed were involved in the drafting of the Rome Statute.

Our analysis focused on two issues: Firstly, prosecutorial discretion, with a specific focus on issues related to the interests of justice, or as it is often termed, the public interest. And secondly, the nature and scope of any review of that discretion

afforded to judicial authorities.

Given this Court's particular preliminary examination and investigations regimes, our analysis focused on the exercise of prosecutorial discretion and the interests of justice criteria principally in the context of decisions to prosecute rather than decisions to investigate. The standards that apply to the decisions to investigate under Article 53(1)(c) and to prosecute under Article 53(2)(c) are to be considered as analogous, as evidenced by both the drafting history and the similarity of language used in both provisions.

In sum, we found that there are two major approaches within domestic criminal justice systems to the grant and exercise of prosecutorial discretion: States either adhere to the mandatory prosecution principle, or the opportunity principle. Consistent with the overriding approach to how the provisions of the Rome Statute were formulated, the ICC system was always intended to represent a marriage of these two approaches.

The language of Articles 15 and 53 indicates that in large measure the mandatory prosecution principle was adopted, since it provides for the strongest presumption for the initiation of an investigation within the Rome Statute.

The language of Article 53(1)(c) also indicates the adoption of features of the opportunity principle, which provides that the assessment of where the interests of justice lies is within the Prosecution's discretion. The Pre-Trial Chamber may only review the exercise of that discretion on the most narrow of bases.

So I would like to start by exploring some of the key features of the mandatory prosecution principle, a principle which is chiefly found in civil law jurisdictions.

The most dominant feature is the obligatory prosecution of serious offences. Encapsulated, by way of example, in section 155(2) of the German Criminal Procedure

Code which provides as follows:

"... except for otherwise provided by law, the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications."

And similar provisions figure in the codes of Lithuania, Poland and Romania, details of which can be found in Annex I, titles A and B.

While prosecutors in such systems are granted a strictly defined residual discretion not to pursue certain cases, by and large, the discretion is narrowly drawn and generally only allows for the discontinuance of cases that are not serious enough to impact on any public interest. For example, article 171(3) of the Afghan Criminal Procedure Code allows a prosecutor to dismiss a case if the perpetrator's culpability and the consequences of the act are insignificant and its prosecution is not in the public interest.

Turning to the second main feature of this approach, generally speaking, mandatory prosecution systems provide for review of decisions not to prosecute before a superior prosecutor or a judicial authority, particularly when the decision is based on discretionary factors. A typical review power can be found at section 12 of the Criminal Procedure Code of the Netherlands, which states that if a criminal offence is not prosecuted, the directly interested party may file a complaint against the said decision with the competent court.

And similar provisions exist in the codes of Romania and Afghanistan.

Bringing this back to the International Criminal Court, it is recognised, for example, in Triffterer's commentary, that Article 53 appears in the main to reflect the mandatory prosecution principle.

Firstly, Article 53(1) provides that the Prosecutor shall initiate an investigation if she

finds there to be a reasonable basis to proceed.

Moreover, in the case of *proprio motu* investigations, once the Prosecutor conducts a preliminary examination and concludes there to be a reasonable basis to proceed with an investigation, she is obliged under Article 15(3) to request authorisation from the Pre-Trial Chamber to do so.

Secondly, as indicated by the language of Article 53(3), the Pre-Trial Chamber, congruent with mandatory prosecution systems, also provides for review of a decision not to investigate. The review arises in two distinct circumstances: Firstly, pursuant to Article 53(3)(a), in the case of a referral by the Security Council or a State Party, a request may be made to the Pre-Trial Chamber to review a decision not to proceed with an investigation. As confirmed by the second Comoros appeal decision, upon review, the Pre-Trial Chamber cannot order the Prosecutor to initiate an investigation or prosecution. However, whilst the Prosecutor is obliged to genuinely reconsider her decision in line with the Pre-Trial Chamber's interpretation of the applicable law, the discretion remains with her and her alone.

Additionally, the Pre-Trial Chamber may, under Article 53(3)(b) on its own initiative, review a decision by the Prosecutor not to investigate if such a decision was solely based on the Prosecutor's assessment of the interests of justice. If the Pre-Trial Chamber comes to a different conclusion, it can compel the Prosecutor to initiate an investigation or prosecution.

To some extent, Article 15(4) creates a divergence from the mandatory prosecution principle, insofar as it provides for a residual review of a positive decision to investigate by the Prosecutor. However, it should be noted that the Pre-Trial Chamber's authority to review is extremely narrow. First, it extends only to *proprio motu* investigations. And secondly, it is limited to the application of the

sensible or reasonable basis to proceed threshold. Consistent with the strongest presumption in favour of investigation, this review threshold is the least demanding within the ICC's framework. If this lowest of thresholds is met, the Pre-Trial Chamber is obliged to authorise the commencement of an investigation.

Moving on, if I may now, to the second of the two principal approaches, that of the opportunity principle, this is manifested chiefly in common law jurisdictions, although not exclusively, and I would refer your Honours to Annex I, title C. Countries that adopt this approach do not oblige prosecutors to pursue every case where the evidence points to the guilt of a suspect. Instead, they enjoy a wide discretion in deciding which cases to prosecute. Accordingly, there is a strong presumption in favour of the prosecution of serious crimes where the evidence points to a reasonable prospect of conviction. Prosecutors can nevertheless exercise discretion in deciding whether to do so would in the public interest, taking into consideration a wide range of factors.

Secondly, and picking up on a point made by Mr Moloney yesterday, judicial review of prosecutorial discretion in opportunity principle jurisdictions, even decisions not to prosecute, is available only in the most exceptional of circumstances. The standard of review is very strict indeed.

The decision whether to prosecute or not tends only to be reviewable on the grounds of *ultra vires*, perversity, irrationality, bad faith, oppressiveness and/or conduct that amounts to an abuse of process. As can be seen, these thresholds do not relate to matters of policy and public interest considerations.

Returning again to this Court, although the ICC system appears to be premised in large part on the mandatory prosecution principle, it contains features that suggest an intention on the part of the drafters to create a practical fusion between the two

approaches.

Specifically, the ICC Prosecutor retains a wide discretion under Article 53 in two important respects: Firstly, in coming to a conclusion on whether there is a reasonable basis to proceed with an investigation. And secondly, in assessing whether there are substantial grounds to conclude that an investigation would not serve the interests of justice. The point has been made, but it bears repeating, every Pre-Trial Chamber authorising the initiation of an investigation, save for the Pre-Trial Chamber in the Afghanistan situation, has to date been consistent in their respect for this broad discretion.

The second principal feature is this, that there exists only the most limited possibility for review by the Pre-Trial Chamber of the Prosecutor's decision to initiate an investigation. While the Pre-Trial Chamber may review and invalidate the Prosecutor's discretion if she decides not to initiate investigation based solely on her assessment of the interests of justice criterion pursuant to Article 53(3)(b), its authority to review the Prosecutor's *proprio motu* decision to initiate an investigation is extremely limited.

And so in sum, if, as we say they did, the drafters of the Rome Statute intended Article 53(1)(c) to be reflective of features of the opportunity principle, it was also clearly intended that the Pre-Trial Chamber would have authority to review the Prosecutor's discretionary decisions on interests of justice grounds on only the most exceptional basis.

In this case, the Pre-Trial Chamber failed to respect both approaches by acting contrary to the strong Article 15(3) presumption in favour of investigation, and by overriding the Prosecutor's discretion under Article 53(1)(c) by impermissibly carrying out its own *de novo* interests of justice assessment.

Absent a showing of *ultra vires*, perversity, irrationality, bad faith and so on, we submit that it was intended that the Pre-Trial Chamber would defer to the Prosecutor's discretion. They did not.

Moving on to our second main point, and I can deal with it briefly, even if it is accepted that the Pre-Trial Chamber had the opportunity to review the exercise of the Prosecutor's discretion, it abused that --

THE COURT OFFICER: [10:56:19] Excuse me, you have one minute left.

MR EDWARDS: [10:56:22] Thank you.

It abused that authority by not giving sufficient weight to a myriad of relevant and significant factors. Your Honours will see a selection of those factors in our Annex II.

