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Nº: **ICC-02/18**
Date: **11 December 2023**

APPEALS CHAMBER

Before: **Judge Piotr Hofmański**
Judge Marc Pierre Perrin de Brichambaut
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balundi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

Public Redacted Version

The Bolivarian Republic of Venezuela's Response to *Amicus Curiae* Observations of the Organization of American States Panel of Experts

Source: Bolivarian Republic of Venezuela

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

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I. INTRODUCTION

1. The authorities of the Bolivarian Republic of Venezuela ('BRV') request the Appeals Chamber to place no weight on the *amicus* observations submitted by the Panel of Experts of the Organization of American States ('PoE Observations').[1]
2. On a procedural level, the PoE observations were filed out of time, exceed the proper scope of the authorised *amicus* brief, while also exceeding the allotted number of pages for ICC filings. To the extent that the PoE Observations express a heavily politicised point of view or opinion, no weight can be placed on their perspective.
3. As concerns substance, the PoE Observations will not assist the Appeals Chamber in reaching a proper determination of the merits of the appeal. Significant swathes of argument focus on irrelevant points that do not concern the pending grounds of appeal. Otherwise, the PoE Observations are also duplicative of flawed arguments raised by the Prosecution and the Office of Public Counsel for Victims. The PoE Observations raise no valid argument that is capable of affecting the proper conclusion that the domestic authorities of the BRV were and are continuing to conduct active investigations in relation to substantially the same conduct and perpetrator groups, which was notified by the Prosecutor pursuant to Article 18(1) of the Statute.

II. CLASSIFICATION

4. The current response has been filed confidential *ex parte* (Prosecution and BRV only) because it refers to confidential *ex parte* Prosecution filings and annexes. The BRV will file a public redacted version forthwith.

III. SUBMISSIONS

A. The PoE Observations should be rejected *in limine* due to lack of reliability and procedural defects

5. In its order of 3 November 2023, the Appeals Chamber granted the PoE a right to file amicus observations on the issues set out in the appeal brief, by 24 November 2023.[2] The Appeals Chamber further clarified that the role of an amicus is to assist the Chamber to reach a proper determination of the matters before it, which in the current case, are

[1] ICC-02/18-85
[2] ICC-02/18-78, para 11.

of a legal nature.[3] The Appeals Chamber further underscored that the Pre-Trial Chamber did not examine issues of willingness and ability, and as such, observations on such matters fall outside the scope of the appeal.[4] Thus, while the Appeals Chamber ultimately allowed the PoE to file an amicus brief on matters falling within its expertise and knowledge, the scope of such observations was strictly confined to the issues falling within the grounds of appeal filed by the BRV.[5] The PoE was further directed to "avoid the submission of material that was not considered by the Pre-Trial Chamber". [6]

6. The PoE Observations fail to respect these directives in several core respects.

7. First, it would appear that the PoE Observations were received at 17:53 on 24 November, which is almost two hours after the deadline for filing. The BRV is sympathetic to the difficulties faced by external participants in submitting filings and for this reason, does not advance the position that this warrants the exclusion of the filing *per se*. It is, nonetheless, a factor to consider in conjunction with the PoE's failure to respect the page limit established by the Regulations of the Court and the Appeals Chamber's clear instructions as concerns the proper scope of the amicus observations.

8. Second, in the absence of a specific page limit set by the Appeals Chamber, Regulation 37(1) of the Regulations of the Court establishes a mandatory page limit of 20 pages. The PoE Observations exceed this limit by 5 pages and have done so without seeking prior authorisation. No arguments or justifications have been provided for doing so. The length of the Observations also appears to have been augmented due to the PoE's inclusion of factual arguments and observations that have no direct link to the grounds of the appeal pending before the Appeals Chamber. Indeed, the PoE Observations do not address the grounds of appeal until page 13.

9. This page limit error is not merely technical, but reflective of the third core procedural defect, which concerns the fact that the substantive content of the PoE Observations falls outside the scope authorised by the Appeals Chamber, in the following respects:

   - the PoE Observations improperly rely on factual reports issued after the Pre-Trial Chamber issued its decision or which were not before the Pre-Trial Chamber, [7] and which do not, therefore, form part of the record before the Appeals Chamber;

[3] ICC-02/18-78, para. 8.
[4] ICC-02/18-78, para. 8.
[5] ICC-02/18-78, para. 10
[6] ICC-02/18-78, para. 10
[7] PoE Observations, fns 6, 10, 11,13, 15, 16, 18, 19, 26, 27, 30, 44, 45, 47.

- a significant portion of the PoE Observations concerns broad strokes notions of accountability in Venezuela.[8] These observations misconceive the nature of Article 18 proceedings, which do not constitute a judgment on a State's legal system writ large, but turn on a specific fact-based analysis as to whether the acts notified by the Prosecution have or are being investigated by the State; and
- a significant portion also concerns the 'genuineness' of domestic processes,[9] which falls outside the parameters of the pending appeal.

10. Such citations and *ultra petita* arguments continue throughout the Observations as a whole. Any consideration of the thrust of argument would inevitably be tainted through the improper reliance on such materials and arguments. Given the cumulative nature of the prejudice occasioned by the PoE's failure to follow the Appeals Chamber's clear directives, the appropriate remedy is to reject the PoE Observations *in limine*.[10]

11. Even if the Appeals Chamber finds that the grounds for automatic exclusion are not met, a further basis arises from the lack of impartiality evidenced by the PoE's deliberate refusal to comply with the directives of the Appeals Chamber and the unreliable methodology that lies at the heart of the Observations (and related reports).[11]The PoE played a direct role in furnishing information to the Prosecutor concerning the alleged events: giving them an opportunity to be heard is akin to giving the Prosecutor a 'second bite of the cherry' in these proceedings.[12] By constantly conflating the BRV with the 'Maduro regime' and attacking it on a political level,[13] the PoE Observations also interject an inappropriate degree of partisanship politicisation into what should be a dispassionate assessment of facts and law. Such partiality (including statements which violate the presumption of innocence) is, in itself, grounds for exclusion of an *amicus*.[14] The two PoE members (one of whom was only recently appointed), [15] possess no specialised knowledge, insight or qualifications as concerns the BRV's legal system.

