



Original: English

**No. ICC-02/18 OA
Date: 12 October 2023**

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

**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**

Decision 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

The Office of Public Counsel for Victims

Ms Paolina Massidda

Mr Enrique Carnero Rojo

States Representatives

Competent authorities of the Bolivarian Republic
of Venezuela

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Victims Participation and Reparations Section

Mr Philipp Ambach

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),

Having before it "The Bolivarian Republic of Venezuela's Request for Leave to Reply to the Prosecution's Response Brief (ICC-02/18-62-Conf-Exp)" of 21 September 2023 (ICC-02/18-63-Conf-Exp),

Pursuant to regulations 23*bis*(3) and 24(5) of the Regulations of the Court,

Renders the following

DECISION

1. The Bolivarian Republic of Venezuela's request for leave to reply to the "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)" (ICC-02/18-62-Conf-Exp) is rejected.
2. The Prosecutor is directed to seek reclassification or file a public redacted version of filing ICC-02/18-62-Conf-Exp, by 16h00 on 18 October 2023.
3. Venezuela is directed to seek reclassification or file a public redacted version of filing ICC-02/18-63-Conf-Exp, by 16h00 on 24 October 2023.
4. The Prosecutor is directed to seek reclassification or file a public redacted version of filing ICC-02/18-64-Conf-Exp, by 16h00 on 31 October 2023.

REASONS

I. PROCEDURAL HISTORY

1. On 27 June 2023, Pre-Trial Chamber I (hereinafter: “Pre-Trial Chamber”) rendered its decision authorising the Prosecutor to resume the investigation into the situation in the Bolivarian Republic of Venezuela (hereinafter: “Venezuela”), pursuant to article 18(2) of the Statute (hereinafter: “Article 18(2) Decision”).¹
2. On 3 July 2023, Venezuela submitted its notice of appeal against the Article 18(2) Decision.²
3. On 14 August 2023, Venezuela filed its appeal brief (hereinafter: “Appeal Brief”).³
4. On 13 September 2023, the Prosecutor filed his response to the Appeal Brief (hereinafter: “Prosecutor’s Response”),⁴ and the OPCV submitted its observations.⁵
5. On 21 September 2023, Venezuela filed a request for leave to reply to the Prosecutor’s Response (hereinafter: “Request for Leave to Reply”).⁶
6. On 26 September 2023, the Prosecutor filed his response to the Request for Leave to Reply (hereinafter: “Response to Request for Leave”).⁷

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

² [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](#), 14 July 2023, ICC-02/18-46-AnxII-Red (confidential *ex parte* version dated 2 July 2023 was registered on 3 July 2023).

³ [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’ \(ICC-02/18-45\)](#), 22 August 2023, ICC-02/18-59-AnxII-Red, with confidential *ex parte* annexes (confidential *ex parte* version of Annex II filed on 14 August 2023, ICC-02/18-59-Conf-Exp).

⁴ 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), ICC-02/18-62-Conf-Exp, with confidential *ex parte* Annexes A and B.

⁵ Observations on behalf of victims on the Venezuela Government Appeal against the Decision authorising the resumption of the investigation, ICC-02/18-61.

⁶ Dated 18 September 2021 and registered on 21 September 2023, ICC-02/18-63-Conf-Exp.

⁷ Prosecution Response to the Bolivarian Republic of Venezuela’s Request for Leave to Reply to the Prosecution’s Response Brief (ICC-02/18-63-Conf-Exp), ICC-02/18-64-Conf-Exp.