An analysis of the Impugned Decision shows that the Pre-Trial Chamber has failed properly or at all to take into account these other factors, opting instead to erroneously focus on only three: the time that has elapsed, a speculative lack of cooperation, and the availability of Prosecution resources.

Additionally, we submit that the Pre-Trial Chamber irrationally failed to take into account other important factors, such as the need to maintain the rule of law, and the level of culpability of the perpetrators of the crimes.

To conclude, these omissions ultimately rendered the Pre-Trial Chamber's overall assessment serious inadequate and, consequently, legally flawed such that, had the errors not been made, the investigations would have been authorised.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [10:57:38] Thank you very much, Counsel.

And now I would invite Mr David Scheffer to address the Chamber. Your 15 minutes begins, please.

MR SCHEFFER: [10:57:52] Your Honours, may it please the court.

I am grateful for the opportunity to address you today. I bring a perspective drawn from the original intent of the drafting of these documents more than two decades ago.

Hereafter when I use the term "*proprio motu* prosecutor", I mean the Article 15 *proprio motu* prosecutor. When I use the term "Prosecutor", I mean the Prosecutor who acts in response to a referred situation.

Pre-Trial Chamber II misinterprets Articles 15 and 53 of the Statute and Rule 48 of the Rules of Procedure and Evidence. Its cumulative reading of these provisions in its decision leads Pre-Trial Chamber II to diverge from original intent and distorts how it should be addressing interests of justice. The writings of my French negotiating colleague Gilbert Bitti in this respect and the *amicus* brief submitted by Professor Doctor Dr Kai Ambos and Dr Alexander Heinze of Germany are recent sources of interpretation that I embrace and strongly recommend be examined. As a drafter, I also found Mr Tim Moloney's presentation on behalf of the victims yesterday particularly compelling.

First, I will answer question C(a).

There is a clear distinction in the Rome Statute between first, the *proprio motu* prosecutor's obligation under Rule 48 to use Article 53(1) criteria in determining whether there is a reasonable basis to request authorisation for an investigation, and second, the Pre-Trial Chamber's reliance on the same Article 53(1) criteria for review, if necessary, of the Prosecutor's initiation of an investigation in a situation that has been referred by a State Party or the UN Security Council.

Rule 48 is an explicit direction to the *proprio motu* prosecutor, and only to the *proprio motu* prosecutor, to incorporate the factors in Article 53(1), paragraphs (a), (b)

and (c), in her determination as to whether there is a reasonable basis to proceed with an investigation under Article 15(3). Those factors are vital criteria that should be met, with the final one, paragraph (c), being a calculation, if invoked at all by the *proprio motu* prosecutor, that the US delegation envisioned typically concerned, for example, the operation of a truth commission, some kind of conditional amnesty deal to achieve peace, a justice alternative under complementarity, and/or other options for the victims to seek justice.

If the *proprio motu* prosecutor determined that the Article 53(1)(c) criterion was met, namely that it would not serve the interests of justice to proceed toward an investigation, then the Pre-Trial Chamber would not be seised with the issue because the *proprio motu* prosecutor technically, at least, would not plead under Article 15(3). That was our intent: to provide guidance to the *proprio motu* prosecutor in Rule 48 about what she needed to do for an Article 15 exercise. We did not get to that issue in Rome; we addressed it in the Rules a short time thereafter, as Judge Prost sought clarification on yesterday.

The interests of justice determination set forth in the final sentence of Article 53(1) only applies for referred situations by a State Party or the UN Security Council. This is because there would not be an Article 15 application to initiate an investigation if the *proprio motu* prosecutor determined that the interests of justice compelled her not to investigate. The application would not be made because the Article 53(1)(c) determination by the *proprio motu* prosecutor would have negated the purpose of any request to the Pre-Trial Chamber. Of course, the *proprio motu* prosecutor could volunteer such a negative determination to the Pre-Trial Chamber to gratuitously explain why a preliminary examination should not mature to an investigation, but there is no statutory requirement to do so if the *proprio motu* prosecutor is not seeking

authorisation to initiate an investigation.

Your Honours, the final sentence in Article 53(1) was intended to apply solely to referral situations, where the Prosecutor would need to inform the Pre-Trial Chamber of her negative determination so that the Pre-Trial Chamber could review the Prosecutor's rationale to cease investigating a referred situation. We knew that would be a controversial moment because the Prosecutor would be trying to terminate investigation of a referred situation, so the Pre-Trial Chamber would need to step in to evaluate the Prosecutor's decision and possibly reverse it.

In comparison, the logical procedure for the *proprio motu* prosecutor is to satisfy the positive criteria of Article 53(1)(a) and (b) as the basis for seeking authorisation to investigate a situation. The Pre-Trial Chamber has no statutory basis for inquiring beyond the merits of those two criteria if the *proprio motu* prosecutor is not volunteering an Article 53(1)(c) negative determination. But, as Ms Brady acknowledged yesterday, the Pre-Trial Chamber can ask the *proprio motu* prosecutor to explain how she addressed paragraph (c) in her preliminary examination.

The US delegation was focused on ensuring that the *proprio motu* prosecutor's powers would be strictly conditioned on obtaining Pre-Trial Chamber approval for an investigation of a situation the legitimacy of which must be argued on jurisdiction and admissibility grounds. Negotiators did not endorse the Pre-Trial Chamber standing in the shoes of either the *proprio motu* prosecutor or the Prosecutor following a referral and then itself initiating a determination that investigating the situation at hand would not be in the interests of justice. Any such power under the Rome Statute would invite the Pre-Trial Chamber to unilaterally delve into possibly politically-influenced rationales for shutting down the investigation of atrocity crimes. If we had intended such a role for the Pre-Trial Chamber, it would have been drafted

into the Rome Statute.

The original intent of the drafters was that there be no statutory requirement that the *proprio motu* prosecutor affirmatively stipulate reasons why an investigation would serve the interests of justice. There was discussion based on the original British draft on this point, but the idea was rejected. We recognised that any such requirement would impose an almost intolerable burden, fraught with politicised rationales, on the *proprio motu* prosecutor and the Pre-Trial Chamber to conjure up any manner of moral and politically acceptable reasonings regarding a prospective investigation.

Now I will answer question C(b).

Your Honours, the founding drafters did not define the term interests of justice because it can mean so many different things to so many different prosecutors and judges, not to mention governments. We did not want to open that can of worms and, in doing so, possibly lose the point entirely during the negotiations. If Pre-Trial Chamber II's decision is permitted to stand, it would be like forcing a political leader to explain why she pursues political objectives, or asking a scientist why he seeks the objective truth in his research. That is all self-evident but grafting it now on to the Rome Statute by adopting Pre-Trial Chamber II's decision in this situation is dangerous.

Drafters framed this requirement strictly in the negative because of the obvious purpose of the International Criminal Court, as with credible national courts, to operate within the framework of the interests of justice. Stipulating a requirement that the *proprio motu* prosecutor and the judges must demonstrate that they serve the interests of justice, or else the request to investigate will fail, would be oddly self-evident drafting but also invite speculative and politically-influenced decisions.

Witness paragraph 91 of the Impugned Decision. Who in the world dreamed up

such criteria, neatly framed to obliterate the Afghanistan situation? My goodness, if in the 1990s, when building five war crimes tribunals, one had followed the factors in paragraph 91, there would have been no cases and no jurisprudence developed because the arc of international criminal justice is very long and should not be cut off at the knees with such impossibly rigid criteria.

Justice is justice: do not massacre the term with undocumented and highly selective explanations that can only invite allegations of political bias or manipulative pressure from great powers.

In the Afghanistan situation, the Pre-Trial Chamber overreached without even documenting the basis for its negative determination on interests of justice. It had nothing really to base its assessment on because the *proprio motu* prosecutor would not have sought authorisation to investigate the Afghanistan situation only to defeat her own application with an assessment that an investigation would not serve the interests of justice. Only the criteria in Article 53(1)(a) and (b) are realistically in play when the Pre-Trial Chamber judges evaluate the *proprio motu* prosecutor's application.

Your Honours, I want to use a few moments to address some points raised in yesterday's hearing. I think my perspective might be appreciated.

