Annex II

Public Redacted Version,

ICC-02/18-59-Conf-Exp-AnxII

Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

Nº: **ICC-02/18**
Date: **14 August 2023**

APPEALS CHAMBER

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

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

Public Redacted

with Annexes A and B CONFIDENTIAL *EX PARTE* only available to the Office of the Prosecutor and Venezuela

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)

Source: Bolivarian Republic of Venezuela

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I. PRELIMINARY REMARKS

1. The Bolivarian Republic of Venezuela ('RBV', per its Spanish acronym) has, since the beginning of the preliminary examination, openly cooperated with the International Criminal Court ('ICC' or 'the Court').

2. As stated in previous writings, the *Situation in the Bolivarian Republic of Venezuela I* ('Venezuela I') is the first one that was deferred to the Court by a group of States, which possessed political interests directly opposed to those of the RBV. This politically motivated referral led the Office of the Prosecutor ('OTP') to open an investigation without requesting judicial authorisation that would have established whether the relevant material and procedural requirements were met in the framework of a preliminary examination. This flawed inception and process contaminated all subsequent acts.

3. Even if the flawed foundation for this situation is disregarded, the Appeals Chamber should still find that the Pre-Trial Chamber I's 'Decision authorizing the resumption of the investigation pursuant to article 18(2) of the Statute' ('PTC I Decision') is erroneous. The RBV has exercised and continues to exercise its primary jurisdiction, in respect of all relevant incidents that occurred within its jurisdiction. The Pre-Trial Chamber acknowledged in the contested decision that the RBV is conducting investigations and prosecutions in respect of 'matters falling within the situation'. There were no findings and no evidence pointing towards any lack of will or inability on the part of the RBV. There is thus no basis for triggering the complementary jurisdiction of the Court, as provided in Article 17 of the Rome Statute ('the Statute').

4. As will develop herein, the contested PTC I Decision inverts the proper scope of an Article 17 assessment. The OTP's preliminary examination was abruptly concluded without any specific cases, suspects or specific circumstances being identified: the OTP Article 18(1) Notification disclosed a mere 'fishing expedition', concerning the carriage of a 'prospective' investigation to see what can be achieved. The indirect and vague expressions of potential investigative activity in this Notification were never validated by objective judicial scrutiny. This is exemplified by the incomplete list of alleged victims, disclosed on 13 January 2022, which was populated by incorrect and duplicated names and pseudonyms.

5. Despite the lack of concrete particulars concerning the existence of a reasonable basis to pursue such alleged act, the RBV paid the utmost attention and responded to all of the OTP's requests and even expanded the information that was provided. The natural consequence should have been that there was no basis to open an investigation on the part of the OTP since the legal

principles and basic findings for doing so were not complied with. Given the procedural situation, the RBV had no other choice but to invoke Article 18(2) of the Statute to make it clear that complementary jurisdiction was neither substantively nor procedurally viable, in circumstances where the OTP has not disclosed a credible and necessary basis to proceed with its own investigation. The fact is that it is only the RBV and not the OTP that has and continues to investigate, prosecute and bring to justice the persons allegedly responsible for these acts. The OTP investigation is therefore inadmissible because it fails to meet the conditions required by Article 17(2) and (3) of the Statute, and complementary jurisdiction cannot be pursued in the face of the RBV's effective exercise of primary jurisdiction.

II. SUMMARY OF APPELLATE GROUNDS

6. Complementarity is the lynchpin of the Rome Statute. It is the notion that led to 120 States voting to accept an unprecedented intrusion into the sovereign domain of domestic criminal jurisdiction when the Statute was adopted in Rome in July 1998. This notion, in turn, is founded on the principle of primacy for domestic jurisdictions: that the Court should be a court of 'last resort', which intervenes only when States are unwilling or unable to do so.

7. Engrained in these principles is the practical recognition that the ICC lacks the means and ability to substitute for domestic jurisdictions. It is easier and more effective for domestic investigators to access evidence and interview witnesses. Retribution and deterrence are best served by public hearings in the location of the alleged crimes. Fair trial and the principle of legality are also facilitated by bringing a defendant to justice in their own legal system and their own language.

8. Given this framework, the admissibility regime of the Statute was never intended to erect impossible hurdles for States wishing to pursue their legal right to exercise jurisdiction over cases occurring in their territory. Nor was it intended to empower ICC judges to pass judgment on domestic states' particular prosecutorial strategies or legal systems.[1]

9. These principles are enshrined in the specific criteria set out in Article 17(2) and (3) of the Statute, which regulates the Chamber's ability to evaluate a State's willingness or ability to take steps to establish the truth in a manner consistent with the objective of ensuring accountability.

10. In the current proceedings, Pre-Trial Chamber I made no findings that the RBV was either unwilling or unable to conduct genuine proceedings consistent with the criteria set out in

[1] ICC-01/11-01/11-565, §§ 219-225.

these provisions. Instead, the Chamber applied a wholly flawed procedural and legal framework to its assessment as to whether the RBV had or was investigating the cases notified to it by the ICC Prosecution. In so doing, the Chamber created a presumption of primacy for ICC prosecutions, which very few States would ever have the capacity to displace. The 'same' or 'substantially the same' conduct test metamorphosed into an asymmetrical competition, in which the RBV was forced to prove that it had taken a series of advanced, concrete investigative steps in order to 'mirror' invisible or amorphous targets which the OTP itself is unlikely to ever hit. In the present proceeding, the Bolivarian Republic of Venezuela is being obliged to make an effort beyond what is established in the Statute. Not only to investigate, but to demonstrate that this is sufficient to meet standards that, at least so far, have only been stated by the Prosecutor's Office, which is presumed to act correctly, while precisely the opposite is done with respect to the country that is subject to such inspection. Complementarity cannot and should not be interpreted in this way because this would lead to considering that the judicial and political institutions of a Member State are being persecuted in any case and without the possibility of any alternative. In this situation, the RBV has demonstrated ad nauseam sufficient jurisdictional activity and, in the face of this, cannot oppose, simply what is drawn from social networks and organisations that are positioned against the State itself, politically.

11. The Appeals Chamber has committed itself to the legal principle that, as a fact-finding body, its decisions must be based on verifiable facts substantiated by some degree of evidence. Yet that is the heart of the problem as concerns the current proceedings. The 'substantial mirroring test' required the Pre-Trial Chamber to compare the state and content of RBV investigations with the acts that are covered by the Article 18(1) Notification. It is not possible for the Chamber to conduct an independent and impartial assessment of both if it only receives details and evidence concerning one side of the inquiry (that is, the investigations conducted by the RBV) and not the other (that is, the investigations that will be conducted by the OTP) – when, in addition, it received biased information from OTP. The Pre-Trial Chamber exercised no judicial oversight on the Prosecution's decision to open an investigation, despite the fact that it had the legal basis and sufficient factual elements to do so. Apart from the Article 18(1) Notification, the Chamber has no access to the materials or allegations that formed the basis of this decision. The Pre-Trial Chamber has no means to ascertain whether any of the acts, which the Prosecution intends to investigate, fulfil the subject matter jurisdiction of the Court or that they are of sufficient gravity. In such circumstances, it was wrong for the Pre-Trial Chamber to require the RBV to demonstrate either that its investigations covered specific crimes (i.e. crimes against humanity or torture or rape) or specific categories of perpetrators ('high-level') when

the Pre-Trial Chamber possessed no mechanisms for verifying whether there as in fact a reasonable basis to conclude that such specific crimes occurred or that such specific perpetrators were involved. In sum, the mirroring test requires the Chamber to create a mirror based on the concrete evidence and specific facts provided by the Prosecution in its Article 18(1) Notification, and not assumptions as concerns what the investigations could or might encompass. States are entitled to be heard in connection with concrete cases, not mirages.

12. The RBV is wholly committed to the ICC as a vehicle for international justice. It is also wholly committed to ensuring accountability and the application rule of law on Venezuelan territory. When the Appeals Chamber carefully considers the materials before it, the Chamber will see that the RBV has brought justice to numerous victims and is in the course of doing so for others. The Pre-Trial Chamber's Decision now imperils these efforts.[2] Unlike many states, which are subject to referrals or complaints because they suffer from ongoing conflicts, the RBV is a fully functioning state with a fully functioning system of administration of justice, which is willing and able to uphold the rule of law. The logic of giving primacy to national investigations applies with full force to the RBV. It has better access to evidence, witnesses and suspects, and greater capacity to conduct sustained and thorough investigations, bringing justice to a greater number of affected people, using legal frameworks that are culturally and linguistically appropriate to their needs, as evidenced by the volume of charges, indictments and convictions that have been brought in relation to the facts of this situation. Far from eliminating impunity, the Decision will create a justice deficit by hindering a state that has demonstrated its willingness and ability to bring to account many more suspects and perpetrators than the ICC Office of the Prosecutor has the means to do so. At this point, one wonders whether the Prosecutor or the Pre-Trial Chamber itself is forgetting the role assigned to it by the Rome Statute by seeking at all costs to subject a state to an investigation because its political regime is inconvenient to some. The State referral against Venezuela that occurred in this situation has never been analysed in detail by the Pre-Trial Chamber, despite having been denounced from the beginning. Simply because of the political bias of those who signed it, it is clear what was the intention behind the activation of this legal instrument. Venezuela, as has been said, has collaborated, has made available to the ICC all its institutions and goodwill to advance in the consolidation and expansion of standards of justice, and, on the contrary, is only

[2] ICC-02/18-45.

receiving an action that puts pressure on it and that will not benefit the advancement of justice in the country, but rather the opposite.

13. These grave consequences have impelled the RBV to appeal the Decision on the following grounds:

14. **Ground 1**: The Chamber erred in law as concerns the burden of persuasion and the applicable deadline:

⇒ *Sub ground 1.1: The Pre-Trial Chamber erred in law by failing to impose the burden of persuasion on the OTP as concerns demonstrating that there was no substantial mirroring between the cases investigated by the RBV and those encompassed by the Article 18(1) Notification.*

⇒ *Sub ground 1.2: The Pre-Trial Chamber erred in law as concerns its definition of the 'Article 18(1) Notification' and by applying an incorrect standard for assessing the specificity of Article 18(1) Notifications in the particular circumstances of these proceedings; and*

⇒ *Sub Ground 1.3: The Pre-Trial Chamber erred in law by finding that there was no deadline for the OTP to request a deferral.*

15. **Ground 2**: The Pre-Trial Chamber erred in law and in fact, and manifestly abused its discretion by excluding relevant information, including:

1. the Chamber's refusal to consider information concerning domestic investigations that were in Spanish;

2. the exclusion of Prosecution summaries of proceedings or records; and

3. the Pre-Trial Chamber's determination that the Memorandum of Understanding ('MoU'), concluded between the OTP and Venezuela, was not 'before it'.

16. **Ground 3**: The Pre-Trial Chamber erred in law and/or misapplied it by rejecting the RBV's arguments that the temporal scope of the Article 18(1) notification and related deferral proceedings was confined to alleged criminal activity occurring from April 2017 onwards.

17. **Ground 4:** The Pre-Trial Chamber erred in law as concerns the legal test it adopted for assessing whether Venezuela was actively investigating 'criminal acts' referred to the information provided by the OTP in its Article 18 Notification:

⇒ *Sub-ground 4.1: The Pre-Trial Chamber erred by failing to tailor the test that concerns the identification of a 'case' to the particularities of the Article 18(1) Notification.*

⇒ *Sub-ground 4.2: The Chamber erred in law by requiring an unspecified degree of coverage between the RBV's investigations and the acts notified by the OTP, and failing*

to provide adequate reasons as to why the acts investigated by the RBV did not 'sufficiently mirror' the alleged criminal acts notified by the OTP;[3]

⇒ *Sub-ground 4.3: Although the Chamber recognised that States do not need to investigate or prosecute criminal acts as 'international crimes', it erred by finding that it was necessary for domestic investigations to cover 'contextual elements' of crimes against humanity. It also erred in fact given the absence of any judicial control or finding that the threshold for crimes against humanity was satisfied by the acts covered by the Article 18(1) Notification;*

⇒ *Sub-ground 4.4: The Chamber erred in law by finding that domestic investigations needed to cover 'discriminatory intent' in connection with underlying acts pertaining to potential OTP investigations related to persecution while also excluding domestic investigations into human rights violations;*

⇒ *Sub-ground 4.5: The Chamber erred in law by excluding domestic investigations into criminal acts pertaining to SGBV due to its erroneous focus as to whether they were being investigated or prosecuted 'as such'.*

18. **Ground 5**: The Pre-Trial Chamber erred in law by basing its assessment on whether Venezuela was conducting 'active investigations' on irrelevant factors and failing to give any weight to relevant factors. This included the Chamber's reliance on the number of identified suspects, the number of arrest warrants, and the rank of possible suspects. The Chamber also erroneously excluded relevant factors, such as the steps taken by the domestic authorities to identify victims.

19. **Ground 6**: The Pre-Trial Chamber erred in law and manifestly abused its discretion concerning how it defined and applied the test of 'unreasonable delay'. This error arose from a series of interlinked errors, including:

⇒ The Chamber failed to provide a reasoned explanation as to the test or standards it used to assess whether there had been an unreasonable delay or inactivity in the progress of domestic investigations;

⇒ The Chamber erred by failing to give sufficient weight to the complexity of the alleged crimes and intervening issues, including the COVID pandemic; and

⇒ The Chamber erred by placing too much weight on delays that occurred before the OTP provided sufficient information as concerns the likely contours of its investigations.

[3] ICC-02/18-45, § 131.

20. The above errors vitiate the outcome of the Decision in its entity. The information properly before the Appeals Chamber shows that at the time the Decision was issued, the RBV was actively investigating the 'cases' notified pursuant to the Article 18(1) Notification. To avoid any further delays in such proceedings, the RBV requests the Appeals Chamber to reverse the Decision in full and reject the Prosecution's request to authorise the resumption of its investigations.

