

**Original: English****No. ICC-02/18 OA  
Date: 1 March 2024****THE APPEALS CHAMBER**

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

**SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I****Public document****Judgment****on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute"**

**Judgment to be notified in accordance with regulation 31 of the Regulations of the Court to:**

**The Office of the Prosecutor**

Mr Karim A. A. Khan, Prosecutor

Ms Helen Brady

**States Representatives**

Competent authorities of the Bolivarian

Republic of Venezuela

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

Mr Enrique Carnero Rojo

***Amicus curiae***

The Organization of American States Panel  
of Independent International Experts

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Victims Participation and Reparations  
Section**

Mr Philipp Ambach

**Other**

Pre-Trial Chamber I

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The Appeals Chamber of the International Criminal Court,

In the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute" of 27 June 2023 (ICC-02/18-45),

After deliberation,

Unanimously,

*Delivers* the following

## JUDGMENT

1. Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute" of 27 June 2023 (ICC-02/18-45) is confirmed.
2. The Bolivarian Republic of Venezuela's request (included in "The Bolivarian Republic of Venezuela's Appeals Brief against the Pre-Trial I's 'Decision authorizing the resumption of the investigation pursuant to article 18(2) of the Statute' (ICC-02/18-45)" (ICC-02/18-59-AnxII-Red)) to present additional evidence, is rejected.
3. The Bolivarian Republic of Venezuela's request (included in "The Bolivarian Republic of Venezuela's Response to *Amicus Curiae* Observations of the Organization of American States Panel of Experts" (ICC-02/18-86-Red)) to dismiss *in limine* the "Amicus Curiae Observations by the Organization of American States Panel of Independent International Experts on the Venezuelan Government's Appeal against the Decision authorising the resumption of the investigation" (ICC-02/18-85) is rejected.

## REASONS

### I. KEY FINDINGS

1. The allegation of fact, which the State makes in requesting deferral pursuant to article 18(2) of the Statute, is not only that national investigations "with respect to

criminal acts which may constitute crimes referred to in article 5” have been or are being conducted. The information from the State must also indicate that those national investigations “relate to the information provided in the notification to States”. The scope of the burden of proof is therefore not limited to the mere existence of domestic investigations. It extends to the relation between the criminal acts investigated by the State concerned and “the information provided in the notification” under article 18(1) of the Statute.

2. It is not, in and of itself, an error for a pre-trial chamber to rely on [additional information provided pursuant to rule 52(2) of the Rules of Procedure and Evidence] as if it were part of the Prosecutor’s article 18(1) notification, to the extent that such information complements or clarifies the information already provided in the Prosecutor’s notification.

3. There is no expectation at [the] stage of the [article 18(1)] proceedings that the Prosecutor should notify States of every act he or she intends to investigate, especially in those situations referred to the Court which cover a large number of alleged criminal acts. Indeed, in such situations, the Prosecutor may be in no position to identify all potential cases that fall within the scope of a broad referral and commit, so early in the process, to investigating them. However, the Prosecutor’s article 18(1) notification must be sufficiently specific in order for the State to be able to assert its jurisdiction in the proceedings under article 18(2) of the Statute.

4. It is not, in and of itself, an error for a pre-trial chamber to rely on the Prosecutor’s information about criminal acts with respect to which the Prosecutor does not express a clear intention to investigate, as long as such information, together with other information provided by the Prosecutor, provides the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, that he or she intends to investigate.

5. Article 18(2) of the Statute does not impose any time limit on the Prosecutor for his or her application to a pre-trial chamber for authorisation to investigate. The proceedings under article 18 of the Statute must be conducted expeditiously. Therefore, while no time limit is set for the Prosecutor’s application under article 18(2) of the



Statute, it is reasonable to expect the Prosecutor to file such an application without undue delay.

6. The burden to provide translations of the information which the Prosecutor received from the State, and which he or she is under an obligation to communicate to the pre-trial chamber, rests on the State seeking deferral. It is the State seeking deferral that must provide the translation into English or French of the documents upon which it relies to assert that it is carrying out or has carried out relevant investigations pursuant to article 18(2) of the Statute, in order to ensure that the pre-trial chamber can analyse the materials submitted in support of its assertion.

7. [The fact that the State must provide the translation into English or French of the documents upon which it relies to assert that it is carrying out or has carried out relevant investigations pursuant to article 18(2) of the Statute] does not preclude the State and the Prosecutor from engaging in a process of consultations to ensure that the documents, which the State considers the most relevant to support its assertion, are provided to the pre-trial chamber in one of the working languages of the Court. While the Prosecutor does not have an obligation to translate the documents in support of a State's deferral request, he or she may provide assistance where needed. The Prosecutor should endeavour to inform the State promptly about his or her intention to make an application for a ruling under article 18(2) of the Statute, in order to enable the State to prepare the information that it wishes the Prosecutor to communicate to the pre-trial chamber, especially where a translation into a working language of the Court is required.

8. In order for a State to be able to assert its jurisdiction in proceedings under article 18(2) of the Statute, the Prosecutor's article 18(1) notification must be sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate. Necessarily, this includes the provision, on the part of the Prosecutor, of sufficiently specific information as regards the temporal scope of his or her intended investigation.

9. In order to pursue the legal interests protected by crimes against humanity, a State, which has not incorporated crimes against humanity in its domestic law, while not required to investigate the alleged criminal acts under the legal qualification of crimes

against humanity, must nevertheless investigate the factual allegations underpinning the contextual elements of such crimes. This includes, in particular, an investigation into the factual allegations underpinning the widespread or systematic nature of the attack and those that may allow the conclusion that the attack was carried out pursuant to a “policy”.

10. When the scope of the Prosecutor’s intended investigation, as set out in an article 18(1) notification, includes allegations relating to crimes against humanity, a State seeking to assert its primary jurisdiction over such crimes must demonstrate the existence of an advancing process of domestic investigations and prosecutions of the facts and circumstances underlying the alleged crimes, including the factual allegations in support of the contextual elements of crimes against humanity that were sufficiently notified through an article 18(1) notification of the Prosecutor. As a result, if a State does not investigate the factual allegations underpinning the contextual elements of the alleged crimes against humanity that were sufficiently notified to it, it follows that it will not be able to demonstrate, in the proceedings under article 18(2) of the Statute, that the domestic criminal proceedings sufficiently mirror the scope of the Prosecutor’s intended investigation.

11. While the Statute does not expressly impose an obligation on States Parties to incorporate crimes against humanity into their domestic legislation, such incorporation may facilitate the fulfilment of their duty to exercise criminal jurisdiction over “those responsible for international crimes”.

12. For a State to be successful in seeking a deferral of the Prosecutor’s investigation, it is not enough for it to make a blanket statement that the Court lacks material jurisdiction on the basis of the absence of contextual elements of the alleged crimes against humanity. In such a situation, the State must support and substantiate its assertion by demonstrating which concrete and tangible investigative steps it undertook to reach that conclusion.

13. Among sexual and gender-based crimes, different legal interests are protected by the distinct elements of each crime. This distinction is even more significant between rape or any other form of sexual violence of comparable gravity and, for instance, the crime of torture. They are listed as distinct crimes against humanity, under article 7(1)(g)

and (f) of the Statute, respectively. They have materially distinct elements, given that they aim at protecting different legal interests.

14. The notion of inactivity in national proceedings may be relevant to the assessment of whether there are ongoing investigations or prosecutions. In this context, “inactivity” signifies the absence of “an advancing process” consisting of steps directed at ascertaining whether a person is responsible for the alleged conduct.

## II. INTRODUCTION

15. In this appeal of the Bolivarian Republic of Venezuela (hereinafter: “Venezuela”) against the decision of Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) entitled “Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute” (hereinafter: “Impugned Decision”),<sup>1</sup> Venezuela raises six grounds of appeal. Under the first ground of appeal, Venezuela submits that the Pre-Trial Chamber erred by imposing on Venezuela the burden of proof and by accepting the Prosecutor’s notification of his intended investigation, despite its procedural shortcomings and insufficient specificity. Under the second ground of appeal, Venezuela argues that the Pre-Trial Chamber erred by exclusively relying on the English translations of selected case files, and failing to require translations of information concerning domestic investigations that was in Spanish, and to examine the English translations of summaries of proceedings or records. Under the third ground of appeal, Venezuela submits that the Pre-Trial Chamber erred by relying on the temporal scope of the Situation referred to the Prosecutor by six States Parties. Under the fourth ground of appeal, Venezuela argues that the Pre-Trial Chamber erred by finding that it was necessary for domestic investigations to cover contextual elements of crimes against humanity, discriminatory intent and sexual and gender-based crimes. Under the fifth ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law in its complementarity assessment by relying on irrelevant factors while failing to give any weight to relevant factors. Lastly, under the sixth ground of appeal, Venezuela argues that the Pre-Trial Chamber erred by excluding national proceedings from its determination on the basis that there had been delays and periods of inactivity.

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<sup>1</sup> [Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute](#), ICC-02/18-45.

16. The Appeals Chamber will address these six grounds of appeal in turn below.

### III. PROCEDURAL HISTORY

#### A. Proceedings before Pre-Trial Chamber I

17. On 27 September 2018, the Office of the Prosecutor received from a group of States Parties to the Rome Statute (hereinafter: “Statute”) a referral under article 14 of the Statute for investigation of possible crimes against humanity committed in Venezuela since 12 February 2014.<sup>2</sup> On the same day, the Prosecutor informed the Presidency, in accordance with regulation 45 of the Regulations of the Court (hereinafter: “Regulations”), of the referral by States Parties.<sup>3</sup>

18. On 16 December 2021, pursuant to article 18(1) of the Statute, the Prosecutor notified all States Parties of his decision of 3 November 2021 to initiate an investigation in the Situation in Venezuela (hereinafter: “Situation”).<sup>4</sup> The Prosecutor attached a summary of the findings of his Preliminary Examination to the Article 18(1) Notification.<sup>5</sup>

19. On 13 January 2022, in response to Venezuela’s request for additional information, the Prosecutor provided, *inter alia*, a sample of open source documents detailing “similar patterns of allegations”, a sample of alleged incidents cited in open sources, a letter of 19 October 2021 from the Prosecutor to the authorities of Venezuela and a more detailed summary of his Preliminary Examination findings (hereinafter: “Prosecutor’s Additional Information”).<sup>6</sup>

20. On 20 April 2022, the Prosecutor informed the Pre-Trial Chamber that on 16 April 2022 he had received a deferral request by Venezuela pursuant to article 18(2) of the

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<sup>2</sup> [Annex I to the Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I](#), dated 27 September 2018 and registered on 28 September 2018, ICC-02/18-1-AnXI (hereinafter: “Prosecutor’s Regulation 45 Notification”).

<sup>3</sup> [Prosecutor’s Regulation 45 Notification](#), p. 2.

<sup>4</sup> Confidential *ex parte* Annex A to Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I, registered on 17 January 2022, ICC-02/18-16-Conf-Exp-AnxA (hereinafter: “Article 18(1) Notification”).

<sup>5</sup> Annex A to Article 18(1) Notification.

<sup>6</sup> Confidential *ex parte* Annex D to Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I, registered on 17 January 2022, ICC-02/18-16-Conf-Exp-AnxD.

Statute (hereinafter: “Deferral Request”),<sup>7</sup> and of his intention to seek the Pre-Trial Chamber’s authorisation to resume his investigation under article 18(2) of the Statute “as soon as possible”.<sup>8</sup>

21. On 4 November 2022, the Prosecutor filed a request to authorise the resumption of his investigation into the Venezuela Situation (hereinafter: “Prosecutor’s Article 18 Request”).<sup>9</sup>

22. On 19 and 20 January 2023, and 20 April 2023, following the Pre-Trial Chamber’s instruction of 18 November 2022,<sup>10</sup> the Victims Participation and Reparations Section (hereinafter: “VPRS”) transmitted to the Pre-Trial Chamber views and concerns of victims, together with reports thereon.<sup>11</sup>

23. On 27 February 2023, following a request for extension of time filed by Venezuela (hereinafter: “Request for Extension of Time to File Translations”),<sup>12</sup> the Pre-Trial

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<sup>7</sup> [Notification of the Bolivarian Republic of Venezuela’s deferral request under article 18\(2\)](#), dated 20 April 2022 and registered on 21 April 2022, ICC-02/18-17 (hereinafter: “Notification of Venezuela’s Deferral Request”), with confidential and public redacted versions of [annex A](#) and [annex B](#), para. 1; [Annex B to the Notification of the Bolivarian Republic of Venezuela’s deferral request under article 18\(2\)](#), dated 15 April 2022 and registered on 21 April 2022, ICC-02/18-17-AnxB-Red.

<sup>8</sup> [Notification of Venezuela’s Deferral Request](#), para. 8.

<sup>9</sup> [Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18\(2\)](#), dated 1 November 2022 and notified on 4 November 2022, ICC-02/18-18, with confidential *ex parte* annexes A and B, only available to the Prosecutor and Venezuela, and public [annex C](#).

<sup>10</sup> [Order inviting observations and views and concerns of victims](#), ICC-02/18-21, para. 11, p. 7.

<sup>11</sup> [First Registry Transmission of Victims’ Views and Concerns in the Article 18\(2\) Proceedings](#), 19 January 2023, ICC-02/18-22, with 16 confidential *ex parte* annexes, only available to the Registry; [First Registry Report on Article 18\(2\) Victims’ Views and Concerns Pursuant to Pre-Trial Chamber’s Order ICC-02/18-21](#), dated 19 January 2023 and registered on 20 January 2023, ICC-02/18-23-Red (confidential version, dated 19 January and registered on 20 January 2023), ICC-02/18-23-Conf), with a confidential *ex parte* annex I, only available to the Registry, and a confidential annex II; [Second Registry Transmission of Victims’ Views and Concerns in the Article 18\(2\) Proceedings](#), 20 February 2023, ICC-02/18-26, with 80 confidential *ex parte* annexes, only available to the Registry; [Second Registry Report on Article 18\(2\) Victims’ Views and Concerns Pursuant to Pre-Trial Chamber’s Order ICC-02/18-21](#), 20 February 2023, ICC-02/18-27-Red (confidential version filed on the same day, ICC-02/18-27-Conf), with a confidential *ex parte* annex I, only available to the Registry, and a confidential annex II; [Third Registry Transmission of Victims’ Views and Concerns in the Article 18\(2\) Proceedings](#), 20 April 2023, ICC-02/18-39, with 1,723 confidential *ex parte* annexes, only available to the Registry; [Final Consolidated Registry Report on Article 18\(2\) Victims’ Views and Concerns Pursuant to Pre-Trial Chamber’s Order ICC-02/18-21](#), 20 April 2023, ICC-02/18-40-Red (confidential version filed on the same day, ICC-02/18-40-Conf; corrigendum filed on 22 June 2023, ICC-02/18-40-Red-Corr), with two confidential annexes I and III, and a confidential *ex parte* annex II, only available to the Registry.

<sup>12</sup> [Annex II to the Transmission of “Request for modification of the deadline for submission of translations of the files related to the State’s observations on OTP request ICC-02/18-18”, received from the Authorities of the Bolivarian Republic of Venezuela](#), dated 23 February 2023 and registered on 24 February 2023, ICC-02/18-28-AnxII.

Chamber granted an extension of time for the submission of translations into one of the working languages of the Court of the material upon which it intended to rely.<sup>13</sup>

24. On 1 March 2023, the Registry transmitted the observations submitted by Venezuela (hereinafter: “Venezuela’s Observations to Prosecutor’s Article 18 Request”).<sup>14</sup>

25. On 21 March 2023, the Prosecution filed its response to Venezuela’s Observations (hereinafter: “Response to Venezuela’s Observations”).<sup>15</sup>

26. On 22 March 2023, the Registry transmitted translations into English of those documents “deemed essential to [the] Deferral Request” prepared and submitted by Venezuela (hereinafter: “Transmission of Translated Material”).<sup>16</sup>

27. On 27 June 2023, the Pre-Trial Chamber rendered its decision authorising the Prosecutor to resume the investigation into the Situation in Venezuela, pursuant to article 18(2) of the Statute.<sup>17</sup>

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<sup>13</sup> [Decision on Venezuela’s request for an extension of time and other procedural matters](#), ICC-02/18-29 (hereinafter: “Decision on Venezuela’s Extension Request”).

<sup>14</sup> [Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation \(ICC-02/18-18\)](#), confidential *ex parte* version filed on 28 February 2023, ICC-02/18-30-Conf-Exp-AnxII (public redacted version filed on 27 March 2023, ICC-02/18-30-AnxII-Red; corrigendum filed on 26 June 2023, ICC-02/18-30-AnxII-Red-Corr); *see also* the corresponding explanatory note, [Explanatory Note to Annex II to the Transmission of the observations communicated by the Authorities of the Bolivarian Republic of Venezuela, pursuant to Pre-Trial Chamber I’s Order ICC-02/18-21 of 18 November 2022](#), 26 June 2023, ICC-02/18-30-AnxII-Red-Corr-Anx. *See also* [Transmission of the observations communicated by the Authorities of the Bolivarian Republic of Venezuela, pursuant to Pre-Trial Chamber I’s Order ICC-02/18-21 of 18 November 2022](#), ICC-02/18-30, with confidential *ex parte* annexes I to III, only available to the Prosecutor and Venezuela.

<sup>15</sup> [Prosecution’s Response to the “Observations of the Government of the Bolivarian Republic of Venezuela’s to the Prosecution request to resume the investigation \(ICC-02/18-30-Conf-Exp-AnxII\)”](#), confidential *ex parte* version filed on 21 March 2023, ICC-02/18-31-Conf-Exp (public redacted version filed on 30 March 2023, ICC-02/18-31-Red), with confidential *ex parte* annexes A and B, only available to the Prosecutor and Venezuela.

<sup>16</sup> [Transmission of Translated Documents Communicated by the Authorities of the Bolivarian Republic of Venezuela](#), ICC-02/18-32, with confidential *ex parte* annexes 1-65, only available to the Registry and Venezuela. *See also* [Decision on Venezuela’s Extension Request](#), para. 11.

<sup>17</sup> [Impugned Decision](#).

## B. Proceedings before the Appeals Chamber

28. On 3 July 2023, Venezuela submitted its notice of appeal against the Impugned Decision and requested suspensive effect of that decision.<sup>18</sup>

29. On 12 July 2023, the Appeals Chamber granted Venezuela's application of 10 July 2023,<sup>19</sup> and extended the time limit for the filing of the appeal brief until 14 August 2023.<sup>20</sup>

30. On 20 July 2023, the Appeals Chamber rejected Venezuela's request for suspensive effect.<sup>21</sup>

31. On 21 July 2023, the Appeals Chamber granted the request of the Office of Public Counsel for Victims (hereinafter: "OPCV"),<sup>22</sup> and invited it to submit written observations on Venezuela's appeal brief in relation to the general interests of victims.<sup>23</sup>

32. On 14 August 2023, Venezuela filed its appeal brief (hereinafter: "Appeal Brief"), in which it made, *inter alia*, a request to present additional evidence.<sup>24</sup>

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<sup>18</sup> [The Bolivarian Republic of Venezuela's Notice of Appeal against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute" \(ICC-02/18-45\) and request for suspensive effect](#), confidential *ex parte* version, only available to the Prosecutor, dated 2 July 2023 and registered on 3 July 2023, ICC-02/18-46-Conf-Exp-AnxII (public redacted version, dated 12 July 2023 and registered on 14 July 2023, ICC-02/18-46-AnxII-Red), with a confidential *ex parte* annex I, only available to the Prosecutor.

<sup>19</sup> [The Bolivarian Republic of Venezuela's Application for Extension of Time to File the Appeal Brief](#), dated 7 July 2023 and registered on 10 July 2023, ICC-02/18-49-Conf-Exp-AnxII (reclassified as public (ICC-02/18-49-AnxII) pursuant to the [Order concerning reclassification](#), 19 February 2024, ICC-02/18-88 (OA)).

<sup>20</sup> [Decision on the Bolivarian Republic of Venezuela's application for extension of time to file the appeal brief](#), ICC-02/18-52, p. 3, para. 8.

<sup>21</sup> [Decision on the Bolivarian Republic of Venezuela's request for suspensive effect of Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute"](#), ICC-02/18-53, p. 3, para. 15.

<sup>22</sup> [Request to appear before the Appeals Chamber pursuant to regulation 81\(4\) of the Regulations of the Court](#), 7 July 2023, ICC-02/18-47.

<sup>23</sup> [Decision on the OPCV's "Request to appear before the Appeals Chamber pursuant to regulation 81\(4\) of the Regulations of the Court"](#), ICC-02/18-54, p. 3, para. 7.

<sup>24</sup> [The Bolivarian Republic of Venezuela's Appeals Brief against the Pre-Trial I's 'Decision authorizing the resumption of the investigation pursuant to article 18\(2\) of the Statute' \(ICC-02/18-45\)](#), confidential *ex parte* version, only available to the Prosecutor and Venezuela, filed on 14 August 2023, ICC-02/18-59-Conf-Exp (public redacted version filed on 22 August 2023, ICC-02/18-59-AnxII-Red), with confidential *ex parte* annex A and annex B, only available to the Prosecutor and Venezuela.

33. On 24 August 2023, the Appeals Chamber granted, in part, the victims' requests to present their views and concerns in the present appeal,<sup>25</sup> by allowing victims to make representations, with the assistance of their legal representatives if they so wish.<sup>26</sup> The VPRS was instructed to collect and transmit to the Appeals Chamber representations from any interested victim and victims group, with the assistance of their legal representatives if they so wish, and submit a report thereon by 17 October 2023.<sup>27</sup> The Appeals Chamber also extended the time limit for the Prosecutor's response to the Appeal Brief until the expiry of the time limit for the OPCV's observations.<sup>28</sup>

34. On 13 September 2023, the Prosecutor filed his response to the Appeal Brief (hereinafter: "Prosecutor's Response"),<sup>29</sup> and the OPCV submitted its observations (hereinafter: "OPCV Observations").<sup>30</sup>

35. On 12 October 2023, the Appeals Chamber rejected Venezuela's request for leave to reply to the Prosecutor's Response.<sup>31</sup>

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<sup>25</sup> See [Application to present victims' views and concerns in the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute"](#), dated 27 July 2023 and registered on 28 July 2023, ICC-02/18-55-Red (confidential *ex parte* version, only available to the Registry, registered on the same day, ICC-02/18-55-Conf-Exp), with two confidential *ex parte* annexes, only available to the Registry; [Application to present victims' views and concerns in the appeal of the Bolivarian Republic of Venezuela against the Pre-Trial Chamber I's "Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation"](#), dated 31 July 2023 and registered on 2 August 2023, ICC-02/18-56-Anx1-Red-Corr (confidential *ex parte* version, only available to the Registry, registered on the same day, ICC-02/18-56-Conf-Exp-Anx1); [Request to Present Opinions and Observations of Victims in the Appeal of the Bolivarian Republic of Venezuela against the "Decision of Pre-Trial Chamber I Authorizing the Resumption of the Investigation Pursuant to Article 18\(2\) of the Statute"](#), dated 1 August 2023 and registered on 3 August 2023, ICC-02/18-57-Anx1-Red (confidential *ex parte* version, only available to the Registry, registered on the same day, ICC-02/18-57-Conf-Exp-Anx1), with other six confidential *ex parte* annexes.

<sup>26</sup> [Decision on requests for victims' involvement](#), ICC-02/18-60 (hereinafter: "Decision on Victims Requests"), p. 3, para. 14.

<sup>27</sup> [Decision on Victims Requests](#), p. 3, paras 14-15.

<sup>28</sup> [Decision on Victims Requests](#), pp. 3-4, para. 16.

<sup>29</sup> [Prosecution Response to the Bolivarian Republic of Venezuela's Appeal against the Pre-Trial Chamber I's 'Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute' \(ICC-02/18-59-Conf-Exp-AnxII\)](#), 13 September 2023, ICC-02/18-62-Conf-Exp (public redacted version filed on 5 October 2023, ICC-02/18-62-Red), with confidential *ex parte* annexes A and B, only available to the Prosecutor and Venezuela.

<sup>30</sup> [Observations on behalf of victims on the Venezuela Government Appeal against the Decision authorising the resumption of the investigation](#), ICC-02/18-61.

<sup>31</sup> [Decision on the Bolivarian Republic of Venezuela's request for leave to reply to the Prosecutor's response to the appeal brief and order concerning reclassification](#), ICC-02/18-66. See [The Bolivarian Republic of Venezuela's Request for Leave to Reply to the Prosecution's Response Brief \(ICC-02/18-62-Conf-Exp\)](#), dated 18 September 2021 and registered on 21 September 2023, ICC-02/18-63-Conf-Exp (reclassified as public (ICC-02/18-63) pursuant to the [Order concerning reclassification](#), 24 November 2023, ICC-02/18-84 (OA)); [Prosecution Response to the Bolivarian Republic of Venezuela's Request for](#)



36. On 17 October 2023, the VPRS transmitted to the Appeals Chamber victims' views and concerns,<sup>32</sup> as well as its report thereon.<sup>33</sup>

37. On 7 and 8 November 2023, the Appeals Chamber held a hearing.<sup>34</sup>

38. On 27 November 2023, the Organization of American States Panel of Independent International Experts (hereinafter: "OAS Panel") filed its *amicus curiae* observations (hereinafter: "OAS Panel's Observations").<sup>35</sup>

39. On 11 November 2023, Venezuela filed its response to the OAS Panel's Observations (hereinafter: "Response to OAS Panel Observations"), which includes a request to dismiss those observations *in limine*.<sup>36</sup>

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[Leave to Reply to the Prosecution's Response Brief \(ICC-02/18-63-Conf-Exp\)](#), 26 September 2023, ICC-02/18-64-Conf-Exp (public redacted version filed on 31 October 2023, ICC-02/18-64-Red).

<sup>32</sup> Registry Transmission of Victims' Views and Concerns Pursuant to Appeals Chamber Decision ICC-02/18-60, ICC-02/18-67 (hereinafter: "Victims' Representations"), with 172 confidential *ex parte* annexes, only available to the Registry. *See also* Registry Transmission of Written Representations Pursuant to Appeals Chamber Decisions ICC-02/18-73, ICC-02/18-76 and ICC-02/18-79, 6 November 2023, ICC-02/18-81 (hereinafter: "Victims' Additional Representations"), with confidential *ex parte* annex 1, only available to the Registry (hereinafter: "Victims' Additional Representations, Annex 1"), confidential *ex parte* annex 2, only available to the Registry and the OPCV (hereinafter: "Victims' Additional Representations, Annex 2"), confidential *ex parte*, only available to the Registry and the OPCV, and public redacted annex 3 (hereinafter: "Victims' Additional Representations, Annex 3"), and confidential *ex parte*, only available to the Registry, and public redacted annex 4.

<sup>33</sup> Registry Report on Victims' Views and Concerns Pursuant to Appeals Chamber Decision ICC-02/18-60, ICC-02/18-69, with confidential *ex parte*, only available to the Registry, and public redacted annex I and confidential *ex parte* annexes II and III, only available to the Registry.

<sup>34</sup> [Transcript of 7 November 2023](#), ICC-02/18-T-001-Red2-ENG (hereinafter: "T-1"); [Transcript of 8 November 2023](#), ICC-02/18-T-002-ENG (hereinafter: "T-2"). *See* [Scheduling order for a hearing on the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's "Decision authorising the resumption of the investigation pursuant to article 18\(2\) of the Statute"](#), 12 October 2023, ICC-02/18-65; [Directions on the conduct of the hearing](#), 17 October 2023, ICC-02/18-68.

<sup>35</sup> [Amicus Curiae Observations by the Organization of American States Panel of Independent International Experts on the Venezuelan Government's Appeal against the Decision authorising the resumption of the investigation](#), dated 24 November 2023 and registered on 27 November 2023, ICC-02/18-85. *See* [Decision on the Organization of American States Panel of Independent International Experts' request for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence](#), 3 November 2023, ICC-02/18-78 (hereinafter: "Decision on Amicus Curiae Observations").

<sup>36</sup> [The Bolivarian Republic of Venezuela's Response to Amicus Curiae Observations of the Organization of American States Panel of Experts](#), ICC-02/18-86-Conf-Exp, only available to the Prosecutor and Venezuela (public redacted version filed on 19 February 2024, ICC-02/18-86-Red).

## IV. MERITS

### A. Standard of appellate review

40. In the present appeal, Venezuela alleges errors of law, fact and procedure and that the Pre-Trial Chamber abused its discretion.

41. Regarding errors of law, the Appeals Chamber has previously held that it

will not defer to the relevant Chamber’s interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.<sup>37</sup>

42. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal.<sup>38</sup> A decision is “materially affected by an error of law” if the chamber “would have rendered a

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<sup>37</sup> *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Mr Ali Muhammad Ali Abd-Al-Rahman against the decision of Trial Chamber I of 17 February 2023 entitled “Decision on the admissibility of video \(DAR-OTP-0216-0119\) and records of telephone calls \(DAR-OTP-0216-0127, DAR-OTP-0216-0128\)”](#), 28 June 2023, ICC-02/05-01/20-982 (OA12) (hereinafter: “*Abd-Al-Rahman OA12 Judgment*”), para. 20, referring to *The Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, [Judgment on the appeal of Maxime Jeoffroy Eli Mokom Gawaka against the decision of Pre-Trial Chamber II of 19 August 2022 entitled “Decision on legal representation further to the Appeals Chamber’s judgment of 19 July 2022”](#), 19 December 2022, ICC-01/14-01/22-124-Red (OA3) (hereinafter: “*Mokom OA3 Judgment*”), para. 19; *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”](#), 22 March 2016, ICC-01/04-02/06-1225 (OA2), para. 33; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V\(A\) of 19 August 2015 entitled “Decision on Prosecution Request for Admission of Prior Recorded Testimony”](#), 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 20; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor’s appeal against Trial Chamber V\(B\)’s “Decision on Prosecution’s application for a finding of non-compliance under Article 87\(7\) of the Statute”](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5), para. 23; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled ‘Décision relative à l’exception d’irrecevabilité pour insuffisance de gravité de l’affaire soulevée par la défense’](#), 19 February 2020, ICC-01/12-01/18-601-Red (OA) (hereinafter: “*Al Hassan OA Judgment*”), para. 38. See also *Situation in the Republic of the Philippines*, [Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I’s “Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation”](#), 18 July 2023, ICC-01/21-77 (hereinafter: “*Philippines OA Judgment*”), para. 35.

<sup>38</sup> [Abd-Al-Rahman OA12 Judgment](#), para. 21, referring to [Mokom OA3 Judgment](#), para. 20; [Al Hassan OA Judgment](#), para. 38; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d’Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled “Decision on Côte d’Ivoire’s challenge to the admissibility of the case against Simone Gbagbo”](#), 27 May 2015, ICC-02/11-01/12-75-Red (OA) (hereinafter: “*Simone Gbagbo OA Judgment*”), para. 40. See also *The Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, [Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’ \(ICC-02/05-01/20-302\)”](#), 1 November 2021, ICC-02/05-01/20-503 (OA8) (hereinafter: “*Abd-Al-Rahman OA8 Judgment*”), para. 12; *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’](#), 17 July 2019, ICC-02/04-01/15-1562 (OA4) (hereinafter: “*Ongwen OA4 Judgment*”), para. 45.

[decision] that is substantially different from the decision that was affected by the error, if it had not made the error”.<sup>39</sup>

43. As to errors of fact,

the Appeals Chamber will determine whether a chamber’s factual findings were reasonable in the particular circumstances of the case. The Appeals Chamber will not disturb a trial chamber’s factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber’s conclusion could have reasonably been reached from the evidence on the record.<sup>40</sup>

44. The Appeals Chamber recalls that procedural errors may be raised as grounds for interlocutory appeals. In this regard, the party alleging the errors must demonstrate that, in the absence of the alleged error, the decision would have substantially differed from the one rendered, as is required under the Appeals Chamber’s jurisprudence relevant to the appellant’s burden to substantiate the material effect of any alleged procedural error.<sup>41</sup>

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<sup>39</sup> [Abd-Al-Rahman OA12 Judgment](#), para. 21, referring to *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeals against the decision of Trial Chamber VI of 8 March 2021 entitled “Reparations Order”](#), 12 September 2022, ICC-01/04-02/06-2782 (A4-A5) (hereinafter: “*Ntaganda A4-A5 Judgment*”), para. 29; [Mokom OA3 Judgment](#), para. 20; [Al Hassan OA Judgment](#), para. 38; [Simone Gbagbo OA Judgment](#), para. 41. See also [Abd-Al-Rahman OA8 Judgment](#), para. 12; *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Judgment on the appeal of Mr Al Hassan against the decision of Trial Chamber X entitled ‘Decision on application for notice of possibility of variation of legal characterisation pursuant to Regulation 55\(2\) of the Regulations of the Court’](#), 1 July 2021, ICC-01/12-01/18-1562-Red (OA3), para. 18; [Ongwen OA4 Judgment](#), para. 45. See also *Situation in the Islamic Republic of Afghanistan*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber II entitled “Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation”](#), 4 April 2023, ICC-02/17-218 (OA5), para. 23.

<sup>40</sup> [Abd-Al-Rahman OA12 Judgment](#), para. 22, referring to [Mokom OA3 Judgment](#), para. 21. See also [Ntaganda A4-A5 Judgment](#), para. 30; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment in the appeal of the Prosecutor against Trial Chamber I’s decision on the no case to answer motions](#), 31 March 2021, ICC-02/11-01/15-1400 (A) (hereinafter: “*Gbagbo and Blé Goudé Appeal Judgment*”), para. 68; *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled ‘Sentencing judgment’](#), 30 March 2021, ICC-01/04-02/06-2667-Red (A3) (hereinafter: “*Ntaganda A3 Judgment*”), paras 27-29; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 10 March 2017 entitled “Decision on Mr Gbagbo’s Detention”](#), 19 July 2017, ICC-02/11-01/15-992-Red (OA10), para. 16.

<sup>41</sup> See, for example, *The Prosecutor v. Banda and Jerbo*, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV’s issuance of a warrant of arrest](#), 3 March 2015, ICC-02/05-03/09-632-Red (OA5), para. 29, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the](#)

45. The Appeals Chamber further recalls that procedural errors “often relate to alleged errors in a [first instance chamber]’s exercise of its discretion”.<sup>42</sup>

46. Where a decision allegedly amounts to an abuse of discretion, the Appeals Chamber has clarified that it

will interfere with the exercise of discretion where the appellant can demonstrate that a chamber gave weight to extraneous or irrelevant considerations, or failed to give weight or sufficient weight to relevant considerations. The degree of discretion afforded to a chamber may depend upon the nature of the decision in question. In its review, the Appeals Chamber will not interfere with a chamber’s exercise of discretion merely because the Appeals Chamber, if it had the power, might have made a different ruling. Moreover, even if an error has not been identified, an abuse of discretion will occur when the decision is so unfair or unreasonable as to force the conclusion that the relevant chamber failed to exercise its discretion judiciously.<sup>43</sup>

47. Finally, the Appeals Chamber recalls that the appellant is obliged to set out all the alleged errors in the appeal brief and “indicate, with sufficient precision, how [the] alleged error would have materially affected the impugned decision”.<sup>44</sup>

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[appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Red (A5), para. 20. Concerning the Appeals Chamber’s jurisprudence on the appellant’s burden to substantiate the material effect of any alleged procedural error, *see, for example, The Prosecutor v. Bosco Ntaganda, Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled ‘Judgment’*, 30 March 2021, ICC-01/04-02/06-2666-Red (A A2) (hereinafter: “*Ntaganda A A2 Judgment*”), paras 44-46; [Gbagbo and Blé Goudé Appeal Judgment](#), paras 63-66.

<sup>42</sup> [Ntaganda A A2 Judgment](#), para. 45; [Gbagbo and Blé Goudé Appeal Judgment](#), para. 64, referring to *The Prosecutor v. Mathieu Ngudjolo Chui, Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”*, 7 April 2015, ICC-01/04-02/12-271-Corr, para. 21; *The Prosecutor v. Jean-Pierre Bemba Gombo, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”*, 8 June 2018, ICC-01/05-0108-3636-Red (A) (hereinafter: “*Bemba Appeal Judgment*”), para. 48; *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”*, 8 March 2018, ICC-01/05-01/13-2275-Red (A A2 A3 A4 A5), para. 100.

<sup>43</sup> *See, for example, The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, Judgment on the appeal of the Prosecution against Trial Chamber X’s “Decision on second Prosecution request for the introduction of P-0113’s evidence pursuant to Rule 68(2)(b) of the Rules”*, 13 May 2022, ICC-01/12-01/18-2222 (OA4), para. 20, referring to [Ntaganda A A2 Judgment](#), para. 46.

<sup>44</sup> [Abd-Al-Rahman OA12 Judgment](#), para. 23, referring to [Abd-Al-Rahman OA8 Judgment](#), para. 14; *The Prosecutor v. Joseph Kony et al., Judgment on the appeal of the Defence against the “Decision on the admissibility of the case under article 19(1) of the Statute” of 10 March 2009*, 16 September 2009, ICC-02/04-01/05-408 (OA3), para. 48.

48. The above standard of review will guide the analysis of the Appeals Chamber.

## **B. Preliminary issues**

### *1. Venezuela's request for admission of evidence*

49. In its Appeal Brief, referring to regulation 62 of the Regulations, Venezuela requests that the Appeals Chamber admit into evidence, for the purposes of the appeal, the documents concerning five cases attached in Annex A to the Appeal Brief (hereinafter: "Request for Admission of Evidence").<sup>45</sup> These documents are English translations of "national records relating to specific measures taken to investigate the same criminal acts that were reported through the Article 18(1) Notification".<sup>46</sup>

50. The Prosecutor submits that the Request for Admission of Evidence should be rejected.<sup>47</sup> The Prosecutor argues that since the additional evidence was not before the Pre-Trial Chamber in English when it conducted its assessment under article 18 of the Statute, the Pre-Trial Chamber was not able to consider it, and that it would not be appropriate for the Appeals Chamber to consider information when the Pre-Trial Chamber has not done so.<sup>48</sup> In addition, the Prosecutor submits that the requirements for admitting evidence on appeal under regulation 62 of the Regulations are not met.<sup>49</sup>

51. The OPCV, in addressing Venezuela's arguments under the second ground of appeal, submits that "since the [Pre-Trial] Chamber did not err in refusing to consider information concerning domestic investigations that was in Spanish, the Appeals

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<sup>45</sup> [Appeal Brief](#), paras 22-25.

<sup>46</sup> [Appeal Brief](#), para. 24.

<sup>47</sup> [Prosecutor's Response](#), paras 86-93.

<sup>48</sup> [Prosecutor's Response](#), para. 89, referring, *inter alia*, to Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the case against Saif Al-Islam Gaddafi](#), 31 May 2013, ICC-01/11-01/11-344-Red (hereinafter: "*Gaddafi* Admissibility Decision"), para. 43; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the "Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility"](#), 28 July 2011, ICC-01/09-01/11-234 (OA), para. 10; Pre-Trial Chamber I, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Decision on the admissibility of the case against Abdullah Al-Senussi](#), 11 October 2013, ICC-01/11-01/11-466-Red, paras 57-59.

<sup>49</sup> [Prosecutor's Response](#), paras 90-92, referring to *The Prosecutor v. Bosco Ntaganda*, [Decision on request for the admission of additional evidence on appeal of 22 October 2020 \(ICC-01/04-02/06-2617-Conf\)](#), 13 November 2020, ICC-01/04-02/06-2617-Red (A), para. 15.

Chamber should not accept the English translations submitted [...] as additional evidence”.<sup>50</sup>

52. The Appeals Chamber notes that the additional evidence consists of English translations of summaries, court records, and records of investigative steps, which Venezuela had previously provided in Spanish as part of the Eleventh and Twelfth Submissions, with updated information provided in Annexes 10 to 12 to the Venezuela’s Observations to Prosecutor’s Article 18 Request.<sup>51</sup> Referring to the arguments developed under its second ground of appeal, Venezuela avers that it did not submit the English translation of these documents to the Pre-Trial Chamber because “the Court’s legal framework imposed this responsibility on the Office of the Prosecutor as the party responsible for transmitting the materials to the Chamber”.<sup>52</sup> Venezuela argues that “if the Appeals Chamber confirms the arguments” under the second ground of appeal, “it will be necessary for the Appeals Chamber to access [the additional evidence] in order to assess the impact on these errors on the outcome of the Decision”.<sup>53</sup>

53. The Appeals Chamber recalls that, in the context of appeals against admissibility decisions, it has emphasised that “[a]s a corrective measure, the scope of proceedings on appeal is determined by the scope of the relevant proceedings before the Pre-Trial Chamber”.<sup>54</sup> In a similar context, the Appeals Chamber rejected a request to submit additional information, noting that “this [additional] information ha[d] not been considered by the Pre-Trial Chamber” and that “it would not be appropriate for the Appeals Chamber to consider this material when the Pre-Trial Chamber ha[d] not done so”.<sup>55</sup>

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<sup>50</sup> [OPCV Observations](#), para. 55.