First, the impressive representations made by the government of Afghanistan in its brief and yesterday, arguing for complementarity, miss the point that the International Criminal Court focuses on leadership responsibility for atrocity crimes, while Afghanistan is building a legal system that may indeed bring lower-level individuals to justice some day. But it is implausible for the Court to stand down on leadership accountability in Afghanistan given the ongoing war and political instability and untested resilience of the evolving domestic legal system. The two can return in parallel, with the Court focusing on military and political leaders

responsible for atrocity crimes while the Afghan courts undertake the Herculian task of bringing thousands of lower-level personnel to justice. This is how it worked in the Balkans and in Rwanda, for example.

Learned counsel's reference to Article 18 yesterday requires the clarification that Article 18, which I had primary responsibility in drafting, only comes into play after an investigation has been initiated, either by Pre-Trial Chamber approval of the *proprio motu* prosecutor's application to initiate an investigation under Article 15 or by the Prosecutor commencing an investigation of a referred situation.

Article 18 is certainly a procedure Afghanistan can take full advantage of, but first the investigation must begin.

Second, Mr Sekulow's explanation of the American Service-Members' Protection Act yesterday was incomplete. There has been significant US cooperation in past years with the Court because the Dodd amendment to the Act, namely section 2015 of the Act, so permits it. But he is correct that when it comes to cooperation with the Court with respect to US nationals, the Act does present a formidable barrier. I am more optimistic, however, that one day there will be an administration in Washington that stops being so intimidated by the Court, restores the legacy of Nuremberg along with almost all of its allies, and reasserts America's rightful place as a leader of the rule of law.

Third, Mr Sekulow's reference to the US military justice system as demonstrating that America can take care of its own is a point I repeatedly made in the 1990s in the negotiations, when I pressed the complementarity argument. Unfortunately, that point has been soiled recently by the US president's appalling interference with several cases in the American military justice system. I doubt many outside the United States would be impressed with the point anymore, which is unfortunate as

the JAG officers and others whom I have known and worked with through the years in the military, who uphold the highest standards of conduct under international law, are to be respected for their integrity and enforcement of the Uniform Code of Military Justice. And yet leadership flows from the top, and right now it is not a very honourable outcome. I fear it will now take many years to restore the credibility of the argument.

Fourth and finally, Mr Sekulow's very able argument regarding the posture of non-State Party nationals under the Vienna Convention in respect of the Court's personal jurisdiction is one I know well. I argued it as a negotiator and ambassador in the 1990s, but it was a policy statement that followed the Rome negotiations, one that I introduced before the American Society of International Law as an official position in early 1999. So it really was not an explicit component of original intent in the drafting of the Rome Statute. It also grained little traction either with governments party to the Rome Statute or in academic circles.

I find it now a rather retrograde --

THE COURT OFFICER: [11:12:30] Professor Scheffer, you have two minutes left.

MR SCHEFFER: [11:12:34] Okay.

I find it now a rather retrograde rationale for bailing out of the quest to end impunity for atrocity crimes. It is an argument that flies in the face of one of the most fundamental rules of criminal law, namely territorial jurisdiction, and defies commonsense regarding atrocity crimes, some of which indeed have entered the realm of *jus cogens*, as Judge Carranza rightly pointed out yesterday. I do believe there was a sloppiness that emerged in the rushed final draft of the Rome Statute on July 17, 1998, that presents an interpretative dilemma for the Court on this matter, and I point you to my 2002 article in the Cornell International Law Journal and my

2004 article in the Journal of International Criminal Justice, as well as my book, All the Missing Souls.

The basic point is that one of the principles we operated under in the negotiations leading to the Rome Statute is that a State's conduct, and that of its nationals for purpose of international criminal justice, prior to becoming a party to the Rome Statute would not be reviewable unless Article 12(3) were activated. This would incentivise universality of membership by encouraging States to enter the treaty without fear of *ex post facto* justice over its nationals and its own conduct.

There may be some merit for the Court to examine this issue in the Afghanistan situation, including the cluster of treaties referenced by Mr Sekulow, and settle this legal issue once and for all. The Myanmar/Bangladesh matter and others will increasingly bring the issue of non-State Party nationals to the fore in the practice of this Court.

So, the Appeals Chamber should reverse the Pre-Trial Chamber's decision on interests of justice and, upon review of the Pre-Trial Chamber's own evaluation of jurisdiction and admissibility, authorise the investigation of the Afghanistan situation to the extent that the Appeals Chamber decides that it meets jurisdiction and admissibility requirements.

I have a couple of other proposals for the future, but I am open to those in the questions.

PRESIDING JUDGE HOFMAŃSKI: [11:14:43] Thank you, Mr Scheffer, very much. We will adjourn now for half an hour. We meet again 11.45.

THE COURT USHER: [11:14:55] All rise.

(Recess taken at 11.14 a.m.)

(Upon resuming in open session at 11.49 a.m.)

THE COURT USHER: [11:49:13] All rise.

Please be seated.

MR DIXON: [11:49:49] Your Honours, before you proceed, if I may?

Having got the schedule now for the final representations, the government wishes to request to have an opportunity after the final representations of the victims to make a final representation submission as well, for no longer than five minutes, so that we are able to also make further submissions as, as the victims are doing before your Honours.

PRESIDING JUDGE HOFMAŃSKI: [11:50:19] (Microphone not activated)

MR DIXON: [11:50:20] Yes, that's our request, your Honours. I understand there would be sufficient time to slot that in, if your Honours are minded to do that.

PRESIDING JUDGE HOFMAŃSKI: [11:50:31] Thank you, Counsel.

(Appeals Chamber confers)

PRESIDING JUDGE HOFMAŃSKI: [11:51:11] Thank you, Counsel.

We will give you the floor before victims will start to make their final submissions.

MR DIXON: [11:51:19] My request, your Honours, if I wasn't clear, was to make our submissions after the final representations of the victims, which will certainly respond to what the government has already said, to have an opportunity to respond to the victim submissions, if that is acceptable, to do it after each of their 10 minute slots for five minutes only.

(Appeals Chamber confers)

PRESIDING JUDGE HOFMAŃSKI: [11:53:09] The Chamber has decided by majority that you will speak after the victims.

MR DIXON: [11:53:13] I am grateful, your Honours.

And that would then be before the Prosecutor, of course, so immediately after the

victims. I am grateful.

PRESIDING JUDGE HOFMAŃSKI: [11:53:23] Thank you, Counsel.

Well, then the Appeals Chamber now invites the Legal Representative of Victims, group 1. I understand Mr Gaynor.

MR GAYNOR: [11:53:37] Thank you very much, Mr President.

PRESIDING JUDGE HOFMAŃSKI: [11:53:41] Ten minutes, please.

MR GAYNOR: [11:53:42] Thank you.

I respond first to the government of Afghanistan's submissions and then I'll --

PRESIDING JUDGE HOFMAŃSKI: [11:53:57](Microphone not activated) Excuse me for misunderstanding. We will now invite the Prosecutor to respond to the submission of the Islamic Republic of Afghanistan and *amici curiae* at this stage, during the 15 minutes, and then we will ask - sorry, Mr Gaynor - Mr Gaynor to take the floor.

Mr Guariglia, please.

MR GUARIGLIA: [11:54:33] Thank you so much, your Honours.

Mr President, your Honours, I will be brief. I don't think I need to use the 15 minutes. In particular, some of the topics that we were going to address have been covered so eloquently by Professor Scheffer that we feel that basically we have really nothing meaningful to add, other than to note perhaps that, whatever the divergence of positions may be, it's very nuanced and very, very, very -- or, very, very small, really.

Your Honours, first I'll address some of the arguments made by Mr Dixon on behalf of the Islamic Republic of Afghanistan yesterday, and then briefly touch on some submissions advanced by the Jerusalem Institute of Justice and others, and the European Centre for Law and Justice.

Firstly, your Honours, we would like to make clear that the Prosecution welcomes the engagement of the government of Afghanistan with the Court, and its willingness to develop a constructive partnership. In this sense, your Honours, the Prosecution always stands ready to work with national authorities and to promote national efforts to ensure accountability, and has done this in many situations to date. So in this sense, the submissions by the Afghanistan representatives yesterday can only be seen as a positive step.