III. CLASSIFICATION

21. Pursuant to regulation 23*bis*(1) of the Regulations of the Court ('RoC'), the present cover filing is classified as 'confidential' because it refers to a number of confidential documents on the record of the case. Annex A is filed as *ex parte* (OTP and RBV only), since they contain sensitive information that could lead to the identification of victims. Annex B is filed as *ex parte* (OTP and RBV only) because it refers to confidential communications between the OTP and the State.

IV. APPLICATION FOR ADMISSION OF ADDITIONAL EVIDENCE

22. According to Regulation 62 of the Regulations of the Court ('RoC'), the RBV respectfully requests the Appeals Chamber to admit the following documents attached in Confidential *Ex Parte* Annex A into evidence for the purpose of the appeal. This evidence is comprised of the following documents ['New Evidence']:

⇒ Annex A.1, English translation of [redacted];

⇒ Annex A.2, English translation of [redacted]

⇒ Annex A.3, English translation of [redacted]

⇒ Annex A.4, English translation of [redacted]

⇒ Annex A.5, English translation of [redacted]

23. Under the criteria delineated by the Appeals Chamber in *Lubanga*,[4] the New Evidence fulfils the criteria for admission in that:

1. There are convincing reasons why the evidence was not submitted to the Pre-Trial Chamber; and
2. The evidence would have had a decisive impact on the Pre-Trial Chamber's Decision.

24. The reasons why the RBV did not submit the English translation are set out in Ground 2(a), and this is because the Court's legal framework imposed this responsibility on the Office of the Prosecutor as the party responsible for transmitting the materials to the Chamber. The arguments in Ground 2(a) further demonstrate that the material in question covers national records relating to specific measures taken to investigate the same criminal acts that were reported through the Article 18(1) Notification.

25. Previous case law dismissing requests to admit additional evidence in the context of admissibility appeals is not relevant to the current request. Unlike *Libya* or *Senussi,* the RBV is not attempting to introduce new facts or developments post-dating the Pre-Trial Chamber's Decision. The New Evidence is also consistent with the corrective nature of appellate intervention in that:

⇒ It relates to the issues that were directly before the Pre-Trial Chamber at the time it issued its Decision and which are now part of the current appeal;

⇒ The original language versions of the New Evidence were before the Pre-Trial Chamber at the time it issued its Decision;

⇒ If the Appeals Chamber confirms the arguments set out in Ground 2(a), it will be necessary for the Appeals Chamber to access the New Evidence (i.e. the translations) in order to assess the impact of these errors on the outcome of the Decision. Access to the New Evidence will therefore facilitate the ability of the Appeals Chamber to exercise its corrective functions.

V. STANDARDS FOR APPELLATE REVIEW

26. The Appeals Chamber recently confirmed that an appeal against a deferral decision falls under Article 82(1)(a) of the Statute, as a decision concerning admissibility.[5] The grounds of appeal under Article 81(1)(a) apply *mutatis mutandis* to Article 82(1)(a) appeals.

[4] ICC-01/04-01/06-3121-Red, § 58.
[5] ICC-01/21-77, § 48.

27. In such a context, an error of law may arise if the decision-maker applied the wrong law or misapplied a legal, argumentative, or evidential standard. Failing to apply relevant criteria or applying irrelevant criteria as part of a legal test amounts to an error of law. Where an error of law arises, the Chamber will not defer to the Pre-Trial Chamber's assessment of the law but will reach its own assessment as to the correct legal standard or definition.

28. An error of procedure or discretion

> will occur when the decision is so unfair or unreasonable as to 'force the conclusion that the Chamber failed to exercise its discretion judiciously'. The Appeals Chamber will also consider whether the first instance Chamber gave weight to extraneous or irrelevant considerations or failed to give weight or sufficient weight to relevant considerations in exercising its discretion. The degree of discretion afforded to a Chamber may depend upon the nature of the decision in question.[6]

29. Regarding errors of fact, 'the Appeals Chamber will determine whether a trial chamber's factual findings were reasonable in the particular circumstances of the case'.[7] The Appeals Chamber has held that '[it] will not disturb a trial chamber's factual finding only because it would have come to a different conclusion'.[8] Rather, it 'may interfere where it is unable to discern objectively how a trial chamber's conclusion could have reasonably been reached from the evidence on the record'.[9]

30. Through this brief, the RBV will demonstrate that the Pre-Trial Chamber made several errors of law as concerns the manner in which the Chamber defined and applied critical concepts of admissibility, the same person/same conduct test, and the substantial mirroring assessment. In terms of procedural errors, the Chamber manifestly abused its discretion by erecting procedural requirements that were not foreseeable or certain, which were not applied equally to the different participants, and which did not facilitate a fair and impartial adjudicative process. Finally, as concerns errors of fact, the Chamber reached key conclusions concerning the substantial mirroring test on assumptions concerning the Prosecution's investigations, which were not supported by any concrete evidence or facts.

31. These errors, individually or cumulatively, materially undermined the validity of the Chamber's conclusion that the RBV had not demonstrated that it was actively investigating the acts covered by the Article 18(1) Notification.

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[6] ICC-01/09-02/11-1032, § 25.
[7] ICC-01/04-02/06-2667-Red, § 27.
[8] ICC-01/04-02/06-2667-Red, § 28.
[9] ICC-01/04-02/06-2667-Red, § 29.

VI. SUBMISSIONS

A. Ground 1: The Chamber erred in law as concerns the burden of persuasion and the applicable deadline.

1. Sub Ground 1.1: The Pre-Trial Chamber erred in law by failing to impose the burden of persuasion on the OTP as concerns demonstrating that there was no substantial mirroring between the cases investigated by the RBV and those encompassed by the Article 18(1) Notification.

32. Article 18 is built on a presumption in favour of national investigations. This is reflected by the language of Article 18(2), which obliges the OTP to defer to national investigations if the OTP receives a request from a State. This presumption is only displaced if the OTP can demonstrate the absence of **relevant** national investigations in its request to the Pre-Trial Chamber. Regulation 38(2)(b)(c) of the Regulations of the Court further requires the Prosecution to set out the basis for its application to the Pre-Trial Chamber. This provision imposes a clear obligation on the OTP to substantiate its application by demonstrating that the information transmitted by the State does not sufficiently mirror the scope of criminality set out in the Article 18(1) Notification or that such investigations are not genuine.

33. The RBV is aware that the Appeals Chamber (consisting of a majority of three judges) recently issued a judgment in the *Philippines situation* concerning 'the burden of providing information relevant to a pre-trial chamber's determination under Article 18(2) of the Statute'.[10] This judgment does not dispose of the current ground of appeal. First, there is no binding doctrine of stare decisis concerning judgments issued by the Appeals Chamber.[11] The Appeals Chamber has, moreover, recognised that it may depart from prior findings where there are convincing or compelling reasons to do so.[12] Second, the Appeal Chamber has no capacity to issue advisory opinions.[13] Its findings must be read restrictively in light of the particular facts and arguments placed before it. In combination, these two elements mean that the Appeals Chamber's finding concerning the limited issue of the burden of proof for 'transmitting' information in the context of an Article 18(2) proceeding does not bind this Chamber as

[10] ICC-01/21-77, § 1.
[11] W. A. SCHABAS, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., OUP, 2016, at 526; G. BITTI, 'Article 21 and the Hierarchy of Sources of Law before the ICC' *in* C. STAHN (ed.), *The Law and Practice of the International Criminal Law*, OUP, 2015, at 422-424.
[12] ICC-01/05-01/08-566, § 16; ICC-01/14-01/21-318, § 45.
[13] ICC-02/11-01/11-464, § 8.

concerns its findings concerning the burden of persuasion or the burden of proof as concerns different aspects of the Article 18(2) adjudicative process, which were not litigated in the *Philippines situation*.

34. The judgment in the *Philippines situation* turned heavily on the principle of *onus probandi incumbit actori*, with the Appeals Chamber finding that since Rule 53 required a State seeking a deferral to 'provide information concerning its investigation', this equates to a burden to substantiate through such information the existence of such investigations.[14] The Appeals Chamber did not address the question as to whether this burden extended to the question as to whether there is or is not an overlap between such information and the cases encompassed by the Article 18(1) Notification. Nor did the Chamber consult the drafting history as concerns the intended operation of this aspect of the inquiry. There are thus compelling reasons for the Appeals Chamber to now conclude that the burden of persuasion for this aspect of the inquiry properly rested with the Prosecution and not the RBV.

35. As recognized an informal Prosecution expert paper on complementarity, there are various scenarios which can lead to a proper conclusion that the burden of proof and the burden of persuasion rest on different parties:[15] whereas the burden of proof might fall on the party seeking to assert a particular fact, the burden of persuasion rests on the party trying to change the *status quo*.[16]

36. The drafting history of Article 18(2) reflects the intention that the burden of persuasion concerning situation-related admissibility challenges should be placed on the Prosecution. The model for this provision emanated from a United States' proposal, which further explained that following a deferral request from a State, 'the Prosecutor would be able to proceed immediately to conduct an independent investigation if, in the face of a challenge by a national judicial system, the Prosecutor could persuade the judge to allow him to do so'.[17] Although amendments

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[14] ICC-01/21-77, § 74.

[15] ICC, 'Informal expert paper: The principle of complementarity in practice', 2003, at fn 18:'Thus, this may be a situation where the burden of bringing evidence (at least at the outset) and the burden of persuasion fall on different parties'. This expert paper was authored by the following experts: Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmshurst & Andreas Zimmermann.

[16] ICC, 'Informal expert paper: The principle of complementarity in practice', 2003, at fn 17: 'The general principle is onus probandi actori incumbit, or "he who alleges must prove": the party raising an issue has the burden of proving the requirements. However, other relevant principles can place the burden on the party seeking to change the status quo; the party making a disfavoured contention (i.e. alleging bad faith); or the party with particular or sole knowledge of the facts'.

[17] D. NSEREKO & M. VENTURA, 'Article 18 Preliminary rulings regarding admissibility', *in* K. AMBOS (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed., Verlag C.H. Beck/Hart Publishing/Nomos, 2022, pp. 1009-1032, at 5 (electronic version), citing UN Doc. A/CONF.183/C.1/SR.11, 22 June 1998, para. 25 (Mr. Scheffer – USA).

were subsequently made to the proposal, the obligation placed on the Prosecution to seek a judicial ruling to reverse the deferral remained intact.

37. Academic commentary further supports this conclusion, with Nsereko and Ventura observing that:

> In accord with the principle that he who asserts must prove, 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. It is suggested that the evidence placed before the PTC must be cogent. This is predicated on complementarity, a fundamental principle of the ICC regime, which gives primacy to State jurisdiction. That primacy should not be overridden save on cogent grounds.[18]

38. By empowering the Prosecution with the ability to request further information from the State, Rule 53 further recognises that first, the Prosecution may be better placed than the State to assess whether there is an overlap with the cases encompassed by the Article 18(1) Notification, and second, the Prosecution bears the burden of persuasion in connection with any arguments, set out in a Rule 54 application, concerning the absence of such an overlap. Indeed, the principle of *onus probandi incumbit actori* is a double-edged sword in the context of Article 18 proceedings. While Rule 53 may impose a burden of proof on the State to demonstrate that it is exercising jurisdiction by conducting investigations, Rule 54 also requires the Prosecution to provide 'the basis for the application'. Where the basis for the application is that the domestic investigations do not sufficiently mirror the cases set out in Article 18(1) Notification, the principle of *onus probandi incumbit actori* then requires that the Prosecution substantiate this contested fact.

39. ICC case law, finding that the burden of persuasion falls on the State in the context of case-related admissibility challenges, is also inapposite to situation-related proceedings. By the time case-related admissibility challenges emerge, the Prosecution has invested a significant amount of time and resources in conducting investigations resulting in a warrant of arrest. The State in question also failed to challenge admissibility at the situation level or was unsuccessful, resulting in a presumption of primacy of Prosecution investigations. In contrast, at the situation level, the opposite holds true. The State benefits from the presumption of primacy, and since the Prosecution has not yet commenced investigations, it is the State which is likely to be prejudiced if it cannot pursue investigations in which it has invested time and resources.

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[18] D. NSEREKO, M. VENTURA, 'Article 18 Preliminary rulings regarding admissibility', in K. AMBOS (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed., Verlag C.H. Beck/Hart Publishing/Nomos, 2022, pp. 1009-1032, at 22 (electronic version).

40. A further distinction between case-related admissibility challenges and those occurring at the situation phase arises from the fact that the State chooses when to initiate the complaint in a case-related admissibility challenge. The State can thus do so at a time when they have reached a particular point in their investigations and litigation preparation that allows them to bring forward concrete evidence of the steps taken to investigate the case in question. In contrast, at the situation phase, the date of notification (which triggers the deadlines for all subsequent procedural acts) rests exclusively in the hands of the Prosecution. The Prosecution also selects the information placed in the Article 18(1) Notification and may withhold particular information due to witness security or confidentiality. The Prosecution is, therefore, better placed than the affected State to demonstrate why the Prosecution's investigations should be given primacy in circumstances where the State has provided information that it is conducting investigations.

41. The Chamber's error had a material impact on the outcome of the Decision. By placing the burden on the RBV, the RBV was forced to prove that it was investigating a very nebulous and shifting target, which was evidently difficult due to the lack of disclosed particulars concerning the acts covered by the OTP's intended investigations.

2. Sub ground 1.2: The Pre-Trial Chamber erred in law as concerns its definition of the 'Article 18(1) Notification' and by applying an incorrect standard for assessing the specificity of Article 18(1) Notifications in the particular circumstances of these proceedings

42. The Pre-Trial Chamber's Decision was marked by two related legal errors concerning the manner in which it defined the notion and content of an Article 18(1) Notification.

43. First, in its Decision, the Pre-Trial Chamber blurred the limits and construction of Article 18(1) by characterising information provided pursuant to Rule 52(2) as a 'Second Article 18(2) Notification', which the Chamber then relied upon to in its assessment as concerns the specificity of the information set out in the Notification. Second, the Chamber further erred in law by concluding that information in this 'Second Article 18(2) Notification', which was derived from open-source reports concerning 'hypothetical cases', satisfied the Prosecution's obligation to provide the RBV with a sufficiently specific foundation, as concerns the basis for the Prosecution's assessment that there was a reasonable basis to open an investigation into actual 'cases' that occurred within the territory of Venezuela.