<sup>51</sup> See Annex A to [Appeal Brief](#). See also [Prosecutor’s Response](#), para. 87, referring to Annex B to [Prosecutor’s Response](#) (cases highlighted in orange); VEN-OTP-00000081 to VEN-OTP-00000582; VEN-OTP-00000590 to VEN-OTP-00001966; Annexes 10, 11, 12 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), pp. 2950-2954, 2955-2957, 2958-2996, and 2997-3572, respectively.

<sup>52</sup> [Appeal Brief](#), para. 24.

<sup>53</sup> [Appeal Brief](#), para. 25.

<sup>54</sup> *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Decision on the “Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility”*, 28 July 2011, ICC-01/09-02/11-202 (OA), para. 12.

<sup>55</sup> *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled “Decision on the admissibility of the case against Saif Al-Islam Gaddafi”*, 21 May 2014, ICC-01/11-01/11-547-Red (OA4) (hereinafter:

54. The Appeals Chamber notes that the material that Venezuela seeks to submit on appeal was not available, in a working language of the Court, before the Pre-Trial Chamber, and therefore was not considered by the Pre-Trial Chamber although it was available to Venezuela during the article 18(2) proceedings. As will be explained under the second ground of appeal, after having been granted an extension of time to provide translation into English of the documents “deemed essential to its Deferral request”,<sup>56</sup> Venezuela translated documents concerning 62 case files.<sup>57</sup> Among those, Venezuela did not include the five case files which it now seeks to admit into evidence before the Appeals Chamber. Given that the Pre-Trial Chamber did not consider this material, the Appeals Chamber finds it appropriate to reject the Request for Admission of Evidence.

55. Additionally, the Appeals Chamber recalls that regulation 62 of the Regulations, upon which Venezuela relies, requires the participant seeking to present additional evidence to set out “the reasons, if relevant, why the evidence was not adduced before the [first instance] Chamber”.<sup>58</sup> Without prejudice to the question of whether regulation 62 of the Regulations applies to interlocutory appeals,<sup>59</sup> the Appeals Chamber notes that Venezuela did not provide convincing reasons as to why such evidence was not presented before the Pre-Trial Chamber.

56. As a result, the Request for Admission of Evidence is rejected.

## 2. *Venezuela’s request to dismiss in limine the OAS Panel’s Observations*

57. In Venezuela’s Response to the OAS Panel Observations, Venezuela requests that the Appeals Chamber reject the OAS Panel’s Observations *in limine*,<sup>60</sup> as they (i) were

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“Gaddafi OA4 Judgment”), para. 43. See also *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled “Decision on the admissibility of the case against Abdullah Al-Senussi”](#), 24 July 2014, ICC-01/11-01/11-565 (OA6) (hereinafter: “Al-Senussi OA6 Judgment”), paras 57-58.

<sup>56</sup> [Decision on Venezuela’s Extension Request](#), para. 11.

<sup>57</sup> [Transmission of Translated Documents](#). See also [Prosecutor’s Response](#), paras 13, 49, 67, 70, fns 12, 25.

<sup>58</sup> Regulation 62(1)(b) of the Regulations.

<sup>59</sup> See Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”](#), 19 October 2010, ICC-01/05-01/08-962 (OA3), para. 32.

<sup>60</sup> [Response to OAS Panel Observations](#), para. 49.

filed out of time; (ii) exceeded the allotted number of pages for filings before the Court; and (iii) exceeded the scope of the authorised *amicus* brief.<sup>61</sup>

58. More specifically, Venezuela argues that while the Appeals Chamber invited the OAS Panel to file *amicus* observations until 24 November 2023,<sup>62</sup> the OAS Panel did so after the deadline.<sup>63</sup> Venezuela further contends that this is a factor to consider “in conjunction with the [...] failure to respect the page limit” and the “proper scope of *amicus* observations”.<sup>64</sup> Venezuela avers that the OAS Panel’s Observations exceeded, without prior authorisation, the page limit set in regulation 37(1) of the Regulations, adding that such error is not merely technical but “concerns the fact that the substantive content [...] falls outside the scope authorised by the Appeals Chamber”.<sup>65</sup> Venezuela further argues that the OAS Panel’s Observations (i) improperly rely on factual reports issued after the Impugned Decision, (ii) touch upon the genuineness of domestic processes, which is outside the scope of the pending appeal, contrary to the Appeals Chamber’s directive to strictly confine the observations to the issues falling within the grounds of appeal,<sup>66</sup> and (iii) show “partisanship politicisation” by attacking Venezuela and “conflating [it] with the ‘Maduro regime’”.<sup>67</sup>

59. Regarding the observance of the time limit, the Appeals Chamber recalls that it invited the OAS Panel to submit written observations by 24 November 2023.<sup>68</sup> On that date, the Registry informed the Appeals Chamber that, although the OAS Panel submitted its observations, it did not comply with formatting requirements and, as a result, its observations could not be registered. Therefore, the OAS Panel had to re-submit its document in the proper format. The re-submitted document was registered on 27 November 2023. While it would have been preferable for the OAS Panel to make its initial filing in the required format, the Appeals Chamber accepts, for the above reasons, the OAS Panel’s Observations as submitted within the time limit.

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<sup>61</sup> [Response to OAS Panel Observations](#), para. 2.

<sup>62</sup> [Decision on Amicus Curiae Observations](#).

<sup>63</sup> [Response to OAS Panel Observations](#), para. 7.

<sup>64</sup> [Response to OAS Panel Observations](#), para. 7.

<sup>65</sup> [Response to OAS Panel Observations](#), para. 9.

<sup>66</sup> [Response to OAS Panel Observations](#), paras 5, 9.

<sup>67</sup> [Response to OAS Panel Observations](#), para. 11.

<sup>68</sup> [Decision on Amicus Curiae Observations](#), p. 3.



60. Concerning the page limit, the Appeals Chamber recalls that the limit of 20 pages, stipulated in regulation 37(1) of the Regulations, also applies to observations under rule 103 of the Rules of Procedure and Evidence (hereinafter: “Rules”).<sup>69</sup> The Appeals Chamber notes that the OAS Panel’s Observations exceed that page limit by 5 pages,<sup>70</sup> without the OAS Panel having sought and been granted an extension of the page limit under regulation 37(2) of the Regulations. In addition, as correctly noted by Venezuela,<sup>71</sup> some of the content of the OAS Panel’s Observations goes beyond the issues indicated in the Appeals Chamber’s authorisation. The Appeals Chamber invited the OAS Panel “to focus its observations on the issues arising from the appeal and to avoid the submission of material that was not considered by the Pre-Trial Chamber”.<sup>72</sup> Therefore, the Appeals Chamber will only consider those parts of the OAS Panel’s Observations which relate to the issues arising from the appeal.

61. As the Appeals Chamber will disregard parts of the OAS Panel’s Observations which go beyond the authorised issues, the Appeals Chamber exceptionally does not find it necessary to dismiss the OAS Panel’s Observations, despite their non-compliance with regulation 37(1) of the Regulations.

62. For the foregoing reasons, Venezuela’s request to dismiss the OAS Panel’s Observations is rejected.

### **C. First ground of appeal: The alleged errors in the allocation of the burden of persuasion**

63. Under the first ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law (i) by failing to impose on the Prosecutor the burden of persuasion to demonstrate that the cases investigated by Venezuela did not sufficiently mirror the Prosecutor’s investigation;<sup>73</sup> (ii) by erroneously defining a notification under article 18(1) of the Statute and applying an incorrect standard of specificity of such a

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<sup>69</sup> Appeals Chamber, *The Prosecutor v. Laurent Koudou Gbagbo*, [Decision on requests related to page limits and reclassification of documents](#), 16 October 2012, ICC-02/11-01/11-266 (OA2), para. 8.

<sup>70</sup> [OAS Panel’s Observations](#).

<sup>71</sup> [Response to OAS Panel Observations](#), para. 9.

<sup>72</sup> [Decision on Amicus Curiae Observations](#), para. 10.

<sup>73</sup> [Appeal Brief](#), paras 32-41.

notification;<sup>74</sup> and (iii) in finding that there is no time limit for the Prosecutor's application for a ruling under article 18(2) of the Statute.<sup>75</sup>

1. *Sub-ground 1.1: The alleged error in failing to impose the burden of persuasion on the Prosecutor*

**(a) Relevant parts of the Impugned Decision**

64. The Pre-Trial Chamber held that

[i]n order to enable it to carry out the assessment [whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court], it is [...] of essence for the Chamber to have sufficient information. In this regard, the onus placed on the concerned State consists in providing 'the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case'. If this is established, the onus is then indeed on the Prosecution to show that the State is either unwilling or unable genuinely to carry out the investigation or prosecution.<sup>76</sup>

65. The Pre-Trial Chamber also rejected Venezuela's argument "[t]o the extent that Venezuela may be suggesting that the mere showing that, on its face, domestic proceedings resemble to some extent the Prosecution's intended investigation would suffice to discharge its onus that it is investigating the same".<sup>77</sup>

**(b) Summary of the submissions**

66. Venezuela submits that article 18 of the Statute "is built on a presumption in favour of national investigations" and that the Prosecutor is therefore obliged to substantiate his application under article 18(2) of the Statute "by demonstrating that the information transmitted by the State does not sufficiently mirror the scope of criminality set out in the Article 18(1) Notification".<sup>78</sup> Venezuela argues that the *Philippines* OA Judgment does not bind the Appeals Chamber as (i) there is no binding doctrine of *stare decisis* concerning the Appeals Chamber's judgments and (ii) that judgment concerns the burden of proof in relation to "different aspects" of the article 18 proceedings.<sup>79</sup> It avers that the burden of proof may rest on the party seeking to assert a fact and the burden of

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<sup>74</sup> [Appeal Brief](#), paras 42-61.

<sup>75</sup> [Appeal Brief](#), paras 62-65.

<sup>76</sup> [Impugned Decision](#), para. 66 (footnote omitted).

<sup>77</sup> [Impugned Decision](#), para. 67.

<sup>78</sup> [Appeal Brief](#), para. 32; [Response to OAS Panel Observations](#), para. 13.

<sup>79</sup> [Appeal Brief](#), para. 33.

persuasion on the party trying to change the *status quo*.<sup>80</sup> Venezuela submits that the drafting history “reflects the intention that the burden of persuasion concerning situation-related admissibility challenges should be placed on the Prosecution”, as confirmed by academic commentary.<sup>81</sup> Venezuela contends that the “basis for the application” under article 18(2) of the Statute, which rule 54 of the Rules requires the Prosecutor to provide, may be that “the domestic investigations do not sufficiently mirror the cases set out in Article 18(1) Notification” and that, in such cases, the burden of persuasion falls on the Prosecutor.<sup>82</sup>

67. The Prosecutor submits that the Pre-Trial Chamber correctly held that the State requesting a deferral bears the burden of proof under the first limb of the complementarity assessment.<sup>83</sup> He argues that both the burden of production and burden of persuasion are “subsumed in the exercise which the State needs to carry out in seeking a deferral”.<sup>84</sup> Regarding the burden of proving or disproving an overlap between the domestic cases and the cases encompassed by the Prosecutor’s notification, the Prosecutor contends that the State must “demonstrate the degree of mirroring”.<sup>85</sup> With respect to Venezuela’s argument that the Prosecutor, as the party seeking to change the *status quo*, carries the burden of proof, he avers that in the *Philippines* OA Judgment the Appeals Chamber rejected the same argument.<sup>86</sup> According to the Prosecutor, Venezuela’s references to the drafting history and academic commentary do not support this sub-ground of appeal.<sup>87</sup> Lastly, the Prosecutor argues that Venezuela would suffer no prejudice if his investigation was to resume, as “the State may continue to exercise jurisdiction in parallel to the Court, and later mount admissibility challenges to specific cases”.<sup>88</sup>

68. The OPCV submits that “the onus is on the State to show that national investigations or prosecutions are taking place or have taken place”.<sup>89</sup> It argues that the fact that the Prosecutor may apply for a ruling by a pre-trial chamber “does not absolve

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<sup>80</sup> [Appeal Brief](#), para. 35.

<sup>81</sup> [Appeal Brief](#), paras 36-37.

<sup>82</sup> [Appeal Brief](#), para. 38; [Response to OAS Panel Observations](#), para. 15.

<sup>83</sup> [Prosecutor’s Response](#), para. 17.

<sup>84</sup> [Prosecutor’s Response](#), para. 19.

<sup>85</sup> [Prosecutor’s Response](#), para. 20, referring to [Philippines OA Judgment](#), para. 107.

<sup>86</sup> [Prosecutor’s Response](#), para. 24.

<sup>87</sup> [Prosecutor’s Response](#), para. 26.

<sup>88</sup> [Prosecutor’s Response](#), para. 27.

<sup>89</sup> [OPCV Observations](#), para. 26.

the requesting State of its responsibility to provide a valid basis for a deferral”.<sup>90</sup> The OPCV contends that there are no “convincing reasons” for the Appeals Chamber to depart from the *Philippines* OA Judgment with respect to the burden of proof in article 18 proceedings.<sup>91</sup> The OPCV submits that Venezuela fails to show a material effect of the alleged error as “the same information would have been before the [Pre-Trial] Chamber” and “it would have reached the same conclusions”.<sup>92</sup>

69. The Victims submit that Venezuela does not point to a rule on which it based its argument that the burden of persuasion lies on the Prosecutor.<sup>93</sup> The Victims further aver that Venezuela seems to confuse the burden of persuasion with the burden of proof, as it is the State that must demonstrate the existence of national investigations which cover the scope of the Prosecutor’s investigation.<sup>94</sup>

70. The OAS Panel submits that Venezuela fails to present cogent reasons for disregarding the *Philippines* OA Judgment.<sup>95</sup> The OAS Panel argues that the allocation of the burden of proof set out in that judgment is “the only viable way to satisfy the test”, as Venezuela “is the only party that has access to complex multidisciplinary data relating to domestic proceedings”.<sup>96</sup>

### (c) Determination by the Appeals Chamber

71. Referring to the Prosecutor’s obligation under rule 54(1) of the Rules to set out the basis for his or her application to a pre-trial chamber, Venezuela submits that the burden of persuasion in article 18(2) proceedings before a pre-trial chamber rests with the Prosecutor.<sup>97</sup> The Appeals Chamber notes at the outset that Venezuela seeks to distinguish the burden of proof from the burden of persuasion.<sup>98</sup> However, the relevance of this distinction to the present context is unclear. In any event, in the following discussion, the Appeals Chamber will only use the term “burden of persuasion” when examining those arguments of Venezuela in which that term was used.

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<sup>90</sup> [OPCV Observations](#), para. 27.

<sup>91</sup> [OPCV Observations](#), para. 30.

<sup>92</sup> [OPCV Observations](#), para. 32.

<sup>93</sup> Victims’ Representations, Annex 148, para. 19.

<sup>94</sup> Victims’ Representations, Annex 148, para. 19.

<sup>95</sup> [OAS Panel’s Observations](#), para. 26.

<sup>96</sup> [OAS Panel’s Observations](#), para. 28.

<sup>97</sup> [Appeal Brief](#), paras 32, 38.

<sup>98</sup> [Appeal Brief](#), para. 35. *See also* [Response to OAS Panel Observations](#), para. 12.

72. The Appeals Chamber recalls its recent ruling, in the *Philippines* OA Judgment, that “the burden of providing information relevant to the pre-trial chamber’s determination under article 18(2) of the Statute remains on the State seeking deferral”.<sup>99</sup> In that context, the Appeals Chamber specifically referred to rule 54(1) of the Rules, which requires the Prosecutor to set out “the basis for the application”, and “to communicate [the] information [provided by the State] to the pre-trial chamber”. The Appeals Chamber also observed that this duty “does not affect the allocation of the burden of proof, as the information remains that which the State initially provided”.<sup>100</sup>

73. Concerning Venezuela’s submission that the *Philippines* OA Judgment does not bind the Appeals Chamber in the present appeal,<sup>101</sup> the Appeals Chamber recalls that although it retains discretion as to whether or not to follow its previous interpretations of principles and rules of law, “[a]bsent ‘convincing reasons’, it will not depart from its previous decisions, given the need to ensure predictability of the law and the fairness of adjudication to foster public reliance on its decisions”.<sup>102</sup> Venezuela refers in this respect to the drafting history of article 18 of the Statute and academic commentary, which, in its view, reflect a different position from that adopted by the Appeals Chamber.<sup>103</sup> However, the Appeals Chamber is not persuaded that these arguments constitute “convincing reasons” and that it should depart from its recent ruling in the *Philippines* OA Judgment.

74. Venezuela also seeks to distinguish the present appeal from the one that led to the *Philippines* OA Judgment, which, in its view, concerns the burden of proof in relation

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<sup>99</sup> [Philippines OA Judgment](#), para. 77.

<sup>100</sup> [Philippines OA Judgment](#), para. 77.

<sup>101</sup> [Appeal Brief](#), para. 33.

<sup>102</sup> Appeals Chamber, *The Prosecutor v. Mahamat Said Abdel Kani*, [Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Trial Chamber VI entitled “Decision on the Defence Application for Interim Release of Mahamat Said Abdel Kani and Contact Restrictions”](#), 19 May 2022, ICC-01/14-01/21-318 (OA3), para. 45, referring to Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, [Reasons for the “Decision on the ‘Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo’s detention \(ICC-02/11-01/15-134-Red3\)”](#), 31 July 2015, ICC-02/11-01/15-172 (OA6), para. 14. See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Reasons for the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa”](#), 20 October 2009, ICC-01/05-01/08-566 (OA2), para. 16.

<sup>103</sup> [Appeal Brief](#), paras 36-37.

to “different aspects” of the article 18 proceedings.<sup>104</sup> In particular, Venezuela submits that there is a distinction between, on the one hand, the burden of demonstrating that the State is conducting or has conducted the relevant investigations, and, on the other hand, the burden of showing that “there is or is not an overlap” between such investigations and the Prosecutor’s investigation.<sup>105</sup> To the extent that Venezuela argues that it does not bear the burden of showing that there is an overlap, the Appeals Chamber finds no merit in its argument.

75. In the *Philippines* OA Judgment, the Appeals Chamber held that

by “inform[ing] the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and *which relate to the information provided in the notification to States*” and requesting deferral pursuant to article 18(2) of the Statute, the State concerned is alleging a fact. [...] [T]he State concerned is expected to provide information in support of its allegation of fact.<sup>106</sup>

76. The allegation of fact, which the State makes in requesting deferral pursuant to article 18(2) of the Statute, is thus not only that national investigations “with respect to criminal acts which may constitute crimes referred to in article 5” have been or are being conducted. The information from the State must also indicate that those national investigations “relate to the information provided in the notification to States”. The scope of the burden of proof, as set out in the *Philippines* OA Judgment, is therefore not limited to the mere existence of domestic investigations. It extends to the relation between the criminal acts investigated by the State concerned and “the information provided in the notification” under article 18(1) of the Statute. As shown above, this aspect of the State’s information was considered in the *Philippines* OA Judgment.<sup>107</sup> The Appeals Chamber finds no convincing reasons to depart from it.

77. Finally, regarding Venezuela’s argument that the Prosecutor is better placed to demonstrate why his investigation should be given primacy,<sup>108</sup> the Appeals Chamber recalls that in the *Philippines* OA Judgment, it held that “the State is ‘uniquely placed’

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<sup>104</sup> [Appeal Brief](#), para. 33.

<sup>105</sup> [Appeal Brief](#), paras 34, 38.

<sup>106</sup> [Philippines OA Judgment](#), para. 74 (emphasis added).

<sup>107</sup> See [Philippines OA Judgment](#), para. 74.

<sup>108</sup> [Appeal Brief](#), para. 40.

to determine the existence and scope of domestic proceedings, information which may not be publicly known”.<sup>109</sup> The Appeals Chamber sees no convincing reason to depart from this ruling either.

78. In view of the foregoing, the Appeals Chamber rejects sub-ground of appeal 1.1.

2. *Sub-ground 1.2: The alleged error in the definition and level of specificity of the article 18(1) notification*

**(a) Background and relevant parts of the Impugned Decision**

79. On 16 December 2021, the Prosecutor informed the States Parties and other States with jurisdiction that he “initiated an investigation with respect to alleged crimes within the jurisdiction of the Court committed in the Situation in Venezuela”.<sup>110</sup>

80. On 13 January 2022, in response to Venezuela’s request for additional information, the Prosecutor provided a “Sample of open source reports”<sup>111</sup> and a “Sample of alleged incidents cited in open sources”,<sup>112</sup> which, according to the Prosecutor, “catalogue similar patterns of allegations”.<sup>113</sup> The Prosecutor noted that his response to Venezuela’s request was “subject to [the] statutory limitations” under articles 18(1), 68 and 93(10)(b)(ii) of the Statute, as well as rules 46 and 52(1) of the Rules.<sup>114</sup>

81. In his Article 18 Request, the Prosecutor stated that his intended investigation is “defined by the parameters of the situation or the sum of potential cases within it”.<sup>115</sup> He argued that

the definition of the investigation for the purpose of article 18(2) should not be limited to those potential cases which were already expressly identified by the Prosecutor for the purpose of the preliminary examination. This follows not least from the fact that, if the Court’s exercise of jurisdiction was triggered by a State Party referral for example, the Prosecutor is not obliged to have

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<sup>109</sup> [Philippines OA Judgment](#), para. 79.

<sup>110</sup> Article 18(1) Notification, p. 2.

<sup>111</sup> Prosecutor’s Additional Information, pp. 9-10.

<sup>112</sup> Prosecutor’s Additional Information, pp. 11-19.

<sup>113</sup> Prosecutor’s Additional Information, p. 5.

<sup>114</sup> Prosecutor’s Additional Information, pp. 4-5.

<sup>115</sup> [Prosecutor’s Article 18 Request](#), para. 63.

publicly referenced any potential case he identified for the purpose of his initial assessment of admissibility under article 53(1)(b).<sup>116</sup>

82. In the Impugned Decision, the Pre-Trial Chamber took note of Venezuela’s argument that the Prosecutor had “only provided ‘generic information on certain cases’”.<sup>117</sup> The Pre-Trial Chamber noted that in the Article 18(1) Notification, the Prosecutor “did not provide very detailed information regarding, for example, specific dates/locations of incidents, approximate number of victims, or alleged individuals/groups responsible for specific incidents”.<sup>118</sup> The Pre-Trial Chamber found that:

In order to enable the State to provide the information required by the Statute and thereby give effect to its right to seek a deferral under article 18(2) of the Statute, the Prosecution is placed under an obligation to provide sufficient information to the State in the notification as stipulated in article 18(1) of the Statute. Since, at the article 18 stage, admissibility can only be assessed against the backdrop of a situation and the ‘potential cases’ that would arise from this situation, it is for the Prosecution to identify those ‘potential cases’.<sup>119</sup>

83. The Pre-Trial Chamber addressed the Prosecutor’s proposal that the definition of his investigation “should not be limited to potential cases which were already expressly identified”.<sup>120</sup> The Pre-Trial Chamber held that this approach “would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless”.<sup>121</sup> The Pre-Trial Chamber noted that

[i]n order to ensure that the domestic investigations sufficiently mirror the scale of criminality that the Prosecution intends to investigate in a given situation, it is upon the Prosecution to provide information that is specific enough for the relevant States to exercise its [*sic*] right under article 18(2) of the Statute and representative enough of the scope of criminality that it intends to investigate in any future case(s).<sup>122</sup>

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<sup>116</sup> [Prosecutor’s Article 18 Request](#), para. 58.

<sup>117</sup> [Impugned Decision](#), para. 68.

<sup>118</sup> [Impugned Decision](#), para. 73.

<sup>119</sup> [Impugned Decision](#), para. 75 (footnote omitted).

<sup>120</sup> [Impugned Decision](#), para. 77, referring to [Prosecutor’s Article 18 Request](#), para. 58.

<sup>121</sup> [Impugned Decision](#), para. 77.

<sup>122</sup> [Impugned Decision](#), para. 77.



84. Referring to possible limitations to the Prosecutor's information provided to States pursuant to article 18(1) of the Statute, the Pre-Trial Chamber held that:

A careful balance must be struck between the Prosecution's statutory duties to protect persons, sources, or information, as the case may be pursuant to article 18(1) of the Statute, on the one hand, and its duty to furnish the relevant States of information specific enough to give effect to their right under article 18(2) of the Statute to seek the deferral of an investigation, on the other hand. What may be considered sufficient will depend on the specific features of each situation.<sup>123</sup>

85. The Pre-Trial Chamber found that

the information provided by the Prosecution in its multiple exchanges with Venezuela appears to have been sufficiently specific for Venezuela to inform the Prosecution of its domestic proceedings and seek the deferral of the investigation. In particular, the sample of alleged incidents provided by the Prosecution to Venezuela as a result of Venezuela's request for more concrete information as to the criminal acts that may constitute crimes referred to in article 5 of the Statute contains the following information for each alleged incident: alleged victim, date, and location.<sup>124</sup>

86. The Pre-Trial Chamber concluded:

In light of the above, the Chamber rejects the arguments advanced by Venezuela that it did not receive sufficient information to exercise its right under article 18 of the Statute. For the purpose of these article 18 proceedings, the scope of the Prosecution's intended investigation can be discerned from the summary of its preliminary examination findings and, in particular, from the sample of incidents provided by the Prosecution to Venezuela.<sup>125</sup>

87. In discussing the Prosecutor's additional arguments regarding the degree of mirroring of the forms of criminality and the gravity of the acts under investigation, the Pre-Trial Chamber noted that

[i]n the list of incidents provided to Venezuela, the Prosecution did not indicate which conduct or alleged crimes it may investigate. Similarly, the orders opening the investigations and other investigative material in the court records submitted by Venezuela frequently do not outline the criminal conduct in question or the alleged crimes sufficiently. As a result, it is difficult to assess whether the domestic investigations sufficiently mirror the forms of

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<sup>123</sup> [Impugned Decision](#), para. 78.

<sup>124</sup> [Impugned Decision](#), para. 79.

<sup>125</sup> [Impugned Decision](#), para. 80.

criminality that the Prosecution intends to investigate and the gravity thereof.<sup>126</sup>

**(b) Summary of the submissions**

88. Venezuela submits that the Pre-Trial Chamber committed two related legal errors in applying the standard of specificity to and determining the status of the Prosecutor’s Article 18(1) Notification and Additional Information.<sup>127</sup> First, Venezuela argues that the Pre-Trial Chamber erroneously characterised the Prosecutor’s Additional Information as a second article 18(1) notification, and relied on it to assess the scope of the Prosecutor’s investigation, as well as his compliance with the requirements for a notification under article 18(1) of the Statute.<sup>128</sup> Second, Venezuela avers that the Prosecutor’s Additional Information does not meet the requirements of notification, as it sets out alleged criminal acts which the Prosecutor does not intend to investigate.<sup>129</sup>

89. The Prosecutor submits that, contrary to Venezuela’s argument, in the *Philippines* OA Judgment the Appeals Chamber “accepted that details of the parameters of the Prosecution’s intended investigation may be conveyed elsewhere than in the Prosecution’s article 18(1) notification”.<sup>130</sup> The Prosecutor argues that the Court’s legal texts “provide for dialogue and exchange of information” between the Prosecutor and the State seeking a deferral.<sup>131</sup> According to the Prosecutor, the Additional Information shows that he “considered these incidents described in open-source reporting (along with others) as relevant to assessing whether [Venezuela] was carrying out investigations that would warrant a deferral”.<sup>132</sup> The Prosecutor avers that an article 18(1) notification need not identify “all possible crimes, perpetrators and incidents”, as, until that point in the proceedings, his office did not formally investigate, and, therefore, he “will only be able to identify the parameters of the potential investigation and the *potential cases* that are *illustrative*”.<sup>133</sup> The Prosecutor argues that the purpose of an article 18(1) notification is “to enable States to decide whether to request a deferral and to be able to provide

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<sup>126</sup> [Impugned Decision](#), para. 123 (footnotes omitted).

<sup>127</sup> [Appeal Brief](#), paras 42-43.

<sup>128</sup> [Appeal Brief](#), paras 45-46.

<sup>129</sup> [Appeal Brief](#), paras 43, 47, 50-51, 57.

<sup>130</sup> [Prosecutor’s Response](#), para. 31, referring to [Philippines OA Judgment](#), para. 107.

<sup>131</sup> [Prosecutor’s Response](#), para. 32.

<sup>132</sup> [Prosecutor’s Response](#), para. 34; Prosecutor’s Oral Submissions, [T-1](#), p. 16, lines 18-20.

<sup>133</sup> [Prosecutor’s Response](#), para. 34 (emphasis in original); Prosecutor’s Oral Submissions, [T-1](#), p. 15, lines 10-13.

supporting material”.<sup>134</sup> Regarding the level of detail required to make a ruling under article 18(2) of the Statute, he submits that the Pre-Trial Chamber was able to appreciate the contours of the Prosecutor’s investigation without difficulty.<sup>135</sup> The Prosecutor contends that the error alleged by Venezuela would not have had any impact on the Impugned Decision, as Venezuela “fully exercised its right to provide information” in the course of the proceedings.<sup>136</sup>

90. The OPCV submits that the Pre-Trial Chamber did not err by characterising the Prosecutor’s Additional Information as a second article 18(1) notification.<sup>137</sup> It argues that the information which the Prosecutor provides at this stage of the proceedings “may eventually not translate into cases actually investigated and prosecuted by the Court”.<sup>138</sup> The OPCV submits that Venezuela’s contention that a notification under article 18(1) of the Statute must set out the acts which the Prosecutor will investigate is inapposite, as it is not possible at this stage to define the exact parameters of cases.<sup>139</sup> The OPCV contends that Venezuela does not show how the Pre-Trial Chamber would have rendered a substantially different ruling if it had not made the alleged error.<sup>140</sup> It also notes that the Prosecutor granted Venezuela a three-month extension of its time limit for making a deferral request.<sup>141</sup>

91. The Victims argue that there is no requirement that specific cases should be reported in an article 18(1) notification, as at this procedural stage of the situation the Prosecutor “does not have cases”.<sup>142</sup> The Victims submit that the characterisation of what can constitute an article 18(1) notification is not nominal and that what matters is that it serves the purpose of informing the State concerned of the contours or parameters of the intended investigation.<sup>143</sup> The Victims aver that Venezuela’s argument concerning

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<sup>134</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 14, lines 19-20.

<sup>135</sup> [Prosecutor’s Response](#), para. 38.

<sup>136</sup> [Prosecutor’s Response](#), para. 40.

<sup>137</sup> [OPCV Observations](#), para. 33.

<sup>138</sup> [OPCV Observations](#), para. 34.

<sup>139</sup> [OPCV Observations](#), para. 37; OPCV Oral Submissions, [T-1](#), p. 20, lines 14-16.

<sup>140</sup> [OPCV Observations](#), para. 39.

<sup>141</sup> [OPCV Observations](#), para. 39.

<sup>142</sup> Victims’ Representations, Annex 148, para. 21.

<sup>143</sup> Victims’ Representations, Annex 148, para. 22.

the time limit for a deferral request is unsubstantiated, as it was granted an extension of that time limit by three months.<sup>144</sup>

92. The OAS Panel submits that an article 18(1) notification must provide sufficient parameters with respect to “the scope of the criminal conduct, nature and gravity of the acts”, and that the Prosecutor is not required to indicate specific acts or specific people.<sup>145</sup> The OAS Panel argues that such a notification is issued upon the completion of a preliminary examination, at which point the Prosecutor “has not had the opportunity to engage in comprehensive investigative activities”.<sup>146</sup>

**(c) Determination by the Appeals Chamber**

*(i) Alleged erroneous reliance on the Prosecutor’s Additional Information*

93. Venezuela submits that the Pre-Trial Chamber erred in characterising the Prosecutor’s Additional Information as a second article 18(1) notification.<sup>147</sup> It argues that an article 18(1) notification (i) “forms the basis for the State’s assessment of the content of the information transmitted pursuant to Article 18(2)”; (ii) enables that State to “exercise [its] rights and [comply with its] obligations under the Statute”;<sup>148</sup> and (iii) is the basis of an assessment of “whether the Prosecution had complied with its Article 18(1) notification obligations”.<sup>149</sup> Venezuela avers that if the additional information requested by a State were to constitute part of the Prosecutor’s notification, the thirty-day period for the State’s response “would start anew”, contrary to rule 52(2) of the Rules, which confirms that this time limit does not restart in such a case.<sup>150</sup>

94. For the reasons that follow, the Appeals Chamber finds no error in the Pre-Trial Chamber’s characterisation of the Prosecutor’s Additional Information as a second article 18(1) notification.

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<sup>144</sup> Victims’ Representations, Annex 148, para. 23.

<sup>145</sup> [OAS Panel’s Observations](#), para. 32.

<sup>146</sup> [OAS Panel’s Observations](#), para. 33.

<sup>147</sup> [Appeal Brief](#), paras 45-46; Venezuela’s Oral Submissions, [T-1](#), p. 9, lines 22-24.

<sup>148</sup> [Appeal Brief](#), para. 44.

<sup>149</sup> [Appeal Brief](#), para. 45.

<sup>150</sup> [Appeal Brief](#), para. 44.

95. Article 18(1) of the Statute provides that

[w]hen a situation has been referred to the Court pursuant to article 13(a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation [...], the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned.

96. Regarding the content of such notification, rule 52(1) of the Rules specifies that “the notification shall contain information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2”.

97. Article 18(2) of the Statute reads:

Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State’s investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

98. Rule 52(2) of the Rules further clarifies that:

A State may request additional information from the Prosecutor to assist it in the application of article 18, paragraph 2. Such a request shall not affect the one-month time limit provided for in article 18, paragraph 2, and shall be responded to by the Prosecutor on an expedited basis.

99. The Appeals Chamber notes that the Prosecutor’s notification under article 18(1) of the Statute shall contain information “relevant for the purposes of article 18 paragraph 2” of the Statute. One of these purposes is to enable the State concerned to inform the Court that it is conducting or has conducted the relevant investigations, and request a deferral. In order to do so, the State will need to be on notice of “the acts that may constitute crimes referred to in article 5”. Similarly, if a State requests additional information, pursuant to rule 52(2) of the Rules, the purpose of receiving such information is “to assist it in the application of article 18, paragraph 2” and thus also in the preparation of a request for a deferral. In light of this stated purpose of the Prosecutor’s additional information, it is not, in and of itself, an error for a pre-trial chamber to rely on such information as if it were part of the Prosecutor’s article 18(1)

notification, to the extent that such information complements or clarifies the information already provided in the Prosecutor's notification.

100. The Appeals Chamber further notes Venezuela's argument that the one-month time limit for a deferral request does not restart despite a State's request for additional information.<sup>151</sup> This argument relates to the requirement, set out in article 18(2) of the Statute, that a State wishing to "inform the Court that it is investigating or has investigated" the relevant crimes, must do so "[w]ithin one month of receipt of [the Prosecutor's article 18(1)] notification". As stipulated in rule 52(2) of the Rules, if, after receiving an article 18(1) notification, the State requests additional information from the Prosecutor, "[s]uch a request shall not affect the one-month time limit provided for in article 18, paragraph 2".

101. Venezuela's argument in this respect appears to be based on the understanding that if additional information is provided to the State concerned after it has made a request for a deferral, that State will not be able to rely on such information for the purpose of making its request. However, the Appeals Chamber notes that in the present proceedings, Venezuela was provided with the Prosecutor's Additional Information prior to the expiry of the time limit for its deferral request, for which it was given a three-month extension by the Prosecutor.<sup>152</sup> It was therefore able to rely on the Additional Information, in addition to the Article 18(1) Notification, when making its request. It follows that the issue raised by Venezuela does not arise in the present proceedings.

102. In light of the foregoing, the Appeals Chamber rejects these arguments under sub-ground of appeal 1.2.

*(ii) Alleged failure to specify acts which the Prosecutor intends to investigate*

103. Venezuela submits that the Prosecutor's Additional Information did not meet the requirements of an article 18(1) notification, as such notification must contain information on the criminal acts which the Prosecutor intends to investigate.<sup>153</sup> Venezuela avers that an article 18(1) notification "is a call for coordination among the jurisdictions of the international community in relation to potential cases to be

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<sup>151</sup> See [Appeal Brief](#), para. 44.

<sup>152</sup> Prosecutor's Additional Information, p. 6.

<sup>153</sup> [Appeal Brief](#), para. 47. See also [Response to OAS Panel Observations](#), paras 21-23.

investigated”.<sup>154</sup> Venezuela argues that the Prosecutor’s Additional Information, derived from open-source reports, concerned only “hypothetical cases”, which were “merely similar and not the same as those covered by the Prosecution’s intended investigations”, and that the Pre-Trial Chamber “wrongly assumed that [such criminal acts] could be treated as ‘potential cases’, which the Prosecution actually intended to investigate”.<sup>155</sup>

104. As discussed above,<sup>156</sup> rule 52(1) of the Rules requires the Prosecutor to notify the States concerned of “the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2”. The State wishing to assert its jurisdiction needs information about such acts in order to formulate its request for a deferral of the Prosecutor’s investigation and, if there are further proceedings before a pre-trial chamber, to prepare its observations.<sup>157</sup>

105. The Appeals Chamber recalls that, pursuant to article 18(2) of the Statute, the Prosecutor gives his or her notification to all States Parties and those States which “would normally exercise jurisdiction” “[w]hen [...] [he or she] has determined that there *would be* a reasonable basis to *commence* an investigation”.<sup>158</sup> The Prosecutor thus issues an article 18(1) notification at a time when he or she is only commencing an investigation.

106. The Appeals Chamber held, in the context of article 15 proceedings, that

[a]t this early stage [when the Prosecutor submits a request for authorisation of an investigation to the pre-trial chamber if she concludes that there is a reasonable basis to proceed], the Prosecutor’s investigative powers are limited and, barring exceptional circumstances, she will not be in a position to identify exhaustively or with great specificity each incident, crime or perpetrator that could be subject to investigation. Also, evidently she will not be able to reference crimes which may occur after the request for authorisation. Nevertheless, the examples of alleged crimes presented by the Prosecutor in her request under article 15(3) of the Statute should be sufficient

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<sup>154</sup> Venezuela’s Oral Submissions, [T-1](#), p. 26, lines 4-6.

<sup>155</sup> [Appeal Brief](#), paras 43, 51, 57, 58; Venezuela’s Oral Submissions, [T-1](#), p. 7, line 25 to p. 8, line 5; p. 10, lines 10-14.

<sup>156</sup> See paragraph 96 above.

<sup>157</sup> See rules 53 and 55(2) of the Rules.

<sup>158</sup> Emphasis added.

to define in broad terms the contours of the situation that she wishes to investigate.<sup>159</sup>

107. While the procedural context of the present proceedings is different, these considerations are of guidance. Indeed, at the time of article 18(2) proceedings the Prosecutor's investigation is at a comparable stage, as the Prosecutor will only have conducted an assessment of whether "there would be a reasonable basis to commence an investigation".<sup>160</sup>

108. The Appeals Chamber also recalls that

[f]or the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.<sup>161</sup>

109. In this respect, the Appeals Chamber notes Venezuela's argument that the words "relevant for the purposes of article 18, paragraph 2" in rule 52(1) of the Rules "clarif[y] that the acts in question must be those the Prosecution intends to investigate".<sup>162</sup> However, as indicated above, at this stage of the proceedings, the Prosecutor may not yet have identified all acts which he or she intends to investigate and therefore the contours of the likely cases may still be vague. It is for this reason that the Appeals Chamber previously found that the language of rule 52(1) of the Rules in fact reflects

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<sup>159</sup> Appeals Chamber, *Situation in the Islamic Republic of Afghanistan*, [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138 (OA4) (hereinafter: "*Afghanistan* OA4 Article 15 Judgment"), para. 59.