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[8] I.e. PoE Observations, paras 2.

[9] This includes citations to reports concerning politics (paras 2-11) arguments concerning witness protection (para 14), which relate to ability, and shielding (paras 68-69), which relate to genuineness.

[10] This would be consistent with the approach adopted by the Appeals Chamber in its judgment concerning the admissibility of the *Simone Gbagbo* case: ICC-02/11-01/12-75-Red, paras. 43-45.

[11] [redacted]

[12] See by analogy, *Prosecutor v. Gotovina et al,* Decision on Request of Republic of Croatia to Appear as Amicus Curiae, 18 October 2006, p. 4.

[13] PoE Observations, para. 15.

[14] See *Prosecutor v. Milosevic*, Decision concerning an amicus curiae', 10 October 2002.

[15] Ms Frivet joined the OAS Panel of Experts in 2023. It is unclear if the 2 experts represent the PoE as a whole.

Given that the BRV withdrew from the OAS,[16] the PoE have no legal or factual competence to assist the Chamber to make an impartial assessment as concerns current domestic proceedings in a State which does not fall under its jurisdiction.

B. The substance of the observations are irrelevant and will not assist the Appeals Chamber to reach a proper determination of the grounds of appeal

1. Ground 1.1 burden of persuasion and proof

12. In positing that the issues raised by ground 1.1 were settled by the *Philippines* appeals judgment,[17] the PoE Observations erroneously conflate the notion of the burden of proof with the burden of persuasion. As explained persuasively by Judge Eboe Osuji:[18]

> They are different concepts. The 'persuasive burden' may be defined as 'the obligation of a party to meet the requirement of a rule of law that a fact in issue must be proved or disproved' at the required standard of proof. In a criminal case, the persuasive burden addresses the issues pleaded in the indictment, the overarching issue being whether the accused is guilty as charged. The persuasive burden on the issues pleaded in the indictment is always on the shoulders of the Prosecution. 'Evidential burden', for its part, has been defined as 'the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.'(...) In other words, the 'burden' in the context of 'evidential burden' is merely the obligation to adduce evidence that is enough to give an air of realism to the issue aimed at by the evidence in question, thus putting the issue beyond a bare assertion or mere conjecture.

13. When this distinction is applied to Article 18, it follows that the burden of proof (the 'evidential burden') only obliges a State to demonstrate that there is sufficient evidence to raise the issue of relevant active investigations. Once a State discharges this burden of production (by providing information concerning domestic proceedings), the Prosecution assumes the persuasive burden of demonstrating that the case is admissible at the ICC. This is consistent with Rule 51 of the Rules of Procedure and Evidence, which requires the State to provide some information concerning its investigations to the Court, following which the burden rests with the Prosecution to persuade the Court as to its irrelevance or insufficiency; although the absence of concrete or specific information from the State may assist the Prosecution to discharge this burden, it does not displace the Prosecutor's obligation to demonstrate how and why the information in question fails to sufficiently mirror the acts set out in the Article 18(1) Notification.[19]

14. Although the PoE Observations rely heavily on the Appeals Chamber's citation of the principle of *onus probandi incumbit actori*,[20] the same reasons that led the Appeals

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[16] The Bolivarian Republic of Venezuela has not been a state party since April 2019.
[17] PoE Observations, para. 25.
[18] Separate Opinion, ICC-01/09-01/11-1334-Anx-Corr paras. 79-80.
[19] J.T. Holmes, 'Complementarity: National Courts versus the ICC' in A. Cassese et al. (eds.), The Rome Statute for an International Criminal Court: A Commentary (2002) 667 at 677.
[20] PoE Observations, para. 30.

Chamber to conclude the State should bear the burden of proof also lead to the conclusion that the Prosecution, and not the State, should bear the burden of persuasion. Specifically, the Appeals Chamber relied on the fact that a State has greater access to domestic case files to reach the conclusion that the State bears the burden of proof concerning the existence of domestic investigation.[21] However, while the State may have greater knowledge as concerns the existence of domestic proceedings,[22] given that the Statute allows the Prosecution to withhold details of its Article 18(1) notification on grounds of protection, it is the Prosecution, and not the State, which has greater knowledge as concerns the potential mirroring of domestic investigations and the intended investigations of the OTP. Indeed, the Prosecutor is not only the best-placed entity to speak to the scope of its intended investigations: in situations where there has been no prior judicial scrutiny as to the existence of a reasonable basis to proceed with the investigation, the Prosecutor may be the sole entity which is capable of providing an assessment as to whether domestic proceedings overlap with the incidents, which the Prosecutor relied upon as the basis for opening the investigation. Far from forcing the Prosecutor to 'prove a negative',[23] a proper allocation of the burden of persuasion ensures that the Pre-Trial Chamber is put in a position where it can make a meaningful assessment as concerns the potential overlap between domestic investigations and the intended investigations of the Prosecution. Otherwise, in situations such as the present, where the Prosecutor has reached an unsupervised internal decision to open the investigation, it is the State which is forced to hit a bullseye with its eyes shut.