44. As concerns the first error, as set out above in the recent *Philippines* judgment, the Article 18(1) Notification forms the basis for the State's assessment of the content of the

information transmitted pursuant to Article 18(2). Given the Appeals Chamber's finding that the State bears the burden of proof of substantiating the existence of domestic investigations, the State must be entitled to rely on the Article 18(1) Notification as the reference point for this determination. The State's ability to request further information does not diminish either the Prosecution's obligation to ensure that the Article 18(1) Notification is sufficiently motivated to ensure that States can exercise their rights and obligations under the Statute nor does it transform information conveyed subsequently into an Article 18(1) Notification. Indeed, if it did so, this would mean that the thirty-day period for response would start anew, which is contrary to the express language of Rule 52(2), which confirms it does not.

45. In light of this legal framework, the Pre-Trial Chamber erred in law by characterising Rule 52 information transmitted in January 2022 as a 'Second' Article 18(1) Notification and treating it as such to assess the scope of the cases encompassed by the Prosecution's investigation and the threshold question as to whether the Prosecution had complied with its Article 18(1) notification obligations.

46. As a result of the Pre-Trial Chamber's first legal error, that is in treating the January 2022 information as a 'Second Article 18(1) Notification', the Chamber then fell into a further legal error by using the January 2022 information as the basis for its evaluation as to first, the specificity of the information provided by the Prosecution, and second, the framework for its assessment as to whether the RBV investigations sufficiently mirrored those of the Prosecution.

47. Apart from the fact that the January 2022 information did not have the formal legal status of an Article 18(1) Notification, the content also failed to satisfy the requirements on a *de facto* level. Article 18(1) requires the Prosecution to 'notify' States in connection with its decision that it has determined that there is a reasonable basis to commence an investigation into cases falling within the jurisdiction of the State in question. Rule 52(1) further specifies that the notification 'shall contain information about the acts that may constitute crimes referred to in Article 5, relevant for the purposes of Article 18, paragraph 2'. The latter part of this sentence – 'relevant for the purposes of Article 18 paragraph 2' – clarifies that the acts in question must be those the Prosecution intends to investigate, should the Pre-Trial Chamber decide to authorise the investigation. This is consistent with the fact that there is only a potential clash of jurisdiction between the State and the Prosecution, triggered by the Article 18(1) Notification, if the Article 18(1) Notification sets out the acts which the Prosecution will investigate. If the Prosecution bases its Article 18(1) Notification on acts that it does not have a concrete intention to investigate, the Statutory goal of eliminating impunity would be

frustrated, as the Notification could block domestic investigations into such acts in furtherance of an ICC investigation that fails to cover the acts in question.

48. In circumstances where there has been no prior judicial control as concerns the existence of a reasonable basis to initiate an investigation, it is also imperative that the Chamber is provided sufficient information in the Article 18(1) Notification so that it can formulate a reasoned determination as concerns the basis for its decision, under Article 18(2), 'to authorise the investigation'. Put simply, there must be clarity as to the parameters and content of the investigations which have received judicial authorisation to proceed. Otherwise, domestic investigations will grind to a halt due to the risk of inadvertent overlap with a wholly nebulous and hypothetical set of potential cases.

49. When faced with an analogous situation in the *Gaddafi case*, the Appeals Chamber underscored that since the filing of an admissibility challenge by a State 'has significant repercussions' for Prosecution investigations, there was a 'need for clarity as far as admissibility proceedings are concerned, and that a challenge should in principle only be submitted when it is substantiated by evidence so that the Chamber in question may then proceed expeditiously to decide thereon'.[19] These findings are equally applicable when the shoe is on the other foot, that is, when the Prosecution is the party responsible for initiating a change in jurisdictional competence, entailing 'significant repercussions' for the State. Since the Prosecution controls the timing of the submission of the Article 18(1) Notification, it is also incumbent on the Prosecution to ensure that the Notification is sufficiently substantiated so as to enable an informed and expeditious resolution of any deferral requests.

50. When viewed through this lens, it is clear that the information conveyed by Prosecution in January 2022 cannot be characterised as a properly formulated and substantiated 'Article 18(1)' Notification. Annex 1 to this letter comprised a sample of open-source reports, which included no pinpoint references or demarcation between information concerning human rights violations and alleged crimes. Annex 2 is prefaced with the caveat that:

[redacted]

51. By using the phrase [redacted], the Prosecution communicated a clear position that it did not intend to investigate these particular alleged

[19] ICC-01/11-01/11-547-Red, § 166.

criminal acts. Since these acts were merely similar and not the same as those covered by the Prosecution's intended investigations, these acts fell outside the scope of a properly formulated Article 18(1) Notification. Moreover, since the Prosecution claimed that the listed acts were only 'similar' in terms of nature and gravity, the RBV had no reference point for ascertaining whether the OTP intended to investigate acts in the same locations or dates, or a similar number of acts. By the same token, the Pre-Trial Chamber also had no fixed reference point to serve as the basis of its decision to 'authorise' an investigation into wholly unknown acts.

52. The Pre-Trial Chamber's reliance on such a vague and nebulous description of potential investigative activity on the part of the Prosecution also contradicted the Chamber's acknowledgement that a proper assessment could only take place if the Chamber received sufficient information concerning the content of 'potential cases' that would be investigated by the Prosecution. Specifically, in its Decision, the Pre-Trial Chamber correctly recognised that:

> In order to enable the State to provide the information required by the Statute and thereby give effect to its right to seek a deferral under Article 18(2) of the Statute, the Prosecution is placed under an obligation to provide sufficient information to the State in the notification as stipulated in Article 18(1) of the Statute. Since, at the article 18 stage, admissibility can only be assessed against the backdrop of a situation and the 'potential cases' that would arise from this situation, it is for the Prosecution to identify those 'potential cases'.[20]

53. The Pre-Trial Chamber further confirmed that:

> [I]t 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).[21]

54. When it applied this standard to the materials before it, the Chamber also correctly found that the 2021 Article 18(1) Notification 'did not provide very detailed information regarding, for example, specific dates/locations of incidents, approximate number of victims, or alleged individuals/groups responsible for specific incidents'.[22] Indeed, the 2021 Article 18(1) Notification was comprised of the following statement:

> I[redacted].[23]

55. In an Annex to this Notification, the Prosecution then provided the sparse detail that from

[20] ICC-02/18-45, § 75.
[21] ICC-02/18-45, § 77.
[22] ICC-02/18-45, § 73.
[23] Letter of 16 December 2021.

[redacted]

56. The description provided in the 2021 Notification under Article 18(1) constituted a wholly inadequate basis for States or the Pre-Trial Chamber to identify the existence of alleged incidents potentially falling within the scope of the Rome Statute. Indeed, there was no reference whatsoever that could even minimally suggest towards the contextual elements of the crime against humanity, as no evidentiary or circumstantial reference was made to 'state policy', 'systematicity' or 'generality'. Given the paucity of information set out in the 2021 Article 18(1) Notification, the Chamber should have rejected the Prosecution's request to resume the investigation on the grounds that it did not provide an adequate basis for assessing a potential conflict of jurisdiction between the investigations envisaged by the Prosecution and those conducted by the RBV.

57. Nonetheless, as a result of its erroneous characterisation of the January 2022 information as an Article 18(1) Notification, the Chamber wrongly assumed that sample acts, which were merely 'similar', could be treated as 'potential cases', which the Prosecution actually intended to investigate.

58. The Chamber further erred by concluding that the 'scope of criminality' of such potential cases could be ascertained by reference to samples that were similar only in regard to the 'gravity' and 'nature' of the acts. In line with appellate jurisprudence concerning the same person/same conduct test, an alleged criminal incident is defined as 'a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators'.[24] It follows from this that in order to ascertain the scope of alleged incidents encompassed by the Article 18(1) Notification, both the Chamber and the RBV should have been provided with particulars concerning these alleged 'historical events' including, at a minimum, the dates and locations of the incidents which the Prosecution actually intended to investigate. This essential information was however, completely missing from the Article 18(1) Notification communicated in 2021, and the further information transmitted in 2022. As a result, neither the RBV nor the Pre-Trial Chamber had

[24] ICC-01/12-01/18-601-Red, § 65.

access to sufficient information to ascertain the proper scope and content of the 'conduct' element in the 'same conduct' test.

59. The existence of confidentiality concerns also did not exempt the Prosecution from its duty to provide a sufficient foundation to the RBV on such issues or to apprise the Chamber itself of the proper scope of its intended investigations. When faced with arguments that confidentiality of investigations prevented the Government of Libya from furnishing particulars as concerns a case under investigation, the Appeals Chamber found that such arguments had no 'affect' on the admissibility proceedings; the party claiming confidentiality should instead seek to resolve confidentiality concerns through sensible discussions concerning the particular case or cases being pursued.[25]

60. In terms of the impact of these errors on the outcome of the Decision, the above errors led the Chamber to incorrectly conclude that the January 2022 information 'clarified the temporal scope of the intended investigation by the Prosecution for the purposes of the Article 18 proceedings'[26] (a matter which will be addressed further in Ground 3) and further led to a flawed foundation for the application of the same person/similar conduct test (which will be discussed in ground 4). Rather than addressing and remedying the lack of specificity in the Article 18(1) Notification, the Chamber decided to impose a heightened degree of specificity on the information provided to the RBV, resulting in entirely asymmetrical standards that frustrated any possible mirroring or proof of overlap.[27]

61. Conversely, if the Chamber had applied its findings correctly in paragraphs 75 to 77 of its Decision to the information transmitted by the OTP to the RBV, it would have found that the Article 18(1) notification was defective as it failed to disclose the alleged criminal acts that the OTP actually intended to pursue. Alternatively, in the absence of any specific details concerning such acts, the Chamber should have recalibrated its assessment of RBV domestic proceedings to allow for a more flexible approach akin to that of the OTP, i.e. one based on 'illustrative samples'. The Chamber would have further found that the materials transmitted by the RBV sufficiently mirrored the vague parameters set out in the 2021 Article 18(1) Notification (as will be further demonstrated in connection with Ground 4).

3. Sub Ground 1.3: The Pre-Trial Chamber erred in law by finding that there was no deadline for the OTP to request a deferral

[25] ICC-01/11-01/11-547-Red, § 165.
[26] ICC-02/18-45, § 48.
[27] ICC-02/18-45, § 78.

62. The Pre-Trial Chamber erred in law by finding that 'neither Article 18(2) of the Statute, nor Rule 54 of the Rules of Procedure and Evidence ('RPE') setting out the procedural requirements of an application by the Prosecution under Article 18(2) of the Statute stipulate a time limit for the filing of such an application'.[28] This is because Article 18(3) should be read to impose a six-month deadline on the OTP to file an application to reverse the deferral, failing which, the OTP is required to demonstrate a 'significant change of circumstances'. This interpretation of the provision is consistent with appellate case law concerning the overarching duty of diligence placed on parties to ensure expeditious proceedings, particularly when admissibility issues are at stake.[29]

63. There are also important practical considerations for reading the provision to impose a deadline at the six-month mark. If the OTP does not submit such an application immediately after the expiration of the six-month deadline, then the State is entitled to assume that the OTP does not contest its jurisdiction and to fully deploy its resources accordingly. The requirement that the OTP must demonstrate a significant change of circumstances if they introduce their application at a later point is therefore intended to mitigate the prejudice caused to the State.

64. Indeed, if the six-month deadline is not enforced as a strict deadline, the requirement that the OTP must demonstrate a 'significant change in circumstances' for later applications would be rendered inoperative. There would be no concrete marker to identify when the requirement of showing a significant change in circumstances should apply – making the clause a dead letter. For example, if the phrase 'after six months' is read to mean 'at any point after 6 months', this would allow the OTP to file such application years or even decades after the deferral request was received. Such an open-ended deadline is clearly contrary to the overarching emphasis of the Statute on resolving issues of competing jurisdictions in an expeditious and diligent manner.

65. This error impacted the outcome of the decision. The Prosecution demonstrated no change in circumstances, which would militate against the GOV's competence, occurring between the six-month mark and the point at which it introduced its application.

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[28] ICC-02/18-45, § 57.
[29] ICC-01/04-01/07-2259, §§ 43-47.

B. Ground 2: The Pre-Trial Chamber erred in law and in fact, and manifestly abused its discretion by excluding relevant information.

66. The Pre-Trial Chamber erred in law and in fact, and manifestly abused its discretion by excluding relevant information:

1. the Chamber's refusal to consider information concerning domestic investigations that were in Spanish;
2. the exclusion of Prosecution summaries of proceedings or records; and
3. the Pre-Trial Chamber's determination that the Memorandum of Understanding ('MoU'), concluded between the OTP and Venezuela, was not 'before it'.

1. Untranslated documents

67. The Pre-Trial Chamber erred in law and manifestly abused its discretion by failing to require the Prosecution to file the information received from the RBV in a working language and then declining to rely on relevant information concerning the status of investigations in Venezuela that the Prosecution had not translated into a working language. As a matter of law, the Prosecution was required to file this information in a working language of the Court. As a matter of procedure, given the lack of clarity during the litigation as concerns the burden of proof and responsibility for translating the information transmitted by the Prosecution, the Chamber manifestly abused its discretion by failing to provide clear directions to the RBV to translate the entirety of these materials and failing to afford it adequate time to do so.

68. As concerns the error of law, Rule 54(1) of the RPE places a strict obligation on the Prosecution to file all information received from the State to the Pre-Trial Chamber; no exception is provided.[30] Regulation 39(1) of the RoC then imposes a related obligation to submit such materials with a translation into one of the working languages of the Court.

69. When the Prosecution submitted its deferral request, although it filed the materials provided by the RBV pursuant to Rule 54(1), it only provided translations into English of a selection of the documents, comprised of correspondence and some summaries. The Pre-Trial Chamber deprecated the OTP's decision to proceed in such a fashion, noting first, that the criteria employed by the OTP to decide which documents should be translated was 'unclear';[31] and second, that apart from the clear terms of Regulation 24(1) of the RoC, the Pre-Trial

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[30] Rule 54(1) RPE: 'The information provided by the State under rule 53 shall be communicated by the Prosecutor to the Pre-Trial Chamber'.