<sup>160</sup> Article 18(1) of the Statute.

<sup>161</sup> Appeals Chamber, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute"](#), 30 August 2011, ICC-01/09-02/11-274 (OA) (hereinafter: "*Muthaura et al.* OA Judgment"), para. 38; *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19\(2\)\(b\) of the Statute"](#), 30 August 2011, ICC-01/09-01/11-307 (OA) (hereinafter: "*Ruto et al.* OA Judgment"), para. 39.

<sup>162</sup> [Appeal Brief](#), para. 47.



that vagueness by referring to “the acts that may constitute crimes referred to in article 5”.<sup>163</sup>

110. The Appeals Chamber however also recalls its recent ruling that “any investigation, irrespective of its stage, [will] have certain defining parameters, which may vary depending on the circumstances of each specific situation”.<sup>164</sup> The Appeals Chamber therefore held that a pre-trial chamber’s enquiry under article 18 of the Statute is with respect to “the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation”.<sup>165</sup> It is thus clear that there is no expectation at this stage of the proceedings that the Prosecutor should notify States of every act he or she intends to investigate, especially in those situations referred to the Court which cover a large number of alleged criminal acts. Indeed, in such situations, the Prosecutor may be in no position to identify all potential cases that fall within the scope of a broad referral and commit, so early in the process, to investigating them. However, the Prosecutor’s article 18(1) notification must be sufficiently specific in order for the State to be able to assert its jurisdiction in the proceedings under article 18(2) of the Statute.<sup>166</sup>

111. Furthermore, the Appeals Chamber notes that certain limitations may apply to the scope of the information included in the Prosecutor’s notification. Article 18(1) of the Statute provides that “where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, [he or she] may limit the scope of the information provided to States”.<sup>167</sup> In those circumstances, the Prosecutor may therefore withhold information about alleged criminal acts.

112. Venezuela submits that an article 18(1) notification must be “sufficiently substantiated so as to enable an informed and expeditious resolution of any deferral

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<sup>163</sup> [Muthaura et al. OA Judgment](#), para. 38 (“The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of ‘information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2’ that the Prosecutor’s notification to States should contain”); [Ruto et al. OA Judgment](#), para. 39.

<sup>164</sup> [Philippines OA Judgment](#), para. 106.

<sup>165</sup> [Philippines OA Judgment](#), para. 106.

<sup>166</sup> See also [Philippines OA Judgment](#), para. 107.

<sup>167</sup> See also rule 52 of the Rules.

requests”.<sup>168</sup> In this respect, Venezuela refers to the following ruling of the Appeals Chamber:

[E]ven the mere challenge to the admissibility of a case by a State has significant repercussions on the Prosecutor’s investigation. This is one of the reasons why admissibility proceedings need to proceed without undue delay. In addition, the Appeals Chamber considers that there is simply a need for clarity as far as admissibility proceedings are concerned, and that a challenge should in principle only be submitted when it is substantiated by evidence so that the Chamber in question may then proceed expeditiously to decide thereon.<sup>169</sup>

113. The Appeals Chamber agrees that the “need for clarity” also applies to proceedings under article 18(2) of the Statute. However, as discussed above, in circumstances where the Prosecutor is only commencing his or her investigation and the contours of the likely cases are vague, his or her information to States may satisfy the requirement of clarity although it contains less detail than that expected of a challenge to admissibility at the stage of a case.

114. For these reasons, the Appeals Chamber does not agree with Venezuela’s argument<sup>170</sup> that a notification under article 18(1) of the Statute, or additional information provided pursuant to rule 52(2) of the Rules, must be limited to alleged criminal acts which the Prosecutor will investigate. It is not, in and of itself, an error for a pre-trial chamber to rely on the Prosecutor’s information about criminal acts with respect to which the Prosecutor does not express a clear intention to investigate, as long as such information, together with other information provided by the Prosecutor, provides the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, that he or she intends to investigate. The Appeals Chamber considers that the Pre-Trial Chamber correctly found that the Prosecutor’s information must be “specific enough” for the State concerned “to exercise its right under article 18(2) of the Statute”.<sup>171</sup>

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<sup>168</sup> [Appeal Brief](#), para. 49.

<sup>169</sup> [Gaddafi OA4 Judgment](#), para. 166.

<sup>170</sup> [Appeal Brief](#), para. 47.

<sup>171</sup> [Impugned Decision](#), para. 77.

115. The Appeals Chamber notes in this respect that the Pre-Trial Chamber assessed the specificity of the Prosecutor’s information not only in relation to the Additional Information. The Pre-Trial Chamber also referred to the “multiple exchanges” between the Prosecutor and Venezuela.<sup>172</sup> It specifically relied on “the summary of [the Prosecutor’s] preliminary examination findings”, attached to the Article 18(1) Notification.<sup>173</sup> The Prosecutor’s Additional Information is thus not the only source of information upon which the Pre-Trial Chamber relied in its determination under article 18(2) of the Statute. The Pre-Trial Chamber concluded that, based on all relevant documents, including the Prosecutor’s Additional Information, “the scope of the Prosecution’s intended investigation can be discerned”.<sup>174</sup> It therefore rejected, on that basis, Venezuela’s argument that it had not received “sufficient information to exercise its right under article 18 of the Statute”.<sup>175</sup>

116. The Appeals Chamber notes that the information provided by the Prosecutor sets out the parameters of his intended investigation as follows: (i) the “Summary of Preliminary Examination Findings”, included in the Article 18(1) Notification, refers to the time of the alleged crimes<sup>176</sup> and groups of persons allegedly involved in their commission;<sup>177</sup> (ii) the Notification also sets out the types of crimes that were allegedly committed;<sup>178</sup> and (iii) the Prosecutor’s Additional Information provides “a sample of concrete examples of allegations within the jurisdiction of the Court”, which, as noted by the Pre-Trial Chamber,<sup>179</sup> indicate the alleged victim, date and location.<sup>180</sup> The Appeals Chamber also observes that in one of the “multiple exchanges” between the Prosecutor and Venezuela,<sup>181</sup> the Prosecutor provided Venezuela with a more detailed summary of the preliminary examination findings, which, in addition to the parameters outlined above, included locations of crimes,<sup>182</sup> descriptions of the underlying acts,<sup>183</sup> as

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<sup>172</sup> [Impugned Decision](#), para. 79.

<sup>173</sup> [Impugned Decision](#), paras 71, 80.

<sup>174</sup> [Impugned Decision](#), para. 80.

<sup>175</sup> [Impugned Decision](#), para. 80.

<sup>176</sup> Annex A to Article 18(1) Notification, paras 1, 3, 15.

<sup>177</sup> Annex A to Article 18(1) Notification, paras 5-6.

<sup>178</sup> Annex A to Article 18(1) Notification, paras 3-4.

<sup>179</sup> [Impugned Decision](#), para. 79.

<sup>180</sup> Prosecutor’s Additional Information, pp. 11-19.

<sup>181</sup> [Impugned Decision](#), para. 79.

<sup>182</sup> Letter from the Prosecutor to the authorities of Venezuela on 19 October 2021, ICC-02/18-16-Conf-Exp-AnxD, pp. 20-21 (hereinafter: “19 October 2021 Letter”), paras 26, 42.

<sup>183</sup> 19 October 2021 Letter, paras 15-40.

well as the Prosecutor’s preliminary finding that the alleged crimes were committed pursuant to a policy, which “was at a minimum encouraged or approved by the Government of Venezuela”, and that “the attack against the civilian population was at a minimum systematic”.<sup>184</sup> The Prosecutor also attached this more detailed summary to the Additional Information.<sup>185</sup> While it is not entirely clear from the Impugned Decision whether the Pre-Trial Chamber specifically considered the additional details provided in this summary, it did refer to “the information provided by the Prosecution in its multiple exchanges with Venezuela”.<sup>186</sup>

117. As is evident in the material submitted by Venezuela,<sup>187</sup> this information was sufficient for the State to identify the incidents listed in the sample.

118. The Appeals Chamber therefore finds that the Pre-Trial Chamber did not err by relying on the Prosecutor’s Additional Information as relevant to its determination of whether to authorise the Prosecutor’s investigation despite Venezuela’s request for a deferral. It also did not err by (i) rejecting Venezuela’s arguments that it had not received sufficient information to exercise its right under article 18 of the Statute, and (ii) finding that “the scope of the Prosecution’s intended investigation can be discerned” from the information provided by the Prosecutor.<sup>188</sup> The Appeals Chamber therefore rejects Venezuela’s arguments in this respect.

3. *Sub-ground 1.3: The alleged error in finding that there was no time limit for the Prosecutor’s article 18(2) application*

**(a) Relevant parts of the Impugned Decision**

119. The Pre-Trial Chamber examined Venezuela’s argument that, since the Prosecutor filed his Article 18 Request more than six months after receiving the Deferral Request, the option of seeking authorisation to resume the investigation was no longer available to him.<sup>189</sup> The Pre-Trial Chamber found that “nothing in the legal framework prevented”

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<sup>184</sup> 19 October 2021 Letter, para. 7.

<sup>185</sup> Prosecutor’s Additional Information, pp. 2, 22-52.

<sup>186</sup> [Impugned Decision](#), para. 79.

<sup>187</sup> [Prosecutor’s Response](#), para. 13, fn 24; Annex 1 to [Transmission of Translated Material](#).

<sup>188</sup> [Impugned Decision](#), para. 80.

<sup>189</sup> [Impugned Decision](#), para. 56.

the Prosecutor from making his request more than six months after receiving Venezuela's Deferral Request.<sup>190</sup> The Pre-Trial Chamber held that

[w]hile the Prosecution is under a continuous obligation to facilitate expeditious proceedings before the Court, neither article 18(2) of the Statute, nor rule 54 of the Rules setting out the procedural requirements of an application by the Prosecution under article 18(2) of the Statute stipulate a time limit for the filing of such an application.<sup>191</sup>

120. The Pre-Trial Chamber also took note of “the volume of the material provided by Venezuela in its communication with the Prosecution” and concluded that “the six-month period does not appear to amount to an excessive delay that could suggest that the Prosecution failed to uphold its obligations to resolve the Deferral Request expeditiously”.<sup>192</sup>

#### (b) Summary of the submissions

121. Venezuela argues that the Pre-Trial Chamber erred in finding that there is no time limit for the Prosecutor's application for a ruling under article 18(2) of the Statute.<sup>193</sup> It submits that article 18(3) of the Statute imposes a six-month time limit for the Prosecutor to file an application for a pre-trial chamber's ruling under article 18(2), “failing which the [Prosecutor] is required to demonstrate a ‘significant change of circumstances’”.<sup>194</sup> Venezuela contends that if the Prosecutor does not file an article 18(2) application immediately after the expiry of the six-month time limit, “the State is entitled to assume that the [Prosecutor] does not contest its jurisdiction and [to] fully deploy its resources”.<sup>195</sup> Venezuela submits that if that time limit “is not enforced as a strict deadline, the requirement that the [Prosecutor] must demonstrate a ‘significant change in circumstances’ for later applications would be rendered inoperative”.<sup>196</sup>

122. The Prosecutor submits that the Pre-Trial Chamber correctly stated that article 18(2) of the Statute does not stipulate any time frame for the Prosecutor's application for a ruling in relation to a State's deferral request.<sup>197</sup> The Prosecutor argues

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<sup>190</sup> [Impugned Decision](#), para. 57.

<sup>191</sup> [Impugned Decision](#), para. 57.

<sup>192</sup> [Impugned Decision](#), para. 58.

<sup>193</sup> [Appeal Brief](#), paras 62-65.

<sup>194</sup> [Appeal Brief](#), para. 62; [Response to OAS Panel Observations](#), para. 26.

<sup>195</sup> [Appeal Brief](#), para. 63.

<sup>196</sup> [Appeal Brief](#), para. 64.

<sup>197</sup> [Prosecutor's Response](#), para. 42.

that he does not need a deadline as he has an interest in resolving a State's request for a deferral expeditiously.<sup>198</sup> The Prosecutor submits that article 18(3) of the Statute stipulates "the minimum period after which the Prosecutor may review whether it is warranted to continue the deferral, once it has been established that there are relevant domestic investigations that warrant the deferral".<sup>199</sup> He argues that a deferral is not automatically triggered upon a State's request and that, rather, the Prosecutor needs to take "an active decision" whether to defer.<sup>200</sup> The Prosecutor contends that even if the Pre-Trial Chamber had erred, this error would not have had any impact on the Impugned Decision.<sup>201</sup>

123. The OPCV submits that article 18(2) and article 18(3) of the Statute have different contexts and purposes and that, therefore, it cannot be argued that the six-month time limit set in the latter applies to the former.<sup>202</sup> The OPCV argues that there is no need for a State to assume that if the Prosecutor has not filed an application for a ruling under article 18(2) of the Statute, he or she does not contest that State's jurisdiction, as a State can file admissibility challenges not only at the situation stage but also at the stage of a subsequent case.<sup>203</sup>

124. The Victims submit that Venezuela erroneously interprets article 18 of the Statute, which, in their view, does not contemplate a time limit for the Prosecutor's application to a pre-trial chamber to authorise the investigation.<sup>204</sup>

125. The OAS Panel submits that the inference that the six-month time limit set in article 18(3) of the Statute applies to article 18(2) is entirely unfounded.<sup>205</sup> The OAS Panel argues that although no time limit applies to the Prosecutor's application under article 18(2) of the Statute, the Prosecutor should be able to demonstrate that he dealt with the State's request for a deferral expeditiously.<sup>206</sup>

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<sup>198</sup> [Prosecutor's Response](#), para. 42.

<sup>199</sup> [Prosecutor's Response](#), para. 43.

<sup>200</sup> [Prosecutor's Response](#), para. 43.

<sup>201</sup> [Prosecutor's Response](#), para. 44.

<sup>202</sup> [OPCV Observations](#), para. 42.

<sup>203</sup> [OPCV Observations](#), para. 44.

<sup>204</sup> Victims' Representations, Annex 148, para. 24.

<sup>205</sup> [OAS Panel's Observations](#), para. 41.

<sup>206</sup> [OAS Panel's Observations](#), para. 40.

**(c) Determination by the Appeals Chamber**

126. Venezuela argues that the Pre-Trial Chamber erred in finding that there is no time limit for the Prosecutor’s application for a ruling under article 18(2) of the Statute.<sup>207</sup>

127. Article 18(2) of the Statute provides in its relevant part that “[a]t the request of [a] State, the Prosecutor shall defer to the State’s investigation [...] unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation”. Article 18(3) further indicates that the Prosecutor’s deferral to a State’s investigation “shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State’s unwillingness or inability genuinely to carry out the investigation”.

128. The Appeals Chamber notes that article 18(2) of the Statute does not impose any time limit on the Prosecutor for his or her application to a pre-trial chamber for authorisation to investigate. Furthermore, the Appeals Chamber is not persuaded that the time limit of six months, set in article 18(3) of the Statute, applies to the Prosecutor’s application to a pre-trial chamber. Rather, this time limit applies to the Prosecutor’s own review of his or her deferral. The Appeals Chamber therefore considers that the Pre-Trial Chamber correctly found that the Court’s legal texts do not “stipulate a time limit for the filing of such an application”.<sup>208</sup>

129. Moreover, although the Prosecutor did not immediately file his Article 18 Request after receiving the Deferral Request, he promptly announced his intention to do so. When notifying the Pre-Trial Chamber of Venezuela’s Deferral Request, four days after its receipt, the Prosecutor informed the Pre-Trial Chamber that he “[would] request the Chamber to authorise resumption of [his] investigation under article 18(2) of the Statute”.<sup>209</sup> It was thus clear already at that point that the Prosecutor took issue with the Deferral Request and intended to file an application under article 18(2) of the Statute before the Pre-Trial Chamber.

130. Notwithstanding the foregoing, the Appeals Chamber is mindful of the need for expeditiousness in proceedings concerning the Prosecutor’s application for a pre-trial

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<sup>207</sup> [Appeal Brief](#), paras 62-65.

<sup>208</sup> [Impugned Decision](#), para. 57.

<sup>209</sup> [Notification of Venezuela’s Deferral Request](#), para. 8.

chamber's ruling under article 18(2) of the Statute. It notes that article 18(2) of the Statute imposes a time limit of one month for a State to inform the Court "that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 of the Statute", and to request a deferral. As discussed above, the State's request for additional information does not affect that time limit, as per rule 52(2) of the Rules. Furthermore, article 18(4) of the Statute provides that "[t]he appeal [against a pre-trial chamber's ruling] may be heard on an expedited basis". The Appeals Chamber is of the view that these provisions indicate that the proceedings under article 18 of the Statute must indeed be conducted expeditiously.<sup>210</sup> Therefore, while no time limit is set for the Prosecutor's application under article 18(2) of the Statute, it is reasonable to expect the Prosecutor to file such an application without undue delay.

131. In the present situation, approximately six months and two weeks passed from the Deferral Request to the Prosecutor's Article 18 Request.<sup>211</sup> When notifying the Pre-Trial Chamber of the Deferral Request, the Prosecutor indicated that "[i]n support of the Deferral Request, Venezuela attache[d] no supporting material".<sup>212</sup> Subsequently, Venezuela submitted six tranches of material, the last one on 18 October 2022<sup>213</sup> – two weeks before the filing of the Article 18 Request by the Prosecutor. The material received by the Prosecutor before his submission of the Article 18 Request comprised over 18,200 pages.<sup>214</sup> The Appeals Chamber therefore finds no error in the Pre-Trial Chamber's conclusion that, in light of "the volume of the material provided by Venezuela", "the six-month period does not appear to amount to an excessive delay".<sup>215</sup>

132. For these reasons, the Appeals Chamber rejects sub-ground of appeal 1.3.

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<sup>210</sup> See J Holmes, 'Jurisdiction and Admissibility', in R. S Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2001), p. 338 ("[I]t was recognized at Rome that, at the initial stage of an investigation, speed was essential to ensure that potential witnesses were contacted and evidence obtained and protected").

<sup>211</sup> [Impugned Decision](#), para. 57.

<sup>212</sup> [Notification of Venezuela's Deferral Request](#), para. 3; *see also* para. 7.

<sup>213</sup> [Prosecutor's Article 18 Request](#), para. 14; [Response to Venezuela's Observations](#), para. 55. *See also* [T-1](#), p. 63, lines 14-17.

<sup>214</sup> [Prosecutor's Article 18 Request](#), para. 15.

<sup>215</sup> [Impugned Decision](#), para. 58.



#### 4. Conclusion

133. Having rejected all of Venezuela’s arguments, the Appeals Chamber rejects the first ground of appeal.

#### **D. Second ground of appeal: The alleged error in excluding relevant information**

134. Under this ground of appeal, Venezuela argues that the Pre-Trial Chamber erred in law and in fact, and manifestly abused its discretion by excluding certain relevant information.<sup>216</sup>

135. In particular, Venezuela submits that the Pre-Trial Chamber erred by exclusively relying on the English translations of selected 62 case files and failing to (i) require translations of, and consider, information concerning domestic investigations that was in Spanish; (ii) examine the Prosecutor’s translations of summaries of proceedings or records and documents other than “court records and other records of investigative steps taken in the context of domestic criminal proceedings”;<sup>217</sup> and (iii) take into consideration the Memorandum of Understanding (“MoU”), concluded between the Prosecutor and Venezuela.<sup>218</sup>

136. Venezuela submits that the Pre-Trial Chamber’s exclusion of relevant material undermined the validity of its conclusion that Venezuela’s investigations did not sufficiently mirror the scope of the Article 18(1) Notification.<sup>219</sup>

#### *1. The alleged failure to require translation of, and consider, documents in Spanish*

##### **(a) Relevant parts of the Impugned Decision**

137. When discussing the material to be considered to determine the merits of the Prosecutor’s Article 18(2) Request, the Pre-Trial Chamber noted that, together with his request, the Prosecutor communicated to the Pre-Trial Chamber the material provided by Venezuela pursuant to rule 54(1) of the Rules.<sup>220</sup> It further noted that “the vast majority of [Venezuela’s] supporting documents are in Spanish” and the Prosecutor

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<sup>216</sup> [Appeal Brief](#), para. 15.

<sup>217</sup> [Impugned Decision](#), para. 89 (footnotes omitted).

<sup>218</sup> [Appeal Brief](#), paras 66-96.

<sup>219</sup> [Appeal Brief](#), paras 82, 91.

<sup>220</sup> [Impugned Decision](#), para. 81.

provided English translations of “some of the information received”.<sup>221</sup> The Pre-Trial Chamber took note of the Prosecutor’s explanation that the material provided by Venezuela was “reviewed by the Prosecution in [its] original language by staff with the necessary language skills”, and that this “enabled the Prosecution to assess the relevance and sufficiency of the supporting documentation and to determine the extent to which national proceedings may mirror the Prosecution’s intended investigation”.<sup>222</sup>

138. The Pre-Trial Chamber further noted that “[t]he only translations provided by the Prosecution consist of some of the correspondence received from Venezuelan authorities and summaries provided by Venezuela of some criminal cases”, and that “[t]he criteria used by the Prosecution to decide which documents’ translation would ‘facilitate the Chamber’s assessment’ appear to be unclear”.<sup>223</sup>

139. After recalling regulation 39(1) of the Regulations and Pre-Trial Chamber II’s findings made in the *Afghanistan* situation,<sup>224</sup> the Pre-Trial Chamber concluded that:

It is immaterial whether the Prosecution has the capacity to analyse the material transmitted by Venezuela in its original language. The requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution. Venezuela explicitly acknowledged this requirement when submitting its request for an extension of time to file translations into English of those documents deemed relevant to its observations in [the article 18(2)] proceedings.<sup>225</sup>

140. As a result, the Pre-Trial Chamber “only considered documents for which English translations [had] been provided”.<sup>226</sup> In this regard, it noted that “in addition to the translations provided by the Prosecution, Venezuela attached 13 annexes to its observations on 1 March 2023 and filed English translations of some of the material

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<sup>221</sup> [Impugned Decision](#), para. 81, referring to [Prosecutor’s Article 18 Request](#), para. 14, fn 19.

<sup>222</sup> [Impugned Decision](#), para. 81, referring to [Prosecutor’s Article 18 Request](#), fn 19.

<sup>223</sup> [Impugned Decision](#), para. 82, referring to [Prosecutor’s Article 18 Request](#), fn 19 and Annex A to the [Prosecutor’s Article 18 Request](#), pp. 4-5.

<sup>224</sup> [Impugned Decision](#), paras 82-83, 85, referring to Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation](#), 31 October 2022, ICC-02/17-196 (hereinafter: “*Afghanistan* Article 18(2) Decision”), para. 50 (Noting that it is for the State “to ensure that the Chamber can analyse the materials submitted in support of a request for deferral”, Pre-Trial Chamber II further clarified that “[t]hat is not to say that, in case a State is unable to provide the supporting documents in one of the working languages of the Court, it may not consult with the Prosecution and agree that any translation for the purpose of the Chamber’s assessment is made by the Prosecution”).

<sup>225</sup> [Impugned Decision](#), para. 86, referring to [Request for Extension of Time to File Translations](#); Annex 1 to [Transmission of Translated Material](#).

<sup>226</sup> [Impugned Decision](#), para. 87.

supporting the Deferral Request on 21 March 2023, which mainly consists of copies of criminal court records and records of other investigative steps taken”.<sup>227</sup>

**(b) Summary of the submissions**

141. Venezuela argues that the Pre-Trial Chamber erred in law and in fact, and manifestly abused its discretion by excluding relevant information, namely: (i) information in Spanish concerning domestic investigations; (ii) the “Prosecution summaries” of proceedings or records (or *fichas*, *minutas*, or *asuntos*); and (iii) the MoU concluded between the Prosecutor and Venezuela.<sup>228</sup>

142. Venezuela submits that the Pre-Trial Chamber erred in law and manifestly abused its discretion “by failing to require the Prosecution to file the information received from [Venezuela] in a working language and then declining to rely on relevant information concerning the status of investigations in Venezuela that the Prosecution had not translated into a working language”.<sup>229</sup> It argues that in light of the clear wording of rule 54(1) of the Rules and regulation 39(1) of the Regulations, the burden to ensure that translations are available to the Pre-Trial Chamber rests on the Prosecutor.<sup>230</sup>

143. The Prosecutor argues that the Pre-Trial Chamber was reasonable in considering a representative sample of case files in English instead of requiring the Prosecutor to translate all Venezuela’s materials into English.<sup>231</sup> In this regard, the Prosecutor submits that his office does not have an obligation to translate the information that Venezuela provided to support its deferral request, and that “it is for the State to provide to the Court this information in one of the working languages of the Court, unless it is otherwise permitted”.<sup>232</sup> This, according to the Prosecutor, is supported by (i) a textual and contextual interpretation of the relevant provisions, (ii) the object and purpose of both the article 18 process and the complementarity regime more generally, as well as (iii) “pragmatic considerations”.<sup>233</sup> The Prosecutor further submits that Venezuela itself provided the sample of cases for the Pre-Trial Chamber to review, and acknowledged its

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<sup>227</sup> [Impugned Decision](#), para. 87 (footnotes omitted).

<sup>228</sup> [Appeal Brief](#), paras 15, 66-96. *See also* Venezuela’s Oral Submissions, [T-1](#), p. 79, lines 7-9.

<sup>229</sup> [Appeal Brief](#), para. 67.

<sup>230</sup> [Appeal Brief](#), paras 71, 74-75; *see also* para. 77. *See also* [Response to OAS Panel Observations](#), paras 27-31.

<sup>231</sup> [Prosecutor’s Response](#), paras 47, 67-80.

<sup>232</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 48, lines 17-21.

<sup>233</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 48, lines 21-24.

representativeness.<sup>234</sup> According to the Prosecutor, the Pre-Trial Chamber drew appropriate inferences from that sample.<sup>235</sup>

144. The OPCV submits that the Pre-Trial Chamber correctly found that not all documents provided by Venezuela had to be translated into a working language of the Court.<sup>236</sup> The OPCV argues that in the light of rule 54(1) of the Rules and regulation 39(1) of the Regulations, the Prosecutor has an obligation only to transmit the documents received by the State to the Pre-Trial Chamber, and it is the State that has the responsibility to provide the material to the Pre-Trial Chamber in one of the working languages of the Court.<sup>237</sup>

145. The Victims, in their representations, submit, *inter alia*, that, if Venezuela wished to present documents in Spanish, it ought to have requested the Pre-Trial Chamber to permit the use of Spanish in these proceedings, pursuant to article 50 of the Statute, rather than assuming that the Prosecutor had the obligation to translate its documents.<sup>238</sup>

146. The OAS Panel submits that the Prosecutor’s duty, pursuant to the Statute and the Rules, is “confined solely to the conveyance of information” received from Venezuela.<sup>239</sup> It argues that the Pre-Trial Chamber properly directed Venezuela to identify essential documents.<sup>240</sup> The OAS Panel avers that court records and investigative records have a high probative value and that “the responsibility for choosing not to prioritise the translation of these official documents rests solely with [Venezuela]”.<sup>241</sup>

### (c) Determination by the Appeals Chamber

147. Within a broad argument concerning the alleged failure to consider documents in Spanish, Venezuela submits that the Pre-Trial Chamber erred in law and manifestly abused its discretion “by failing to require the Prosecution to file the information received from [Venezuela] in a working language and then declining to rely on relevant

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<sup>234</sup> [Prosecutor’s Response](#), paras 47, 67-80.

<sup>235</sup> [Prosecutor’s Response](#), paras 47, 49, 67-80.

<sup>236</sup> [OPCV Observations](#), paras 47-55.

<sup>237</sup> OPCV Oral Submissions, [T-1](#), p. 56, lines 1-14; *see also* p. 56, line 15 to p. 58, line 15.

<sup>238</sup> Victims’ Representations, Annex 148, para. 27.

<sup>239</sup> [OAS Panel’s Observations](#), para. 46.

<sup>240</sup> [OAS Panel’s Observations](#), para. 48.

<sup>241</sup> [OAS Panel’s Observations](#), para. 48.

information concerning the status of investigations in Venezuela that the Prosecution had not translated into a working language”.<sup>242</sup> Venezuela argues that “[a]s a matter of law, the Prosecution was required to file this information in a working language of the Court”, and that “[a]s a matter of procedure, given the lack of clarity during the litigation as concerns the burden of proof and responsibility for translating the information transmitted by the Prosecution, the [Pre-Trial] Chamber manifestly abused its discretion by failing to provide clear directions to [Venezuela] to translate the entirety of these materials and failing to afford it adequate time to do so”.<sup>243</sup> Venezuela submits that, in the absence of any request on the part of the Prosecutor to obtain translations, it was entitled to assume that all information submitted in Spanish would be translated by the Prosecutor if necessary or accepted as “an official language”,<sup>244</sup> or alternatively translated by the Court, pursuant to rule 42 of the Rules.<sup>245</sup>

(i) *The alleged error in failing to require the Prosecutor to provide translations of material received from the State in support of a deferral request*

148. Venezuela submits that rule 54(1) of the Rules and regulation 39(1) of the Regulations place the burden on the Prosecutor to ensure that translations are available to the Pre-Trial Chamber.<sup>246</sup> Venezuela argues that despite the clear wording of these provisions, the Pre-Trial Chamber erroneously determined that “the requirement of submitting documents to the Pre-Trial Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution”.<sup>247</sup>

149. The Appeals Chamber notes that rule 54(1) of the Rules provides that when seising a pre-trial chamber with an application for authorisation of the investigation under article 18(2) of the Statute, the Prosecutor must provide “the basis for the application”. In addition, rule 54(1) stipulates that “[t]he information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber”.<sup>248</sup>

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<sup>242</sup> [Appeal Brief](#), para. 67.

<sup>243</sup> [Appeal Brief](#), para. 67.

<sup>244</sup> [Appeal Brief](#), paras 70-72, 74. *See also* Venezuela’s Oral Submissions, [T-1](#), p. 42, lines 14-16; p. 45, lines 18-22; p. 61, line 14 to p. 62, line 11.

<sup>245</sup> [Appeal Brief](#), para. 72.

<sup>246</sup> [Appeal Brief](#), paras 71, 74-75; *see also* para. 77.

<sup>247</sup> [Appeal Brief](#), paras 69-71.

<sup>248</sup> *See also* [Philippines OA Judgment](#), para. 76.

150. Regulation 39(1) of the Regulations provides:

All documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof.

151. Pursuant to rule 54(1) of the Rules and regulation 39(1) of the Regulations, the Prosecutor has thus an obligation to file, in one of the working languages of the Court, “[a]ll documents and materials” that form the basis for his or her application for a ruling under article 18(2) of the Statute. Pursuant to rule 54(1) of the Rules, the Prosecutor also has a duty to communicate to the pre-trial chamber the information provided by the State in support of its deferral request.

152. The following considerations concern the information that the Prosecutor must “communicate” to the pre-trial chamber.

153. Venezuela submits that, since the Prosecutor filed an application for a ruling under article 18(2) of the Statute, and in light of regulation 39(1) of the Regulations, it was for the Prosecutor to file translations of the information provided by the State under rule 53 of the Rules.<sup>249</sup> The Appeals Chamber recalls in this respect that pursuant to regulation 39(1) of the Regulations, all documents and materials “filed” with the Registry shall be in English or French, unless otherwise provided, and that the material supporting a request for deferral shall be “communicated” to the pre-trial chamber. Regardless of whether in the present proceedings such material was communicated by means of “filing” within the meaning of regulation 39 of the Regulation or in another form, a joint reading of article 50(2) of the Statute<sup>250</sup> and regulation 39(1) of the Regulations indicates that said material had to be provided to the Pre-Trial Chamber in either of the two working languages. Regarding Venezuela’s argument that, since it is the Prosecutor who “filed”, within the meaning of regulation 39(1), an application for a ruling under article 18(2) of the Statute, he was the “participant” responsible for providing a translation thereof, the Appeals Chamber recalls that the Regulations “shall be read subject to the Statute and the Rules”,<sup>251</sup> and regulation 39(1) cannot be read in

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<sup>249</sup> [Appeal Brief](#), paras 67-68, 71.

<sup>250</sup> Article 50(2) of the Statute: “The working languages of the Court shall be English and French. [...]”.

<sup>251</sup> Regulation 1 of the Regulations.

such a way as to alter the scope of rule 54(1) of the Rules, which limits the obligation of the Prosecutor to “communicat[ing]” to the Pre-Trial Chamber “the information provided by the State” under rule 53 of the Rules.

154. The Appeals Chamber notes that the verb “to communicate” has different meanings, including “to share” information with others<sup>252</sup> and “to transmit information [...] so that it is satisfactorily received and understood”.<sup>253</sup> Furthermore, the French version of rule 54(1) of the Rules uses the term “*communiquer*”, which signifies “[f]aire passer quelque chose à quelqu’un pour qu’il en prenne connaissance”.<sup>254</sup> In addition, it is important to read rule 54(1) of the Rules in the context of article 18(2) proceedings. Viewed in that context, the “participant” under regulation 39(1) of the Regulations, bearing the onus to substantiate the assertion that it is carrying out or has carried out relevant investigations, is the State. As held in the *Philippines* OA Judgment, “the burden of providing information relevant to the pre-trial chamber’s determination under article 18(2) of the Statute remains on the State seeking deferral”,<sup>255</sup> and “the fact that it is the Prosecutor who seises a pre-trial chamber with an application under article 18(2) of the Statute does not shift the burden of proof to the Prosecutor”.<sup>256</sup> Recalling that pursuant to article 50(2) of the Statute, the working languages of the Court are English and French, it follows that the burden to provide translations of the information which the Prosecutor received from the State, and which he or she is under an obligation to communicate to the pre-trial chamber, rests on the State seeking deferral. Contrary to Venezuela’s argument,<sup>257</sup> this conclusion is not affected by the Court’s duty to arrange for translation and interpretation services, pursuant to rule 42 of the Rules. This duty serves “to ensure the implementation of [the Court’s] obligations under the Statute and the Rules”.<sup>258</sup> However, it does not relieve parties and participants of their obligation to

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<sup>252</sup> See *Cambridge Dictionary*, accessed at <https://dictionary.cambridge.org/dictionary/english/communicate>.

<sup>253</sup> *Merriam-Webster Dictionary*, accessed at [Communicate Definition & Meaning - Merriam-Webster](#). See also Prosecutor’s Oral Submissions, [T-1](#), p. 50, line 8; Venezuela’s Oral Submissions, [T-1](#), p. 60, lines 13-18.

<sup>254</sup> *Larousse, Dictionnaire de français*, accessed at <https://www.larousse.fr/dictionnaires/francais/communiquer/17568>.

<sup>255</sup> *Philippines OA Judgment*, para. 77; see more generally paras 74-79. See also paragraphs 72-77 above.

<sup>256</sup> *Philippines OA Judgment*, para. 77.

<sup>257</sup> *Appeal Brief*, para. 72. See also [Response to OAS Panel Observations](#), para. 29.

<sup>258</sup> Rule 42 of the Rules.

ensure that the material, which is to be filed with the Registry, is in one of the Court's working languages, unless otherwise provided for or ordered.<sup>259</sup>

155. Pre-Trial Chamber II in the *Afghanistan* Article 18(2) Decision had found that “[a]s the onus to substantiate a deferral request is on the State, it follows that it is also for the State to ensure that the Chamber can analyse the materials submitted in support of a request for deferral”;<sup>260</sup> and that “whilst the Prosecution may offer its services, no obligation rests on it to provide translations”.<sup>261</sup> The Appeals Chamber notes that the Pre-Trial Chamber correctly referred to this finding in the Impugned Decision.<sup>262</sup> As a result, Venezuela's argument that the Pre-Trial Chamber's reliance on this prior decision is “legally flawed” because “the burden of persuasion rests with the Prosecutor and not the State”<sup>263</sup> is dismissed.

156. Venezuela also submits that the time limit of one month set in article 18(2) of the Statute for the State to inform the Prosecutor that it is investigating the acts in question supports its argument that the burden to translate material is not on the State.<sup>264</sup> The Appeals Chamber is not persuaded by this argument. First, the Appeals Chamber agrees with the Prosecutor<sup>265</sup> that at this stage the State does not need to provide a large amount of supporting information. The Appeals Chamber also recalls that pursuant to rule 53 of the Rules, “[t]he Prosecutor may request additional information from that State”.

157. Furthermore, it is not only in its request for a deferral that the State concerned may include information and material on domestic investigations. The State may also rely on such information when making observations before the pre-trial chamber, pursuant to rule 55(2) of the Rules. Therefore, even if the State is unable to provide all relevant material and translations thereof in its request for a deferral, this does not affect its ability

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<sup>259</sup> Article 50(2) and (3) provides, in its relevant parts, that: “(2)The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages. (3) At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified”. *See also* paragraph 168 below.

<sup>260</sup> [Afghanistan Article 18\(2\) Decision](#), para. 50.

<sup>261</sup> [Afghanistan Article 18\(2\) Decision](#), para. 50.

<sup>262</sup> *See Impugned Decision*, para. 85.

<sup>263</sup> [Appeal Brief](#), para. 71; *see also* paragraph 72 above.

<sup>264</sup> [Appeal Brief](#), para. 72.

<sup>265</sup> [Prosecutor's Response](#), para. 73; Prosecutor's Oral Submissions, [T-1](#), p. 52, lines 12-15; p. 73, lines 19-25.



to assert its jurisdiction in the proceedings before the pre-trial chamber. Finally, the State may seize the relevant chamber with a request for extension of time if it considers the time limit insufficient to collect and, where necessary, translate any relevant material. Accordingly, Venezuela's argument that the obligation to provide translations of the supporting material of its deferral request may limit its rights under article 18 of the Statute<sup>266</sup> is also rejected.

158. Regarding Venezuela's argument concerning article 87(2) of the Statute,<sup>267</sup> the Appeals Chamber finds that this provision is not applicable to the proceedings at hand. Contrary to Venezuela's argument, the fact that requests for cooperation may be in the official language of a State (which is not a working language of the Court) does not mean that the State may use that language in its filings and material submitted in proceedings before the Court, as that would contravene article 50(2) of the Statute and regulation 39(1) of the Regulations. Likewise, the Appeals Chamber cannot agree with the proposition that, since the Pre-Trial Chamber allowed the VPRS to collect and submit victims' views and concerns in a non-working language, Venezuela should have been allowed to provide material to the Court in a non-working language.<sup>268</sup>

159. In light of the foregoing, the Appeals Chamber considers that it is the State seeking deferral that must provide the translation into English or French of the documents upon which it relies to assert that it is carrying out or has carried out relevant investigations pursuant to article 18(2) of the Statute, in order to ensure that the pre-trial chamber can analyse the materials submitted in support of its assertion. The Appeals Chamber is of the view that the State concerned is in the best position to identify the relevant documents, especially where the supporting material is voluminous and the State chooses to present a selection of this material.

160. The Appeals Chamber therefore finds that to the extent that the Pre-Trial Chamber meant to impose a joint duty,<sup>269</sup> on the State and on the Prosecutor, to translate documents in support of the Deferral Request, the Pre-Trial Chamber erred. This

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<sup>266</sup> [Appeal Brief](#), para. 75.

<sup>267</sup> [Appeal Brief](#), para. 72. See also [Response to OAS Panel Observations](#), paras 28-29. See also Venezuela's Oral Submissions, [T-1](#), p. 70, line 24 to p. 71, line 3; [Prosecutor's Response](#), para. 78; Prosecutor's Oral Submissions, [T-1](#), p. 72, lines 3-21.

<sup>268</sup> See [Appeal Brief](#), para. 73; [Prosecutor's Response](#), para. 78.

<sup>269</sup> [Impugned Decision](#), para. 86 ("The requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution").

notwithstanding, for the reasons developed below,<sup>270</sup> the Appeals Chamber finds that this error had no material effect on the Impugned Decision.

161. Furthermore, the finding above does not preclude the State and the Prosecutor from engaging in a process of consultations to ensure that the documents, which the State considers the most relevant to support its assertion, are provided to the pre-trial chamber in one of the working languages of the Court. While, as recalled above, the Prosecutor does not have an obligation to translate the documents in support of a State's deferral request, he or she may provide assistance where needed.

