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International Criminal Court

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No.: **ICC-02/18**
Date: **13 September 2023**

**THE APPEALS CHAMBER**

**Before:** **Judge Marc Pierre Perrin de Brichambaut, Presiding Judge**
**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**

# Observations on behalf of victims on the Venezuela Government Appeal against the Decision authorising the resumption of the investigation

**Source:** **Office of Public Counsel for Victims**

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

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## I. INTRODUCTION

1. In accordance with the Appeals Chamber's instructions,[1] and pursuant to regulation 81(4) of the Regulations of the Court (the "Regulations"), the Principal Counsel ("Counsel") of the Office of Public Counsel for Victims (the "OPCV" or the "Office") hereby files her observations in the interest of the victims in relation to the appeal brought by the Bolivarian Republic of Venezuela ("Venezuela" or the "Appellant")[2] against the decision of Pre-Trial Chamber I (the "Chamber") authorising the Prosecutor to resume the investigation into the Situation in Venezuela (the "Impugned Decision").[3]

2. The appeal is directed against the whole decision authorising the resumption of the investigation. The issues on appeal fundamentally affect the general interests of the victims because a reversal of the Impugned Decision may result in halting the Prosecutor's investigation, thereby jeopardising the victims' rights to truth, justice, and reparations.

3. Counsel opposes in full the six grounds of appeal raised by Venezuela and the relief sought. She submits that the Chamber (i) properly conducted its proceedings pursuant to article 18 of the Rome Statute (the "Statute"); (ii) correctly assessed the temporal scope of the Prosecutor's intended investigation; (iii) properly applied the complementarity test under article 17 of the Statute; and (iv) rightly addressed the relevant admissibility factors under article 17 of the Statute, including the activities of the domestic authorities. The Appellant fails to demonstrate that the Chamber committed any error of fact or law, and therefore, the Appeal should be dismissed.

## II. PROCEDURAL BACKGROUND

4. On 27 September 2018, the Prosecution received from a group of States Parties to the Statute a referral under article 14 of the Statute concerning possible crimes against humanity committed in Venezuela since 12 February 2014 (the "Referral").[4]

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[1] See the "Decision on the OPCV's 'Request to appear before the Appeals Chamber pursuant to regulation 81(4) of the Regulations of the Court'" (Appeals Chamber), No. ICC-02/18-54 OA, 21 July 2023, para. 7.
[2] See "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)", No. ICC-02/18-59-Conf-Exp OA, 14 August 2023, with confidential *ex parte* annexes (a public redacted version of Annex II dated 21 August 2023 was registered on 22 August 2023, No. ICC-02/18-59-AnxII-Red OA) (the "Appeal" or the "Appeal Brief").
[3] See the "Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute", No. ICC-02/18-45, 27 June 2023 (the "Impugned Decision").
[4] See the "Annex I to the Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I", No. ICC-02/18-1-AnxI, 28 September 2018 (the "Referral").

5. On 16 December 2021, the Prosecutor, pursuant to article 18(1) of the Statute, notified all States Parties, including Venezuela, of his decision to initiate an investigation in the Situation in Venezuela (the "First Article 18(1) Notification").[5]

6. On 3 January 2022, Venezuela requested additional information from the Prosecutor ("Venezuela's Additional Information Request").[6]

7. On 13 January 2022, the Prosecutor provided additional information and agreed to grant Venezuela a three-month extension to inform the Court of its investigation (the "Second Article 18(1) Notification").[7]

8. On 15 April 2022, Venezuela notified the Prosecutor that it was investigating or had investigated alleged punishable acts against human rights in accordance with the First Article 18(1) Notification and requested a deferral of the investigation (the "Deferral Request").[8]

9. On 1 November 2022, the Prosecutor requested the Chamber to authorise the resumption of the investigation into the Situation pursuant to article 18(2) of the Statute (the "Resumption Request").[9]

10. On 27 June 2023, the Chamber issued the Impugned Decision.[10]

11. On 2 July 2023, Venezuela filed its Notice of Appeal requesting suspensive effect of the Impugned Decision.[11]

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[5] See the "Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I", No. ICC-02/18-16, 17 January 2022, paras. 1-2, and confidential *ex parte* annex A only available to the Prosecution, the Registrar and the Bolivarian Republic of Venezuela, No. ICC-02/18-16-Conf-Exp-AnxA, containing a copy of the notification pursuant to article 18(1) of the Statute, as sent to all States Parties and other States with jurisdiction (the "First Article 18(1) Notification").

[6] See the "Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I", No. ICC-02/18-16, 17 January 2022, para 4, and confidential *ex parte* annex C only available to the Prosecution, the Registrar and the Bolivarian Republic of Venezuela, No. ICC-02/18-16-Conf-Exp-AnxC, 17 January 2022 (the "Venezuela's Additional Information Request").

[7] See the "Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I", No. ICC-02/18-16, 17 January 2022, paras. 5-6, and confidential *ex parte* annex D only available to the Prosecution, the Registrar and the Bolivarian Republic of Venezuela, No. ICC-02/18-16-Conf-Exp-AnxD, 17 January 2022 (the "Second Article 18(1) Notification").

[8] See the "Annex B to the Notification of the Bolivarian Republic of Venezuela's deferral request under article 18(2) of the Rome Statute", No. ICC-02/18-17-AnxB-Red, 21 April 2022, p. 13 (the "Deferral Request").

[9] See the "Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2)", No. ICC-02/18-18, 1 November 2022 (the "Resumption Request").

[10] See the Impugned Decision, *supra* note 3.

[11] See the "The Bolivarian Republic of Venezuela's Notice of Appeal against the Pre-Trial Chamber I's' Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute' (ICC-02/18-45) and request for suspensive effect", No. ICC-02/18-46-Conf-Exp-AnxII, 3 July 2023 (a public redacted version was registered on 12 July 2023, No. ICC-02/18-46-AnxII-Red OA).

12. On 7 July 2023, the Appeals Chamber issued a decision on the Presiding Judge in the appeal.[12] On the same day, the OPCV filed a request to appear before the Appeals Chamber under regulation 81 of the Regulations.[13]

13. On 20 July 2023, the Appeals Chamber rejected Venezuela' request for suspensive effect of the Impugned Decision.[14]

14. On 21 July 2023, the Appeals Chamber authorised the OPCV to submit written observations regarding the general interests of victims.[15]

15. On 14 August 2023, Venezuela filed its Appeal Brief.[16]

16. On 24 August 2023, the Appeals Chamber issued the "Decision on requests for victims' involvement", instructing the Victims Participation and Reparations Section (the "VPRS") to collect and transmit any representation by victims by 17 October 2023.[17]

[12] See the "Decision on the Presiding Judge of the Appeals Chamber 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'", No. ICC-02/18-48 OA, 7 July 2023.
[13] See the "Request to appear before the Appeals Chamber pursuant to regulation 81(4) of the Regulations of the Court", No. ICC-02/18-47 OA, 7 July 2023.
[14] See the "Decision on the Bolivarian Republic of Venezuela's request for suspensive effect of Pre-Trial Chamber I's 'Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute'" (Appeals Chamber), No. ICC-02/18-53 OA, 20 July 2023. See also, the "Prosecution response to the Bolivarian Republic of Venezuela's request for suspensive effect (ICC-02/18-46-Conf-Exp)", No. ICC-02/18-50-Conf-Exp OA, 11 July 2023 (a public redacted version was registered on 17 July 2023, No. ICC-02/18-50-Red OA).
[15] See the "Decision on the OPCV's 'Request to appear before the Appeals Chamber pursuant to regulation 81(4) of the Regulations of the Court'", *supra* note 1, para. 7.
[16] See the Appeal Brief, *supra* note 2.
[17] See the "Decision on requests for victims' involvement" (Appeals Chamber), No. ICC-02/18-60 OA, 24 August 2023, para. 16. In this regard, between 28 July and 3 August 2023, three groups of victims submitted requests to present views and concerns to the Appeals Chamber and the Organization of American States Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela filed a request for leave to submit amicus curiae observations. See respectively, the "Application to present victims' views and concerns in the appeal of the Bolivarian Republic of Venezuela against Pre-Trial Chamber I's 'Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute'", No. ICC-02/18-55-Red OA, 27 July 2023; the "Registry Transmission of an 'Application to present victims' views and concerns in the appeal of the Bolivarian Republic of Venezuela against the Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", No. ICC-02/18-56-Anx1-Red-Corr OA, 31 July 2023; and the "Registry Transmission of a 'Request to Present Opinions and Observations of Victims in the Appeal of the Bolivarian Republic of Venezuela against the 'Decision of Pre-Trial Chamber I Authorizing the Resumption of the Investigation Pursuant to Article 18(2) of the Statute'", No. ICC-02/18-57-Anx1-Red OA, 3 August 2023; and the "Annex 1 to the Registry Transmission of a 'Request for Leave to Submit *Amicus Curiae* Observations by the OAS Panel of Independent International Experts'", No. ICC-02/18-58-Anx1 OA, 8 August 2023.

## III. SUBMISSIONS

### 1. On the applicable legal standards

17. In exercising its powers under rule 158 of the Rules of Procedure and Evidence (the "Rules"), the Appeals Chamber will only consider specific grounds of appeal alleging legal, factual or procedural errors that materially affect an impugned decision.[18] The Appeals Chamber will intervene only where "*clear errors of law, fact or procedure are shown to exist and vitiate the Impugned Decision*",[19] or if the findings of the Chamber "*are flawed on account of a misdirection on a question of law, a misappreciation of the facts founding its decision, a disregard of relevant facts, or taking into account facts extraneous to the* sub judice *issues*".[20]

18. Regarding questions of law, the Appeals Chamber "[w]*ill not defer to the relevant Chamber's interpretation of the law, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law. If the relevant chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the decision impugned on appeal*".[21] In this regard, "[a] *decision is 'materially affected by an error of law' if the chamber 'would have rendered a* [decision] *that is substantially different from the decision that was affected by the error, if it had not made the error'*".[22]

19. As regards errors based on a misappreciation of facts, the Appeals Chamber has clarified that it "[w]*ill not disturb a trial chamber's factual findings only because it would have come to a different conclusion. When considering alleged factual errors, the Appeals Chamber will*

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[18] See the Public redacted version of the "Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 6 January 2012 entitled 'Decision on the defence's 28 December 2011 'Requête de Mise en liberté provisoire de M. Jean-Pierre Bemba Gombo'" (Appeals Chamber), No. ICC-01/05-01/08-2151-Red OA10, 5 March 2012, para. 29.