[31] ICC-02/18-45, § 82: 'the criteria used by the Prosecution to decide which documents' translation would "facilitate the Chamber's assessment" appear to be unclear'.

Chamber had also instructed the OTP to file translations in a prior decision issued in the *Afghanistan* situation.[32]

70. The Pre-Trial Chamber nonetheless declined to apply Rule 54(1) and Regulation 24(1) in full or to draw any adverse conclusions against the Prosecution, following the Prosecution's failure to transmit a complete record in a working language. Instead, and notwithstanding the ambiguous wording of Rule 54(1), the Chamber erroneously determined 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'.[33] The Pre-Trial Chamber justified this conclusion by reference to an earlier decision, in which the RBV had been directed to identify only the most relevant or 'essential' documents required for their observations responding to the OTP.[34]

71. The Chamber erred in law by deviating from the mandatory requirements of Rule 54(1) and Regulation 39(1)(c). The Chamber justified this deviation by referencing a legal precedent in the Afghanistan situation, where the Pre-Trial Chamber had found that 'it is for the State 'to ensure that the Chamber can analyse the materials submitted in support of a request for deferral'.[35] This precedent was, however, legally flawed. In the decision in question, the Pre-Trial Chamber concluded that '[a]s the onus to substantiate a deferral request is on the State, it follows that it is also for the State to ensure that the Chamber can analyse the materials submitted in support of a request for deferral'.[36] As will be demonstrated through ground 3, the burden of persuasion properly rests with the Prosecution and not the State. The Statute, Rules and Regulations also set out no legal requirement on the State to either file the material in the record (which would trigger Regulation 39(1) of the RoC) or to transmit the materials in a working language (particularly if the Prosecution has not requested such translations).

72. The materials were also communicated in Spanish, an official language of the ICC. Article 87(2) of the Statute specifies that requests for cooperation shall be transmitted in an official language of the requested State or one of the working languages of the Court, depending on the choice made by the State upon ratification. Since the Article 18(1) Notification effectively 'requested' the State to indicate whether it wished to seek deferral of the investigation, the RBV was entitled to convey its response and supporting materials in its official language (Spanish). Rule 42 of the RPE also places an obligation on the Court to

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[32] ICC-02/18-45, §§ 82-84.
[33] ICC-02/18-45, § 86.
[34] ICC-02/18-29, § 11.
[35] ICC-02/18-45, § 85, *citing* ICC-02/17-196, § 50.
[36] ICC-02/17-196, § 50.

arrange for translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and Rules. This rule bolsters the conclusion that the Court was responsible for ensuring that the materials transmitted by the RBV were translated into a working language. Any other conclusion would also be inconsistent with the timelines and respective obligations set out in Article 18. Specifically, whereas Article 18(2) affords States only one month to inform the Prosecution that it is investigating the acts in question, Article 18(3) allows the Prosecution to bring its application six months afterwards. Since the Prosecution is presumed to conduct its operations in a working language of the Court, this legal provision is built on the assumption that the Prosecution will arrange for translations to facilitate the ability of the Prosecutor to make an informed decision. The existence of such an assumption is further confirmed by a Prosecution paper on referrals and deferrals, which specifies that if the Prosecution receives documents or information concerning an investigation in a non-working language, it will translate the materials itself.[37] If, for any reason, the Prosecution is unable to do so, the Prosecution will then revert to the sending party with requests for specific translations into either a working language or an official language. Given this stance and the absence of any request on the part of the Prosecution to obtain translations, the RBV was entitled to assume that all information submitted in an official language (Spanish) would be translated by the Prosecution if necessary or accepted as 'an official language'.

73. When the Pre-Trial Chamber issued the Order on the Conduct of the Proceedings ('the Order'),[38] the Chamber had received the domestic records filed by the OTP and would have been aware that many had not been translated by the OTP into a working language. The Order was nonetheless silent on the issue of translations of materials included in the deferral request, imposing no obligation on either the OTP or the RBV to provide translations of the full dossier. The Chamber also allowed alleged victims to file applications and representations in Spanish, which were either translated by the Registry when they filed before the Chamber, or summarised, to allow the Chamber to take notice of the position adopted by the applicants.[39] The Chamber's position towards alleged victim applications thus consolidated the appearance

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[37] See 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', p. 3.
[38] ICC-02/18-21.
[39] See ICC-02/18-40-AnxI-Red, § 16, referring to the fact that '1,342 Article 18(2) forms were submitted in Spanish, 531 in English, and 2 in French', and fn. 37, 'The VPRS applied its Spanish-speaking capacity to conduct the legal assessment of the Spanish Article 18(2) forms received; therefore all views and concerns received by the deadline of 7 March have been analysed. However, not all Article 18(2) forms transmitted to the Chamber contain an English translation due to the high number of forms received and the reporting deadline. 22 videos were translated and subtitled by the VPRS'.

that first, the filing party/entity was responsible for ensuring that materials were either filed in the record in a language understood by the Chamber or presented in a manner that allowed the Chamber to understand the position in question, and second, that the use of Spanish (an official language) was not prohibited and would not result in exclusion.

74. The Pre-Trial Chamber, therefore, erred by applying a legal precedent that was predicated on an interpretation of the law that was erroneous and which could not have been foreseen by the RBV. Indeed, if the drafters had intended the State to bear the burden of putting domestic files before the Chamber (in a language understood by the Chamber), then Rule 54(1) would have specified that the State, and not the OTP, was obliged to file such materials before the Chamber. Conversely, the fact that Rule 54(1) specifies that the OTP is responsible for placing the file before the Chamber shows that the drafters intended for the OTP to carry the responsibility for ensuring that the Chamber was duly informed of the basis for the deferral request.

75. Placing the burden on the Prosecution to ensure that translations are available to the Chamber is also consistent with the principle of primacy that underpins Article 18. In circumstances where the OTP or third parties elect to initiate a challenge to a State's primary jurisdiction, it would clearly be unfair for the State to foot the bill of such a decision.[40] Moreover, given that Article 53 proceedings are likely to be initiated in connection with States that are developing or in a period of transition/economic instability, the right to seek a deferral could also be rendered illusory if the cost of substantiating it through the provision of translated records falls outside the means of the impacted State.

76. The RBV's request for additional time to file translations in its observations does not constitute a waiver of a right to a remedy regarding the Prosecution's failure to file translation or acknowledgement of any legal obligation on its part to correct the OTP's error.

77. First, the RBV request concerned documents that are related to its observations, not its original deferral.[41] The RBV's acknowledgement that documents transmitted directly from the RBV to the Chamber should be filed in a working language cannot be construed as accepting that the RBV was responsible for documents filed by another party (i.e. the Prosecution) in the record. The fact that the documents originated from the RBV is not dispositive of the issue. When either the Registry or the Prosecution file update reports on issues pertaining to State

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[40] See as an example *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, *U.N.T.S.*, vol. 2225, p. 209, art. 18(14).
[41] ICC-02/18-28-AnxII, § 9.

cooperation, it is the responsibility of the filing party to secure the necessary translations. The same holds true when victims submit applications to the VPRS. It is the VPRS, as the entity responsible for filing such applications in the record, that must arrange the necessary translations.

78. Second, by directing the RBV to focus only on those documents which the RBV deemed 'essential',[42] the Pre-Trial Chamber circumscribed the scope of translations prepared by the RBV in connection with its observations. The prejudice occasioned by the limiting effect of this directive was further compounded by the Chamber's subsequent decision to exclude the summaries prepared by the OTP. Since the RBV could not have predicted that the Pre-Trial Chamber would exclude such summaries, it did not prepare translations of all the materials transmitted in the initial deferral, nor was it afforded sufficient time to do so.

79. The error materially impacted and invalidated the outcome of the decision in the following ways. The Chamber confirmed that it only based its decision on the English translations provided by the Prosecution or the RBV.[43] The Prosecution only included correspondence and summaries of court records provided by the RBV,[44] and not the translation of the original underlying records. The Chamber acknowledged that the translated materials constituted 'only a very small fraction of the material presented by Venezuela' and that the criteria employed by the Prosecution was 'unclear'.[45] Faced with: a dearth of relevant translations provided by the Prosecutor, a strict deadline to provide translations and an instruction to focus on documents that were relevant to its observations (as opposed to the original deferral request), the RBV provided 13 annexes, and some of the documents that had been transmitted to the Prosecution in the deferral request, namely, 'copies of criminal court records and records of other investigative steps taken'.[46]

80. The Chamber, in response, declared that

> since the translated material transmitted by the Prosecution and the material contained in the annexes attached to Venezuela's Observations do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela, they cannot be relied upon as relevant substantiating documentation for the determination of the Chamber.[47]

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[42] ICC-02/18-29, § 11.
[43] ICC-02/18-45, § 87.
[44] ICC-02/18-45, § 82
[45] ICC-02/18-45, § 84.
[46] ICC-02/18-45, § 87.
[47] ICC-02/18-45, § 88.

81. Since none of the materials transmitted by the Prosecution pursuant to Rule 54(1) were relied upon by the Chamber, the Decision turned on a limited selection of documents (those translated by the RBV), which did not reflect the totality of relevant investigations and prosecutions. The Chamber acknowledged that it excluded at least two cases, which concerned SGBV crimes and were thus relevant to the acts set out in the Article 18(1) Notification, because they were provided by the OTP in Spanish.[48]

82. Moreover, as can be seen from the New Evidence, the Prosecution had received probative documentation from the RBV (in Spanish) concerning over 177 cases relating to active investigations and pre-trial procedures carried out in relation to alleged acts of murder, physical assault, sexual assault and arbitrary detention, allegedly carried out by members of security groups against civilians.[49] These cases directly mirror the intended scope of the

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[48] ICC-02/18-45, § 124.

[49] [redacted]

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Prosecution's investigations and demonstrate that the RBV was taking concrete steps to investigate these acts. The Chamber's exclusion of Spanish materials filed by the OTP thus materially undermined the validity of its conclusion that RBV investigations did not sufficiently mirror the scope of the Article 18(1) Notification.

2. The exclusion of Prosecution summaries of proceedings or records

83. The Chamber erred in law and abused its discretion by excluding *in limine* summaries prepared by the OTP of records transmitted by the RBV and any other documents that were not 'original police or court records'.[50] Although the Chamber added that such documents were 'often' unrelated to domestic investigations,[51] the Chamber did not conclude that all such documents were unrelated to domestic investigations. It follows, therefore, that at the very least, some documents were excluded due to the fact they were not 'original police or court records'. The Chamber cited no legal provision mandating the exclusion of such materials, nor did prior Article 18(2) jurisprudence require such a measure.

84. Article 69(4) of the Statute embodies an expansive and flexible approach concerning the admission of evidence, with limited grounds for mandatory exclusion. When deciding whether to rely on documents, the Chamber must assess individual items of evidence according to the criteria set out in Article 69(4), providing a reasoned opinion allowing the impacted party to assert its potential rights on appeal.[52] The Chamber's approach will also need to be tailored to the stage of the proceedings and the evidential threshold concerned. For this reason, the Appeals Chamber has confirmed that the use of 'summaries' is acceptable in connection with

1 [redacted]

[50] ICC-02/18-45, § 88.
[51] ICC-02/18-45, § 88.
[52] ICC-01/05-01/08-1386, §§ 2-3.

confirmation proceedings, where the evidential standard is higher than that of admissibility proceedings.[53] The Chamber is also obliged to apply the same approach to assessing information provided by both parties.

85. The Pre-Trial Chamber failed to either adhere to these legal principles or to provide a sound legal foundation for its departure from them. When the Chamber assessed the materials by the Prosecution, it failed to provide a reasoned opinion as concerns if and why the entirety of the materials was not relevant to the issues before it. Indeed, by stating that the documents were 'often' unrelated to any domestic investigation in Venezuela, the Chamber conceded that some of them were relevant to such investigations. It then fell to the Chamber to issue a reasoned opinion as to which documents were irrelevant and those that were relevant, and why they were insufficiently reliable to assist the Chamber in determining the issues before it. This reasoning was never provided, even though no party had challenged the reliability of the Prosecution's summaries, and the Chamber itself had acknowledged that none of the participants were prejudiced as they possessed the means to review the underlying materials in Spanish.

86. The scope and ramifications of the Pre-Trial Chamber's error can be assessed by examining the materials, which formed the basis for the summaries prepared by the OTP. These documents are composed of copies of original documents from case files, such as orders to

[53] ICC-01/04-01/06-773, §§ 2, 40, 46.

initiate investigations,[54] expert reports,[55] witness statements,[56] summons to appear,[57] autopsy reports,[58] medical examinations.[59] These types of documents fall directly within the category

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54 [redacted].

55 [redacted]

[redacted]

[redacted].

[56] [redacted]

[redacted]

57 [redacted]

of documents which other Pre-Trial Chambers have confirmed to be relevant to their assessment of the existence of active investigations.[60] In circumstances where, first, neither party opposed the use of summaries, and second, the Chamber had access to the materials used to create the summaries, there was a higher onus on the Chamber to provide sufficient reasoning for its decisions to exclude all summaries *in limine.*

87. The Pre-Trial Chamber also applied its standard of evidence in an asymmetrical and thus arbitrary manner. The information provided by the Prosecution to the RBV setting out the alleged criminal acts that the Prosecution intended to investigate was derived from 'open source documents and reports'.[61] The First Article 18(1) Notification also described the alleged criminal acts through a summary of the OTP's preliminary findings. The Chamber based its assessment on the relevance of the materials to the existence of criminal acts, rather than the *form* of the information. The Chamber thus created an unfair discrepancy between the type of information that was used to establish the existence of alleged criminal acts as compared to the type of information that could be used to establish whether the RBV was actively investigating such acts.

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[59] [redacted]
[redacted].

[60] ICC-01/11-01/11-239, § 12.
[61] ICC-02/18-45, § 74.