15. The PoE has asserted that 'states could force the ICC Prosecutor to terminate investigations relating to the entirety of a situation, merely because it is engaged in some unspecified number of investigations, however minimal, and has made a written request'.[24] This puzzling proposition ignores the operation of the last sentence of Article 18(2), which allows the Prosecutor to apply to the Chamber for authorisation to resume its investigations. Since the very act of introducing such an application can have significant implications for state sovereignty and the rights of the impacted State, the Prosecutor is evidently required to carefully assess the criteria set out in Article 53(2) of the Statute before submitting such an application. Rule 54(1) further requires the

[21] ICC-01/21-77, paras. 78-79.
[22] PoE Observations, para 28.
[23] PoE Observations, para 29.
[24] PoE Observations, para. 30.

Prosecutor to set out 'the basis for the application'. During the hearing, the Prosecution conceded that this provision requires the Prosecution to 'explain why the criteria under Article 17 are not met on the basis of the information we have received and why the investigation should not be deferred and why we should be allowed to proceed'.[25]

16. The language in Rule 54(1) is also virtually identical to Rule 58(1) ('A request or application made under article 19 shall be in writing and contain the basis for it'). In *Mbarushimana,* the Pre-Trial Chamber ruled that this language translates to an obligation on the party filing such an application to substantiate and justify the foundation for its request.[26] In line with Article 31(1) of the Vienna Convention on the Law of Treaties, the Court's interpretation of the wording of Rule 58(1) necessarily informs its approach to Rule 54(1). It follows that since Rule 58(1) has been judicially interpreted as requiring the applicant to substantiate the basis for its application, the same holds true for Rule 54(1).

17. The Appeals Chamber's approach to the burden of persuasion must also be consistent with, first, the primacy of States and, second, the right to adversarial proceedings, which dictates that the authorities of the BRV must be afforded a fair right to be heard on all matters that are likely to influence the Chamber's decision. Both these notions dictate that the burden of persuasion should fall on the Prosecution and not the State.

18. As concerns the notion of primacy, it is not disputed that the Rome Statute is based on the assumption that the ICC is a court of last resort: States have primacy as concerns their right to exercise jurisdiction over cases. When a State files its Article 18(2) 'notice', '[i]n as much as the Prosecutor has no choice in the matter but to comply, the request is not really a request. It is a demand or an assertion by the State of its right to primacy.' [27] Article 18 thus establishes a 'presumption of regularity' in favour of domestic investigations. This presumption of domestic regularity and primacy in Article 18 results in the conclusion that 'in order to succeed in its request of the Court, the prosecution must substantiate the assertions that form the basis of its application'.[28]

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[25] ICC-02/18-T-002-Eng, p 11 line 25 – p. 12 line 2.
[26] *Prosecutor v. Callixte Mbarushimana*, Decision on the 'Defence Challenge to the Jurisdiction of the Court', ICC-01/04-01/10-451, 26 October 201, para 4: 'The Chamber observes that, pursuant to rule 58(1) of the Rules, "a request or application made under article 19 shall be in writing and contain the basis for if (emphasis added). It is therefore the responsibility of the defence to set out the basis for its jurisdictional challenge."
[27] Daniel D. Ntanda Nsereko, Article 18, 'Preliminary Rulings Regarding Admissibility'in O. Triffterer and K. Ambos (eds.), Commentary on the Rome Statute of the International Criminal Court (3rd ed., 2016) 832,843.
[28] M Fairlie, 'Burdens and Standards of Proof for Complementarity Determinations', FIU Legal Studies Research Paper Series Research Paper No. 17-09 April 2017, p. 8.

This is consistent with international practice, where, when faced with an assumption of regularity, the party seeking to displace that assumption bears the burden of persuasion.[29] For example, the ICTY and ICTR Statutes enshrined the notion that the Tribunal had primacy over States (the reverse situation to the ICC). The principle of primacy in that context meant that any entity seeking to displace that presumption of primacy bore the burden of justification. Accordingly, if the Prosecution filed a request to refer a case to a national court, the Prosecution (as the moving party acting on behalf of the State) was responsible for satisfying the Chamber that the grounds for deferral to a national court were met.[30] Since the converse applies at the ICC (that is, primacy rests with States and not the Court), any entity challenging this presumption bears the persuasive burden of demonstrating why the presumption should be displaced.

2. Ground 1.2 The failure to particularize the 'cases', which should have been encompassed by domestic investigations

19. The PoE Observations rest on two faulty premises: first, that the nascent stage of investigations exempts the Prosecutor from the duty to provide clear contours as concerns the scope of its intended investigations, and second, that abstract witness protection issues give rise to a general right to withhold relevant details concerning the scope of its intended investigations from both affected States and the Pre-Trial Chamber resolving article 18 challenges.

20. As concerns the first error, before initiating an investigation, the Prosecutor is required, pursuant to Article 53(1)(b), to make an assessment of whether the 'case is or would be admissible under article 17'. The compulsory nature of this language confirms that the ICC Statute does not confer on the Prosecutor *carte blanche* to investigate all acts occurring within a situation. Rather, intervention is confined to acts for which there is a reasonable basis to believe that the elements of a Rome Statute crime are fulfilled, and the Prosecutor has ascertained that no State is or has carried out proceedings in connection with the 'case' in question. This assessment cannot be reached in a vacuum. Clearly, in order to make such an assessment, the Prosecutor must identify specific acts fulfilling this criteria, which will fall within the scope of its intended investigations.

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[29] M Fairlie, 'Burdens and Standards of Proof for Complementarity Determinations', FIU Legal Studies Research Paper Series Research Paper No. 17-09 April 2017, p. 7.
[30] ICTR: Prosecutor v. Uwinkindi, Decision on Uwinkindi's Appeals Against the Referral of his case to Rwanda and Related Motions, para. 28.

