International Criminal Court

Appeals Chamber

Situation: Bolivarian Republic of Venezuela I

ICC-02/18

Presiding Judge Marc Perrin de Brichambaut, Judge Piotr Hofmański,

Judge Luz del Carmen Ibáñez Carranza, Judge Solomy Balungi Bossa and

Judge Gocha Lordkipanidze

Appeals Hearing - Courtroom 1

Tuesday, 7 November 2023

(The hearing starts in open session at 9.08 a.m.)

THE COURT USHER: [9:08:07] All rise.

The International Criminal Court is now in session.

Please be seated.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:08:45] Good morning, to all.

Bonjour. *Buenas días*.

Court Officer, could you please call the case.

THE COURT OFFICER: [9:08:57] Good morning, Mr President, your Honours.

Situation in the Bolivarian Republic of Venezuela I, situation reference ICC-02/18.

And for the record, we are in open session.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:09:10] Thank you very much.

Good morning again.

My name is Marc Perrin de Brichambaut, I am the Presiding Judge in this appeal.

The bench is composed of Judge Piotr Hofmański, sitting on my right; Judge Luz del Carmen Ibáñez Carranza, sitting on my left; Judge Solomy Bossa, sitting on my right; and Judge Gocha Lordkipanidze, sitting on my left. I would like now to invite the

parties and the participants to introduce themselves for the record, beginning with the authorities of the Bolivarian Republic of Venezuela, *por favor*.

MR EMMERSON: [9:09:53] Good morning to your Honours, and everybody in the courtroom. My name is Ben Emmerson, I am lead counsel for the Bolivarian Republic of Venezuela. To my right is Minister Yvan Gil Pinto, the Minister of Popular Power for Foreign Affairs; and to his right, Larry Devoe Marquez, State Agent before the International Human Rights System and Legal Consultant to the Vice Presidency.

Also with us today from the government is Karin Garcia Carrasco, General Director of Human Rights Protection -- to Human Rights Protection of the Public Ministry.

Counsel now, sitting behind me is Venkateswari Alagendra. To her right is Aitor Martínez Jiménez. To his right is Mr Christophe Marchand. All three of the counsel I have mentioned will, at one point or another, be addressing some of the questions posed by the Court.

And finally, the support counsel are Señor Jorge Núñez and Señor Miguel Jaraiz.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:11:17] Thank you very much. Counsel for the Prosecution, please.

MS BRADY: [9:11:22] Good morning, your Honours, and good morning to everybody in the courtroom.

Appearing on behalf of the Prosecution, next to me we have, Ms Nivedha Thiru, associate appeals counsel; next to her, Ms Meritxell Regue, appeals counsel.

And then behind me in the second row Ms Alice Zago, trial lawyer and head of the Venezuela unified team; and next to her, Ms Cara Pronk-Jordan, senior legal coordinator in pillar A, and I am Helen Brady and I'm the senior appeals counsel for the Prosecution. Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:12:10] Thank you very much. And now the Office of Public Counsel for Victims, please.

MS MASSIDDA: [9:12:14] *Bonjour*, Mr President, your Honours. *Buenas días*. For the Office of Public Counsel for Victims appearing today, to my right, Mr Enrique Carnero Rojo, legal officer; behind me, Ms Ludovica Vetruccio, legal officer; and myself, Paolina Massidda, principal counsel.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:12:42] Thank you very much. If the composition of any team were to change during the different sessions of today, I ask that the parties and participants inform the Chamber about this at the beginning of each session.

I would now like to welcome everyone to this hearing of the Appeals Chamber.

I wish to inform everyone following this hearing via the Court's website that the broadcast will be delayed by 30 minutes, in accordance with the practice.

At this hearing, the Appeals Chamber will receive submissions from the parties and the participants in relation to the appeal brought by the authorities of Venezuela against Pre-Trial Chamber I's "Decision authorising resumption of the investigation pursuant to Article 18(2) of the Statute" rendered on 27 June 2023. I shall refer to this decision as the "impugned decision".

Before inviting parties and participants to make their submissions, I will briefly summarise the background of these appellate proceedings.

The appeal of Venezuela arises from the decision of Pre-Trial Chamber I, which authorised the Prosecutor to resume his investigation into the situation in Venezuela. This was in relation to a request made earlier by the authorities of Venezuela to the Prosecutor for a deferral of his investigation. In that request the Venezuelan authorities informed the Court that they are investigating or have investigated

Venezuelan nationals or others within Venezuela's jurisdiction with respect to alleged punishable acts covered by the Prosecutor's intended investigations. Subsequently, the Prosecutor seized the Pre-Trial Chamber with an application for authorisation of resumption of his investigation. The Pre-Trial Chamber then issued the impugned decision, in which it concluded that, I quote, "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". End of quote. The authorities of Venezuela filed the present appeal against this decision.

The Appeals Chamber has received written submissions on this appeal from the State authorities, from the Prosecutor and from the Office of Public Counsel for Victims, as well as representations from victims.

That is the background that leads to today's hearing.

I turn now to the substance of the appeal.

In its appeal against the impugned decision, Venezuela raises six grounds of appeal.

Under the first ground of appeal, Venezuela argues that the Pre-Trial Chamber erred in failing to impose on the Prosecutor the burden of persuasion.

Under the second ground of appeal, Venezuela argues that the Pre-Trial Chamber erred in failing to consider relevant information, including documents which were provided only in Spanish.

The third ground of appeal concerns the Pre-Trial Chamber's reliance on the States' referral to deduce the temporal scope of the Prosecutor's Article 18(1) notification.

The fourth ground of appeal raises issues of the degree of mirroring between the Court's investigation and the domestic proceedings with respect to, among other elements, contextual elements of crimes against humanity.

Under the fifth ground of appeal, Venezuela submits that the Pre-Trial Chamber erred in basing its assessment as to whether Venezuela was conducting "active investigations" on irrelevant factors and failing to give any weight to relevant factors. Finally, the sixth ground of appeal concerns the Pre-Trial Chamber's findings that there were "periods of unexplained investigative inactivity" in the domestic proceedings.

Venezuela requests that the Appeals Chamber reverse the impugned decision and reject the Prosecutor's request to authorise the resumption of his investigation.

Turning now to the conduct of these proceedings, I wish to recall that in the "Directions on the conduct of the hearing", which was issued by this Chamber on 17 October, in these directions, the Appeals Chamber indicated both the order and time allocated to the parties and to the OPCV to address the Appeals Chamber on each day of the hearing.

The speakers are requested not merely to repeat arguments already made in their fillings, but to make submissions on the issues which are outlined in the directions. As indicated in the directions, those questions are of guidance. However, I shall point out that these legal issues were carefully selected for the hearing, which means that the Appeals Chamber is particularly interested in receiving the parties' and participants' further submissions on these issues. Therefore, I encourage the speakers to follow these questions and to structure their submissions accordingly.

Towards the end of the hearing tomorrow, the parties and participants will be able to make closing remarks if they so wish. We shall allocate seven minutes of our final session to each party and participant for that purpose.

The closing remarks shall then begin with those of the Prosecutor, followed by closing remarks by the OPCV and, at the end, the closing remarks of the representative of the

Venezuelan authorities.

I will remind you to please speak slowly for the benefit of the interpreters. We are fortunate to have today a Spanish interpretation. I point out that at this hearing, therefore, we will have three different languages.

I also note that the Appeals Chamber would like to stay as much as possible in open session during the two-day hearing. For that reason, the parties and participants are invited to refrain from referring to information that has been classified as confidential unless it is absolutely necessary.

If there is a need to refer to such information, please do alert the Chamber before starting with your substantive submissions every day in order to allow arrangements to be made in advance for closed or in private sessions.

May I also remind the parties and participants that they are expected to complete their submissions within the indicated time frame set by the Appeals Chamber.

I emphasise the need to follow the schedule set out in the directions as there are a number of issues to be discussed in the limited time available to us.

The court officer will be monitoring the time and will kindly indicate to the party or participant when this time is about to expire.

We shall now move to the substantive issues.

I wish to recall that the following issues were identified for guidance to the parties and participants:

(a) whether the Prosecutor's Article 18(1) notification must identify specific criminal acts which he or she intends to investigate;

(b) whether such notifications must identify criminal acts and specific defendants in relation to which the domestic investigations of the State concerned are expected to, I quote, "have reached the point of identifying particular suspects or defendants" -- end

of quotation;

(c) whether the provision that a State's request for additional information from the Prosecutor "shall not affect the one-month time limit" for making a request for deferral, under Rule 52(2) of the Rules of Procedure and Evidence. This implies that such additional information does not constitute part of the Prosecutor's Article 18(1) notification.

So these are the first three questions which we should consider during this initial session.

And I would now like to give the floor to the state's representative.

You have the floor, sir.

MR EMMERSON: [9:22:52] Mr President, honourable judges, this appeal raises extremely important issues affecting the practical implementation of the complementarity principle underpinning the Rome Statute system.

As the Pre-Trial Chamber conceded at paragraph 33 of its ruling, proceedings under Article 18 engage the sovereign right of States to investigate and prosecute their own nationals and others within their jurisdiction in relation to crimes allegedly committed on their territory.

The essence of the Pre-Trial Chamber's ruling is that in order to sufficiently mirror the Prosecutor's proposed investigation, Venezuela should have investigated or be investigating the alleged crimes which constitute the presumed crime base that the Prosecutor himself intends to investigate.

The core reason why this amounts to a reversible error of law on the facts of this case is that the Prosecutor's Article 18(1) notification provided no information whatsoever on the actual crimes he proposed to investigate.

Moreover, the information subsequently provided under Rule 52(2) pursuant to a

request from Venezuela didn't constitute or form any part of the Article 18(1) notification and did not in any event cure the defective Article 18(1) notice because it cited what it described as similar allegations made in public-source materials which it expressly confirmed to be different allegations to the ones considered by the Prosecutor in reaching his decision.

It was not a valid Article 18(1) notice either from a legal perspective or in substance.

At paragraph 118 of its ruling, the Pre-Trial Chamber held that, "high-ranking officials are expected to be the investigation's focus." That simple proposition lies at the very heart of the Pre-Trial Chamber's reasoning and we respectfully submit that it also lies at the root of each of the reversible errors in the decision.

But, Mr President, honourable judges, the Prosecutor has never identified any high-ranking official that he suspects of involvement in any offence that he intends to investigate. Indeed, he has consistently emphasised that his examination of the situation never reached the stage of identifying any individual suspect.

Whilst the scope of the Prosecutor's proposed investigation remains at this level of generality, it is quite impossible in any practical sense for Venezuela to respond as envisaged and required in Article 18(2) or for the Pre-Trial Chamber to have properly evaluated the Prosecutor's resumption request on its evidential merits.

The procedural scheme under the Rome Statute for ensuring respect for the principle of complementarity, we say, has simply broken down in this case.

As we point out in paragraphs 52 to 55 of our appeal brief, the Pre-Trial Chamber correctly found that the Article 18(1) notification communicated to Venezuela in 2021 had failed to provide sufficiently detailed information. It said only that the Prosecutor had determined that there was a reasonable basis to believe, and I quote that "since [...] April 2017, civilian authorities, members of the armed forces and

pro-government individuals have committed [...] crimes" pursuant to Article 7(1) of the Rome Statute.

That was the extent of its particularisation.

According to the Pre-Trial Chamber, as it rightly held, the information set out in the Article 18(1) notification was just insufficiently detailed because it lacked -- and I quote again, because it lacked "specific dates [or] locations of incidents, approximate number of victims, or alleged individuals [or] groups responsible for specific incidents".

It was devoid, in other words, of any relevant information that would enable Venezuela to either respond under Article 18(2) or to carry out investigations in response.

It certainly can't be said that the Pre-Trial Chamber would have reached the conclusion that it, in fact, did if it had confined its consideration of the sufficient mirror principle to the original Article 18(1) notification. Indeed, it's plain from the ruling that the opposite is true.

However, the Pre-Trial Chamber, went on, we say quite erroneously, to characterise the communication of certain further information in 2022, in response to a request from Venezuela under Rule 52(2) as if that were a further or -- and sufficient Article 18(1) notification or somehow a valid amendment to the original Article 18(1) notification.

We say, for reasons I shall turn to, that was completely the wrong approach.

The further information that was conveyed by the Prosecutor in 2022 was not either an appropriately formulated or substantiated Article 18(1) notification in the formal sense for the reasons we've set out in our appeals brief; but, of even greater importance, it did not even purport to contain any information relating to the crimes

the Prosecutor proposes to investigate, which is what Article 18(1) expressly requires.
To the contrary, the information provided under Article 52(2) in response to a request for clarification from the State, consisted of a selection of open-source reports and a table of allegations drawn from those reports and other open-source documents which the Prosecutor said could constitute crimes under the Statute.
However, the covering pages of each document, and including the selection, expressly stated that this table consisted of, and I quote, "allegations [...] that were 'of a nature and gravity similar'" -- similar -- "'to those the Office has relied upon in reaching its determination [...]'"
Now, it's quite clear what that means and what it can only mean. The Prosecutor himself formally accepted that the alleged crimes he intended to investigate and on which he reached his determination to make a resumption request were different -- albeit similar, they were different from the crimes contained in the information supplied in 2022 in response to Venezuela's request.
It is thus, we say, quite plain from the Prosecutor's own description that those examples were not in fact the crimes that he had relied upon in reaching his determination; he said so in terms. In other words, they were not the crimes he actually proposed to investigate when he filed his 18(1) application and sought an order for resumption.
That's not mere words -- it's quite clear they were not the crimes -- and it becomes extremely important when one sees Venezuela's response, because, as we will demonstrate during the hearing, of the crimes he selected from the open-source material, nearly all of them were investigated by Venezuela either already or in response to the notification, demonstrating beyond any doubt Venezuela's willingness and ability to carry out such investigations. But they were not the crimes

that the Prosecutor had identified.

It's obviously quite impossible for a State to provide an effective Article 18(2) notification or seek a meaningful deferral when the Prosecutor has supplied nothing more than a decoy list of alleged crimes to work from.

States have the right to be properly and sufficiently notified of the actual offence the Prosecutor suspects and intends to investigate. The information must be set out in the Article 18(1) notification.

But the entire procedure mandated by Article 18(1) and (2) and Article 53 depends on the service of a valid notification providing sufficient information to the State about the crimes the Prosecutor actually intends to investigate in order for the State to formulate its notification and a deferral request and to investigate those crimes for itself.

A general indication of the category of crime that make up the suggested crime base that the Prosecutor wishes to investigate is evidently insufficient for the purposes of the scheme set up under Articles 18 and 53. It cannot work that way.

So we submit that Article 18(1) notification requirement just cannot be met by a mere recital of the words of the Rome Statute. That would be to afford the Prosecutor an effectively unchallengeable discretion. And as we submit -- and as we shall submit, that involves a usurpation of the judicial function and a mission creep on the part of the Office of the Prosecutor.

So with those brief overarching introductory remarks, let me turn within that framework to address the specific questions posed to the parties.

I'd like, if I may, just to group questions 1(a) and (b) together in my submissions because they are so closely related.