88. The truth is that, in the face of the official documentation presented by the RBV that proves the investigations mentioned and that are being carried out, the OTP only provides elements, most of which come from open sources and international organisations that have not even had a field presence in the country and have gratuitously disregarded and disqualified all the investigations and national advances in defense and protection of the victims.

89. ICC legal precedents also do not justify this arbitrary distinction. In the *Philippines* decision, the Pre-Trial Chamber found that in order to demonstrate that a State was actively investigating a case, it was necessary for the State to 'provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case'.[62] This finding, which was derived from case law issued originally in cases in the Kenya situation,[63] was intended to distinguish between mere assertions that a State was taking steps to investigate a case, as compared to evidence that proved the existence of such steps.[64] It was not intended to erect an artificial barrier as to the *type* of evidence that a State could submit to prove the existence of such steps. In the *Gaddafi* case, the Pre-Trial Chamber promulgated a broad definition of the type of evidence that would assist its admissibility determination: '[i]n this context, "evidence" rather means all material capable of proving that an investigation is ongoing and that appropriate measures are being envisaged to carry out the proceedings'.[65] In line with this approach, in past cases, Chambers have considered the contents of a range of different documents, including correspondence and progress reports,[66] photographs and media reports comprising evidence (i.e. of speeches),[67] and summaries of witness statements.[68] But, in the present situation, the RBV has demonstrated with sufficient documentation, which has been arbitrarily excluded by the SCP and not translated by the OTP, to decide against it and disqualify any attempt that has been made. This biased and self-serving interpretation causes serious prejudice to the action of justice in defense of the victims and the guarantees of due process.

90. The magnitude of the Chamber's error is illustrated by the absence of any determination as to which records were excluded on the basis that they were irrelevant and which were

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[62] ICC-01/21-56-Red, § 14, citing ICC-02/17-196, § 45. See also ICC-01/09-02/11-274, §§ 2, 61, 68; ICC-01/11-01/11-344-Red, § 54; ICC-01/09-02/11-96, §§ 59, 64-65.
[63] ICC-01/09-02/11-274, § 61.
[64] ICC-01/09-02/11-274, § 61.
[65] ICC-01/11-01/11-239, § 10.
[66] ICC-01/09-02/11-274, §§ 63-66.
[67] ICC-01/11-01/11-239, § 12.
[68] ICC-01/11-01/11-344-Red, § 121.

excluded because of the type of documentation. The Appeals Chamber can, however, assess the impact of the error by reference to the following:

⇒ First, documents (provided in English in March 2023) demonstrate the existence of concrete steps taken to investigate alleged acts of murder, sexual assault, physical assault, or detention-related abuses;[69]

⇒ Second, the Chamber's failure to reference such cases or documents in its assessment of files that it considered relevant to the Prosecution's Article 18(1) Notification; and

⇒ Third, the Chamber's ultimate conclusion that the RBV's investigations did not sufficiently mirror the Article 18(1) Notification.

91. It is, therefore, clear that as a result of its flawed decision to exclude relevant and probative materials, the Chamber excluded specific items that showed that the RBV was actively taking steps to investigate the alleged criminal acts that had been notified by the Prosecution.

3. The MoU

92. The Pre-Trial Chamber declined to address the arguments of the RBV concerning the lack of good faith dialogue between the OTP and the RBV, as evidenced by the OTP's decision to open an investigation immediately after signing a Memorandum of Understanding (MoU) with the RBV. The sole reason for not addressing this argument was 'that no memoranda of understanding has been officially notified and filed before it.'[70] As a result, the Chamber failed

[69] ICC-02/18-32; I[redacted]

[70] ICC-02/18-45, § 60.

to place any weight on the MoU when assessing the existence of steps taken by the RBV to actively investigate the acts falling within the Article 18(1) notice.

93. As a first point, the Chamber erred in fact by claiming that the MoU had not been filed before it. The Prosecution had cited the 2021 MOU at footnote 5 of its 'Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I'[71] and a link was provided in this filing to the English translation of its contents. Given that this filing was notified to both the Pre-Trial Chamber and the RBV, and concerned Article 18, the RBV was entitled to rely on the assumption that this legal instrument was part of the record of proceedings concerning Article 18 in this situation.

94. The MoU is also a bilateral legal instrument between the OTP and RBV. In accordance with ICC precedents, it is not necessary for parties to seek formal admission of legal instruments as evidence in order to rely on their contents to demonstrate legal obligations[72] Since the Government of Venezuela cited it in its Observations,[73] the document was properly before the Chamber. The Chamber, therefore, had a duty to consider the impact of the MOU on the Chamber's Article18 assessment.

95. The Chamber's errors had a material impact on the outcome of its decision. According to the terms of the 2021 MoU, the OTP agreed that it would 'recognize any efforts, reforms and investigations carried out in the Bolivarian Republic of Venezuela'.[74] Both parties also agreed that since no targets had been identified (as of November 2021), the investigations should proceed by establishing the truth and whether there were or were not grounds to charge individuals.[75] Given that the OTP specifically endorsed an investigative approach focusing on establishing the facts (rather than particular targets), there was no basis for either the OTP or the Pre-Trial Chamber to disregard domestic investigations that followed this agreed course of action, that is, that focused on establishing the crime base before targeting particular individuals.

96. Following the Pre-Trial Chamber's decision, the RBV has continued to engage a bilateral dialogue of collaboration with the OTP, thereby demonstrating its commitment to

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[71] ICC-02/18-16, fn. 5: 'In this respect, reference was also made to the Memorandum of Understanding ("MoU") signed in Caracas on 3 November 2021 by the Bolivarian Republic of Venezuela ("Venezuela" or "Venezuelan authorities") and the OTP: https://www.icc-cpi.int/itemsDocuments/otp/acuerdo/acuerdo-eng.pdf. As explained in the notification letter, the MoU sets the stage for continued dialogue and cooperation between Venezuela and the OTP, pursuant to the principle of complementarity.'
[72] ICC-01/12-01/18-2496, § 17.
[73] ICC-02/18-30-AnxII-Red-Corr, § 17 (cited in fn. 17).
[74] ICC-02/18-30-AnxII-Red-Corr, § 136, citing the MoU, p. 2.
[75] MoU, p. 2.

bringing justice to the people of Venezuela, in a manner that is consistent with the Rome Staute. The RBV is aware that the Appeals Chamber can only base itself on facts and evidence that were before the Pre-Trial Chamber. It is important to note, however, that the temporal expiration of the original MoU has not altered these facts. [redacted]

C. Ground 3: The Pre-Trial Chamber erred in law and or misapplied it by rejecting the RBV's arguments that the temporal scope of the Article 18(1) notification was confined to alleged criminal activity occurring from April 2017 onwards.

97. As part of its observations, the RBV argued that the Chamber's assessment of the alleged criminal acts concerned by the Article 18 deferral proceedings should focus on alleged incidents occurring in 2017, as this was the relevant time period that had been communicated in the Prosecutor's Article 18(1) notice and related communications.[76]

98. As set out above, the Chamber correctly found that first, its Article 18 assessment should be based on the potential cases that had already been identified by the Prosecution,[77] second, that it was incumbent on 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)',[78] and third, that the information provided in the first Article 18(1) Notification 'seems to indeed have caused unnecessary confusion as to the scope of the Prosecution's intended investigation for the purposes of article 18 proceedings'.[79] The Chamber nonetheless found, based on the content of the States" referral and information provided to Venezuela by the Prosecution, that the temporal scope of the OTP's intended investigation also covered acts prior to April 2017.[80]

[76] ICC-02/18-30-AnxII-Red-Corr, § 188.
[77] ICC-02/18-45, § 77.
[78] ICC-02/18-45, § 77.
[79] ICC-02/18-45, § 46.
[80] ICC-02/18-45, § 49.

99. In reaching this conclusion, the Chamber erred in law by erroneously conflating issues of temporal jurisdiction, with the more specific issue as to the temporal scope of the alleged incidents concerned by the Article 18 deferral proceedings.[81] The Chamber further erred by finding that the incidents set out in the 'Second Notification' (that is, the information conveyed in 2022) were capable of curing the misleading and ambiguous temporal scope described in the First Article 18 Notification.[82]

100. As concerns the first aspect of the Chamber's error, it was legally erroneous for the Chamber to rely on the temporal scope of State referrals in order to deduce the temporal scope of the Article 18(1) Notification. The issue of the temporal scope of the Article 18(1) notice is separate from the issue of temporal jurisdiction. Even if State referrals give the Prosecution the theoretical competence to conduct investigations into a particular time period, it does not automatically follow that there are reasonable grounds to investigate alleged acts occurring during these time periods. It is therefore possible, and indeed probable, that the investigation opened by the Prosecution will cover a narrower temporal or geographic range of incidents.

101. For this reason, when making an assessment under Article 18, the Pre-Trial Chamber must ascertain the actual temporal scope of the alleged criminal acts that are concerned by the potential clash of jurisdiction between the ICC and the State in question. This is because the same person/same conduct test requires the Chamber to ascertain whether there is an overlap between alleged criminal incidents investigated by the RBV and those, which will be investigated by the OTP. And, as explained above, 'incidents' are defined as 'historical events', 'defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators'.[83] In order to define the incidents that underpin the same person/same conduct test, the Chamber must identify the temporal and geographic scope of the alleged criminal acts that were notified to States, through the Article 18(1) Notification.

102. It would also be legally incorrect to err on the side of adopting a temporal scope, which is more expansive than the time period covered by the actual incidents which the Prosecution intends to investigate. Whereas the objectives of the Statute might militate in favour of giving the Prosecution a relative freehand to investigate the truth in connection with situations where there are no competing options before the Chamber (which was the circumstance considered by

[81] ICC-02/18-45, § 45.
[82] ICC-02/18-45, § 48.
[83] ICC-01/12-01/18-601-Red, § 65.

the Appeals Chamber in its 2020 *Afghanistan* appeals judgment), the opposite is true where a State has asserted its primacy and intention to exercise jurisdiction over the situation. The absence of any certain or clarity as to the temporary and geographic scope of the acts that the Prosecution intends to pursue will have a chilling effect on the ability and willingness of that State to conduct its own investigations, since if the State risks doing so, it may run into a future article 19 confrontation, entailing domestic delays, litigation expenses, and a possible outcome that requires the State to close the domestic case. Adopting a wait and see approach, that is, waiting to see which cases are pursued by the Prosecution, would deprive alleged victims of their right to speedy justice before domestic courts.[84]

103. Given these issues, the question before the Chamber was not the temporal scope of the Article 13(a) referral, but the temporal scope of the investigations concerned by the deferral request, triggered by the Article 18(1) Notification. As such, the proper reference point was the information set out in the Article 18(1) Notification, rather than the initial State referrals. This is consistent with the approach in Mbarushimana, where the Pre-Trial Chamber found that a State referral did not give rise to an open-ended right on the part of the OTP to conduct investigations.[85] The Chamber further found it appropriate to rely on the content of the Article 18(1) letter, sent to States, in order to determine the scope of the investigations comprising the situation in question.[86]

104. If the Chamber had properly based its assessment on the Article 18(1) Notification content, there would have been no foundation to conclude that the Article 18 proceedings encompassed alleged incidents occurring before April 2017. The 2021 Article 18(1) Notification informed States that the Prosecution 'focussed its assessment on a sub-set of crimes related to the treatment of persons in detention that are alleged to have been committed since at least 2017'. The Prosecution then clarified that it considered that 'there was a reasonable basis to believe that since at least April 2017, civilian authorities, members of the armed forced and pro-government individuals have committed crimes pursuant to article 7(1) of the Rome Statute'. The Prosecution then annexed to this Notification a 'summary' of the findings of its preliminary investigation, which again replicated this language (that the Prosecution was focusing on acts committed from at least April 2017). In terms of the further information that was provided subsequently, the Prosecution annexed a table listing open-source reports,

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[84] ICC-01/04-01/10-451, §§ 33-34.
[85] ICC-01/04-01/10-451, § 16. See also § 21: 'the territorial and temporal scope of a situation is to be inferred from the analysis of the situation of crisis that triggered the jurisdiction of the Court through the referral'.
[86] ICC-01/04-01/10-451, §§ 33-34.

which – [redacted] and a table of 'samples' extracted from open source reports, which were intended to reflect a 'similar' nature and gravity to those that the Prosecution had relied upon in connection with its investigations into detention. As set out above, the Prosecution did not state that it intended to investigate these acts or that the acts that fell within the scope of its intended investigation had the same temporal or geographic characteristics as these 'samples'. In the covering letter dated 13 January 2022, the Prosecution once again referred to the information set out in the First Notification, thereby underlining the impression that the actual alleged criminal acts that fell within the scope of the Prosecution's intended investigations were confined to detention-related incidents occurring since April 2017.

105. Given that information conveyed in January 2022 did not reflect the content of the OTP's intended investigations, the Pre-Trial Chamber erred by concluding that it provided a sufficiently clear and concrete basis for the RBV to be on notice that the Article 18 proceedings encompassed alleged criminal acts occurring before April 2017.

D. Ground 4: The Pre-Trial Chamber erred in law as concerns the legal test it adopted for assessing whether Venezuela was actively investigating 'criminal acts' referred to the information provided by the OTP in its Article 18 Notification.

1. Sub-ground 4.1: The Pre-Trial Chamber erred by failing to tailor the test that concerns the identification of a 'case' to the particularities of the Article 18(1) Notification.

106. In setting out its approach to Article 18(1), the Pre-Trial Chamber acknowledged the very difficult and challenging task of comparing concrete steps taken by a State, on the one hand, with abstract statements of hypothetical future OTP investigations based on samples illustrating possible investigative targets.[87] The Chamber then found that the most appropriate way to resolve this dilemma was to require the State to provide specific and concrete evidence proving that it was investigating the 'case'.[88] The Pre-Trial Chamber further explained that its task in assessing such evidence consisted of determining whether 'domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court.[89] In line with this approach, the Pre-Trial Chamber then focused on whether domestic

[87] ICC-02/18-45, § 65.
[88] ICC-02/18-45, § 66.
[89] ICC-02/18-45, § 65.

investigations had identified particular perpetrators or taken steps to secure the arrest of particular individuals.[90]

107. This approach was incorrect in law. The Appeals Chamber has recently confirmed that the 'sufficient mirroring' test is an appropriate formula for assessing whether a State is investigating the same or substantially the same cases as the Prosecution.[91] The Appeals Chamber further confirmed that a failure to apply a legal test correctly constitutes a legal error.[92] In line with this test, if the acts described in the Article 18(1) notification are vague and do not concern specific defendants or alleged perpetrators, then it is also not necessary for domestic investigations to have reached the point of identifying particular suspects or defendants. A 'mirror' reflects the information that is conveyed to it. The Chamber thus erred by imposing a higher degree of specificity and progression on the RBV than was evident in the information set out by the Prosecution in the Article 18(1) Notification.