[19] See the "Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled 'Decision on the 'Defence Request for Interim Release'" (Appeals Chamber), No. ICC-01/04-01/10-283 OA, 14 July 2011, para. 15; and the Public Redacted Version of the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'" (Appeals Chamber), No. ICC-01/05-01/08-631-Red OA2, 2 December 2009, para. 62.

[20] See the "Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release" (Appeals Chamber), No. ICC-01/04-01/07-572 OA4, 9 June 2008, para. 25. See also, the "Judgment on the appeal of the Prosecutor against Pre-Trial Chamber II's 'Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa'", *supra* note 19, para. 61.

[21] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'" (Appeals Chamber), No. ICC-01/21-77 OA, 18 July 2023, paras. 35-36, and references contained therein.

[22] *Ibid*., para. 36.

*allow the deference considered necessary and appropriate to the factual findings of a chamber. However, the Appeals Chamber may interfere where it is unable to discern objectively how a chamber's conclusion could have reasonably been reached from the evidence on the record*".[23]

### 2. The issues raised on appeal affect the general interests of victims

20. The appeal is directed against the whole decision authorising the resumption of the investigation. As such, the issues raised on appeal fundamentally affect the general interests of the victims. A reversal of the Impugned Decision on appeal may result in halting the Prosecutor's investigation, thereby jeopardising the victims' rights to truth, justice, and reparations. In particular, the grounds of appeal and the issues raised therein as to (i) the Court's jurisdiction over the Situation in Venezuela; (ii) the complementarity assessment in the context of a situation; and (iii) the related application of the admissibility factors, are all at the core of the victims' interests.

21. In fact, depending on their resolution, victims may be denied the opportunity to uncover the truth, present their views and concerns throughout the proceedings, ensure that those responsible are held accountable, and ultimately claim reparation.[24] A decision regarding the opening of an investigation concerns the first step towards the perpetrators' accountability before the Court in respect of the crimes suffered by the victims. Their personal interest in seeing that the Court is seized with a situation, and that an investigation proceeds, has been regarded as "*the most essential of all victims' interests*".[25] The Court has a duty to exercise its jurisdiction over those responsible for international crimes when the complementary test is met. Said duty includes respecting the internationally recognised human rights of victims during criminal proceedings, where the "*outcome of such proceedings lead to the identification, prosecution and punishment of those who have victimised them*".[26]

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[23] *Ibid*., para. 37.
[24] See the "Decision on the victims' request to participate in the appeal proceedings" (Appeals Chamber), No. ICC-01/09-02/11-1015 OA5, 24 April 2015, para. 11; and the "Decision on the Participation of Victims in the Appeal against the 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence' of Trial Chamber III" (Appeals Chamber), No. ICC-01/05-01/08-857 OA4, 18 August 2010, para. 10.
[25] See HUMAN RIGHTS WATCH, Commentary to the 2nd Preparatory Commission Meeting on the International Criminal Court, July 1999, p. 33. See also, ECtHR, *Kaya v Turkey*, App. No. 22535/93, Judgment, 28 March 2000, paras. 121-126; and IACtHR, *Mapiripán Massacre v Colombia*, Merits, Reparations and Costs, Judgment, 15 September 2005, paras. 116 and 123.
[26] See the "Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case" (Pre-Trial Chamber I), No. ICC-01/04-01/07-474, 13 May 2008, para. 41.

22. Indeed, almost 9000 victims[27] indicated to the Chamber that the proceedings in Venezuela are not genuine,[28] and that an investigation by the Court offers a unique opportunity for victims' voices being heard, finding out the truth, ending the impunity of those most responsible, and preventing future crimes.[29] Victims maintain this position despite the tentative of Venezuela, in the last months, to persuade the Court of its willingness and ability to investigate and prosecute crimes internally.

### 3. Grounds of appeal 1 and 2: the Chamber correctly conducted its proceedings pursuant to article 18 of the Statute

23. In Ground 1, the Appellant argues that the Chamber erred in law by (i) failing to impose the burden of persuasion on the Prosecutor pursuant to article 18 of the Statute;[30] (ii) applying an incorrect standard for assessing the specificity of the Prosecutor's Notifications pursuant to article 18(1);[31] and (iii) finding that there was no deadline for the Prosecutor to request a deferral under article 18(2).[32] In Ground 2, the Appellant submits that the Chamber erred in law and in fact and manifestly abused its discretion by excluding (i) information concerning domestic investigations that were in Spanish;[33] (ii) the Prosecution summaries of proceedings,[34] and (iii) the Memorandum of Understanding concluded between the Prosecutor and Venezuela (the "MoU").[35]

24. Counsel submits that the Chamber correctly conducted its proceedings pursuant to article 18 of the Statute. Contrary to Venezuela's arguments in this regard, the Chamber was correct in: (a) finding that Venezuela bore the burden of proof under article 18(2) of the Statute; (b) understanding the scope and content of the Prosecutor's Notifications; (c) considering that there is no time limit for the Prosecutor to file an application under article 18(2) of the Statute; (d) limiting its assessment to documents translated into a working language of the Court; (e) excluding summaries prepared by the Prosecution of some documents transmitted by the Appellant; and (f) finding that the MoU had not been officially notified and filed.

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[27] See the "Final Consolidated Registry Report on Article 18(2) Victims' Views and Concerns Pursuant to Pre-Trial Chamber's Order ICC-02/18-21", No. ICC-02/18-40-Conf, with confidential annex I, confidential annex III and confidential *ex parte* Annex II, only available to the Registry (a public redacted version of annex I was notified on the same date and a corrigendum thereof on 22 June 2023, No. ICC-02/18-40-Red-Corr), 20 April 2023, paras. 18, 23.
[28] *Ibid.*, paras 28-33.
[29] *Ibid.*, paras 34-36.
[30] See the Appeal Brief, *supra* note 2, paras. 14, 32-41.
[31] *Ibid.*, paras. 14, 42-61.
[32] *Ibid.*, paras. 14, 62-65.
[33] *Ibid.*, paras. 15, 66-82.
[34] *Ibid.*, paras. 15, 66, 83-91.
[35] *Ibid.*, paras. 15, 66, 92-96.

### *a) Sub-ground of appeal 1.1: the Chamber correctly found that Venezuela bore the burden of proof under article 18(2) of the Statute*

25. Contrary to the Appellant's contention,[36] the Chamber correctly found that the onus under article 18(2) of the Statute is placed on the Appellant to provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is investigating or prosecuting crimes under the ICC jurisdiction.

26. In this regard, the Prosecutor, as also recalled by the Chamber,[37] must always, and did so in this situation, assess the criteria under article 53(1) of the Statute before deciding to initiate an investigation.[38] In turn, a State requesting a deferral must demonstrate, on the basis of the information provided, the existence of domestic proceedings justifying deferral under article 18(2) of the Statute.[39] Thus, the onus is on the State to show that national investigations or prosecutions are taking place or have taken place. The relevant State must provide the Court with evidence of a sufficient degree of specificity and probative value showing that it is indeed investigating the potential case(s); and that tangible, concrete, and progressive investigative steps are undertaken. Sparse and disparate activities do not suffice, a State must rather take proactive investigative steps with a view to conduct *criminal* prosecutions.[40]

27. The fact that the Prosecutor may seek a ruling under article 18(2) of the Statute does not absolve the requesting State of its responsibility to provide a valid basis for a deferral.[41] This procedural mechanism primarily serves to foster the dialogue between the Prosecutor and relevant States as intended by article 18.[42] If a State's request for deferral proceeds to the

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[36] *Ibid.*, para. 32.
[37] See the "Decision on the 'Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the regulations of the Court'" (Pre-Trial Chamber I), No. ICC-02/18-9-Conf, 14 June 2021 (a public redacted version was notified on 2 March 2022, No. ICC-02/18-9-Red) (the "Request for Judicial Control Decision"), paras. 14, 16.
[38] CHAITIDOU, "Article 14: Referral of a situation by a State Party", in AMBOS (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* Beck, Hart, Nomos, 4th ed., 2022, Article 14, p. 870, mn. 26; FROUVILLE, "Article 14: Renvoi d'une situation par un Etat partie", in FERNANDEZ et al. (eds.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article* (Pedone, 2019), pp. 798, 808.
[39] See the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation" (Pre-Trial Chamber II), No. ICC-02/17-196, 31 October 2022, para. 45.
[40] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'" (Pre-Trial Chamber I), No. ICC-01/21-56-Red, 26 January 2023, para. 14 (original emphasis) and authorities referred therein; and the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", *supra* note 39, para. 45.
[41] See NTANDA NSEREKO and VENTURA, "Article 18: preliminary rulings regarding admissibility,' in AMBOS (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary*, 4th ed., 2022, p. 1027 mn. 48: "*the Prosecutor bears the evidentiary and legal burden to prove by a preponderance of evidence or on a balance of probabilities that valid grounds exist to justify the PTC granting him/her authority to carry out the investigation*".
[42] HOLMES, "Complementarity: National Courts versus the ICC", in Cassesse et al. (eds.), *The Rome Statute of the International Criminal Court*, Vol. I, 2002, p. 681; STAHN, "Admissibility Challenges before the ICC: From

relevant Chamber for adjudication, the Prosecution does not supplant the State's obligation to provide proof. This approach aligns with the burden of proof outlined in article 19(2) of the Statute, which allows a State to challenge the admissibility of specific cases.[43]

28. Through the First and Second Article 18(1) Notification, Venezuela was made aware of the scope of the Prosecutor's intended investigation. When making an article 18(2) request, the Appellant must present information concerning any domestic proceedings that it considered within that scope because "*a State must show that in addition to being 'opened', its investigations and proceedings also sufficiently mirror the content of the article 18(1) notification* […] *and its scope*".[44] In this regard, the State is "*uniquely placed*" to determine the existence and scope of domestic proceedings, as the information may not be publicly known.[45]

29. Contrary to the Appellant's argument that the "*presumption* [in favour of national investigations] *is only displaced if the OTP can demonstrate the absence of relevant national investigations in its request*",[46] the Appeals Chamber recently found 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 State concerned discharges this burden by providing information in support of its initial request for deferral. The Prosecutor's subsequent duty to communicate that information to the pre-trial chamber does not affect the allocation of the burden of proof, as the information remains that which the State initially provided.* […] *the fact that it is the Prosecutor who seises a pre-trial chamber with an application under article 18(2) of the Statute does not shift the burden of proof to the Prosecutor. Indeed, under article 18(2) of the Statute, a State alleges that it is carrying out or has carried out relevant investigations. It is thus incumbent upon the State to establish the facts supporting this assertion.*

Quasi-Primacy to Qualified Deference?", in STAHN (ed.), *The Law and Practice of the International Criminal Court*, 2015, p. 240.