The starting point for this discussion is the axiomatic proposition that the adoption of

an unduly permissive interpretation of Articles 18(1) and Rule 52 would deprive States of a key procedural protection which was intentionally incorporated into the Statute by the States that signed up to it, as a precondition for surrendering their sovereign right to prosecute their own nationals and others within their jurisdiction, in respect of crimes committed on their territory. That right is surrendered subject to a strict statutory regime which requires effective judicial supervision and respect for the *audi alteram partem* principle that a State must be notified, must have a fair opportunity to respond to the allegations that are being made, and, must, indeed, have a fair opportunity to investigate for itself the actual crimes the Prosecutor wishes to address.

Due to the importance of the complementarity scheme under the Statute, we say Article 18 and particularly Article 18(1) must be interpreted and applied as a bright line rule rather than being subjected to the kind of legal fudge that characterises the Pre-Trial Chamber's approach to these issues.

If it was to be sufficient for the Prosecutor to supply a list of crimes different --

THE COURT OFFICER: [9:37:11] Excuse me, counsel, you have one minute left.

MR EMMERSON: [9:37:13] -- from those he actually intends to investigate, this would drive a bulldozer through the complementarity protections that the State Parties expressly deemed to be necessary.

In the present case, the implications of the Prosecutor's failure to follow the procedure were played out in the Pre-Trial Chamber's decision. In paragraphs 108 and 109, the Chamber concluded that it was for Venezuela to show that its domestic investigations sufficiently mirrored the scope of the investigation. It then found against Venezuela on the basis that it hadn't so far targeted sufficiently high-ranking officials.

We say that in light of the Article 18(1) notification and its scope, the Pre-Trial

Chamber's decision was based on nothing more than speculation. The purpose of Rule 52 is not to create a vehicle for the Prosecution to expand or modify the scope of its Article 18(1) notification, it is, as the Court's question points out, subject to the express provision that a Rule 52 request does not affect the one-month deadline for submitting a deferral.

We say --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:38:51] Thank you very much, counsel. I will suggest you stop here. You might want to revert to those points at a later stage in our conversations.

I wish to extend some apologies for those present here. As you may have noticed, we've had an interversion between the Spanish and the English channel, which had an impact on the work of the transcribers. I'm very grateful to the transcribers to have adapted to this and caught up, and, therefore, I think everybody has understood the proper numbering in terms of channels.

Thank you very much for that.

And now I would like to give the floor to the Prosecution for 15 minutes. Thank you very much.

MS THIRU: [9:39:35] Good morning, your Honours, I will address the Chamber on the first issue concerning the content of the Article 18(1) notice to States. My colleague Ms Regue will address you on issues 2 and 3 regarding the Chamber's approach to translation and certain documents. And tomorrow, Ms Brady will address you on issues 4 and 5 regarding the State's investigation of the contextual elements of crimes against humanity and certain international crimes. And as for any other further issues that Venezuela raises, we will respond to those in the time allotted to us tomorrow afternoon.

Turning then to the Prosecution's Article 18(1) notice to States and whether the notice must identify the specific criminal acts which the Prosecutor intends to investigate. Your Honours, our submission is no, not in the way that Venezuela frames this issue. Venezuela submits that the notice must only contain those incidents that the Prosecution will or concretely intends to investigate or that sets out the presumed base of its investigation.

But we respectfully disagree. The notice must provide sufficiently specific parameters showing the scope of the Prosecution's intended investigation. It is not required, as a matter of law, to identify certain specific acts which the Prosecution intends to investigate. Whether a notice should include such incidents or not is a matter of fact, and this will depend on the circumstances of each situation.

I will explain how this interpretation arises from a purposive, textual and contextual reading of the provisions.

Firstly, the purpose of the Article 18(1) notice is very specific. Its purpose is not to comprehensively map out the presumed crime base of the Prosecution's investigation, as my learned friend has suggested, it is not intended to confine the Prosecution's investigation, and it is not a vehicle for a State to dispute whether in fact the alleged crimes have occurred, as Venezuela has done in this situation.

No, your Honours, the purpose of the notice is to enable States to decide whether to request a deferral and to be able to provide supporting material. To achieve this, the notice only needs to contain a sufficient level of detail about the scope of the investigation. And "scope" implies a range or an area of operation; not a detailed or prescriptive listing of the activities within that range.

We also glean this from a textual reading of the provisions, which is my second point. The provisions are broadly worded. They require the notice to inform States about

acts that may constitute crimes, that are relevant for the State to be able to request a deferral. This is in Article 18(1) and (2) and Rule 52(1). These provisions allow the Prosecution an appropriate degree of flexibility as to how much detail to provide, based on the circumstances of the situation and based on the Prosecution's statutory obligations to protect individuals.

And this brings me to my third point, which is that this flexibility is necessary because of the context in which Article 18(1) proceedings occur. The notice is issued when the Prosecution has just concluded its preliminary examination, or PE, and decided that the threshold is met to commence the investigation.

Until this point, the Prosecution did not formally investigate and it could not utilise its full suite of investigative powers under the Statute. So it would be unreasonable to expect that the Prosecution at this stage can identify specific perpetrators, set out the full factual scope of its investigation. It would not be able to.

Its investigation also cannot be limited to the facts that it could ascertain at this nascent stage. This goes against the Prosecution's obligation and truth-seeking function to investigate all relevant facts in a situation as a whole, including incriminating and exonerating ones. And the references to that obligation is at item 1 of our list of authorities that we filed this morning.

So the law recognises that the contours of the Prosecution's investigation will be vague at this stage. It therefore only requires the Prosecution to identify potential cases that are likely to be the focus of its investigation. Pre-Trial Chambers have applied this approach consistently in the three deferral requests that have been brought before the Court. The Article 15 jurisprudence also recognises the limitations at this early stage. This is cogent and consistent jurisprudence, your Honours, and there is no reason to depart from it.

In this situation, the Pre-Trial Chamber correctly applied the law. It found Venezuela received sufficiently specific information to make a deferral request. The Prosecution did not just include a pithy statement in an Article 18(1) notice amounting to two lines, as my learned friend has suggested. Its 18(1) notice was not issued in a vacuum. I will come to that a bit later, but first of all, the 18(1) notice attached a summary of the PE findings and the Prosecution provided additional information under Rule 52 which provided the list of 124 sample cases.

Together, these documents set out the parameters showing the scope of the Prosecution's intended investigation. They were not mere speculative indications of where the investigation would go; they were specific parameters that were meaningful and that Venezuela could respond to.

They included time frames and geographic scope, the groups of persons allegedly responsible, the crimes against humanity that appeared to have been committed.

The parameters included factual details of the underlying crimes and facts relevant to showing a state policy to commit a systematic attack against a civilian population.

The parameters were also demonstrated by the list of sample cases concerning the treatment of persons in detention.

These were taken from open sources so that the Prosecution could continue to comply with its obligations to protect individuals. And these incidents were similar in nature, gravity and pattern of allegations to those the Prosecution had examined.

The Prosecution expressly invited Venezuela to provide information regarding these allegations and any other proceedings that Venezuela considered relevant. This list -- the references to that information that I've characterised is at item 2 of our list.

Now the sample list was not a decoy; it was not there to distract Venezuela by referring to cases that the Prosecution may never investigate. No. It was intended

to provide a meaningful comparison between what Venezuela was doing and what the Prosecution intended to do.

Venezuela was able to respond to the request for information and it provided over 25,000 pages of material over the course of a three-year consultation process. So it wasn't responding to an Article 18(1) notice in a vacuum completely unaware of the scope of the Prosecution's investigation. It had been afforded every opportunity to request information and it was provided with that information.

This showed Venezuela understood the scope of the Prosecution's intended investigation and suffered no prejudice. And, your Honours, Venezuela's arguments concerning the content of the Article 18(1) notice could be rejected on that basis alone.

But I turn now to the second question, which is whether the notice must specify criminal acts and defendants for which the State's investigations should have reached the point of identifying particular suspects or defendants.

And, your Honours, we read this question as asking whether there must be a symmetry in the detail provided by the Prosecution and the detail provided by Venezuela under Article 18.

Venezuela argues that this symmetry is necessary, but we respectfully disagree.

First of all, the Prosecution and the State are not in the same position in the Article 18 process. Their information will be tailored to their respective purposes.

As I've already mentioned, the Prosecution's purpose in issuing the Article 18(1) notice is to give a State sufficient information to be able to request a deferral, and, at this stage, the Prosecution can only provide parameters of potential cases to show the scope of its intended investigation.

By contrast, the State's purpose in making a deferral request under Article 18(2) is

a very different one. The State aims to demonstrate that its investigations and prosecutions sufficiently mirror the scope of the Prosecution's intended investigation. To meet this burden of proof, the State must show an advancing process of investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality in a situation, including patterns and forms of criminality. And this was the test most recently endorsed by the Appeals Chamber majority in the Philippines Article 2 judgment at paragraph 106.

The test inherently requires the State to provide details of actual cases and, so, yes, the jurisprudence recognises that the Article 18 process will require the Court to compare two different sets of information: the Prosecution's parameters on the one hand and the State's information about actual cases on the other.

Chambers have not found any error in this approach. And I refer to the cases at item 3 of our list.

The Chamber in this situation undertook the correct comparison. Contrary to what Venezuela claims, the Chamber did not require it to have identified specific defendants or to have taken specific steps against them as a matter of law. The Chamber noted that in most of the cases suspects had not yet been identified, but this was relevant to whether Venezuela could show an advancing process in its domestic activities.

This observation was a reasonable one based on the materials, and it was not determinative in any event. The Chamber undertook the correct fact-specific analysis and it did not err.

Your Honours' third question is whether the one-month time limit for a State to request deferral means that additional information does not constitute part of the Article 18(1) notice. Our answer is no.

Your Honours, the Article 18 process is designed to facilitate dialogue and exchange so that the State and Prosecution can request and receive relevant information from one another consistently with the goals of complementarity.

The one-month time limit was not meant to be an immovable deadline or a cut-off point for the information that the Prosecution and State could exchange. If it were, this would render Rule 52(1) meaningless.

The time limits were introduced to ensure that States could not use the deferral process as a dilatory tactic to derail ICC investigations. And the reference to that drafting history is at item 4 of our list.

So when Chambers assess the sufficiency of information, they will provide the substance of the information provided in its totality and not the form that it took.

For example, in the Philippines situation, the Appeals Chamber majority found that even the information in the Prosecution's Article 18(2) request that was filed after the State had made a deferral request, even this information provided the State with sufficiently specific notice regarding certain crimes. This is at paragraphs 191 to 193 of that judgment.

The Chamber in this situation applied the same approach. It correctly considered the additional information provided by the Prosecution and found that this, together with the Article 18(1) notice, gave Venezuela sufficiently specific notice of the scope of the Prosecution's intended investigation.

Your Honours, I will wrap up by reiterating a very important point that I made at the start; which is, regardless of what Venezuela says the Article 18 notice should have contained, its own actions demonstrate that it understood the scope of the Prosecution's intended investigation, and that this was evident throughout the three-year course of communication between it and the Prosecution; and, yet, as the

Chamber found, its investigations did not sufficiently mirror the scope.

THE COURT OFFICER: [9:54:48] Excuse me, counsel, you have one minute left.

MS THIRU: [9:54:51] I am done now.

Your Honours, those are my submissions on the first issue, unless you have any questions I can assist you with at this stage.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:54:59] Thank you very much. We will come back to questions at a later stage.

I would like now to give the floor to the counsel of the OPCV, please. You have 10 minutes. Thank you very much.

MS MASSIDDA: [9:55:12] Thank you very much, your Honour.

Mr President, your Honours, the first set of questions relates to the core of the assessment a Chamber must undertake in order to determine whether or not the principle of complementarity is satisfied.

Starting with letter (a), we submit that the Prosecutor's Article 18(1) notification must not identify specific criminal acts intended for investigation because this is not always possible at the moment of starting an investigation.

We amply argued on this point in our written observations, and we maintain, that the degree of specificity required from the Prosecutor to assess admissibility is not the same when dealing with the situation and a case.

At the time of an Article 18(1) notification, the Prosecutor can only often identify only types of criminality allegedly committed within a given situation. In fact, the notification takes place immediately after the opening of any investigation at the time when no evidentiary material *stricto sensu* may have been collected yet.

In this regard, Chambers have consistently found that prior to the start of an actual investigation, it is not possible to define the exact parameters of a case in terms of

conduct and identified suspects for the purpose of prosecutions, and I refer to decision 3, 7 and 17 on our list of authorities filed yesterday.

Only during the investigation, once evidence is collected, the Prosecutor will identify specific criminal acts and specific defendants. To require otherwise would amount to putting the cart before the horse. There is no need, in our submission, for the Prosecutor to include in the Article 18(1) notification details such as the dates and locations of the incidents eventually falling within his investigation and reference to the same types of conduct suffices.

Addressing now the requirement of an Article 18(1) notification to answer letter (b) of your query, we understand the question as related to two separate issues: one, whether the Prosecutor actually needs to identify specific defendants in his notification; and, two, whether the domestic investigations of a State concerned by an Article 18(1) notification must have reached the point of identifying particular suspects or defendants.

In relation to the first issue, the matter is addressed in our written submission in subground of appeal 4, and we maintain that the Prosecutor needs to identify only groups or categories of individual and not specific defendants.

In this regard -- as also recalled by the Prosecutor a few minutes ago -- the Appeals Chamber, in this same composition in the Philippines situation, has recently recalled that the appropriate test for preliminary admissibility rulings requires verification that, I quote, "domestic criminal proceedings must sufficiently mirror the scope of the Prosecutor's intended investigation."

As a consequence, in our submission, an Article 18(1) notification must contain the temporal, geographical and material parameters of the investigation intended by the Prosecutor, as well as the parameters of criminality considered relevant.

And again in the Philippines situation, the Appeals Chamber found, I quote: "...the Pre-Trial Chamber correctly assessed whether there exists an advancing process of domestic investigations or prosecutions of the same groups or categories of individuals in relation to the relevant criminality within the situation which sufficiently mirrors the scope of the Prosecutor's intended investigation ..." End of quote.

At paragraph 67 of the impugned decision, the Pre-Trial Chamber clarified that the correct understanding of the sufficiently mirror test, is that in order to show that it is investigating the potential cases that the Prosecution may investigate, domestic investigation must substantially cover the same conduct and the same persons/groups.

Accordingly, Article 18 proceedings do not require a complete symmetry between the two investigations, also in terms of the specific identity of the defendants. Instead, what is required is that at least the same categories of individuals are targeted.

The Prosecution has to provide information that is specific enough for the relevant State to exercise its right under Article 18 and representative enough of the scope of criminality that it intends to investigate in future cases.

In the circumstances of this situation, the information provided by the Prosecution in its multiple exchanges with Venezuela was sufficiently specific for the State to be informed of the degree of coverage required by its domestic proceedings.

In particular, and as opposed to what 20 minutes ago when Venezuela has argued as being at the level of generality, the sample of alleged incidents provided by the Prosecution all went so far to contain information of the victim, date and location for each alleged incident.