But, your Honours, this does not detract from the fact that the focus of this appeal is not, and could never be, what positive developments have taken place recently in Afghanistan as to accountability for war crimes or crimes against humanity. This is a corrective proceeding related to a confined issue, as I said at the beginning of our submissions on Wednesday: whether the Pre-Trial Chamber erred in its interpretation or application of the interests of justice criterion to the instant situation. The issue of complementarity, under Article 53(1)(b), is not part of this appeal.

Nor is the remedy sought by Mr Dixon - which is for you to set aside the Pre-Trial Chamber decision and simply render your own first instance decision based on new information - one that you can provide. Your review is not a *de novo* review.

But you shouldn't provide Mr Dixon's alternative request either, that is, his request to remand the matter for the Pre-Trial Chamber but not to authorise the investigation, but rather to make a new determination on interests of justice, based on additional information to be provided by the government of Afghanistan.

Your Honours, first, interests of justice and complementarity are different legal requirements under the Statute and they should not be conflated in a single, "all encompassing" undefined and blurry category, as Mr Dixon proposes. This is not the logic of the Rome Statute.

Second, your Honours, while we welcome the developments that have been described by Mr Dixon, so far we have heard nothing that would justify a fundamental change in our position, or that of the Pre-Trial Chamber, concerning the admissibility of the situation, much less warrant the extraordinary and extra-statutory procedure proposed by Mr Dixon. And, your Honours, this impression has been reinforced by the submissions made earlier today by the Afghan Human Rights Organisations.

Third, your Honours, these proceedings have already lasted for too long. It is slightly over two years since we filed our Article 15 request with the first Pre-Trial Chamber. It is in the interests of judicial economy and fairness to all involved, starting with the victims - who, as it has been repeatedly said here, have already waited for long enough - that we get a final decision on that request.

So, your Honours, the proper avenue is for your Honours to authorise the commencement of the investigation as soon as possible. And here we agree with Mr Gaynor yesterday and with Professor Scheffer today. As a territorial state, Afghanistan will then receive the Article 18 notification, and within a month of receipt of that notification it can notify the Court that it is investigating or has investigated its nationals or others within its jurisdiction for the relevant crimes, as provided by Article 18(2). Now this will trigger the Article 18 process and afford Afghanistan all the rights and all the obligations that are contemplated in that provision.

This will ensure, first, the provision of clear and tangible information, showing the existence of concrete investigative steps, if this exists, related to Article 5 crimes and not only submissions from the bar table concerning the existence of certain government structures or agencies. So this will allow, if this process happens, for an informed decision on complementarity. And second, it will also provide for

adequate and meaningful victim participation which, as we have confirmed in this hearing, will be invaluable in assisting the Office of the Prosecutor and the Pre-Trial Chamber in reaching the right conclusion.

Now this procedure, your Honours, I note, seems perfectly in line with the undertakings of cooperation and participation that the Afghan representatives have made before you, both orally and in writing. And of course, Afghanistan can also choose to sit and wait until a case is brought by the Prosecutor before the Court and then challenge admissibility of that case, so it has amble recourse under the Statute as to what to do.

I would like also to make the point, your Honours, that opening an investigation into this situation, as noted by others, does nothing to prevent the Afghan authorities from carrying out their own domestic proceedings. On the contrary, we welcome that. Judge Morrison suggested this in his question yesterday, and Professor Scheffer was very clear on this point today, earlier today in his presentations, both our investigations and any investigations carried out by the Afghan authorities can proceed perfectly well, side by side, in relation to different incidents and different perpetrators. And if they happen to relate to the same incidents or the same perpetrators, then that can be resolved through the normal admissibility procedures. Nothing in the opening of an investigation at this Court stands opposed to any good faith efforts by the Afghan authorities to ensure justice for the citizens.

A couple of small points to finish this part of my response, your Honours: First, a correction, the Office of the Prosecutor did conduct missions in Afghanistan during 2013, 2015 and 2016. Admittedly, it did not in 2017, 2018 or 2019, but that was the time in which the Pre-Trial Chamber was deliberating on our request.

Second, your Honours, while we recognise the challenges noted by the Afghan

representatives in terms of security and access to the field, we note that, sadly, this is a reality that occurs frequently in situations before the Court. For instance, your Honours, the security situation in Libya is very bad and access to the field is very limited. However, this has not prevented the Office of the Prosecutor from investigating and continuing to investigate into the situation. And identical considerations, I note, apply to lack of cooperation, which is another sad reality of international criminal investigations. Frankly, your Honours, it will certainly not be the first time that the Office of the Prosecutor has to investigate without the cooperation of some of the States involved.

Now turning to the points made by the Jerusalem Institute of Justice and the European Centre for Law and Justice, we have listened to those points very carefully. We reiterate, your Honours, that the issue of exercise of jurisdiction over nationals of non-State Parties is not part of this appeal.

Your Honours, in its decision at paragraph 50, the Pre-Trial Chamber was very clear. It asserted that conduct allegedly occurring in full or in part in the territory of Afghanistan or, rather, State Parties, fell under the Court's jurisdiction, and I quote, "irrespective of the nationality of the offender", end of quote. This finding is not under appeal, and accordingly is not before you. I don't really need to say anything else on this point, perhaps, other than noting that these proceedings are not a forum to discuss the policy and legal choices made by the drafters of the Rome Statute when adopting Article 12, or the duties of State Parties to cooperate with the Court under Part 9.

But second, your Honours, the Statute itself provides for mechanisms for States to avail themselves of if they consider it justified, such as challenges to jurisdiction of the Court, or consultations procedure in Article 97 for part 9 requests made by the Court.

So any intervention by your Honours in relation to these matters now would not only be premature and outside the scope of this appeal, it would also be unnecessary. And in this sense, your Honours, I think that there is a difference of view between the Prosecution and Professor Scheffer. We don't think you should embark on any of these matters in this appeal; you should stay within the confined boundaries of the matters that have been brought before you.

Your Honours, this concludes our brief response. Thank you so much.

PRESIDING JUDGE HOFMAŃSKI: [12:04:24] Thank you, Mr Guariglia.

Now I will ask Mr Gaynor. Please proceed.

MR GAYNOR: [12:04:32] Thank you very much, Mr President.

We endorse the comments made by the Office of the Prosecutor.

It is clear from the record that Afghanistan is both unable and unwilling genuinely to carry out investigation into the crimes at issue.

In particular, Afghanistan has had every opportunity to bring proceedings against members of its own armed forces. There has been unjustified delay by the government in bringing those proceedings. This delay is inconsistent with an intent to bring those responsible to justice. Therefore, the test in Article 17(2)(b) is satisfied.

Now, turning to the question of unable, which is the test in 17(3), that test is also satisfied. And we can see that on the basis of paragraphs 24 to 29 and 52(c) of the government's written submissions of 2 December alone; those alone prove that 17(3) is satisfied. There has been a substantial collapse or unavailability of Afghanistan's national judicial system. Afghanistan is unable to obtain suspects or necessary evidence and testimony on much of its territory, that part held by the Taliban and associated groups.

In respect of Afghanistan's ability to exercise jurisdiction over crimes allegedly

committed by international forces, it is clear, as we have heard, that there are legal and political impediments to doing that and it plainly has not tried in any way to exercise jurisdiction over crimes by international forces.

Now, Mr Dixon says that we shouldn't discourage the government of Afghanistan from taking out reforms to improve the administration of justice and the rule of law in Afghanistan, and nobody is discouraging that. But 17(3) is not a value judgment, 17(3) is a purely factual assessment. Even a State with the best will in the world to investigate and prosecute, which is carrying out reforms to its legal system, still falls under 17(3) if it has lost control of large parts of its territory. Afghanistan is precisely the kind of situation that 17(3) was designed to cover.

So the conclusion is inescapable that the Afghanistan situation fully satisfies the Article 17 requirements for admissibility.

I want to turn now to the jurisdictional points raised by the European Centre for Law and Justice, and the Jerusalem Institute, and other parties. And nothing in their submissions prevents, as Mr Guariglia said, your Honours from ordering the commencement of the investigation immediately.

Ordering an investigation to begin does not deprive Afghanistan or the United States of legal remedies before this Court.