[43] See the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'" (Appeals Chamber), No. ICC-02/11-01/12-75-Red OA, 27 May 2015, para. 128; the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'" (Appeals Chamber), No. ICC-01/11-01/11-565 OA6, 24 July 2014, para. 166; and the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (Appeals Chamber), No. ICC-01/09-01/11-307 OA, 30 August 2011, para. 62.

[44] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 14 (original emphasis) and authorities referred therein, para. 16.

[45] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 79.

[46] See the Appeal Brief, *supra* note 2, para. 32.

> *This is in line with the well-established principle of onus probandi* incumbit actori*".*[47]

30. There are no "*convincing reasons*"[48] for the Appeals Chamber to depart from this interpretation when resolving this appeal.[49] In the Philippines Situation, the Appeals Chamber fully addressed the question of who must prove that the State is conducting "*relevant investigations*", [50] *i.e.* that there is an "*overlap between such* [State] *information* [concerning its investigations] *and the cases encompassed in the* [Prosecutor's] *Article 18(1) Notification*".[51] Moreover, the fact that rule 54 of the Rules requires the Prosecutor to provide "*the basis for the application*" submitted under article 18(2) of the Statute cannot be read to mean that he is required to prove that "*the domestic investigations do not sufficiently mirror the cases set out in* [the] *Article 18(1) Notification*".[52]

31. In this regard, rule 53 of the Rules expressly obliges States requesting a deferral to do so "*in writing and provide information concerning its investigation*". As found by the Chamber, "*the onus placed on the concerned State consists in providing 'the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case'. If this is established, the onus is then indeed on the Prosecution to show that the State is either unwilling or unable genuinely to carry out the investigation or prosecution*".[53] This approach is consistent with the fact that States are uniquely placed to determine the existence and scope of domestic proceedings.[54] This conclusion is not altered by regulation 38(2)(b) of the Regulations.[55] This provision merely refers to the page limit of applications submitted by the Prosecutor under article 18(2) of the Statute, and therefore does not put on the latter the burden of proof in preliminary admissibility proceedings.

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[47] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, paras. 1, 77-78 (emphasis added).
[48] See the "Reasons for the 'Decision on the 'Request for the recognition of the right of victims authorized to participate in the case to automatically participate in any interlocutory appeal arising from the case and, in the alternative, application to participate in the interlocutory appeal against the ninth decision on Mr Gbagbo's detention (ICC-02/11-01/15-134-Red3)'" (Appeals Chamber), No. ICC-02/11-01/15-172 OA6, 31 July 2015, para. 14.
[49] See the Appeal Brief, *supra* note 2, para. 33.
[50] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, paras. 1, 78.
[51] See the Appeal Brief, *supra* note 2, para. 34.
[52] *Contra* Appeal Brief, *supra* note 2, para. 38.
[53] See the Impugned Decision, *supra* note 3, para. 66.
[54] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 79.
[55] *Contra* Appeal Brief, *supra* note 2, para. 32.

32. In any event, and notwithstanding the above, the Appellant fails to show that the Impugned Decision would have been materially affected even if the Chamber had erred in stating that the onus was placed on the Appellant. To the contrary, the same information would have been before the Chamber, since this was required by rule 54(1) of the Rules. The Chamber would have had the same opportunity to receive the submissions of Venezuela, and it would have reached the same conclusions from the assessment of the information before it.

#### *b) Sub-ground of appeal 1.2: the Chamber correctly understood the scope and content of the Prosecutor's Notifications*

33. Contrary to the Appellant's contention,[56] the Chamber did not err in law by characterising as the "Second Article 18(1) Notification" the information transmitted by the Prosecution under rule 52(2) of the Rules, nor by relying on this information to determine whether the investigation in Venezuela sufficiently mirrors the scope of the Prosecutor's intended investigation.

34. *First*, in the Impugned Decision, the Chamber stated that "*it is upon the Prosecution to provide information that is specific enough for the relevant States to exercise its right under Article 18(2) of the Statute and representative enough of the scope of criminality that it intends to investigate in any future case(s)*".[57] This means that, although specific, the information provided at that stage, before the start of an investigation, may eventually not translate into cases actually investigated and prosecuted by the Court. In this regard, Chambers ruling on requests to authorize investigations have consistently found that "*the* [Prosecutor's] *selection of persons or perpetrators as well as certain incidents which are likely to shape the Prosecutor's future case(s) at this stage is preliminary, and as such, this may change as a result of the investigation*".[58]

35. The Chamber followed this approach in the Impugned Decision and did not err in considering "*specific enough*" the catalogue with "*similar patterns of allegations*" and the "*sample of concrete examples of allegations within the jurisdiction of the Court*" provided by the Prosecution in the Second Article 18(1) Notification.[59] Contrary to the Appellant's

[56] See the Appeal Brief, *supra* note 2, paras. 43, 45-46.
[57] See the Impugned Decision, *supra* note 3, para. 77.
[58] See the "Decision on the Prosecutor's request for authorization of an investigation" (Pre-Trial Chamber I), No. ICC-01/15-12, 27 January 2016, para. 37. See also the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya" (Pre-Trial Chamber II), No. ICC-01/09-19-Corr, 1 April 20210, para. 50; and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'" (Pre-Trial Chamber III), No. ICC-02/11-14-Corr, 15 November 2011, para. 191.
[59] See the Impugned Decision, *supra* note 3, para. 74.

contention,[60] "*the sample of alleged incidents provided by the Prosecution to Venezuela as a result of Venezuela's request for more concrete information*" could be considered as "potential cases" because they referred to victims, dates and locations.[61] Thereby, said information provided clarity regarding the "*parameters and content of the investigations which have received judicial authorisation to proceed*",[62] including "*the dates and locations of the incidents*".[63]

36. *Second*, the degree of specificity required to assess admissibility is not the same when dealing with a case or a situation. Under article 19 of the Statute, admissibility is assessed *vis-à-vis* an actual case under ongoing investigation and/or prosecution. Therefore, the acts and persons covered by domestic action must be the same as those covered by the Prosecutor's intended investigations. By contrast, "*at the article 18 stage, no suspect has yet been the subject of an arrest warrant, and* […] *admissibility can only be assessed against the backdrop of a situation and the potential cases that would arise from this situation*",[64] since "*depending on the situation, the latter investigation* [of this Court] *may look into a large number of crimes, and cover a large geographical area and timeframe*".[65]

37. In this regard, Chambers ruling on requests to authorize investigations under article 15 of the Statute have consistently found that "*an admissibility assessment at the stage of authorization of an investigation cannot be conducted against the backdrop of a concrete case, as prior to the start of an actual investigation it is not possible to define the exact parameters of the case(s) in terms of conduct and identified suspects for the purpose of prosecution*".[66] Therefore, the Appellant's contention that the First and Second Article 18(1) Notification must set out the acts which the Prosecutor *will* investigate,[67] as well as its reliance on the *Gaddafi* and *Al Hassan* cases,[68] are inapposite.

[60] See the Appeal Brief, *supra* note 2, paras. 52, 57.
[61] See the Impugned Decision, *supra* note 3, para. 79.
[62] See the Appeal Brief, *supra* note 2, para. 48.
[63] *Ibid.*, para. 58.
[64] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 16.
[65] *Ibid.*, para. 13, *referring to* the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", *supra* note 39, para. 46.
[66] See the "Decision on the Prosecutor's request for authorization of an investigation", *supra* note 58, para. 36. See also the "Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", *supra* note 58, para. 48; and the "Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire'", *supra* note 58, para. 190.
[67] See the Appeal Brief, *supra* note 2, paras. 47, 51, 61.
[68] *Ibid.*, paras. 49, 58.

38. *Third*, the Chamber did not err in granting the Resumption Request despite the paucity of information in the First Article 18(1) Notification.[69] The Chamber rightly relied on the information transmitted by the Prosecution to the Appellant under rule 52(2) of the Rules as the Second Article 18(1) Notification, upon finding that the "*multiple exchanges with Venezuela appear*[s] *to have been sufficiently specific for Venezuela to inform the Prosecution of its domestic proceedings and seek the deferral of the investigation*".[70] This information was requested by the Appellant under rule 52(1) of the Rules, and referred to in its observations on the Resumption Request.[71] It is worth noting that said exchange of information between the Prosecutor and the Appellant was encouraged by the Chamber, which found that a meaningful dialogue was in line with the complementarity principle.[72]

39. *Lastly*, assuming *arguendo* that the Chamber erred in law, the Appellant does not show how the Chamber would have rendered a substantially different ruling from the Impugned Decision, if it had not made the error. In compliance with the Chamber's direction to cooperate and engage in meaningful dialogue with the concerned State,[73] Venezuela agreed to the Prosecutor's offer of a three-month extension - running from the Second Article 18(1) Notification for Venezuela to provide information about its investigations.[74] The Appellant had therefore ample time to provide said information to the Court.[75]

### *c) Sub-ground of appeal 1.3: the Chamber correctly found that there is no time limit for the Prosecutor to file an application under article 18(2) of the Statute*

40. Contrary to the Appellant's contention,[76] the Chamber correctly found that neither article 18(2) of the Statute, nor rule 54 of the Rules stipulate a six-month deadline for the Prosecutor to file a resumption request.