162. In this regard, the Prosecutor should endeavour to inform the State promptly about his or her intention to make an application for a ruling under article 18(2) of the Statute, in order to enable the State to prepare the information that it wishes the Prosecutor to communicate to the pre-trial chamber, especially where a translation into a working language of the Court is required.<sup>271</sup>

163. For the foregoing reasons, Venezuela's argument that the Pre-Trial Chamber erred in law by failing to require the Prosecutor to file the material received from Venezuela in a working language of the Court is rejected.

*(ii) The alleged error in requiring translation into English of, and relying on, only "essential" documents*

164. The Appeals Chamber notes that, in the present proceedings, the material transmitted by Venezuela in support of its deferral request to the Prosecutor comprised approximately 18,000 pages,<sup>272</sup> and was for "the vast majority" in Spanish.<sup>273</sup> That

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<sup>270</sup> See paragraphs 170-175 below.

<sup>271</sup> Once an application is made by the Prosecutor under article 18(2) of the Statute, the pre-trial chamber has the discretion to determine which documentation it considers to be relevant to its assessment of the application, and to request the State or the Prosecutor to provide other information or material translated, if necessary. In this regard, the Appeals Chamber recalls that pursuant to rule 55(1) of the Rules, in relation to "[p]roceedings concerning article 18, paragraph 2", "[t]he Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. [...]"

<sup>272</sup> [Prosecutor's Response](#), para. 8. See also [Prosecutor's Article 18 Request](#), para. 15.

<sup>273</sup> [Prosecutor's Article 18 Request](#), para. 14, fn 19.

material was transmitted to the Prosecutor through eight submissions sent before the deferral request,<sup>274</sup> and six further submissions sent after the deferral request.<sup>275</sup>

165. When filing his request under article 18(2) of the Statute, the Prosecutor communicated to the Pre-Trial Chamber such material, pursuant to rule 54 of the Rules.<sup>276</sup> He explained that while he had “carefully studied all of th[e] information”,<sup>277</sup> “[t]o facilitate the Chamber’s assessment”, his office provided English translations of “some information” received at the time or after the Deferral Request,<sup>278</sup> consisting mainly of correspondence received from the Venezuelan authorities and 112 summaries of cases provided by Venezuela.<sup>279</sup> In his request and annexes thereto, he also provided an overview of the information submitted by Venezuela,<sup>280</sup> as well as overviews of information contained in the documents or summaries of the contents.<sup>281</sup>

166. However, as correctly noted by the Pre-Trial Chamber, “[t]he criteria used by the Prosecution to decide which documents’ translation would ‘facilitate the Chamber’s assessment’ appear to be unclear”.<sup>282</sup> The Pre-Trial Chamber also took note of a similar practice by the Prosecutor in the *Afghanistan* situation and recalled that such practice had been found “inappropriate”,<sup>283</sup> as “it is not for the Prosecution, which is effectively a ‘party’ to the present proceedings, to decide which of the documents transmitted by [a State] are worth translating for the purpose of the Chamber’s consideration”, and that “[i]n the absence of a response from [the State], it would have been appropriate for the Prosecution to seek the Chamber’s guidance”.<sup>284</sup>

167. The Appeals Chamber notes that it is only in his response to the Appeal Brief and during the hearing that the Prosecutor provided an explanation as to his selection of

<sup>274</sup> [Notification of Venezuela’s Deferral Request](#), para. 3; *see also* para. 7.

<sup>275</sup> [Prosecutor’s Article 18 Request](#), paras 14-15; [Response to Venezuela’s Observations](#), para. 55. *See also* Prosecutor’s Oral Submissions, [T-1](#), p. 63, lines 14-17.

<sup>276</sup> [Prosecutor’s Article 18 Request](#), para. 13. The material was uploaded into the Court record “in its entirety and original form” ([Prosecutor’s Article 18 Request](#), para. 14, fn 19).

<sup>277</sup> [Prosecutor’s Article 18 Request](#), para. 14.

<sup>278</sup> [Prosecutor’s Article 18 Request](#), para. 14, fn 19.

<sup>279</sup> *See* Annex A to [Prosecutor’s Article 18 Request](#), ICC-02/18-18-Conf-Exp-AnxA; [Prosecutor’s Impugned Decision](#), para. 12. *See also* [Impugned Decision](#), para. 87.

<sup>280</sup> [Prosecutor’s Article 18 Request](#), paras 16, 21. The information was divided as follows: (a) Reports; (b) Charts listing domestic proceedings; (c) Summaries of domestic proceedings; and (d) Court records.

<sup>281</sup> Annexes A and B to [Prosecutor’s Article 18 Request](#).

<sup>282</sup> [Impugned Decision](#), para. 82 (footnotes omitted), *referring to* [Prosecutor’s Article 18 Request](#), fn 19 and Annex A to the Request, pp. 4-5.

<sup>283</sup> [Impugned Decision](#), para. 83, *referring to* [Afghanistan Article 18\(2\) Decision](#), para. 49.

<sup>284</sup> [Impugned Decision](#), para. 83, *referring to* [Afghanistan Article 18\(2\) Decision](#), para. 49.

documents to be translated, indicating that he “proceeded in good faith and mindful of [his] obligation to facilitate expeditious proceedings before the Court”. The Prosecutor noted in particular that “[w]hen [he] decided to translate the Summaries [...], [he] had not yet received court records and records of investigative steps”,<sup>285</sup> which Venezuela only provided in its last three submissions (on 26 July, 19 September and 18 October 2022).<sup>286</sup> In this regard, according to the Prosecutor, the material received by his office before his submission of the Article 18 Request comprised over 18,200 pages.<sup>287</sup> As further clarified during the hearing, the Prosecutor decided to translate the summaries because, at that time, that information was the “most relevant” that he had received, and it was, at that time, “a decision that was taken in order to be helpful and to ensure an efficient conduct of the proceedings”.<sup>288</sup>

168. The Appeals Chamber also notes that there is no indication that Venezuela informed the Prosecutor as to which parts of the material it regarded as being most important, for the purpose of translation, nor that it requested assistance, either by addressing a request to the Prosecutor or by seeking guidance from the Pre-Trial Chamber, including on whether the use of Spanish could be authorised, pursuant to article 50(3) of the Statute.<sup>289</sup> There is also no indication that Venezuela expressed any concerns about the selection of the material translated by the Prosecutor when he made his article 18 request.<sup>290</sup>

169. Noting the arguments raised on appeal, the Appeals Chamber considers that the proceedings would have benefited from a better communication between the Prosecutor and Venezuela on the issue of translation of the material provided under rule 53 of the Rules. It would have been preferable for the Prosecutor and Venezuela to engage in

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<sup>285</sup> [Prosecutor’s Response](#), para. 79.

<sup>286</sup> Furthermore, in his letter of 4 June 2022, the Prosecutor had asked Venezuela to provide, under rule 53 of the Rules, any further material no later than 4 July 2022, so that he could “adequately assess” it and “decide on any necessary course of action”. After this deadline, Venezuela provided three tranches of material, including court records and records of investigative steps (approximately 20,800 pages in Spanish) (*see* [Prosecutor’s Response](#), para. 79).

<sup>287</sup> [Prosecutor’s Article 18 Request](#), para. 15.

<sup>288</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 53, line 20 to p. 54, line 1; p. 73, lines 2-7.

<sup>289</sup> *See* article 50(3) of the Statute: “At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified”. *See also* OPCV Oral Submissions, [T-1](#), p. 57, line 19 to p. 58, line 4.

<sup>290</sup> *See* [Afghanistan Article 18\(2\) Decision](#), para. 50 (“[W]ithout any information to the contrary, it must be assumed that the State accepts the translation, as well as the selection made by the Prosecution, as being reflective of the materials submitted in support of a deferral request”).

consultations in order to identify which material the latter considered as being most relevant in support of its deferral request and, later, of its subsequent observations before the Pre-Trial Chamber.

170. The Appeals Chamber further notes that, following the filing of the Prosecutor's Article 18 Request and the setting of a time limit for its observations in response, Venezuela seized the Pre-Trial Chamber with a request for extension of time in order to provide translations of documents that seemed "necessary to make available" to the Pre-Trial Chamber and upon which it intended to rely in its observations to the Prosecutor's Article 18 Request.<sup>291</sup> While granting the request, the Pre-Trial Chamber "encourage[d] Venezuela to ensure that translations are provided only for those documents deemed essential to its Deferral Request".<sup>292</sup> Attached to its observations to the Prosecutor's Article 18 Request, Venezuela provided 13 annexes of material, mostly in English, including reports, a memorandum about a media campaign against Venezuela, charts and the translation of more than 230 "summaries" of case files, which had already been provided in Spanish.<sup>293</sup> In a separate filing, Venezuela provided translations of material concerning 62 case files,<sup>294</sup> indicating that such material was a representative sample of its domestic proceedings related to 124 incidents listed in the Prosecutor's Additional Information, and identified as essential to the Deferral Request.<sup>295</sup>

171. For the reasons that follow, the Appeals Chamber considers that, in the circumstances, the Pre-Trial Chamber did not commit any error and its approach was reasonable. As recalled above,<sup>296</sup> rule 55(1) of the Rules stipulates that "[t]he Pre-Trial Chamber shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the [proceedings under article 18 (2)]". It therefore

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<sup>291</sup> [Request for Extension of Time to File Translations](#), para. 9.

<sup>292</sup> [Decision on Venezuela's Extension Request](#), para. 11.

<sup>293</sup> Annexes to [Venezuela's Observations to Prosecutor's Article 18 Request](#).

<sup>294</sup> [Transmission of Translated Material](#). In Annex 1, Venezuela provided a letter and a list of files related to victims (*see* Annex 1 to [Transmission of Translated Material](#)). The remaining 64 annexes relate to 62 cases (as four annexes relate to two cases). *See* [Prosecutor's Response](#), fns 12, 25.

<sup>295</sup> Annex 1 to [Transmission of Translated Material](#), p. 4. *See also, for example*, Prosecutor's Oral Submissions, [T-1](#), p. 64, lines 3-9, p. 70, lines 5-10, p. 85, line 25 to p. 86, line 4; p. 89, lines 21-25.

<sup>296</sup> *See* fn 271 above.

fell within the Pre-Trial Chamber's discretion to determine how to conduct the article 18(2) proceedings in the present situation.

172. As also recalled above, it was for Venezuela to ensure that the Pre-Trial Chamber was provided with the information supporting its deferral request or its subsequent observations in one of the working languages of the Court. The Appeals Chamber considers that, having regard to the large amount of information submitted by Venezuela, it was reasonable for the Pre-Trial Chamber to invite Venezuela to focus its translation on "documents deemed essential to its Deferral Request".<sup>297</sup> Subsequently, Venezuela provided the Pre-Trial Chamber with the translation of material concerning 62 cases, of which 59 related to the 124 incidents (118 cases) listed in the Prosecutor's Additional Information.<sup>298</sup> The Appeals Chamber finds that the Pre-Trial Chamber did not err in relying on the English translations of records related to those 62 cases, which were identified by Venezuela as essential to the Deferral Request and representative of its domestic proceedings, rather than requiring translation of the remaining material.

173. To the extent that Venezuela argues that the legal framework was not clear to it, the Appeals Chamber recalls that "there is no rule in the Court's legal framework requiring a [...] chamber to pronounce on its interpretation of the law at a specific point during the proceedings".<sup>299</sup> In any event, the Appeals Chamber notes that, in the present proceedings, the Pre-Trial Chamber gave guidance by inviting Venezuela to provide translations into English of the documents "deemed essential to its Deferral Request",<sup>300</sup> and, in order for Venezuela to do so, it granted the extension of time sought. Venezuela's argument that the Pre-Trial Chamber "manifestly abused its discretion by failing to provide clear directions to [Venezuela] to translate the entirety of these materials and failing to afford it adequate time to do so"<sup>301</sup> is therefore rejected.

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<sup>297</sup> [Decision on Venezuela's Extension Request](#), para. 11.

<sup>298</sup> [Transmission of Translated Material](#). See also [Prosecutor's Response](#), paras 13, 49, 67, 70; Annex B to the [Prosecutor's Response](#). See also Prosecutor's Oral Submissions, [T-1](#), p. 64, lines 4-7; [T-2](#), p. 9, lines 18-21.

<sup>299</sup> *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"](#), 15 December 2022, ICC-02/04-01/15-2022-Red (A) (hereinafter: "*Ongwen Appeal Judgment*"), para. 346.

<sup>300</sup> [Decision on Venezuela's Extension Request](#), para. 11.

<sup>301</sup> [Appeal Brief](#), para. 67.

174. Regarding Venezuela’s argument that by directing it to focus only on the documents deemed “essential”, the Pre-Trial Chamber “circumscribed” the scope of translations prepared by Venezuela,<sup>302</sup> which ultimately “did not reflect the totality of relevant investigations and prosecutions”,<sup>303</sup> the Appeals Chamber first recalls that a State does not need to provide a large amount of supporting information. Second, and more importantly, the Appeals Chamber notes that, in this case, Venezuela itself identified a sample of proceedings considered as “essential” to its Deferral Request, and as representative of its domestic proceedings,<sup>304</sup> thereby accepting that they did not encompass the totality of them. For these reasons, Venezuela’s argument is rejected.

175. In conclusion, the Appeals Chamber finds that, in the circumstances, Venezuela has not demonstrated any error in the Pre-Trial Chamber’s decision to conduct its article 18(2) assessment based on a sample of case files provided by Venezuela in English.

## 2. *The alleged error in only relying on a certain type of evidence*

### (a) **Relevant part of the Impugned Decision**

176. After discussing the material to be considered to determine the merits of the Prosecutor’s Article 18(2) Request, the Pre-Trial Chamber found that:

Since the translated material transmitted by the Prosecution and the material contained in the annexes attached to Venezuela’s Observations do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela, they cannot be relied upon as relevant substantiating documentation for the determination of the Chamber.<sup>305</sup>

177. The Pre-Trial Chamber thus decided, “for the purpose of its analysis, [to] focus on the material deemed most essential by Venezuela that consists of court records and other records of investigative steps taken in the context of domestic criminal proceedings”.<sup>306</sup>

### (b) **Summary of the submissions**

178. Venezuela submits that the Pre-Trial Chamber erred in law and abused its discretion by excluding *in limine* the summaries prepared by the Prosecutor of records

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<sup>302</sup> [Appeal Brief](#), para. 78.

<sup>303</sup> [Appeal Brief](#), para. 81.

<sup>304</sup> Annex 1 to [Transmission of Translated Material](#), p. 4.

<sup>305</sup> [Impugned Decision](#), para. 88.

<sup>306</sup> [Impugned Decision](#), para. 89.

transmitted by Venezuela and any other documents that were not “original police or court records”.<sup>307</sup> It argues that the Pre-Trial Chamber cited no legal provision mandating the exclusion of such materials, nor did prior article 18(2) jurisprudence require such a measure.<sup>308</sup> Venezuela further argues that the Pre-Trial Chamber should have correctly applied article 69(4) of the Statute, and adopted “an expansive and flexible approach concerning the admission of evidence”;<sup>309</sup> and it should have reasoned its decision.<sup>310</sup>

179. The Prosecutor submits that the Pre-Trial Chamber correctly relied on copies of case files, containing court records and records of investigative steps, as relevant substantiating documentation.<sup>311</sup> He argues that the remaining material transmitted by Venezuela could not prove the existence of ongoing investigations or prosecutions, and that the Impugned Decision was “adequately reasoned and consistent with the Court’s jurisprudence”.<sup>312</sup>

180. The OPCV argues that the Pre-Trial Chamber did not err in excluding the Prosecutor’s translations of summaries of documents provided by Venezuela, as that material did not contain police or court records.<sup>313</sup>

### (c) Determination by the Appeals Chamber

181. At the outset, the Appeals Chamber recalls that in order for the State to demonstrate “activity” as part of the first step of the admissibility assessment, the “relevant State must provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”.<sup>314</sup>

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<sup>307</sup> [Appeal Brief](#), para. 83.

<sup>308</sup> [Appeal Brief](#), para. 83.

<sup>309</sup> [Appeal Brief](#), para. 84.

<sup>310</sup> [Appeal Brief](#), para. 85.

<sup>311</sup> [Prosecutor’s Response](#), paras 47, 52-66.

<sup>312</sup> [Prosecutor’s Response](#), para. 47; *see also* paras 52-66; Prosecutor’s Oral Submissions, [T-1](#), p. 55, lines 1-13.

<sup>313</sup> [OPCV Observations](#), paras 56-61.

<sup>314</sup> [Philippines OA Judgment](#), para. 72, and jurisprudence cited therein. *See also* [Gaddafi Admissibility Decision](#), para. 54.



182. In this respect, the Appeals Chamber recalls that in the *Philippines* OA Judgment, it held that

any investigation, irrespective of its stage, [will] have certain defining parameters, which may vary depending on the circumstances of each specific situation. [...] [F]or the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation. The domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor’s intended investigation.<sup>315</sup>

183. The Appeals Chamber notes that whether certain material can prove the existence of ongoing domestic investigations and prosecutions is a case-specific determination that depends on the circumstances of each case. In the Impugned Decision, the Pre-Trial Chamber recalled that

[r]elevant substantiating documentation should include any ‘material capable of proving that an investigation or prosecution is ongoing’ such as ‘directions, orders and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]’.<sup>316</sup>

184. In the present proceedings, the Pre-Trial Chamber noted that

[s]ince the translated material transmitted by the Prosecution and the material contained in the annexes attached to Venezuela’s Observations do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela, they cannot be relied upon as relevant substantiating documentation for the determination of the Chamber.<sup>317</sup>

It concluded that “for the purpose of its analysis, [it would] focus on the material deemed most essential by Venezuela that consists of court records and other records of investigative steps taken in the context of domestic criminal proceedings”.<sup>318</sup>

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<sup>315</sup> [Philippines OA Judgment](#), para. 106 (footnote omitted).

<sup>316</sup> [Impugned Decision](#), para. 88, referring to Pre-Trial Chamber I, *Situation in the Republic of the Philippines. Authorisation pursuant to article 18(2) of the Statute to resume the investigation*, 28 January 2023, ICC-01/21-56-Red (confidential version filed on the same day, ICC-01/21-56-Conf) (hereinafter: “*Philippines* Article 18(2) Decision”), para. 15.

<sup>317</sup> [Impugned Decision](#), para. 88 (footnotes omitted).

<sup>318</sup> [Impugned Decision](#), para. 89 (footnotes omitted).

185. On appeal, Venezuela submits that the Pre-Trial Chamber erred in law and abused its discretion by excluding *in limine* the Prosecutor’s translations of summaries provided by Venezuela and any other documents that were not “original police or court records”.<sup>319</sup> Venezuela argues that the Pre-Trial Chamber cited no legal provision mandating the exclusion *in limine* of such materials,<sup>320</sup> and that the Pre-Trial Chamber should have adopted “an expansive and flexible approach concerning the admission of evidence”, in line with article 69(4) of the Statute.<sup>321</sup> It further submits that the Pre-Trial Chamber “failed [...] to issue a reasoned opinion as to which documents were irrelevant and those that were relevant, and why they were insufficiently reliable to assist the Chamber in determining the issues before it”.<sup>322</sup> According to Venezuela, in circumstances where neither party opposed the use of summaries, and the Pre-Trial Chamber had access to the materials used to create the summaries, there was “a higher onus on the Chamber to provide sufficient reasoning for its decisions to exclude all summaries *in limine*”.<sup>323</sup>

186. For the reasons that follow, the Appeals Chamber finds that the Pre-Trial Chamber erred by failing to provide a sufficiently reasoned decision on this point.

187. The Appeals Chamber recalls that “[t]he Statute and the Rules [...] in various places emphasise the importance of sufficient reasoning in decisions of Chambers”,<sup>324</sup> and that “[a] Chamber’s provision of reasons in decisions also ‘enables the Appeals Chamber to clearly understand the factual and legal basis upon which the decision was taken and thereby properly exercise its appellate functions’”.<sup>325</sup> Regarding the “minimum threshold” required for a reasoned decision, the Appeals Chamber has held that

‘[t]he extent of the reasoning will depend on the circumstances of the case’. Such reasoning ‘will not necessarily require reciting each and every factor that was before the [...] Chamber to be individually set out, but it must

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<sup>319</sup> [Appeal Brief](#), para. 83.

<sup>320</sup> [Appeal Brief](#), para. 83.

<sup>321</sup> [Appeal Brief](#), para. 84.

<sup>322</sup> [Appeal Brief](#), para. 85.

<sup>323</sup> [Appeal Brief](#), para. 86.

<sup>324</sup> [The Prosecutor v. Mahamat Said Abdel Kani, Judgment on the appeal of Mr Mahamat Said Abdel Kani against the decision of Pre-Trial Chamber II entitled ‘Decision on the “Prosecution’s Request for Extension of Contact Restrictions’](#), 29 June 2021, ICC-01/14-01/21-111-Red (hereinafter: “*Said OA Judgment*”), para. 41 (footnotes omitted).

<sup>325</sup> [Said OA Judgment](#), para. 43, referring to [Bemba Appeal Judgment](#), para. 50.

identify which facts it found to be relevant in coming to its conclusion.’  
‘Relatively sparse’ reasoning will not amount to an error if it is nonetheless  
‘sufficiently clear to discern the basis’ for the finding challenged on appeal.<sup>326</sup>

188. Turning to the impugned finding, and contrary to Venezuela’s suggestion,<sup>327</sup> the Appeals Chamber first notes that the Pre-Trial Chamber did not exclude the summaries translated by the Prosecutor’s office and other documents that had been provided in English *in limine*. Rather, the Pre-Trial Chamber considered such documents, but it decided that they could not be relied upon as “relevant substantiating documentation” because they did “not contain original police or court records and [were] often unrelated to any domestic investigation in Venezuela”.<sup>328</sup> The Appeals Chamber notes however that paragraph 88 of the Impugned Decision does not indicate which documents were not relied upon because they were deemed not to be relevant, and which were not relied upon because they did not contain original records. The Appeals Chamber considers that the Pre-Trial Chamber erred by failing to conduct this assessment and to sufficiently explain why it decided not to rely on these documents on the ground that they were not relevant or did not contain court or police records.

189. In particular, the Appeals Chamber notes that the Prosecutor clarified that of the 112 summaries provided in English by the Prosecutor, 28 had corresponding court and investigative records provided in English by Venezuela, and that these 28 cases were therefore considered by the Pre-Trial Chamber for its determination in the Impugned Decision.<sup>329</sup> It could thus be argued that the assessment of those 28 cases could have been made on the basis of the court or investigative records and the corresponding summaries were superfluous. However, the remaining summaries were the only source of information about the corresponding domestic proceedings. Nonetheless, the Pre-Trial Chamber did not explain with sufficient detail why it chose not to rely on those summaries. It did not express any specific concerns about, for instance, the relevance or reliability of those documents. Accordingly, the Appeals Chamber finds that the

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<sup>326</sup> [Said OA Judgment](#), para. 45 (footnotes omitted), *referring to* relevant jurisprudence.

<sup>327</sup> [Appeal Brief](#), para. 83.

<sup>328</sup> [Impugned Decision](#), para. 88.

<sup>329</sup> [Prosecutor’s Response](#), fn 139. Similarly, a certain number of the summaries translated by Venezuela had corresponding court and investigative records provided in English (*see* [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 148).

Pre-Trial Chamber failed to identify with sufficient clarity the factors it found to be relevant to reach its conclusion.

190. In order to determine whether the Pre-Trial Chamber’s error materially affected the Impugned Decision, the Appeals Chamber has conducted a review of the relevant material. The Appeals Chamber notes that this material consisted of documents translated by the Prosecutor’s office – in particular the 112 summaries of cases provided originally in Spanish by Venezuela – and the material included in the 13 annexes to the Venezuela’s Observations to Prosecutor’s Article 18 Request, which, as recalled above, included correspondence between the Office of the Prosecutor and Venezuela, reports and memoranda, with press articles or reviews (a number of them in Spanish and unrelated to the domestic proceedings), charts, lists, information about the Human Rights Directorate,<sup>330</sup> and the translation of more than 230 “summaries” of case files (previously provided in Spanish in the Ninth to the Eleventh Submissions).<sup>331</sup> The Appeals Chamber notes that on appeal Venezuela focuses its submissions on the alleged erroneous exclusion by the Pre-Trial Chamber of the summaries of the proceedings, provided in translated form by the Prosecutor. While Venezuela also refers to “any other documents that were not ‘original police or court records’”,<sup>332</sup> all of its arguments focus on the summaries or “*fichas*”. Therefore, the Appeals Chamber will only address the issue of the Pre-Trial Chamber’s alleged failure to rely on the summaries.<sup>333</sup>

191. Venezuela submits that these documents are “official, contemporaneous working documents”<sup>334</sup> prepared by the general prosecutor’s office, recording “the progress of a case, from an investigation and charge through prosecution, trial and sentencing, if the accused is convicted”.<sup>335</sup> It added that they provide “a real-time record and snapshot of the case progression”,<sup>336</sup> and are created “to ensure that an accurate and up-to date record

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<sup>330</sup> Annexes 1-12 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#). See also [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), paras 52, 86; [Response to Venezuela’s Observations](#), para. 43; [Impugned Decision](#), para. 87; [Prosecutor’s Response](#), paras 9-11.

<sup>331</sup> Annex III to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), pp. 2997-3552. It is noted that the 239 summaries translated by Venezuela and contained in Annex 13 cover the 112 translated summaries provided by the Prosecutor (*see* Annex A to [Prosecutor’s Article 18 Request](#)).

<sup>332</sup> [Appeal Brief](#), para. 83.

<sup>333</sup> See Annex A to [Prosecutor’s Article 18 Request](#); Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), pp. 2997-3552.

<sup>334</sup> Venezuela’s Oral Submissions, [T-1](#), p. 80, lines 2-3.

<sup>335</sup> Venezuela’s Oral Submissions, [T-1](#), p. 79, lines 7-13; p. 81, line 25 to p. 82, line 2. See also [T-2](#), p. 5, lines 3-18.

<sup>336</sup> Venezuela’s Oral Submissions, [T-1](#), p. 80, lines 15-16.

existed at any given time of the stage a case had reached, including any procedural or evidential setbacks or obstacles encountered in the progression to trial of a case”.<sup>337</sup> It further clarified that these documents are “administrative file[s] with a view to coordinating [the work of] all the different prosecutors in the country”.<sup>338</sup> Venezuela submits that since they are “internal reports contemporaneously prepared [by multiple senior representatives of the general prosecutor’s office] which included regular updates related to the progress of the domestic proceedings”,<sup>339</sup> they amounted to “internal reports, updates”, which the Pre-Trial Chamber itself acknowledged as a form of “relevant substantiating documentation”.<sup>340</sup> According to Venezuela, the Pre-Trial Chamber erred by misunderstanding the official nature of the documents and by misapplying the test referred to in the relevant case-law.<sup>341</sup> In addition, Venezuela submits that all these summaries are relevant as they demonstrate that all 124 incidents identified by the Prosecutor in his Additional Information have been investigated.<sup>342</sup>

192. The Prosecutor, having had compared the summaries to “cover sheets” listing the judicial and investigative measures taken in the corresponding cases,<sup>343</sup> avers that “[t]he information in the summaries is very limited, lacks specificity and it is often unclear”, and that “[i]t does not allow the Court to meaningfully identify the scope and progression of the domestic proceedings.”<sup>344</sup>

193. The Appeals Chamber considers that the summaries, or *fichas*, are of very limited probative value. The Appeals Chamber notes that while providing some information on the status of specific proceedings, they are essentially “administrative” files, as conceded

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<sup>337</sup> Venezuela’s Oral Submissions, [T-1](#), p. 80, lines 2-6.

<sup>338</sup> Venezuela’s Oral Submissions, [T-2](#), p. 8, lines 24-25.

<sup>339</sup> Venezuela’s Oral Submissions, [T-1](#), p. 83, lines 7-9; *see also* p. 79, lines 7-13; p. 81, line 25 to p. 82, line 2; [T-2](#), p. 5, lines 3-18.

<sup>340</sup> [Impugned Decision](#), para. 88.

<sup>341</sup> Venezuela’s Oral Submissions, [T-1](#), p. 82, line 24 to p. 83, line 23.

<sup>342</sup> Venezuela’s Oral Submissions, [T-1](#), p. 92, line 24 to p. 96, line 2; p. 100, line 25 to p. 101, line 5; p. 102, lines 14 to p. 105, line 10; p. 105, line 25 to p. 106, line 12. *See also* [T-2](#), p. 6, line 21 to p. 7, line 11. *See also* Annex B to Transmission of the visual aid presented to the Appeals Chamber during the Hearing in the appeal of the Bolivarian Republic of Venezuela against Pre-Trial I “Decision authorizing the resumption on the investigation pursuant article 18(2) of the Statute” of 27 June 2023 (ICC-02/18-45), 24 November 2023, ICC-02/18-83-Conf-Exp-AnxB.

<sup>343</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 86, lines 18-20.

<sup>344</sup> Prosecutor’s Oral Submissions, [T-1](#), p. 87, lines 3-12. *See also* [Prosecutor’s Response](#), para. 12.

by Venezuela, aiming at “coordinating [the work of] all the different prosecutors in the country”.<sup>345</sup>

194. In particular, the Appeals Chamber notes that, in many cases, the alleged conduct and/or legal qualification of the alleged crimes is unclear or not sufficiently specified.<sup>346</sup> Furthermore, generally, no perpetrator has been identified,<sup>347</sup> and where perpetrators have been identified, it is often unclear whether they were direct perpetrators or otherwise responsible for the alleged crimes.<sup>348</sup> In addition, in those cases where there

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<sup>345</sup> Venezuela’s Oral Submissions, [T-2](#), p. 8, lines 24-25; *see also* [T-1](#), p. 79, line 7 to p. 80, line 1.

<sup>346</sup> *See, for example*, Ninth Submission, “Summaries of prosecutions undertaken in relation to the list of 124 cases transmitted by the Office of the Prosecutor of the International Criminal Court”, VEN-OTP-00001981 (hereinafter: “Ninth Submission”), Case Summary No. 12; Tenth Submission, “Second sample containing 50 summaries of prosecutions undertaken in relation to the list of 124 cases transmitted by the Office of the Prosecutor of the International Criminal Court”, VEN-OTP-00002001 (hereinafter: “Tenth Submission”), Summary Nos 1, 7, 8, 15, 26, 28, 32-34, 45, 50; Eleventh Submission, “Third sample containing 50 summaries of prosecutions undertaken in relation to cases from open sources transmitted by the Prosecutor of the International Criminal Court”, VEN-OTP-00001984 (hereinafter: “Eleventh Submission”), Summary No. 11. *See also* Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), ICC-02/18-30-Conf-Exp-AnxIII, “First sample – 12 examples of prosecution in relation to the list of 124 issues referred by the Office of the Prosecutor of the International Criminal Court” (hereinafter: “First sample of Annex 13”), Issue No. 12; Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), ICC-02/18-30-Conf-Exp-AnxIII, “Second sample – 50 examples of prosecution in relation to the list of 124 issues referred by the Office of the Prosecutor of the International Criminal Court” (hereinafter: “Second sample of Annex 13”), Information Sheet Nos 1, 7, 8, 15, 26, 28, 32-34, 45, 50; Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), ICC-02/18-30-Conf-Exp-AnxIII, “Third sample – 50 examples of prosecutions developed in relation to the cases indicated in the open sources referred to by the prosecution office of the International Criminal Court” (hereinafter: “Third sample of Annex 13”), Information Sheet No. 11; Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), ICC-02/18-30-Conf-Exp-AnxIII, “Fourth sample – 80 examples of prosecutions carried out in relation to the issues indicated in the open sources referred by the prosecution office of the International Criminal Court” (hereinafter: “Fourth sample of Annex 13”), Information Sheet Nos 30, 48, 50, 57, 60, 62, 67-68, 70-72, 74-75, 77-80; Annex 13 to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), ICC-02/18-30-Conf-Exp-AnxIII, “Fifth sample – 47 examples of prosecutions in connection with the listing of 124 issues referred by the Office of the Prosecutor of the International Criminal Court” (hereinafter: “Fifth sample of Annex 13”), Information Sheet Nos 4, 10-17, 19-23, 25, 28-37.

<sup>347</sup> *See, for example*, Ninth Submission, Case Summary No. 10; Tenth Submission, Summary Nos 1-5, 12, 14, 22, 24-26, 33, 45, 50; Eleventh Submission, Summary Nos 2, 7-8, 10, 25, 27, 29. *See also* First sample of Annex 13, Issue Nos 10; Second sample of Annex 13, Information Sheet Nos 1-5, 12, 14, 22, 24-26, 33, 45, 50; Third sample of Annex 13, Information Sheet Nos 2, 7-8, 10, 25, 27, 29; Fourth sample of Annex 13, Information Sheet Nos 1-2, 4, 16-17, 22, 25, 28-31, 34, 40-41, 45, 47-50, 52-62, 65, 67-68, 70-80; Fifth sample of Annex 13, Information Sheet Nos 1-2, 5-40, 42, 46-47.

<sup>348</sup> *See, for example*, Ninth Submission, Case Summary No. 6; Tenth Submission, Summary No. 39; Eleventh Submission, Summary Nos 12, 17, 21, 28, 30, 32, 34, 38, 45. *See also, for example*, First sample of Annex 13, Issue No. 6; Second sample of Annex 13, Information Sheet No. 39; Third sample of Annex 13, Information Sheet Nos 12, 17, 21, 28, 30, 32, 34, 38, 45.

is some information about the persons under investigations, it appears that they are mostly direct perpetrators even if they are higher ranking officers.<sup>349</sup>

195. In light of the above, the Appeals Chamber considers that even if it had not made the error, the Pre-Trial Chamber would not have rendered a decision that that would have been “substantially different” from the Impugned Decision.<sup>350</sup>

196. The Appeals Chamber therefore finds that the Pre-Trial Chamber’s error does not materially affect the Impugned Decision.

### 3. *The alleged error in failing to consider the MoU*

#### (a) **Relevant part of the Impugned Decision**

197. While discussing “[o]ther alleged irregularities in the present article 18(2) proceedings”,<sup>351</sup> the Pre-Trial Chamber noted, *inter alia*,

Venezuela’s submission that, during the Prosecutor’s visit to the State in 2021 in the context of which he signed a Memorandum of Understanding with the President of Venezuela, he ‘surprisingly announced his decision to open an investigation’. In this regard, the Chamber notes that no memoranda of understanding has been officially notified and filed before it. For the purposes of the determination of the Request, the Chamber has only considered the material and submissions filed before it.<sup>352</sup>

#### (b) **Summary of the submissions**

198. Venezuela argues that the Pre-Trial Chamber erred by failing to address its arguments concerning the “lack of good faith dialogue between the [Prosecutor and Venezuela], as evidenced by the [Prosecutor]’s decision to open an investigation immediately after signing the MoU [...]”,<sup>353</sup> and to place any weight on the MoU when assessing the existence of steps taken by Venezuela to actively investigate the acts falling within the Article 18(1) Notification.<sup>354</sup> In this respect, it argues that the Pre-Trial

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<sup>349</sup> *See, for example*, Ninth Submission, Case Summary Nos 1-5, 7-9; Tenth Submission, Summary Nos 8, 10, 38; Eleventh Submission, Summary Nos 1, 3, 4, 5, 6, 9, 11, 13, 14, 15, 16, 18-20, 22, 23, 24, 26, 31, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 46, 47, 50. *See also, for example*, First sample of Annex 13, Issue Nos 1-5, 7-9; Second sample of Annex 13, Information Sheet Nos 8, 10, 38; Third sample of Annex 13, Information Sheet Nos 1, 3, 4, 5, 6, 9, 11, 13, 14, 15, 16, 18-20, 22, 23, 24, 26, 31, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 46, 47, 50; Fourth sample of Annex 13, Information Sheet Nos 7, 19-21, 23-24, 26-27, 32, 38, 69; Fifth sample of Annex 13, Information Sheet Nos 3, 43.

<sup>350</sup> *See* [Impugned Decision](#), paras 112-116. *See also* paragraph 42 above.

<sup>351</sup> [Impugned Decision](#), p. 20.

<sup>352</sup> [Impugned Decision](#), para. 60.

<sup>353</sup> [Appeal Brief](#), para. 92.

<sup>354</sup> [Appeal Brief](#), para. 92.

Chamber erred in fact by claiming that the MoU had not been filed before it,<sup>355</sup> and that, in any event, the MoU is a “bilateral legal instrument”, and, as such, it was not necessary for parties to seek its formal admission.<sup>356</sup> Finally, Venezuela submits that the Pre-Trial Chamber’s errors had a material impact on the outcome of its decision.<sup>357</sup>

199. The Prosecutor submits that the MoU is unrelated and irrelevant to the complementarity assessment required under article 18, which must be conducted based on the facts “as they exist” at present, and that it was reasonable for the Pre-Trial Chamber not to consider the MoU.<sup>358</sup>

200. The OPCV submits that the Pre-Trial Chamber did not err in finding that the MoU had not been officially notified and filed.<sup>359</sup>

### (c) Determination by the Appeals Chamber

201. Venezuela submits that in its article 18(2) assessment, the Pre-Trial Chamber failed to consider its submissions and to place any weight on the MoU signed between Venezuela and the Prosecutor in November 2021, simply because “no memoranda of understanding ha[d] been officially notified and filed before it”.<sup>360</sup>

202. For the reasons that follow, the Appeals Chamber finds that the Pre-Trial Chamber’s decision not to consider the MoU, and to instead “conside[r] the material and submissions filed before it”<sup>361</sup> was reasonable.

203. Venezuela argues that the Pre-Trial Chamber erred in stating that the MoU had not been filed before it, as the Prosecutor had cited the MoU in his Article 18(1) Notification with a link to the English translation of its contents, and this filing was notified to the Pre-Trial Chamber, and Venezuela could thus assume that the MoU was part of the record of these proceedings.<sup>362</sup> Venezuela further submits that it “is not necessary for parties to seek formal admission of legal instruments as evidence in order to rely on their

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<sup>355</sup> [Appeal Brief](#), para. 93.

<sup>356</sup> [Appeal Brief](#), para. 94.

<sup>357</sup> [Appeal Brief](#), para. 95.

<sup>358</sup> [Prosecutor’s Response](#), paras 47, 81-85.

<sup>359</sup> [OPCV Observations](#), paras 62-64.

<sup>360</sup> [Appeal Brief](#), paras 92-96, referring to [Impugned Decision](#), para. 60.

<sup>361</sup> [Impugned Decision](#), para. 60.

<sup>362</sup> [Appeal Brief](#), para. 93.



contents to demonstrate legal obligations”.<sup>363</sup> The Appeals Chamber notes that the Prosecutor indeed referred to the MoU in his article 18 request in the section on “Lack of independence and impartiality—article 17(2)(c)”.<sup>364</sup> Venezuela referred to the MoU in its Observations to Prosecutor’s Article 18 Request, in the context of “positive complementarity”.<sup>365</sup>

204. The Appeals Chamber considers that, regardless of the above, Venezuela does not explain the significance of what it intended to demonstrate on the basis of the MoU. In its Observations to Prosecutor’s Article 18 Request, it argued that in the MoU “both parties undertook to promote mutual dialogue and cooperation”,<sup>366</sup> and that they signed the MoU “with a view to making technical consultancy services available [...], in the spirit of positive complementarity”.<sup>367</sup> However, the relevance of these statements to the Pre-Trial Chamber’s assessment is not apparent. Venezuela has therefore failed to explain why the Pre-Trial Chamber “had a duty to consider the impact of the MoU on the Chamber’s Article 18 assessment”.<sup>368</sup>

205. For these reasons, Venezuela’s arguments regarding the MoU are rejected.

#### 4. Conclusion

206. Having rejected all arguments of Venezuela, the Appeals Chamber rejects the second ground of appeal.

### **E. Third ground of appeal: The alleged errors in relation to the temporal scope of the Prosecutor’s intended investigation**

207. Under this ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law by relying on the temporal scope of the Situation referred to the Prosecutor by the six States Parties to reach the conclusion that the temporal scope of the Prosecutor’s intended investigation “also covers conduct *prior to April 2017*”.<sup>369</sup>

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<sup>363</sup> [Appeal Brief](#), para. 94.

<sup>364</sup> [Prosecutor’s Article 18 Request](#), para. 165; *see also* fn 8.

<sup>365</sup> [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), paras 17, 131, 132, 136.

