



Summary

Judgment of the Appeals Chamber

in

Situation in the Bolivarian Republic of Venezuela I

(Venezuela OA)

1 March 2024 at 15h00

[INTRODUCTION]

1. Today, the Appeals Chamber will deliver its judgment in the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's decision of 27 June 2023, entitled "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute". I shall refer to it as the "Impugned Decision".
2. This is a non-authoritative summary of the Appeals Chamber's written judgment in the appeal. The written judgment will be made available and notified after this hearing.

[BACKGROUND OF THE APPEAL]

3. I will now briefly explain the background of this appeal.
4. On 16 December 2021, pursuant to article 18(1) of the Statute, the Prosecutor notified all States Parties of his decision to initiate an investigation in the Situation in Venezuela.
5. On 16 April 2022, the Prosecutor received from Venezuela a request for deferral of his investigation, on the basis that Venezuela is investigating or has investigated its nationals with respect to alleged punishable acts.
6. On 4 November 2022, the Prosecutor filed an application to the Pre-Trial Chamber requesting it to authorise the resumption of his investigation into the Venezuela Situation.
7. On 27 June 2023, the Pre-Trial Chamber rendered the Impugned Decision, in which it authorised the Prosecutor to resume the investigation into the Situation in Venezuela.
8. On 3 July 2023, Venezuela submitted its notice of appeal and on 14 August 2023, its appeal against the Impugned Decision.
9. In the course of these appellate proceedings, the Appeals Chamber received written submissions from the Prosecutor and the Office of Public Counsel for Victims, as well as representations from victims and observations from the Organization of American States Panel of Independent International Experts.
10. On 7 and 8 November 2023, the Appeals Chamber held a hearing, during which representatives of Venezuela, the Office of the Prosecutor, and the OPCV made oral submissions, including on certain issues identified by the Appeals Chamber.
11. In its appeal brief, Venezuela raises six grounds of appeal.
12. First, 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.

13. Second, 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.
14. Third, Venezuela submits that the Pre-Trial Chamber erred by relying on the temporal jurisdiction of the Situation referred to the Prosecutor by the six States Parties.
15. Fourth, 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.
16. Fifth, 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.
17. Sixth, 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.
18. Venezuela requests the Appeals Chamber to reverse the Impugned Decision.

[MERITS]

19. The Appeals Chamber's judgment, which I will now outline, is unanimous. As I shall set out in more detail later, the Appeals Chamber has found it appropriate to confirm the Impugned Decision.

[FIRST GROUND OF APPEAL]

20. Under the first ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in law 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. In this regard, the Appeals Chamber recalls its recent ruling, in the *Philippines* 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". The Appeals Chamber finds no convincing reasons to depart from this ruling.

21. Venezuela also argues that the Pre-Trial Chamber erroneously characterised the additional information provided by the Prosecutor as a second article 18(1) notification, and relied on it to assess the scope of the Prosecutor's investigation. The Appeals Chamber finds no error in the Pre-Trial Chamber's findings in this regard. In light of the purpose of such additional information, stipulated in rule 52(2) of the Rules of Procedure and Evidence, 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.
22. 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. The Appeals Chamber notes in this regard 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.
23. 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.
24. The Appeals Chamber also finds that the Pre-Trial Chamber did not err by rejecting Venezuela's arguments that it had not received sufficient information to exercise its right under article 18 of the Statute.
25. Venezuela further 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. However, 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.
26. As a result, the Appeals Chamber rejects the first ground of appeal.

[SECOND GROUND OF APPEAL]

[1.1 Failure to require the Prosecutor to provide translations]

27. Under the second ground of appeal, Venezuela mainly submits that the Pre-Trial Chamber erred by exclusively relying on the English translations of selected 62 case files and failing to require the Prosecutor to provide translations of material received from the State in support of a deferral request.
28. 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, 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.
29. Furthermore, the finding that the State must provide the required translations 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.
30. The Appeals Chamber also considers that, having regard to the large amount of information submitted by Venezuela in its original form, it was reasonable for the Pre-Trial Chamber to invite Venezuela to focus its translation on "documents deemed essential to its Deferral Request".