41. *First*, there is no lacuna in article 18(2) that may require inferring a time limit based on the text of article 18(3) of the Statute.[77] As stated by the Chamber, "*nothing in the legal*

[69] *Contra* Appeal Brief, *supra* note 2, para. 56.
[70] See the Impugned Decision, *supra* note 3, para. 79.
[71] See the "Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation (ICC-01/18-18 [*sic*])", No. ICC-02/18-30-Conf-Exp-AnxII, 28 February 2023 (a public redacted version was notified on 28 March 2023, No. ICC-02/18-30-AnxII-Red, with a corrigendum filed on 26 June 2023, No. ICC-02/18-30-AnxII-Red-Corr) ("Venezuela's Observations"), paras. 19, 99, 101, 119, 121-127, 148, 152, 167-168, 177-178.
[72] See the Request for Judicial Control Decision, *supra* note 37, paras. 19-20.
[73] *Ibid.*, p. 12.
[74] See the Second Article 18(1) Notification, *supra* note 7, para. 6.
[75] *Contra* Appeal Brief, *supra* note 2, para. 44.
[76] See the Appeal Brief, *supra* note 2, para. 62.
[77] *Contra* Appeal Brief, *supra* note 2, para. 62.

*framework prevented the Prosecution from requesting authorisation to resume its investigation into the Situation pursuant to article 18(2) of the Statute more than six months after Venezuela had transmitted the Deferral Request*".[78] This finding is consistent with the Appeals Chamber jurisprudence that a lacuna does not exist when a matter is "*exhaustively defined in the legal instruments of the Court*", when interpreted "*in accordance with the applicable canon of interpretation*" and noting that "*not every silence in the legal framework of the Court constitutes a lacuna*".[79]

42. In this regard, the terms in article 18(2) of the Statute "*shall defer* […] *unless*" suggest that the Prosecutor must assess the material submitted and decide whether to seize the Pre-Trial Chamber of the matter or not.[80] The fact that article 18(2) does not expressly provide a time limit does not imply that the time indication in article 18(3) for the Prosecutor to review its decision to defer its investigation should apply. The different contest and purpose of these two provisions do not support this interpretation.[81] Moreover, it will not always be feasible to submit resumption requests under article 18(2) of the Statute within the time limit provided for in paragraph 3 of the same provision. In the situation at hand, the Prosecutor communicated to the Chamber his intention to seek authorisation to resume his investigation on 21 April 2022, five days after receiving the Deferral Request.[82] This notwithstanding, since the submission of said Request, the Prosecution received six tranches of material from the Appellant, the last one on 18 October 2022,[83] while the Resumption Request was eventually filed on 1 November 2022.

43. *Second*, the Appeals Chamber has indeed affirmed the duty of diligence placed on the parties to ensure the expeditiousness of the proceedings.[84] However, this finding was made in

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[78] See the Impugned Decision, *supra* note 3, para. 57.
[79] See the "Judgment on the appeals of the Prosecutor, Mr Jean-Pierre Bemba Gombo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial ChamberVII entitled 'Decision on Sentence pursuant to Article 76 of the Statute' " (Appeals Chamber), No. ICC-01/05-01/13-2276-Red A6 A7 A8 A9, 8 March 2018, para. 76.
[80] See HOLMES, "Jurisdiction and admissibility", in Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, p. 340 ("*faced with a request by a State, the Prosecutor has several options*").
[81] See HOLMES, "The Principle of Complementarity", in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 1999, pp. 71-72 ("*the decision to defer could be reviewed after six months (the United States had proposed six or 12 months)* […] *a new provision was added permitting the Prosecutor at any time to seek a ruling to recommence an investigation in the event of a significant change of circumstances* […] *where States failed to provide information on the progress of its investigations or prosecutions, the Prosecutor could seek a ruling from the Pre-Trial Chamber. Thus, the failure to respond constituted a 'significant change of circumstances* "').
[82] See the "Notification of the Bolivarian Republic of Venezuela's deferral request under article 18(2) of the Rome Statute", No. ICC-02/18-17, 21 April 2022, paras. 1, 8.
[83] See the "Prosecution's Response to the 'Observations of the Government of the Bolivarian Republic of Venezuela's to the Prosecution request to resume the investigation' (ICC-02/18-30-Conf-Exp-AnxII)", No. ICC-02/18-31-Conf-Exp, 21 March 2023 (a public redacted version was notified on 30 March 2023, No. ICC-02/18-31-Red) (the "Response to Venezuela's Observations"), para. 55.
[84] See the Appeal Brief, *supra* note 2, para. 62.

a situation where none of the time limits stipulated in the legal texts of the Court applied because the motions at hand were not provided for in said texts.[85] By contrast, an application by the Prosecutor to resume his investigation is expressly regulated in article 18(2) of the Statute, and in rules 53 and 54 of the Rules. Since no time limit is expressly indicated in these provisions, the Chamber made no error in finding that there is no deadline for the submission of the Resumption Request, and correctly indicated that "*the Prosecution is under a continuous obligation to facilitate expeditious proceedings before the Court*".[86]

44. *Third*, the "*practical considerations*" alleged by the Appellant to argue the existence of a six-month deadline for the submission of the Resumption Request under article 18(2) of the Statute are not consistent with the complementarity principle. A State can file admissibility challenges not only throughout a situation pursuant to article 18(2), but also at the subsequent case stage pursuant to article 19(2)(b) of the Statute (as per article 18(7)). Therefore, there is no need for a State to "*assume* [after the expiration of the six-month deadline] *that the OTP does not contest its jurisdiction* [sic] *and to fully deploy its resources accordingly*".[87] In fact, in accordance with the complementarity principle,[88] States may - and actually should - continue their investigative and/or prosecutorial activities.[89]

45. Moreover, for the reasons mentioned *supra*,[90] the Prosecutor does not need to demonstrate "a significant change of circumstances" when seeking a review of the deferral of his investigation. Said interpretation would be inconsistent with the context and purpose of the relevant provisions.[91] Even more so because showing a change of circumstances is not a condition for "*later applications*" under article 18(3) as suggested by the Appellant,[92] but a possibility open to the Prosecutor for reviewing a deferral before or after the six-month period stipulated in the provision ("*or at any time*"). Therefore, the Prosecutor was not required to demonstrate any change in circumstances against the "*competence*" (sic) of Venezuela between

[85] See the "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings'" (Appeals Chamber), No. ICC-01/04-01/07-2259 OA10, 12 July 2010, para. 39.
[86] See the Impugned Decision, *supra* note 3, para. 57.
[87] See the Appeal Brief, *supra* note 2, para. 63.
[88] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute', Dissenting Opinion of Judge Anita Ušacka", No. ICC-01/09-01/11-336 OA, 20 September 2011, paras. 19-20.
[89] See the Impugned Decision, *supra* note 3, para. 134.
[90] See *supra* note 81.
[91] *Contra* Appeal Brief, *supra* note 2, para. 64.
[92] See the Appeal Brief, *supra* note 2, para. 64.

the six months after the filing of the Deferral Request and the submission of the Resumption Request.[93]

46. For all these reasons, Ground 1 should be dismissed.

#### *d) Sub-ground of appeal 2.1: the Chamber correctly found that only the essential documents from the Appellant must be translated into a working language of the Court*

47. Contrary to the Appellant's contention,[94] the Chamber did not err in law and did not abuse its discretion by failing to require the Prosecution to file in a working language of the Court the information received in Spanish from the Appellant, and by declining to rely on information that had not been translated into a working language.

48. *First*, regulation 39(1) of the Regulations indicates that "[a]*ll documents and materials filed with the Registry shall be in English or French* […] [i]*f the original document or material is not in one of these languages, a participant shall attach a translation thereof*". In the context of article 18(2) proceedings, the "*participant*" "[with] *the onus to substantiate a deferral request*" is the State which must provide the translation into English or French of the documents it relies upon "*to ensure that the Chamber can analyse the materials submitted in support of a request for deferral.* […] [W]*hilst the Prosecution may offer its services* [to a State unable to provide the supporting documents in one of the working languages of the Court]*, no obligation rests on it to provide translations*".[95] In this regard, the Appellant's argument that the abovementioned "*precedent*" was "*legally flawed*" because "*the burden of persuasion rests with the Prosecution and not the State*" must be dismissed.[96] Indeed, as argued *supra*,[97] the onus to substantiate a deferral request rests on the moving State.

49. *Second*, the obligation imposed on the Prosecution by rule 54(1) of the Rules to "*communicate*" to the Pre-Trial Chamber "*the information provided by the State under rule 53*" is limited by the precise terms of this provision. The Prosecution is only obliged to transmit the translations received from the State, if any. The Prosecution is not obliged to provide translations itself nor to "*ensur*[e] *that the Chamber was duly informed of the basis of the*

[93] *Contra* Appeal Brief, *supra* note 2, para. 65.
[94] See the Appeal Brief, *supra* note 2, para. 67.
[95] See the "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", *supra* note 39, para. 50.
[96] See the Appeal Brief, *supra* note 2, para. 71.
[97] See *supra* para. 29.