Far from it. Afghanistan or the United States can challenge the admissibility of the case or the jurisdiction of the case under Article 19(2)(b). The procedure is open to non-parties. It is the proper forum to hear and determine arguments, such as status of forces agreements, between the United States and Afghanistan, Article 98 agreements, and it is the appropriate forum in which to bring full and informed submissions concerning proceedings that have taken place or are taking place or are about to take place in the military justice systems of the United States or Afghanistan.

Now, in respect of the view that we all have to take a very pessimistic view of what the next United States administration might, what position it might take on the ICC, let's not forget that in Nicaragua versus the United States, a decision of the International Court of Justice of 27 June 1986 at paragraph 10, the Court noted that the United States took the position that the Court is, "without jurisdiction to entertain the dispute". The US went on to say that the United States, quote, "intend not to participate in any further proceedings", unquote.

Now roll on a few years and we have Hamdan against Rumsfeld, a well-known judgment of the United States Supreme Court, and in that judgment the US Supreme Court quoted with approval the judgment of the International Court of Justice in Nicaragua versus United States on the interpretation of Common Article 3 of the Geneva Conventions.

Now as for timing, Mr Kern emphasised how important it was to clear jurisdictional issues early in the proceedings, and indeed 19(5) in fact requires a State that makes an Article 19(2)(b) challenge to make it, quote, "at the earliest opportunity", unquote. So that addresses the urgency point made by Mr Kern in his very eloquent submissions.

Now, if Afghanistan or the United States were to disagree with a jurisdiction or an admissibility decision of the Pre-Trial Chamber, they have an appeal as of right to the Appeals Chamber under Article 19(6) and the now famous Article 82(1)(a).

There are other remedies available under the Statute as well as that process. This was alluded to by Mr Guariglia. Issues relating to treaties been Afghanistan and the United States, Article 98 agreements, status of forces agreements and so on, can be raised by Afghanistan in accordance with Article 93(3) or Article 97(c). These - I am grateful to a very helpful article by your Honour Judge Prost on the operation of Part 9 of the Statute, which will be useful to all parties.

Now, Afghanistan can argue in accordance with those provisions that complying with a request is prohibited in Afghanistan on the basis of an existing fundamental legal principle of general application. Under 97(c) it can argue that a request might require Afghanistan, quote, "to breach a pre-existing treaty obligation undertaken with respect to", unquote, the United States or any other State.

Now, where disclosure of information by Afghanistan is sought by the Court pursuant to a request for cooperation, and if that request raises a national security issue, Afghanistan can invoke the 93(4) procedure, Article 93(4) of the Statute. This can be invoked by Afghanistan or any other party which is minded to cooperate with the Court. It is intended to address the national security concerns of those parties.

So in short, the Statute also envisages the tenor of most of the arguments made by the European Centre and made by the Jerusalem Institute. It provides specific procedures in which those arguments can be fully made and determined. And very importantly, it provides the relevant State with an appeal as of right on decisions with respect to jurisdiction or admissibility.

Your Honours, what is not an option, I respectfully suggest, is to keep the preliminary examination open. That would be totally unconscionable.

The process of justice at this Court must progress. This is reflected in the presumption in favour of investigation which is set out in Articles 53(1), 15(3) and 15(4).

Justice must proceed not stagnate. The preliminary examination here took 11 years. The preliminary examination in Libya lasted less than a week.

Frankly, your Honours, it is impossible to understand how a preliminary examination into, for example, Taliban crimes against women and girls could have lasted more than two or three days. Just how long does it take a reasonable person to conclude,

on the basis of reading a dozen reports from reliable sources that the Taliban's treatment of Afghanistan's women and children, quote, "provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", close quote?

From the victims' perspective, it really is a matter of enormous concern that the preliminary examination has lasted so long. It's been clear for many years that Afghanistan was either unable or unwilling to investigate. The conclusion is of course strongly reinforced by the submissions of the government of Afghanistan of 2 December. The Court can't simply, as our American friends would put it, keep kicking the can down the road. Recommencing the preliminary examination simply isn't an option. We must move forward to the investigation phase. Admissibility and jurisdiction hearings can be heard in due course.

I want to turn now to the danger of working on the territory of Afghanistan.

Mr Guariglia has already made some excellent points about this. And also let's remember about how much investigation can take place without having access to the territory of the situation in question.

We are nearly in 2020. Technological advances mean that investigations can be advanced very significantly without access to territory. Investigators have cyber investigative tools that were science fiction just 20 years ago. The Werfalli case at this court is an excellent example of a case constructed largely on open source material.

Dutch investigators working to determine the identity of those responsible for downing Malaysia Airlines fight MH17 have made enormous advances in determining the identity of the anti-aircraft missile brigade that fired the projectile. They did not have access to the territory where that brigade is stationed.

The Office of the Prosecutor has, has access to many servers located in ICC States Parties.

The UNAMA continues to issue quarterly reports on civilian casualties in Afghanistan.

Most importantly, all States Parties, once the investigation is triggered, who have information of relevance to the crimes that have been committed in Afghanistan will be required to comply with requests for assistance from this Court, but that only is triggered if an investigation is ordered.

When your Honours retire to consider your verdict in this appeal, you do so not only as judges of the ICC but as judges who are a part of Afghanistan's legal order. When you deliberate, I am sure you will not allow threats aimed at undermining the rule of law to distract you from your duty as judges to remain scrupulously impartial.

When you deliberate, I respectfully ask you to remember one group of Afghans in particular who come to you for justice: the surviving women and girls who suffered such horrific abuses at the hands of the Taliban, ISIS and other entities.

I ask your Honours to remember one perhaps uncomfortable but inescapable truth. At the end of the day, the prospects of any genuine investigation in Afghanistan are very slim. If your Honours do not bring justice to those women and girls, nobody will.

Thank you very much.

PRESIDING JUDGE HOFMAŃSKI: [12:16:29] Thank you, Mr Gaynor. And now I would like also, please, representatives of victims, Ms Gallagher. Please keep the 10 minutes time limit.

MS GALLAGHER: [12:16:45] Thank you. Thank you, your Honours. And I will be under that time, speaking on behalf of all three components of LRV2 right now.

Just a few small points: First going back to complementarity, which a number of us have already addressed on the merits in our discussions of Wednesday and Thursday. But yesterday, just in light of the opinion offered by the European Centre for Law and Justice, on behalf of the three organisations in LRV2, the Centre for Constitutional Rights, NYU, Global Justice Clinic and Reprieve which are all components of this group, we have been litigating in US courts for more than the better part of 15 years to try and have some measure of justice and accountability.

I believe Michael Ratner, the former president of the Centre for Constitutional Rights filed the first habeas corpus petition 18 years ago this month. Over the course of those many years we have sought meetings with the Department of Justice through the Department of State to have criminal investigations open. We have filed civil lawsuits in the US where we have faced obstruction under again, unfortunately, three successful administrations. We have filed habeas corpus petitions, as I mentioned, which have been fought for those 18 years. Our universal jurisdiction cases have been obstructed by the United States and so we too are here truly at a court of last resort.

I would also just like to note that there is a distinction between noncooperation, whether principled or misguided, and active obstruction, intimidation, and threats.

Finally, we appreciate -- on this first point, we appreciate and fully endorse the submissions this morning by Professor Hannah Garry on behalf of the former UN Special Rapporteurs with regards to the regime that has been set out for accountability and redress, particularly for torture.

The second point, yesterday it was said, again by the European Centre for Law and Justice that sometimes, quote, "something" -- that a country should not be immune from, quote, "something not going as planned".

Just to again emphasise as we have through our written submissions, including our victims' representations, that our submission is that what our clients were subjected to, and indeed so many victims of the US torture programme, was planned, organised and what they endured was indeed not a mistake but rather the object and purpose of the US torture programme, so it is a widespread or systematic carefully planned policy.

The third point, as we are now in a different position than we were on Wednesday, we would just ask your Honours to please take into account all four grounds that the victims in our briefs represented by LRV2 and LRV3 put forward, so our two submissions on the interests of justice as well as our submissions on the scope and the nexus to the armed conflict. So to the extent that your Honours move before ground one, which we think is the place where this appeal should end, into a review of the interests of justice factors that the Pre-Trial Chamber looked at, which we say that they inappropriately looked at some of the factors, please take into account also nexus and scope.