Therefore, we do not see how the Pre-Trial Chamber could have reached a different

conclusion other than Venezuela had received sufficient information to exercise its rights under Article 18. Venezuela was aware of the scope of the Prosecutor's intended investigation and understood that it would only meet the test under Article 17 of the Statute by investigating and prosecuting the same groups or categories of individuals in relation to the relevant criminality within the information provided by the Prosecutor.

In relation to the second issue on whether domestic investigation must have reached the point of identifying particular suspects or defendants, we submit that the domestic investigations do not necessarily need to have reached that point.

This is not a requirement under the applicable legal framework. What is required under the applicable legal framework is that the State provides relevant, probative, and sufficiently specific information showing that "tangible, concrete and progressive investigative steps" have been undertaken.

And I refer to decision 10, 11, 13, 16, 17 and 18 on our list of authorities.

These assessments cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future. It must be based on concrete facts as they exist at the time of the deferral request.

There is no objective formula or criteria for which one has to build a box and tick "fulfilled" or "not fulfilled".

Only a holistic assessment of the national investigations will lead to determine whether or not a deferral is warranted.

In this regard, the Pre-Trial Chamber correctly concluded that Venezuela appeared "to have taken limited investigative steps" --

THE COURT OFFICER: [10:04:17] Excuse me, counsel, you have one minute left.

MS MASSIDDA: [10:04:22] -- based on the inconclusive information provided by the

State and by the fact that the delay in carrying out domestic investigations made it impossible to identify any specific suspect in about three quarters of the cases.

I have four paragraphs, your Honour, and I beg for the indulgence of the Chamber for 30 seconds more.

Much obliged.

Finally, on point (c), Article 18(2) proceedings are meant to ensure that there is a continued dialogue between the Prosecutor and the State concerned to guarantee that there are no impunity gaps.

From this point of view, the one-month time limit established in Article 18(2) for States to make a request for deferral is not meant to limit this dialogue. The wording of Rule 52(2) is clear:

"A State [...] request [for] additional information [...] shall not affect the [...] time limit".

However, this does not mean that the additional information provided by the Prosecution does not constitute part of the Article 18(1) notification.

In our view, on the contrary, such additional information elaborates or clarifies the reasonable basis found by the Prosecutor to commence an investigation and completes the notification.

In conclusion, the Pre-Trial Chamber was correct in its assessment of the content of the Article 18(1) notification and of the elements Venezuela should have proven to show that domestic proceedings sufficiently mirror the Prosecutor's intended investigation.

This concludes my answers to the questions, and thank you very much for your indulgence, your Honour

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:06:18] Thank you very much. I thank the counsel for the OPCV and would like now to give the floor back to the

State Representative in order to respond to the submissions of the Prosecutor and the OPCV.

You have 10 minutes, please.

MR EMMERSON: [10:06:36] These responses are going, with your Honour's permission, to be provided by Monsieur Marchand, in the first instance, and Mr Martínez to follow.

MR MARTÍNEZ: [10:06:52] Thank you, Mr President, your Honours.

The systemic interpretation of Article 18 and Rule 52(2) is the following:

Article 18(1) is an act aimed at coordinating the international community as a whole, hence the expressed indication that the notification is addressed to States Parties and all those who would normally exercise jurisdiction over the crimes concerned, indicating to them, of course, the specific acts to be investigated.

It would be a mistake to think that notification under Article 18(1) is addressed only to the State in whose territory the acts were committed.

We must not forget that multiple criminal jurisdictions may be established in the international community in respect of one act: territorial jurisdiction, jurisdiction by active personality, passive personality jurisdiction, protective jurisdiction, and of course, universal jurisdiction.

In drafting the Rome Statute, States established procedures to ensure the principle of complementarity and the primacy of national jurisdictions.

One of them was that the notification of Article 18(1) should be made to the entire international community. In this way, all the States can report within one month whether their jurisdiction is investigating any of the specific cases set out in the notification, whether by territorial jurisdiction, active personality, passive personality, protective jurisdiction or universal jurisdiction, and thus all the States of the

international community that are notified of the specific cases can trigger the second step and approach the OTP on the basis of Rule 52(2) to seek further information of the specific cases that that State is investigating or has prosecuted.

Therefore, the notification of Article 18(1) is a call for coordination among the jurisdictions of the international community in relation to potential cases to be investigated, so that the notification must include specific cases, and, thus, Rule 52(2) becomes only a tool to complete information vis-à-vis bilateral between the OTP and a particular State seeking to know more about a case or cases notified under Article 18(1) that are under its jurisdiction.

This is the systematic interpretation of both provisions. However, the notification of Article 18(1) without specifying cases in the situation of Venezuela breaks with this logic. This notification did not include specific cases; so States of the international community could not effectively know whether any of the cases that the OTP intends to investigate were already under its jurisdiction. Only Venezuela resorted to Rule 52(2), so only this jurisdiction had access to annex 2, which sets out a list of incidents.

The other States of the international community are still unable to inform the OTP whether or not they are hearing the same cases, because they were not duly informed in the Article 18(1) notification.

And I'm not talking about speculation, I will give a concrete example. Not long ago it was reported in the press that alleged Venezuelan victims had applied through the principle of universal jurisdiction to the Argentinian courts. However, due to the incorrect notification of Article 18(1), without exposing to the international community the specific cases over which the jurisdictions of the world must coordinate, Argentina has not been able to know whether its case is a mirror image of

one of the cases that the OTP intend to investigate.

Of course, Rule 52(2), and the transfer of a specific incident in annex 2, was carried out vis-à-vis Venezuela; so Argentina has not been aware of this incident and could be violating *non bis in idem* as well as being in breach of the principle of complementarity.

Your Honours, if this Appeals Chamber confirms that an Article 18(1) notification to States Parties and jurisdictions involved could be made without including concrete cases, it will set a precedent contrary to the spirit of coordination of the jurisdictions of the international community that resides in the Article 18(1) notification.

The result would be multiple national proceedings overlapping with the ICC without regard to complementarity, along with violations of the principle of *non bis in idem*.

Thank you.

If you agree, Mr President, I will give the floor to my colleague, Mr Marchand.

MR MARCHAND: [10:12:46](Interpretation) Mr President, your Honours, I would like to pass from the language of Shakespeare to the language of Voltaire.

Yes, we have said that the Prosecution does have a responsibility to identify necessary matters. No, the Prosecutor cannot affirm that it provided Venezuela with the necessary information, in particular within the framework of the preliminary examination as claimed. In reality, Venezuela never had such an adequate preliminary examination.

On 2 October 2020, the Prosecutor sent a questionnaire to the State of Venezuela, requesting that it respond to a series of questions about the investigations underway at national level, a first step necessary in the dialogue which is required by complementarity.

Immediately Venezuela and its institutions got to work and placed themselves at the

disposal of the Prosecution in total transparency and with the constant concern of applying in good faith the Rome Statute, which provides for the primacy of jurisdiction of national criminal courts.

And what I would like to say to your Court on this day is that within the case of Venezuela the decision -- the impression that we have is that the decision to open an investigation was taken before the dialogue with the State, which -- and it just started after the investigation.

Now, in the question of 2 October 2020, the Prosecutor gives the impression that there's a large and detailed investigation with the OPCV and there was dialogue over three years. This is something we contest.

In fact, this dialogue never existed and minimal necessary information to make such a mirroring exercise was not there at the preliminary stage.

From 30 November 2020, Venezuela presented its first report; thereafter, four other reports in this first semester of *2021, making up more than 600 pages sent to the Prosecutor.

Venezuela invited the Prosecutor to visit the country and asked for road maps and proposed the creation of working groups and pilots.

And the Prosecutor did not react positively to any of these proposals. And, unfortunately, while the Prosecutor announced in telematic colloquy that he was going to open an investigation before finalising the mandate and that there would be a request for cooperation under Article 93(10) of the Statute.

And there was no response to them, while the Pre-Trial Chamber noted the fruitful cooperation of Venezuela.

In its observations of 15 June 2021 on the decision of 14 June 2021, the Prosecutor wrote that, in reality, it had already taken a position without any dialogue with the

States. And I quote here:

"... within the framework of its evaluation [...] concluded in 2020, the Office of the Prosecutor had made findings, in its internal reports, [concerning] the lack of independence and impartiality of the judicial authority, as well as the efforts aimed to protect the perpetrators of crimes, and the underlying factors made it possible to establish a State policy directed against the civilian population".

On 29 July, and still within the framework of the preliminary examination, the Prosecutor organised a meeting with state representatives and legal advisors explaining that it would not automatically follow the decision of its predecessor, but that first of all, it would visit Venezuela, that it would meet the authorities and thereafter it would take its decision.

Nevertheless, on 3 November 2021 --

THE COURT OFFICER: [10:17:04] Excuse me, counsel, you have one minute left.

MR MARCHAND: [10:17:08](Interpretation) Thank you.

Nevertheless, on 3 November 2021, so this famous first visit, it brusquely announced that it had decided to conclude the preliminary examination and open an investigation, asking that all meetings with the authorities be cancelled.

There was no real dialogue that ever took place with the Republic in the preliminary stage, your Honours, and it's once again the Prosecutor who explains in his observations that a meeting took place in 2020 with the Prosecutor General of Venezuela, between October 2020 and May 2021, diplomatic meetings took place in The Hague with the ambassador. Full stop. It's insufficient. It's not much.

Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:17:50] (Interpretation) Thank you, counsel.

I'm now going to ask my colleague judges if they have any questions that they would like to put to the parties and participants.

Your Honour, Judge Ibáñez.

JUDGE IBÁÑEZ CARRANZA: [10:18:16](Interpretation) Many thanks.

(Speaks English) I will speak in Spanish to honour the language from the State and from victims and myself. Thank you.

(Interpretation) So first of all, I would like to ask about certain aspects with regards to complementarity which we have been speaking about much this morning.

Indeed, the Rome system and this Court itself is based on complementarity, which is a permanent situation of dialogue between the national States and the Rome system, and, here, I'm referring to the States to investigate -- where they can investigate whether -- atrocious crime, and they are listed in Article 5 of the Rome Statute.

Now, Article 7 of the Rome Statute on crimes against humanity establishes that for -- that these must be committed or this conduct, which is listed under Article 7, is part of a systematic and widespread attack against the civilian population, and this implies in that context that it is the case.

Now, the question that I wanted to make to put this into -- to put this into context, to make investigation redundant, all the efforts that Venezuela has made, then we have to see if they have carried them out.

What investigations have they carried out to determine if there exists this widespread or systematic context of attacks against the civilian population, with a view to seeing if these different acts -- possible criminal acts, which are classified as crimes against humanity, are sufficiently reflected in terms of the investigative attempt of the Prosecutor?

And this question is for the State of Venezuela. Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:23] (Interpretation) Many thanks, colleague.

(Speaks English) Does the State party wish to answer?

MR EMMERSON: [10:20:31] The position as we will seek to demonstrate in due course is that all of the instances given by the Prosecutor as analogies in the information provided pursuant to the requests under Article 52 were -- almost the entire list, were, in fact, investigated or under investigation.

But the Pre-Trial Chamber blinded itself procedurally to the evidential foundations by declining to admit and consider the vast majority of the evidence that was put before it.

So to the extent that the inference of widespread and systematic crimes is based on patterns in the material - and this is something very much arising in the Court's next question - it is impossible for a Pre-Trial Chamber to fairly evaluate whether there are patterns or what those patterns disclose, if they chose to confine the focus of their observations to the very tip of the iceberg amongst the whole evidential foundation.

Whatever the reasons, whatever the technical rules - and we will look at those in question 2 - the fact of the matter was this was a wholly flawed exercise because Venezuela was not informed of the crimes it was supposed to be investigating, but rather given some instances of crimes that the Prosecutor doesn't propose to investigate, "But will give", says the Prosecutor, "a flavour of the sorts of things we are hoping to investigate."

So what does Venezuela do? It sets about investigating all of them. Indeed, from public-source materials which, of course, were not first seen by Venezuela when they were served by the Prosecutor, they'd been studied by Venezuela since they were published insofar as they disclosed identifiable and investigatable allegations of

criminal conduct, they are already the subject of investigation insofar as the Prosecutor drew from -- they're quite wide reports dealing with human rights violations generally, but drew crimes that he contended from these examples would fall within the jurisdiction of the Court as crimes against humanity, the Prosecution has investigated them.

In tandem, working collaboratively and there -- I mean, there have been breakdowns at various points in the cooperation and the resumption application is one of them, but Venezuela has been progressively investigating - and, the evidence will demonstrate this - each of the examples that the Prosecutor gave.

Now, of course, that doesn't answer his question because they are not the crimes he wants to investigate, but they do form part of a pattern and the Pre-Trial Chamber was trying to evaluate that pattern.

But with the greatest of respect, what Court worthy of the name says, "We're looking for patterns in this body of material and seeing whether you're investigating those crimes and the patterns they disclose, but we'll close our eye, not just to half of it, but to almost two-thirds of the material available through the technical application of the costs distribution argument in relation to whose responsibility it is to translate the material."

JUDGE IBÁNEZ CARRANZA: [10:24:31] (Interpretation) Thank you. That was well understood.

I would also like to make a question with regards to victims, if I may, in the same context as I have explained of crimes against humanity and the need to determine these contextual elements.

I would like to know from the office for victims, the OPCV, what is their opinion with regards to the crimes or the points of view generally, that the investigations in

Venezuela are not taking into account or do not reflect substantially the investigative activity that the Prosecutor intended to carry out in this case?

MS MASSIDDA: [10:25:24] *Muchas gracias*. Thank you very much, your Honour, for this question, which is very important and goes actually to the core of the participation of victims today and tomorrow in this hearing. And, actually, I will have a point -- a specific point on this tomorrow, in which I will summarise for the judges the main views and concerns of the victims in relation to these proceedings. But to start answering already today to your question, your Honour, the victims maintain a very clear position, and the position of the victims today is that Venezuela is not and will not in the future investigate the crimes they, their family, their friends suffered from.

A number of reasons have been indicated by the victims in order to substantiate why this is happening, and these reasons are also included in a number of written submissions which were filed recently, including yesterday, before the Appeals Chamber. Some of these submissions have been filed confidentially; so I will limit at the moment myself, in indicating as an example to the Chamber, annex 2 of the submission which was filed yesterday and annex 3, which includes specific cases showing how Venezuela is now investigating and prosecuting crimes.

Now going specifically to your point in relation to crimes against humanity, because this was your starting point, your Honour, in answering question 4 tomorrow, we will make some arguments about that, but I can already start summarising since you made the question our position.

Now the point of view of the victims is that the contextual elements are essential for the existence and establishing crimes against humanity. If these contextual elements are not part of a domestic investigation, it cannot be said that crimes against

humanity suffered by the victims are investigating and prosecuting. This is, in summary, our position, and we will be more than happy to substantiate more, but I will also address this question tomorrow in question 4, and, more generally, the views and concerns of the victims probably in point 6 and in the concluding remarks.