*deferral request*".[98] Contrary to the Appellant's contention,[99] regulation 39(1) of the Regulations cannot alter the scope of the obligation under 54(1) of the Rules because the Regulations "*shall be read subject to the Statute and the Rules*".[100]

50. In this regard, the Appellant's argument that the obligation to provide translations into a working language may limit the rights of States under article 18 of the Statute must be dismissed.[101] As reminded by the Chamber, "[the obligation for a State to ensure that the Chamber can analyse the materials submitted] *is not to say that, in case a State in* [sic] *unable to provide the supporting documents in one of the working languages of the Court, it may not consult with the Prosecution and agree that any translation for the purpose of the Chamber's assessment is made by the Prosecution*".[102]

51. *Third*, the Chamber did not "*erroneously determine*[d] *that the requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution*".[103] Indeed, it granted an extension of time for the Appellant to file translations of the documents "*essential*" to its Deferral Request,[104] but it did so only after the Appellant requested *sua sponte* an extension of time to file English translations of the documents "*seemed necessary to make available to the Chamber*".[105] The Chamber did not direct the Appellant to focus on documents deemed "essential".[106]

52. Moreover, Counsel observes that translation of all documents is not required even to provide a fair trial before the Court.[107] As stated by the Appeals Chamber,

> *"*[t]*here is no general requirement that filings of parties and participants submitted in English be translated into French, or vice versa,* […]*. This is also confirmed with respect to the language which a suspect fully understands and*

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[98] *Contra* Appeal Brief, *supra* note 2, para. 74.
[99] See the Appeal Brief, *supra* note 2, para. 68.
[100] See regulation 1(1) of the Regulations; the "Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled 'Décision sur la Demande de Mise en Liberté Provisoire de Thomas Lubanga Dyilo'" (Appeals Chamber), No. ICC-01/04-01/06-824 OA7, 13 February 2007, para. 43; and the "Decision on Defence request on the suspension of time limits during judicial recess" (Pre-Trial Chamber I), No. ICC-02/11-01/11-585, 27 December 2013, para. 7.
[101] See the Appeal Brief, *supra* note 2, para. 75.
[102] See the Impugned Decision, *supra* note 3, para. 85.
[103] See the Appeal Brief, *supra* note 2, para. 70.
[104] *Idem*, referring to the See the "Decision on Venezuela's request for an extension of time and other procedural matters", No. ICC-02/18-29, 27 February 2023, para. 11.
[105] See the "Annex II to the Transmission of 'Request for modification of the deadline for submission of translations of the files related to the State's observations on OTP requests ICC-02/18-18', received from the Authorities of the Bolivarian Republic of Venezuela", No. ICC-02/18-28-AnxII, 24 February 2023, para. 9.
[106] *Contra* Appeal Brief, *supra* note 2, para. 78.
[107] See the "Order on reclassification of documents and Reasons for the 'Decision on requests for variation of time limits for a request for leave to reply'" (Appeals Chamber), No. ICC-01/05-01/13-2196 A A2 A3 A4 A5, 14 August 2017, para. 10.

> *speaks by the wording of regulation 40 (6) of the Regulations of the Court, which provides that* '[t]*he Registrar shall ensure translation into the language of the* [suspect]*, if he or she does not fully understand or speak any of the working languages, of all decisions or orders in his or her case. Counsel shall be responsible for informing that person of the other documents in his or her case*'".[108]

53. *A maiore ad minus*, a Chamber may decide on a request pursuant to article 18(2) of the Statute even if not all documents from the State involved in the proceedings have been translated into a working language of the Court.

54. *Fourth*, article 87(2) of the Statute is not applicable to proceedings pursuant to article 18(2) of the Statute, even if the text of the First Article 18(1) Notification "'*requested' the State to indicate whether it wished to seek deferral of the investigation*".[109] Article 87(2) is included in Part 9 of the Statute devoted to international cooperation and judicial assistance, and refers to "*requests for cooperation*" in relation to the "*investigation and prosecution of crimes within the jurisdiction of the Court*" (article 86 of the Statute). By contrast, the admissibility proceedings envisaged in article 18(2) are "preliminary" to said stage, and are specifically regulated in rules 53 to 55 of the Rules. In light of this distinction, Counsel argues that the Appellant could transmit a response to the First and Second Article 18(1) Notification, in accordance with the language requirements provided for in regulation 39(1) of the Regulations.

55. *Lastly*, since the Chamber did not err in refusing to consider information concerning domestic investigations that was in Spanish, the Appeals Chamber should not accept the English translations submitted by the Appellant as additional evidence.[110]

#### *e) Sub-ground of appeal 2.2: the Chamber correctly excluded summaries prepared by the Prosecution of some documents transmitted by the Appellant*

56. Contrary to the Appellant's contention,[111] the Chamber did not err in law and did not abuse its discretion by excluding materials which "*do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela*".

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[108] See the "Decision on Mr. Gbagbo's Request for Translation and an Extension of Time for the Filing of a Response to the Document in Support of the Appeal" (Appeals Chamber), No. ICC-02/11-01/11-489 OA5, 22 August 2013, para. 10 (emphasis added).
[109] *Contra* Appeal Brief, *supra* note 2, paras. 72, 77.
[110] *Contra* Appeal Brief, *supra* note 2, para. 24.
[111] See the Appeal Brief, *supra* note 2, para. 83.

57. *First*, the Appellant misreads the Impugned Decision. The main reason for the Chamber[112] to exclude translations by the Prosecution of summaries provided by Venezuela of some criminal cases was because they did not "*contain*" police or court records, not because they "*were not* […] *police or court records*".[113]

58. *Second*, contrary to the Appellant's contention,[114] the Chamber was not required to identify which documents were "*unrelated to any domestic investigation*". Since all the summaries were excluded because they did not contain police or court records, the additional conclusion reached by the Chamber that some of them did not relate to domestic investigations, was superfluous for the purpose of article 18(2) proceedings.

59. *Third*, the Chamber properly justified the exclusion of the material that were not accompanied by "*original*" police or court records, since they were not "*relevant substantiating documentation*" for the purposes of article 18(2) of the Statute.[115] Contrary to the Appellant's assumption,[116] the Chamber based this finding on prior article 18(2) jurisprudence.[117] Because the material allegedly identified by Venezuela as being at the basis of the Prosecution summaries are not "*evidence for the purposes of substantiating* [an] *admissibility challenge*",[118] but "*evidence on the merits of* [an eventual] *domestic case*",[119] the Chamber did not err in not considering it at this stage of the proceedings.

60. *Fourth*, the Chamber was not obliged to rule on the material at hand following the relevance and admissibility criteria set out in article 69(4) of the Statute.[120] As it is clear from the wording of this provision ("trial"), its scope of application does not encompass article 18(2) admissibility proceedings.

61. *Fifth*, the Chamber did not create an "*unfair discrepancy*" between the type of information requested from the Appellant and from the Prosecution.[121] The difference in the

[112] See the Impugned Decision, *supra* note 3, para. 82.
[113] See the Appeal Brief, *supra* note 2, para. 83.
[114] *Ibid.*, para. 85.
[115] See the Impugned Decision, *supra* note 3, para. 88.
[116] See the Appeal Brief, *supra* note 2, para. 83.
[117] See the Impugned Decision, *supra* note 3, para. 88, referring to the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 15.
[118] *Cf.* the Appeal Brief, *supra* note 2, para. 86, with the "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-239, 7 December 2012, para. 11. See also the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi" (Pre-Trial Chamber I), No. ICC-01/11-01/11-344-Red, 31 May 2013, para. 123.
[119] *Cf.* the Appeal Brief, *supra* note 2, para. 89, with the "Decision requesting further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi", *supra* note 118, para. 12. See also the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", *supra* note 118, para. 122.
[120] *Contra* Appeal Brief, *supra* note 2, paras. 84, 90-91.
[121] *Contra* Appeal Brief, *supra* note 2, paras. 87-88.

type of information is justified by the fact that the State requesting a deferral of an investigation is better placed to determine the existence and scope of domestic proceedings.[122] Therefore, the Appellant could provide more detailed information than the Prosecution, which at this stage of the proceedings had only conducted a preliminary examination.

#### *f) Sub-ground of appeal 2.3: the Chamber correctly found that the MoU had not been officially notified and filed*

62. Contrary to the Appellant's contention,[123] the Chamber did not err in law by finding that "*no memoranda of understanding had been officially notified and filed before it*".

63. *First*, the Appellant misconstrues the Chamber's findings. In fact, contrary to the submissions by Venezuela, the Chamber did not refer to the MoU "*when assessing the existence of steps taken by the RBV to actively investigate the acts falling within the Article 18(1) notice*",[124] but when addressing "*other alleged irregularities in the present article 18(2) proceedings*".[125]

64. *Second*, the Court has not found that the parties must not seek the admission of legal instruments "*in order to rely on their contents to demonstrate legal obligations*",[126] but that the preceptive admission is not necessary if the parties "*seek to use* [items] *in support of their legal arguments*".[127] By contrast, the Appellant seeks to rely on the MoU to advance arguments *on the facts*, namely that the Prosecutor surprisingly announced his decision to open an investigation, and that he specifically endorsed the investigative approach adopted by Venezuela.[128] Therefore, the Appellant should have formally filed the MoU before the Chamber for its assessment. The fact that the Prosecutor referred to the MoU when informing the Chamber of the First Article 18(1) Notification does not relieve the Appellant from this obligation.

65. In any event, and notwithstanding the above, the Appellant also fails to show that the Impugned Decision would have been materially affected if the Chamber had erred in finding that the MoU had not been officially notified and filed before it. The signature of the MoU was

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[122] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 79.
[123] See the Appeal Brief, *supra* note 2, para. 92.
[124] *Idem*.
[125] See the Impugned Decision, *supra* note 3, section II.A.2, para. 60.
[126] See the Appeal Brief, *supra* note 2, para. 94.
[127] See the "Decision on the Defence's request for authorisation to file a corrigendum to its closing brief and to strike a reference from the Prosecution's response to the closing briefs" (Trial Chamber X), No. ICC-01/12-01/18-2496, 16 May 2023, para. 17 (emphasis added).
[128] See Venezuela's Observations, *supra* note 71, para. 17; and the Appeal Brief, *supra* note 2, para. 95.

relied upon by the Appellant to argue its "*cooperative approach*" with the Prosecutor,[129] and that the latter agreed with Venezuela to provide "*technical consultancy services* […] *in the spirit of positive complementarity*".[130] These submissions were, however, not relevant to the Chamber's assessment of the criminal proceedings undertaken by Venezuela at the time of the Resumption Request - *i.e.* whether Venezuela was conducting an investigation which sufficiently mirrored the Prosecutor's intended investigation,[131] or whether said criminal proceedings were genuine.[132]

66. The submissions advanced by the Appellant based on the MoU, namely that the Prosecutor "*specifically endorsed an investigative approach focusing on establishing the facts (rather than particular targets)*",[133] are not accurate and equally fail to demonstrate that the alleged error had a material impact on the Impugned Decision. The MoU does not show the Prosecutor's agreement on any investigative approach, but simply indicates that "*no suspect or target has been identified at this stage and that the investigation is intended to establish the truth*".[134] Moreover, the Chamber's consideration of said submissions would not have had any material impact on the Impugned Decision, since the admissibility analysis of a potential case must be conducted considering the facts as they exist at the time of the admissibility challenge before the Chamber, instead of eventual domestic investigations and/or prosecutions.[135] Therefore, there was no error in the Chamber's decision that "*for the purposes of the determination of the Request, the Chamber has only considered the material and submissions filed before it*".[136]

67. For all these reasons, Ground 2 should be dismissed.

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[129] See Venezuela's Observations, *supra* note 71, paras. 17, 136.
[130] *Ibid.*, paras. 132, 166.
[131] See the Resumption Request, *supra* note 9, para. 4.
[132] *Ibid.*, para. 5.
[133] See the Appeal Brief, *supra* note 2, para. 95.
[134] See page 2 of the Memorandum of Understanding signed in Caracas on 3 November 2021 by Venezuela and the Prosecution, available at https://www.icc-cpi.int/itemsDocuments/otp/acuerdo/acuerdo-eng.pdf.
[135] See the "Decision on the ' Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), No. ICC-01/09-01/11-234 OA, 28 July 2011, para. 10; and the "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case" (Appeals Chamber), No. ICC-01/04-01/07-1497 OA8, 25 September 2009, para. 57.
[136] See the Impugned Decision, *supra* note 3, para. 60.