And lastly, on behalf of the victims that we represent and their families, we express our deep appreciation for the honour and privilege of appearing before you over the last three days. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:20:55] Thank you, Ms Gallagher.

Mr Pietrzak, LRV3, you have also the opportunity to address the Chamber for next 10 minutes, please.

MR PIETRZAK: [12:21:08] Mr President, your Honours, firstly, because Ms Hollander is limited in what she can say, she has asked me to make all of our statements today on behalf of our client Mr Abd Al Rahim Al-Nashiri.

Ms Hollander has asked me to tell you that when she met him in Guantanamo in

prison in 2008, over 11 years ago, he took her hand as he told her about the torture he endured. She understood that all he wanted, all he sought is accountability for the perpetrators of the terrible crimes committed against him. This is his last chance, his last resort, if you will, for justice, accountability, vindication of his rights as a victim of terrible crimes through criminal proceedings.

I would like to address certain statements made yesterday on behalf of the European Centre for Law and Justice. Mr Jay Sekulow argued yesterday, and I quote, "the United States has a very comprehensive military justice system and very comprehensive criminal justice system". But Mr Al-Nashiri is facing the death penalty in a military commission created exclusively to prosecute him, designed for that purpose. It has few of the rights guarantees he would be granted in either the military or civil criminal justice systems in the United States. That commission and the criminal justice system have denied Mr Al-Nashiri his basic fair trial rights now for almost two decades as the moment of his abduction by US, US authorities. They have denied him any accountability for the perpetrators of torture and other crimes which he has suffered.

In fact, the European Court of Human Rights in the case against Poland found that the forced and extralegal transfer of Mr Al-Nashiri to the United States was in violation of his fair trial rights under Article 6 of the European Convention on Human Rights because of the failure of the military commission or the justice system in the United States to meet the standards, the fair trial standards established under the European Convention on Human Rights. Even though the European Court of Human Rights expressly ruled that Poland should demand diplomatic guarantees or assurances from the United States that Mr Al-Nashiri's fair trial rights would be respected after his extralegal and forcible transfer to the United States, neither such

assurances nor diplomatic guarantees have ever been provided by the United States. More importantly, the unfair and abusive military justice system to which Mr Al-Nashiri is subjected to today is targeted only against Mr Al-Nashiri as a defendant. It seeks only his accountability *per fas et nefas*. However, these proceedings, the investigation for which the Office of the Prosecutor seeks authorisation before this Court concerning Mr Al-Nashiri not as a defendant, but as a victim of torture and other grievous crimes in the context of the situation in Afghanistan. I want to make it clear that the United States justice system as a whole, both civil and military, and in particular this peculiar system of justice before the military commission, they have completely failed Mr Al-Nashiri in this respect. He does not even have access to the ordinary United States civil or military justice systems. No investigation or other proceedings have been initiated or allowed before the United States authorities to vindicate his rights and hold accountable those who are responsible for his torture. In fact, agents of the United States authorities have taken active steps to impede any effective investigation by destroying video recordings of the torture and of the interrogations of our client. Needless to say, these recordings could have constituted important evidence in any investigation regarding the crimes committed against Mr Al-Nashiri.

We wholly support the argument made -- the arguments made by the former Special Rapporteurs in their *amicus* brief and so clearly presented today by Professor Hannah Garry. The Impugned Decision is a violation of the rights of Mr Al-Nashiri under *jus cogens* and the standards set forth so clearly in articles 13 and 14 of the Convention against Torture. Mr Al-Nashiri has the right to an effective remedy, to an effective investigation and to accountability for the perpetrators of crimes committed against him.

We therefore urge the Appeal Court not only -- the Appeals Chamber not only to change the Impugned Decision, but to do so in such a way as to make it express, to make it very clear that the investigation must not be limited in scope as suggested by the Pre-Trial Chamber's decision.

I would reiterate that the justice which Mr Al-Nashiri is due via an effective investigation will not be accessible if this Court does not authorise an investigation in such a way as to leave no doubt that the scope of authorisation for an investigation does include victims of the transnational and transjurisdictional system of torture, incommunicado detention and forcible transfer, euphemistically referred to as the system of extraordinary rendition and the enhanced interrogation techniques programme.

We ask that the Appeals Chamber change the decision of the Pre-Trial Chamber and authorise the investigation in a way that leaves no doubt that the grievous crimes against Mr Al-Nashiri, violating his very dignity, his humanity, do not fall outside the scope of the investigation. Failure to do so at this stage will leave Mr Al-Nashiri without justice, with no chance of an effective investigation and will ultimately result in impunity.

Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:28:42] Thank you, Counsel.

This concludes the final presentations of victims. I will now invite the representatives of State of Afghanistan to make a final submission.

Mr Dixon, your 10 minutes begins, please proceed.

MR DIXON: [12:29:07] Thank you, your Honours.

We have to recall where we are in this process. An investigation has not been authorised, as yet, and we can't jump ahead and start looking at Article 18 and

Article 19. At this stage, the Court has to be satisfied of all of the requirements, either before the Pre-Trial Chamber or at the Appeals Chamber level.

We are in, squarely, the field of Article 15(4), and that requires the Court to consider admissibility whether or not the case, in relation to all the information that has been provided to the Court, is being dealt with by the national jurisdiction or not. Now if it is, there is no grey area, your Honours. The Court can't say, well, we're nevertheless going to authorise an investigation so that we can have two investigations going alongside each other. That's the point I was making yesterday. It's an either/or at this stage. Later down the line, yes, when cases develop it might change, but the Statute doesn't allow the Court to say that an investigation can be authorised when the national jurisdiction is dealing with the same information that has been provided in the Prosecution's application to investigate.

Now that is a factual matter, I accept that entirely. And some of those facts have been presented before your Honours and there have been responses. We don't accept many of the responses that have been made that the office of international crimes is defunct. But those are matters, as I have said in our alternative submission, that we are asking in the alternative could be dealt with by the Pre-Trial Chamber rightly at this stage if it was sent back there.

There is no justification for rushing ahead if there is now a genuine dispute over this issue, we say. It should be determined now in the logical sequence of the Statute's framework. This is not something blurry that we are making up. The Statute requires first of all those elements to be satisfied, including admissibility, then an investigation can be authorised by the ICC taking all those factors into account. And of course the State has rights later on, but we are not at that stage and I urge your Honours not to be lured into jumping head. We have got to look at where we

are at this point and the State is coming before you in good faith, as a dedicated ICC State party, saying we are investigating all of the information that is before your Honours, not just parts of it, we are not saying: oh, we would like to look at low-level perpetrators, could you please look at high-level perpetrators. Our obligation as a State Party is to look at all perpetrators wherever the evidence leads. That's what we are required to do by international law and that's what we are doing. The preamble doesn't say that the ICC will look at high level and, States, you look at low level. The requirement is that we look at all potential perpetrators.

And that's what's happening. That's why I explain that the law has changed to allow command responsibility to be charged. In one of the cases that I mentioned in the Paktia area regarding the Afghan security forces, that's a case where they are looking at who did it, but also who was in charge. That's a case that's actively before the war crimes unit at the moment; not a defunct unit that's doing nothing.

I accept, your Honours, those are factual matters that may have to be delved into further and are not possible to be ventilated in full today. But I make that point to say that we come here not a second class citizen State saying well, can we have the scraps and look at the local-level perpetrators? We come saying we as a State are looking at all potential perpetrators.

And that's where we need assistance. We accept that is a very, very, very difficult task to take on, but that's the one we are determined to take on and have started taking on. And the submission I was trying to make yesterday was that we think we are in a better position, certainly as good as the ICC, to do that, particularly where we have the support of the Court to do that right now.

And as I emphasised, that doesn't mean that the Court then disappears into the background. For four reasons, the ICC is still centrally involved, and that's

permitted in the structure and scheme of the Statute. First of all, it will be made clear that the ICC under its structure is allowing the national jurisdiction to do this and providing that support.

Then there is the possibility of positive complementarity, those arrangements can be made directly with the Prosecutor to assist, as has happened in many other situations, the country involved.