Indeed, if the available information is insufficient to identify particular crimes or cases, then the requirements for opening an investigation have not been met.

21. This reading of Article 53(1) is consistent with the language of Rule 52(1) and Article 18(2). Rule 52(1) then provides 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'. Exactly the same language is used in Article 18(2) which provides that within a month of receiving the Article 18(1) notification, the State concerned, with a view to seeking a deferral, 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. The use of the definitive article, in the statutory expression 'the acts that may constitute crimes referred to in Article 5' requires the Prosecutor to identify those specific acts.

22. For cases concerning alleged crimes against humanity, it would also be impossible for the Prosecutor to reach a meaningful assessment as concerns the existence of a reasonable basis to conclude that a crime has occurred without identifying a link between the acts in question and a State or organisational policy. Thus, even if the Prosecutor is not in a position to identify specific perpetrators, at the very least, the Prosecutor must identify a link between the perpetrator group and the policy underpinning the alleged Article 7 crimes. Conversely, if the Prosecutor has identified a particular perpetrator, then it is necessary to include such information in the Article 18(1) Notification in order to give effect to the mandatory terms of Article 53(1)(b). If the Prosecutor withholds such information from a State, which normally exercises jurisdiction over the crimes concerned, and the State conducts proceedings against the individual concerned, the Prosecutor will have violated his duties under Article 53(1)(b) and further prevented the State from exercising its rights under Article 18 of the Statute.

23. It therefore follows that while the definition of a 'case' for the purpose of Article 18 proceedings can and should be tailored to the particularities of the investigation phase, it must be interpreted in a manner that gives effect to the mandatory requirements and safeguards built into Articles 53 and 18. At a minimum, and in line with the *Comoros* judgment, the 'ease/s' set out in the Article 18(1) Notification should include information pertaining the 'groups of persons likely to be the object of the

investigation', and the incidents which comprise the crimes identified by the Prosecutor as falling within the jurisdiction of the Court.[31]

24. Turning to the second faulty premise, while Article 18(1) permits the Prosecutor to limit the scope of information provided to States, there are two key considerations which demonstrate why this provision is not relevant to the pending appeal grounds. First, this provision does not afford the Prosecutor a general right to withhold information: the ability to withhold information is contingent on the Prosecutor reaching a determination that the disclosure of specific information could impact the protection of persons, the destruction of evidence, or lead to persons absconding. The Prosecutor never cited these grounds as justification for limiting the disclosure of information, in either the Article 18(1) Notification or its Article 18(2) Application. Instead, the Prosecutor argued that it was not in principle required to provide any further particulars. Second, while Article 18(2) refers to limiting the scope of information provided to a State or States, it does not include a carve-out as concerns the disclosure of such information to the Pre-Trial Chamber. Read in conjunction with Rules 54 and 55, it is clear that the Prosecutor is obliged to furnish sufficient information to the Pre-Trial Chamber to enable the Chamber to discharge its duty to 'consider the factors in article 17'[32] when deciding whether to authorise the Prosecutor's continued investigation. Given that Article 17 speaks of the admissibility of particular 'cases', it follows that the Chamber must be placed in a position where it can conduct a meaningful independent comparison between the 'cases', which are the intended subject of Prosecution investigations, and those which have or are being investigated by the State. In the absence of any particulars from the Prosecutor (and as concerns investigations which were not the subject of an Article 15(4) assessment), the role of the Chamber would be reduced to accepting the Prosecutor's avowal concerning the absence of an overlap at face value. Such a diluted judicial assessment would contravene the Appeals Chamber's directive that judicial decisions must be founded on evidentially substantiated propositions that are capable of being verified by the Chamber.[33]

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[31] Decision on the 'Application for Judicial Review by the Government of the Comoros', ICC-01/13-111, para. 18
[32] Rule 55(2) of the Rules of Procedure and Evidence.
[33] ICC-02/04-01/05-371, paras. 36. See also *Prosecutor v. Gaddafi*, where the Appeals Chamber stressed that ""It must be possible for a Chamber to compare what is being investigated domestically against what is being investigated by the Prosecutor in order for it to assess whether the same case (substantially the same conduct) is being investigated": ICC-01/11-01/11-547-Red, para. 83.

25. The PoE Observations claim that this issue caused no prejudice to the BRV[34] is contradicted by the plain text of the Decision. While attempting to apply the 'mirroring test', the Pre-Trial Chamber noted that its ability to compare domestic proceedings with the acts falling within the scope of the Prosecutor's intended investigations was impeded by the fact that '[i]n the list of incidents provided to Venezuela, the Prosecution did not indicate which conduct or alleged crimes it may investigate'.[35] In essence, the 'mirroring test' was not fulfilled because the Prosecutor had failed to describe the acts, which domestic proceedings should mirror. Given that the obligation to furnish such details rested exclusively with the Prosecutor, it was a clear and reversible error of law for the Chamber to conclude that the Prosecutor had provided a sufficient basis for the resumption application.

3. Ground 1.3 Article 18(3) requires the Prosecutor to file a resumption request at the point of 'six months after the date of deferral'.