JUDGE IBÁÑEZ CARRANZA: [10:28:25] Thank you very much.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:28:26] Thank you very much.

I would like to remind everybody that the victims have been making written submissions which are available to all. These are very substantial documents which the Chamber will definitely bear in mind in its deliberations and, indeed, the ones that have just been referred to did arrive late yesterday evening, but will be fully looked into.

With the permission of my colleague, I would like to have a brief question addressed to the Prosecutor's office, which may give us -- shed us some light on some of the points which have just been addressed, and maybe Judge Ibáñez will also have one.

Can I ask the Prosecutor's office, since you raised the point that the purpose of Article 18(1) notifications is to enable States to decide whether to request deferral, what is the exact legal basis on which you have founded yourself for this particular assertion? And this might give you the opportunity also to raise some broader points which have just been discussed, but Judge Ibáñez may have some further --

(Trial Chamber confers)

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:29:33] Judge Ibáñez is kind enough to tell me that she had the same problem, and maybe Judge Bossa would like to have a similar question so that you can group your answers.

Judge Bossa, please.

JUDGE BOSSA: [10:29:56] Thank you, Mr President.

Actually, I had a similar question for the Prosecutor but I also have a question for the OPCV and the Venezuelan authorities.

As you have stated, the Prosecution says it is to enable the State to decide whether to request a deferral.

The OPCV says it's meant to ensure the continued dialogue between the Prosecution and States to ensure there is no impunity gap.

The Venezuelan authorities are saying it's for coordinating international community as a whole to ensure that any State is investigating and can seek -- any State investigating can seek more information.

I would like to ask the respective parties the legal basis for their statements?

Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:31:06] Thank you very much, judge.

Perhaps we should start with the OTP. Thank you.

MS THIRU: [10:31:15] Thank you very much for those questions, your Honours, and I'm grateful for the chance to be able to further elucidate this.

Those goals that Judge Bossa just outlined, which we had all referenced already this morning, they are all related to the same thing, which is basically making complementarity practical, functional and useable.

Article 18(1) - as the Pre-Trial Chamber had said in the Philippines Article 18 decision - requires the Prosecution to provide the States with information to allow it -- to allow it to ensure that it is -- sorry, to enable it to make a deferral request, and that's where I founded my submission on.

I will try and find the precise reference in that judgment for you, but this is related

also to achieving the goals of complementarity and ensuring there are no impunity gaps.

When it issues this notice - and, yes, it's correct that it does issue it to a community of States - it will provide certain details, and because it has to do this in a broader communication, there is a danger obviously if it has to provide to specific details. The Prosecution always has to bear in mind its obligation to protect individuals that come within -- interacting with the Court in its investigations.

So what then can States do? They can go ahead and request further information under Rule 52, and that's precisely why that is there. It recognises that there will be these initial limitations; that the scope of what the Prosecutor informs the State may require further clarification from the State. There is no immovable or hard and fast cut-off point that Article 18(1) prescribes.

And this is perfectly in line with the goals of complementarity which is not a zero-sum game. Complementarity does not pit the Prosecution against States. It does not require an investigation into whether the State -- into whether crimes actually occurred in the State. It's just merely to ensure that States and the Court can burden share in investigating and prosecuting those suspected of international crimes.

The system is designed to ensure that this burden sharing occurs, because even if a State can show sufficient mirroring, the Court will defer and the Prosecution will revisit that assessment periodically to make sure it is still carrying on what it is meant to be doing.

If the Court finds, however, that the State is not carrying out sufficiently mirrored investigations, then the Prosecution will do it. This is all that the process entails and that's why we say that Article 18(1) notice has this broad purpose of, firstly,

practically, allowing States to respond and to trigger this entire process. Wrapped in with that, of course, is the ultimate goal of making sure that there is no impunity for these serious crimes.

I hope that answers your Honours' questions.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:35:04] Thank you very much, indeed.

I might give the floor now to OPCV and then to the State for some final remarks.

OPCV.

MS MASSIDDA: [10:35:12] Thank you very much, Judge Bossa, for this question. I think that our starting point is the preamble of the Rome Statute, which clearly indicates that the Court is also part of the efforts of avoiding any kind of impunity, and the complementarity principle on which the Rome Statute is based is clearly framed for this purpose.

And on this point, I would like to recall your Honour, Judge Bossa and Judge Carranza's opinion in the Al-Bashir case, the decision is the decision 397, annex 2, 6 May 2019, and I will read the relevant part.

"The object and purpose of the Rome Statute is crystallised in the preamble of the founding treaty of this Court. In relevant part, States Parties express mindfulness 'that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity', recognise that 'such grave crimes threaten the peace, security and well-being the world' and affirm that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured'.

Of particular relevance is the mandate given to the Court to put an end to impunity thereby bringing justice to the victims of the atrocities that form the subject-matter

jurisdiction of the Court. In other words, justice for victims is the *raison d'être* of the International Criminal Court. Victims are at the heart of international justice. It was precisely by acknowledging the unimaginable suffering caused to victims as a result of the great atrocities constituting the crimes under the [Court's jurisdiction] that the international community as a whole finally reached an agreement in Rome to establish this Court to put an end to impunity for such crimes, and in that way contribute to global peace and security."

These are paragraphs 191 and 192.

Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:37:57] Thank you very much.

I now give the floor to the State representative. Please be brief. Thank you.

MR EMMERSON: [10:38:05] I will be brief, except I want to move from the rather generalised submissions that you've heard of the principle of the institution to the rather more technical questions and answers in relation to Article 18(1) notice. There are three purposes to an Article 18(1) notice, bearing in mind that it is sent out not just to the State with sovereign jurisdiction to prosecute, but to any state that may have jurisdiction to prosecute -- a point that Mr Martínez emphasised a moment ago. The reason for that is to observe the principles of *lis pendens* and *ne bis in idem*; in other words, to ensure that the Prosecutor is not about to start an investigation that is already the subject of an ongoing criminal prosecution or, indeed, a verdict of acquittal or conviction.

And that's made very clear in a passage of a judgment from the Spanish Constitutional Court, which we have put in our case list, where it is considering Article 17 and 18 of the Rome Statute and its impact on ongoing

proceedings -- criminal proceedings in Spain. And the Court says in relation to concurrent prosecutions:

The need for jurisdictional intervention in accordance with the principle of universal jurisdiction is, in a national court, is -- I'm sorry, by the international court is excluded when the territorial jurisdiction is effectively pursuing the universal crime case committed in their own country.

In other words, if Spain, exercising universal jurisdiction, were already prosecuting, for example, General Pinochet, if it were to happen today, that would be a reason to note -- for the Prosecutor to say to all States that, "We're about to prosecute General Pinochet", to which Spain would then say, "We're already prosecuting him. What are we going to do about that?"

And a dialogue would ensue.

That's the first reason, and that, of course, is particularly relevant to the sovereign state with the responsibility because its own nationals in its own territory, in this case, Venezuela. So that's the first reason to avoid, broadly speaking, double-jeopardy, ongoing concurrent proceedings for a conviction/acquittal which bars a second set of proceedings.

But the second reason is to enable the State with sovereign right to prosecute to say within one month, so this is not a lengthy process, what has it already done.

Now, it may be prosecuting, so it would say, "I'm prosecuting General Pinochet" or it may not be prosecuting, but it may have prosecuted other cases within, for example, a war crimes context and it would tell the Prosecutor what it is already doing in that sense.

But the third possibility or the third focus, and this involves extending beyond the Article 18(2) notice within one month, is to enable -- and this is the core of

complementarity which is what is being put forward here, of dynamic complementarity, to enable the State with sovereign rights to prosecute, to hear what it is the prosecutor thinks needs to be being prosecuted with sufficient information to be able to respond, and then to do the investigation and prosecution themselves, because they are willing and able to do it within the exercise of their sovereign rights. That's what the whole system requires.

And so, for that purpose to be effective, obviously the State may then apply for a deferral to enable it to give effect to that and that is exactly why, though it has been investigating thousands of cases, though it furnished 30,000 pages of material to the Prosecutor, Venezuela has continued a dialogue with the Prosecution cooperating closely to establish technical assistance agreements by which the Office of the Prosecutor can share with Venezuela their experience of such investigations - the witness protection issues involved, the technical expertise - and that process is ongoing and underway.

Indeed, there's been an agreement to open an office for the purpose, which is due to open any time now in order that the Prosecutor can work with Venezuela in the exercise of its sovereign right.

So the Article 8(1) -- and it's quite clear from the jurisprudence as well that the Article 18(1) notice enables the States with sovereign rights to prosecute, to say, "Okay, let's look at this material together, we will then be given a chance to respond." And the Appeals Chamber judgments have made that clear repeatedly.

So that's why the Article 18(1) notice supplemented, if it is, by additional information, needs at least to be telling the State very very clearly, "This is what we think you ought to be prosecuting and we'll give you some technical assistance or we'll work with you in cooperation to do it".

That is what has been going on. And yet, and yet, the Pre-Trial Chamber finds, "Well, you haven't prosecuted sufficiently senior people."

But that was an entirely invented criterion because there's nothing in the Article 18(1) notice or in any other communication from the Prosecutor to specify the seniority of the individuals or the ranks even, or the branch of government that they should be involved in, whether it's military or whether it's civilian, which branch of the military or the civilian, whether it's -- and how -- when the Pre-Trial Chamber says, "You don't prosecute -- you haven't prosecuted sufficiently senior people", it was completely flying solo. It didn't even say how senior and it had no basis on which to reach its finding.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:44:34] Thank you very much, counsel. Thank you to all. I think this terminates an excellent exchange.

I suggest we now take a break of 30 minutes and reassemble at quarter past 11 sharp. Thank you very much.

THE COURT USHER: [10:44:54] All rise.

(Recess taken at 10.44 a.m.)

(Upon resuming in open session at 11.17 a.m.)

THE COURT USHER: [11:17:47] All rise.

Please be seated.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:18:16] Thank you very much to you all. We shall now move to the second group of issues.

I wish to recall that the following issue was identified for guidance to the parties and to the participants:

(a) Whether Rule 54(1) of the Rules and Regulation 39(1) of the Regulations of the Court impose a duty on the Prosecutor to provide the Pre-Trial Chamber with

translations into one of the Court's working languages of documents received from the State in support of a request for deferral pursuant to Article 18 of the Statute.

We shall begin with the submissions by the State Representatives. You have 15 minutes, please.

You have the floor.

MR EMMERSON: [11:19:22] Your Honours, there are two questions on this aspect of the list that the Court has posed. One is cast in terms of a burden of proof, or a burden of responsibility for translation, but the other, of equal importance, is the power of the Pre-Trial Chamber to admit evidence in a language other than an official language, if the interests of justice so require.

And those two issues must be considered separately and not, we respectfully submit, descend into a resource-pushing around exercise about who bears the cost burden of translation.

It was evidently incumbent on the Pre-Trial Chamber, as part of its inherent responsibilities as an independent judicial tribunal, to fairly consider all of the relevant evidence that either party puts forward in support of its case. That is an axiom of judicial decision making. It's not a question of burdens of proof. It's not a question of who pays the bill. It's an axiom of a responsibility resting on the Court to ensure that it can do justice according to its oath.

It is, we say, the hallmark of a fair adjudication of the issues by an independent and impartial tribunal operating on an adversarial model of dispute resolution.

Now, of course, a fair, independent and impartial tribunal may decide that an item of evidence is inadmissible, but it can't make that decision without considering the evidence that's been put forward. It can't delegate that responsibility to one of the parties in an adversarial process. The only possible exception to that

requirement - and it goes right to the heart of what it is to be a judge - is where a party seeking to adduce the evidence has culpably failed to comply with an express obligation under the rules of procedure in seeking to adduce it, and the interests of justice can be satisfied by its exclusion.

But there is no express rule of procedure applicable here imposing that obligation on Venezuela. It is simply made up out of a series of decisions and processes, none of which apply on the facts of the present case.

It is perfectly obvious here that all of the evidence submitted by Venezuela to the Prosecutor under Article 52 concerning domestic criminal investigations and prosecutions that were underway was obviously relevant to the Pre-Trial Chamber's judicial decision-making function -- obviously relevant. Indeed, a fair consideration of the whole body of evidence was essential as a prerequisite to the application of the mirror test and to the true performance of a judicial function.

The Trial Chamber itself claims to discern patterns in the evidence, patterns concerning the seniority of rank, patterns concerning unexplained delay. How can you ask -- determine that there is an unexplained delay without looking at the material that might provide you with the explanation? It is, with respect, a perversion of a judicial analysis to suggest that that is a possible way forward.

Given the nature of the patterns that the Trial Chamber was seeking to discern, the only way they could have adequately performed their core judicial function of weighing the evidence fairly and applying the correct legal test was to consider all the evidence put forward by both sides. That much is, we say, common sense.

Nevertheless, the Pre-Trial Chamber reached its decision - and let's remember a decision on a contested question - implicating Venezuela's core sovereign rights. It did so in deliberate disregard of most of the evidence that Venezuela had furnished to

the Prosecutor, even though the Court had that material in its original form.

We say that States Parties to the Rome Statute are entitled to, and do, expect a higher standard of procedural justice from the Court than this.

Rule 54(1) of the Rules of Procedure and Evidence clearly imposes two unequivocal obligations on the Prosecutor, not on the State, in relation to any Article 18(2) deferral or resumption request.

The first is to inform the Pre-Trial Chamber in writing of the basis of its application and the second is to communicate to the Chamber - communicate to the Chamber - all the information received from the State under Rule 53. Not dump it on the Chamber, but communicate it to the Chamber. Those are the express words of Rule 54(1).

But that requirement must be read in conjunction with Regulation 39(1), which I should quote in full:

"All documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute, Rules, these Regulations or authorised by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation [...]"

So there's no obligation on Venezuela to translate the material it sends to the Prosecutor, but there is a statutory obligation on the Prosecutor to communicate that material to the Pre-Trial Chamber, and unless he can persuade the Pre-Trial Chamber to exercise its authority to receive it in Spanish, then he must submit it with a translation. So there's no breach of the rules of procedure here.

In the context of this case - and it's distinguishable from the Philippines situation for that reason - Venezuela is not under a statutory or other obligation to translate what they send to the Prosecutor in response to a 52 and 53 application, but the Prosecutor is statutorily required to communicate that information to the Pre-Trial Chamber,

either in one of the official languages or to ask the Chamber to accept it in Spanish, which it had the power to do.

So when we go back to the two elements that I identified at the beginning, the fault here lies both with the Prosecutor in failing to perform his function - it's his decision when he triggers a resumption request - but it's also with the Chamber for not *ex officio* examining its powers under Regulation 39(1) to receive the evidence in Spanish. Either of those institutions have a responsibility.

The one party to the process that does not have that responsibility is Venezuela. And, of course, if it were the State concerned, that would produce a wholly discriminatory application of the Rome Statute amongst its State Parties because it would mean that any State Party where the predominant language was English or French had no obligation costs-wise to translate, but any country that uses Spanish, which includes some of the poorer countries in the world by comparison to those using English and French, some of the poorer countries in the world, the consequence would be that the Court was saying, "You, Spanish speakers, have got to pay our bill, but the French and English speakers don't." And that can't be what the drafters and the States Parties intended.