<sup>366</sup> [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 17.

<sup>367</sup> [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 166.

<sup>368</sup> [Appeal Brief](#), para. 94.

<sup>369</sup> [Appeal Brief](#), para. 98, *referring to* [Impugned Decision](#), para. 49 (emphasis added).

*I. Relevant part of the Impugned Decision*

208. With respect to the temporal scope of the Prosecutor’s intended investigation, the Pre-Trial Chamber first recalled that the referral transmitted to the Prosecutor by the six States Parties encompasses alleged crimes from 12 February 2014,<sup>370</sup> and found that “[t]herefore, the temporal scope of the [s]ituation *as referred by the States* concerns alleged crimes committed *since 12 February 2014*”.<sup>371</sup>

209. Noting that “the Prosecution should be sufficiently clear and specific in its communications with States Parties”,<sup>372</sup> the Pre-Trial Chamber further found that the language used in the Article 18(1) Notification, namely the statement that the Prosecutor “focused [his] assessment on a sub-set of crimes [...] committed since at least 2017” and the statement that “[t]hese findings are without prejudice to the scope of the investigation now opened”,<sup>373</sup> created “some uncertainty” and “unnecessary confusion as to the scope of the Prosecution’s intended investigation for the purposes of article 18 proceedings”.<sup>374</sup>

210. However, the Pre-Trial Chamber considered that “the information subsequently provided to Venezuela by the Prosecution, most notably the list of concrete examples of allegations within the jurisdiction of the Court [included in the Prosecutor’s Additional Information], clarified the temporal scope” of the Prosecutor’s intended investigation for the purposes of article 18 proceedings.<sup>375</sup>

211. On the basis of “the content of the States’ referral and the information provided to Venezuela by the Prosecution”, the Pre-Trial Chamber concluded that the temporal scope of the Prosecutor’s intended investigation “also covers conduct *prior to April 2017*”,<sup>376</sup> and found that “all of the incidents listed in the Additional Information fall within the temporal scope of the Situation”.<sup>377</sup>

212. As regards Venezuela’s arguments in relation to the Prosecutor’s alleged failure to provide sufficient information to exercise its right under article 18 of the Statute, the

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<sup>370</sup> [Annex I to the Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I](#), 20 September 2018, ICC-02/18-1-AnxI, pp. 4-15.

<sup>371</sup> [Impugned Decision](#), para. 45 (emphasis added).

<sup>372</sup> [Impugned Decision](#), para. 48.

<sup>373</sup> [Impugned Decision](#), paras 46-47, *referring to* Article 18(1) Notification, p. 2.

<sup>374</sup> [Impugned Decision](#), paras 46-48.

<sup>375</sup> [Impugned Decision](#), para. 48 (footnote omitted), *referring to* Prosecutor’s Additional Information.

<sup>376</sup> [Impugned Decision](#), para. 49 (emphasis added).

<sup>377</sup> [Impugned Decision](#), para. 49.

Pre-Trial Chamber found that in order to give effect to article 18 of the Statute, the Prosecutor is placed under an obligation to provide sufficient information to the State in his or her article 18(1) notification that is (i) specific enough for the relevant State to provide the information required by the Statute and to exercise its right to seek a deferral under article 18(2) of the Statute, and (ii) “representative enough of the scope of criminality that [he or she] intends to investigate in any future case(s)”.<sup>378</sup> The Pre-Trial Chamber concluded that in the circumstances of the present situation, “the information provided by the Prosecution in its multiple exchanges with Venezuela”, in particular, “the summary of [the] preliminary examination findings” and “the sample of alleged incidents” provided in the Additional Information, “appears to have been sufficiently specific for Venezuela to inform the Prosecution of its domestic proceedings and seek the deferral of the investigation”.<sup>379</sup>

## 2. *Summary of the submissions*

213. Venezuela submits that the Pre-Trial Chamber, in reaching the conclusion that the temporal scope of the Prosecutor’s intended investigation “also covers conduct *prior to April 2017*”,<sup>380</sup> erred in law by (i) conflating issues of temporal jurisdiction of the situation, with the temporal scope of the alleged incidents that were notified to Venezuela, through the Prosecutor’s Article 18(1) Notification, in the context of the article 18 deferral proceedings,<sup>381</sup> and (ii) finding that the incidents set out in the Prosecutor’s Additional Information “were capable of curing the misleading and ambiguous temporal scope described in the [...] Article 18 Notification” and thus “provided a sufficiently clear and concrete basis for [Venezuela] to be on notice that the Article 18 proceedings encompassed alleged criminal acts occurring before April 2017”.<sup>382</sup>

214. The Prosecutor submits that the third ground of the appeal is “inconsistent with the nature and purpose of the [A]rticle 18(1) [N]otification and the [Prosecutor’s] investigation”, and should be dismissed for the following reasons:<sup>383</sup> (i) the Prosecutor’s

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<sup>378</sup> [Impugned Decision](#), paras 75-78.

<sup>379</sup> [Impugned Decision](#), paras 79-80.

<sup>380</sup> [Appeal Brief](#), para. 98, referring to [Impugned Decision](#), para. 49 (emphasis added).

<sup>381</sup> [Appeal Brief](#), para. 99.

<sup>382</sup> [Appeal Brief](#), paras 99, 105.

<sup>383</sup> [Prosecutor’s Response](#), paras 94, 101.

investigation is not confined by the temporal scope of the allegations considered in opening an investigation,<sup>384</sup> as he does not “blindly accept the terms of a situation referred to it by a State Party/Parties” or “open an investigation automatically on the terms referred or in an open-ended manner”, but rather, “independently and objectively assesses the consistency of the parameters of the referral with the Statute, and the criteria under article 53(1) before deciding to initiate an investigation, as [he] did in this situation”,<sup>385</sup> (ii) the Pre-Trial Chamber correctly found that Venezuela received sufficient details regarding the temporal scope of the alleged cases relevant to the Prosecutor’s intended investigation,<sup>386</sup> since “any perceived ambiguity as to the temporal scope of the intended investigation that may have arisen [from the Article 18(1) Notification] was in any event resolved in other related documents provided or made available to [Venezuela]”,<sup>387</sup> and (iii) the alleged errors would not have impacted the Impugned Decision since Venezuela provided its views on the alleged incidents from February 2014, and transmitted material relating to the example cases from this time identified by the Prosecutor, showing that “it understood the temporal scope of the Prosecutor’s intended investigation to commence from February 2014”.<sup>388</sup>

215. The OPCV submits that the third ground of appeal should be dismissed,<sup>389</sup> because the Pre-Trial Chamber correctly found that the temporal scope of the Prosecutor’s Article 18(1) Notification and Additional Information, as well as related deferral proceedings, were not limited to alleged criminal activity occurring from April 2017 onwards.<sup>390</sup> It avers that, while acknowledging the temporal scope of the situation as referred by the States, *i.e.* since 12 February 2014, the Pre-Trial Chamber “considered at length the language used in the [...] Article 18(1) Notification”,<sup>391</sup> “made a clear distinction between the temporal scope of the referral and that of the article 18(1)

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<sup>384</sup> [Prosecutor’s Response](#), para. 95.

<sup>385</sup> [Prosecutor’s Response](#), para. 96.

<sup>386</sup> [Prosecutor’s Response](#), para. 97, referring to [Impugned Decision](#), paras 79-80.

<sup>387</sup> [Prosecutor’s Response](#), para. 98, referring to The Office of the Prosecutor, [Report on Preliminary Examination Activities 2018](#), 5 December 2018 (hereinafter: “2018 Report on Preliminary Examination Activities”), para. 101; The Office of the Prosecutor, [Report on Preliminary Examination Activities 2019](#), 5 December 2019 (hereinafter: “2019 Report on Preliminary Examination Activities”), paras 59, 62; The Office of the Prosecutor, [Report on Preliminary Examination Activities 2020](#), 14 December 2020 (hereinafter: “2020 Report on Preliminary Examination Activities”), para. 199.

<sup>388</sup> [Prosecutor’s Response](#), para. 100, referring to [Deferral Request](#), pp. 2, 5-6; [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), paras 50-58.

<sup>389</sup> [OPCV Observations](#), paras 68, 75.

<sup>390</sup> [OPCV Observations](#), para. 68.

<sup>391</sup> [OPCV Observations](#), para. 69.

notification”;<sup>392</sup> and reached its conclusion regarding the temporal scope of the intended investigation on the basis of both “the content of the State’s referral and the information provided to Venezuela by the Prosecution”,<sup>393</sup> including the list of incidents included in the Prosecutor’s Additional Information.<sup>394</sup> According to the OPCV, Venezuela’s arguments that the Prosecutor failed to state that he intended to investigate conduct prior to 2017 and that there was an impression that investigations were confined to detention-related incidents occurring since April 2017 are “not tenable”,<sup>395</sup> considering in particular (i) the context and content of the Prosecutor’s Additional Information, following which Venezuela was given a three-month extension to file its deferral request;<sup>396</sup> and (ii) the fact that the temporal scope of the preliminary examination was not limited to conduct after April 2017 in the Prosecutor’s annual preliminary examination reports of 2018, 2019 and 2020,<sup>397</sup> as well as *inter partes* communications with Venezuela.<sup>398</sup>

216. The Victims, in their representations, submit that the temporal scope of the Situation is precisely provided by the temporal parameters determined by the Prosecutor, given that the Prosecutor considered facts prior to 2017, which were also covered by the referral of the States Parties, and that he notified these facts in a timely manner to Venezuela through the Additional Information.<sup>399</sup>

217. The OAS Panel submits that Venezuela’s argument under this ground of appeal is (i) “flawed”, because Venezuela was well-informed of the temporal scope of the Prosecutor’s investigation, as well as the number and extent of the allegations that have occurred since 2014;<sup>400</sup> and (ii) “legally untenable” and misinterpret the judicial basis of the Statute, as well as the concept of the scope of investigation, as “the temporal

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<sup>392</sup> [OPCV Observations](#), para. 70.

<sup>393</sup> [OPCV Observations](#), para. 70, referring to [Impugned Decision](#), para. 49.

<sup>394</sup> [OPCV Observations](#), para. 71.

<sup>395</sup> [OPCV Observations](#), para. 72, referring to [Appeal Brief](#), para. 104.

<sup>396</sup> [OPCV Observations](#), paras 73-74.

<sup>397</sup> [OPCV Observations](#), para. 73, referring to [2018 Report on Preliminary Examination Activities](#), paras 116, 124; [2019 Report on Preliminary Examination Activities](#), para. 73; [2020 Report on Preliminary Examination Activities](#), paras 199, 213.

<sup>398</sup> [OPCV Observations](#), para. 73, referring to [Response to Venezuela’s Observations](#), para. 52.

<sup>399</sup> Victims’ Representations, Annex 148, para. 32.

<sup>400</sup> [OAS Panel’s Observations](#), paras 58-60.

jurisdiction for the incidents under [a]rticle 18(1) arises from the scope of the temporal jurisdiction of the investigation itself”.<sup>401</sup>

### 3. *Determination by the Appeals Chamber*

218. At the outset, the Appeals Chamber recalls that pursuant to article 14 of the Statute, “[a] State Party may refer to the Prosecutor a situation [...], requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of [crimes within the jurisdiction of the Court]”. A State Party’s referral of a situation “in which one or more [crimes within the jurisdiction of the Court] appears to have been committed”, under article 13(a) of the Statute, provides the parameters of a situation and the Prosecutor’s determination as to whether there is a reasonable basis to initiate an investigation in accordance with articles 18(1) and 53(1) of the Statute.

219. The Appeals Chamber further recalls that while a referral by a State Party requires the Prosecutor, in principle, to initiate an investigation into the specific situation, the Prosecutor has to first make a determination, pursuant to article 53(1) of the Statute, as to whether there is, as a matter of fact, a reasonable basis to initiate an investigation into the situation.<sup>402</sup> Article 53(1) of the Statute stipulates in this regard that “[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether: (a) [t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) [t]he case is or would be admissible under article 17; and (c) [t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.

220. Subsequently, if the Prosecutor has determined that “there would be a reasonable basis to commence an investigation”, he or she “shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned”.<sup>403</sup> Crucially, as recalled above, at this stage of the proceedings, the Prosecutor’s intended investigation will have to have certain

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<sup>401</sup> [OAS Panel’s Observations](#), para. 61.

<sup>402</sup> See also [Afghanistan OA4 Article 15 Judgment](#), paras 28-29.

<sup>403</sup> Article 18(1) of the Statute.

defining parameters,<sup>404</sup> which the Prosecutor indicates in the article 18(1) notification.<sup>405</sup> Necessarily, this includes the provision, on the part of the Prosecutor, of sufficiently specific information as regards the temporal scope of his or her intended investigation.

221. Turning to the present situation, in particular Venezuela’s argument that if the Pre-Trial Chamber “had properly based its assessment on the Article 18(1) Notification content, there would have been no foundation to conclude that the Article 18 proceedings encompassed alleged incidents occurring before April 2017”,<sup>406</sup> the Appeals Chamber recalls its findings under the first ground of appeal that the Pre-Trial Chamber did not err (i) in relying on the Prosecutor’s Additional Information as if it were part of the Prosecutor’s notification under article 18(1) of the Statute; (ii) by rejecting Venezuela’s arguments that it had not received sufficient information to exercise its right under article 18 of the Statute; or (iii) by finding that “the scope of the Prosecution’s intended investigation can be discerned from” the information provided by the Prosecutor.<sup>407</sup>

222. The Appeals Chamber observes that the Prosecutor’s Article 18(1) Notification, together with the Additional Information, provided Venezuela with sufficiently specific information as to the temporal scope of the Prosecutor’s intended investigation.<sup>408</sup> More specifically, in the Article 18(1) Notification, the Prosecutor first recalled that “[i]n accordance with the jurisdictional scope set out in the referred situation, and without

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<sup>404</sup> See [Philippines OA Judgment](#), para. 106 (“[A]ny investigation, irrespective of its stage, [will] have certain defining parameters”).

<sup>405</sup> See paragraphs 110, 116 above. See also [Philippines OA Judgment](#), para. 106.

<sup>406</sup> [Appeal Brief](#), para. 104.

<sup>407</sup> See paragraph 118 above.

<sup>408</sup> See Prosecutor’s Additional Information, pp. 11-19, 26, 29, 31, 32, 34. The Appeals Chamber further notes that in his Response to Venezuela’s Observations, the Prosecutor explicitly stated that “[t]he temporal scope of the OTP’s intended investigation starts as of 12 February 2014” ([Response to Venezuela’s Observations](#), fn 75). See also [2018 Report on Preliminary Examination Activities](#), para. 124 (In the section of “Conclusion and Next Steps”, the Prosecutor stated that “[g]iven the open-ended nature of the referred situation, the Office will continue to record allegations of crimes committed in Venezuela to the extent that they may fall within the subject-matter jurisdiction of the Court. The Office may also include in its analysis any alleged crime connected to the situation and falling within the Court’s jurisdiction that may have been committed since 12 February 2014”); [2019 Report on Preliminary Examination Activities](#), paras 62-64 (“Contextual background” of “Demonstrations between February 2014 and April 2017”), 73 (In the section of “Subject-Matter Jurisdiction”, the Prosecutor provided that “[t]he preliminary examination has focu[s]ed primarily on crimes allegedly committed in Venezuela since at least April 2017. Nonetheless, the Office has also sought to place these events in the context of previous waves of violence and political unrest, including with respect to conduct occurring from February 2014 onwards. This exercise has been conducted to examine the potential linkage of those events to allegations of crimes committed after April 2017”), 77 (“Deprivation of liberty: [...] Based on information available, since 2014, of more than 15,000 persons arrested in the context of these events, at least 5,000 were allegedly detained for periods exceeding two weeks”); [2020 Report on Preliminary Examination Activities](#), paras 199, 213.

prejudice to the focus of the investigation, the overall scope of the situation encompasses any conduct amounting to crimes within the jurisdiction of the Court that are alleged to have been committed in Venezuela since 12 February 2014”.<sup>409</sup> The Prosecutor then explained that the preliminary examination focused on “a sub-set of crimes [...] alleged to have been committed since at least 2017”.<sup>410</sup> In this context, the Prosecutor informed Venezuela of his determination, following the conclusion of the preliminary examination, “that there was a reasonable basis to believe that since at least April 2017, civilian authorities, members of the armed forces and pro-government individuals have committed crimes pursuant to article 7(1) of the Rome Statute”,<sup>411</sup> emphasising that, given the scope of the referred situation, these findings are “without prejudice to the scope of the investigation now opened”.<sup>412</sup>

223. Noting that the summary of the preliminary examination findings, annexed to the Article 18(1) Notification, forms part of the Prosecutor’s Article 18(1) Notification, the Appeals Chamber observes that the Prosecutor further provided that “the crimes identified during a preliminary examination should be considered as [illustrative] examples of relevant criminality within a situation”,<sup>413</sup> and that the preliminary examination findings “were without prejudice to other crimes that might be determined at a later stage and with respect to a wider time period”.<sup>414</sup> The Prosecutor explained that “[his] investigation will not be limited only to the specific crimes that informed the assessment at the preliminary examination stage”, as “[he] will be able to expand or modify the investigation with respect to the acts identified above or other alleged acts, incidents, groups or persons and/or to adopt different legal qualifications, so long as any cases identified for prosecution are sufficiently linked to the situation, which will

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<sup>409</sup> Article 18(1) Notification, p. 2. The Appeals Chamber further notes that in his regulation 45 notification to the Presidency, the Prosecutor informed the Presidency that in their referral, six States Parties requested the Prosecutor to “initiate an investigation on crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014”, and recalled that “[he] decided, on 8 February 2018, to open a preliminary examination of the situation in Venezuela to analyse crimes allegedly committed in [Venezuela] since at least April 2017” ([Prosecutor’s Regulation 45 Notification](#), p. 2).

<sup>410</sup> Article 18(1) Notification, p. 2 (emphasis added); Annex A to Article 18(1) Notification, para. 4.

<sup>411</sup> Article 18(1) Notification, p. 2; Annex A to Article 18(1) Notification, para. 3.

<sup>412</sup> Article 18(1) Notification, p. 2.

<sup>413</sup> Annex A to Article 18(1) Notification, paras 13, 15.

<sup>414</sup> Annex A to Article 18(1) Notification, para. 4.



encompass all Rome Statute crimes allegedly committed in Venezuela since 12 February 2014”.<sup>415</sup>

224. The Appeals Chamber observes that in the detailed summary of the preliminary examination findings attached to the Prosecutor’s Additional Information, the Prosecutor provided that “[t]he *focus* of Office’s analysis ha[d] been on alleged crimes that occurred *from 1 April 2017 onwards up to February 2019*”,<sup>416</sup> and that “the information available provides a reasonable basis to believe that from at least April 2017 onwards members of the State security forces, at times acting jointly with pro-government individuals” committed the crimes against humanity of: imprisonment or severe deprivation of liberty;<sup>417</sup> torture;<sup>418</sup> rape and other forms of sexual violence;<sup>419</sup> and persecution.<sup>420</sup> The Appeals Chamber further observes that a significant number of incidents listed in the sample in Annex II to the Additional Information – 46 incidents – concern the temporal scope of between 12 February 2014 and April 2017.<sup>421</sup>

225. Having examined Venezuela’s Deferral Request, as well as its Observations to the Prosecutor’s Article 18 Request, the Appeals Chamber considers that Venezuela appears to have indeed understood that the temporal scope of the Prosecutor’s intended investigation encompasses acts allegedly committed in Venezuela since 12 February 2014.<sup>422</sup>

226. For the foregoing reasons, the Appeals Chamber finds that Venezuela has failed to demonstrate any error in the Pre-Trial Chamber’s finding that, while the Prosecutor’s language in its Article 18(1) Notification may have created confusion as to the temporal scope of the criminal acts that the Prosecutor intends to investigate and in relation to which Venezuela was required to provide information pursuant to article 18(2) of the Statute, his Additional Information “clarified the temporal scope of the intended investigation by the Prosecution for the purposes of the article 18 proceedings”, and

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<sup>415</sup> Annex A to Article 18(1) Notification, para. 15.

<sup>416</sup> See Prosecutor’s Additional Information, p. 34, para. 43 (emphasis added).

<sup>417</sup> See Prosecutor’s Additional Information, p. 26, para. 15.

<sup>418</sup> See Prosecutor’s Additional Information, p. 29, para. 23.

<sup>419</sup> See Prosecutor’s Additional Information, p. 31, para. 29.

<sup>420</sup> See Prosecutor’s Additional Information, p. 32, para. 34.

<sup>421</sup> See Prosecutor’s Additional Information, pp. 11-19.

<sup>422</sup> See [Deferral Request](#), pp. 3, 6-7; [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), paras 5, 50, 56, 88, 103, 108, 130, 139, 163, 188; Annex III to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), pp. 2992, 3013-3014, 3081.

provided sufficiently clear information for Venezuela to be on notice that the Situation under investigation encompasses alleged criminal acts occurring before April 2017.<sup>423</sup>

227. Turning to Venezuela’s argument that it was legally erroneous for the Pre-Trial Chamber “to rely on the temporal scope of State Referrals in order to deduce the temporal scope of the Article 18(1) Notification”, “conflat[ing] issues of temporal jurisdiction of the Court” and the temporal scope of the Prosecutor’s intended investigation,<sup>424</sup> the Appeals Chamber considers that Venezuela misrepresents the Impugned Decision. In this respect, the Appeals Chamber notes that, in the context of a referral by a State Party pursuant to article 13(a) of the Statute, a pre-trial chamber’s assessment under article 18 of the Statute requires identification of (i) the scope of the Situation as referred by a State Party or States Parties, and (ii) the scope of the Situation under investigation, defined by the Prosecutor, on the basis of which the pre-trial chamber determines whether the scope of the Prosecutor’s intended investigation falls within the boundaries of the Situation in relation to which the Court’s jurisdiction as referred to the Prosecutor.<sup>425</sup>

228. The Appeals Chamber notes that the Pre-Trial Chamber first identified the scope of the Court’s temporal jurisdiction in the situation at hand, by noting that “the temporal scope of the Situation as referred by the States concerns alleged crimes committed since 12 February 2014”.<sup>426</sup> Separately, the Pre-Trial Chamber concluded, after having analysed the information set out in the Prosecutor’s Article 18(1) Notification, as well as the Additional Information, that the temporal scope of the Prosecutor’s intended investigation encompasses alleged criminal acts occurring before April 2017.<sup>427</sup> On the basis of these findings, the Pre-Trial Chamber correctly concluded that the scope of the

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<sup>423</sup> See [Impugned Decision](#), para. 48.

<sup>424</sup> [Appeal Brief](#), paras 99-100; see also paras 101-103, referring to Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the “Defence Challenge to the Jurisdiction of the Court”](#), 26 October 2011, ICC-01/04-01/10-451 (hereinafter: “*Mbarushimana* Jurisdiction Decision”), paras 33-34.

<sup>425</sup> See also Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the Prosecutor’s Application for a Warrant of Arrest against Callixte Mbarushimana](#), 28 September 2010, ICC-01/04-01/10-1, para. 6.

<sup>426</sup> See [Impugned Decision](#), para. 45.

<sup>427</sup> See [Impugned Decision](#), paras 46-48, 79-80. See also paragraph 118 above.

Prosecutor's intended investigation falls within the temporal parameters of the situation.<sup>428</sup>

229. In light of the above, the Appeals Chamber finds that, contrary to Venezuela's contention, the Pre-Trial Chamber, in identifying the temporal scope of the Prosecutor's intended investigation, examined the Prosecutor's Article 18(1) Notification and the Additional Information, separately from the States' referral. Therefore, the Appeals Chamber rejects Venezuela's arguments in this regard.

230. Additionally, the Appeals Chamber does not see the relevance of the *Afghanistan* OA4 Article 15 Judgment and the *Mbarushimana* Jurisdiction Decision to Venezuela's arguments under this ground of appeal.<sup>429</sup> The Appeals Chamber notes that the relevant finding in the *Afghanistan* OA4 Article 15 Judgment and the *Mbarushimana* Jurisdiction Decision concern the scope of the Prosecutor's investigation *after* its commencement,<sup>430</sup> confirming that the Prosecutor's investigation is not limited to crimes pre-dating the referral, and that, as correctly noted by the Pre-Trial Chamber, the obligation to provide sufficiently specific information in an article 18 notification does not limit in any way the Prosecutor's future investigations.

231. Lastly, with respect to Venezuela's arguments relating to "a chilling effect on the ability and willingness of [the] State to conduct its own investigations",<sup>431</sup> the Appeals Chamber recalls that as far as domestic investigations are concerned, Venezuela is in a position to continue its investigations irrespective of the ongoing proceedings before the Court.<sup>432</sup>

232. Having rejected all of Venezuela's arguments under this ground of appeal, the Appeals Chamber rejects the third ground of appeal in its entirety.

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<sup>428</sup> See [Impugned Decision](#), para. 49.

<sup>429</sup> See [Appeal Brief](#), paras 102-103.

<sup>430</sup> See [Afghanistan OA4 Article 15 Judgment](#), para. 60; See [Mbarushimana Jurisdiction Decision](#), paras 23, 26, 29-33.

<sup>431</sup> See [Appeal Brief](#), para. 102.

<sup>432</sup> See Appeals Chamber, *Situation in the Republic of the Philippines*, [Decision on request for suspensive effect of Pre-Trial Chamber I's "Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation" of 26 January 2023 \(ICC-01/21-56\)](#), 27 March 2023, ICC-01/21-67, para. 19; Appeals Chamber, *The Prosecutor v. Saif Al-Islam Gaddafi et al.*, [Decision on the request for suspensive effect and related issues](#), 18 July 2013, ICC-01/11-01/11-387 (OA4), para. 26.

## **F. Fourth ground of appeal: The alleged errors relating to the Pre-Trial Chamber's complementarity assessment**

233. Under this ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law in its assessment as to whether Venezuela was actively investigating criminal acts referred to in the Article 18(1) Notification<sup>433</sup> by: (i) failing to tailor the complementarity test with respect to the identification of a case to the particularities of the Article 18(1) Notification;<sup>434</sup> (ii) requiring an unspecified degree of coverage between Venezuela's domestic investigations and the acts notified by the Prosecutor, and failing to provide adequate reasons as to the basis for its conclusion that the acts investigated by Venezuela did not sufficiently mirror the alleged criminal acts notified by the Prosecutor;<sup>435</sup> (iii) finding that it was necessary for domestic investigations to cover contextual elements of crimes against humanity;<sup>436</sup> (iv) finding that Venezuela's investigations needed to cover discriminatory intent in connection with underlying acts pertaining to the Prosecutor's potential investigations related to persecution, while excluding domestic investigations into human rights violations;<sup>437</sup> and (v) excluding domestic investigations into criminal acts pertaining to sexual and gender-based violence, due to its erroneous focus on whether they were being investigated or prosecuted as such.<sup>438</sup>

234. The Appeals Chamber will address these issues in turn.

### *1. Sub-ground 4.1: The alleged error of failing to tailor the complementarity assessment to the particularities of the Prosecutor's Article 18(1) Notification*

#### **(a) Relevant parts of the Impugned Decision**

235. The Pre-Trial Chamber recalled its previous jurisprudence relating to the assessment of complementarity at the stage of article 18 proceedings,<sup>439</sup> and found that "the onus placed on the concerned State consists in providing 'the Court with evidence

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<sup>433</sup> [Appeal Brief](#), p. 42, paras 106-139.

<sup>434</sup> [Appeal Brief](#), paras 106-115.

<sup>435</sup> [Appeal Brief](#), paras 116-122.

<sup>436</sup> [Appeal Brief](#), paras 123-130.

<sup>437</sup> [Appeal Brief](#), paras 131-135.

<sup>438</sup> [Appeal Brief](#), paras 136-139.

<sup>439</sup> [Impugned Decision](#), paras 64-65, referring to [Philippines Article 18\(2\) Decision](#), paras 12-13.

of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case”<sup>440</sup>.

236. The Pre-Trial Chamber also noted:

[I]n order to satisfy the complementarity principle, the domestic proceedings should also sufficiently mirror the content of the article 18(1) notification. It is unclear in what aspects the ‘considerable overlap’ test proposed by Venezuela differs from the ‘sufficiently mirror’ test established in previous jurisprudence. To the extent that Venezuela may be suggesting that the mere showing that, on its face, domestic proceedings resemble to some extent the Prosecution’s intended investigation would suffice to discharge its onus that it is investigating the same, the Chamber rejects Venezuela’s argument. To the extent that Venezuela suggests that, in order to show that it is investigating the potential cases that the Prosecution may pursue, its domestic investigations must substantially cover the same conduct and the same persons/groups, this is indeed the correct understanding of the ‘sufficiently mirror’ test adopted in the jurisprudence.<sup>441</sup>

237. As regards the conduct investigated by Venezuela, the Pre-Trial Chamber took note of “a significant period of inactivity [in domestic investigations] without any apparent justification discernible from the relevant material” and that “[o]nly in a minority of [the relevant] cases, a suspect was identified, an accused charged, and/or a judicial decision on an accused’s criminal responsibility taken”.<sup>442</sup>

#### (b) Summary of the submissions

238. Venezuela submits that the Pre-Trial Chamber erred in law by “focus[ing] on whether domestic investigations had identified particular perpetrators or taken steps to secure the arrest of particular individuals”, and that by “imposing a higher degree of specificity and progression on [Venezuela] than was evident in the information set out by the [Prosecutor] in the Article 18(1) Notification”,<sup>443</sup> the Pre-Trial Chamber “wrongly excluded from its assessment domestic investigations that covered the same conduct and acts as described in the Article 18(1) Notification”.<sup>444</sup>

239. The Prosecutor submits that, contrary to Venezuela’s arguments, the Pre-Trial Chamber “appropriately tailored its complementarity assessment to the features of

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<sup>440</sup> [Impugned Decision](#), para. 66 (footnote omitted).

<sup>441</sup> [Impugned Decision](#), para. 67 (footnote omitted).

<sup>442</sup> [Impugned Decision](#), para. 91 (footnotes omitted).

<sup>443</sup> [Appeal Brief](#), paras 106-107.

<sup>444</sup> [Appeal Brief](#), para. 115.

[article 18] proceedings”, and “correctly defined the test” by “stating that it would consider whether the ‘domestic investigations [...] substantially cover the same conduct and the same persons/groups’”.<sup>445</sup> He avers that since “the purpose of the notification is [...] to inform States of the general parameters of the Prosecution’s intended investigation in a sufficiently specific manner to enable them to request deferral of the investigation”,<sup>446</sup> “the Prosecution is not constrained or limited to investigate only the incidents or allegations described in the article 18(1) notification”.<sup>447</sup> The Prosecutor contends that, contrary to Venezuela’s description of the relevant paragraph of the Impugned Decision, “the [Pre-Trial] Chamber did not require [Venezuela] to have identified perpetrators or secured their arrest”.<sup>448</sup> Rather, the Pre-Trial Chamber, in his view, “simply describe[d] the general features of [Venezuela’s] proceedings based on the records transmitted”.<sup>449</sup> Additionally, the Prosecutor argues that the Pre-Trial Chamber’s observations in this respect “were not determinative of [the Impugned Decision]” as the records provided by Venezuela do not demonstrate that Venezuela “investigate[d] or prosecute[d] factual allegations underlying crimes against humanity and generally focused on low-level/direct perpetrators”.<sup>450</sup>

240. The OPCV submits that, contrary to Venezuela’s contention, the Pre-Trial Chamber applied the appropriate test for preliminary admissibility rulings pursuant to article 18 of the Statute.<sup>451</sup> It argues that, rather than “request[ing] complete symmetry between the two investigations in terms of the specific identity of the alleged offenders”, as Venezuela claims, the Pre-Trial Chamber required that “at least the same categories of individuals are targeted”, such as “higher-ranking instead of direct and lower-ranking potential perpetrators”.<sup>452</sup>

241. The Victims, in their representations, submit that the Pre-Trial Chamber did not err in the application of the “sufficient mirroring” test, as the Prosecutor provided the general parameters of the situation, while Venezuela should have initiated its investigations as of 2014 when the relevant events occurred in accordance with its duty

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<sup>445</sup> [Prosecutor’s Response](#), para. 104, referring to [Impugned Decision](#), para. 67.

<sup>446</sup> [Prosecutor’s Response](#), para. 108; Prosecutor’s Oral Submissions, [T-1](#), p. 14, lines 19-20.

<sup>447</sup> [Prosecutor’s Response](#), para. 108; Prosecutor’s Oral Submissions, [T-1](#), p. 15, lines 11-15.

<sup>448</sup> [Prosecutor’s Response](#), para. 109, referring to [Impugned Decision](#), para. 91.

<sup>449</sup> [Prosecutor’s Response](#), para. 109, referring to [Impugned Decision](#), para. 91.

<sup>450</sup> [Prosecutor’s Response](#), para. 109.

<sup>451</sup> [OPCV Observations](#), paras 77, 80.

<sup>452</sup> [OPCV Observations](#), para. 79.

under the Statute, as well as the applicable legislation.<sup>453</sup> The Victims also submit that the Pre-Trial Chamber did not specifically require that arrest warrants be issued, nor that the legal qualifications match, but that Venezuela demonstrate that it carried out tangible, concrete and progressive investigative measures, which would allow verifying whether the scope of its proceedings sufficiently mirrored those that the Prosecutor intends to cover in his investigation.<sup>454</sup>

242. The OAS Panel submits that the Pre-Trial Chamber, in line with the *Philippines* OA Judgment, did not impose a disproportionately high standard on Venezuela by requiring an exact symmetry with the Prosecutor's intended investigation, but rather, correctly concluded that Venezuela failed to demonstrate that the domestic proceedings target at least the same categories of individuals, focusing on high-ranking, rather than direct and low-ranking, potential perpetrators.<sup>455</sup>

### (c) Determination by the Appeals Chamber

243. Venezuela submits that the Pre-Trial Chamber erred in law by "imposing a higher degree of specificity and progression" on Venezuela than on the Prosecutor, focusing on whether Venezuela's investigations had identified particular perpetrators or taken steps to secure the arrest of particular individuals,<sup>456</sup> and consequently, excluding from its assessment the domestic investigations that covered the same conduct and acts as provided in the Prosecutor's Article 18(1) Notification.<sup>457</sup>

244. At the outset, concerning Venezuela's argument in relation to the "lack of detail" in the Prosecutor's Article 18(1) Notification,<sup>458</sup> the Appeals Chamber recalls its findings under the first ground of appeal that the Pre-Trial Chamber did not err by (i) rejecting Venezuela's arguments that it had not received sufficient information to exercise its right under article 18 of the Statute; or (ii) finding that "the scope of the

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<sup>453</sup> Victims' Representations, Annex 148, para. 36.

<sup>454</sup> Victims' Representations, Annex 148, para. 37.

<sup>455</sup> [OAS Panel's Observations](#), para. 63.

<sup>456</sup> [Appeal Brief](#), paras 106-107.

<sup>457</sup> [Appeal Brief](#), para. 115.

<sup>458</sup> See [Appeal Brief](#), paras 109-110, 112-113. Venezuela avers that the Article 18(1) Notification (i) "disclosed no particulars concerning the identification of particular perpetrators"; (ii) "failed to confirm the Prosecution's intent to investigate specific incidents in specific localities on specific dates"; (iii) "listed acts of sexual violence in an alternative manner [...], thereby indicating that the acts themselves could satisfy the more generic category and still properly trigger a deferral"; and (iv) described the victims broadly. See also Venezuela's Oral Submissions, [T-2](#), p. 33, lines 1-12.

Prosecution’s intended investigation can be discerned from” the information provided by the Prosecutor.<sup>459</sup>

245. Bearing in mind the above finding, the Appeals Chamber turns to Venezuela’s contention that it was not required to demonstrate that its investigations “had reached the point of identifying specific perpetrators”<sup>460</sup> or “particular localities, date or even a particular number of cases”,<sup>461</sup> since, in its view, the notion of a case for the purposes of article 18 proceedings is defined by reference to the “acts” described in an article 18 notification, which in the present proceedings “did not name any specific individuals as alleged perpetrators”.<sup>462</sup> The Appeals Chamber recalls in this respect that, for the purpose of deferral requests under article 18 of the Statute, a State is required to demonstrate that there are national investigations “of the same groups or categories of individuals” in relation to the relevant criminality.<sup>463</sup>

246. Relatedly, the Appeals Chamber reiterates that, in order for a State to be able to assert its jurisdiction in proceedings under article 18(2) of the Statute, the Prosecutor’s article 18(1) notification must be sufficiently specific, providing the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality that the Prosecutor intends to investigate.<sup>464</sup>

247. In the present situation, the Prosecutor, in the Article 18(1) Notification and the Additional Information, notified Venezuela of his conclusion that there is a reasonable basis to believe that, from at least April 2017 onwards, members of the State security forces and pro-government individuals committed the crimes against humanity of imprisonment or other severe deprivation of liberty, torture, rape and other forms of sexual violence and persecution against civilians, who were perceived or actual opponents of the government.<sup>465</sup> Accordingly, Venezuela, contrary to its contention,<sup>466</sup>

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<sup>459</sup> See paragraph 118 above.

<sup>460</sup> [Appeal Brief](#), para. 112.

<sup>461</sup> [Appeal Brief](#), para. 113.

<sup>462</sup> [Appeal Brief](#), paras 108-109, referring to [Muthaura et al. OA Judgment](#), para. 38.

<sup>463</sup> [Philippines OA Judgment](#), para. 106.

<sup>464</sup> See paragraphs 114, 220 above.

<sup>465</sup> Annex A to Article 18(1) Notification, paras 1, 3-6, 15; 19 October 2021 Letter, paras 5-7, 9-10, 15-42; Prosecutor’s Additional Information, pp. 11-19.

<sup>466</sup> See [Appeal Brief](#), paras 109, 114.



was required to demonstrate an advancing process of domestic investigations and prosecutions of the members of the State security forces and pro-government individuals, in relation to the alleged patterns and forms of criminality, namely the crimes against humanity of imprisonment or other severe deprivation of liberty, torture, rape and other forms of sexual violence and persecution, committed against civilians, who were perceived or actual opponents of the government.

248. Moreover, the Appeals Chamber considers that Venezuela misrepresents the Impugned Decision in arguing that the Pre-Trial Chamber “focused on whether domestic investigations had identified particular perpetrators or taken steps to secure the arrest of particular individuals”.<sup>467</sup> Rather, the Pre-Trial Chamber noted the general features of Venezuela’s proceedings and that in the majority of the national investigations there were periods of inactivity.<sup>468</sup> It is in this context that the Pre-Trial Chamber observed that in many cases “no (specific) suspect ha[d] been identified yet”.<sup>469</sup> The Pre-Trial Chamber thus did not “*focus[]* on whether domestic investigations had identified particular perpetrators”.<sup>470</sup> This enquiry merely served the Pre-Trial Chamber in addressing the Prosecutor’s allegation that “very limited investigative steps” had been taken, a factor which the Pre-Trial Chamber found to be “non-determinative”.<sup>471</sup> Rather, the focus of the Pre-Trial Chamber’s assessment was on whether Venezuela was conducting or had conducted any investigations or prosecutions of the same categories of individuals, *i.e.* alleged high-ranking members of the State security forces and pro-government individuals, in relation to the relevant criminality, as encompassed by the Prosecutor’s intended investigation.<sup>472</sup>

249. In light of the foregoing, the Appeals Chamber finds that Venezuela fails to demonstrate any error of the Pre-Trial Chamber in this regard.<sup>473</sup> Accordingly the Appeals Chamber rejects sub-ground of appeal 4.1.

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<sup>467</sup> [Appeal Brief](#), para. 106.

<sup>468</sup> [Impugned Decision](#), para. 91.

<sup>469</sup> [Impugned Decision](#), para. 91.

<sup>470</sup> [Appeal Brief](#), para. 106 (emphasis added).

<sup>471</sup> [Impugned Decision](#), paras 96, 121.

<sup>472</sup> [Impugned Decision](#), paras 104-108, 112-119.

<sup>473</sup> See [Impugned Decision](#), para. 67.