Then there is also, your Honours, the monitoring procedure. And I mentioned Article 18(2) because there is that 6-month procedure there that the drafters envisaged. Exactly the same could apply, there is nothing stopping positive complementarity from allowing a six month or whatever time period of monitoring. And then fourthly, there is always the potential for the Prosecution to come back and apply if needed.

So the ICC is very much in the picture, not investigating alongside but supporting the national jurisdiction and there as the safety net at all times. And what we are urging as the State is not for overreach here where if the State is genuinely willing to take this on, for that to be interpreted as, well, maybe you can do some of it, but we will, we will as the ICC take over the other part and to run the two in tandem. That's not permitted at that stage, we say, under the Statute, your Honours.

I also just wish to emphasise one other matter that arose from what the NGOs in Afghanistan were saying. No doubt, the victims want the ICC to investigate this matter, and who wouldn't? But I think, with respect, that that misses the point. The real issue is will anything, if they look at the track record, be done right now? That paralysis is what we say kills hope, where because of the delays, yes, people want it to happen but is it happening? We are trying to fill that void as the national jurisdiction to make sure that these cases can be brought now.

What we say is, if there are factual disputes that your Honours are minded to refer back to the Pre-Trial Chamber, that is an alternative we are putting forward. And I have placed perhaps more emphasis on that in my further submissions today because that would allow these issues to be ventilated, together with all the other issues in relation to the interests of justice as well.

And a final one in relation to that is one which His Excellency the ambassador raised in his address and which I reinforced as well, another matter that could be taken into account if the matter was remitted, that being the priorities of peace and security. It was highlighted very aptly by the NGOs that one of those mothers most awfully affected by the loss of her son in a bombing attack said that justice means a peace where no mother ever loses a child. So justice can mean peace and preventive measures to stop further war crimes happening and that might well be a factor that has to be weighed into how far the national jurisdiction in the immediate term can take the matters.

That's not to in any way undermine the priority that has been placed currently on national investigations. Those are two twin factors we say could certainly be reconsidered. And instead of taking a knee-jerk reaction of saying, well, we must correct what the Pre-Trial Chamber has done and authorise immediately, what we are urging is let's go through the proper steps in a logical fashion, let's look at what the State is doing, hear all the submissions. And we are no worse off, in fact we say we are far better off and far more advanced, because the signal will be sent that the ICC is committed, the national jurisdiction will be allowed to function, and at all times the ICC remains there, if needed.

Those are our submissions in reply, your Honours.

PRESIDING JUDGE HOFMAŃSKI: [12:38:10] Thank you, Mr Dixon.

And now I give the floor to my learned colleagues to ask questions and first I invite Judge Ibáñez, please.

JUDGE IBÁÑEZ CARRANZA: [12:38:26] Thank you, Mr Presiding Judge.

The question goes to Professor Scheffer, please.

Given that the interest of victims are a factor that the Prosecutor must take into account under Article 53(1)(c) when analysing whether there is any reason to believe that an investigation could not serve interests of justice, is it a mandate that drafters imposed to take into account whether the personal interest of victims are affected in the same way that it considers under Article 68(3)? Please. I hope it is clear, the question.

MR SCHEFFER: [12:39:28] Your Honours, Judge, I am just looking at 68(3), this is what you referred to?

JUDGE IBÁÑEZ CARRANZA: Yes, yes.

MR SCHEFFER: [12:39:33] Is that correct? I just want to make sure I recall exactly the terms of it. Yes.

My recollection is that Article 68 certainly.

PRESIDING JUDGE HOFMAŃSKI: [12:39:43] Excuse me, Professor, please micro on.

MR SCHEFFER: [12:39:55] My mic is on. I'll try this one. Can you hear me now?

PRESIDING JUDGE HOFMAŃSKI: [12:39:59] Yes.

MR SCHEFFER: [12:40:00] Okay. Sorry about that.

I don't have a precise memory of how Article 68 links to Article 53 in how we were drafting. But I would say that Article 68's focus on the interests of victims certainly would have an impact on what we were considering in Article 53 and it may be that the phrase "interest of victims" migrated into Article 53 after we were focused on

Article 68. Because remember the whole focus on victims in the drafting of the Rome Statute occurred most strongly in 1977 and 1998 after the French government introduced it as a prominent feature of our discussions.

So in Article 53 it would have been natural in considering whether or not to proceed with an investigation to bring the interest of victims into that calculation once we had established the priority of victims elsewhere in the Rome Statute. I doubt, although my memory is not perfect on this, I doubt that Article 53's reference to interests of victims preceded our focus on the interests of victims elsewhere in the Statute, it probably followed it and then that phrase was inserted. But that's the best my memory serves me at this point.

JUDGE IBÁÑEZ CARRANZA: [12:41:41] There is another question almost in the same vein, please.

Regarding the analysis whether there is any reason to believe that an investigation could not serve to the interests of justice, could you please tell us about, first, the discussions at the Rome conference regarding the factors of gravity of the crimes and the interest of victims.

Second, whether the factors of -- whether the factors considered by the Pre-Trial Chamber, that is the time elapsed, the lack of cooperation, financial considerations, have any relevance.

And third, what factors are taken into consideration in the situation of other tribunals that you helped to design, such as tribunal for Rwanda or the former Yugoslavia or Cambodia, please.

MR SCHEFFER: [12:42:37] Right. I will try to be succinct as possible.

On your first question regarding gravity and interests of victims, certainly the issue of gravity had been with us for several years in the negotiations, and I don't know

exactly when it was introduced into Article 53, I would have to check, but my -- it would be astonishing for it not to be a factor of consideration in launching an investigation. It was a fundamental building block of the drafting exercise, the issue of the gravity of the crimes, because it created a realistic paradigm for the International Criminal Court. We could not be dealing with minor commissions of crimes, it was only the crimes of greatest gravity that would be the focus of the attention of the Court. For pragmatic reasons as well as, frankly, for reasons of law. In terms of your second point, if you can just remind me, your second point was, your second question, Judge, could you remind me? You asked three questions.

JUDGE IBÁÑEZ CARRANZA: [12:43:50] (Microphone not activated)

Sorry. The second question or the second part of the question was if those factors considered by the Pre-Trial Chamber in the Impugned Decision --

MR SCHEFFER: [12:44:01] Oh, yes.

JUDGE IBÁÑEZ CARRANZA: [12:44:02] -- such as the time elapsed, financial situation, et cetera, are factors that should be taken into consideration to resolve this issue.

MR SCHEFFER: [12:44:11] Those issues simply, in my recollection, were not a factor of the negotiations hardly at all. I mean, it was simply not a factor of discussion that we would sit there and speculate about how long this process would take. I think most of us were rather optimistic that once the Court was created there would be a fairly timely application of the resources of the Court and of the investigation of crimes such that those, those issues would not be prominent issues in the operation of the Court.

And that did influence a lot of the discussions about Part 9 on cooperation, but those discussions -- or those issues then got sort of funnelled into very specific discussions

about how you achieve cooperation with a State. What are the steps that you go through to achieve prosecution -- or cooperation?

Not, let's speculate if there is noncooperation for eight or 10 years, what do we do then? That wasn't part of the negotiating scenario. It was rather, how do you get there as quickly as possible?

And then, I'm sorry, my mind is so focused, Judge, what was your third question?

JUDGE IBÁÑEZ CARRANZA: [12:45:44] I could rather ask you, earlier we heard that you had two suggestions or proposals to the Bench. I am curious, could you share it with us now, please.

MR SCHEFFER: [12:45:57] Yes. There were only two suggestions. One is a very mild one, and that is that it might benefit the public understanding of this entire situation, including the understanding of certain governments, if it were possible for the Prosecutor to have a more publicly available statement as to why this is in the interests of justice to proceed with an investigation on Afghanistan. One can always read her pleadings and get a full picture of why it's important, but sometimes I think there needs to be sort of a more public expression by the Prosecutor in a more, you know, sort of targeted way so that governments and the public can have a much better understanding of why this is so important and being pressed forward in chambers.