108. The plain text of Article 18 refers to 'criminal acts'. This is further buttressed by Rule 52(1) of the Rules of Procedure and Evidence, which speaks of 'information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2'.[93] Article 18 does not require there to be symmetry between the persons targeted by the domestic authorities and potential OTP suspects – indeed, there is no requirement that the investigations have reached the stage of confirming the 'prime' suspect or suspects. It also does not require the State to have reached the point of attaching a legal classification to these acts, nor does it require such a classification to mirror that of the OTP. The Appeals Chamber has further confirmed that an Article 17(1) assessment conducted at the situation phase would need to be tailored to the specificities of this phase, taking a particular account of the fact that 'no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear'.[94]

109. In line with these principles, the notion of a case for the purposes of Article 18 proceedings is defined by reference to the acts described in the Article 18(1) notification. In the current proceedings, the OTP emphasised that, at this point, no specific perpetrators had been identified.[95] At most, the notification referred to potential groups allegedly responsible for the

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[90] ICC-02/18-45, § 91.
[91] ICC-01/21-77, § 2.
[92] ICC-01/21-77, § 201.
[93] ICC-01/09-02/11-274, § 38.
[94] ICC-01/09-02/11-274, § 38.
[95] ICC-02/18-45, §§ 36, 71.

actions in question.[96] Since the Article 18(1) notification did not name any specific individuals as alleged perpetrators, the definition of a case in the context of these proceedings does not encompass specific individuals or alleged perpetrators.

110. The Chamber's failure to tailor its assessment to the nature of the cases disclosed by the Prosecution was a clear legal error. The threshold question – whether the State had or is investigating acts set out in the Article 18(1) notification – is satisfied by investigative acts that demonstrate an intent to establish the truth as concerns the allegations in question. An independent and impartial investigation into the truth may or may not result in further steps being taken against particular individuals. It would be fundamentally inimical to the presumption of innocence to impose a specific outcome as a requirement on States, or to measure the efficiency or effectiveness of domestic proceedings by reference to purely hypothetical outcomes, such as arrest warrants or convictions, in particular in the absence of any assessment by the Prosecution itself that there would be grounds to issue an arrest warrant against specific perpetrators.

111. Rather than comparing apples with oranges, the sufficient mirroring test required the Chamber to compare the information provided by the Prosecution in the Article 18(1) Notification with the information provided by the RBV, with a view to identifying overlaps.

112. This information disclosed no particulars concerning the identification of particular perpetrators, referring to potential suspects as pro-government individuals or as belonging to State security forces. Given this lack of detail, it was not necessary for the RBV to demonstrate that its investigations had reached the point of identifying specific perpetrators.

113. Similarly, since the Article 18(1) Notification failed to confirm the Prosecution's intent to investigate specific incidents in specific localities on specific dates, it was not necessary for the RBV to prove that its investigations mirrored particular localities, date or even a particular number of cases. The Article 18(1) Notification also listed acts of sexual violence in an alternative manner ('rape and/or other forms of sexual violence'), thereby indicating that the acts themselves could satisfy the more generic category and still properly trigger a deferral. The victims were also described broadly as [redacted].

114. Thus, in line with the particular information set out in the Article 18(1) Notification and its annex, the mirroring effect would be satisfied if the RBV provided information that national

[96] ICC-02/18-45, § 71.

authorities were conducting investigations [redacted]

115. As a result of the Chamber's flawed application of the sufficient mirroring test, the Chamber wrongly excluded from its assessment domestic investigations that covered the same conduct and acts as described in the Article 18(1) Notification.

2. Sub-ground 4.2: The Chamber erred in law by requiring an unspecified degree of coverage between the RBV's investigations and the acts notified by the OTP and failing to provide adequate reasons as to the basis for its conclusion that the acts investigated by the RBV did not 'sufficiently mirror'[97] the alleged criminal acts notified by the OTP

116. The Pre-Trial Chamber endorsed its previous finding 'that, in order to satisfy the complementarity principle, the domestic proceedings should also sufficiently mirror the content of the article 18(1) notification'.[98] The Chamber nonetheless failed to provide an explanation as concerns the meaning of the phrase 'sufficiently mirror' in the context of this specific article 18 proceeding. Nor is it possible to deduce from the Chamber's findings which threshold it employed to evaluate 'sufficiency'.

117. The word 'sufficient' means adequate or enough.[99] Its adjectival employment in the context of Article 17 proceedings, in the absence of further explanation or reasoning, fails to shed any light as concerns the quantitative or qualitative degree of 'overlap' required.

118. This ambiguity was compounded by the Chamber's failure to specify what the domestic proceedings should mirror, that is, whether they should mirror specific acts and conduct, specific offences, or types of criminality, and if so, which types of conduct or acts were being used by the Chamber as the basis for its comparison.[100]

119. This ambiguity was not cured by the materials cited by the Pre-Trial Chamber in reaching its conclusions. As set out above, the materials communicated in January 2022 were

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[97] ICC-02/18-45, § 131.
[98] ICC-02/18-45, § 67.
[99] https://www.oxfordlearnersdictionaries.com/definition/english/sufficient
[100] The Chamber's approach can be contrasted to case related admissibility decisions, Pre-Trial Chambers have commenced by setting out their understanding of the OTP's case, before analysing whether domestic investigations overlap with the case in question: ICC-01/11-01/11-344-Red, §§ 82-83.

provided as 'samples', which were 'similar' in nature and gravity to those the OTP intended to rely upon in investigating alleged detention-related crimes. This communication contained no commitment on the part of the OTP that it would investigate these specific acts or similar acts occurring in the same location or at the same time, nor did it provide any estimate of the approximate number of incidents which the OTP had earmarked for investigation. In the absence of such specifics, it was impossible for the Chamber to make any reasoned assessment as to what type or degree of overlap would satisfy the threshold for deferring to the RBV investigations.

120. Paradoxically, the Chamber appears to have recognised that a reasoned admissibility assessment cannot be conducted unless the OTP provides information reflecting the content and scope of the investigations it intends to conduct.[101] This confirmation of intent on the part of the Prosecution is particularly important in connection with situations that have been initiated through a State or Security Council referral, as the Chamber lacks any insight as concerns the incidents relied upon by the Prosecution to satisfy itself that there was a reasonable basis to proceed with an investigation. In such circumstances, the Chamber is wholly dependent on the information set out in the Article 18(1) notification for issuing a decision that will have profound consequences regarding the ability of domestic authorities to pursue these cases and to deploy resources accordingly.

121. These errors had a material impact on the outcome of the decision, as they led the Chamber to incorrectly apply an overly stringent standard as concerns the status of RBV investigations. The Chamber reached a positive determination that the RBV was 'investigating slightly more than half of the incidents',[102] which the OTP provided as samples (extracted from open-source reports) but seemed to infer that this was numerically deficient. Similarly, later in the Decision, the Chamber found that:

> Only in a minority of cases, a suspect was identified, an accused charged, and/or a judicial decision on an accused's criminal responsibility taken. Nonetheless, these cases are very limited and, for the reasons set out below, not capable of altering the Chamber's overall determination.[103]

122. In the absence of any clear indicators from the OTP as to the number of incidents it intended to investigate or any transparent benchmarks as to what constitutes a 'sufficient mirroring', the reference to a 'minority of cases' is not a meaningful quantitative finding. A

[101] ICC-02/18-45, § 77.
[102] ICC-02/18-45, § 89.
[103] ICC-02/18-45, § 91.

minority of domestic cases could still satisfy the admissibility threshold if they overlap with the type or samples of criminality set out in the Article 18(1) Notification, or the number of cases that the OTP actually intends to open. Due to the absence of objective criteria or sufficient reasoning as concerns how the Chamber defined and assessed the 'sufficient mirroring test', there was no reasonable basis for the Chamber to conclude that the number of active investigations conducted by the RBV was insufficient.

3. Sub-ground 4.3: Although the Chamber recognised that States do not need to investigate or prosecute criminal acts as 'international crimes', it erred by finding that it was necessary for domestic investigations to cover 'contextual elements' of crimes against humanity.

123. ICC case law on admissibility has consistently recognised that domestic investigations need only cover the same or similar conduct as the OTP: they do not need to cover identical conduct or the same legal qualification.[104] For this reason, it is acceptable for States to investigate and prosecute such conduct using domestic legislation and offences (also referred to as 'ordinary crimes').[105] Although the Pre-Trial Chamber recognised such precedents,[106] the Chamber nonetheless found that the fact that the RBV did not appear to be investigating contextual elements of crimes against humanity played a key role in its conclusion that the domestic investigations conducted by the RBV did not sufficiently mirror those of the OTP.[107] The Chamber's reliance on the RBV's failure to investigate 'contextual elements' for crimes against humanity constitutes a reversible error of law that vitiates the ultimate conclusion that the situation is admissible before the ICC.

124. There was no sound legal or practical basis for the Pre-Trial Chamber to depart from appellate jurisprudence on this point. The preamble to the Rome Statute emphasises 'the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. This wording is significant. On the one hand, the emphasis is placed on pursuing

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[104] ICC-01/11-01/11-565, § 119.
[105] ICC-01/11-01/11-565, § 119.
[106] ICC-02/18-45, § 102, citing ICC-01/21-56-Red, § 68: 'Whereas the Court's investigations concern international crimes, with certain contextual elements, domestic investigations may follow different approaches and a State need not investigate conduct as crimes against humanity, for example, or allege the same modes of liability found in the Rome Statute to still investigate the persons and conduct.'
[107] ICC-02/18-45, §§ 107-108. See also § 130: 'In light of the above analysis, the Chamber draws the following conclusions. While Venezuela is taking some investigative steps, its domestic criminal proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation. This conclusion is primarily informed by: (i) the fact that Venezuela is not investigating (and does not express any intention to investigate) the factual allegations underlying the contextual elements of crimes against humanity; and, relatedly, (ii) the fact that the focus of the domestic investigations appear to generally be on direct/low level perpetrators'.

persons who commit international crimes rather than pursuing international crimes. On the other, the reference to using domestic criminal jurisdictions suggests that as long as the person responsible for committing such crimes is held to account, the domestic criminal jurisdiction has satisfied its obligation. Academic commentary concerning the drafting of the Statute further confirms the drafters' intent to preserve States' right to investigate and prosecute offences falling under the jurisdiction of the Court as 'ordinary offences'.[108] Indeed, the chapeau elements of crimes against humanity are of a jurisdictional nature: the satisfaction of these elements pierces the veil of State sovereignty and attracts universal jurisdiction of the ICC.[109] In circumstances where the State already possesses jurisdiction over the conduct in question, it is entirely unnecessary for the State to fulfil the additional contextual elements when they possess the means and legal right to prosecute the conduct as a domestic offence. Nor is it necessarily advisable for States to prosecute such conduct as a crime against humanity since investigating the contextual elements can exhaust a significant amount of time and resources, and result in acquittals, if the necessary elements are not met. For example, in the FDLR case in Germany, the Prosecutors were forced to drop several charges based on crimes against humanity and war crimes due to lack of evidence, and one of the defendants was acquitted of all charges relating to war crimes and crimes against humanity.[110] The Presiding Judge in that case also criticised the lengthy trial process, caused by delays in the collection of evidence.[111] Defence teams could also challenge the legality of proceedings conducted under legislation brought in retrospectively, for the sole purpose of satisfying artificial admissibility requirements. Nor does the Rome Statute impose any obligation to incorporate such crimes into domestic legislation in order to anticipate future admissibility challenges.

125. In line with the approach adopted in the *Gaddafi & Senussi* cases, the Pre-Trial Chamber should have focused on whether the acts pursued by domestic authorities encompassed the same types of conduct as the intended OTP investigations. The existence of an organisational policy is a matter that concerns knowledge, intent and modes of liability at the domestic level, which is irrelevant to the admissibility assessment. The alleged existence of a widespread or systematic attack would be reflected by domestic investigations pursuing several alleged crimes

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[108] I. TALLGREN & A. REISINGER CORACINI, 'Article 20: *Ne Bis In Idem*', *in* O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Hart, 2008, pp. 688-689; M A NEWTON, 'Comparative complementarity: Domestic jurisdiction consistent with the Rome Statute of the International Criminal Court', *Military Law Review*, vol. 167, 2001, pp. 20-73 at 70.
[109] ICC-01/04-02/06-2666-Red, § 416.
[110] HRW, DR Congo: German Court Convicts Two Rwandan Rebel Leaders, 28 September 2015.
[111] 'Rwandan rebel leaders jailed in Germany for war crimes', *The Guardian*, 28 September 2015.

either in different locations at the same time period or in the same location over a period of time. This element is, in fact, satisfied by the materials presented by the RBV.

126. For example, in relation to alleged allegations of alleged acts of torture and cruel and inhumane treatment associated with arrest and detention, the RBV submitted English documentation concerning:

⇒ [redacted];[112]

⇒ [redacted].[113]

127. Irrespective of the 'label' attached to such cases, it is clear that the scope of alleged criminality in these investigations satisfies the same objective as an investigation into alleged crimes against humanity.

128. Considering the legal and practical framework, it was wholly consistent with the criteria set out in Article 17 for domestic authorities in the RBV to focus their investigations on alleged acts of criminality. Since investigations must comport with the presumption of innocence, it would also be inappropriate for domestic authorities to start with the assumption that *sub judice* investigations and prosecutions would establish the existence of a widespread or systematic attack or organisational policy.