2. *Sub-ground 4.2: The alleged errors of requiring an unspecified degree of coverage between Venezuela's investigations and the acts notified by the Prosecutor, and failing to provide adequate reasons for the Pre-Trial Chamber's conclusion in relation to the relevant test*

**(a) Relevant parts of the Impugned Decision**

250. The Pre-Trial Chamber found that “in order to satisfy the complementarity principle, the domestic proceedings should also sufficiently mirror the content of the article 18(1) notification”.<sup>474</sup> In its analysis of “the material deemed most essential by Venezuela that consists of court records and other records of investigative steps taken in the context of domestic criminal proceedings”,<sup>475</sup> the Pre-Trial Chamber noted, with respect to the conduct investigated by Venezuela, that

[o]nly in a minority of cases, a suspect was identified, an accused charged, and/or a judicial decision on an accused's criminal responsibility taken. Nonetheless, these cases are very limited and [...] not capable of altering the Chamber's overall determination.<sup>476</sup>

**(b) Summary of the submissions**

251. Venezuela submits that the Pre-Trial Chamber failed to provide objective criteria or sufficient reasoning with respect to how it defined and assessed the sufficient mirroring test in the context of this situation.<sup>477</sup> Emphasising the importance of the Prosecutor's “confirmation of intent” with respect to the content and scope of the intended investigation,<sup>478</sup> and noting the absence of such confirmation in the present proceedings,<sup>479</sup> Venezuela contends that “it was impossible for the [Pre-Trial Chamber] to make any reasoned assessment as to what type or degree of overlap would satisfy the threshold for deferring to [Venezuela's] investigations”.<sup>480</sup> Venezuela also submits that these alleged errors “had a material impact on the outcome of the [Impugned Decision], as they led the [Pre-Trial] Chamber to incorrectly apply an overly stringent standard as

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<sup>474</sup> [Impugned Decision](#), para. 67.

<sup>475</sup> [Impugned Decision](#), para. 89.

<sup>476</sup> [Impugned Decision](#), para. 91 (footnote omitted).

<sup>477</sup> [Appeal Brief](#), paras 116-120, 122.

<sup>478</sup> [Appeal Brief](#), para. 120.

<sup>479</sup> [Appeal Brief](#), para. 119. *See also* Venezuela's Oral Submissions, [T-1](#), p. 7, lines 22-24; p. 8, lines 15-18; p. 11, lines 2-4.

<sup>480</sup> [Appeal Brief](#), para. 119.

concerns the status of [Venezuela’s] investigations”, and to conclude that the number of active domestic investigations was insufficient.<sup>481</sup>

252. The Prosecutor submits that this sub-ground of appeal “lacks merit and should be dismissed”.<sup>482</sup> In support, the Prosecutor first argues that the Pre-Trial Chamber “adequately articulated how it applied the complementarity test” by holding that “the domestic investigations must substantially cover the same conduct and the same persons/groups”,<sup>483</sup> and that this “approach is reasonable and correct, and shows no error”.<sup>484</sup> Second, the Prosecutor contends that a pre-trial chamber’s assessment of whether the Prosecutor’s article 18(1) notification provides “sufficiently specific information regarding the general parameters of the situation to enable a State or States to request a deferral” is “a case by case determination since ‘[w]hat may be considered sufficient will depend on the specific features of each situation’”, and “any incident identified in the article 18(1) notification will necessarily be an example or a ‘sample’”.<sup>485</sup> Lastly, he avers that the Pre-Trial Chamber “did not positively determine” that the number of active domestic investigations was numerically insufficient to warrant deferral.<sup>486</sup> Rather, the Pre-Trial Chamber “describ[ed] the features of [Venezuela’s] materials it had assessed, [...] before [...] appl[ying] the complementarity test to such materials”.<sup>487</sup> Additionally, the Prosecutor contends that the number of domestic proceedings, albeit possibly relevant, is not always determinative, as the sufficient mirroring test “will not be satisfied despite the State having conducted a large number of cases, if they do not encompass certain criminality or categories of perpetrators, or focus on low-level/direct perpetrators, as in this situation”.<sup>488</sup>

253. The OPCV submits that, contrary to Venezuela’s contention, the Pre-Trial Chamber reasonably explained the degree of coverage required from domestic investigations pursuant to article 18 of the Statute.<sup>489</sup> It avers that the Pre-Trial Chamber

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<sup>481</sup> [Appeal Brief](#), paras 121-122.

<sup>482</sup> [Prosecutor’s Response](#), para. 110.

<sup>483</sup> [Prosecutor’s Response](#), para. 111, referring to [Impugned Decision](#), para. 67.

<sup>484</sup> [Prosecutor’s Response](#), para. 111.

<sup>485</sup> [Prosecutor’s Response](#), para. 112. See also Prosecutor’s Oral Submissions, [T-1](#), p. 15, lines 21-25; p. 17, line 19 to p. 18, line 11.

<sup>486</sup> [Prosecutor’s Response](#), para. 114.

<sup>487</sup> [Prosecutor’s Response](#), para. 114 (footnote omitted).

<sup>488</sup> [Prosecutor’s Response](#), para. 114.

<sup>489</sup> [OPCV Observations](#), paras 77, 80; OPCV Oral Submissions, [T-1](#), p. 22, lines 7-11, referring to [Impugned Decision](#), para. 67.

correctly found that “the information provided by the [Prosecutor] in [his] multiple exchanges with Venezuela was sufficiently specific for the State to be informed of the degree of coverage required by its domestic proceedings”, and noted, in particular, that the sample of alleged incidents provided by the Prosecutor in the Additional Information “all went so far to contain information on the victim, date, and location for each alleged incident”.<sup>490</sup>

254. The Victims, in their representations, submit that (i) the Pre-Trial Chamber explained the reasons why it found that Venezuela’s investigations do not sufficiently mirror that of the Prosecutor, namely that Venezuela flatly ruled out the possible commission of crimes, arguing that they were isolated events, and that (ii) the measures undertaken by Venezuela have been limited, with long periods of investigative inactivity, without correctly reflecting the relevant criminality covered by the Prosecutor’s intended investigation.<sup>491</sup>

### (c) Determination by the Appeals Chamber

255. In respect of Venezuela’s submission that the Pre-Trial Chamber failed to provide sufficient explanation or reasoning as to (i) which threshold the Pre-Trial Chamber employed to evaluate “sufficiency”,<sup>492</sup> and (ii) “what the domestic proceedings should mirror”,<sup>493</sup> the Appeals Chamber recalls that while “it is essential that [the reasoning] indicates with sufficient clarity the basis of the decision”, “[s]uch reasoning ‘will not necessarily require reciting each and every factor that was before [a chamber] to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion’”.<sup>494</sup> In the circumstances of the instant situation, the Appeals Chamber considers that the Impugned Decision was sufficiently reasoned. The Pre-Trial Chamber set out the criteria for its determination of whether Venezuela’s investigation sufficiently mirrored the parameters of the Prosecutor’s intended investigation.<sup>495</sup> The Impugned Decision indicates with sufficient clarity the factual basis of the Pre-Trial Chamber’s conclusions, with respect to both the specificity of the Prosecutor’s information provided

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<sup>490</sup> [OPCV Observations](#), para. 81; OPCV Oral Submissions, [T-1](#), p. 22, lines 18-24.

<sup>491</sup> Victims’ Representations, Annex 148, para. 39.

<sup>492</sup> [Appeal Brief](#), para. 117.

<sup>493</sup> [Appeal Brief](#), para. 118 (emphasis omitted).

<sup>494</sup> *See, for example, Said OA Judgment*, para. 45 (footnotes omitted), and jurisprudence cited therein. *See also* paragraph 187 above.

<sup>495</sup> *See Impugned Decision*, paras 64-67.

to Venezuela<sup>496</sup> and the material relevant to the Pre-Trial Chamber's determination.<sup>497</sup> The Impugned Decision also sets out with sufficient clarity how the Pre-Trial Chamber arrived at its conclusions.<sup>498</sup> Accordingly, the Appeals Chamber finds that Venezuela fails to show any errors in the Impugned Decision in this respect.

256. Turning to Venezuela's arguments in relation to the Prosecutor's use of "samples" in the Additional Information, which, according to Venezuela, rendered it "impossible for the [Pre-Trial Chamber] to make any reasoned assessment as to what type or degree of overlap would satisfy the threshold for deferring to [Venezuela's] investigations",<sup>499</sup> the Appeals Chamber recalls its findings under the first ground of appeal regarding the sufficient specificity of the information provided by the Prosecutor.<sup>500</sup> As discussed above,<sup>501</sup> the information provided by the Prosecutor sets out the necessary parameters.<sup>502</sup> Furthermore, the samples included in the Prosecutor's Additional Information, as noted by the Pre-Trial Chamber,<sup>503</sup> indicate the alleged victim, date and location.<sup>504</sup>

257. Moreover, the Appeals Chamber recalls its finding that it is not, in and of itself, an error for a pre-trial chamber to rely on the Prosecutor's information about criminal acts with respect to which the Prosecutor does not express a clear intention to investigate, as long as such information, together with other information provided by the Prosecutor, provides the general parameters of the situation and sufficient detail with respect to the groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, that he or she intends to investigate.<sup>505</sup>

258. In view of the aforementioned details, in addition to the sample included in the Prosecutor's Additional Information, the Appeals Chamber considers that the Pre-Trial Chamber was provided with sufficient information for its assessment under article 18(2)

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<sup>496</sup> [Impugned Decision](#), paras 68-80.

<sup>497</sup> [Impugned Decision](#), paras 81-91.

<sup>498</sup> [Impugned Decision](#), paras 104-108, 112-119.

<sup>499</sup> [Appeal Brief](#), para. 119. *See also* Venezuela's Oral Submissions, [T-1](#), p. 7, lines 22-24; p. 8, lines 15-18; p. 11, lines 2-4.

<sup>500</sup> *See* paragraph 118 above.

<sup>501</sup> *See* paragraph 116 above.

<sup>502</sup> Annex A to Article 18(1) Notification, paras 1, 3-6, 15; 19 October 2021 Letter, paras 15-40, 42.

<sup>503</sup> [Impugned Decision](#), para. 79.

<sup>504</sup> Prosecutor's Additional Information, pp. 11-19.

<sup>505</sup> *See* paragraph 114 above.

of the Statute. Accordingly, the Appeals Chamber rejects Venezuela's argument in this regard.<sup>506</sup>

259. With respect to Venezuela's argument that the test adopted by the Pre-Trial Chamber "fails to shed any light as concerns the quantitative or qualitative degree of 'overlap' required",<sup>507</sup> the Appeals Chamber observes that, as an apparent example of the alleged erroneous application of the quantitative degree of overlap, Venezuela refers to the Pre-Trial Chamber's finding that Venezuela was "investigating slightly more than half of the incidents" listed in the Prosecutor's sample, which, according to Venezuela, the Pre-Trial Chamber considered to be "numerically deficient".<sup>508</sup> However, the Appeals Chamber notes that the Pre-Trial Chamber made no finding or observation to the effect that "slightly more than half of the incidents" was an insufficient number for the purposes of its determination. The Pre-Trial Chamber merely referred to that number in the context of its overview of the material provided by Venezuela,<sup>509</sup> and there is no indication that it drew any adverse conclusions therefrom. Similarly, it is not apparent that the Pre-Trial Chamber drew conclusions relevant to its overall determination from another finding to which Venezuela refers concerning the "minority of cases" in which "a suspect was identified".<sup>510</sup> As discussed above, the Pre-Trial Chamber referred to cases in which "a suspect was identified" in the context of an assessment of periods of inactivity, which it found to be a "non-determinative" factor.<sup>511</sup>

260. In light of the above, the Appeals Chamber considers that Venezuela has failed to show any errors in the Pre-Trial Chamber's reliance on the Prosecutor's information provided in the Article 18(1) Notification, as well as the Additional Information, as a term of reference in its complementarity assessment. Therefore, the Appeals Chamber rejects Venezuela's argument in this regard.

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<sup>506</sup> See [Appeal Brief](#), para. 119. See also Venezuela's Oral Submissions, [T-1](#), p. 7, lines 22-24; p. 8, lines 15-18; p. 11, lines 2-4.

<sup>507</sup> [Appeal Brief](#), para. 117.

<sup>508</sup> [Appeal Brief](#), para. 121, referring to [Impugned Decision](#), para. 89.

<sup>509</sup> [Impugned Decision](#), para. 89 ("[T]he Chamber will, for the purpose of its analysis, focus on the material deemed most essential by Venezuela that consists of court records and other records of investigative steps taken in the context of domestic criminal proceedings. From this material, it transpires that Venezuela is currently investigating slightly more than half of the incidents provided by the Prosecution as 'representative of the broader patterns of criminality [...] analysed during the [preliminary examination]'" (footnotes omitted)).

<sup>510</sup> [Appeal Brief](#), paras 121-122, referring to [Impugned Decision](#), para. 91.

<sup>511</sup> [Impugned Decision](#), paras 91, 96, 121.

261. Having rejected all arguments under this sub-ground of appeal, the Appeals Chamber rejects sub-ground of appeal 4.2.

3. *Sub-ground 4.3: The alleged error in finding that it was necessary for domestic investigations to cover “contextual elements” of crimes against humanity*

**(a) Relevant parts of the Impugned Decision**

262. The Pre-Trial Chamber considered that the following two factors, taken together, are determinative of its conclusion that Venezuela’s domestic investigations do not sufficiently mirror the Prosecutor’s intended investigation:<sup>512</sup> (i) “[w]hether Venezuela is investigating the patterns and policies underlying the contextual elements of crimes against humanity”,<sup>513</sup> and (ii) “[w]hether the focus of the domestic proceedings is on direct perpetrators and arguably low level members of security forces”.<sup>514</sup>

263. First, on the basis of numerous submissions made by Venezuela, the Pre-Trial Chamber considered that “Venezuela appears to admit that it is not investigating the factual allegations underlying the contextual elements of crimes against humanity”.<sup>515</sup> In this regard, the Pre-Trial Chamber noted that “Venezuela does not point to *any* specific domestic criminal investigations to support its conclusion on the factual allegations underlying the alleged crimes against humanity that the [Prosecutor] intends to investigate”.<sup>516</sup> It further noted that

from the relevant material submitted by Venezuela, it appears that Venezuela is indeed not investigating the factual allegations underlying the contextual elements of crimes against humanity. In other words, Venezuela appears to *a priori* conclude that the crimes alleged by the [Prosecutor] were not committed as part of a widespread or systematic attack directed against the civilian population. However, these are factual conclusions that can only be reached after an investigation, either by Venezuela or the [Prosecutor]. No information that such an investigation took place and, if any, how its conclusions were reached, are before the Chamber. For the same reasons, Venezuela’s submissions that a policy to commit an attack within the meaning of article 7(2)(a) of the Statute is incompatible with public statements made

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<sup>512</sup> [Impugned Decision](#), paras 108, 119.

<sup>513</sup> *See* [Impugned Decision](#), paras 97-108.

<sup>514</sup> *See* [Impugned Decision](#), paras 109-119.

<sup>515</sup> [Impugned Decision](#), para. 104.

<sup>516</sup> [Impugned Decision](#), para. 106 (emphasis in original).

by high level authorities of Venezuela and with the existence of the Human Rights Directorate are without merit.<sup>517</sup>

264. Second, the Pre-Trial Chamber considered that “given the Court’s role and purpose, high-ranking officials are expected to be the investigation’s focus”,<sup>518</sup> and noted that the cases to which Venezuela referred in its Observations to Prosecutor’s Article 18 Request “appear to concern alleged direct perpetrators”,<sup>519</sup> and that “the general focus of the domestic investigations on direct/low level perpetrators is consistent with Venezuela’s assertion that crimes against humanity did not occur in Venezuela insofar as violations of citizens’ rights were isolated in what Venezuela describes as ‘potential acts of abuse committed by public officials’”.<sup>520</sup>

265. As regards the material presented by Venezuela in this regard, the Pre-Trial Chamber noted that “it [...] transpires that the few arrest warrants and indictments filed, and convictions entered appear to concern one Lieutenant Co[l]onel; three Sergeants and three Second Sergeants; eight military officers; and four police officers”.<sup>521</sup> The Pre-Trial Chamber also noted that (i) one case referred to in Venezuela’s Observations is “unclear” as to “the current status of the proceedings against the accused following the relatively recent formal reading of the charges”;<sup>522</sup> (ii) another case referred to in Venezuela’s Observations “does not allow for the conclusion that high-ranking individuals were formally investigated”, as “the investigative steps taken still mainly focused on accessing information on the victims” and the case “file does not contain arrest warrants for, or even documents outlining more preliminary investigations into”, the alleged perpetrators, specifically mentioned by the alleged victims;<sup>523</sup> (iii) “at least in two other cases it appears that, despite the victim(s) clearly identifying higher ranking potential perpetrators, the subsequent investigative steps either focused on lower-ranking perpetrators and/or on accessing information on the victims and not the alleged perpetrators”;<sup>524</sup> and (iv) “in several of the cases provided by Venezuela a common investigative step consists of requesting the duty roster and the daily report log for the

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<sup>517</sup> [Impugned Decision](#), para. 107.

<sup>518</sup> [Impugned Decision](#), para. 118.

<sup>519</sup> See [Impugned Decision](#), paras 112, 115.

<sup>520</sup> [Impugned Decision](#), para. 119.

<sup>521</sup> [Impugned Decision](#), para. 115.

<sup>522</sup> [Impugned Decision](#), para. 112.

<sup>523</sup> [Impugned Decision](#), para. 113.

<sup>524</sup> [Impugned Decision](#), para. 114.



date(s) of the incident(s)”, which “appears to be additional indicia that the focus of the domestic investigations is indeed on the direct perpetrators without enquiries, for example, as to the persons to whom those on duty on the day of the incident would respond”.<sup>525</sup>

266. In addition to the above determinative factors, the Pre-Trial Chamber noted in relation to the conduct underlying the crime of torture that, on the basis of material provided by Venezuela,

it transpires that the State is investigating cases of alleged cruel treatment under article 18 of the Special Law, whereas there do not appear to be any investigations focusing on instances of torture. The fact that Venezuela may be giving a different (yet related) legal qualification to the relevant conduct does not affect the fact that it appears to be investigating the same ‘conduct’ in relation to the conduct underlying the crime of torture.<sup>526</sup>

**(b) Summary of the submissions**

267. Venezuela submits that the Pre-Trial Chamber erred in law by “[relying] on [Venezuela’s] failure to investigate ‘contextual elements’ for crimes against humanity”.<sup>527</sup> In this regard, Venezuela argues that “[t]here was no sound legal or practical basis” for the Pre-Trial Chamber to depart from the consistent jurisprudence of the Court, namely in the cases of *Gaddafi* and *Al-Senussi*, that “domestic investigations need only cover the same or similar conduct as the [Prosecutor’s investigation]: they do not need to cover identical conduct or the same legal qualification”.<sup>528</sup> In particular, Venezuela contends that since “[t]he existence of an organisational policy is a matter that concerns knowledge, intent and modes of liability at the domestic level”, this element is “irrelevant to the admissibility assessment”, and, in any event, “is, in fact, satisfied by the materials presented by [Venezuela]”, which demonstrate the “domestic investigations pursuing several alleged crimes either in different locations at the same time period or in the same location over a period of time”,<sup>529</sup> “[i]rrespective of the ‘label’ attached to [the] cases”.<sup>530</sup>

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<sup>525</sup> [Impugned Decision](#), para. 116.

<sup>526</sup> [Impugned Decision](#), para. 125 (footnotes omitted).

<sup>527</sup> [Appeal Brief](#), para. 123.

<sup>528</sup> [Appeal Brief](#), paras 123, 125, 128; Venezuela’s Oral Submissions, [T-2](#), p. 15, lines 3-13; p. 17, lines 13-15; p. 19, lines 2-6; p. 20, lines 17-22.

<sup>529</sup> [Appeal Brief](#), para. 125.

<sup>530</sup> [Appeal Brief](#), paras 125, 127.

268. Venezuela also submits that the Pre-Trial Chamber erred both in law and in fact by “rely[ing] on specific legal classifications and unproven facts as the basis for its comparison” in the application of the “substantial mirroring” test.<sup>531</sup> In support, Venezuela avers that, considering the statutory role of the Court as “a neutral adjudicatory body” and “given the absence of any prior judicial determination that there was a reasonable basis for concluding that specific crimes or crimes against humanity had occurred”, the Pre-Trial Chamber erred by “using predetermined legal labels as its benchmark for the ‘substantial mirroring’ test” and “[relying] on the assumption that crimes against humanity must have been committed”.<sup>532</sup>

269. Lastly, Venezuela submits that these alleged errors invalidate the outcome of the Impugned Decision and warrant its reversal, because if the Pre-Trial Chamber had not erred by focusing on chapeau elements rather than underlying acts, it would have found that the threshold for deferring to domestic jurisdiction was met.<sup>533</sup>

270. In his response to the Appeal Brief, the Prosecutor submits that Venezuela’s arguments under this sub-ground of appeal “do not adequately describe the [Impugned] Decision and rely on erroneous legal propositions”,<sup>534</sup> as the Pre-Trial Chamber did not require Venezuela to “label” its crimes as crimes against humanity.<sup>535</sup> Rather, the Pre-Trial Chamber correctly focused on conduct, and not on legal labels, by finding that Venezuela was not investigating “factual allegations underlying the contextual elements of crimes against humanity”.<sup>536</sup> In this regard, relying on the *Philippines* OA Judgment, the Prosecutor argues that “when the [Prosecutor] intends to investigate crimes against humanity”, the relevant State is required to demonstrate that it is investigating and prosecuting the relevant “patterns” and “the factual allegations [...] underlying the contextual elements of crimes against humanity in order to succeed in its deferral request”.<sup>537</sup> It is because, in the view of the Prosecutor, an investigation of crimes against humanity “requires [...] ascertain[ing] the existence of specific factual allegations that

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<sup>531</sup> [Appeal Brief](#), para. 129.

<sup>532</sup> [Appeal Brief](#), para. 129.

<sup>533</sup> [Appeal Brief](#), para. 130.

<sup>534</sup> [Prosecutor’s Response](#), para. 119.

<sup>535</sup> [Prosecutor’s Response](#), para. 116.

<sup>536</sup> [Prosecutor’s Response](#), para. 116 (emphasis in original omitted), referring to [Impugned Decision](#), para. 107.

<sup>537</sup> [Prosecutor’s Response](#), para. 118, referring to [Philippines OA Judgment](#), paras 106, 163; Prosecutor’s Oral Submissions, [T-2](#), p. 21, lines 8-11; p. 21, line 19 to p. 22, line 4.

are not necessarily encompassed by investigating isolated acts of detention and physical assault”, in order to “adequately examine and assess, and potentially determine, the breadth of potential criminal liability, culpability in the situation, and the scope of the harms and the interests protected by those contextual elements”.<sup>538</sup> In particular, the Prosecutor contends that the element of a State or organisational policy, which “does not need to be a pre-established design or plan” and can be “a plan that crystallises and develops only as actions are undertaken by perpetrators”, “ensures that an attack against the civilian population has a ‘collective’ dimension”, which is an essential aspect of crimes against humanity.<sup>539</sup>

271. According to the Prosecutor, the Pre-Trial Chamber correctly found that Venezuela “has not shown that its investigations and prosecutions considered any of these factors and related factual allegations to establish the existence or non-existence of such ‘patterns’”.<sup>540</sup> Moreover, the Prosecutor argues that, unlike Libya in the case of *Al-Senussi*,<sup>541</sup> Venezuela “has affirmed that it is not investigating crimes against humanity, and appears to have ruled out their possibility *a priori*”, without providing any information as to whether an investigation in this regard was conducted or how the factual conclusions were reached.<sup>542</sup>

272. The Prosecutor also submits that, contrary to Venezuela’s claim, the Pre-Trial Chamber “did not ‘assume’ that the domestic investigations would establish the existence of crimes against humanity”.<sup>543</sup> Rather, the Pre-Trial Chamber correctly, as a first step of a complementarity assessment, sought to determine whether domestic investigations of certain conduct, including patterns, existed, and correctly applied the Court’s legal framework by requiring Venezuela to substantiate its Deferral Request to discharge its burden of proof under article 18 of the Statute.<sup>544</sup>

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<sup>538</sup> [Prosecutor’s Response](#), para. 117. *See also* Prosecutor’s Oral Submissions, [T-2](#), p. 22, lines 1-4.

<sup>539</sup> [Prosecutor’s Response](#), para. 118; Prosecutor’s Oral Submissions, [T-2](#), p. 27, lines 5-12; p. 89, lines 15-17.

<sup>540</sup> [Prosecutor’s Response](#), para. 119; Prosecutor’s Oral Submissions, [T-2](#), p. 22, line 21 to p. 23, line 8; p. 90, lines 7-13, *referring to* [Impugned Decision](#), paras 104, 106.

<sup>541</sup> [Prosecutor’s Response](#), para. 120.

<sup>542</sup> [Prosecutor’s Response](#), para. 119; Prosecutor’s Oral Submissions, [T-2](#), p. 23, line 15 to p. 24, line 2, *referring to* [Impugned Decision](#), paras 106-107.

<sup>543</sup> [Prosecutor’s Response](#), para. 122.

<sup>544</sup> [Prosecutor’s Response](#), para. 122.

273. The OPCV submits that the Pre-Trial Chamber, in finding that “it appears that Venezuela is indeed not investigating the factual allegations underlying the contextual elements of crimes against humanity”,<sup>545</sup> correctly used, as a comparator, “the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to their criminal responsibility for the conduct described in those incidents” in its assessment of whether the domestic case sufficiently mirrors the potential cases before the Court.<sup>546</sup> The OPCV adds that “the evidence presented by a State in this regard must be of a ‘sufficient degree of specificity and probative value’ which demonstrates that it is indeed genuinely investigating the case”.<sup>547</sup> Lastly, the OPCV contends that it cannot be said that crimes against humanity are being investigated unless the contextual elements, which are essential to establish crimes against humanity, are part of a domestic investigation,<sup>548</sup> and that the Pre-Trial Chamber “properly assessed [...] and drew the correct conclusions as to the lack of relevant domestic investigations [...] from Venezuela’s multiple and unsubstantiated statements” in this regard.<sup>549</sup>

274. The Victims, in their representations, submit that at no time the Pre-Trial Chamber required that there be a complete overlap of the legal qualification or *nomen iuris* of the punishable acts.<sup>550</sup> Rather, in the Victims’ view, what was essential was that the crime be covered by Venezuela’s law, in such a way that the factual or objective aspect of the punishable act is contained in the applicable norm and penalty.<sup>551</sup> The Victims also submit that (i) Venezuela is not investigating the factual allegations underlying the contextual elements of crimes against humanity;<sup>552</sup> (ii) the focus of the domestic investigations appears generally to be directed at direct and/or low-level perpetrators;<sup>553</sup>

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<sup>545</sup> [OPCV Observations](#), para. 84, referring to [Impugned Decision](#), para. 107.

<sup>546</sup> [OPCV Observations](#), paras 83-84; OPCV Oral Submissions, [T-2](#), p. 29, lines 12-15, referring to [Impugned Decision](#), para. 107.

<sup>547</sup> [OPCV Observations](#), para. 85, OPCV Oral Submissions, [T-2](#), p. 29, lines 16-23, referring to [Ruto et al. OA Judgment](#), para. 62.

<sup>548</sup> OPCV Oral Submissions, [T-1](#), p. 33, line 23 to p. 34, line 1; [T-2](#), p. 28, lines 1-16. See also [T-2](#), p. 30, line 16 to p. 31, line 2.

<sup>549</sup> [OPCV Observations](#), para. 84; [T-2](#), p. 29, lines 12-15; p. 30, lines 3-11, referring to [Impugned Decision](#), para. 107.

<sup>550</sup> Victims’ Representations, Annex 148, para. 40.

<sup>551</sup> Victims’ Representations, Annex 148, para. 40.

<sup>552</sup> Victims’ Additional Representations, Annex 1, p. 3; Victims’ Additional Representations, Annex 2, para. 39; Victims’ Additional Representations, Annex 3, para. 15.

<sup>553</sup> Victims’ Additional Representations, Annex 1, p. 3; Victims’ Additional Representations, Annex 2, paras 29, 31.

and that (iii) Venezuela's purported investigations merely seek to hide the systematic character of the crimes against humanity committed in Venezuela.<sup>554</sup> The Victims add that Venezuela cannot use its failure to effectively incorporate the fundamental principles of international crimes as a shield to avoid conducting a legitimate and thorough investigation into crimes against humanity, including the contextual elements.<sup>555</sup> Lastly, the Victims attest to the existence of a State policy and a distinct pattern in cases of torture, arbitrary detention and persecution.<sup>556</sup>

275. The OAS Panel submits that the Pre-Trial Chamber's finding relating to Venezuela's failure to investigate the contextual elements of the alleged crimes against humanity was correct.<sup>557</sup> The OAS Panel argues that the absence of domestic investigations and prosecutions regarding the widespread and systematic nature of the crimes against humanity, as well as the pattern of focusing exclusively on low level perpetrators and treating these cases as isolated incidents, disregard the systematic nature and gravity of the crimes, and also indicate a deliberate strategy to shield the high-level individuals who have defined and implemented the state policy underlying the widespread and systematic attack against the civilian population from full accountability.<sup>558</sup>

### **(c) Determination by the Appeals Chamber**

276. The Appeals Chamber recalls that, in order to seek a deferral of the Prosecutor's investigation, a State must demonstrate the existence of national investigations with respect to "the same groups or categories of individuals in relation to the relevant criminality, including the patterns and forms of criminality, within a situation".<sup>559</sup> A pre-trial chamber's assessment in this context is a situation-specific and largely

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<sup>554</sup> Victims' Additional Representations, Annex 1, p. 3.

<sup>555</sup> Victims' Additional Representations, Annex 3, paras 29, 31.

<sup>556</sup> Victims' Additional Representations, Annex 3, paras 42, 46-49.

<sup>557</sup> [OAS Panel's Observations](#), para. 67.

<sup>558</sup> [OAS Panel's Observations](#), paras 67-68.

<sup>559</sup> [Philippines OA Judgment](#), para. 106.

fact-driven inquiry, requiring an analysis of all the circumstances of the situation, including the patterns and forms of alleged criminality.<sup>560</sup>

277. The Appeals Chamber further recalls that, as discussed above under the first ground of appeal,<sup>561</sup> the relevant State must provide information not only as to domestic investigations or prosecutions, but also, as stipulated in article 18(2) of the Statute and rule 52(1) of the Rules, “with respect to criminal acts which may constitute crimes referred to in article 5 and which *relate to the information provided in the notification to States*”.<sup>562</sup> The Prosecutor’s notification must thus contain sufficiently specific information as to the facts and circumstances underpinning the elements of the alleged criminal acts within the Court’s jurisdiction that he or she intends to investigate.

278. In the situation at hand, the Appeals Chamber recalls its finding that the information provided by the Prosecutor sufficiently informed Venezuela of the scope and general parameters of the Prosecutor’s intended investigation as follows: alleged crimes against humanity of imprisonment or other severe deprivation of physical liberty, torture, rape and/or other forms of sexual violence of comparable gravity and persecution, under article 7(1) of the Statute, committed by civilian authorities, members of the armed forces and pro-government individuals.<sup>563</sup> Relevantly, the Prosecutor provided: groups of persons allegedly involved in their commission;<sup>564</sup> types of crimes that were allegedly committed;<sup>565</sup> and descriptions of the underlying acts.<sup>566</sup>

279. In this regard, the Appeals Chamber observes that the following requirements, including the contextual elements of crimes against humanity, can be delineated from article 7(1) and (2) of the Statute,<sup>567</sup> as well as the “Introduction” to “Crimes against

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<sup>560</sup> [Philippines OA Judgment](#), para. 106. *See also*, in the context of a case, [Gaddafi OA4 Judgment](#), paras 62, 71.

<sup>561</sup> *See* paragraph 76 above.

<sup>562</sup> Emphasis added.

<sup>563</sup> *See* Article 18(1) Notification, p. 2; Annex A to Article 18(1) Notification, para. 3; 19 October 2021 Letter, paras 5, 15-46.

<sup>564</sup> Annex A to Article 18(1) Notification, paras 5-6.

<sup>565</sup> Annex A to Article 18(1) Notification, paras 3-4.

<sup>566</sup> 19 October 2021 Letter, paras 15-40.

<sup>567</sup> Article 7(1) of the Statute provides that “‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Article 7(2)(a) of the Statute indicates that “[a]ttack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”.

humanity”, provided in the Elements of Crimes: (i) underlying acts; (ii) an attack directed against any civilian population; (iii) pursuant to or in furtherance of a State or organisational policy; (iv) the widespread or systematic nature of the attack; (v) a nexus between the individual act and the attack; and (vi) knowledge of the attack. Paragraph 3 of the “Introduction” to “Crimes against humanity”, the Elements of Crimes states that the “‘policy to commit such attack’ requires that the State or organization actively promote or encourage such an attack against a civilian population”. Footnote 6 to the “Introduction” to “Crimes against humanity”, the Elements of Crimes further provides that:

A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

280. The Appeals Chamber recalls that “the inclusion of the contextual elements as constitutive elements of the crimes allows [for] the identification of the legal interests protected by each provision”, and that while “war crimes give protection in criminal law to persons in times of armed conflict”, crimes against humanity “protect persons where there is a widespread and [/or] systematic attack on a civilian population”.<sup>568</sup> In this regard, the Appeals Chamber recalls that crimes against humanity can occur also in times of peace so long as a widespread or systematic attack against a civilian population is established.<sup>569</sup> Indeed, a widespread or systematic attack directed against any civilian population is the hallmark, as well as a cross-cutting element of crimes against humanity.<sup>570</sup> Therefore, in order to pursue the legal interests protected by crimes against humanity, a State, which has not incorporated crimes against humanity in its domestic law, while not required to investigate the alleged criminal acts under the legal

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<sup>568</sup> [Ongwen Appeal Judgment](#), para. 1656, referring to Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Trial Judgment](#), 4 February 2021, ICC-02/04-01/15-1762-Red, para. 2820; see also para. 1654 (“[A]s the Trial Chamber correctly stated in the Conviction Decision, crimes against humanity and war crimes ‘reflect (partly) different forms of criminality, in that they complement, in terms of protected interests, the incrimination of the individual ‘specific’ crimes - which, in turn, are therefore distinct depending (also) on the relevant contextual elements’”).

<sup>569</sup> [Ongwen Appeal Judgment](#), para. 1656.

<sup>570</sup> See *The Prosecutor v. Bosco Ntaganda*, [Separate opinion of Judge Luz Del Carmen Ibáñez Carranza on Mr Ntaganda’s appeal](#), 30 March 2021, ICC-01/04-02/06-2666-Anx3 (hereinafter: “*Ntaganda Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza*”), para. 187.

qualification of crimes against humanity, must nevertheless investigate the factual allegations underpinning the contextual elements of such crimes. This includes, in particular, an investigation into the factual allegations underpinning the widespread or systematic nature of the attack and those that may allow the conclusion that the attack was carried out pursuant to a “policy”.<sup>571</sup>

281. Accordingly, when the scope of the Prosecutor’s intended investigation, as set out in an article 18(1) notification, includes allegations relating to crimes against humanity, a State seeking to assert its primary jurisdiction over such crimes must demonstrate the existence of an advancing process of domestic investigations and prosecutions of the facts and circumstances underlying the alleged crimes, including the factual allegations in support of the aforementioned contextual elements of crimes against humanity that were sufficiently notified through an article 18(1) notification of the Prosecutor. As a result, if a State does not investigate the factual allegations underpinning the contextual elements of the alleged crimes against humanity that were sufficiently notified to it, it follows that it will not be able to demonstrate, in the proceedings under article 18(2) of the Statute, that the domestic criminal proceedings sufficiently mirror the scope of the Prosecutor’s intended investigation.

282. In this context, the Appeals Chamber further notes Venezuela’s arguments in the Appeal Brief that the Statute does not impose any obligation on States Parties to incorporate crimes against humanity into domestic legislation and that, therefore, “[t]he existence of an organisational policy [...] is irrelevant to the admissibility

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<sup>571</sup> See [Ntaganda A A2 Judgment](#), para. 381 (“[A]ccording to article 7(2) of the Statute, the required ‘State or organizational policy’ is a policy to commit an attack, being ‘a course of conduct involving the multiple commission of [criminal] acts [...] against any civilian population’”); [Ntaganda Separate Opinion of Judge Luz Del Carmen Ibáñez Carranza](#), para. 153 (“[A] State or organisational policy can be inferred from various factors, including the level of planning of the attack, recurrent patterns of violence, the involvement of the State or organisational forces in the commission of crimes, statements attributable to the State or organisation condoning or encouraging the commission of crimes, an underlying motivation, deliberate omissions by the organisational hierarchy, the *modus operandi*, etc”). The Appeals Chamber further observes that the chambers of this Court found that the existence of a “policy” can be deduced from a repeated occurrence and a regular pattern of a series of events (see Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Ngudjolo Chui*, [Decision on the confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717, para. 396; Pre-Trial Chamber II, *Situation in the Republic of Kenya*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya](#), 31 March 2010, ICC-01/09-19-Corr, para. 84; Trial Chamber II, *Prosecutor v. Germain Katanga*, [Judgment pursuant to article 74 of the Statute](#), 7 March 2014, ICC-01/04-01/07-3436-tENG, para. 1109; Pre-Trial Chamber III, *Situation in the Republic of Côte d’Ivoire*, [Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire](#), 15 November 2011, ICC-02/11-14-Corr, para. 43).



assessment”;<sup>572</sup> as well as its statement at the hearing that “[c]ompliance with the Statute [...] does not require having in your own law international crimes that mirror those of the Rome Statute in terms of legal qualification”.<sup>573</sup> Venezuela also argues that a State fulfils its duty “to exercise its criminal jurisdiction over those responsible for international crimes” in circumstances where a State has jurisdiction over the conduct in question as a domestic offence and it is unnecessary for the State to fulfil the contextual elements.<sup>574</sup>

283. The Appeals Chamber notes in this respect that the Preamble of the Statute stipulates that an “effective prosecution” of “the most serious crimes of concern to the international community as a whole” “must be ensured by taking measures at the national level”.<sup>575</sup> The Preamble also imposes on every State “the duty to exercise its criminal jurisdiction over those responsible for international crimes”.<sup>576</sup> Therefore, while the Statute does not expressly impose an obligation on States Parties to incorporate crimes against humanity into their domestic legislation, such incorporation may facilitate the fulfilment of their duty to exercise criminal jurisdiction over “those responsible for international crimes”. The Appeals Chamber agrees in this regard with the Pre-Trial Chamber that “generally, States Parties are encouraged to transpose the Statute into their domestic legislation”.<sup>577</sup>

284. In the same vein, the Appeals Chamber recalls that in the *Al-Senussi* OA6 Judgment, in the context of an admissibility assessment under article 19 of the Statute, the Appeals Chamber held, in relation to the Defence’s submission that “the international crime of persecution cannot be charged at the national level, as no corresponding provisions under Libyan law exist”,<sup>578</sup> that “there is no requirement in the Statute for a crime to be prosecuted as an international crime domestically”, since “it is the alleged conduct, as opposed to its legal characterisation, that matters” in the assessment of “whether the domestic case sufficiently mirrors the case before the Court”.<sup>579</sup> In that judgment, the Appeals Chamber concluded that “the conduct underlying the crime of

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<sup>572</sup> See [Appeal Brief](#), paras 124-125; [Response to OAS Panel Observations](#), para. 38.

<sup>573</sup> Venezuela’s Oral Submissions, [T-2](#), p. 36, lines 14-16.

<sup>574</sup> [Appeal Brief](#), para. 124.

<sup>575</sup> Fourth paragraph of the Preamble.

<sup>576</sup> Sixth paragraph of the Preamble.

<sup>577</sup> [Impugned Decision](#), para. 131, fn 236.

<sup>578</sup> [Al-Senussi OA6 Judgment](#), para. 118.

<sup>579</sup> [Al-Senussi OA6 Judgment](#), para. 119 (emphasis in original omitted).

persecution is sufficiently covered in the Libyan proceedings so that the conduct being investigated is substantially the same as that alleged before the Court”.<sup>580</sup> The Appeals Chamber emphasised that the pre-trial chamber’s finding in this regard was “based upon the *combined* considerations of the crimes charged at the national level and the provisions [...] of the Libyan Criminal Code”.<sup>581</sup> The Appeals Chamber considers that this principle also applies in the context of article 18 proceedings, where a State, in seeking a deferral of the Prosecutor’s investigation including allegations relating to crimes against humanity, is not required to demonstrate that it investigates the alleged criminal acts under the legal qualification of crimes against humanity, as long as its domestic investigations and prosecutions cover the factual allegations underpinning the aforementioned contextual elements of the alleged crimes against humanity.