My second suggestion is for the Appeals Chamber, which I do consider has unique moral authority here, to send a message, just dicta, we're just talking about dicta here, but to send a message to the Assembly of States Parties and to the UN Security Council to address the financial problems of this Court in terms of sufficient resources for the Office of the Prosecutor, as well as, frankly, the Office of the Defence and the public defender to be able to address these requirements that are presented. And the

Afghanistan situation is a clear example of where resources are needed by this Court to achieve its work far more efficiently and with sufficient staff in order to address these issues. And this also goes for the victims and their representatives. These are huge budgetary items.

But the way in which the Assembly of States Parties addresses their assessment issues, the way in which the UN Security Council completely avoids any responsibility for spurring UN funding for the work of referrals that it itself has launched under the Statute -- and as a drafter we anticipated the Security Council would actually take steps to stimulate UN funding for Security Council referrals, that was very clear in the negotiations, no doubt about that. It can't be forced, but certainly the Security Council should be pressing for it. And I know the Prosecutor makes that plea constantly, as well as the President of the Court, when they appear before the, before the Security Council.

So my suggestion is simply that in the, in the decision on this case there might be a suggestion that financial issues are prominent in the administration of justice and they cannot be ignored.

Thank you.

JUDGE IBÁÑEZ CARRANZA: [12:49:06] Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:49:07] Thank you, Professor Scheffer, for extensive answers and for your suggestions.

I'm afraid the next question is also going to you.

Judge Prost, please proceed.

JUDGE PROST: [12:49:20] Professor Scheffer, I want to take advantage of your extensive knowledge of the negotiating history and receive your comments. On one point your submissions on Article 15 were very clear, but on one question I would

appreciate your input and that is in relation to the proper interpretation of Article 15(4) and the criteria which the Pre-Trial Chamber should be considering. And I place the question in this fashion presuming, or assuming for the argument that there is a different interpretation to be given to the words "reasonable basis to proceed with an investigation" in Article (3) and in Article (4), particularly because of the existence of Rule 48.

So if there is a different interpretation to be given to that term in paragraph (4), is there not an interpretation that there are only two criteria for the Pre-Trial Chamber to consider, which is "reasonable basis to proceed" in the literal sense, a factual basis for the investigation, not a fanciful investigation, which was a concern?

And secondly, the jurisdiction question but not the issue of admissibility, especially given the proximity in time of triggering an Article 18 process after the authorisation of the investigation.

I would appreciate your comments, especially in light of the drafting history.

MR SCHEFFER: [12:50:50] Right. The drafting history behind Article 15 really should be viewed on a quite simple plane of analysis, reasonable basis to proceed. Now, that does not set forth any stipulated criteria of the decision of the Pre-Trial Chamber to actually authorise the initiation of an investigation. And I don't recall that we were sitting there establishing specific criteria in our own understanding of a reasonable basis. We brought from all of our national judicial systems our own particular understanding of what it means to be on a reasonable basis to proceed, which is a very commonsensical platform of analysis, and also a somewhat low threshold as well. We didn't put any qualifying words on reasonable basis or significantly reasonable or substantial reasons, et cetera, that's not what we established in Article 15. But in the rules discussion after Rome, that's why Rule 58

emerged in the discussion was because there was needed some sort of framework of analysis that the Pre-Trial Chamber could work with.

Now that frame of analysis, however, is one that is imposed upon the *proprio motu* Prosecutor, not on the Pre-Trial Chamber. The Pre-Trial Chamber, I mean, technically, technically could ignore Rule 48 in its evaluation of an Article 15(4) application, it could just ignore it. But the *proprio motu* prosecutor, of course, being professional, would nonetheless go through the steps of Rule 48 and then, if the *proprio motu* prosecutor is seeking to launch an investigation, it would be responsible for her to, in her pleading before the Pre-Trial Chamber, bring the criteria of Rule 48 forward.

Now, that's where I said technically that would be parts (a) and (b) because that's the positive moving forward reason she is coming to the Pre-Trial Chamber to launch an investigation.

Practically speaking, however, if I were a judge on the Pre-Trial Chamber, I would say: Well, thank you very much, this is all very interesting. What was your thinking about part (c)? Did you ever think about part (c)? Was there anything in part (c) that came into your evaluation of this matter? Because I, I want to know what the, what the negative aspect of -- was there any negative aspect that was brought to your attention while you were achieving your decision on jurisdiction and admissibility?

But that question doesn't have to be asked by the Pre-Trial Chamber is my response.

JUDGE PROST: [12:53:52] Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:53:57] Thank you very much.

We will now invite the counsel of the Office of the Prosecutor to make the final submissions. You have 10 minutes. Please, Mr Guariglia.

MR GUARIGLIA: [12:54:21] Thank you, your Honours.

I think I will be shorter than that.

Your Honours, it is now incumbent upon us in the Prosecution to bring these proceedings to a close. But if I may, I hope that many of our colleagues in this courtroom will find that these remarks reflect their own views as well, even if in part.

We have been moved by many of the submissions brought before the Appeals Chamber by victims who have been affected but in different ways by the alleged crimes in the situation.

We are profoundly grateful for their participation and look forward to working constructively with them in the future. We are also grateful to the various *amici curiae*, both inside the courtroom and those who have made written submissions, for their learning and expertise.

For our own part, we take this opportunity to fully acknowledge that the duration of the preliminary examination in this situation, perhaps unavoidably, was very lengthy. The reports of alleged crimes falling within this situation continue, even today, almost daily. They shock the conscience. And if any reminder was needed as to why an investigation should be authorised, we submit that your Honours have heard that reminder here this week.

Based on her careful and independent analysis during the preliminary examination, the Prosecutor was, and remains, resolved to open an investigation of these matters and to make her best effort to deliver justice to the victims and hold perpetrators to account, as her mandate requires.

We know that this will be difficult and the road ahead may still be very long. But we will approach this task with all the resolution, independence and diligence that we can muster, without fear or favour, as we must.

It is in this context that we have been particularly concerned by the reasoning in the Pre-Trial Chamber's decision. The difficulties arising from the decision have been thoroughly addressed in the various written submissions and in the oral arguments that your Honours heard this week, and we do not propose to revisit them again.

On the basis of the arguments that we and other colleagues during the last three days have made before this Chamber we renew our request to your Honours to reverse the decision in its entirety and authorise the commencement of the investigation. Or, alternatively, to direct the Pre-Trial Chamber to do so without any further delay.

We would also like to take this moment finally to underline again our appreciation for the government of Afghanistan's decision to engage with the Court and to participate in these proceedings, even if we disagree with their view that as a matter of law, any recent efforts to address the alleged crimes at the national level are relevant to this corrective appeal proceedings. We invite Afghanistan to continue this engagement, including by effectively using the procedural rights and opportunities that the Statute affords to it, if it so wishes. And we stress that Afghanistan will always find a receptive partner in the Prosecution in seeking to promote domestic accountability for international crimes.

In concluding, therefore, I would like to borrow words from counsel for Afghanistan. It is indeed past time to grasp the nettle and to unleash the potential of the Court and the Rome Statute in this situation.

But that means, in our submission, correcting the errors in the Pre-Trial Chamber's decision and promptly authorising an investigation.

That is the procedural framework which States have established for the Prosecutor to carry the next phase of her work, not re-opening Article 15 proceedings.

Proceedings must move forward, not backwards, as it has been said.

And it is in the framework of an investigation, your Honours, that the Prosecutor can and will engage seriously not only with interested States but also, and above all, with the victims of alleged crimes.

This concludes our submissions, your Honours. We appreciate the Chamber's patience and attention. Thank you.

PRESIDING JUDGE HOFMAŃSKI: [12:58:54] Thank you, Counsel.

The schedule for the final day of the hearing is now closed, it is complete.

The Appeals Chamber has had the privilege of hearing oral submissions during the last three days from each of you and which will serve to greatly assist our deliberation and eventual judgment on the novel and important issues that the Prosecutor's appeal has seised the Chamber with.

The Appeals Chamber is grateful for your participation and for your very good cooperation throughout the hearing. The Chamber will issue its fully reasoned judgment in due course.

I thank all the court officers, interpreters, reporters, as well as the technicians and security for assisting with today's proceedings. I thank all of you.

The hearing is now closed.

THE COURT USHER: [13:00:05] All rise.

(The hearing ends in open session at 1.00 p.m.)