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[112] [redacted]

[113] [redacted]

129. In this regard, it was an error of fact for the Pre-Trial Chamber to use predetermined legal labels as its benchmark for the 'substantial mirroring' test, given the absence of any prior judicial determination that there was a reasonable basis for concluding that specific crimes or crimes against humanity had occurred. As an impartial decision-making body, the Pre-Trial Chamber is obliged to treat the RBV and the OTP equally and cannot, therefore, apply a strict standard of evidentiary scrutiny and standards to the RBV's domestic investigations, while assigning a significant degree of deference to those of the OTP. Applying such an unbalanced standard would give rise to the perception that the Tribunal unfairly favours the OTP. Similarly, the Pre-Trial Chamber's reliance on the assumption that crimes against humanity must have been committed is wholly incompatible with the ICC's statutory role as a neutral adjudicatory body. It was therefore an error both in law and in fact for the Pre-Trial Chamber to rely on specific legal classifications and unproven facts as the basis for its comparison.

130. The outcome of the Chamber's findings was therefore invalidated by their erroneous focus on chapeau elements rather than underlying acts. If the Chamber had properly focused on the question as to whether the *acts* investigated by the RBV substantially overlapped with the types of alleged criminality set out in the Article 18(1) Notification, it would have found that the threshold for deferring to domestic jurisdictions was satisfied. The Chamber's errors therefore invalidate the outcome of the decision and warrant its reversal.

4. Sub-ground 4.4: The Chamber erred in law by finding that domestic investigations needed to cover 'discriminatory intent' in connection with underlying acts pertaining to potential OTP's investigations related to persecution, while also excluding domestic investigations into human rights violations.

131. In its observations, the RBV informed the Chamber that the crime of persecution was not incorporated into domestic legislation due to its 'lack of specificity'.[114] This concern is not unique to the RBV, but was one shared by multiple States during the drafting of the Rome Statute.[115] As observed by Bassiouni, 'there is no crime known by the label "persecution" in the world's major criminal justice systems, nor is there an international instrument that criminalizes it'.[116] These concerns led to the decision to attach persecution to other underlying

[114] ICC-02/18-30-AnxII-Red-Corr, § 104.
[115] D. ROBINSON, 'Defining "Crimes Against Humanity" at the Rome Conference', *The American Journal of International Law*, Vol. 93, No. 1, 1999, pp. 43-57 at 53-54.
[116] Cited in D. ROBINSON, 'Defining "Crimes Against Humanity" at the Rome Conference', *The American Journal of International Law*, Vol. 93, No. 1, 1999, pp. 43-57 at 54.

acts set out in Article 7.[117] Persecution is thus composed of an underlying act, coupled with proof that it was connected to human rights violations committed for discriminatory intent.

132. Rather than breaking down these constituent elements and focusing on whether the RBV was first conducting investigations into the type of underlying acts that fall within the crime of persecution in the Rome Statute, and second, investigating human rights violations that would assist in demonstrating discriminatory intent, the Chamber adopted an absolutist approach. The Chamber disaggregated the two types of investigations required to 'mirror' persecution at the domestic level, disregarding investigations into human rights violations on the grounds that they were not being labelled as criminal offences,[118] and rejecting criminal investigations with the sweeping statement that 'the material provided by Venezuela does not allow for the conclusion to be drawn that the State is investigating factual allegations of discriminatory intent'.[119] In reaching this concussion, the Chamber committed a reversal error of law by focusing on the 'labels' and domestic classification of conduct rather than the content of the conduct. It also expressly disregarded and failed to follow appellate precedent, which has accepted that it is not necessary for domestic investigations to charge discriminatory intent or to use the label of persecution.

133. These issues came directly to the fore in the *Gaddafi & Senussi* cases, where the Government of Libya sought to exercise jurisdiction over the defendants in connection with ICC cases that included allegations of persecution. Like many other countries, Libya did not have the crime of persecution in its domestic legislation but argued that the underlying conduct was adequately reflected by charges concerning domestic offences, coupled with the possibility of addressing matters of discriminatory intent as an aggravating factor in sentencing. The Pre-Trial Chamber accepted this approach[120] and it was further approved by the Appeals Chamber in its judgment on the *Senussi* admissibility appeal.[121]

134. In accordance with legal precedents, it was also unnecessary for the RBV to show that its investigations into persecution-related acts covered identical incidents to those of the OTP.

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[117] D. ROBINSON, 'Defining "Crimes Against Humanity" at the Rome Conference', *The American Journal of International Law*, Vol. 93, No. 1, 1999, pp. 43-57 at 54.
[118] ICC-02/18-45, § 90.
[119] ICC-02/18-45, § 125. See also § 131: 'In addition, the Chamber notes that: (i) Venezuela appears to have taken limited investigative steps; (ii) there appear to be periods of unexplained investigative inactivity; and (iii) the domestic investigations appear to not sufficiently mirror the forms of criminality the Prosecution intends to investigate – noting in particular the discriminatory intent underlying the alleged crimes and the insufficient investigation of crimes of a sexual nature'.
[120] ICC-01/11-01/11-344-Red, §§ 111, 113.
[121] ICC-01/11-01/11-565, §§ 119-122.

In the context of a case-specific admissibility challenge, Pre-Trial Chamber I found that 'bearing in mind the purpose of the complementarity principle, the Chamber considers that it would not be appropriate to expect Libya's investigation to cover exactly the same acts of murder and persecution mentioned in the Article 58 Decision as constituting instances of Mr Gaddafi's alleged course of conduct'.[122] Similarly, in the context of deferral proceedings taking place at the ICTY, the Chamber found that the test for deciding competence concerning a set of incidents should be determined by reference to the question as to whether the acts pursued by the State are closely related to those pursuant by the ICTY OTP: it was not necessary for them to be identical.[123]

135. These findings are equally applicable to the investigations conducted by the RBV. As conceded by the Prosecution, 'the 2017 Law against Hate, for Peaceful Coexistence and Tolerance acknowledges that any criminal act that is committed due to the victim's membership of a particular ethnic, racial, religious or political group shall be considered as an aggravating circumstance in determining the appropriate sentence'.[124] The Chamber completely failed to address this point or to acknowledge that when coupled with evidence of domestic investigations into serious offences such as torture and cruel treatment and human rights violations, there were clear indications that the domestic proceedings encompassed acts that would amount to persecution under the Rome Statute, and otherwise overlapped with the acts set out in the Article 18(1) Notification. The Chamber's error on this point invalidated its ultimate conclusion that the investigations conducted by the RBV failed to satisfy the 'same/substantial conduct test' (as recalibrated to fit the particularities of the situation phase).

5. Sub-ground 4.5: The Chamber erred in law by excluding domestic investigations into criminal acts pertaining to SGBV, due to its erroneous focus as to whether they were being investigated or prosecuted 'as such'.

136. The Pre-Trial Chamber committed the same legal error as it did with persecution in reaching its findings concerning domestic investigations into sexual and gender-based violence (SGBV). The Pre-Trial Chamber acknowledged that the domestic authorities were actively investigating such offences, but concluded that 'it is unclear whether the Venezuelan authorities

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[122] ICC-01/11-01/11-344-Red, § 83.
[123] Decision on the Prosecutor's Request for Deferral and Motion for Order to the Former Yugoslav Republic of Macedonia, IT-02-44-Misc. 6, 4 October 2002, at § 41.
[124] ICC-02/18-18, § 111.

are also investigating this criminal conduct as such'.[125] This ambiguous finding appears to concern the fact that domestic legislation labelled certain forms of sexual assault, which were based on threats and where there was no physical contact, as 'torture' or inhumane treatment.[126]

137. Given that the Chamber's inquiry should have focused on the conduct that was being investigated or prosecuted rather than the label, it was a clear error for the Chamber to draw adverse conclusions from the fact that domestic authorities did not attach the same label as the OTP to these acts. The Chamber also made no finding that this difference in classification was due to reasons that would suggest the absence of a genuine intent to ensure accountability. Nor would there have been any basis to reach such a finding. As explained by the RBV, domestic legislation concerning torture and cruel treatment attracts a higher penalty than charges based on rape or sexual assault.[127] The existence of a different label in these circumstances is irrelevant in the absence of any indication that the label used by the RBV would impede the progression of active and effective investigations and proceedings.

138. A further consideration arises from the fact that the admissibility proceedings have arisen at the situation phase, during which '[o]ften, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear'.[128] In the same manner that the legal classification of charges can be requalified at the ICC pursuant to Regulation 55, the same can occur in the context of domestic investigations and proceedings. The RBV has demonstrated through the information submitted that domestic authorities are prepared to requalify charges as 'rape' if they collect evidence that allows them to satisfy this particular criteria under domestic legislation.[129] Given the mutating nature of legal qualifications, it was arbitrary and legally erroneous for the Chamber to focus on the RBV's failure to qualify certain conduct as SGBV crimes 'as such', rather than focussing on whether concrete steps were being taken to ensure accountability for the conduct in question. Indeed, sexual assault can encompass a wide range of conduct, ranging from physical violence to verbal harassment that might not reach the threshold of a crime. Since the Prosecution did not include in its Article 18(1) Notification any specifics concerning the factual matrices underpinning its assessment that there was a reasonable basis to open an investigation into alleged acts of rape or sexual assault, there was no objective reference point available to the Chamber to support its

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[125] ICC-02/18-45, § 124.
[126] ICC-02/18-30-AnxII-Red-Corr, § 103.
[127] ICC-02/18-30-AnxII-Red-Corr, § 103.
[128] ICC-01/09-01/11-307, § 39.
[129] ICC-02/18-30-AnxII-Red-Corr, § 103 [redacted]

conclusion that the label or designation used by domestic authorities did not appropriately reflect the gravity or type of conduct that had allegedly occurred.

139. The Chamber's error on this point impacted its ultimate conclusions, in which it expressly cited 'insufficient investigation of crimes of a sexual nature' as a reason to conclude that the RBV had not investigated and is not actively investigating acts that overlapped with the scope of the OTP's intended investigations.[130]

E. Ground 5: The Pre-Trial Chamber erred in law by basing its assessment as to whether Venezuela was conducting 'active investigations' on irrelevant factors and failing to give any weight to relevant factors.

140. Admissibility assessments under Article 17 entail 'a two-step analysis', according to which:

> 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. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability.[131]

141. In the present case, the Pre-Trial Chamber made no findings that the RBV was either unwilling or unable to conduct genuine investigations.[132] Its ultimate conclusion rested instead on the finding 'that Venezuela is not investigating or has not investigated criminal acts which may constitute crimes referred to in article 5 of the Statute that sufficiently mirror the scope of the Prosecution's intended investigation'.[133] The Chamber essentially found that the first step of the admissibility test was not met, and it was therefore unnecessary to proceed to the second step. The manner in which the Chamber reached this conclusion was, however, undermined by the Chamber's reliance on factors that were irrelevant to this first step, including: the number of identified suspects, the number of arrest warrants, and the rank of possible suspects. The Chamber also erroneously excluded relevant factors, such as the steps taken by the domestic authorities to identify victims. The Appeals Chamber has confirmed that failing to consider legally relevant factors or relying on irrelevant factors constitutes an error of law.[134]

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[130] ICC-02/18-45, § 131.
[131] ICC-02/11-01/12-75-Red, § 27, citing ICC-01/04-01/07-1497, § 78. See also ICC-01/09-01/11-307, § 41; ICC-01/09-02/11-274, § 40.
[132] ICC-02/18-45, § 132: 'There is no need to consider whether Venezuela is unwilling or unable to genuinely carry out any such investigation or prosecution'.
[133] ICC-02/18-45, § 132.
[134] ICC-01/04-02/06-2667-Red, § 26.

142. As set out in appeal ground 4.1, since the Article 18(1) Notification did not identify particular suspects or perpetrators, it was not necessary for the RBV to demonstrate that its investigations had targeted certain individuals. This is consistent with the wording of Article 17(1) and the three possible scenarios that could result in a deferral to national jurisdictions. The first scenario concerns the situation where the case is in the process of being investigated.[135] In this scenario, the Statute imposes no express guidelines or specifications concerning the stage that the investigation must have reached. In the *Ruto* admissibility appeal, the Appeals Chamber observed that:

> The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be understood in the context to which it is applied. For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear.[136]

143. This language clearly indicates that within the context of a situation-related admissibility challenge, in order to prove that it is investigating the 'case', it is not necessary for a State to identify particular suspects or to use specific legal classifications in relation to the conduct which is being investigated. Even within the context of a case-related admissibility challenge, the Appeals Chamber explained that a State could provide that it was taking concrete steps to investigate a suspect by bringing evidence that it had interviewed suspects, collected evidence and conducted forensic analysis.[137] These steps do not require an arrest warrant to have been issued, nor does it require the investigation to have concluded.[138] Given this framework, it is not necessary for a State to demonstrate that it has issued a certain number of arrest warrants or identified particular targets in order to prove that it is actively investigating a case within the context of situation-related admissibility proceedings. Instead, according to academic commentary endorsed by the Appeals Chamber, the relevant issue is whether there has been 'an examination of some detail reflecting a sufficient measure of thoroughness'.[139]

144. This standard is clearly satisfied by the steps taken by the RBV: in particular, the Pre-Trial Chamber, and now the Appeals Chamber, have received evidentiary documentation that

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[135] Article 17(1)(a) Statute.
[136] ICC-01/09-01/11-307, § 39.
[137] ICC-02/11-01/12-75-Red, § 28.
[138] ICC-01/09-01/11-307, § 83.
[139] J. STIGEN, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff Publishers, 2008, at 203, cited in ICC-01/09-01/11-307, fn. 82.

the RBV's domestic authorities have issued numerous arrest warrants, indictments and sentences that are directly related to the acts covered by the Article 18(1) Notification. This is demonstrated in Annex A of the OTP's Request for Resumption of Investigation, in which the OTP, after reviewing the files and original documentation of the domestic cases, expressly acknowledged that there was an effective investigation in relation to at least:

⇒ [redacted][140]

⇒ [redacted];[141]

⇒ [redacted][142] and

⇒ [redacted][143]

145. The second scenario concerns a State that has investigated the acts but decided not to prosecute.[144] In most jurisdictions, such a decision is likely to be taken during the preliminary phase and need not have been preceded by an arrest warrant. Using the framework provided by the Appeals Chamber, the focus of inquiry should be on whether, before reaching such a decision, the State carried out steps to ascertain whether the alleged suspects were responsible for the conduct in question.[145] The third scenario is when the person (who is the subject of ICC proceedings) has already been tried by domestic courts for the same conduct as the case before the ICC.[146] This need not result in a conviction.[147]

146. It is clear from the above that the first step analysis in Articles 17(1)(a) and (b) does not require proof that domestic investigations have or had reached the point of an arrest warrant or indictment. While an arrest warrant or information about suspects might establish that a State is actively investigating the case, the converse is not true. A State may still be actively

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[140] [redacted]

[141] [redacted]

[142] [redacted]

[143] [redacted]

[144] Article 17(1)(b) Statute.