285. In the instant situation, the Appeals Chamber finds that the Pre-Trial Chamber correctly followed this approach, reiterating the finding it had made in another decision, namely:

Whereas the Court’s investigations concern international crimes, with certain contextual elements, domestic investigations may follow different approaches and a State need not investigate conduct as crimes against humanity, for example, or allege the same modes of liability found in the Rome Statute to still investigate the persons and conduct.<sup>582</sup>

286. In light of the foregoing considerations, the Appeals Chamber rejects Venezuela’s argument that “[t]he existence of an organisational policy [...] is irrelevant to the admissibility assessment”<sup>583</sup> in the present situation, where the Prosecutor alleged that “the policy to attack the targeted population was at a minimum encouraged or approved by the Government of Venezuela and carried out primarily by members of the State security forces”.<sup>584</sup>

287. Turning to Venezuela’s contention that an alleged widespread or systematic attack is investigated where national authorities investigate “several alleged crimes either in different locations at the same time period or in the same location over a period of

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<sup>580</sup> [Al-Senussi OA6 Judgment](#), para. 122.

<sup>581</sup> [Al-Senussi OA6 Judgment](#), para. 121 (emphasis in original).

<sup>582</sup> [Impugned Decision](#), para. 102, referring to [Philippines Article 18\(2\) Decision](#), para. 68.

<sup>583</sup> See [Appeal Brief](#), para. 125.

<sup>584</sup> 19 October 2021 Letter, para. 7; [Impugned Decision](#), para. 101.

time”,<sup>585</sup> the Appeals Chamber notes that Venezuela does not refer to any national investigation that compared or otherwise jointly examined findings made in the course of investigations into individual alleged crimes with a view to assessing whether such crimes were widespread or systematic. Furthermore, the Appeals Chamber observes that, on the one hand, Venezuela submits in the Appeal Brief that it was not necessary for it to investigate the contextual elements for crimes against humanity; and that, in any event, its investigations of individual and isolated acts would reflect the alleged existence of a widespread or systematic attack.<sup>586</sup> On the other hand, Venezuela submitted, both before the Pre-Trial Chamber and during the hearing before the Appeals Chamber, that it denies the alleged occurrence of crimes against humanity, in particular the existence of a systematic nature and a State policy in this regard, and that the Court thus lacks material jurisdiction over the Situation.<sup>587</sup> The Appeals Chamber also observes that, during the hearing before the Appeals Chamber, Venezuela submitted that “there were more than 17,000 investigations which have been carried out by the ministry”, and that “these acts, when examined objectively, [...] are crimes against human rights, [...] not crimes against humanity”.<sup>588</sup> Venezuela thus apparently contests the systematic nature of the alleged acts and the existence of a State policy.

288. The Appeals Chamber notes that for a State to be successful in seeking a deferral of the Prosecutor’s investigation, it is not enough for it to make a blanket statement that the Court lacks material jurisdiction on the basis of the absence of contextual elements of the alleged crimes against humanity. In such a situation, the State must support and substantiate its assertion by demonstrating which concrete and tangible investigative steps it undertook to reach that conclusion.

289. In this context, the Appeals Chamber notes that Venezuela did not provide the Pre-Trial Chamber with sufficient information as to Venezuela’s domestic proceedings in respect of the same groups or categories of individuals in relation to the factual allegations underpinning the contextual elements of the alleged crimes against humanity,

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<sup>585</sup> [Appeal Brief](#), para. 125.

<sup>586</sup> [Appeal Brief](#), para. 125.

<sup>587</sup> Venezuela’s Oral Submissions, [T-2](#), p. 32, lines 7-9; p. 96, line 25 to p. 97, line 2; p. 99, lines 14-16; p. 100, line 20 to p. 101, line 6. *See also* [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 49.

<sup>588</sup> Venezuela’s Oral Submissions, [T-2](#), p. 85, lines 13-20.

including the “patterns” of criminality.<sup>589</sup> As discussed above, domestic investigations into isolated acts of detention and physical assaults allegedly perpetrated by direct low-level perpetrators without examining the systematic nature of their commission and investigating the factual allegations underpinning the contextual elements, albeit the subject-matter of “17,000 investigations”, fail to address the distinct legal interests protected by crimes against humanity.

290. The Pre-Trial Chamber found in this regard that “Venezuela does not point to any specific domestic criminal investigations to support its conclusions on the factual allegations underlying the alleged crimes against humanity that the Prosecution intends to investigate”.<sup>590</sup> The Pre-Trial Chamber also examined the relevant material submitted by Venezuela to conclude that “Venezuela is indeed not investigating the factual allegations underlying the contextual elements of crimes against humanity”, and that it “appears to *a priori* conclude that the crimes alleged by the Prosecution were not committed as part of a widespread or systematic attack directed against the civilian population”.<sup>591</sup> The Appeals Chamber finds that Venezuela fails to show any errors in the Pre-Trial Chamber’s findings in this respect.

291. As an example of the Pre-Trial Chamber’s alleged erroneous approach, Venezuela refers to the domestic proceedings concerning the alleged acts of torture and cruel and inhumane treatment associated with arrest and detention,<sup>592</sup> from which, in its view, “it is clear that the scope of alleged criminality in these investigations satisfies the same objective as an investigation into alleged crimes against humanity”.<sup>593</sup>

292. The Appeals Chamber, however, notes the Pre-Trial Chamber’s finding that in some of these proceedings, “investigative steps either focused on lower-ranking perpetrators and/or on accessing information on the victims and not the alleged

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<sup>589</sup> See [Philippines OA Judgment](#), paras 106, 163.

<sup>590</sup> [Impugned Decision](#), para. 106 (emphasis in original omitted).

<sup>591</sup> [Impugned Decision](#), para. 107.

<sup>592</sup> [Appeal Brief](#), para. 126, referring to Annexes 2-8, 10, 13-14, 16, 18-19, 21-22, 26, 28-30, 33-34, 37, 41, 43-44, 47, 55, 57-58, 61 to [Transmission of Translated Material](#). See also [Response to OAS Panel Observations](#), para. 44.

<sup>593</sup> [Appeal Brief](#), para. 127.

perpetrators”.<sup>594</sup> Some of these cases concern alleged direct perpetrators.<sup>595</sup> In some of these proceedings, “a common investigative step consists of requesting the duty roster and the daily report log for the date(s) of the incident(s)”, which, in the view of the Pre-Trial Chamber, “appears to be additional indicia that the focus of the domestic investigations is indeed on the direct perpetrators without enquiries, for example, as to the persons to whom those on duty on the day of the incident would respond”.<sup>596</sup> The Pre-Trial Chamber also noted that in many of these domestic proceedings, there were significant periods of inactivity.<sup>597</sup> The Appeals Chamber finds that these features of the domestic proceedings in question do not support Venezuela’s argument that these proceedings had “the same objective as an investigation into alleged crimes against humanity”.<sup>598</sup> Furthermore, the Appeals Chamber notes that none of these proceedings show any investigative efforts on the part of the competent national authorities to explore possible patterns of criminality, connections between those isolated crimes and other similar crimes, or the existence of a policy. The decontextualised information contained in these case records does not indicate the existence of concrete and progressive investigative steps in relation to the factual allegations underlying the contextual elements of crimes against humanity. Accordingly, the Appeals Chamber finds that Venezuela fails to show that the Pre-Trial Chamber’s conclusion in this regard was unreasonable.

293. With respect to Venezuela’s argument that the Pre-Trial Chamber applied “an unbalanced standard” by “unfairly favour[ing]” the Prosecutor through the use of “predetermined legal labels”,<sup>599</sup> the Appeals Chamber recalls its finding under the first ground of appeal that “[o]ne of [the] purposes [of the Prosecutor’s article 18(1) notification] is to enable the State concerned to inform the Court that it is conducting or

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<sup>594</sup> [Impugned Decision](#), para. 114, *referring to* Annex 43 to [Transmission of Translated Material](#) (Noting that “Annex 43 suggests that a disciplinary measure was taken against one of the officers alleged to be a direct perpetrator (namely his dismissal) but no investigative or disciplinary measures are shown with regard to the commanding Lieutenant Colonel”); Annex 57 to [Transmission of Translated Material](#).

<sup>595</sup> [Impugned Decision](#), para. 115, *referring to, inter alia*, Annexes 5, 10, 16, 18, 28, 30, 44, 47 to [Transmission of Translated Material](#).

<sup>596</sup> [Impugned Decision](#), para. 116, *referring to, inter alia*, Annexes 3-4, 7, 14, 18, 21, 37, 43, 58 to [Transmission of Translated Material](#).

<sup>597</sup> [Impugned Decision](#), para. 91, *referring to, inter alia*, Annexes 4, 7-8, 13, 18, 22, 26, 29, 33, 41, 55, 58 to [Transmission of Translated Material](#).

<sup>598</sup> *See* [Appeal Brief](#), para. 127.

<sup>599</sup> [Appeal Brief](#), para. 129.

has conducted the relevant investigations, and request a deferral”.<sup>600</sup> The Appeals Chamber further recalls its finding under the third ground of appeal that while a referral by a State Party requires the Prosecutor, in principle, to initiate an investigation into the specific situation, the Prosecutor has to first make a determination, pursuant to article 53(1) of the Statute, as to whether there is, as a matter of fact, a reasonable basis to initiate an investigation into the situation.<sup>601</sup>

294. Given the different purposes of and evidentiary standards applicable respectively to the Prosecutor’s article 18(1) notification and a State’s deferral request as outlined above, the Appeals Chamber considers that Venezuela mischaracterises the Impugned Decision. Contrary to Venezuela’s argument, there is no indication in the Impugned Decision that the Pre-Trial Chamber assigned “a significant degree of deference” to the Prosecutor’s investigation or that it relied on “the assumption that crimes against humanity must have been committed”.<sup>602</sup> The Pre-Trial Chamber made no assumption of this kind. Rather, it examined the material provided by Venezuela to determine whether the national investigations covered the factual allegations underpinning the elements of crimes against humanity, as included in the Prosecutor’s Article 18 Notification. Accordingly, the Appeals Chamber finds that Venezuela fails to demonstrate any error of the Pre-Trial Chamber in this regard.

295. Having rejected all arguments under this sub-ground of appeal, the Appeals Chamber rejects sub-ground of appeal 4.3 in its entirety.

4. *Sub-ground 4.4: The alleged error in requiring domestic investigations to cover discriminatory intent*

**(a) Relevant parts of the Impugned Decision**

296. On the basis of the material provided by Venezuela, the Pre-Trial Chamber observed that:

With regard to the conduct investigated, in nearly half of the cases, the criminal conduct in question or the alleged crimes do not appear to be sufficiently specified in the relevant documents, if at all. Whereas, in some cases, the criminal conduct or the alleged crimes are qualified in terms of the ‘Law to Prevent and Punish Torture and Other Cruel, Inhuman or Degrading

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<sup>600</sup> See paragraph 99 above.

<sup>601</sup> See paragraph 219 above.

<sup>602</sup> See [Appeal Brief](#), para. 129.

Treatment' [...], primarily as cruel treatment under article 18 of said law, in many cases, the conduct is, if at all, qualified in very broad terms, such as by reference to a 'human rights violation'.<sup>603</sup>

297. The Pre-Trial Chamber noted that “[i]n relation to the conduct underlying the crime of persecution, the material provided by Venezuela does not allow for the conclusion to be drawn that the State is investigating factual allegations of discriminatory intent in relation to the crimes investigated”.<sup>604</sup>

#### (b) Summary of the submissions

298. Venezuela submits that the Pre-Trial Chamber committed a reversible error of law by adopting “an absolutist approach” of “focusing on the ‘labels’ and domestic classification of conduct rather than the content of the conduct”, “fail[ing] to follow appellate precedent” of the *Gaddafi* and *Al-Senussi* cases, and thereby “disregarding investigations into human rights violations on the grounds that they were not being labelled as criminal offences”.<sup>605</sup> Venezuela argues that in “rejecting criminal investigations with the sweeping statement that ‘the material provided by Venezuela does not allow for the conclusion to be drawn that the State is investigating factual allegations of discriminatory intent in relation to the crimes investigated’”,<sup>606</sup> the Pre-Trial Chamber failed to (i) address the fact that “the 2017 Law against Hate, for Peaceful Coexistence and Tolerance acknowledges that any criminal act that is committed due to the victim’s membership of a particular ethnic, racial, religious or political group shall be considered as an aggravating circumstance in determining the appropriate sentence”; and (ii) “acknowledge that when coupled with evidence of domestic investigations into serious offences such as torture and cruel treatment and human rights violations, there were clear indications that the domestic proceedings encompassed acts that would amount to persecution under the Rome Statute, and otherwise overlapped with the acts set out in the Article 18(1) Notification”.<sup>607</sup>

299. The Prosecutor submits that Venezuela was required to conduct investigations to ascertain the facts as to “whether the alleged criminal acts were carried out by

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<sup>603</sup> [Impugned Decision](#), para. 90 (footnotes omitted).

<sup>604</sup> [Impugned Decision](#), para. 125.

<sup>605</sup> [Appeal Brief](#), paras 132-134. *See also* Venezuela’s Oral Submissions, [T-2](#), p. 17, lines 13-15; p. 20, lines 17-22; p. 61, lines 3-12; [Response to OAS Panel Observations](#), para. 38.

<sup>606</sup> [Appeal Brief](#), para. 132, *referring to Impugned Decision*, para. 125.

<sup>607</sup> [Appeal Brief](#), para. 135; [Response to OAS Panel Observations](#), para. 39.

perpetrators on discriminatory grounds”,<sup>608</sup> and that, contrary to Venezuela’s arguments,<sup>609</sup> the Pre-Trial Chamber’s conclusion that the material provided by Venezuela did not allow it to find that Venezuela has investigated factual allegations of discriminatory intent in relation to the crimes investigated was “reasonable, correct and sufficiently reasoned”.<sup>610</sup> The Prosecutor first argues that the Pre-Trial Chamber “did not exclude as irrelevant [Venezuela’s] purported investigations into human rights violations”.<sup>611</sup> Rather, the Pre-Trial Chamber’s observations and description of Venezuela’s material in this regard imply that Venezuela’s material did not enable the Pre-Trial Chamber to ascertain the scope of the domestic criminal proceedings, and this assessment is “essential for a chamber to determine whether the domestic proceedings sufficiently mirrored the scope of the Prosecution’s intended investigation”.<sup>612</sup> The Prosecutor also avers that Venezuela raises, for the first time on appeal, the arguments that (i) it is investigating the factual allegations underpinning the crime of persecution; and that (ii) the 2017 Law against Hate, for Peaceful Coexistence and Tolerance could potentially apply to capture the discriminatory intent, at least for criminal acts post-dating the enactment of this law, *i.e.* November 2017.<sup>613</sup> According to the Prosecutor, the Pre-Trial Chamber thus did not address these arguments since Venezuela had only argued that the law in question could not apply retroactively.<sup>614</sup> Lastly, the Prosecutor contends that “[i]n any event, the [Pre-Trial] Chamber’s observation about the lack of investigation of the discriminatory intent at the domestic level was not a determinative factor for its [Impugned] Decision”,<sup>615</sup> and, therefore, “even if the [Pre-Trial] Chamber had erred in its assessment, [...] the [Pre-Trial] Chamber would have still reached the same conclusion”.<sup>616</sup>

300. The OPCV submits that Venezuela “misunderstood and/or misapplied the ‘same conduct’ test”, as the Pre-Trial Chamber “correctly recognised that different legal qualifications do not influence the assessment on whether Venezuela appears (or not) to

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<sup>608</sup> Prosecutor’s Oral Submissions, [T-2](#), p. 67, lines 6-12.

<sup>609</sup> [Prosecutor’s Response](#), para. 124.

<sup>610</sup> [Prosecutor’s Response](#), para. 127; Prosecutor’s Oral Submissions, [T-2](#), p. 68, lines 5-8.

<sup>611</sup> [Prosecutor’s Response](#), para. 125.

<sup>612</sup> [Prosecutor’s Response](#), para. 125, referring to [Gaddafi OA4 Judgment](#), paras 83, 85-86; [Simone Gbagbo OA Judgment](#), paras 89, 92.

<sup>613</sup> [Prosecutor’s Response](#), para. 126.

<sup>614</sup> [Prosecutor’s Response](#), para. 126. See also Prosecutor’s Oral Submissions, [T-2](#), p. 67, line 20 to p. 68, line 1.

<sup>615</sup> [Prosecutor’s Response](#), para. 127, referring to [Impugned Decision](#), paras 120, 130-131.

<sup>616</sup> [Prosecutor’s Response](#), para. 127.



be investigating the same conduct”, and Venezuela fails to show whether or how its domestic human rights investigations covered the discriminatory intent.<sup>617</sup> The OPCV further argues that, unlike the *Al-Senussi* case, in which the admissibility test was applied to a concrete case and the Appeals Chamber could thus identify the specific domestic offences that Libya envisaged to charge the defendant with, “Venezuela has not reached this stage and did not demonstrate how the crimes allegedly investigated included factual allegations of discriminatory intent”.<sup>618</sup> According to the OPCV, “[i]n these circumstances”, it is “not sufficient to satisfy the preliminary admissibility test under article 18 proceedings” for a State to merely refer to the available domestic legislation or judicial reform actions.<sup>619</sup> The OPCV concludes that “it is essential that the analysis of the discriminatory element is included in the investigation” as this “fundamental element of a crime of persecution” “sheds light on the full extent of the victims’ suffering and the reasons behind their victimisation”, which “mak[e] their suffering distinct from other crimes”.<sup>620</sup>

301. The Victims, in their representations, submit that Venezuela’s institutions, including the Prosecutor’s Office, in coordinated actions with Venezuelan courts, are part of the regime’s political repression structure as an institutional tool for persecution against the political opposition.<sup>621</sup> The Victims also submit that Venezuela treated the relevant facts as isolated incidents and ignored the possible application of the 2017 Law against Hate, for Peaceful Coexistence and Tolerance, thereby failing to include the required elements of the crime of persecution, and that it has been part of the pattern of the State officials’ action to use this 2017 law selectively against the political opposition.<sup>622</sup>

302. The OAS Panel submits that Venezuela’s failure to implement domestic legislation corresponding to the crime against humanity of persecution is “a critical factor in perpetuating a comprehensive *de facto* impunity gap for one of the most widespread forms of crimes against humanity committed within Venezuelan borders since 2014”, and that “establishing discriminatory intent – discerned through contextual evidence and

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<sup>617</sup> [OPCV Observations](#), para. 89.

<sup>618</sup> [OPCV Observations](#), para. 90.

<sup>619</sup> [OPCV Observations](#), para. 91.

<sup>620</sup> OPCV Oral Submissions, [T-2](#), p. 70, lines 14-23; p. 95, lines 5-14.

<sup>621</sup> Victims’ Additional Representations, Annex 1, p. 2.

<sup>622</sup> Victims’ Representations, Annex 148, para. 43.

legal analysis, focusing on [*inter alia*] the discernible patterns of behavior, is a crucial aspect” of investigations concerning the crime against humanity of persecution.<sup>623</sup> The OAS Panel also submits that Venezuela was sufficiently notified of which types of incidents the Prosecutor intends to investigate, and, as a result, Venezuela understood that, in order to meet the standards under article 17 of the Statute, it needed to demonstrate that it was investigating the same specific categories or groups of potential perpetrators involved in the types of crimes of humanity highlighted by the Prosecutor.<sup>624</sup>

**(c) Determination by the Appeals Chamber**

303. The Appeals Chamber recalls its findings under the first and third grounds of appeal (i) that the Pre-Trial Chamber did not err by finding that “the scope of the Prosecution’s intended investigation can be discerned from” the information provided by the Prosecutor, and (ii) that this information sufficiently notified Venezuela of the scope of the Prosecutor’s intended investigation; and notes that this investigation encompasses the alleged crime against humanity of persecution, under article 7 of the Statute, committed by civilian authorities, members of the armed forces and pro-government individuals.<sup>625</sup>

304. In this context, the Appeals Chamber notes that the crime against humanity of persecution is defined in article 7(2)(g) of the Statute as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. Article 7(1)(h) of the Statute further provides that persecution must be committed

against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

305. The Appeals Chamber notes that the crime against humanity of persecution under article 7 of the Statute requires discriminatory intent, as one of its elements is that it is

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<sup>623</sup> [OAS Panel’s Observations](#), para. 64.

<sup>624</sup> [OAS Panel’s Observations](#), para. 66.

<sup>625</sup> See paragraphs 118, 222 above; Article 18(1) Notification, p. 2; Annex A to Article 18(1) Notification, para. 3; 19 October 2021 Letter, paras 5, 34-40.

committed “on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law”. Given the distinct legal interests protected by this element of the crime, as set out in the Article 18(1) Notification, it was not an error for the Pre-Trial Chamber to examine whether the competent authorities investigated “factual allegations of discriminatory intent in relation to the crimes investigated”.<sup>626</sup>

306. As regards Venezuela’s argument that the Pre-Trial Chamber “expressly disregarded and failed to follow appellate precedent” of the *Al-Senussi* OA6 Judgment,<sup>627</sup> the Appeals Chamber notes that Venezuela fails to show which aspects of this judgment the Pre-Trial Chamber allegedly disregarded and failed to follow, nor points to any finding of the Pre-Trial Chamber that suggests a different reading of the judgment.

307. Relatedly, Venezuela refers to “the possibility of addressing matters of discriminatory intent as an aggravating factor in sentencing” in relation to the domestic investigations of the relevant alleged acts characterised as “torture”, “cruel treatment” and “human rights violations”,<sup>628</sup> as well as under the 2017 Law against Hate, for Peaceful Coexistence and Tolerance.<sup>629</sup> However, the Appeals Chamber notes that, as pointed out by the Prosecutor,<sup>630</sup> Venezuela did not argue before the Pre-Trial Chamber that this 2017 law was applied “to capture the discriminatory intent”. Rather, in its Observations to the Prosecutor’s Article 18 Request, Venezuela submitted in response to the Prosecutor’s argument relating to this law that “that Law entered into force in November 2017, i.e., after the alleged acts in 2014 and 2017”, and that the Prosecutor’s argument “would imply a retroactive application of the Law to the detriment of the alleged perpetrator and contrary to Article 24 of the Statute”.<sup>631</sup> Similarly, in the Appeal Brief, Venezuela merely recalls the Prosecutor’s argument that this law enables consideration as an aggravating circumstance in sentencing when a criminal act is committed due to the victim’s membership in a group,<sup>632</sup> without referring to any

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<sup>626</sup> [Impugned Decision](#), para. 125.

<sup>627</sup> [Appeal Brief](#), paras 132-134. *See also* Venezuela’s Oral Submissions, [T-2](#), p. 15, lines 10-13; p. 17, lines 13-15; p. 20, lines 17-22; p. 61, lines 3-12.

<sup>628</sup> [Appeal Brief](#), paras 132-135. *See also* Venezuela’s Oral Submissions, [T-2](#), p. 17, lines 13-15.

<sup>629</sup> *See* [Appeal Brief](#), para. 135.

<sup>630</sup> [Prosecutor’s Response](#), para. 126.

<sup>631</sup> [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 108.

<sup>632</sup> [Appeal Brief](#), para. 135.

specific cases in which such a factor was actually used in the determination of the appropriate sentence.

308. Turning to Venezuela's contention that the Pre-Trial Chamber erred in law by "focusing on [...] domestic classification of conduct rather than the content of the conduct" and thereby "disregarding investigations into human rights violations on the grounds that they were not being labelled as criminal offences",<sup>633</sup> the Appeals Chamber notes that Venezuela fails to indicate any specific domestic investigation or prosecution that the Pre-Trial Chamber purportedly disregarded.

309. Moreover, the Appeals Chamber considers that Venezuela misrepresents the Impugned Decision, as the challenged findings do not indicate that the Pre-Trial Chamber focused only on the legal qualification. Rather, as noted below, the Pre-Trial Chamber correctly assessed whether Venezuela demonstrated an advancing process of domestic investigations of the factual allegations of discriminatory intent in relation to the alleged persecution as a crime against humanity.

310. In one of the impugned findings, the Pre-Trial Chamber expressed concerns that "the criminal conduct in question or the alleged crimes do not appear to be sufficiently specified in the relevant documents, if at all".<sup>634</sup> It is in this context that the Pre-Trial Chamber observed that "in many cases, the conduct is, if at all, qualified in very broad terms, such as by reference to a 'human rights violation'".<sup>635</sup> There is no indication that the Pre-Trial Chamber required any particular labelling for the subject-matter of national investigations. Rather, it referred to the fact that "the conduct" which the national authorities investigated was qualified in a way that made it difficult to carry out a meaningful assessment under article 18(2) of the Statute.<sup>636</sup> Furthermore, in another finding to which Venezuela refers, the Pre-Trial Chamber clearly stated that "[i]n relation to the *conduct* underlying the crime of persecution", the relevant material "does not allow for the conclusion to be drawn that the State is investigating *factual allegations* of discriminatory intent".<sup>637</sup> Again, the Pre-Trial Chamber did not require any particular

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<sup>633</sup> [Appeal Brief](#), para. 132, referring to [Impugned Decision](#), paras 90, 125, 131. See also Venezuela's Oral Submissions, [T-2](#), p. 20, lines 17-22; p. 61, lines 3-12.

<sup>634</sup> [Impugned Decision](#), para. 90.

<sup>635</sup> [Impugned Decision](#), para. 90.

<sup>636</sup> See [Impugned Decision](#), para. 90.

<sup>637</sup> [Impugned Decision](#), para. 125 (emphasis added).

labelling and focused on the existence of national investigations into the factual allegations of conduct underpinning discriminatory intent. Additionally, the Appeals Chamber notes that this issue, in any event, was not determinative of the outcome of the Impugned Decision.<sup>638</sup> Accordingly, the Appeals Chamber finds that Venezuela fails to demonstrate any errors in the Pre-Trial Chamber’s approach and conclusion.

311. Having rejected all arguments under this sub-ground of appeal, the Appeals Chamber rejects sub-ground of appeal 4.4 in its entirety.

5. *Sub-ground 4.5: The alleged error of focusing on whether criminal acts pertaining to sexual and gender-based crimes were investigated or prosecuted “as such”*

**(a) Relevant parts of the Impugned Decision**

312. The Pre-Trial Chamber, “[i]n addition to the [...] determinative factors”, considered “the remaining factors alleged by the [Prosecutor] in support of its [Article 18 Request]”,<sup>639</sup> including Venezuela’s investigation of sexual and gender-based crimes.<sup>640</sup>

313. In this context, the Pre-Trial Chamber noted that Venezuela, in its Observations to Prosecutor’s Article 18 Request, “refer[red] to three specific cases”, “only provid[ing] information for one of them”.<sup>641</sup> The Pre-Trial Chamber observed that “[t]his case contains a reference to a rape [...], as well as other acts that could qualify as sexual and gender based crimes, but the legal pre-qualification and conviction do not include any crimes with a sexual or gender component”.<sup>642</sup>

314. The Pre-Trial Chamber further noted that “[a] few other cases contain information that suggest that the criminal conduct in question could qualify as sexual and gender based crimes, but from the court records it is unclear whether [Venezuela is] also investigating this criminal conduct as such”,<sup>643</sup> and that on the basis of Venezuela’s

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<sup>638</sup> See [Impugned Decision](#), paras 120, 130-131. The observations with respect to discriminatory intent are made “[i]n addition to the [previously listed] determinative factors” ([Impugned Decision](#), para. 120).

<sup>639</sup> [Impugned Decision](#), para. 120.

<sup>640</sup> [Impugned Decision](#), para. 124.

<sup>641</sup> [Impugned Decision](#), para. 124.

<sup>642</sup> [Impugned Decision](#), para. 124.

<sup>643</sup> [Impugned Decision](#), para. 124.

Observations, “it would further appear that the State does not intend to prosecute these incidents as such”.<sup>644</sup>

315. In concluding that “[w]hile Venezuela is taking some investigative steps, its domestic criminal proceedings do not sufficiently mirror the scope of the Prosecution’s intended investigation”,<sup>645</sup> the Pre-Trial Chamber stated:

In addition, the Chamber notes that: [...] the domestic investigations appear to not sufficiently mirror the forms of criminality the Prosecution intends to investigate – noting in particular [...] the insufficient investigation of crimes of a sexual nature.<sup>646</sup>

### (b) Summary of the submissions

316. Venezuela submits that the Pre-Trial Chamber “should have focused on the conduct that was being investigated or prosecuted rather than the label”, and that “it was a clear error for the [Pre-Trial] Chamber to draw adverse conclusions from” and “focus on Venezuela’s failure to qualify” or “attach the same label as the [Prosecutor] to” “certain conduct”.<sup>647</sup> Venezuela argues in this regard that (i) while “domestic legislation labelled certain forms of sexual assault [...] as ‘torture’ or ‘inhumane treatment’”,<sup>648</sup> they “attract[] a higher penalty than charges based on rape or sexual assault”,<sup>649</sup> (ii) “[t]he existence of a different label [...] is irrelevant in the absence of any indication that the label used by [Venezuela] would impede the progression of active and effective investigations and proceedings”<sup>650</sup> or “would suggest the absence of a genuine intent to ensure accountability”,<sup>651</sup> and that (iii) “domestic authorities are prepared to requalify as ‘rape’ if they collect evidence that allows them to satisfy this particular criteria under domestic legislation”.<sup>652</sup>

317. Venezuela further contends that due to the lack of “any specifics concerning the factual matrices underpinning its assessment”, in relation to the alleged acts of rape or

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<sup>644</sup> [Impugned Decision](#), para. 124.

<sup>645</sup> [Impugned Decision](#), para. 130.

<sup>646</sup> [Impugned Decision](#), para. 131.

<sup>647</sup> [Appeal Brief](#), paras 137-138. *See also* Venezuela’s Oral Submissions, [T-2](#), p. 58, lines 1-5; p. 59, lines 4-6.

<sup>648</sup> [Appeal Brief](#), para. 136.

<sup>649</sup> [Appeal Brief](#), para. 137 (emphasis in original omitted); Venezuela’s Oral Submissions, [T-2](#), p. 59, lines 1-6.

<sup>650</sup> [Appeal Brief](#), para. 137; Venezuela’s Oral Submissions, [T-2](#), p. 59, lines 4-6.

<sup>651</sup> [Appeal Brief](#), para. 137; Venezuela’s Oral Submissions, [T-2](#), p. 58, lines 19-25.

<sup>652</sup> [Appeal Brief](#), para. 138.

sexual assault, in the Prosecutor’s Article 18(1) Notification, “there was no objective reference point available to the [Pre-Trial] Chamber to support its conclusion that the label or designation used by domestic authorities did not appropriately reflect the gravity or type of conduct that had allegedly occurred”.<sup>653</sup>

318. Lastly, Venezuela argues that the Pre-Trial Chamber’s error in this regard “impacted its ultimate conclusions”, in which “it expressly cited ‘insufficient investigation of crimes of a sexual nature’ as a reason” to conclude that Venezuela’s criminal proceedings do not sufficiently mirror the scope of the Prosecutor’s intended investigation.<sup>654</sup>

319. The Prosecutor submits that Venezuela’s arguments under this ground of appeal “do not reflect the complementarity test and show no error” of the Pre-Trial Chamber in the Impugned Decision.<sup>655</sup> He argues that the Pre-Trial Chamber’s “factually-driven and case-specific assessment” accords with jurisprudence that while the State concerned need not use the same legal label as the Court, “it must investigate substantially the same underlying conduct”,<sup>656</sup> and that “legal qualifications may be considered in some circumstances as an additional indicator to determine whether the domestic authorities are investigating substantially the same conduct as the Prosecution’s”.<sup>657</sup>

320. With respect to Venezuela’s contention regarding domestic investigations or prosecutions for “torture” or “cruel treatment”, the Prosecutor avers that (i) Venezuela’s investigation into or conviction for “torture” or “cruel treatment” does not address “all the same facts or reflect the distinguishable harms suffered by a victim of rape or other forms of sexual violence”;<sup>658</sup> (ii) for complementarity purposes, it is irrelevant that the crimes of “torture” and “cruel treatment” attract higher sentences “if the same (or substantially the same) underlying conduct is not being investigated”; and that (iii) Venezuela has not articulated why it did not apply specific domestic legislation

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<sup>653</sup> [Appeal Brief](#), para. 138; Venezuela’s Oral Submissions, [T-2](#), p. 59, line 21 to p. 60, line 23.

<sup>654</sup> [Appeal Brief](#), para. 139, referring to [Impugned Decision](#), para. 131; Venezuela’s Oral Submissions, [T-2](#), p. 59, lines 7-19.

<sup>655</sup> [Prosecutor’s Response](#), para. 129. See also Prosecutor’s Oral Submissions, [T-2](#), p. 64, lines 7-17.

<sup>656</sup> [Prosecutor’s Response](#), paras 129-130 (emphasis in original omitted), referring to [Al-Senussi OA6 Judgment](#), para. 119. See also Prosecutor’s Oral Submissions, [T-2](#), p. 62, lines 4-6.

<sup>657</sup> [Prosecutor’s Response](#), para. 130; Prosecutor’s Oral Submissions, [T-2](#), p. 62, lines 7-9; p. 65, line 19 to p. 66, line 15.

<sup>658</sup> [Prosecutor’s Response](#), para. 129; Prosecutor’s Oral Submissions, [T-2](#), p. 64, line 25 to p. 65, line 13.

criminalising acts of gender violence.<sup>659</sup> As regards Venezuela’s argument in relation to a potential legal re-characterisation of the conduct as rape, the Prosecutor contends that Venezuela “has provided no documentation to substantiate its assertion”, and that, in any event, “this is irrelevant for the Court’s complementarity assessment”, which “is made on the facts ‘as they exist[]’ ‘at present’”.<sup>660</sup>

321. Lastly, the Prosecutor adds that since the Pre-Trial Chamber’s observation concerning Venezuela’s investigation of crimes of a sexual nature “was not determinative” for the Impugned Decision,<sup>661</sup> the Pre-Trial Chamber “would have still reached the same conclusion”, “[e]ven if the [Pre-Trial] Chamber had erred in this respect”.<sup>662</sup>

322. The OPCV submits that Venezuela “misunderstood and/or misapplied the test applicable to article 18 proceedings”.<sup>663</sup> It argues that “the limited number of cases put forward by Venezuela already provides a strong indication of the absence of relevant domestic investigations”, and “it also made it impossible for the [Pre-Trial] Chamber to evaluate whether the national proceedings sufficiently mirror the Prosecutor’s intended investigation on [sexual and gender-based] crimes”.<sup>664</sup> According to the OPCV, given that the crimes of rape and other forms of sexual violence “have unique constitutive elements” and “safeguard distinct interests and [...] different types of harm”, and considering that “the relevant assessment under article 18 of the Statute must be made on the basis of the facts as they presently exist”, Venezuela’s arguments in relation to a higher penalty of “torture” and “cruel treatment” or a potential requalification of such conducts have “no bearing on the test that the [Pre-Trial] Chamber should apply”.<sup>665</sup>

323. Emphasising that sexual crimes have a specific connotation, the Victims, in their representations, submit that Venezuelan legislation contemplates “torture”, “cruel treatment”, and sexual violence as separate and different types of crimes, which should have been applied in concurrence with the crimes of “torture” or “cruel treatment”, if applicable, and that Venezuela was required to demonstrate that it was investigating the

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<sup>659</sup> [Prosecutor’s Response](#), para. 129.

<sup>660</sup> [Prosecutor’s Response](#), para. 131; Prosecutor’s Oral Submissions, [T-2](#), p. 64, lines 19-24.

<sup>661</sup> [Prosecutor’s Response](#), para. 133, referring to [Impugned Decision](#), paras 120, 130-131.

<sup>662</sup> [Prosecutor’s Response](#), para. 133.

<sup>663</sup> [OPCV Observations](#), para. 92.

<sup>664</sup> [OPCV Observations](#), para. 93. See also OPCV Oral Submissions, [T-2](#), p. 69, line 4 to p. 71, line 1.

<sup>665</sup> [OPCV Observations](#), para. 93; OPCV Oral Submissions, [T-2](#), p. 70, lines 2-12; p. 94, lines 16-23.



criminal offences concerning the attacks against the sexual integrity and indemnity of the victims.<sup>666</sup> The Victims also submit that Venezuela failed to establish that the crimes of “torture” and “cruel treatment” were being consistently applied in cases of sexual violence.<sup>667</sup>

324. The OAS Panel submits that Venezuela’s approach of categorising rape as “a form of cruel treatment or an aggravating factor in other crimes”, and not as a distinct crime, undermines the “unique and severe impact of rape” and “the principles of accountability and justice”, thereby “profoundly affect[ing] victims’ rights and the pursuit of justice”.<sup>668</sup>

### (c) Determination by the Appeals Chamber

325. At the outset, concerning Venezuela’s argument regarding the lack of specificity in relation to the alleged crimes of rape and other forms of sexual violence in the Prosecutor’s Article 18(1) Notification,<sup>669</sup> the Appeals Chamber recalls its findings under the first ground of appeal regarding the sufficient specificity of the information provided by the Prosecutor.<sup>670</sup>

326. As regards Venezuela’s contention with respect to the domestic investigations into the alleged acts of sexual nature as “torture” or “cruel treatment”, the Appeals Chamber notes the submissions of the Prosecutor and the OPCV that the crimes of rape and other forms of sexual violence “have unique constitutive elements” which “safeguard distinct interests” and “different types of harm” suffered by victims.<sup>671</sup> In this respect, the Appeals Chamber reiterates that the legal interests protected by each crime can be discerned by reference to the elements of that specific crime, and that the interests protected by materially distinct elements are necessarily different.<sup>672</sup> For example, in the *Ongwen* Appeal Judgment, the Appeals Chamber noted with regard to sexual and

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<sup>666</sup> Victims’ Representations, Annex 148, para. 44.

<sup>667</sup> Victims’ Representations, Annex 148, para. 44.

<sup>668</sup> [OAS Panel’s Observations](#), para. 65.

<sup>669</sup> See [Appeal Brief](#), para. 113. Venezuela avers that the Article 18(1) Notification (i) listed acts of sexual violence in an alternative manner, thereby indicating that the acts themselves could satisfy the more generic category and still properly trigger a deferral; and (ii) described the victims broadly. See also Venezuela’s Oral Submissions, [T-2](#), p. 58, lines 19-23.

<sup>670</sup> See paragraph 116 above.

<sup>671</sup> [Prosecutor’s Response](#), para. 129; Prosecutor’s Oral Submissions, [T-2](#), p. 64, line 25 to p. 65, line 13; OPCV Oral Submissions, [T-2](#), p. 70, lines 2-12.

<sup>672</sup> [Ongwen Appeal Judgment](#), paras 24, 1635.

gender-based crimes that different legal interests are protected by the distinct elements of each crime.<sup>673</sup> This distinction is even more significant between rape or any other form of sexual violence of comparable gravity and, for instance, the crime of torture. They are listed as distinct crimes against humanity, under article 7(1)(g) and (f) of the Statute, respectively. They have materially distinct elements, as indicated below, given that they aim at protecting different legal interests.

327. The crime of rape, within the meaning of article 7(1)(g) of the Statute, is committed when:

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.<sup>674</sup>

328. The crime of torture under article 7(1)(f) of the Statute, on the other hand, is committed when:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.<sup>675</sup>

329. In the situation at hand, the Appeals Chamber considers that the Pre-Trial Chamber did not err by observing that “the legal pre-qualification and conviction do not include any crimes with a sexual or gender component”.<sup>676</sup> To the extent that Venezuela’s

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<sup>673</sup> The Appeals Chamber noted that the crimes of rape and sexual slavery as crimes against humanity (article 7(1)(g) of the Statute), as well as the crime of forced marriage as a form of other inhumane acts (article 7(1)(k) of the Statute), have materially distinct elements, given the different protected interests (see [Ongwen Appeal Judgment](#), paras 1678-1679, 1682-1683).

<sup>674</sup> Elements of Crimes of article 7(1)(g)-1 of the Statute, paras 1-2.

<sup>675</sup> Elements of Crimes of article 7(1)(f) of the Statute, paras 1-3.