26. The PoE has erroneously described the Statute as imposing an 'open-ended deadline'.[36] This description is incongruous with the clear wording of Article 18(3). Rather than stipulating that the Prosecutor may apply to resume its investigations after 6 months have elapsed, the article provides that the Prosecutor may do so 'six months after the date of deferral'.[37] The placement of the word 'after' governs the calculation of time between the date of deferral and the submission of the resumption request and not the subsequent period. If the drafters had wished to create a general open-ended deadline, the wording would have stated that the 'Prosecutor's deferral to a State's investigation shall be open to review **after** six months have elapsed from the date of deferral'. Further guidance can be derived from the second limb of this provision, which provides that the Prosecutor may also apply for review of the deferral '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'. This second limb sets out a more limited scope for review: the Prosecutor must demonstrate a significant change of circumstances concerning the State's ability or willingness to genuinely carry out investigations. This limitation would, however, have no statutory effect if the 6-month period were to be

[34] PoE Observations, para. 35.
[35] ICC-02/18-45, para. 123.
[36] PoE Observations, para. 39.
[37] The same placement of 'after' is also evident in other language versions i.e. «Ce sursis à enquêter peut être réexaminé par le Procureur six mois **après** avoir été décidé, ou à tout moment où il se sera produit un changement notable de circonstances découlant du manque de volonté ou de l'incapacité de l'État de mener véritablement à bien l'enquête modifie sensiblement les circonstances ».

interpreted as '6 months and any period thereafter'. Such an outcome would be contrary to the principle of *effet utile*, 'according to which a provision must be interpreted in such a manner to ensure that it has practical effect'.[38] This effect can only be achieved if Article 18(3) is read to establish a clear deadline for the first limb so that it is possible to ascertain when the second limb applies. Indeed, it would be entirely illogical and imbalanced for the Statute to require States to respond to the Article 18(1) Notification 'within one month of receipt' of notification, while extending an unfettered right to seek review to the Prosecutor at any point after 6 months. Read together with Article 18(2), it follows that when a State communicates its deferral, Article 18(2) requires the Prosecutor to formulate an immediate response when communicating this deferral to the Chamber: to acquiesce or contest, setting out the basis for its decision to do so. If the Prosecutor acquiesces (expressly or by failing to submit the basis for its position), the Prosecutor may then seek review subsequently (under Article 18(3)) upon demonstration of a significant change of circumstances or at the 6-month mark. In the current situation, the Prosecutor failed to comply with the requirements of either Articles 18(2) or Article 18(3). While the PoE has sought to minimise the consequence of the Prosecutor's tardiness, the Appeals Chamber has repeatedly stressed the importance of expediency and compliance with Statutory deadlines.[39] The question as to whether it was reasonable to file at a later point can also be regulated through Regulation 35 (and a timeous application for an extension of the deadline by the Prosecutor).

4. Ground 2: the Pre-Trial Chamber erred by relevant materials from its consideration including Spanish materials and 'fichas'

27. As concerns translation, the PoE Observations are predicated on the illogical stance that while the Prosecutor has a duty to furnish the materials received from a State to the Pre-Trial Chamber, the Prosecutor is not required to communicate them in a form that the Chamber can understand. This stance is contrary to the ICC legal regime as concerns the translation of matters pertaining to States and the clear wording of Rule 54(1).

28. Concerning the first point, neither Article 18(2) nor Rule 53 impose any requirement on States to submit information in a working language. There is also no general rule to such an effect. To the contrary, Article 87(2) of the Statute provides that cooperation requests shall be provided in a translation of either the official language of the requested State or one of the working languages of the Court depending on the choice made by the State.

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[38] See Minority Opinion of Judge Perrin de Brichambaut, ICC-02/05-01/09-302-Anx, para. 45.
[39] ICC-02/04-01/15-1562, paras 2, 131, 135-137; ICC-01/14-01/21-171, para. 122.

ASP documents confirm the understanding that Article 87(2) encompasses related proceedings before the Chamber.[40]

29. Commentary concerning the drafting history of Article 87(2) also supports the conclusion that this provision imposes an obligation on the Court (as the requesting entity) to assume responsibility for translations. Claus Kress and Kimberly Prost have explained that the compromise reached in Rome favored the position that the Court would 'bear the responsibility for any requisite translations'.[41] This is consistent with other Statutory provisions. For example, Article 99(3), which concerns the execution of requests for assistance, specifies that replies from the requested State shall be transmitted in their original language and form.[42] This article must be read together with Rule 42 of the Rules of Procedure, which provides that the 'Court shall arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and the Rules.' The two provisions therefore clarify that States fulfil their obligations by transmitting materials in the original language: it then falls to the Court to make arrangements to obtain translations necessary to fulfil its mandate. Article 100(b), which concerns the allocation of costs that occur on the territory of a requested State, further stipulates that any costs of translation, interpretation and transcription should be borne by the Court.

30. The *Philippines* and *Afghanistan* situations can also be distinguished from the current case. In the *Philippines* situation, the Appeals Chamber was seized of the question concerning the State's obligation to furnish relevant information to the Prosecutor. The Chamber did not address the separate question of transmitting information to the Chamber, nor did it address the format or language of such information. It is also a non-sequitur to claim that just because a State may be well placed to identify national proceedings that relate to the Article 18(1) Notification, it is also well placed to translate such materials into a completely foreign language. The Afghanistan decision can also be distinguished on the basis that the Prosecutor had specifically requested the authorities to provide materials which would allow the Prosecutor to understand the

[40] ICC-ASP/7/5, 26 May 2008, para. 8: "Requests for judicial cooperation include requests for arrest and surrender, warrant of arrest, requests for the freezing of the assets, judicial decision in relation to the requests, among other documents. Such requests, also accompanied by notes verbales are to be translated into the above languages. The judicial cooperation also includes files received from countries in the relevant languages as well as any correspondence that ensues."
[41] C Kress K Prost, 'Article 87, Request for Cooperation General Provisions" in Triffterer ed. Commentary on the Rome Statute 2nd edition, p. 1521
[42] Article 99 (3), Statute.

materials in *Dari*.[43] In contrast, the Prosecutor made no such request to Venezuela, as it clearly possessed the capacity to review the materials in Spanish.