### 4. Ground of appeal 3: the Chamber correctly assessed the temporal scope of the Prosecutor's intended investigation

68. Contrary to the Appellant's contention,[137] the Chamber correctly found that the temporal scope of the Prosecutor's First and Second Article 18(1) Notification and related deferral proceedings were not limited to alleged criminal activity occurring from April 2017 onwards.

69. *First*, the Appellant wrongly concludes that the Chamber "*rel*[ied] *on the temporal scope of State referrals in order to deduce the temporal scope of the Article 18(1) Notification*".[138] In this regard, the Chamber indeed acknowledged that the temporal scope of the situation as referred by the States concerns alleged crimes committed since 12 February 2014.[139] However, "*notwithstanding the above* [the temporal scope of the referral]",[140] the Chamber considered at length the language used in the First Article 18(1) Notification, and concluded that it "*create*[d] *some uncertainty as to the temporal scope of the criminal acts that* [the Prosecution] *intends to investigate and on which Venezuela was required to provide information pursuant to article 18(2)*".[141]

70. The Chamber eventually reached its conclusion on the temporal scope of the intended investigation both "*from the content of the States' referral and the information provided to Venezuela by the Prosecution*".[142] Thus, it made a clear distinction between the temporal scope of the referral and that of the article 18(1) Notifications.[143]

71. *Second*, the Appellant misreads the Impugned Decision to argue that there was "*no foundation to conclude that the Article 18 proceedings encompassed alleged incidents occurring before April 2017*".[144] In this regard, the Chamber correctly relied on the list of incidents within the jurisdiction of the Court included in the Second Article 18(1) Notification to determine that the temporal scope of the intended investigation covered also conduct prior to 2017.[145]

72. *Third*, the Appellant's arguments that the Prosecution did not state that it intended to investigate conduct prior to 2017 and that there was an impression that investigations were

[137] See the Appeal Brief, *supra* note 2, paras. 16, 97-105.
[138] *Ibid.*, para. 100.
[139] See the Impugned Decision, *supra* note 3, para. 45, referring to the Referral, *supra* note 4.
[140] See the Impugned Decision, *supra* note 3, para. 46.
[141] *Ibid.*, para. 47.
[142] *Ibid.*, para. 49.
[143] *Contra* the Appeal Brief, *supra* note 2, paras. 101-103.
[144] See the Appeal Brief, *supra* note 2, para. 100.
[145] See the Impugned Decision, *supra* note 3, paras. 48-49.

confined to detention-related incidents occurring since April 2017 are not tenable.[146] These complaints were not raised before the Chamber by the Appellant, who simply requested a ruling on the temporal jurisdiction of the Court on the basis that there were allegedly "*arbitrary changes of dates*" in the analysis of the Situation by the Prosecution.[147]

73. In any case, given the context and content of the Second Article 18(1) Notification, it cannot be reasonably argued that the Prosecution did not intend to investigate conduct prior to 2017. In fact, the temporal scope of the preliminary examination was not limited to conduct after April 2017 in the Prosecutor's annual Preliminary Examination reports of 2018, 2019 and 2020,[148] and in *inter partes* communications with Venezuela.[149] And even assuming *arguendo* that it was, the Prosecutor's investigation is not limited to the incidents identified during the preliminary examination.[150]

74. More importantly, the Second Article 18(1) Notification was provided to the Appellant upon its Additional Information Request.[151] Said Notification included a sample of alleged incidents cited in open-source reports, and invited Venezuela to inform the Prosecutor of any national proceedings that it had undertaken with respect to these alleged acts.[152] After the provision of this "*additional information*", the Prosecutor agreed to grant Venezuela three months "*to inform the Court of its investigations within the meaning of article 18(2)*".[153] Therefore, the Appellant cannot reasonably argue that it was not informed of the temporal scope of the Prosecutor's intended investigation.

75. For all these reasons, Ground 3 should be dismissed.

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[146] *Contra* the Appeal Brief, *supra* note 2, para. 104.
[147] See the Impugned Decision, *supra* note 3, para. 43.
[148] See the OTP Report on Preliminary Examination Activities (2018), 5 December 2018, paras. 116, 124; OTP Report on Preliminary Examination Activities (2019), 5 December 2019, para. 73; OTP Report on Preliminary Examination Activities (2020), 14 December 2020, paras. 199, 213.
[149] See the Response to Venezuela's Observations, *supra* note 83, para. 52.
[150] See the "Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan" (Appeals Chamber), No. ICC-02/17-138 OA4, 5 March 2020, para. 61; and the "Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute" (Pre-Trial Chamber I), No. ICC-01/21-12, 15 September 2021, paras. 116-118, and references contained therein. See also the Impugned Decision, *supra* note 3, para. 76.
[151] See Venezuela's Additional Information Request, *supra* note 6, and the Impugned Decision, *supra* note 3, paras. 73, 79.
[152] See the Second Article 18(1) Notification, *supra* note 7, footnote 9; and the Impugned Decision, *supra* note 3, para. 74.
[153] See the Second Article 18(1) Notification, *supra* note 7, para. 6.

### 5. Ground of appeal 4: the Chamber correctly applied the complementarity test under article 17 of the Statute

76. In Ground 4, the Appellant argues that the Chamber erred in law in the test it adopted for assessing whether Venezuela was actively investigating the acts referred to in the Article 18 Notification[154] by (i) not tailoring the test to the particularities of the Notification;[155] (ii) not clarifying the scope and content of the test;[156] and (iii) finding that the contextual elements of crimes against humanity,[157] the discriminatory intent of crimes of persecution,[158] and sexual and gender-based violence crimes ("SGBV crimes") as such[159] must be covered by domestic investigations.

77. Counsel submits that the Chamber correctly applied the complementarity test under article 17 of Statute, as expressly foreseen by rule 55(2) of the Rules and in accordance with the relevant law. In particular, contrary to Venezuela's arguments in this regard, the Chamber: (a) applied the appropriate test for preliminary admissibility rulings pursuant to article 18 of the Statute; (b) reasonably explained the degree of coverage required from domestic investigations pursuant to article 18 of the Statute; and (c) correctly found that the contextual elements of the crimes against humanity, the discriminatory intent of the crime of persecution and SGBV crimes had to be subject of domestic investigation.

#### *a) Sub-grounds of appeal 4.1 and 4.2: the Chamber applied the appropriate test for preliminary admissibility rulings and reasonably explained the degree of coverage required from domestic investigations under article 18 of the Statute*

78. Contrary to the Appellant's contention,[160] the Chamber's test of considering "*whether domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court*"[161] is the same as the one recently upheld by the Appeals Chamber in the Philippines Situation – namely, that "*domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor's intended investigation*".[162] In fact, the Appeals Chamber found no error since "*the Pre-Trial Chamber correctly assessed whether there exists an advancing process of domestic investigations or prosecutions of the same groups or*

[154] See the Appeal Brief, *supra* note 2, para. 17.
[155] *Ibid.*, paras. 17, 106-115.
[156] *Ibid.*, paras. 17, 116-122.
[157] *Ibid.*, paras. 17, 123-130.
[158] *Ibid.*, paras. 17, 131-135.
[159] *Ibid.*, paras. 17, 136-139.
[160] *Ibid.*, paras. 107-114.
[161] See the Impugned Decision, *supra* note 3, para. 65.
[162] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, paras. 2, 106.

*categories of individuals in relation to the relevant criminality within the situation which sufficiently mirrors the scope of the Prosecutor's intended investigation, taking into account the stage of a situation, as well as the specific circumstances and parameters of the* […] *Situation*".[163]

79. In the Impugned Decision, the Chamber clarified that the correct understanding of the "*sufficiently mirror*" test is that "*in order to show that it is investigating the potential cases that the Prosecution may pursue,* [Venezuela's] *domestic investigations must substantially cover the same conduct and the same persons/groups*".[164] At no point the Chamber requested complete symmetry between the two investigations in terms of the specific identity of the alleged offenders. Instead, what the Chamber required is that at least the same categories of individuals are targeted, such higher-ranking instead of direct and lower-ranking potential perpetrators.

80. Contrary to the Appellant's submissions,[165] the Chamber committed no error in its application of the test and in explaining the degree of coverage required from domestic investigations pursuant to article 18 of the Statute. In fact, for the purpose of proceedings relating to the initiation of an investigation into a situation under articles 15 and 53(1) of the Statute, the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages.[166] This is consistent with the preliminary stage of proceedings when the Prosecution has not had the opportunity to gather evidence and ascertain the facts in the course of an investigation.