[145] ICC-01/09-01/11-307, § 43.

[146] Article 17(1)(c) Statute.

[147] ICC-01/11-01/11-565, § 200.

investigating a case or cases in a manner consistent with Article 17(1)(a) and (b), even if it has yet to confirm a specific suspect or issue an arrest warrant. The Pre-Trial Chamber erred in law by failing to acknowledge or respect these distinctions. Rather than giving credit to the RBV for the number of arrest warrants and suspects that had been identified, the Chamber drew adverse conclusions against the RBV because of what it considered to be a limited number of arrest warrants or targeted suspects. The specific number of arrest warrants is not, however, indicative of the existence of active investigations. Indeed, the ICC Prosecution has diligently investigated several situations without producing a high number of warrants.[148] In some situations, the OTP has been investigated for years without issuing any warrants. States may also properly give effect to the presumption of liberty by reserving the use of arrest warrants for situations where the suspect is a flight risk or danger to the integrity of the investigations. It is therefore artificial and arbitrary to conclude that the RBV is not actively investigating the Article 18(1) acts by referencing the current status of domestic arrest warrants or convictions.

147. By focusing on arbitrary indicators of inactivity, the Chamber also failed to analyse more relevant factors, such as whether there were indicia that national authorities were taking concrete steps to ascertain the facts and persons responsible, for example, by collecting data about victims, forensic analysis, and witness statements. If the Chamber had used this framework for analysing the materials, it would have concluded that there was a range of probative evidence concerning concrete steps that were taken to establish the facts in relation to the same or similar types of criminal acts notified to the RBV,[149] and that as such, the first step of its Article 17(1) analysis was satisfied.

148. The same error applied in connection with the Pre-Trial Chamber's focus on the rank of suspects identified by the RBV. First, the domestic investigations did not need to have identified all or particular suspects by this stage. The fact that current suspects have a 'low rank' does not

[148] The largest number of arrest warrants requested by the OTP in connection with a situation is currently six. Of these six, which were issued in the DRC situation, one remains unexecuted, one resulted in an acquittal and in another, the charges were not confirmed: https://www.icc-cpi.int/drc

[149] S[redacted]

preclude the possibility that the domestic authorities will identify high-ranked suspects, after the conclusion of proceedings against direct perpetrators. It is in fact a valid and recommended strategy for prosecutors to build a case against high-ranked suspects (who might be more remote from the alleged crime scene) by first securing convictions or evidence from perpetrators who were present. Such a strategy was recommended by the former Prosecutor (who was in office at the time that the RBV was investigating these cases),[150] and various experts who have commented on the perceived successes and failures of the ICC.[151] As a second point, as found by the Appeals Chamber, the rank of a suspect does not in itself reflect their responsibility or the gravity of the case.[152] The Appeals Chamber also underscored that physical perpetrators can also be deemed the persons 'most responsible' depending on the facts of the case: 'the imposition of rigid standards based primarily on top seniority may result in neither retribution nor prevention being achieved'.[153] Whereas the Chamber drew adverse findings from the information that some high-ranking persons had been interviewed as witnesses, not suspects,[154] in some cases at the ICC, ICTY and ICTR, the Prosecution has called witnesses of a higher rank to testify against accused persons who were their subordinate. This is a matter of prosecutorial strategy and it is neither appropriate nor feasible for ICC judges in The Hague to second-guess or sit in judgment of the particular strategy employed by domestic investigators and prosecutors, provided that there is indicia that the strategy is following a path of taking steps to establish the truth and accountability. Since the Chamber made no findings of unwillingness or inability, the interviews of high-ranking witnesses were evidence of active investigations. Similarly, since the imposition of disciplinary measures against military officers does not attract ne bis in idem and is an appropriate safeguard pending the outcome of an investigation, it was wrong for the Chamber to suggest that the fact that RBV authorities ordered such disciplinary measures shows that they are not actively investigating relevant alleged criminal acts.[155]

149. Thus, while the arrest of high-ranked suspects might be a sign of concrete investigations, the same conclusion also applies to other arrests or interviews, which aim to establish accountability for the acts in question. The arrest of high-ranked individuals also cannot

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[150] OTP, OTP Strategic Plan: June 2012-2015, 2013, at 6, which recommended first focusing on low level or mid-level perpetrators in order to build a "pyramid".
[151] W. FERDINANDUSSE & A. WHITING, 'Prosecute little fish at the ICC', *Journal of International Criminal Justice*, Vol. 19, No. 4, 2021, pp. 759-781.
[152] ICC-01/04-169, §§ 74-79.
[153] ICC-01/04-169, § 74.
[154] ICC-02/18-45, § 114.
[155] ICC-02/18-45, fn. 211.

constitute a legal criterion for demonstrating that the State is actively investigating acts, which have been characterised by the Prosecution as crimes against humanity. If this were true, then ICC cases targeting lower-ranked accused for crimes against humanity would be inadmissible.

150. The Chamber therefore committed a reversible error of law by focusing on labels and arbitrary benchmarks rather than the particular factual constellations of cases investigated by the RBV. It was also legally contradictory for the Chamber to rely on 'rank' while holding simultaneously that issues of gravity were irrelevant to its admissibility determination.[156]

151. Turning to relevant factors, which the Pre-Trial Chamber failed to assess in a positive manner, although the Pre-Trial Chamber acknowledged that the RBV had taken steps to identify victims (which is a necessary preliminary step in any investigations into alleged crime bases), the Chamber appeared to suggest that the domestic authorities acted improperly by doing so before investigating suspects.[157] The Chamber cited no legal principles in support of its approach. Following the guidance provided by the Appeals Chamber in *Ruto,*[158] the collection of information or evidence concerning victims is an indication that the authorities are taking concrete steps to investigate the case. Since the information received from victims may impact the authorities' assessment of the likely suspect or suspects, it is also reasonable to pursue such actions before allocating resources to inquiries concerning specific suspects.

152. Viewed holistically, the RBV's efforts in interviewing witnesses, taking measures to prevent further harm or interference by disciplining potential suspects and removing them from office, and locating information about persons who are best placed to provide information about the relevant acts, show that the RBV's actions fully satisfied the first prong of the admissibility test.

F. Ground 6: The Pre-Trial Chamber erred in law and manifestly abused its discretion as concerns the manner in which it defined and applied the test of 'unreasonable delay'

153. As set out above, the Pre-Trial Chamber expressly stated that it had made no findings concerning unwillingness or inability. The Chamber nonetheless referred to what it characterised as 'delays' in the advancement or resolution of certain cases, which it used to exclude these cases from its consideration as to whether the domestic investigations

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[156] ICC-02/18-45, § 36.
[157] ICC-02/18-45, § 114.
[158] ICC-02/11-01/12-75-Red, § 28.

substantially overlapped with the Article 18(1) notification.[159] Specifically, the Chamber noted that although the alleged conduct occurred in 2017, there had been delays and inactivity until the investigations were resumed in 2020/2021.[160]

154. In reaching this finding, the Chamber made a series of interlinked errors of law, namely:

⇒ The Chamber failed to provide a reasoned explanation as to the test or standards it used to assess whether there had been an unreasonable delay or inactivity in the progress of domestic investigations;

⇒ The Chamber erred by failing to give sufficient weight to the complexity of the alleged crimes, and intervening issues, including the COVID pandemic; and

⇒ The Chamber erred by placing too much weight on delays that occurred before the OTP provided sufficient information as concerns the likely contours of its investigations.

155. Regarding the first point, Article 17(2) and (3) confirms that delays are not in and of themselves fatal to an admissibility challenge or deferral. Instead, to trigger inadmissibility in the context of Article 17(2)(b), the Chamber must assess whether the delays are 'unjustified' and have occurred in circumstances which are 'inconsistent with an intent to bring the person to justice'. In the context of Article 17(3), it would be necessary to show that the delays result from a total or substantial collapse or unavailability of the national judicial system. However, the Chamber did not reach any findings supporting such conclusions. The Chamber also did not cite any alternative basis for assessing, in the first step of the admissibility assessment, a factor that pertains to the second step. The Chamber's failure to set out a legal and factual foundation for its reliance on delays invalidates these findings and the related exclusion of relevant case files.

156. Article 17(2)(b) also makes clear that the delay in question must be unreasonable in the circumstances since delays exist in legal proceedings throughout the world, including the ICC. This is consistent with Article 60(4) of the ICC Statute, which speaks of unreasonable or inexcusable delays on the part of the Prosecution. The Pre-Trial Chamber nonetheless failed to provide any explanation as to if and how it determined that the delays in question were unreasonable or inexcusable in the circumstances of the case.

157. The absence of sufficient reasoning on this point was then compounded by the Chamber's failure to refer to (and thus give weight) a range of relevant factors. First and foremost, the investigations in question occurred during the COVID pandemic. While the RBV

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[159] ICC-02/18-45, § 91. See also § 131.
[160] ICC-02/18-45, § 91.

judicial system continued to function, this clearly constitutes a valid justification for delays, as demonstrated by the Prosecutor's own request to reschedule certain meetings with the RBV during this period,[161] and various extensions of time that ICC Chamber has granted for the same reason.[162] Case law from the ICC and other international tribunals have also consistently found that the question as to whether delay is unreasonable or inexcusable must be assessed by reference to the complexity of the case and the sensitivities of conducting investigations in a confidential and secure manner.[163] Delays of several months and indeed years have been judged to be reasonable through this lens.[164] As part of its obligation to issue a reasoned opinion, the Chamber had a duty to consider the facts before it in light of such legal standards and to explain why the delays in question justified the exclusion of the impacted cases.

158. Finally, the Chamber placed a significant amount of weight on the existence of delays, which occurred before the Article 18(1) Notification was communicated to the RBV. It did not, however, make any finding that the subsequent proceedings were not genuine. In adopting such an approach, the Chamber failed to comply with the legal requirement that its admissibility assessment must be based on the facts in existence at the time its decision is issued.[165] It was not tasked to assess the state of investigations in 2020, but the state of investigations in June 2023. In the absence of any evidence that domestic authorities are currently failing to take steps to progress in these cases or that past delays would impede their ability to do so, the mere existence of past delays cannot trigger the exclusion of active cases from the Chamber's Article 17(1) consideration. Moreover, Article 18 prescribes the principles of primacy in favour of States. As such, there is no rule or principle that prevents a State from asserting its right to exercise jurisdiction over alleged criminal acts that have been brought to its attention through the Prosecution's notification.[166] The Statute itself enshrines avenues in Article 93 by which

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[161] ICC-02/18-16, § 6.
[162] ICC-02/04-01/15-1861, § 17.
[163] ICC-01/04-01/06-824, §§ 122-124; ICTY, *Perisic,* Decision on Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay, IT-04-81-PT, 23 November 2007, §§ 12-19.
[164] ICC-01/05-01/08-321, §§ 46-47; ICTY, *Perisic,* Decision on Motion for Sanctions for Failure to Bring the Accused to Trial Without Undue Delay, IT-04-81-PT, 23 November 2007, §§ 12-19.
[165] ICC-01/11-01/11-565, § 181; ICC-01/11-01/11-547-Red, § 41; ICC-01/04-01/07-1497, § 56.
[166] D. NSEREKO & M. VENTURA, 'Article 18 Preliminary rulings regarding admissibility', *in* K. AMBOS (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th ed., Verlag C.H. Beck/Hart Publishing/Nomos, 2022, pp. 1009-1032 at 20 (electronic version): 'What if a State has not investigated the criminal acts alleged prior to receiving the Prosecutor's notification but, prompted by the notification, now wishes to institute investigations into those acts? Is it precluded from requesting the Prosecutor to defer to its jurisdiction? It is submitted that it is not. The spirit and general tenor of the Rome Statute is to give due deference to State jurisdiction. Thus, a State that has not yet started investigations but is otherwise able and willing to do so must be given a chance to do so under Article 18(2). It is in this spirit that it may request, and the Prosecutor should furnish it with, additional information to enable such investigations'.

States may request the Prosecution to furnish evidence or information to help progress domestic investigations. This is what in fact occurred through the conclusion of the Memorandum of Understanding concluded between the RBV and the Prosecution.

159. It is thus legally erroneous for the Chamber to exclude cases from its consideration simply because the domestic authorities were able to employ this information to progress their investigations, in a manner that was consistent with Article 17(1) and the objective of establishing the facts and accountability. Such an approach would also have a chilling effect on the notion of positive complementarity: a State that attempts to actively engage with the Court by seeking information and assistance to help kick-start domestic investigations would risk creating a legal barrier to domestic prosecutions.

160. These legal errors have a significant impact on the outcome of the decision, as the Chamber recognised that the impacted cases did in fact overlap with the Article 18(1) notification.[167] The error therefore justifies the reversal of the decision in full.

VII. RELIEF SOUGHT

161. Accordingly, the RBV requests the Appeals Chamber to:

⇒ Reverse the Decision of the Pre-Trial Chamber; and

⇒ Reject the Prosecution's request to authorise the resumption of its investigations into the situation in Venezuela.

Respectfully submitted,

Yván Gil Pinto

Minister of Foreign Affairs of the Bolivarian Republic of Venezuela

Dated this 14 August 2023

At Caracas, Venezuela

[167] ICC-02/18-45, § 112.