It follows, then, we say, that the Prosecutor was obliged to communicate that material, under Article 53, in one of the official languages of the Court or seek a ruling from the Court to accept it in Spanish. He did neither of those things and we say it was obviously incumbent on the Pre-Trial Chamber to consider proprio motu whether it should be the Prosecutor or the Chamber should receive the material in Spanish. Certainly the one party that is in the clear on this is the State of Venezuela, and to try and put the burden on Venezuela and thereby deprive it of its sovereign right to investigate its own crimes on the basis of a claim of lack of complementarity is an

outrageous abuse of the system by the Prosecutor.

What happened is set out in part D of the Chamber's decision, paragraph 81 onwards. The Prosecutor's justification for translating just a spotlight fraction of the documents is set out in the decision. He says it was -- they were all reviewed by Spanish-speaking lawyers, so they have the Spanish-speaking facilities which enabled him to assess the relevance and to determine for himself - this is what he said - to determine for himself the extent of any mirroring disclosed by the documents with the Prosecutor's intended investigation.

So he sorts through the material, he decides on relevance by reference to his view of what a mirroring exercise is.

And then the Pre-Trial Chamber expressly held, at paragraph 82, that the criteria used by the Prosecution to make that selection is unclear. In other words, they don't know why he's chosen some and not others, and he's failed to give them an explanation.

The Prosecution has now conceded in these proceedings that there wasn't a criteria of any meaningful -- in any meaningful sense. The selection wasn't made on the basis of probative value or even representativeness; the governing criteria was that the Prosecution chose not to even translate anything from the 12th, 13th and 14th submissions of material because of timing reasons. Didn't go through the exercise. It just wanted to launch its resumption request immediately, so it just -- they use that as the governing criteria. But the submissions that were not translated were court records, copies of investigating steps and prosecutorial and judicial material, original documents, that were quite obviously of direct relevance to the Chamber's inquiry.

With the greatest of respect to the Prosecutor, the process he adopted, analysed objectively, involve a usurpation of the judicial function. It is for the

Pre-Trial Chamber, not the Prosecutor, to determine the extent to which national proceedings mirror the Prosecutor's intended investigation. That's not his decision; it's the judges' decision. It's also for the judges and not the Prosecutor to determine the relevance of the material submitted by the State under Rule 54.

It's important to remember, and there is judicial authority in this jurisdiction to support it, that -- at paragraph 83, cited at paragraph 83 of the ruling, the Pre-Trial Chamber says the Prosecutor's approach here was inappropriate and inconsistent with the jurisprudence of the court. So quoting, endorsing, the proposition from previous decisions, and I quote, "It is not for the Prosecution, which is effectively a party to the proceedings, to decide which of the documents transmitted by a State are worth translating ...". It's not for the Prosecutor.

Venezuela, as you know, used all --

THE COURT OFFICER: [11:33:10] Excuse me, counsel, you have one minute left.

MR EMMERSON: [11:33:13] Thank you very much --

Used all its efforts that it could to mitigate the effect of that, but we say it was incumbent on the Pre-Trial Chamber to rectify the resulting unfairness using its powers under Rule 39(1).

Mr President, in the end, although Venezuela provided 204 case files, only 62 of those were translated into English. This was -- and they were translated as much as possible, but they were translated by Venezuela itself under pressure of time from the Court. This was -- despite their efforts, only 62 of the 204 cases could be translated. That means 142 case files, more than two-thirds of the total, were simply ignored by the Chamber.

As the Prosecution has confirmed, 23 of the case files that were left untranslated, as it happens, related directly to incidents that the Prosecution had set out in its distillation

of the publicly available materials. So the Court was looking at this case under a complete misapprehension of the factual position, and its conclusions reflect that. There was -- in fact, if those cases were taken into account, Venezuela provided case files concerning 85 of the 124 sample incidents. That equates to a very substantial overlap between the list of analogous cases and the list of cases under investigation.

Lastly, Mr President --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:34:59] Thank you very much, counsel. Please, really conclude now.

MR EMMERSON: [11:35:04] Yes. I am.

Those cases are highlighted in Annex B of the Prosecutor's response and, as you will see, they overlap directly with the investigative parameters in his Article 18(1) notification. Those are my submissions.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:35:19] Thank you very much.

I would now like to give the floor to the Prosecution for 15 minutes.

MS REGUE: [11:35:25] Good morning. Good morning, your Honours.

It is the Prosecution's submission that the Chamber did not err by not requiring the Prosecution to translate the information that Venezuela provided to support its deferral request. The Prosecution does not have an obligation to translate this information. It is for the State to provide to the Court this information in one of the working languages of the Court, unless it is otherwise permitted. This is supported by a textual and contextual interpretation of the relevant provisions, it is supported by the object and purpose of the Article 18 process, and also of the complementarity regime more generally. And it is also supported by pragmatic considerations.

I will develop these three arguments in turn and then, to conclude, I will explain why

the Chamber was reasonable in not considering the information that was provided only in Spanish.

I will now pull up on your Honours' screens the relevant provisions for ease of reference.

Starting with the textual -- it is in evidence 1 channel, your Honours. Evidence 1 channel.

Starting with the textual and contextual interpretation of the provisions. Regulation 39(1) must be read in light of all the provisions regulating the Article 18 process. I would like to focus on the first three steps of the Article 18 process.

The first step is when the Prosecution notifies the States that it opens an investigation into a situation and informs States of the scope of this investigation.

Then, within one month of receiving this notification, the State may inform the Court that it is investigating persons for the acts related to the information in the notification and may request the deferral of the Court's investigation. The State shall make the request in writing and shall provide information concerning its investigation. This is in Article 18(2) and Rule 53.

The majority of the Appeals Chamber has already interpreted these provisions in the Philippines Article 18 judgment. It has held that the requesting State has the obligation to provide information -- has the -- the requesting State has the obligation to provide information, to substantiate its allegations and to prove that the deferral is warranted.

And finally, if the Prosecution, after assessing the information provided by the State, considers that the deferral is not warranted, it will refer the matter to the Chamber for the Chamber to make the final complementarity determination.

As the basis of its application, the Prosecution will explain why the criteria under

Article 17 is not met on the basis of the information provided by the State. It will explain that the investigation shall not be deferred to the State and instead the Prosecution shall be allowed to continue with its investigation.

But significantly, the Prosecution is required to communicate the information provided by the State to the Chamber. I would like to emphasise the terms used in the second sentence of Rule 54(1): the State provides the information and the Prosecution communicates the information to the Chamber.

Your Honours, to communicate means to transmit, to pass on something to someone. The plain meaning of the term suggests that the Prosecution is a mere vehicle that transmits to the Chamber the information that it has received from the State as it has received it. This is a reasonable interpretation since the State is the only source and provider of this information and it is the State that decides which information, the quantity, and in which format. As a mere conduit, the Prosecution cannot alter or modify this information. As such, the Prosecution is expected to transmit it to the Chamber in its original form, which also means in the language in which it has received it.

And we submit that the jurisprudence supports this interpretation. The majority of the Appeals Chamber found in the Philippines Article 18 judgment at paragraph 77 that the Prosecution's application does not alter the burden of proof that remains with the State, since the information that the Chamber will assess is the information that the State has originally provided. This is also consistent with what Pre-Trial Chamber II ruled in the Afghanistan Article 18 decision. It held that "as 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 deferral request."

Your Honours, we submit that this implies that when a State requests a deferral, the information that it first provides to the Prosecution, and which is then communicated to the Chamber, must be in a form and language that enables the Court's assessment. This means that the Prosecution must receive the information in one of the working languages of the Court.

Moving now to my second point, and we will not need the slides anymore.

Our interpretation of these provisions is consistent with the practice followed in challenges to the admissibility of concrete cases under Article 19(2). This practice shows that the States and suspects who have challenged the admissibility of concrete cases have generally provided the information -- or have translated the information into one of the working languages of the Court.

Your Honours can find the authorities -- the court records in item 1 of our list of authorities.

As a matter of coherence and consistency with the Article 19 process, a State challenging the admissibility of a situation under Article 18 must also provide the information into one of the working languages of the Court. This is consistent with the drafting history, the drafters of Article 18. The drafters explain that the late introduction of this provision was consistent with the legal framework of complementarity under Articles 17 and 19.

That's item number 2 of our list of authorities.

But it is also consistent with the object and purpose of complementarity determinations, which seek to resolve a potential conflict of jurisdictions between the Court and the States who assert that they are investigating the same situation or the same case. It makes sense that questions regarding the Court's jurisdiction, which are fundamental, are discussed on the basis of documents translated into one of the

Court's working languages.

And with respect to the principle of complementarity, I would like to address a small remark of my learned colleague. If Venezuela does not succeed in its deferral request and the Prosecution continues with its investigation, Venezuela is not precluded at all from investigating in the situation. On the contrary, Venezuela must abide to its obligations under international law to investigate and prosecute international crimes. It's the opposite that is dangerous, because if the deferral request succeeds, the Court is precluded at all from investigating into the situation.

And that brings me to my third and last point. This interpretation is also supported by pragmatic considerations. Since the State is the source of the information, the State is uniquely placed to surgically identify the most relevant information in support of its deferral request and to translate it accordingly. This process does not require necessarily a State to provide large amounts of information. It suffices that the State provides specific and probative information capable of demonstrating the existence of ongoing domestic criminal proceedings. This can be done in a timely manner if the State engages with the Prosecution, and it can even require the Prosecution to extend the one-month timeline.

And with respect to this particular point, the Prosecution and Venezuela have kept, have engaged, in communications throughout the whole preliminary examination. We have informed them since the very beginning of the scope of our preliminary examination, that we would focus on a * sub-set of criminality regarding mistreatments in detention as of April 2017. These communications are listed in our Article 18 request at paragraph 12, as well as in our response to the appeal brief at paragraph 73 where we list all the documents since 2020 where we informed them of the scope of our preliminary examination and intended investigation.

On the other hand, if the Court was required to translate all the information provided by a state, this could lead to impracticable results. States could send large volumes of material to the Court, much of which may not be relevant to the matter and in a different language specific to that situation. This could have serious resource and time implications for the Court, with negative results for the State authorities, victims and witnesses alike.

It is unrealistic to expect the Court, including the Prosecution, that has the necessary resources ready to promptly translate all this information and, at the same time, to issue a speedy assessment as it is required in Article 18. This appeal ground, in particular, has significant implications for all cases and situations before the Court.

And to show you the impracticality of this scenario, allow me to take you to the circumstances of this situation. Since the start of the preliminary examination in February 2018 until the filing of the Prosecution's application one year ago, the Prosecution has received more than 25,000 pages of material. It would have disproportionately delayed the filing of the Prosecution's application to wait for official translations of this material. And considering that some of this information, after a careful analysis, was not deemed relevant, to assess complementarity, its translation would have not served the object and purpose of Article 18.

And on this point of the translations, I would like to address the comment of my learned colleague. The Prosecution decided to translate the summaries, which were the first three submissions that we received after Venezuela requested the deferral on 15 April 2022, because, at that time, that information was the most relevant that we had received until that moment. We still had not received the court records which were provided afterwards when we decided to provide the translation. So it was not a selective decision; it was, at that time, a decision that was taken in order to be

helpful and to ensure an efficient conduct of the proceedings.

And finally, your Honours, I would like to conclude by responding to the broader question posed -- that is, whether the Chamber erred in not relying on the materials in Spanish.

We submit that the Chamber did not err and, importantly, that there was no prejudice for Venezuela. This is because most of the materials only in Spanish were unrelated to domestic criminal proceedings. Only the charts, the summaries, and the Court and investigative records related to domestic criminal proceedings. And of these, only the Court and investigative records had sufficient information to allow the Chamber to meaningfully assess the scope and progression of domestic criminal proceedings.

We will explain this in our answering --

THE COURT OFFICER: [11:49:11] Excuse me, counsel, you have one minute left.

MS REGUE: [11:49:15] Thanks.

We will explain this in answering our next question.

But, crucially, the Chamber relied on court and investigative records to reach its decision. It relied on a representative sample of 62 cases which Venezuela had considered essential to its domestic proceedings.

Your Honours, I would like to say a few words with respect to these two points, if your Honours could allow me 30 seconds more?

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:49:39] Please do, but quickly.

MS REGUE: [11:49:41] Thank you very much.

It was reasonable for the Chamber to encourage Venezuela to translate only the records which were essential to its deferral request. This is consistent with the object and purpose of the Article 18 process.

And with respect to the representativeness, the 62 case files in English are indeed a representative sample of the Venezuelan proceedings, including of those case files, of those court records which were only submitted in Spanish. They have the same features and they have the same key deficiencies.

In particular, there is no investigation of factual allegations relevant to patterns, the focus is on low-level direct perpetrators, there is no investigation of persecutory intent and there are no additional cases of rape or acts qualified as sexual violence.

It is also doubtful that the proceedings are really advancing since most of them are in the early stages, even if the events took place in 2017.

Your Honours, the Prosecution has assessed the totality of the materials, the totality of the court records, in Spanish and English, and we have reached the same conclusion as the Chamber -- that these Venezuelan proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation.

We respectfully request your Honours to uphold the Chamber's decision.

Thank you for your attention and for the extra time.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:51:09] Thank you very much.

I would now like to invite the OPCV to make its submissions for 10 minutes, please. Thank you.

MS MASSIDDA: [11:51:18](Interpretation) Thank you, your Honour. My considerations will be quite brief, so I believe I will be pardoned for that.

(Speaks English) Now, question 2 -- a lot has been said and we generally agree with the main point made by the Prosecution, we have a very limited submission and we refer mainly to the arguments developed in our written observations. But I would like to add just a few considerations for your Honours' attention.

For us, the issue looks straightforward. We have a very clear interpretation. In our submission, it's very clear, the legal framework.

Rule 54(1) of the Rules: The Prosecutor communicates to the Pre-Trial Chamber the information provided by the State under Rule 53. This means, in our view, that the Prosecutor is obliged to provide the Pre-Trial Chamber only with the documents transmitted by the State; in other words, it's an obligation of transmission.

In turn, Regulation 39(1) of the Regulations of the Court indicates that documents filed before the Court must be either in English or French: "If the original document or material is not in one of these languages, a participant shall attach a translation."

Therefore, in our view, the provision to the Pre-Trial Chamber of a translation into a working language of the court, be it English or French, is the sole responsibility of the State claiming that the investigation intended by the Prosecutor will not be complementary to national proceedings. And this is consistent with the universally known principle of *onus probandi incumbit actori*.

And going for a second to what has been argued by my learned colleague in relation to the finding of a Pre-Trial Chamber, my learned colleague quoted paragraph 83 of the impugned decision, indicating that to some extent the Pre-Trial Chamber has the knowledge. But the way in which the Prosecutor decided to go forward, only translating a sample of the documents, was inappropriate.