31. As concerns the second point, Rule 54(1) requires the Prosecutor to communicate both the information received from States and the basis for the application. Read together, the provision amounts to a clear obligation to place the Chamber in a position where it can review the 'basis' for the Prosecutor's assessment that the information in question revealed that the grounds for deferral were not met. When read in conjunction with Rule 42 of the Rules of Procedure, it follows that the obligation falls on the Court (and not States) to ensure the translation of any documents required by the Chamber to perform its duty to review the materials communicated by the Prosecutor pursuant to Rule 54(1) and to make an informed evaluation of the factors set out in article 17.

32. At a minimum, if it is the Prosecutor's position that certain domestic cases are not relevant to its Article 18(1) Notification or fail to satisfy the requirements of Article 17, the Prosecutor must communicate (in a working language) the particular features of the transmitted the information, which were relied upon to reach such an assessment. As concerns the particular Article 18(2) resumption request filed in this situation, the Prosecutor averred that although it had 'identified 28 cases where progressive investigative steps have been taken with respect to the named individuals for the crimes for which they were sought, a deferral of the situation is not warranted at this stage of the proceeding'. [44] When elaborating on this point, the Prosecutor argued that the information concerning the status of the perpetrators showed that their rank was 'low'.[45] Although this information was set out in the Eleventh, Thirteenth and Fourteenth Submission, [46] the Prosecutor only provided translations from the 'Ninth, Tenth and Eleventh Submissions'. [47] This means that the Prosecutor failed to communicate the 'basis' for its conclusion that the perpetrators identified by domestic proceedings were 'lowly' ranked. Similarly, the Prosecutor's assessment of the type of criminality encompassed by domestic proceedings rested on an evaluation of materials that it never translated for the Chamber.[48] As a result, the Pre-Trial Chamber endorsed positive

[43] ICC-02/17-196, para. 48.
[44] ICC-02/18-18, para. 97.
[45] ICC-02/18-18, para. 105.
[46] ICC-02/18-18, fn. 213.
[47] ICC-02/18-62-Red, para. 12.
[48] ICC-02/18-18, para. 108.

assertions of fact advanced by the Prosecutor,[49] even though it lacked the means to independently verify the accuracy of such facts. This led the Chamber to adopt factual assertions that were controverted by the Spanish materials before it. This includes the following conclusions:

- that domestic investigations targeted low-ranking suspects only, which was based on the Chamber's rejection of information included in Spanish materials;[50]
- that there was no information before the Chamber that Venezuela had investigated patterns relevant to the factual underpinning of crimes against humanity (an error that will be addressed in connection with ground 4);[51] and
- the exclusion of two cases concerning sexual violence charges, which had not been provided in English,[52] and further disregard for other cases concerning sexual violence conduct, which were not included in the translated materials.[53]

33. Contrary to the position advanced in the PoE Observations,[54] the submission of 'essential translations' was also incompatible with the quantitative nature of the Chamber's approach to the same person-same conduct test. Specifically, at various points in its decision, the Chamber reached a negative verdict concerning the sufficiency of the overlap, based on the number of cases carried out by domestic authorities. The Chamber reached this numerical assessment on the basis of the English 'representative' sample before it. Venezuela was thus forced to compete in a 'numbers' race, without the benefit of the full array of cases submitted to the Prosecutor.

34. With respect to the issue of 'fichas', the PoE Observation merely rehearsed the erroneous description used by the Prosecutor, which led the Pre-Trial Chamber into error in the first place.[55] Whereas the PoE Observations claim that the BRV failed to adduce documentation concerning its domestic investigative activities,[56] in its First Report to the Prosecutor,[57] the BRV provided a detailed description of its internal case tracking system, which, in the ordinary course of business, generated reports concerning

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[49] ICC-02/18-45, para. 97.
[50] ICC-02/18-45, paras 111-113: "The Prosecution responds that Venezuela 'provided limited or no information about the perpetrator or perpetrator group(s) involved in the cases presented'. The Chamber notes that Venezuela refers to two cases to support its submissions on this matter. (...) With regard to the second case explicitly mentioned by Venezuela, no translation was provided to the Chamber."
[51] ICC-02/18-45, para. 107: "However, these are factual conclusions that can only be reached after an investigation, either by Venezuela or the Prosecution. No information that such an investigation took place and, if any, how its conclusions were reached, are before the Chamber".
[52] ICC-02/18-45, para. 124
[53] ICC-02/18-45, para. 124 (see fn.227 which relates exclusively to the translated materials).
[54] ICC-02/18-85, para. 48.
[55] PoE Observations, para. 50.
[56] PoE Observations, para. 50.
[57] This was filed by the Prosecutor as VEN-OTP-0001-1250 and included in its Article 18(2) Resumption Request.

the investigative and procedural steps taken in each case.[58] According to the Prosecution's assessment, [redacted][59] The active progression of such cases was further corroborated through the submission of documents, reflecting concrete investigative steps (i.e. autopsies, medical examinations, suspect interviews, witness statements).[60] The Pre-Trial Chamber's failure to review the evidential record holistically led the Chamber to wrongly conclude that domestic authorities were not actively pursuing cases related to the Article 18(1) Notification.

5. Ground 3: the temporal scope of the Article 18(1) Notification

35. The PoE Observations correctly recognise that there is a distinction between 'the temporal scope of the referral, the temporal scope of the investigation, and the temporal scope of the incidents' (falling within the Article 18(1) Notification).[61] The question before the Pre-Trial Chamber was not, however, whether the OAS or referring States believed there to be evidence of alleged crimes dating from 2014,[62] but the temporal scope of the conduct described in the Article 18(1) Notification.