[Exclusion of the summaries]

31. Venezuela further submits that the Pre-Trial Chamber erred in law and abused its discretion by excluding *in limine* summaries of proceedings translated by the Prosecutor, originally provided by Venezuela in Spanish, and any other documents that were not "original police or court records".
32. The Appeals Chamber finds that the Pre-Trial Chamber erred by failing to provide a sufficiently reasoned decision on this point. The Appeals Chamber notes that the Impugned Decision does not indicate which documents were not relied upon because they were deemed to be irrelevant, 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.

33. Having reviewed the material in question, the Appeals Chamber considers that the summaries or *fichas* have very limited probative value and that, even if it had not made the error, the Pre-Trial Chamber “would [not] have rendered a [decision] that is substantially different” from the Impugned Decision. The Appeals Chamber therefore finds that the Pre-Trial Chamber’s error does not materially affect the Impugned Decision.

[Failure to consider the Memorandum of Understanding]

34. Venezuela submits that the Pre-Trial Chamber failed to consider its submissions and to place any weight on the Memorandum of Understanding signed between Venezuela and the Prosecutor, simply because no such memorandum had been filed before it.
35. The Appeals Chamber considers that Venezuela does not explain the significance of what it intended to demonstrate on the basis of the Memorandum of Understanding. Venezuela has therefore failed to explain why the Pre-Trial Chamber had a duty to consider the impact of that memorandum on the Pre-Trial Chamber’s article 18 assessment.

[Conclusion]

36. For the foregoing reasons, the Appeals Chamber rejects the second ground of appeal.

[THIRD GROUND OF APPEAL]

37. Under the third ground of appeal, Venezuela alleges that the Pre-Trial Chamber erred by relying on the temporal scope of the Situation referred to the Prosecutor by six States Parties to reach the conclusion that the temporal scope of the Prosecutor’s intended investigation “also covers conduct *prior to April 2017*”. Venezuela also submits that the Pre-Trial Chamber erred by finding that the incidents set out in the Prosecutor’s additional information were capable of curing the ambiguous temporal scope described in the article 18 notification.
38. The Appeals Chamber notes 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.

39. The Appeals Chamber also notes that 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.
40. For these reasons, the Appeal Chamber rejects the third ground of appeal.

[FOURTH GROUND OF APPEAL]

41. Under the fourth ground of appeal, Venezuela alleges five errors in the Pre-Trial Chamber's assessment of whether Venezuela was actively investigating criminal acts referred to in the Prosecutor's article 18(1) notification.

[4.1. Failure to tailor the complementarity test]

42. First, Venezuela alleges that the Pre-Trial Chamber failed to tailor the complementarity test with respect to the identification of a case to the particularities of the Prosecutor's article 18(1) notification. Venezuela also argues that the Pre-Trial Chamber "focused on whether domestic investigations had identified particular perpetrators or taken steps to secure the arrest of particular individuals".
43. The Appeals Chamber considers that Venezuela misrepresents the Impugned Decision in this respect. 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, that is 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.
44. The Appeals Chamber therefore finds that Venezuela fails to demonstrate any error of the Pre-Trial Chamber in this regard.

[4.2. Error of requiring an unspecified degree of overlap and failure to provide sufficient reasoning]

45. Second, Venezuela alleges that the Pre-Trial Chamber required an unspecified degree of coverage between Venezuela's domestic investigations and the acts notified by the Prosecutor, and failed 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.

46. 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. The Impugned Decision indicates with sufficient clarity how the Pre-Trial Chamber arrived at its conclusions.
47. Turning to Venezuela's contentions in relation to the Prosecutor's use of "samples" in the additional information, the Appeals Chamber notes the detail regarding the alleged crimes, provided by the Prosecutor, in addition to the samples. The Appeals Chamber considers that sufficient information was provided for the Pre-Trial Chamber's assessment. Accordingly, the Appeals Chamber rejects Venezuela's arguments in this regard.

[4.3. Error of requiring domestic investigations to cover contextual elements of crimes against humanity]

48. Third, Venezuela alleges that the Pre-Trial Chamber erred in law by finding that it was necessary for domestic investigations to cover contextual elements of crimes against humanity.
49. 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". 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 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".
50. 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 underpinning the alleged crimes, including the factual allegations underpinning 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.