81. The Chamber, however, considered that it is upon the Prosecution to provide information that is specific enough for the relevant State to exercise its right under article 18(2) of the Statute and representative enough of the scope of criminality that it intends to investigate in any future case(s).[167] In the circumstances of this Situation, the Chamber correctly found that the information provided by the Prosecution in its multiple exchanges with Venezuela was sufficiently specific for the State to be informed of the degree of coverage required by its domestic proceedings.[168] In particular, the Chamber noted that the sample of alleged incidents provided by the Prosecution - in response to Venezuela's request for more concrete information

[163] *Ibid.*, para. 110 (emphasis added).
[164] See the Impugned Decision, *supra* note 3, para. 67.
[165] See the Appeal Brief, *supra* note 2, paras. 116-122.
[166] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 43, para. 39.
[167] See the Impugned Decision, *supra* note 3, para. 77.
[168] *Ibid.*, para. 79.

to the criminal acts that may constitute crimes under article 5 of the Statute - all went so far to contain information on the victim, date, and location for each alleged incident.[169] Accordingly, the Chamber properly determined that Venezuela had received sufficient information to exercise its right under article 18 of the Statute. Venezuela was aware of the scope of the Prosecutor's intended investigation and understood that it would only meet the test under article 17 of the Statute by investigating and prosecuting the same groups or categories of individuals in relation to the relevant criminality within the information provided by the Prosecution.

#### *b) Sub-ground of appeal 4.3: the Chamber correctly found that the contextual elements of the crimes against humanity must be subject of domestic investigation*

82. In sub-ground 4.3, the Appellant argues that the Chamber committed an error of law in considering Venezuela's failure to investigate contextual elements of crimes against humanity as a key factor to conclude that the domestic investigations did not sufficiently mirror those of the Prosecutor.[170]

83. In State admissibility challenges of a case under article 19(2)(b) of the Statute there is no requirement for a crime to be prosecuted as an international crime domestically.[171] In the Impugned Decision, the Chamber correctly recalled that what is required is that the crimes prosecuted at the domestic level cover "*substantially the same conduct*" as those investigated by the Court.[172] In determining whether they do, the Chamber assessed whether the domestic case sufficiently mirrors the potential cases before the Court. It is the alleged conduct, as opposed to its legal characterisation, that matters.[173] The parameters of a 'case' are defined by the suspect under investigation and the conduct that gives rise to criminal liability under the Statute.[174] The Appeals Chamber considered that to carry out the assessment, it is necessary to use, as a comparator, the underlying incidents under investigation both by the Prosecutor and

[169] *Ibid.*, para. 122.
[170] See the Appeal Brief, *supra* note 2, para. 123.
[171] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", *supra* note 43, para. 119. See also the "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", *supra* note 118, para. 113.
[172] See the Impugned Decision, *supra* note 3, para. 102.
[173] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", *supra* note 43, para. 119.
[174] *Ibid*., para. 99.

the State, alongside the conduct of the suspect under investigation that gives rise to their criminal responsibility for the conduct described in those incidents.[175]

84. In the Impugned Decision, the Chamber correctly applied the above test and properly found that, on the basis of the material submitted, "*it appears that Venezuela is indeed not investigating the factual allegations underlying the contextual elements of crimes against humanity*".[176] In addition, the Chamber properly assessed - and drew the correct conclusions as to the lack of relevant domestic investigations - from Venezuela's multiple and unsubstantiated statements (i) rejecting *a priori* the applicability of the features developed by the case law to interpret the element of the *attack* in the context of crimes against humanity;[177] (ii) defining the violations of protesters' rights as "*isolated incidents*";[178] and (iii) alleging an incompatibility of the policy element within the meaning of article 7(2)(a) of the Statute with public statements made by high level authorities of Venezuela and with the existence of the Human Rights Directorate.[179]

85. On this last point, Counsel reiterates that the evidence presented by a State in this regard must be of a "*sufficient degree of specificity and probative value*" which demonstrates that it is indeed genuinely investigating the case.[180] In this regard, the Appeals Chamber ruled that:

> "[…] *'a statement by a Government that it is actively investigating is not* […] *determinative. In such a case the Government must support its statement with tangible proof to demonstrate that it is actually carrying out relevant investigations'. In other words, there must be evidence with probative value".*[181]

[175] See the "Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi'" (Appeals Chamber), No. ICC-01/11-01/11-547-Red OA 4, 21 May 2014, para. 732.
[176] See the Impugned Decision, *supra* note 3, para. 107.
[177] *Ibid.*, para. 104.
[178] *Ibid.*, paras. 104-105.
[179] *Ibid.*, para. 107.
[180] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 43, para. 2.
[181] *Ibid.*, para. 62 (footnotes omitted).

86. In this sense, it would never suffice for a State *merely to assert* that relevant investigations are ongoing,[182] or for a State to rely on judicial reform actions and promises for future investigative activities.[183]

### *c) Sub-ground of appeal 4.4 and 4.5: the Chamber correctly found that the discriminatory intent of crimes of persecution and SGBV crimes were not subject of domestic investigation*

87. In sub-ground 4.4, the Appellant argues that the Chamber erred in law by finding that domestic investigations needed to cover 'discriminatory intent' in connection with underlying acts pertaining to the Prosecutor's intended investigations related to persecution, and by failing to take into account domestic investigations into human rights violations.[184] Similarly, in sub-ground 4.5, the Appellant argues that the Chamber committed the same legal error in finding that Venezuela was not carrying out domestic investigations into SGBV crimes.[185]

88. As regards sub-ground 4.4, an act referred to in article 7(1) or any crime within the Court's jurisdiction qualifies as persecution when it is perpetrated against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.

89. The Chamber correctly recognised that different legal qualifications do not influence the assessment on whether Venezuela appears (or not) to be investigating the same conduct.[186] In this regard, the Appellant misunderstood and/or misapplied the "same conduct" test. Venezuela claims that the Chamber erred in rejecting the alleged domestic human rights investigations as a relevant indicator. But it fails to show whether or how those investigations were in fact covering the discriminatory intent - related to the same criminality and groups or categories of individuals mirroring the Prosecutor's intended investigation.

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[182] See the "Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute'", *supra* note 43, paras. 62-63. See also, the "Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled 'Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo'", *supra* note 43, paras. 29 and 128.

[183] See the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute" (Pre-Trial Chamber II), No. ICC-01/09-01/11-101, 30 May 2011, para. 64. See also, the "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017" (Pre-Trial Chamber III), No. ICC-01/17-9-Red, 9 November 2017, para. 162.

[184] See the Appeal Brief, *supra* note 2, paras. 131-135.

[185] *Ibid.*, paras. 136-139.

[186] See the Impugned Decision, *supra* note 3, para. 125.

90. In this regard, in the *Al-Senussi* case, the Appeals Chamber found that the conduct underlying the crime of persecution was sufficiently covered in the domestic proceedings, because judges in Libya could include in sentencing "*discrimination on grounds constituting the international crime of persecution as an aggravating feature*".[187] In *Al-Senussi* the admissibility test was applied to a concrete case. The Appeals Chamber could thus identify the specific domestic offenses that Libya envisaged to charge the defendant with - including "*civil war*", "*assault the political rights of the citizen*", "*stirring up hatred between the classes*".[188] In the present Situation, Venezuela has not reached this stage and did not demonstrate how the crimes allegedly investigated included factual allegations of discriminatory intent.

91. In these circumstances, the mere reference to the existing domestic legislation providing that criminal acts "*committed due to the victim's membership of a particular ethnic, racial, religious or political group shall be considered as an aggravating circumstance in determining the appropriate sentence*"[189] is not sufficient to satisfy the preliminary admissibility test under article 18 proceedings. It is not enough for a State to rely on the available legislation or judicial reform actions.[190]

92. In sub-ground 4.5, the Appellant argues that the Chamber committed the same legal error as it did in relation to persecution, when finding that Venezuela was not carrying out domestic investigations into sexual and gender-based violence crimes.[191] As submitted for sub-ground 4.4, the Appellant misunderstood and/or misapplied the test applicable to article 18 proceedings. The Chamber correctly noted that Venezuela only alleged three specific cases involving SGBV crimes and provided information for one of them.[192] The Chamber further noted that while a few other cases contain information that may suggest that SGBV crimes were considered, it remained unclear whether this specific aspect was the object of domestic investigations.[193]

93. While the limited number of cases put forward by Venezuela already provides a strong indication of the absence of relevant domestic investigations, it also made it impossible for the

[187] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", *supra* note 43, para. 121.
[188] *Ibid*., para. 120.
[189] See the Appeal Brief, *supra* note 2, para. 135.
[190] See the "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", *supra* note 183, para. 64. See also, the "Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017", *supra* note 183, para. 162.
[191] See the Impugned Decision, *supra* note 3, paras. 124.
[192] *Idem*.
[193] *Idem*.

Chamber to evaluate whether the national proceedings sufficiently mirror the Prosecutor's intended investigation on SGBV crimes. In addition, Venezuela's generic argument that domestic legislation concerning torture and cruel treatment attracts a higher penalty has no bearing on the test that the Chamber should apply.[194] The same goes for the Appellant's arguments on the Chamber's failure to consider a potential requalification of such conducts by the domestic judges at a later stage.[195] As discussed *infra,* the relevant assessment under article 18 of the Statute must be made on the basis of the facts as they presently exist.[196]

94. For all these reasons, Ground 4 should be dismissed in its entirety.

### 6. Ground of appeal 5: the Chamber relied on correct indicators to conclude the inexistence of relevant domestic investigations

95. In Ground 5, the Appellant argues that the Chamber erred in law by assessing the existence of domestic investigations on irrelevant factors and by failing to give any weight to relevant factors.[197]

96. In the Impugned Decision, the Chamber correctly relied on the Appeal Chamber's jurisprudence according to which article 17(1)(a) of the Statute entails a two-step analysis to determine whether a case is inadmissible.[198] The Chamber then proceeded to address the factors put forward by the Prosecutor and considered determinative to the Chamber's ultimate findings on the Deferral Request, including: (i) whether Venezuela is investigating the patterns and policies underlying the contextual elements of crimes against humanity; and (ii) whether the focus of the domestic proceedings is on direct perpetrators and arguably low level members of security forces.[199] As regards point (i), the Chamber properly analysed the material submitted by Venezuela and correctly found that the national investigations failed to cover any factual allegations underlying the contextual elements of crimes against humanity. The Chamber