But the reasoning of the Pre-Trial Chamber does not stop at paragraph 83. The reasoning of the Pre-Trial Chamber ends at paragraph 86 of the impugned decision, and I quote, "It is immaterial whether the Prosecution has the capacity to analyse the material transmitted by Venezuela in its original language. The requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution." End of quote.

And, in this regard, the Prosecution quoted the Afghanistan situation decision, Pre-Trial Chamber decision 17 in our list of authorities, paragraph 50. And the Prosecution ended the quote before the end of a sentence. This is the full reading of paragraph 50: "for the State" at hand "to ensure that the Chamber can analyse the materials submitted in support of a request for deferral."

It is for the State at hand "to ensure that the Chamber can analyse the materials submitted in support of a request for deferral." And -- and this is the important part of it I would like to underline -- "whilst the Prosecution may offer its services, no obligation rests on it to provide translations."

End of quote.

And these considerations were properly taken into account by the Pre-Trial Chamber when it found in paragraph 85 of the decision that if a State is unable to provide the supporting documents of its Article 18(1) challenge in one of the working languages of the Court, it may consult with the Prosecutor and agree that any translation for the purpose of the Chamber's assessment be made by the latter.

This clearly shows, in our view, that the Prosecutor is not obliged to translate into the working language of the Court documents received from the State in another language.

And, incidentally, your Honours, going to a few remarks by Venezuela in relation to the fact that the Pre-Trial Chamber cannot make the decision without considering the evidence put before it, and it is a question of responsibility resting on the Court to ensure that it can do justice in accordance to its oath, well, if the onus is on Venezuela, as we said, Venezuela had a clear legal view to eventually request something. I'm referring to Article 30(3) of the Statute, which clearly indicates at the request of any party to a proceeding or a State allowed to intervene, the Court shall authorise a

language other than English and French to be used by such a party or State provided that the Court considers such authorisation to be adequately justified.

So there was even another way for Venezuela to eventually ask to use Spanish as a language in these proceedings.

And all this reasoning -- and this is my final point, your Honour -- all this reasoning is consistent with the current practice before this Court where the translation of all documents is not even obligatory to ensure the defendant receives a fair right before this Court. Not even defendants before this Court are entitled to full translation in a language they fully understand and speak.

A fortiori, a Chamber may decide on a request pursuant to Article 18(2) of the Statute even if not all documents from the State involved in the proceedings has been translated into a working language of the Court.

In conclusion, the Pre-Trial Chamber was correct in finding that the Prosecutor has no obligation to provide translations of documents provided by a State in a non-working language of the Court.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:58:38](Interpretation) Thank you very much for your remarks.

(Speaks English) And I would like now to give the floor back to the States Representative to respond to the Prosecutor and to the OPCV, if you wish. You have 10 minutes.

MR EMMERSON: [11:58:52] So the position that's being advanced by the institution -- and by that I mean the combination of the Prosecutor and the Pre-Trial Chamber in this instance -- is: The interests of justice of a fair and full administration have nothing to say if an evolving process of who is to pay for the translations has ended up pushing that responsibility onto the State, even though it's

essential material that the Court must use.

This is obviously, by definition, an international court. It is only fit for purpose if it can do justice. If to do justice it needs to see material in a language it understands, then it has to have clear provisions in its rules, making it clear where the burden lies. At the outset, this is a State responsibility. States do not -- if a State does not consent to a financial obligation being imposed on it, in the express words of the treaty, international law requires that that obligation not be imposed upon it. And there is no clarity at all.

Let me explain what I mean here. And there is a great danger of this debate devolving, dissolving, descending into the burden of proof, which ultimately is the burden of payment. But it isn't as simple as that.

What happened here is that having asked the Prosecutor for clarification, Venezuela began sending case files and the first batch was 50 case files in Spanish, and the Prosecutor, or Deputy Prosecutor as it was, Nazhat Shameem Khan, on 17 June wrote back to Venezuela thanking them for the communication of the 50 Spanish case files and saying this: "On behalf of the Prosecutor, let me reiterate our appreciation for the open and cooperative communication channel which the Office of the Prosecutor and the Government of Venezuela have established to date. In this regard, I wish to acknowledge receipt of the information you provided, together with your letter of 13 June concerning the procedural steps taken by the Venezuelan authorities in 50 exemplary cases. Let me reassure you that this information will be carefully analysed by the office, together with all the other material received so far, to assess whether there are elements of information that might affect our admissibility assessment."

There is no suggestion in that original letter, or in any subsequent correspondence,

that when discharging its statutory duty under Article 18(1) to communicate this information to the Court, it would be necessary first for Venezuela to supply the Prosecutor with translations. Indeed, nobody knew that that was a recognised obligation until the Philippines situation appeals judgment came out.

So everybody was proceeding on the assumption that this was being handled in good faith, but now it's being turned by a trick of chicanery into a suggestion that Venezuela has failed to discharge an obligation clearly resting upon it. It's a somewhat disgraceful situation. But even if that were not the case, I mean, we've heard submissions from the Prosecution from a dictionary definition of the word "communicate," saying, "All our job to do is to hand over to the Trial Chamber whatever's been handed over to us and that's what communicate means in the dictionary."

It's always not ideal when we're starting to resort to dictionary definitions of statutory words, but as we have said in the documents we've submitted to you, and it's a helpful riposte, item 13 of our list is the definition of the word "communicate" from the Mirriam-Webster dictionary, and it describes the word "communicate" -- it defines the word "communicate" as "to transmit information, thought, or feeling so that it is satisfactorily received [and] understood". Well, that's exactly what the Rules require, that the Prosecution transmit the material it has considered to the Court for its review in a manner in which it is understood. And that obligation, because it was the Prosecution that submitted the material to the Registry, under the Rules rests on them and not us.

Now, in the light of the Philippines decision, you might say, well, if you'd complied with that obligation -- even though neither the Prosecutor nor Venezuela knew the obligation existed until the Philippines judgment came out -- if you had anticipated

that approach and you'd borne the burden in the beginning of tending to translated documents which, given the time frame that had been imposed at that stage was utterly impractical, then it wouldn't be -- then the Prosecutor would only be required to dump the material in the Registry and not to put it in a form in which the judges could understand.

But even if that were to happen, and this is where the OPCW's submission helps Venezuela's case, of course the Prosecutor could have applied under Article 35, if he didn't want to spend the money. I mean, we know he's read all the documents in Spanish because he's told us that in his evidence. But if he didn't want to pay for the translations or have the resources to do that, he could have applied to this Court to receive its case and pleadings in Spanish.

But leaving his responsibility aside, let's focus not on the Prosecutor for a minute, who has caused this chaos; let's focus on the Court. Because what is the explanation for the Court's refusal to exercise its power under Rule 39(1)? 39(1) is absolutely clear that the Chamber has the power to authorise the receipt and use of material in a language other than an official language. That power existed within the Chamber. And there is absolutely no requirement for it to be triggered by an application by either party, unlike Article 35; it simply says the Chamber may authorise it. Now, that is an obligation that has to have some meaning. The Court has to ascribe some meaning to the fact that the rule gives the Chamber power.

Now, in what circumstances, may I ask rhetorically -- sorry, I was just pausing. In what circumstances would that have meaning? You have a very clear provision in Rule 39 that says the Chamber may authorise it. Posing the question rhetorically, what is the test for when the Chamber ex proprio motu should authorise that? And I would suggest, and it seems to me self-evidently unanswerable, that the test is when

the interests of justice require it. And clearly here the interests of justice required the Chamber to understand the material that they were evaluating. We know that, because they have made a whole series of wrongful findings that if they'd seen the material, they would never have made. So clearly the interests of justice required it. Now, my question is, your Honours can't read that provision so as to empty it of all meaning. The basic requirements of any statutory interpretation is that each word of a provision has to be given a meaning. So there is a meaning. This Court, Pre-Trial Chamber, under Rule 39, has the power when? Well, when the interests of justice require it. And I defy anyone in this courtroom to say that the interests of justice do not require a tribunal looking into patterns to look at the entirety of the evidence.

Those are my submissions.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:08:21] Thank you very much, counsel.

We now have some time for questions by judges.

Colleagues? Judge Hofmański?

JUDGE HOFMAŃSKI: [12:08:27] No, thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:08:31] Judge Ibáñez?

Well, I might have a question, if you allow me. My reading of the process of exchanges between the Prosecution and the State was that the Prosecutor's Article 18 request was made on 1 November 2022 and included a number of documents. Beyond that, there were further exchanges which lasted until March of 2023. In March of 2023, Venezuela transmitted 65 annexes of translated material which covered 62 cases which Venezuela thought was a particularly relevant selection of cases which had been considered.

In its decision, the Pre-Trial Chamber said that the Pre-Trial Chamber focused on the material in the 65 annexes deemed most essential by Venezuela. In other words, the selection was made by Venezuela, the translations were provided by Venezuela.

In regard to this, the Pre-Trial Chamber in paragraph 86, indicated the following -- of its impugned decision indicated the following thing:

"The requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and to the Prosecut[or]."

I would be interested to hear from parties and participants what was the nature of the exchanges and discussions that took place between November of 2022 and March 2023, because it appears that there were reciprocal communications regarding those issues during that period. Thank you very much.

Perhaps I will give the floor first to the Prosecutor.

MS REGUE: [12:10:44] Yes, your Honour.

When Venezuela -- when Venezuela filed the deferral request on 15 April 2022, they relied on all the material that they had submitted during the preliminary examination, which was eight batches, eight submissions of information. Then they submitted six more batches. And we all considered this information in our application of 1 November 2022.

We filed the application. The Chamber issued its order, direction of proceedings. It allowed Venezuela to file observations by February. Venezuela filed the observations in February in annex -- 13 annexes of information -- none of them containing any court records. Most of them actually in English, or Spanish and English. We have assessed this material in our response to those observations.

There were reports, memorandum about a media campaign against Venezuela, there were some charts as well, but no court and investigative records. And then

Venezuela requested leave to the Chamber to provide a representative -- to provide translations of court and investigative records.

The Chamber granted the request and encouraged Venezuela to focus on those files which were essential to the deferral request. And then in response to that encouragement, then Venezuela provided 65 annexes which corresponded to 62 cases, and 59 of them related to our list of 124 incidents which are mentioned in our January 2022 letter in English.

And Venezuela, in that letter, said that those materials were essential to the deferral request and they were representative of their domestic proceedings.

So it's our position, your Honour, that the Chamber could make an assessment based on that representative sample.

We have assessed all the material. We have assessed this representative sample and we have assessed also the court records which are also only in Spanish, and we can -- and we have reached the conclusion that indeed it is a representative sample.

We see the same features, the same characteristics that I just described in my oral submissions, and it was totally reasonable for the Chamber to issue the decision based on that representative sample.

This is consistent with the practice in Article 19 as well, because the States also don't provide the whole universe of domestic evidence that they have with respect to a concrete case; they provide a sample that is sufficiently specific and probative for the Chamber to make this assessment.

Thank you, your Honours.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:13:43] Thank you very much.

I will give the floor to the OPCV and to the State, but my colleague, Judge Bossa,

wishes to put a question which might then be answered. Thank you.

Please, Judge.

JUDGE BOSSA: [12:13:54] Mr President, my question has been answered. Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:14:07] Okay. Thank you very much, Judge.

OPCV, would you like to come in on this issue?

MS MASSIDDA: [12:14:10] Mr President, I fear we will not be of much assistance, because this is -- concerns the nature -- if I understand correctly your question, the nature of exchanges and discussions between the Prosecution and the State, in which victims of course are not included. So we don't have any contribution to that.

But, since I have the floor, what I may maybe address as an incidental point is that in the period November 2020 to March 2023, there was already a decision of the Pre-Trial Chamber, which was I think 18 November 2022, authorising victims to present their views and concerns.

And why I'm saying that? Because I suspect that a number of indications provided by the victims were also part maybe of some exchanges between the Prosecution and Venezuela to understand whether or not domestic investigations were ongoing, mirroring the intended Prosecution investigation. Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:15:12] *Merci beaucoup*.

And I give the floor to the State and thereafter Judge Ibáñez will have another question.

Thank you very much.

MR EMMERSON: [12:15:25] Your Honour, I'm going to give just two very short answers to that, but I will also invite my colleague, Monsieur Marchand, to add some

words. Then perhaps after, the last question.

Two things, if I may. The short answer to the President's question, bearing in mind the statement, the judicial observation that the burden of filing the material applies equally to the parties, is that throughout the entire process of negotiation, right up to the moment and including the moment when the Prosecutor applied to resume the investigation, at no stage did the Office of the Prosecutor say to Venezuela, "If you want this material to be considered you need to send it to us in English." Quite the contrary. The vice-president came to The Hague to meet with the Prosecutor. There were letters backwards and forwards, there was constant contact during that time, and I have read a passage of the first one to you where the material is -- the Prosecutor thanks Venezuela for its cooperative approach in submitting the material in Spanish, says it will be considered and reviewed and never says, "But we will obviously have to put it in front of the Chamber so you had better to be sending it to us in English translations." How can they then say we have discharged our equal obligation if they kept Venezuela in the dark about what they were intending to argue and never raised it right up until the moment of the application to resume, but only then seek to argue, "Ah, Venezuela's not done its job", without saying, "We haven't done our job either"? I mean, with respect, this is not conforming to an appropriately ordered, fair and professional process.

You know, if we are dealing with an institution that engages states, it's no good turning up and trying to play tricks, because that's what it comes to. If you don't tell the State throughout the entire process, and there is no clear provision in the statute that the State has consented to, and the rules are clearly so vague that they weren't determined until the Philippines situation appeal, how can the Prosecution then turn around and say, "It doesn't matter that the Trial Chamber didn't have the vast

majority of the evidence in a language it could understand"?
And it goes a bit further than that, because in the end the argument that Venezuela was given a last-minute attempt and a very short time limit to translate what it regarded as the most essential documents in a hurry - Mr Marchand will tell you some more about this in a moment, the cost and time implications that that involved -- I mean, this is supposed to be an international institution, not to tell a State at the last minute that's under sanctions all over the world, find the resources to translate 30,000 pages of documents, find the resources to translate 30,000 pages of documents quickly, because we are not going to adjourn the hearing and we are not going to use the power that's available to us under rule 39 to vary the rules.
But, worse than that, in its decision at various points -- you have read it, there are many points in which the Chamber finds insufficient evidence of direct correlation or mirroring, or representative, or patterns of unexplained delay and so forth, based on the number of cases and investigations carried out by the Defence.
But it's clear, and we know that, and there can't be any dispute about that from the Prosecution or among the bench, that the Chamber reached that numerical assessment on the basis solely of the English language sample.
So Venezuela was dragged by the Prosecution and the Trial Chamber into a numbers race, but without the benefit of two-thirds or more of the information that was needed to answer the questions that the Court was posing and required to pose to itself.
We recall that the Chamber itself acknowledged, based on previous jurisprudence in relation to Afghanistan, that it's quite inappropriate for the Prosecutor to be selectively deciding what documents to put before the Pre-Trial Chamber in a language they understand, because he's a party to the proceedings and he's usurping the judicial function. But that can normally be put right if the judges do their job.