7. On 12 October 2023, the Appeals Chamber scheduled a hearing in the present appeal for 7 and 8 November 2023.⁸

II. MERITS

8. Venezuela requests leave to reply “in order to address the issue as to if and how the notion of ‘representative samples’ should be employed in connection with Articles 18(1) and (2) of the Statute”.⁹ Venezuela submits that further submissions on this issue will “facilitate the ability of the Appeals Chamber to issue an informed determination as concern [*sic*] a test that is likely to generate profound consequences for Venezuela and other States participating in future admissibility proceedings”.¹⁰ Venezuela also submits that it was unable to anticipate the Prosecutor’s reliance on the concept of representative samples.¹¹

9. The Prosecutor argues that the Request for Leave to Reply does not accurately reflect the Prosecutor’s Response and seeks to expand the scope of the reply beyond the issue of the Pre-Trial Chamber’s reliance on a group of criminal files selected as essential to Venezuela’s request for deferral.¹² The Prosecutor defers to the Appeals Chamber’s discretion “as to whether it would be assisted by further submissions in reply”.¹³

10. Regulation 24(5) of the Regulations of the Court provides:

Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations. Unless otherwise permitted by the Chamber, a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated.

⁸ 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”, ICC-02/18-65.

⁹ Request for Leave to Reply, para. 15.

¹⁰ Request for Leave to Reply, para. 12.

¹¹ Request for Leave to Reply, para. 13.

¹² Response to Request for Leave, para. 3.

¹³ Response to Request for Leave, para. 3.

11. The Appeals Chamber may grant a request for leave to reply if the above-mentioned conditions are met, or if it considers that a reply would otherwise be necessary for the adjudication of the appeal.¹⁴

12. The Appeals Chamber first notes that the Request for Leave to Reply is based on Venezuela's understanding that the arguments presented in the Prosecutor's Response "rely heavily on the Prosecution's stance that 'representative' samples can be employed in connection with the information set out in the Article 18(1) Notification".¹⁵ However, in the view of the Appeals Chamber, the Prosecutor's Response does not appear to "rely heavily" on that notion, as "the issue as to if and how the notion of 'representative samples' should be employed" does not appear to be central or even relevant to any of the arguments raised in the Prosecutor's Response that Venezuela refers to.¹⁶ It also appears that none of the alleged errors identified in the Appeal Brief relies on this issue. Second, even assuming that this issue is relevant to the Appeal Brief in the way Venezuela suggests, the Appeals Chamber considers that Venezuela could have reasonably anticipated it.

13. The Appeals Chamber is therefore of the view that the issue of a "representative sample" could have been reasonably anticipated, and that, in any event, further submissions on this issue would not assist the Appeals Chamber in its determination of the appeal. Accordingly, the Request for Leave to Reply is rejected. The Appeals Chamber recalls that it will hold a hearing, at which Venezuela will have an opportunity to make submissions on various issues arising from the appeal.

14. Lastly, the Appeals Chamber notes that filings ICC-02/18-62-Conf-Exp, ICC-02/18-63-Conf-Exp and ICC-02/18-64-Conf-Exp remain confidential. To the extent their level of confidentiality may have depended on the confidentiality of the Appeal Brief, the Appeals Chamber recalls that Venezuela filed a public redacted version of the Appeal Brief on 22 August 2023.¹⁷ Therefore, the Prosecutor and Venezuela are

¹⁴ *Situation in the Islamic Republic of Afghanistan*, [Decision on the Prosecutor's request for leave to reply](#), 23 December 2022, ICC-02/17-206 (OA5), para. 8; *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 17 July 2017, ICC-01/04-02/06-1994 (OA6), para. 9 (footnote omitted); *The Prosecutor v. Bosco Ntaganda*, [Decision on Mr Ntaganda's request for leave to reply](#), 3 March 2017, ICC-01/04-02/06-1813 (OA5), para. 8.

¹⁵ Request for Leave to Reply, para. 7.

¹⁶ Request for Leave to Reply, para. 7, referring to Prosecutor's Response, paras 3, 8, 46-47, 49, 67-69.

¹⁷ [ICC-02/18-59-AnxII-Red](#).

directed to either seek reclassification or file public redacted versions of the following filings: ICC-02/18-62-Conf-Exp, by 16h00 on 18 October 2023; ICC-02/18-63-Conf-Exp, by 16h00 on 24 October 2023; and ICC-02/18-64-Conf-Exp, by 16h00 on 31 October 2023.

Done in both English and French, the English version being authoritative.



Judge Marc Perrin de Brichambaut
Presiding

Dated this 12th day of October 2023

At The Hague, The Netherlands