[194] See the Appeal Brief, *supra* note 2, para. 137.
[195] *Ibid.*, para. 138.
[196] See the "Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 135, para. 56. See also, the "Decision on the admissibility of the case under article 19(1) of the Statute"(Pre-Trial Chamber II), No. ICC-02/04-01/05-377, 10 March 2003, paras. 49-52 (noting that admissibility assessments cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time).
[197] See the Appeal Brief, *supra* note 2, paras. 18, 140-152.
[198] See the Impugned Decision, *supra* note 3, para. 95. In considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, "*the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. Only when both questions are answered in the affirmative, should a chamber consider whether a State is unwilling or unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute. Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court".*
[199] *Ibid.*, paras. 96-119.

considered that this finding is also supported by Venezuela's unsubstantiated claim that the crimes alleged by the Prosecution were not committed as part of a widespread or systematic attack directed against the civilian population.[200]

97. As regards point (ii), the Chamber concluded that the focus of the national investigations appeared to be on direct and low-level perpetrators. It noted that said focus is "*consistent with Venezuela's assertion that crimes against humanity did not occur in Venezuela insofar as violations of citizens' rights were isolated in what Venezuela describes as 'potential acts of abuse committed by public officials*'".[201] The Chamber concluded that these two factors, when combined, decisively led to its determination that the domestic investigations in Venezuela do not sufficiently mirror the Prosecutor's intended investigation.[202]

98. The Chamber's approach to the information provided by Venezuela is thus correct. When assessing the merits of an article 18(2) request, a Chamber must consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court. Whereas the Court's investigations concern international crimes with certain contextual elements, a State need not investigate conduct as crimes against humanity, for example, or to allege the same modes of liability found in the Statute to still investigate the persons and conduct. Notwithstanding the challenges in making such a comparison between an ICC investigation and domestic investigations - especially in the absence, at this stage, of any identified individuals by the Prosecution - the Chamber rightly observed that given the Court's role and purpose, and the fact that the authorised investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the investigation's focus.[203]

99. Similarly, the domestic proceedings in Venezuela were found to not sufficiently mirror the expected scope of the Court's investigation, since they only addressed the physical, low-ranking perpetrators and did not extend to any high-ranking officials.[204] The Chamber considered the failure to inquire into any pattern of criminality or the systematic nature of crimes, and the decision to investigate cases concerning low-ranking suspects instead of

[200] *Ibid.*, paras. 107 and 119.
[201] *Ibid.*, para. 119.
[202] *Ibid.*, para. 119.
[203] *Ibid.*, para. 118. See also the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 68.
[204] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 68.

individuals who would appear to be most responsible. As found in the Philippines Situation,[205] even if Venezuela contends that "*the fact that current suspects have a 'low rank' does not preclude the possibility that the domestic authorities will identify high-ranked suspects, after the conclusion of proceedings against direct perpetrators*",[206] it is evident that at present no investigations or prosecutions covering patterns of criminality or the responsibility of individuals beyond the physical perpetrators of the alleged crimes are taking place.

100. As in the Philippines Situation,[207] the Chamber's enquiry was whether the domestic proceedings sufficiently mirror the Prosecutor's intended investigation. Since the latter concerns alleged crimes against humanity, the Chamber expected the domestic proceedings to focus on high-ranking officials.[208] Similarly, in article 18 proceedings in the Philippines Situation, the Chamber found that the limited number of cases mentioned by the State and the type of persons charged, meant that said cases could not represent the range and scope of crimes of the Court's investigation.[209] The Chamber was thus not satisfied that the State had shown that it had investigated or was investigating in such a manner that the domestic investigations could be seen as sufficiently mirroring the authorised investigation.[210] The Appeals Chamber found no error in this approach.[211]

101. For all these reasons, Ground 5 should be dismissed.

### 7. Ground of appeal 6: the Chamber correctly assessed the domestic investigations

102. In Ground 6, the Appellant argues that the Chamber erred in law and manifestly abused its discretion concerning how it assessed and drew conclusions from the delays occurring in domestic cases.[212]

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[205] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 161; and the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 93.
[206] See the Appeal Brief, *supra* note 2, para. 148.
[207] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 68; and the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 163.
[208] See the Impugned Decision, *supra* note 3, para. 118, referring in footnote 216 to the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 68.
[209] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 63.
[210] *Ibid.*, para. 83.
[211] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 165.
[212] See the Appeal Brief, *supra* note 2, paras. 19, 153-159.

103. At first, Counsel recalls that Venezuela is obliged to substantiate its submissions, in the same way as any party or participant to the proceedings must support the assertions it makes, in order to enable the Chamber to assess the correctness of the propositions advanced.[213] The information provided must be relevant, probative, and sufficiently specific to enable the Prosecution – and the Chamber, if applicable – to ascertain the stage of the domestic proceedings, assess the investigative steps taken, and determine whether deferral is justified considering the State's proceedings as a whole. As a necessary determination in deciding whether to seek an order under article 18(2) of the Statute, the Prosecutor's review of the national proceedings includes their compatibility with article 17 of the Statute in terms of jurisdiction and complementarity.[214] In the same vein, when seized of an application under article 18(2) of the Statute, the Pre-Trial Chamber "*shall consider the factors in article 17*".[215]

104. Said complementarity assessment must be made on the basis of the facts as they presently exist.[216] The complementarity principle is properly applied by ensuring that article 18 of the Statute is not used to create an impunity gap. So that effective investigations of the alleged crimes in the situation are timely carried out primarily by a State with jurisdiction, but otherwise by the Court. Accordingly, these assessments cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time.[217]

105. The Chamber found that Venezuela's delay in carrying out domestic investigations and prosecutions made it impossible to identify any specific suspect in about three-quarters of the cases.[218] Thus, the Chamber correctly determined that it was not possible to conclude that national proceedings were sufficiently mirroring the scope of the Prosecution's intended investigation on the basis of the few national cases in which "*a suspect was identified, an accused charged, and/or a judicial decision on an accused's criminal responsibility taken*".[219]

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[213] See the "Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled 'Decision on the admissibility of the case against Abdullah Al-Senussi'", *supra* note 43, para. 167 confirming the finding in the "Decision on the admissibility of the case against Abdullah Al-Senussi" (Pre-Trial Chamber I) No. ICC-01/11-01/11-466-Red, 11 October 2013, para. 208.
[214] See the "Decision regarding applications related to the Prosecution's 'Notification on status of the Islamic Republic of Afghanistan's article 18(2) deferral request'" (Pre-Trial Chamber II), No. ICC-02/17-156, 3 September 2021, para. 23 ("*Article 18(2)* […] *confers upon the Prosecution the exclusive power to review the Deferral Request with the modalities and the timing it regards as appropriate*"). See also, rule 55(2) of the Rules.
[215] See rule 55(2) of the Rules.
[216] See the "Judgment on the Appeal of Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", *supra* note 135, para. 56. See also, the "Decision on the admissibility of the case under article 19(1) of the Statute", *supra* note 196, paras. 49-52.
[217] *Idem*.
[218] See the Impugned Decision, *supra* note 3, para. 91.
[219] *Ibid.*, para. 91.

106. In article 18 proceedings in the Philippines Situation, upon finding that a limited number of cases had been substantiated, the Chamber was not satisfied that the State had shown that it had investigated or was investigating in such a manner that the domestic investigations could be seen as sufficiently mirroring the authorised investigation.[220] The Appeals Chamber found no error in this approach since the State "*provided information only on a few relevant cases in which charges were brought or the alleged crime was prosecuted*".[221]

107. In light of the above, Ground 6 should also be dismissed.

### 8. Specific views of victims on the appeal

108. Finally, Counsel wishes to inform the Appeals Chamber that, in the course of the article 18(2) proceedings, the Office received a number of communications from victims, their legal representatives and relevant organisations. Counsel summarises *infra* the information received from Victims supporting the Chamber's findings on the scarce domestic investigations and prosecutions (Ground 6).

109. Victims reported a significant fragmentation and a substantial, unjustified delay in undertaking some few proceedings at national level which makes it impossible to evaluate whether the national activities sufficiently mirror the Prosecutor's intended investigation. Some Victims indicated that their cases have been summarily dismissed without being properly investigated, thereby introducing a double jeopardy clause and preventing new investigations and prosecutions against the same person for the same facts. Others indicated that their cases were dismissed on the basis that the conduct of the perpetrators was not found to be criminal in nature or that the facts themselves were not showing any element of criminality.

110. Victims also reported that since 2014, numerous individuals have been unlawfully killed during demonstrations not only for civil and political rights, but also for social and economic rights. In the vast majority of cases, the alleged perpetrators of these unlawful killings still have not been prosecuted.

111. Counsel recorded 159 cases of torture, mainly in detention facilities, where victims, to no avail, denounced the crimes they suffered to national judicial authorities. Victims indicated that they had not been contacted by prosecutorial or judicial authorities to provide witness

[220] See the "Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 40, para. 83.
[221] See the "Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation'", *supra* note 21, para. 200.

statements nor notified about any procedural steps or other measures taken or that they had been threatened for seeking information.[222] This is also confirmed by the Independent International fact-finding mission on the Bolivarian Republic of Venezuela, which reported a large number of allegations of torture - including acts of sexual violence - raised before judicial authorities, but without any effective response.[223]

112. Finally, Victims stressed that they have been waiting for almost ten years for a proper investigation into the tragic events they suffered. During all this time however, the national authorities have taken no genuine action to identify and prosecute the alleged perpetrators. Therefore, at present, the Court is the only judicial remedy available to Victims to seek justice.

## IV. CONCLUSION

113. For the foregoing reasons, Counsel respectfully requests the Appeals Chamber to dismiss the Appeal in its entirety and confirm the Impugned Decision.

**Paolina Massidda**
**Principal Counsel**

Dated this 13th day of September 2023
At The Hague, The Netherlands

[222] See in this regard, the Human Rights Council, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", 16 September 2021, A/HRC/48/CRP.5, para. 411.
[223] See Human Rights Council, "Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", A/HRC/48/69, 16 September 2021, para. 6 *et seq*..