But here the judges -- at the same time as witnessing a judicial usurpation by the Prosecutor, we have an abdication by the judges of their duty to consider the exercise of their powers under rule 39. And, as a result, it's exactly the same as the Titanic. The reason the Titanic sank was because it only saw the tip of the iceberg, and the reason why this analysis that's being conducted by the Pre-Trial Chamber has broken down into a farce is because it only saw the tip of the iceberg.

So, with that general observation, I simply want to say, in conclusion, you cannot have this degree of chaotic confusion in an international institution worthy of the name.

Now, when it comes to a little bit of the detail and in response to the final judicial question I will ask Mr Marchand to respond.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:22:08] Thank you very much. Before I give the floor to Mr Marchand, two of my colleagues will ask questions which Mr Marchand might care to address. First Judge Ibáñez and then Judge Bossa. Judge Ibáñez, please.

JUDGE IBÁÑEZ CARRANZA: [12:22:22] Thank you very much, Presiding Judge. My question will be in Spanish. (Interpretation). This is a declaration I want to know on the part of the State of Venezuela -- or a clarification I would like from Venezuela.

What I would like to know is at the time of providing the information on these cases to the Court in support of its request for deferral, was it aware of the existence of the provision -- or of the provisions in regulation 39 and, in particular, the last sentence, sub-regulation (1), which says that if the documents or materials provided are not in any of the official languages of the Court, the participant must carry out a translation, and the only exception to this, which is an obligation on the party, is the case of

victims, which is -- and this is in sub-regulation (2).

Now, the question, or the clarification that I wanted to have is were you aware of the existence of these regulations? If you were aware of them, why did you not make an application to the Court such that it would employ the provisions of Article 53 so that you can carry out all of the relevant provisions in Spanish? And the only exception here is victims, but I would appreciate if you could give me some clarifications in this regard.

Thank you very much.

JUDGE BOSSA: [12:24:04] Thank you, Mr President. My question also goes to the Venezuelan authorities. The Prosecution had this to say, and I would like to have your comment on this -- the Prosecution said:

"We have assessed this material in our response to those observations. There were reports, memorandum about a media campaign against Venezuela, there were some charts as well, but no court and investigative records. And then Venezuela requested leave to the Chamber to provide a representative -- to provide translations of court and investigative records.

The Chamber granted the request and encouraged Venezuela to focus on those files which were essential to the deferral request. And then in response to that encouragement, then Venezuela provided 65 annexes which corresponded to 62 cases, and 59 of them related to our list of 124 incidents which are mentioned in our January 2022 letter ..."

So, what I really want to know, is this a correct statement from the Prosecutor? Do you confirm that this is what happened?

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:25:29] Thank you very much.

MS REGUE: [12:25:30] Your Honour, can I just ask, because when I spoke -- I just want to correct something because the transcript reflected something that I did not correctly say and because the question is quoting --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:25:38] Strictly factual, please.

MS REGUE: [12:25:40] Venezuela sought leave to provide the records, but when it requested leave it didn't say that the records that was going to provide were representative. It was when it provided the records in the letter, then it said, "These records that I'm providing are representative samples." It was when they provided the records, not when they requested the Chamber authorisation to provide them. I just wanted to correct that, thanks.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:26:04] Thank you very much. We will take due note. Counsel, in whatever order you wish. Mr Marchand?

MR MARCHAND: [12:26:14](Interpretation) Thank you, Mr President.

Your Honours, I think that this issue of translation is a very complicated issue, and which is at the very core of the work of the international court. It is important to know what we are talking about when we refer to translation.

The Court feels that the party that asked for a deferment has to show that the investigations are going on, whatever they concern -- ballistics, and so on. These are voluminous cases. The question that will arise and that we faced is what are we going to do with these tens of thousands of pages relating to these cases? Do we have to translate everything? The translators that were there confirmed that it is not an easy job to translate legal documents. They do three or four pages per day, and so we have this volume of work. Who is going to do it?

And if you look at Article 87 of the Statute, it deals with this question of translation, to try to determine whether it is the State that is going to carry out the translations or

whether it is the Court that is to do it.

Finally, it was the Court that was designated to be primarily responsible for this issue of translation.

Another important element, and that is my second comment, is that in the communications that Venezuela had with the Prosecutor, these communications were in Spanish and this means that the OTP accepted that we should be communicating in Spanish -- from time to time in English and from time to time in Spanish, but the OTP accepted to receive all this information. So that was a practice on the part of the Prosecutor to receive this document, so this issue will come up again when -- came up again when we had to deal with the state of progress on the investigations.

Now, if you look at the way that the *note verbales* exchanged in the United Nations and the guidelines that are given, it is obviously -- it is in one of the working languages, French or English. So Venezuela indicated that the primary language between them was the Spanish and, therefore, there was a need for translation of the materials.

Now, since this is a practice that became a pattern within the course of those communications with the OTP, in the final analysis the President has talked about 23 February 2023. Well, the question could have been: You translated 63 files, how many pages are those? It is enormous.

So, subscribing to what my learned colleague has said, I would say that it is something that has to be settled by your Court. It is in the hands of your Court based on the high standards of a fair trial, because the issue of translation is very, very crucial and it is fundamental for the rights of the parties.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:31:27] Thank you, Mr Marchand. I ask the Prosecution to make a few points of clarification which I

think would be useful to us and then,

Mr Emmerson, I will give you the floor.

MS REGUE: [12:31:40] Thank you, your Honours. I wanted to respond indeed to several points. I will start with the last one, the comparison with Article 87 and request for cooperation when the State who becomes a State Party chooses the language that it wishes to have the exchanges. This is a completely different matter from when the State requests a deferral and it has to substantiate and provide the information to support the deferral.

Article 18 is not part of part 9, cooperation, and when the Prosecutor informs the State that it's opening an investigation, it's not requesting anything to the State. On the contrary, it is the State afterwards that requests the Court to defer the investigation. So we submit that this comparison is inapposite. And actually, if we look at the drafting history of Article 87, we can see that there was a heated debate among the State Parties about who should bear the costs of the accompanying documents of requests for cooperation, and it was agreed that it would be the normal practice of a State cooperation with some flexibility and accommodation for the court.

Actually, your Honours, if we look at rule 194, which is the cases where the State requests for information to the Court, it has to provide this request for information to the Court in one of the working languages of the Court.

So even the provisions regarding the cooperation regime do not fully support the position of my learned colleagues.

I also wanted to clarify a few points. It has never been the Prosecution's position that we have an obligation to translate the materials, and it cannot be inferred from a courtesy letter of the deputy prosecutor saying "thank you very much for this material", that we were misleading. That was not. It was a "thank you very much"

letter. It was always our position that we did not have the obligation.

We decided to translate the summaries, the *fichas* which were the first three batches of information that we received after the deferral request to be helpful, and in order to expedite the proceedings we didn't want to engage in a side litigation and that was the decision. It was not selective, because at that time it was the only pieces of information that we had received that had something to do with domestic proceedings, so it was not a selective decision at all.

And then I also wanted to clarify -- my colleague is saying that we were all in the dark until there was the Philippines appeal judgment in July this year. That's incorrect, because 31 October last year, just the day before we filed, Pre-Trial Chamber II issued a decision in Afghanistan and it already stated that the onus, the burden, was on the State and that the State had the obligation to provide the information in a manner that will enable the Court's assessment. That was 31 October 2022.

And then in January of this year there was the PTC decision in Philippines which said the same thing. And actually in the observations that Venezuela filed on 1 March, they refer to both -- to the Philippines and to the Afghanistan PTC decision. So they were quite aware that there was previous jurisprudence placing the burden on the State to substantiate their deferral request.

And then also with respect to the comments about large amounts of information, Venezuela didn't have to translate and didn't have to provide 20,000/25,000. It sufficed that from the very beginning it provided 4,000 pages of court records, the representative sample, the 62 case files, the 65 annexes -- there were 3,000, actually, pages of records. With that, there was enough for the Court to make the assessment. It's not an impossible obligation; it's a reasonable obligation and the State can always engage with the Prosecution and can always engage with the Chamber and the

Chamber was really fair, was really reasonable in the manner in which it conducted their proceedings, and we can see that in the procedural background previous to the decision.

Thank you, your Honours.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:35:49] Thank you very much.

Counsel Emmerson, you wanted to have the last word before lunch?

MR EMMERSON: [12:35:57] That's very kind.

If it's right that the OTP always knew it was not their obligation to translate the material and they always knew it was Venezuela's obligation, despite the fact that the jurisprudence holds clearly that the obligation applies equally between the two, then they are wrong, and they were wrong, because the jurisprudence made it clear the obligation applies equally to both.

However, one thing is for certain, if they had this secret certainty, why on earth didn't they say anything to Venezuela in these numerous meetings amongst the correspondence sent to Venezuela in Spanish, that, "Oh, by the way, we are not going to translate the stuff we give to the Court to help substantiate your case and their analysis, we are not going to give it to them in a language they understand and we are not going to remind the Court or apply to the Court to receive the material in Spanish either"?

Now, that looks -- I'm not alleging prosecutorial misconduct, but it's shoddy, it's unprofessional and it has the appearance of chicanery.

So, in answer to Judge Ibáñez's question, yes, of course Venezuela read the Statute and knew about Rule 39, but on a plain reading of Rule 39, it wasn't Venezuela's responsibility to do the translations because it was the Prosecutor who chooses when to make the resumption request, and it's Article 81 that statutorily obliges the

Prosecutor to communicate the information to the Trial Chamber in one of the two official languages.

39 puts the obligation on the person filing the material with the Registry, and any understanding of the operation of that rule, without a very clear indication from the Prosecution or any notice that they were operating a secret policy that it was never, never going to do the translations themselves, despite equally bearing the responsibility -- I mean, where does the concept of equally bearing the responsibility for translations come into this, come into the Prosecutor's submission? The Prosecutor says, "I have no responsibility, it all rests on Venezuela but we are not going to tell them and that way we can put forward a case with just a few sparkles translated into English and the vast majority of the material Venezuela wants considered to be left incomprehensible to the Court." Perfect. That's a fair procedure? I don't think so.

So, I mean, whatever you might have decided in the Philippines case about where you want the burden of translation to rest, whatever might have been decided by Pre-Trial Chambers just before the deferral request was triggered -- and maybe it was triggered by the fact that the Prosecution now knew that they could go ahead with the deferral request without the Court even knowing what the evidence was because that obligation had now been clarified as resting on the State -- it doesn't really matter what the reasons are.

I mean, on any outside view, the idea that the Prosecutor in the Court can infringe the sovereign right of a contracting State to prosecute its own cases on the basis of a confusing fudge of this kind is shoddy. Those are our submissions.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:40:00] Thank you very much.

I see the OPCV. Just a word, please.

MS MASSIDDA: [12:40:09] Sorry, your Honour, I would like to request, before I forget, for a correction in the transcript. It has been brought to my attention that during my oral submission I mentioned Article 30, paragraph 3, and this is, of course, Article 50, paragraph 3. Thank you very much. It is page 70, line 10, the English real-time transcript.

Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:40:32] Thank you very much. This will certainly be taken into account.

I thank all the parties and participants.

I suggest we adjourn now until a quarter to 2, 13:45, and we will then take the group of issues number 2.

(Recess taken at 12.41 p.m.)

(Upon resuming in open session at 1.45 p.m.)

THE COURT USHER: [13:45:15] All rise.

Please be seated.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [13:45:41] Good afternoon to all. Before we start, let me mention that we have this afternoon a little constraint. One of the members of the Bench has an obligation that will lead us to suspend at 3 o'clock. This will of course not be at the expense of our exchanges. Whatever we cannot do this afternoon, we shall continue and resume tomorrow morning and, if necessary, extend further the time of our proceedings tomorrow afternoon. So this is just to -- for everybody to be aware of it.

So we shall now be moving to the second group of issues, and I would like to recall that the following issue was identified for guidance to the parties and participants:

(a) Whether it was reasonable for the Pre-Trial Chamber to decide not to rely on material which did not contain "original police or court records" as relevant documentation for its Article 18 determination.

Let me also mention that this Chamber greatly appreciates moderation and courtesy and we shall therefore begin with the submissions of the State Representatives.

You have 15 minutes, please.

MR EMMERSON: [13:47:24] Your Honours, before I turn specifically to the question -- question 3, there's one matter that was brought to my attention over the luncheon adjournment that relates both to this question and to the last question and the question of translation confusions, and that's relevant as well to question 3.

May I bring up a document that -- which your Honours can see, this was a 2003 paper on policy issues affecting the Office of the Prosecutor. And if we can just turn to the relevant paragraph, please. As your Honours can see, this is the statement of principle of the Prosecutor binding, effectively, on the operations or guiding the operations of the Prosecutor and its understanding of its translation obligations up until the decision in the Afghanistan case.

The working languages of the Court are English and French, and the official languages of the Court are Arabic, Chinese, English French, Russian and Spanish. That's a reference to Article 50. So neither Portuguese nor Farsi, of course, are official languages of the Court.

Sorry, I've now lost it. Thank you.

Where information is submitted in a language other than these, as is the cases in the Philippines and Afghanistan, the office will endeavour to obtain informal translation relying on the linguistic diversity of its staff. Where this is not possible, senders will be advised in English and French of the working and official languages

and requested to submit the information preferably in a working language or alternatively in an official language.

So the Prosecutor was undertaking to engage in an analysis of translation for documents that were submitted by a State Party in languages that did not include, obviously, Farsi, which was the issue in -- that the Afghanistan case -- or Portuguese, but it was unnecessary in relation to Spanish, because, just like in English and French, it is a working language of the Court.

So that is the understanding under which the Prosecutor was working of the law --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [13:50:03] Official language.

MR EMMERSON: [13:50:05] -- of the law, is that the proceedings were being conducted - and bear in mind it was a complementarity discussion between the parties at that stage - in one of the official languages of the Court.

It was in the Afghanistan and Philippines cases that it was then said no, that must be transmitted to the Prosecutor in a working language, but until then, the position was very clear, an official language would be sufficient without translations, which entirely explains why it was that the Prosecutor didn't consider the need to have those documents translated at the outset, but it doesn't in any way affect his obligations under Article 81 to communicate them to the Court in a working language.

So the position is very clear. There can be no possible responsibility on the part of Venezuela for the course of events that led the Court to ignore the majority of the evidence in the case.

And although we've heard from Prosecution appeals counsel that they -- the Prosecution have looked at the -- sorry. That the Prosecution have -- so although we've heard from Prosecution counsel today that the Prosecution have looked at the untranslated material, and they can tell you that its representative, one

sees exactly the same usurpation the function where Prosecution counsel is acting and giving evidence in this case to you and saying, we've seen it, the material that was translated is representative of that, which was not. That is not the Prosecution's function and we shall show shortly the impact of this neglect of procedure is -- has been profound.

Now let me turn to the third question.

As your Honours already know, the Prosecution translated only a selection from the 9th, 10th and 11th batches of material, all of which were what is known as -- in domestic law as either '*fichas*', '*minutas*', or '*asuntas*'.