36. States do not have crystal balls and cannot be expected to mirror future lines of investigations that have not been particularised in the Notification. If the Notification indicates that the intended focus of investigations is detention-related abuses connected with demonstrations occurring on or after April 2017, then this temporal information should operate as the fulcrum for the Chamber's mirroring assessment.

6. Grounds 4.1, 4.2, 4.3, 4.4 and 4.5

37. The PoE Observations rehearse the Pre-Trial Chamber's legal findings without explaining how such findings are correct or why the appeal grounds are misconceived.

38. With respect to the Pre-Trial Chamber's findings concerning discriminatory intent, in suggesting that Venezuela was required to enact domestic legislation concerning

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[58] VEN-OTP-0001-1250 at pp. 76-78 (paras 146-150).
[59] Resumption Request, ICC-02/18-18, para. 21: "Having reviewed this material, the Prosecution has concluded that of the 893 cases reported 765 cases (85.67%) relate to events arising from the April 2017 political demonstrations. Of the cases arising from the 2017 events, 25 cases appear not to relate to crimes within the Court's jurisdiction.738 of the reported cases (82.64%) appear to have been opened when an individual filed a complaint, and 117 cases (13.10%) were opened *proprio motu*. In some cases, the authorities initiated proceedings in response to allegations reported by international bodies such as OAS, IACHR, OHCHR and FFM.
[60] Appeal Brief para 86, fn. 149 (English materials), fn. 69; ICC-02/18-Eng, p. 7 lines 3-6.
[61] ICC-02/18-85, para. 59.
[62] ICC-02/18-85, para. 59.

persecution, the PoE Observations go beyond the findings of the Pre-Trial Chamber and the submissions of the Prosecutor. [63]There is no legal requirement for State parties to enact Rome Statute crimes into domestic legislation and the Appeals Chamber should be very cautious regarding propositions that would have far-ranging consequences not only for Venezuela but also all other State parties and States that might wish to join the Court in the future. Indeed, given that the admissibility regime can also be invoked by non-State parties (such as the United States of America), it is imperative that its provisions are not interpreted in an overly rigorous manner which would discourage such non-State parties from engaging in good faith with the Court's admissibility regime should potential conflicts of jurisdiction arise. The imposition of such a requirement would also be inconsistent with state practice and internationally recognised human rights law concerning *ne bis in idem*, according to which such protections apply even if the domestic State pursue the individual for an offence with a different form of intent.[64]

39. In terms of the underlying factual conduct related to persecution, both the Prosecution and the Chamber received concrete and specific evidence that domestic authorities are pursuing a significant number of cases related to allegations pertaining to the targeting of actual or perceived opponents of the political regime.[65] Issues of discriminatory intent can be addressed in sentencing under relevant provisions of the penal code.[66]

40. In terms of contextual elements, the PoE Observations endorse the Pre-Trial Chamber's flawed reliance on submissions from the representatives of the BRV concerning the fact that the conduct set out in the Article 18(1) does not fulfil the legal qualification of crimes against humanity.[67] The PoE Observations thus fail to acknowledge the distinction and separation between the representatives of the BRV and the independent position of courts and domestic prosecutors. As a first point, the PoE arguments on this point concern the genuineness of investigations.[68] It thus falls outside the scope of the pending grounds of appeal and would in any case necessitate clear proof that such

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[63] During the hearing, the Prosecution acknowledged that it is not necessary for States to prosecute the conduct using the same legal qualification as the Prosecutor: the crimes need not be prosecuted as 'persecution' or crimes against humanity as such: ICC-02/18-T-002-Eng, p. 21 lines 19-24.
[64] Case C-537/16, Garlsson Real Estate and others, Judgment of 20 March 2018, paras 36-41; Case C-524/15, Menci, Judgment of 20 March 2018, paras. 34-39
[65] See paras. 43-46 *infra*.
[66] Article 77 of the Código Penal sets out a range of aggravating factors, including abuse of authority or public office, acting in in a premeditated manner or in a manner that increases the harm of the offence. The gender, age and vulnerability of the victim can also be considered as an aggravating factor (article 77(14)). Under article 56, acting with premeditation, cruelty or treachery are also grounds for denying a potential commutation of sentence.
[67] ICC-02/18-85, paras 7, 20.
[68] ICC-02/18-85, para. 69.

statements have affected concrete cases.[69] As a second point, it would be inappropriate for the Chamber to draw adverse inferences from Venezuela's sovereign right to contest the legal qualification of acts. This is particularly the case in circumstances where no ICC Chamber has exercised any oversight over the correctness of this qualification. A State should not be penalized for attempting to pursue a sovereign right. A State which challenges admissibility on the basis of gravity does not lose the right to challenge admissibility on the basis that it is conducting genuine investigations in relation to the same conduct. Consistent with the fact that the obligation to ensure accountability in an effective manner is an obligation of means, not result,[70] it is also possible to issue statements that are consistent with the presumption of innocence, while simultaneously taking active steps to investigate the acts notified by the Prosecutor.

41. The Pre-Trial Chamber made no findings that the representations of the BRV before the ICC had impacted specific investigations or resulted in the non-investigation of relevant acts set out in the Article 18(1) Notification. The Pre-Trial Chamber therefore erred by relying on the BRV's position concerning the legal qualification of events, to dispose of a question which should have required the Chamber to conduct an objective assessment as to the overlap of the acts described in the Article 18(1) Notification and the subject matter of domestic proceedings.