<sup>676</sup> [Impugned Decision](#), para. 124.

investigations and prosecutions examined the relevant alleged acts as “torture” and “cruel treatment”, the domestic proceedings failed to address the distinctive legal interests protected by the crimes of rape and other forms of sexual violence as outlined above, and to protect the distinguishable harms suffered by victims.

330. Furthermore, Venezuela relies on a potential requalification as rape at a later stage in the national proceedings.<sup>677</sup> However, while referring to a case in which such re-characterisation allegedly occurred, Venezuela provided no documents or detail demonstrating that the case was indeed reclassified as rape.<sup>678</sup> In addition, Venezuela submits that the “domestic authorities are *prepared* to requalify charges as ‘rape’”.<sup>679</sup> However, the Appeals Chamber recalls that a pre-trial chamber’s complementarity assessment of the existence of domestic investigations and prosecutions under article 18 of the Statute must be determined on the basis of the facts as they exist “at present”, that is at the time of the proceedings concerning the admissibility challenge.<sup>680</sup> In the absence of any concrete evidence of taking such steps at present, the Appeals Chamber will not entertain Venezuela’s hypothetical submissions in this regard.

331. The Appeals Chamber further notes Venezuela’s arguments relating to the Pre-Trial Chamber’s alleged “erroneous focus” on the legal qualification in the domestic legislation.<sup>681</sup> However, Venezuela fails to indicate any specific domestic investigation or prosecution in relation to the alleged crimes of rape and other forms of sexual violence that the Pre-Trial Chamber purportedly excluded from its assessment under article 18(2) of the Statute on such basis. Moreover, the challenged finding does not indicate that the Pre-Trial Chamber focused on the legal qualification in the domestic legislation. Rather, the Pre-Trial Chamber examined the three specific cases that Venezuela presented, and observed that while only one of these cases was supported with relevant information and “contain[ed] a reference to a rape [...], as well as other acts that could qualify as sexual and gender based crimes”, “the legal pre-qualification and conviction” of the case “do

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<sup>677</sup> [Appeal Brief](#), para. 138.

<sup>678</sup> [Appeal Brief](#), para. 138, referring to [Venezuela’s Observations to Prosecutor’s Article 18 Request](#), para. 103.

<sup>679</sup> [Appeal Brief](#), para. 138 (emphasis added).

<sup>680</sup> See [Philippines OA Judgment](#), paras 161, 167. See also in the context of article 19 proceedings, [Simone Gbagbo OA Judgment](#), para. 32, referring to Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case](#), 25 September 2009, ICC-01/04-01/07-1497 (OA8) (hereinafter: “*Katanga OA8 Judgment*”), para. 56.

<sup>681</sup> [Appeal Brief](#), p. 52.

not include any crimes with a sexual or gender *component*".<sup>682</sup> The Pre-Trial Chamber thus did not require any specific legal qualification, as long as the legal qualification under domestic law contained "a sexual or gender component". In the view of the Appeals Chamber, the Pre-Trial Chamber correctly assessed whether Venezuela demonstrated an advancing process of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the alleged crimes of rape and other forms of sexual violence. Lastly, the Appeals Chamber notes that the Pre-Trial Chamber's observations in this regard, in any event, were not determinative for the outcome of the Impugned Decision.<sup>683</sup>

332. Having rejected all arguments of Venezuela under this sub-ground of appeal, the Appeals Chamber rejects sub-ground of appeal 4.5 in its entirety.

#### 6. *Conclusion*

333. In view of the foregoing considerations, the Appeals Chamber rejects the fourth ground of appeal.

### **G. Fifth ground of appeal: The alleged error in relying on irrelevant factors and failing to give any weight to relevant factors**

334. Under this ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law in its complementarity assessment by relying on irrelevant factors while failing to give any weight to relevant factors.<sup>684</sup>

#### 1. *Relevant parts of the Impugned Decision*

335. In the section of the Impugned Decision concerning "Material to be considered to determine the merits of the Request", the Pre-Trial Chamber provided "an overview of its analysis" of the material on which it relied.<sup>685</sup>

336. The Pre-Trial Chamber noted "the following two patterns":

First, in relation to approximately more than half of the cases, investigations were only opened in 2021 or 2022. For approximately two-thirds of these

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<sup>682</sup> See [Impugned Decision](#), para. 124 (emphasis added).

<sup>683</sup> See [Impugned Decision](#), paras 120, 130-131.

<sup>684</sup> See [Appeal Brief](#), paras 140-152.

<sup>685</sup> [Impugned Decision](#), para. 89.

cases (for which investigations were only opened in 2021 or 2022), the alleged criminal conduct occurred in 2017. Second, among those investigations that were opened earlier than 2021, the majority shows a significant period of inactivity without any apparent justification discernible from the relevant material. It would appear that, in these cases, investigations were resumed in 2021/2022. Moreover, and possibly as a direct consequence of the foregoing, in relation to about three-quarters of the cases, no (specific) suspect has been identified yet. Only in a minority of cases, a suspect was identified, an accused charged, and/or a judicial decision on an accused's criminal responsibility taken. Nonetheless, these cases are very limited and [...] not capable of altering the Chamber's overall determination.<sup>686</sup>

337. In the section titled "Whether Venezuela 'is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the [notification to Venezuela]'",<sup>687</sup> the Pre-Trial Chamber stated that it first "focus[ed] on the factors that it [had] consider[ed] determinative to its ultimate findings" on the Prosecutor's Article 18 Request,<sup>688</sup> namely (i) "[w]hether Venezuela is investigating the patterns and policies underlying the contextual elements of crimes against humanity";<sup>689</sup> and (ii) "[w]hether the focus of the domestic proceedings is on direct perpetrators and arguably low level members of security forces".<sup>690</sup> It then briefly addressed "[t]he remaining factors alleged by the Prosecut[or]" in the Article 18 Request,<sup>691</sup> which the Pre-Trial Chamber referred to as "non-determinative" factors.<sup>692</sup> In particular, the Pre-Trial Chamber stated:

121. In relation to the Prosecution's submissions that Venezuela has taken very limited investigative steps and that there have been unjustified delays in the domestic proceedings, the material provided by Venezuela shows that, in the majority of its domestic investigations, the authorities have, thus far, not identified, and even less formally indicted or charged, any suspects. This is also true for cases where a criminal complaint refers to the alleged perpetrators by name. From the material considered by the Chamber, it is also possible to discern a pattern of periods of investigative inactivity for some years between the first investigative steps and 2021 or 2022.<sup>693</sup>

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<sup>686</sup> [Impugned Decision](#), para. 91 (footnotes omitted).

<sup>687</sup> [Impugned Decision](#), paras 92-134.

<sup>688</sup> [Impugned Decision](#), para. 96.

<sup>689</sup> [Impugned Decision](#), paras 97-108.

<sup>690</sup> [Impugned Decision](#), paras 109-119.

<sup>691</sup> [Impugned Decision](#), paras 96, 120-129.

<sup>692</sup> [Impugned Decision](#), para. 96.

<sup>693</sup> [Impugned Decision](#), para. 121 (footnotes omitted).

122. Furthermore, the Venezuelan authorities appear to have focused on identifying, locating, and accessing information on the alleged victims listed in the [Prosecutor’s Additional Information] and have frequently failed to move past this stage in the investigations.<sup>694</sup>

## 2. *Summary of the submissions*

338. Venezuela submits that the Pre-Trial Chamber erred in law by basing its assessment as to the existence of “active investigations” carried out by Venezuela on irrelevant factors while failing to give any weight to relevant factors.<sup>695</sup> More specifically, recalling that “[a]dmissibility assessments under [a]rticle 17 of the Statute entail ‘a two-step analysis’”,<sup>696</sup> Venezuela argues that the manner in which the Pre-Trial Chamber reached its conclusion that the first step of the admissibility test was not met, and that it was therefore unnecessary to proceed to the second step, was “undermined” by the Pre-Trial Chamber’s (i) reliance on irrelevant factors, “including: the number of identified suspects, the number of arrest warrants, and the rank of possible suspects”; and (ii) failure to give any weight to relevant factors, “such as the steps taken by the domestic authorities to identify victims”.<sup>697</sup>

339. Venezuela concludes that, “[v]iewed holistically”, its efforts in “interviewing witnesses”, taking disciplinary measures “to prevent further harm or interference”, and “locating information about persons who are best placed to provide information about the relevant acts”, show that Venezuela’s “actions fully satisfied the first prong of the admissibility test”.<sup>698</sup>

340. The Prosecutor submits that this ground of appeal should be dismissed,<sup>699</sup> as the Pre-Trial Chamber correctly identified and weighed relevant factors in assessing whether Venezuela was conducting investigations.<sup>700</sup> In the Prosecutor’s view, the conclusion drawn by the Pre-Trial Chamber about the absence of progressive investigative steps or an advancing process of investigations or prosecutions in accordance with article 17(1)(a) of the Statute was reasonable and consistent with the

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<sup>694</sup> [Impugned Decision](#), para. 122.

<sup>695</sup> [Appeal Brief](#), paras 140-152.

<sup>696</sup> [Appeal Brief](#), para. 140.

<sup>697</sup> [Appeal Brief](#), para. 141.

<sup>698</sup> [Appeal Brief](#), para. 152.

<sup>699</sup> [Prosecutor’s Response](#), para. 145.

<sup>700</sup> [Prosecutor’s Response](#), paras 135-144.

Court's jurisprudence.<sup>701</sup> The Prosecutor further notes that the observations with which Venezuela takes issue were not determinative for the Pre-Trial Chamber's conclusion.<sup>702</sup> He also argues that the fact "that the domestic proceedings might in the future focus on high-ranking suspects after first securing convictions or evidence from direct perpetrators is irrelevant to the current complementarity assessment".<sup>703</sup> Finally, the Prosecutor notes that Venezuela misread parts of the Impugned Decision, as well as parts of the Prosecutor's Article 18 Request.<sup>704</sup>

341. The OPCV submits that this ground of appeal should be dismissed, as the Pre-Trial Chamber relied on correct indicators to conclude the inexistence of relevant domestic investigations.<sup>705</sup> It argues that the Pre-Trial Chamber's approach with respect to the information provided by Venezuela was correct.<sup>706</sup> In particular, the OPCV submits that the Pre-Trial Chamber's enquiry was whether the domestic proceedings sufficiently mirror the Prosecutor's intended investigation, and that, if the Prosecutor's intended investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the focus of the domestic proceedings.<sup>707</sup> The OPCV submits that it is evident that "at present no investigations or prosecutions covering patterns of criminality or the responsibility of individuals beyond the physical perpetrators of the alleged crimes are taking place".<sup>708</sup>

342. The Victims, in their representations, submit, *inter alia*, that, contrary to Venezuela's argument, the reasons that led to the Pre-Trial Chamber's conclusion that Venezuela was not conducting active investigations are based on relevant facts, which made it possible to determine, for the purpose of article 17(1)(a) and (b) of the Statute, that Venezuela was not investigating and, moreover, expresses no intention to investigate the factual allegations underlying the contextual elements of crimes against

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<sup>701</sup> [Prosecutor's Response](#), paras 136-137, referring, *inter alia*, to [Philippines OA Judgment](#), para. 106.

<sup>702</sup> [Prosecutor's Response](#), para. 138.

<sup>703</sup> [Prosecutor's Response](#), paras 139-140.

<sup>704</sup> [Prosecutor's Response](#), paras 141-144.

<sup>705</sup> [OPCV Observations](#), paras 95-101.

<sup>706</sup> [OPCV Observations](#), para. 98.

<sup>707</sup> [OPCV Observations](#), paras 98-100, referring to [Philippines Article 18\(2\) Decision](#), para. 68.

<sup>708</sup> [OPCV Observations](#), para. 99.

humanity, coupled with the fact that the focus of the few domestic investigations has generally been on direct or low-level perpetrators.<sup>709</sup>

343. The OAS Panel argues that Venezuela’s submissions under this ground of appeal are unsupported.<sup>710</sup> It submits that the Pre-Trial Chamber correctly conducted the two-step analysis, followed by consideration of factors such as whether Venezuela was “probing the broader patterns and policies that form the basis of crimes against humanity”, and whether “the domestic proceedings [were] primarily targeting direct, lower-level perpetrators in the security forces”.<sup>711</sup> The OAS Panel contends that the Pre-Trial Chamber correctly found that Venezuela’s proceedings “failed to address high-ranking officials and therefore did not align with the expected scope of the Court’s investigation”.<sup>712</sup> The OAS Panel avers that, contrary to Venezuela’s argument that investigating low-ranking suspects now does not rule out identifying high-ranking suspects later, “it is clear that no investigations or prosecutions are addressing patterns of criminality or the responsibility of higher-level individuals nearly a decade after the incidents”.<sup>713</sup>

### 3. *Determination by the Appeals Chamber*

344. At the outset, the Appeals Chamber notes that Venezuela qualifies the alleged error as an error of law, stating that “[t]he Appeals Chamber has confirmed that failing to consider legally relevant factors or relying on irrelevant factors constitutes an error of law”.<sup>714</sup> The Appeals Chamber considers that Venezuela misinterprets its finding, which was specifically related to the standard of review for errors of law concerning a trial chamber’s determination of an appropriate sentence. In that regard, the Appeals Chamber recalled that, pursuant to rule 145(1)(b) of the Rules, when determining an appropriate sentence, a trial chamber must balance all the relevant factors and “failure to consider any of the listed [mandatory] factors may amount to a legal error”.<sup>715</sup> The Appeals Chamber thus made it clear that a legal error would consist in failing to consider a mandatory factor. This is different from the errors alleged under this ground of appeal.

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<sup>709</sup> Victims’ Representations, Annex 148, para. 46.

<sup>710</sup> [OAS Panel’s Observations](#), paras 71-76.

<sup>711</sup> [OAS Panel’s Observations](#), para. 71.

<sup>712</sup> [OAS Panel’s Observations](#), para. 72.

<sup>713</sup> [OAS Panel’s Observations](#), para. 73.

<sup>714</sup> [Appeal Brief](#), para. 141, referring to [Ntaganda A3 Judgment](#), para. 26.

<sup>715</sup> [Ntaganda A3 Judgment](#), para. 26.



Based on the arguments presented by Venezuela, the Appeals Chamber understands the alleged reliance on irrelevant factors and the alleged failure to consider relevant factors as an allegation of an abuse of discretion on the part of the Pre-Trial Chamber, and will assess it accordingly.<sup>716</sup>

345. Turning now to the question of whether the Pre-Trial Chamber erred in relying on irrelevant factors, “including the number of identified suspects, the number of arrest warrants, and the rank of possible suspects”,<sup>717</sup> Venezuela first argues that, since the Prosecutor’s Article 18(1) Notification did not identify particular suspects or perpetrators, it was not necessary for Venezuela to demonstrate that its investigations had targeted certain individuals.<sup>718</sup> In this regard, Venezuela submits that “the first step analysis in article 17(1)(a) and (b) of the Statute does not require proof that domestic investigations have or had reached the point of an arrest warrant or indictment”, and that “the specific number of arrest warrants is not [...] indicative of the existence of active investigations”.<sup>719</sup> Venezuela submits that the Pre-Trial Chamber erred in law “by failing to acknowledge or respect these distinctions”, and “by referencing the current status of domestic arrest warrants or convictions” to conclude that Venezuela was not actively investigating.<sup>720</sup>

346. The Appeals Chamber recalls its finding, made under the fourth ground of appeal, that the Pre-Trial Chamber did not refer to the identification of a suspect as a condition for considering a national investigation as relevant to its determination under article 18(2) of the Statute.<sup>721</sup> Similarly, Venezuela fails to identify any part of the Impugned Decision where the Pre-Trial Chamber purportedly “drew adverse conclusions” from “a limited number of arrest warrants”.<sup>722</sup> Nor is it apparent from the Impugned Decision that the Pre-Trial Chamber attached undue weight to the number of warrants of arrest. The Appeals Chamber therefore considers that Venezuela misrepresents the Impugned Decision. The Pre-Trial Chamber did not require Venezuela to identify particular suspects, issue arrest warrants or convictions to meet the

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<sup>716</sup> See [Simone Gbagbo OA Judgment](#), para. 46.

<sup>717</sup> [Appeal Brief](#), paras 141-144.

<sup>718</sup> [Appeal Brief](#), paras 142-145.

<sup>719</sup> [Appeal Brief](#), para. 146.

<sup>720</sup> [Appeal Brief](#), para. 146.

<sup>721</sup> See paragraph 248 above.

<sup>722</sup> [Appeal Brief](#), para. 146.

requirements of article 18(2) of the Statute. Rather, the Pre-Trial Chamber observed certain patterns in Venezuela’s proceedings,<sup>723</sup> and concluded that Venezuela “appears to have taken limited investigative steps”, and that there had been “periods of unexplained investigative activity”.<sup>724</sup> Furthermore, as discussed above, the factors considered by the Pre-Trial Chamber in its conclusions regarding the limited investigative steps and periods of inactivity were not determinative for the outcome of the Impugned Decision.<sup>725</sup>

347. Venezuela further argues that the Pre-Trial Chamber erred by focusing on the rank of suspects identified by the State, despite the fact that the “low rank” of suspects in the current proceedings does not preclude the identification of high-ranking suspects in future.<sup>726</sup> The Appeals Chamber recalls that it rejected a similar argument from the Republic of the Philippines in the *Philippines* OA Judgment, noting that “the Philippines does not argue that any such investigation [into the culpability of high-ranking officials], based on leads identified in this way [through the identification of direct perpetrators], is being carried out ‘at present’”.<sup>727</sup> Similarly, and in the absence of information that the competent authorities in Venezuela have actually identified any high-ranking suspects through the investigation of low-ranking perpetrators, the argument that the domestic proceedings might in the future focus on high-ranking is irrelevant to the Pre-Trial Chamber’s assessment under article 18 of the Statute.

348. Regarding Venezuela’s hypothetical argument relating to the “ICC cases targeting lower-ranked accused for crimes against humanity”,<sup>728</sup> the Appeals Chamber observes that the Pre-Trial Chamber’s enquiry in the situation at hand was whether the domestic proceedings, at present, sufficiently mirror the Prosecutor’s intended investigation. It was clear from the Prosecutor’s Article 18 Notification and the Additional Information that the focus of the Prosecutor’s investigation would be, *inter alia*, on “the members of the security forces”, “who appear most responsible for [the alleged] crimes”, and that the alleged crimes against humanity were committed as part of an attack against a

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<sup>723</sup> See [Impugned Decision](#), paras 91, 121.

<sup>724</sup> [Impugned Decision](#), para. 131.

<sup>725</sup> See [Impugned Decision](#), paras 121, 131. The observations with respect to limited investigating steps and periods of inactivity are made “[i]n addition to the [previously listed] determinative factors” ([Impugned Decision](#), para. 120).

<sup>726</sup> [Appeal Brief](#), para. 148.

<sup>727</sup> [Philippines OA Judgment](#), para. 161, referring to [Philippines Article 18\(2\) Decision](#), paras 68, 93.

<sup>728</sup> [Appeal Brief](#), para. 149.

civilian population “pursuant to or in furtherance of a State policy to commit such an attack”, a policy which “was at a minimum encouraged or approved by the Government of Venezuela”.<sup>729</sup> It was therefore not an error for the Pre-Trial Chamber to observe that “high-ranking officials are expected to be the investigation’s focus”,<sup>730</sup> and conclude that the national proceedings do not sufficiently mirror the scope of the Prosecutor’s intended investigation due to, among other reasons, “the fact that the focus of the domestic investigations appear to generally be on direct/low level perpetrators”.<sup>731</sup>

349. Finally, the Appeals Chamber considers that Pre-Trial Chamber did not, as argued by Venezuela, “dr[a]w adverse findings from the information that some high-ranking persons had been interviewed as witnesses, not suspects”.<sup>732</sup> The Pre-Trial Chamber considered the content of the interview of a commander of a mobile detachment unit, together with other measures, and noted that “the line of questioning in this interview and other investigative measures taken suggest that the investigative focus was on the direct perpetrators under his command (and, yet, it appears that no suspect has been formally identified thus far)”.<sup>733</sup> The Pre-Trial Chamber observed that in this case the focus was on the direct perpetrators, “despite the victim(s) clearly identifying higher ranking potential perpetrators”.<sup>734</sup> This consideration was clearly relevant to the Pre-Trial Chamber’s assessment of the Prosecutor’s argument that “the domestic investigations reported are limited to direct perpetrators and purported low level members of the State security forces, lacking investigative inquiries within the chain of command”.<sup>735</sup> Venezuela’s argument in this respect is unsubstantiated and therefore dismissed.

350. Turning to the alleged failure to assess relevant factors, Venezuela submits that the Pre-Trial Chamber failed to “assess in a positive manner” relevant factors, such as whether the “national authorities were taking concrete steps to ascertain the facts and persons responsible, for example, by collecting data about victims, forensic analysis, and witness statements”.<sup>736</sup> According to Venezuela, if the Pre-Trial Chamber had used this

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<sup>729</sup> Annex A to Article 18(1) Notification, paras 3, 5-6; Prosecutor’s Additional Information, pp. 23-24.

<sup>730</sup> [Impugned Decision](#), para. 118.

<sup>731</sup> [Impugned Decision](#), para. 130.

<sup>732</sup> [Appeal Brief](#), para. 148.

<sup>733</sup> [Impugned Decision](#), para. 114.

<sup>734</sup> [Impugned Decision](#), para. 114.

<sup>735</sup> [Impugned Decision](#), para. 109, referring to [Prosecutor’s Article 18 Request](#), para. 131.

<sup>736</sup> [Appeal Brief](#), paras 147, 151.

framework for analysing the materials, it would have concluded that “there was a range of probative evidence concerning concrete steps that were taken to establish the facts in relation to the same or similar types of criminal acts notified to [Venezuela]”, and therefore that the first step of its analysis under article 17(1) of the Statute was satisfied.<sup>737</sup>

351. The Appeals Chamber finds that, contrary to Venezuela’s assertion that the Pre-Trial Chamber “appeared to suggest that the domestic authorities acted improperly” by taking steps to identify victims prior to investigating suspects,<sup>738</sup> the Pre-Trial Chamber merely observed that “the subsequent investigative steps [in at least two other cases ] [...] focused [...] on accessing information on the victims and not the alleged perpetrators”.<sup>739</sup> However, as indicated above, this remark was made in relation to the fact that in those cases “the victim(s) [had] clearly identif[ied] higher ranking potential perpetrators”.<sup>740</sup> The Pre-Trial Chamber was thus concerned not with the fact that the domestic authorities accessed information on the victims, but with the fact that they did not focus on the identification of higher ranking potential perpetrators, despite having received the relevant information from the victims. The Appeals Chamber therefore rejects this argument of Venezuela.

352. Having rejected all of Venezuela’s arguments, the Appeals Chamber rejects the fifth ground of appeal.

#### **H. Sixth ground of appeal: The alleged erroneous test of “unreasonable delay”**

353. Under the sixth ground of appeal, Venezuela submits that the Pre-Trial Chamber erred by excluding national proceedings from its determination on the basis that there had been delays and periods of inactivity.<sup>741</sup> In particular, Venezuela argues that the Pre-Trial Chamber failed to (i) set out the standard for assessing delays or inactivity in

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<sup>737</sup> [Appeal Brief](#), para. 147.

<sup>738</sup> [Appeal Brief](#), para. 151, referring to [Impugned Decision](#), para. 114.

<sup>739</sup> [Impugned Decision](#), para. 114.

<sup>740</sup> [Impugned Decision](#), para. 114.

<sup>741</sup> [Appeal Brief](#), paras 153-160.

the progress of domestic investigations, and (ii) consider relevant factors while attaching undue weight to irrelevant factors.<sup>742</sup>

*1. Relevant parts of the Impugned Decision*

354. In the section of the Impugned Decision concerning “Material to be considered to determine the merits of the Request”, the Pre-Trial Chamber noted that “among those investigations that were opened earlier than 2021, the majority shows a significant period of inactivity without any apparent justification discernible from the relevant material”.<sup>743</sup>

355. The Pre-Trial Chamber found that “[f]rom the material considered by the Chamber, it is [...] possible to discern a pattern of periods of investigative inactivity for some years between the first investigative steps and 2021 or 2022”.<sup>744</sup>

356. The Pre-Trial Chamber concluded:

Considering the above, pursuant to article 18(2) of the Statute, the Chamber concludes that Venezuela is not investigating or has not investigated criminal acts which may constitute crimes referred to in article 5 of the Statute that sufficiently mirror the scope of the Prosecution’s intended investigation. In light of the foregoing, there is no need to consider whether Venezuela is unwilling or unable to genuinely carry out any such investigation or prosecution.<sup>745</sup>

*2. Summary of the submissions*

357. Venezuela argues that the Pre-Trial Chamber failed to set out the standard which it used for assessing delays or inactivity, and to explain how it determined that “the delays in question were unreasonable or inexcusable in the circumstances of the case”.<sup>746</sup> Venezuela submits that the Pre-Trial Chamber failed to consider the complexity of the cases concerned and the impact of intervening issues, such as the COVID pandemic.<sup>747</sup> It contends that the Pre-Trial Chamber attached undue weight to delays that occurred before the Prosecutor provided sufficient information about the contours of his

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<sup>742</sup> [Appeal Brief](#), paras 154-159.

<sup>743</sup> [Impugned Decision](#), para. 91 (footnotes omitted).

<sup>744</sup> [Impugned Decision](#), para. 121 (footnote omitted).

<sup>745</sup> [Impugned Decision](#), para. 132.

<sup>746</sup> [Appeal Brief](#), paras 154-156.

<sup>747</sup> [Appeal Brief](#), paras 154, 157.

investigation.<sup>748</sup> Venezuela submits that these alleged errors had a significant impact on the outcome of the Impugned Decision.<sup>749</sup>

358. The Prosecutor submits that the Pre-Trial Chamber's observations on the periods of inactivity were non-determinative to the Impugned Decision, as it "did not assess Venezuela's unwillingness or inability to carry out investigations at all", nor did it rely on this factor to conclude that Venezuela was not carrying out the relevant investigations.<sup>750</sup> The Prosecutor avers that the Pre-Trial Chamber was not required to set out a standard "as it did not find that the delays were 'unreasonable' or 'unjustified'".<sup>751</sup> He further argues that the Pre-Trial Chamber "was not required to speculate as to the possible reasons for any periods of investigative inactivity [such as the complexity of the cases or the COVID-19 pandemic], particularly since [Venezuela] did not draw these issues to the Chamber's attention".<sup>752</sup>

359. The OPCV submits that the Pre-Trial Chamber correctly determined that, based on the few cases in which a suspect had been identified, an accused charged and a judicial decision on criminal responsibility taken, it was not possible to conclude that national proceedings sufficiently mirrored the scope of the Prosecutor's intended investigation.<sup>753</sup> The OPCV also submits that it received communications from victims, who reported "a substantial, unjustified delay in undertaking some few proceedings at national level which makes it impossible to evaluate whether the national activities sufficiently mirror the Prosecutor's intended investigation".<sup>754</sup>

360. The Victims, in their representations, submit that the complexity of cases "does not represent a blank cheque to give a State an indeterminate investigative time", and that Venezuela does not explain "how COVID-19 could have had a substantial effect on the delay in prosecutions, given that most of the crimes occurred three to five years before the start of the pandemic".<sup>755</sup> The Victims also submit that the national

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<sup>748</sup> [Appeal Brief](#), paras 154, 158-159.

<sup>749</sup> [Appeal Brief](#), para. 160.

<sup>750</sup> [Prosecutor's Response](#), para. 147, referring to [Impugned Decision](#), paras 96, 120-121.

<sup>751</sup> [Prosecutor's Response](#), para. 149.

<sup>752</sup> [Prosecutor's Response](#), para. 150.

<sup>753</sup> [OPCV Observations](#), para. 105.

<sup>754</sup> [OPCV Observations](#), para. 109.

<sup>755</sup> Victims' Representations, Annex 127, pp. 48-49.

investigations “do not adequately reflect the complexity of crimes against humanity”.<sup>756</sup> They argue that the delays in the national proceedings which occurred prior to the Article 18(1) Notification “could raise questions about the seriousness of ongoing investigations and whether they meet the required standards”.<sup>757</sup>

361. The OAS Panel submits that the Pre-Trial Chamber took note of inactivity in the national investigations, but did not rely on it.<sup>758</sup> The OAS Panel argues that the Impugned Decision is primarily based on the progress of relevant investigations at the time of the Pre-Trial Chamber’s review.<sup>759</sup> The OAS Panel avers that Venezuela had ample time before the COVID-19 pandemic to have started investigations and prosecutions in a number of cases.<sup>760</sup>

### 3. *Determination by the Appeals Chamber*

362. Venezuela submits that the Pre-Trial Chamber neither made findings to support a conclusion under article 17(2)(b) of the Statute that there was an unjustified delay, nor cited “any alternative basis for assessing, in the first step of the admissibility assessment, a factor that pertains to the second step”.<sup>761</sup> Venezuela argues that the Pre-Trial Chamber “failed to provide an explanation as to if and how it determined that the delays in question were unreasonable or inexcusable”.<sup>762</sup>

363. The Appeals Chamber notes at the outset that, according to the Pre-Trial Chamber, its overall conclusion in the Impugned Decision was “primarily informed”<sup>763</sup> by factors other than “periods of unexplained investigative inactivity”,<sup>764</sup> which it considered to be “non-determinative” factors.<sup>765</sup> Therefore, even if it were an error for the Pre-Trial Chamber to rely on these factors, this would not have affected the Impugned Decision.

364. In any event, the Appeals Chamber notes that the impugned finding of the Pre-Trial Chamber was not that there were “delays” in the domestic proceedings. Rather,

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<sup>756</sup> Victims’ Representations, Annex 148, para. 57.

<sup>757</sup> Victims’ Representations, Annex 148, para. 71.

<sup>758</sup> [OAS Panel’s Observations](#), para. 78.

<sup>759</sup> [OAS Panel’s Observations](#), para. 78.

<sup>760</sup> [OAS Panel’s Observations](#), para. 78.

<sup>761</sup> [Appeal Brief](#), para. 155.

<sup>762</sup> [Appeal Brief](#), para. 156.

<sup>763</sup> [Impugned Decision](#), para. 130.

<sup>764</sup> [Impugned Decision](#), para. 131.

<sup>765</sup> [Impugned Decision](#), para. 96.

in its discussion of this issue, the Pre-Trial Chamber used the term “inactivity”.<sup>766</sup> Furthermore, as acknowledged by Venezuela,<sup>767</sup> the Pre-Trial Chamber did not examine whether there was “an unjustified delay” in the domestic proceedings. “[A]n unjustified delay” is listed under article 17(2) of the Statute as one of the factors relied upon to determine unwillingness of a State genuinely to prosecute.<sup>768</sup> It is thus part of the second step of the analysis to determine whether “a case is inadmissible”. However, a pre-trial chamber must first address “(1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned”.<sup>769</sup> The Appeals Chamber recalls that “[i]t is only when the answers to these questions are in the affirmative that one has [...] to examine the question of unwillingness and inability”.<sup>770</sup> The Appeals Chamber further recalls that “article 17 of the Statute applies not only to the determination of the admissibility of a concrete case (article 19 of the Statute), but also to preliminary admissibility rulings (article 18 of the Statute)”, although “the words ‘case is being investigated’ in article 17(1)(a) of the Statute must [...] be understood in the context to which it is applied”.<sup>771</sup> Having concluded that “Venezuela is not investigating or has not investigated criminal acts which may constitute crimes referred to in article 5 of the Statute that sufficiently mirror the scope of the Prosecution’s intended investigation”, the Pre-Trial Chamber found that “there is no need to consider whether Venezuela is unwilling or unable to genuinely carry out any such investigation or prosecution”.<sup>772</sup>

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<sup>766</sup> [Impugned Decision](#), paras 91, 121, 131.

<sup>767</sup> [Appeal Brief](#), para. 153.

<sup>768</sup> Article 17 of the Statute provides, in its relevant part:

“1. [...] the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; [...]

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: [...]

(b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice [...]” (emphasis added).

<sup>769</sup> [Katanga OA8 Judgment](#), para. 78.

<sup>770</sup> [Katanga OA8 Judgment](#), para. 78. See also [Simone Gbagbo OA Judgment](#), para. 27.

<sup>771</sup> [Philippines OA Judgment](#), para. 105, referring to [Muthaura et al. OA Judgment](#), para. 37; [Ruto et al. OA Judgment](#), para. 39.

<sup>772</sup> [Impugned Decision](#), para. 132.



365. The Appeals Chamber therefore considers that, contrary to Venezuela’s argument,<sup>773</sup> it was not necessary for the Pre-Trial Chamber to determine that there was an unjustified delay in the domestic proceedings. Similarly, it was not necessary for the Pre-Trial Chamber to provide a basis for assessing, “in the first step of the admissibility assessment, a factor that pertains to the second step”.<sup>774</sup>

366. Turning to the Pre-Trial Chamber’s use of the term “inactivity”,<sup>775</sup> the Appeals Chamber recalls that the words “the case is being investigated” in article 17(1)(a) of the Statute signify “the taking of steps directed at ascertaining whether [the same] suspects are responsible for [substantially the same] conduct”.<sup>776</sup> The Appeals Chamber also recalls that “[t]he mere preparedness to take such steps [...] is not sufficient”.<sup>777</sup> The Appeals Chamber notes that these findings were made in the context of concrete cases, rather than a situation. In that context, “the taking of steps” relates to “the same suspects” as the individuals summoned to appear by the Court and to “substantially the same conduct” as the conduct which is being investigated by the Court.<sup>778</sup> In the present proceedings, no suspects were identified in the Article 18(1) Notification. Nevertheless, the examples of “steps” identified in these rulings are relevant to the present context: “interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses”.<sup>779</sup> These are non-exhaustive examples and there may be other investigative or judicial “steps” relevant to an article 18(2) assessment. Furthermore, the Appeals Chamber recently held that “for the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions”.<sup>780</sup>

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<sup>773</sup> [Appeal Brief](#), para. 155.

<sup>774</sup> [Appeal Brief](#), para. 155.

<sup>775</sup> The impugned findings of the Pre-Trial Chamber refer to periods of inactivity in ongoing national proceedings. These references to “inactivity” are not meant to describe the totality of investigative efforts at the national level. In previous cases before the Court the term “inaction” was used to convey “the fact that a State is not investigating or prosecuting, or has not done so” and served as a conclusion on the first step of the admissibility test (*see Katanga OA8 Judgment*, para. 78 (“[I]n case of inaction, the question of unwillingness or inability does not arise”). “Inaction” was thus used to reflect the overall assessment of national proceedings. The term “inactivity” in the Pre-Trial Chamber’s findings in question is not used in the same way.

<sup>776</sup> [Ruto et al. OA Judgment](#), para. 41 (emphasis omitted); [Simone Gbagbo OA Judgment](#), para. 28.

<sup>777</sup> [Ruto et al. OA Judgment](#), para. 41.

<sup>778</sup> [Ruto et al. OA Judgment](#), para. 41.

<sup>779</sup> [Ruto et al. OA Judgment](#), para. 41.

<sup>780</sup> [Philippines OA Judgment](#), para. 106.

367. In light of this jurisprudence, the Appeals Chamber considers that the notion of inactivity in national proceedings may be relevant to the assessment of whether there are ongoing investigations or prosecutions. In this context, “inactivity” signifies the absence of “an advancing process” consisting of steps directed at ascertaining whether a person is responsible for the alleged conduct. In this regard, the Pre-Trial Chamber referred to “steps” such as the identification of suspects, the charging of an accused and the taking of “a judicial decision on an accused’s criminal responsibility”.<sup>781</sup> The Appeals Chamber considers that it is sufficiently clear from these findings what the Pre-Trial Chamber understood to constitute “inactivity”. It follows that, contrary to Venezuela’s argument,<sup>782</sup> the Pre-Trial Chamber did not err by failing to provide a reasoned explanation in this respect.

368. Venezuela also argues that the Pre-Trial Chamber erred by failing to give sufficient weight to the complexity of the cases in question and the impact of intervening issues, such as the COVID pandemic.<sup>783</sup> The Appeals Chamber notes that Venezuela did not refer to any of these factors in the proceedings before the Pre-Trial Chamber, such that the Pre-Trial Chamber would have been able to take them into account when assessing progress in the national proceedings. In his Article 18 Request, the Prosecutor raised the issue of “unjustified delays” in a large number of national proceedings and reported that “[i]n many instances the investigations appear[ed] to have largely been inactive until 2021 or 2022”.<sup>784</sup> However, in its Observations to Prosecutor’s Article 18 Request, Venezuela did not comment on these submissions and did not provide any justification for the alleged periods of inactivity.<sup>785</sup> Furthermore, despite the Pre-Trial Chamber having listed specific cases in which periods of inactivity occurred, Venezuela, in the Appeal Brief, does not specify which of those cases was affected by the factors it lists such that inactivity had been justified. The Appeals Chamber therefore rejects Venezuela’s present argument as unsubstantiated.

369. Moreover, Venezuela argues that an admissibility assessment of national proceedings must relate to the time when an article 18(2) decision is rendered, and that

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<sup>781</sup> [Impugned Decision](#), paras 91, 121.

<sup>782</sup> [Appeal Brief](#), paras 154, 156.

<sup>783</sup> [Appeal Brief](#), paras 154, 157.

<sup>784</sup> [Prosecutor’s Article 18 Request](#), para. 136; *see also* para. 118.

<sup>785</sup> [Venezuela’s Observations to Prosecutor’s Article 18 Request](#).

“the mere existence of past delays cannot trigger the exclusion of active cases” from the pre-trial chamber’s assessment.<sup>786</sup> However, the Appeals Chamber notes that the Pre-Trial Chamber did not exclude any domestic cases on the basis that periods of inactivity occurred before the Prosecutor’s Article 18(1) Notification. As discussed above, the Pre-Trial Chamber considered “periods of unexplained investigative inactivity” to be “non-determinative” factors.<sup>787</sup>

370. Finally, Venezuela argues that the exclusion of cases for reasons of inactivity may have “a chilling effect” on complementarity in that “a State that attempts to actively engage with the Court by seeking information and assistance to help kick-start domestic investigations would risk creating a legal barrier to domestic prosecutions”.<sup>788</sup> However, the Appeals Chamber notes that the Pre-Trial Chamber’s findings on inactivity relate to the national proceedings that “were opened earlier than 2021”<sup>789</sup> and were thus *ongoing* at the time of the Prosecutor’s Article 18(1) Notification. These findings do not concern any national proceedings that were only *initiated* upon receipt of information from the Prosecutor. Furthermore, Venezuela argues elsewhere in the Appeal Brief that the Article 18(1) Notification “constituted a wholly inadequate basis for States [...] to identify the existence of alleged incidents potentially falling within the scope of the Rome Statute”.<sup>790</sup> The Appeals Chamber therefore does not see how the information provided by the Prosecutor could “help progress domestic investigations” in the manner described by Venezuela. Nor does Venezuela refer to any national case which commenced or progressed based on the information included in the Prosecutor’s Article 18(1) Notification. This argument is therefore rejected.

371. For the foregoing reasons, the Appeals Chamber rejects the sixth ground of appeal.

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<sup>786</sup> [Appeal Brief](#), para. 158.

<sup>787</sup> [Impugned Decision](#), paras 96, 131.

<sup>788</sup> [Appeal Brief](#), para. 159.

<sup>789</sup> [Impugned Decision](#), para. 91.

<sup>790</sup> [Appeal Brief](#), para. 56.

## V. APPROPRIATE RELIEF

372. In an appeal pursuant to article 18(4) of the Statute, read in conjunction with article 82(1)(a), the Appeals Chamber may confirm, reverse or amend the decision appealed.<sup>791</sup> In the present case it is appropriate to confirm the Impugned Decision.

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



**Judge Marc Perrin de Brichambaut**  
Presiding



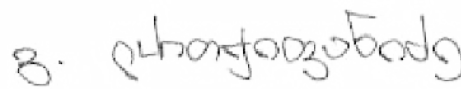
**Judge Piotr Hofmański**



**Judge Luz del Carmen Ibáñez**  
Carranza



**Judge Solomy Balungi Bossa**



**Judge Gocha Lordkipanidze**

Dated this 1<sup>st</sup> day of March 2024

At The Hague, The Netherlands

<sup>791</sup> See rule 158(1) of the Rules.