51. In respect of Venezuela's arguments relating to incorporation of crimes against humanity into domestic legislation, the Appeals Chamber notes 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". The Preamble also imposes on every State "the duty to exercise its criminal jurisdiction over those responsible for international crimes". Therefore, while the Statute does not expressly impose an obligation on States Parties to incorporate the crimes against humanity in their domestic legislation, such incorporation may facilitate the fulfilment of their duty to exercise criminal jurisdiction over "those responsible for international crimes".
52. 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 time", 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.
53. Concerning Venezuela's arguments contesting the systematic nature of the alleged acts and the existence of a State policy, 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.
54. 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, including

the “patterns” of criminality. As just discussed, domestic investigations of isolated acts of detention and physical assaults allegedly perpetrated by direct low-level perpetrators without identifying the systematic nature 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. The Appeals Chamber finds that Venezuela fails to show any errors in the Pre-Trial Chamber’s findings in this respect.

55. As regards the domestic proceedings concerning the alleged acts of torture and cruel and inhumane treatment associated with arrest and detention, to which Venezuela refers, 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.
56. The Appeals Chamber therefore rejects these arguments presented by Venezuela.

[4.4. Error of requiring domestic investigations to cover discriminatory intent]

57. Fourth, Venezuela alleges that the Pre-Trial Chamber erred by 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.
58. 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 committed “on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law”.
59. Given the distinct legal interests protected by this element of the crime, 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”.
60. Venezuela refers to “the possibility of addressing matters of discriminatory intent as an aggravating factor in sentencing”. However, the Appeals Chamber notes that Venezuela does not refer to any specific cases in which consideration of discriminatory intent was actually used as a factor in the determination of the appropriate sentence.

61. Similarly, the Appeals Chamber notes that Venezuela misrepresents the Impugned Decision in arguing that the Pre-Trial Chamber erred by “disregarding investigations into human rights violations on the grounds that they were not being labelled as criminal offences”, and fails to indicate any specific domestic investigation or prosecution that the Pre-Trial Chamber purportedly disregarded.
62. The Appeals Chamber therefore rejects Venezuela’s arguments in this respect.

[4.5. Error of focusing on whether criminal acts pertaining to sexual and gender-based violence were being investigated or prosecuted as such]

63. Fifth, Venezuela alleges that the Pre-Trial Chamber erred in law by 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.
64. 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.
65. 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”. To the extent that Venezuela’s 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 and protect the distinguishable harms suffered by victims.
66. Furthermore, Venezuela relies on a potential requalification as rape at a later stage in the national proceedings. However, 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.
67. The Appeals Chamber therefore rejects these arguments of Venezuela.

[Conclusion on the fourth ground of appeal]

68. Therefore, the Appeals Chamber rejects the fourth ground of appeal in its entirety.

[FIFTH GROUND OF APPEAL]

69. 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. For instance,

Venezuela argues that the Pre-Trial Chamber erroneously relied on the number of identified suspects, the number of arrest warrants, and the rank of possible suspects. Venezuela also contends that the Pre-Trial Chamber failed to give any weight to relevant factors, such as whether the national authorities were collecting data about victims. However, the Appeals Chamber rejects this ground of appeal, as, with respect to some of the arguments under this ground, Venezuela misrepresents the Impugned Decision, and makes unsubstantiated arguments on other points.

[SIXTH GROUND OF APPEAL]

70. 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. In particular, Venezuela argues that the Pre-Trial Chamber failed to (i) set out the standard for assessing delays or inactivity in the progress of domestic investigations, and (ii) consider relevant factors while attaching undue weight to irrelevant factors.
71. However, the Appeals Chamber notes that, according to the Pre-Trial Chamber, its overall conclusion in the Impugned Decision was “primarily informed” by factors other than “periods of unexplained investigative inactivity”, which it considered to be “non-determinative” factors. Therefore, even if it was an error for the Pre-Trial Chamber to rely on these factors, this would not have affected the Impugned Decision.
72. The Appeals Chamber also notes that “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”. 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, the Pre-Trial Chamber did not err by failing to provide a reasoned explanation in this respect.
73. Therefore, the Appeals Chamber rejects the sixth ground of appeal.

[CONCLUSION]

74. For these reasons – and for the reasons stated more fully in the written judgment – the Appeals Chamber rejects the appeal and confirms the Impugned Decision.