42. If the Pre-Trial Chamber had conducted such an assessment (based on the full array of relevant materials), there would have been no basis to conclude that domestic proceedings were deficient. According to the Prosecution, this conduct was captured in the Article 18(1) Notification through the following description:[71]

> That summary which was attached to the December notification says in paragraph 3, specifically, the office concluded that the information available provided a reasonable basis to believe that since at least April 2017, civilian authorities, members of the armed forces and pro-government individuals have committed the crimes against humanity, and then listing those crimes against humanity. That's paragraph 3 of the summary. That goes to patterns of crimes and links necessary for both policy, for attack, for widespread, for systematic.

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[69] ICC-01/11-01/11-466-Red, para. 235.

[70] Giuliani and Gaggio v. Italy [GC], § 306: "However, it cannot be inferred from the foregoing that Article 2 may entail the right to have third parties prosecuted or sentenced for a criminal offence (...) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence"; Hanan v. Germany [GC], § 210: "Article 2 does not entail the right to have third parties prosecuted or convicted for a criminal offence (...). To date, the Court has not faulted a prosecutorial decision which flowed from an investigation which was in all other respects Article 2 compliant (see *Armani Da Silva*, cited above, § 259), or required the competent domestic court to order a prosecution if that court had taken the considered view that application of the appropriate criminal legislation to the known facts would not result in a conviction". See also the OTP Final Report on Columbia, 2023, para. 46: "The relevant test under the Statute is not framed to answer the question whether the State has fully discharged its duty under national and international law to provide full and effective redress to victims, utilizing the full range of processes and mechanisms associated with transitional justice processes."

[71] ICC-02/18-T-002-ENG, p. 40 lines 15-22.

43. The described conduct concerning 'pattern' of criminality is fully subsumed by Venezuela's domestic investigations. The Prosecutor has conceded in its written response that Venezuela had adduced documentation concerning '115 victims and 62 cases',[72] which 'related to approximately half of the 124 incidents (amounting to 118 cases) which the Prosecution listed in its 13 January 2022 letter'.[73] If these incidents fail to cover the contextual elements of crimes against humanity, then it follows that the Prosecution's intended investigations do not themselves cover contextual elements.

44. Domestic authorities have also taken active steps to investigate regular repetitions of similar conduct occurring in the same location and time period. [redacted].[74] [redacted].[75] [redacted].[76]

45. Domestic proceedings concerning serious allegations of murder also demonstrate that the element of an alleged organizational policy is objectively captured (or mirrored) by cases which targeted specific groups, and multiple high-ranking individuals in these groups, for related crimes. [redacted].[77]

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[72] Response, fn. 12, para. 8. See also Response, para. 46, where the Prosecution described these cases as being 'representative'.
[73] Response, para. 49.
[74] Appeal Brief, para. 126.
[75] [redacted]
[76] [redacted]
[77] [redacted]

46. Finally, the PoE has incorrectly claimed that domestic proceedings do not encompass charges of rape as such, whereas the Prosecution conceded that the BRV had provided information concerning active investigations involving allegations of rape against 15 defendants and 15 victims. In contrast, t[redacted]'[78] The Chamber's role in Article 18 proceedings is not to sit in judgment of domestic courts but to objectively assess whether they overlap with the parameters identified by the Prosecutor. Here, they clearly do and in fact entail more specificity than the conduct described by the Prosecutor.

7. Ground 5- The Chamber relied on irrelevant factors

47. As concerns the Chamber's findings concerning the rank of alleged perpetrators, the PoE Observations repeat the same non-sequitur as the Chamber – that the gravity of the crimes or the degree of responsibility of the perpetrator can be judged solely based on rank. The Appeals Chamber has also already dismissed this premise in both the DRC situation gravity judgment and the *Bemba et al.* sentencing appeal.[79] Apart from referring to groups in a generic manner, the Article 18(1) Notification did not provide any information concerning the particular ranks or 'high positions' that would be targeted by the Prosecutor. In the absence of such details, there was simply no foundation for the Chamber to conclude that domestic investigations were insufficient or inadequate. The presumption of innocence dictates that domestic investigators and the ICC must avoid a rush to judgment as concerns the proper result of such ongoing investigations. ICC Pre-Trial Chambers have themselves concluded that in the absence of a formal decision closing an investigation or case, there is no basis to intervene in the prosecutor's independent conduct of investigations.[80] The same holds true for domestic authorities. Investigations are ongoing and capture a range of different officers of comparable rank to ICC defendants.[81] [redacted]

[78] [redacted]
[79] ICC-01/04-169, paras 39-41; ICC-01/05-01/13-2276-Red, para 1.
[80] ICC-01/04-373, para 5.
[81] See also ICC-02/18-T002-Eng p.8 lines 3-14.

[redacted]

[redacted] These positions – sergeants, captains, and police supervisors – are equivalent to the ranks of individuals convicted by the ICC.[82]

48. As the Chamber made no findings on willingness or ability, the Appeals Chamber's focus necessarily falls on the overlap between existing domestic investigations and the information in the Article 18(1) Notification. Since domestic investigations cover the same groups described in the Notification, the Chamber erred in judging them by reference to speculative criteria concerning hypothetical cases that were not described in the Notification.

IV. RELIEF SOUGHT

49. For the reasons set out above, the RBV requests the Appeals Chamber to:

- Dismiss the PoE Observations *in limine;* or, in the alternative,
- Place no weight on the PoE Observations; and
- Grant the BRV's Appeals against the 'Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute'.

Respectfully submitted,

Yván Gil Pinto

Minister of Foreign Affairs of the Bolivarian Republic of Venezuela

Dated this 11 December 2023.
At Caracas, Venezuela.

[82] For example, Al Mahdi was the supervisor of a village morality police. Ntaganda was deputy chief of staff of a sub-regional militia, and. Ongwen was a foot soldier.