These documents were prepared by the Ministerio Publico, that is the general prosecutor's office, in the ordinary course of regular business and record the progress of a case from an investigation and charge through prosecution, trial and sentencing if the accused is convicted. It is the official practice of the general prosecutor to require the compilation of such records contemporaneously with the purpose of facilitating coordination between staff within the relevant department and between different agencies.

This has been a longstanding practice in Venezuela, but was confirmed as mandatory in a regulation issued in 2011 which had legal force under article 51 and 284 of the constitution and under the relevant Organic Law of the Public Prosecutor's Office.

Let me just read a section of the text.

All -- this is from the prosecutor, the general prosecutor, to all staff: "[A]ll representatives of the Public Prosecutors Office are obliged to process the commissions assigned to them in a timely manner, and to ensure effective compliance, they must send a regular report to the Commissioning Directorate or Unit every two months, specifying the latest steps or actions taken, as well as

the procedural status of the corresponding case."

Mr President, the documents excluded by the Pre-Trial Chamber were official, contemporaneous working documents created to ensure that an accurate and up-to-date record existed at any given time of the stage a case had reached, including any procedural or evidential setbacks or obstacles encountered in the progression to trial of a case.

So the very answer to the question of unexplained "they", it is liable to be found in the *fichas* and other minute documents.

The purpose then is to collate the relevant information in one place so it can be accessible to public officials in the domestic investigating, prosecuting and judicial authorities.

So these documents provided an official record in real time of the stages in the process that had passed or that the case was passing through on any given date. They recorded a snapshot of what was happening for the reasons that I have said.

The case progression, they perform a real-time record and snapshot of the case progression.

Now, the case progression, Mr President, was the very core issue that the Trial Chamber was called upon to address. Were cases being processed efficiently and if not, why not? And based on a small sample of the cases, which Prosecution counsel has testified in court this afternoon should be regarded by you as representative, a proposition we dispute, but based on that, the very issue that the Court was called upon to determine, it concluded that it did not have an explanation for the delays. But that's hardly surprising because it had consciously and deliberately ruled out the very documents where that explanation could be found.

That is an absolutely critical and unrectifiable flaw in the approach that the Court

took.

By considering those records, you could accurately monitor who was under investigation, when, what was being done to take that further, what the evidence was, who the witnesses were. And they were before the Court in English. These documents had been regarded by Venezuela as important and therefore they had translated them. But without even understanding what they were - and I'll show you why I say that - the Court rejected them en masse.

What they were not, as the Pre-Trial Chamber seems erroneously to have concluded, what they were not was a series of ex post facto summaries of relevant information drawn up by Venezuela from the original documents for use in the Article 18 proceedings. It's quite clear that's what the Court thought it was looking at because it was only looking at the English translations. If it had looked at the original Spanish, it would have been quite apparent to the Court that what it was seeing were documents contemporaneously compiled and official records from the Prosecution answering the very investigation question that the Pre-Trial Chamber was required to address.

And we say that is an inexplicable error. We say it's inexplicable because the focus of the Article 18 inquiry was to determine whether the State had shown itself willing and able to prosecute with reasonable expedition. Indeed, the Pre-Trial Chamber concluded that it wasn't, in part because of unexpected delays -- unexplained delays, without having the opportunity to look at the explanation because they had entirely arbitrarily excluded the documents that would have given them that evidence, even though they were translated into English.

So we say, in this context, it was legally irrational for the Chamber to reject contemporaneous -- contemporary prosecutorial records from within the general

prosecutor's office, the very purpose of which was to chart the progress of an investigation, a charge and prosecution. That is most certainly as a minimum a reversible error of law and an abuse of discretion.

And again, since this was -- category of documentation was so central to the issue the Pre-Trial Chamber had to decide, it should not only have considered the English translations of those documents, but should then have looked for corresponding documents in the body of untranslated material, because by not doing that, they made an entirely erroneous statement of fact. They claimed in their judgment that these *fichas*, many of them didn't relate to any cases under investigation. How could they make that statement without knowing what cases were under investigation? Because in reality the *fichas* almost all related to cases for which there are police and court records in the untranslated material. So we see how these two errors caused the Court to fundamentally proceed on a mistaken basis of fact. And despite the efforts of appeal Prosecution counsel to testify in these proceedings, it is not appropriate for the Court to assume that there weren't answers to those questions in the material that was not before the Court, as we shall demonstrate in a moment.

This is all very clear if your Honours have in mind paragraph 88 of the Pre-Trial Chamber's decision, where the error in its reasoning sticks out like a sore thumb. You can see it happening in the paragraph as it progresses.

So without making any enquiries of the parties about what these documents were, what their nature was, or what was the context of them, in which they'd been created, the Pre-Trial Chamber mischaracterised them as nothing more than summaries prepared for the proceedings from original documents, holding they were not authentic working documents but ex post facto summaries. The relevant passage -- and it's interesting to see how it progresses because the test is set out

perfectly correctly, quote:

"It is recalled that relevant substantiating documentation should include any 'material capable of proving that an investigation or prosecution is ongoing' such as 'directions, orders and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file' [...]"

Well, that's a perfect description of these documents. It fits these documents with complete accuracy if you know what they are. It's self-evident that these *fichas* and *minutas* were internal reports contemporaneously prepared which included regular updates related to the progress of the domestic proceedings.

THE COURT OFFICER: [14:02:13] Counsel, you have one minute left.

MR EMMERSON: [14:02:15] However, the Pre-Trial Chamber then immediately goes on to misapply that test, saying 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 [...] domestic investigation in Venezuela," all completely wrong, "they cannot be relied upon as relevant [...]"

And in the end, the Court comes to the conclusion that they were to be excluded because they were not, quote, "original police or court records". Well, that's about the only thing they were right about. They weren't original police records or court records, they were original prosecutorial records which covered the process from the investigation by the police to the sentencing by the court. And it is completely inconceivable a proper judicial analysis could have been conducted without understanding the documents that the Court was looking at.

Thank you.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:03:24] Thank you very much,

counsel.

I would like now to give the floor to the Prosecution for 15 minutes, please. You have the floor.

MS REGUE: [14:03:32] Good afternoon, your Honours.

Your Honours, we submit that the Chamber was reasonable and correct in relying on court records and other records of investigative steps taken in 62 representative criminal proceedings.

My submissions will be divided in two parts. First I will explain how the Pre-Trial Chamber adopted the correct legal principles. And second, I will develop how the Pre-Trial Chamber reasonably applied these legal principles to the circumstances of this case.

Starting with the first part.

The Trial Chamber did not --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:04:12] May I ask you to speak closer to the microphone, please.

MS REGUE: [14:04:15] Sure.

Starting with the first part with the legal approach that the Pre-Trial Chamber took. The Pre-Trial Chamber did not set out a general rule or legal principle suggesting that only original police or court records can be relied upon for complementarity determinations. Instead, the Chamber's decision was specific to the characteristics of this situation. Most importantly, the Pre-Trial Chamber adopted the correct legal approach. The Chamber held, and I quote:

"[...] relevant substantiating documentation should include any 'material capable of proving that an investigation or prosecution is ongoing' [...]" That's at paragraph 88.

The Chamber explained that this material may include "'directions, orders and

decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file [of the domestic proceedings]'". The Pre-Trial Chamber then referred to the Philippines Article 18 decision which in turn in paragraphs 14 and 15 also set out the relevant jurisprudence.

This jurisprudence indicates that substantiating documentation for the purposes of complementarity can also include evidence on the merits of the case collected in the context of domestic criminal proceedings.

The Chamber's legal position was thus consistent with well-established Court jurisprudence on complementarity dating more than 10 years. We referred to this jurisprudence in our response brief at paragraphs 56 to 61. And the majority of the Appeals Chamber recall it and again endorse it in the Philippines Article 18 judgment at paragraphs 85 to 86, which is in item 1 of our list of authorities.

These decisions indicate that Chambers require sufficient information to undertake a complementarity assessment. This information must be of a sufficient degree of specificity and probative value to establish that there are tangible, concrete and progressive investigative steps taken in the context of domestic criminal proceedings. And these requirements equally apply to the Article 18 stage. So the State that asserts to investigate the same criminality and the same group of perpetrators as the Court must provide sufficiently a specific and probative information to support this allegation. As the Appeals Chamber has held on numerous occasions, providing evidence to substantiate an allegation is a hallmark of judicial proceedings. That's item number 2 of our list of authorities.

And this brings me to the second part of my submissions, that is the Chamber's application of these principles to this situation.

Your Honours, the Chamber was reasonable and was correct in relying on 62 case

files which included court records of cases which were defined by Venezuela as essential to the deferral request and representative to the domestic criminal proceedings and which related to the information contained in the Prosecution's letter of 13 January 2022.

The remaining material, which did not include the records, either in Spanish or in English, did not permit the Chamber to assess the existence of advancing domestic criminal proceedings. In response to a previous question, I have explained that since the start of the preliminary examination, Venezuela provided different types of material, many of them were unrelated to domestic criminal proceedings, only charts, only the summaries which are called *fichas* or *asuntos*, and the court and investigative records related to domestic criminal proceedings. And of these materials, only the court and investigative records had sufficient information to assess the scope and progression of domestic criminal proceedings.

On appeal, and we have heard my learned colleague, mainly takes issue with the decision of the Chamber not to consider the summaries of cases that the Prosecution translated into English. These summaries are 112 documents that Venezuela call in Spanish *fichas* or *asuntos* and it provided in the first three submissions, first three submissions after it requested the deferral. These summaries are like cover sheets that provide some information about the cases and list the judicial and investigative measures taken in those cases. Your Honours have seen examples of these summaries in the five cases that Venezuela seeks to admit as additional evidence on appeal. For those five cases, your Honours have been provided with court and investigative records but also with a cover sheet which has the very same format as the *fichas* or summaries.

So the Pre-Trial Chamber decided to rely only on the court and investigative records

translated into English instead of the summaries, instead of those cover sheets. And this decision, we submit, was reasonable.

The information in the summaries is very limited, lacks specificity and it is often unclear. It does not allow the Court to meaningfully identify the scope and progression of the domestic proceedings. For example, in those documents, in many cases the conduct being described is unclear, and this is essential for the Court to be able to compare the scope of the domestic proceedings with the scope of the Prosecution's intended investigation. Also in the cases, in the cases where the suspects are identified, for most of them the ranks are not provided. And also not all the summaries include the legal qualification of the cases. And, crucially, there is no evidence that the investigative measures listed in the summaries have in fact been taken.

And these were the reasons why the Chamber did not rely on the summaries, because there is nowhere in the decision that the Chamber decided not to rely on * the summaries because they were done ex post facto. This is nowhere to be seen in the decision and the Pre-Trial Chamber did not make that assessment and that finding.

And, your Honours, the Chamber's approach not to rely on the summaries is not new. To the contrary, it is fully consistent with the Court's jurisprudence. I will just mention two examples which appear in item 3 of our list of authorities.

One is in the Ruto et al. and Muthaura et al. cases. In those cases the Appeals Chamber confirmed that mere instructions to investigate the suspects did not provide sufficient details as to the investigative steps that Kenya may have taken. Likewise, assertions by a police representative that officers had visited a crime scene were insufficient without supporting evidence such as police reports attesting to

the time and location of those visits.

And there is the recent decision in the Philippines situation authorising the resumption of the investigation issued by the same Pre-Trial Chamber just some few months before. The Pre-Trial Chamber found that charts or lists of cases with limited information were insufficient to demonstrate that investigative steps were being taken. The Chamber explained that the mere reference to the existence of cases in the absence of underlying supporting documentation does not allow for an assessment as to whether any concrete and progressive investigatory steps have been taken. And the majority of the Appeals Chamber has confirmed this decision.

And importantly, this jurisprudence also shows that Chambers have relied on court and investigative records to reach their complementarity determinations, just like this Chamber, and this is because these records are highly probative to determine the scope and progression of domestic proceedings as required by Article 17. And I refer to paragraphs 57 to 58, our response brief, where we cite some examples, as well as item 4 of our list of authorities.

And significantly, your Honours, even if the Chamber had considered the summaries and also the court records, which were only in Spanish, it would have reached the same conclusion, that is that the domestic proceedings do not sufficiently mirror the scope of the Court's intended investigation.

My colleague is suggesting that there is a big pool of evidence of court records that the Chamber did not consider and that it will show that Venezuela is investigating -- sufficiently investigating the same criminality and the same group of perpetrators as the office intends to investigate. But this is incorrect. We have seen no information suggesting this.

I would like to emphasise that the sample of 62 case files in the 65 annexes which

were provided on 22 March 2023 is indeed a representative sample of the Venezuelan proceedings and of the remaining court records which are in Spanish.

Just to give you some figures, most of the cases relate in both instances to incidents that took place in 2017. In many cases, the possible perpetrator is not mentioned. This is the case for three quarters of the cases in the sample and for nearly half of the cases for which no English translation was provided. Also, most of them are in the preparatory phase. This means that there has not been an *acta de acusación* which would be akin to an indictment. This is the case for most of the cases in the sample, 57 out of 62, and for 80 per cent of the Court records in Spanish.

And also, in both cases, for nearly half of the cases the proceedings are not advancing, they are not progressing. This means that the investigation was open shortly after the events, but there has been years of inactivity, * there is a gap of inactivity.

According to our jurisprudence, these disparate and isolated measures do not constitute a progressing investigation. And also, for all the cases, we see the two features that the Pre-Trial Chamber found determinative. There is no investigation of the patterns of the systematicity. And also, even in the cases where there are convictions, these are for low-level and, seemingly, direct perpetrators.

Also, we don't see an investigation of the persecutory intent, and none of the records in Spanish refer to instances of rape.

And the Pre-Trial Chamber did not reach its conclusion because I -- we were -- because the Prosecution was giving evidence, no. The Pre-Trial Chamber reached its conclusion based on a sample of representative cases that Venezuela itself said they were representative, that Venezuela itself said that they related to the incidents that the Prosecution identified in January 2022, and that Venezuela itself said that they were essential to the deferral request.

Your Honours, we submit that the Trial Chamber's decision was reasonable and we respectfully request you to uphold it.

And if I could have your Honours' leave, like two minutes, to address to the document that has been pulled up in our screens, because this document relates to a 2003 annex of a policy paper, that the policy paper relates to referrals and communications. Not deferrals, referrals. It refers to exchanges that the Prosecution may have in the context of the preliminary examination with communication providers. So we need to put that into context. We are talking about that now, about the different stage of the proceedings, but there has been an assessment under Article 53, there are reasonable basis to believe that a crime within the jurisdiction of the Court has been committed. There has been a complementarity assessment also under Article 53(1)(b) that at least one case -- at least a case is admissible before the Court.

We are at a very different stage of the proceedings than the one that this document was referring to back 20 years ago.

Thank you very much, your Honours.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:17:48] Thank you very much.

And I would like now to invite the OPCV to make its submissions.

You have 10 minutes, please.

MS MASSIDDA: [14:17:57] Thank you very much, your Honours. Being the last speakers -- the last speaker, I think I can again contain my submissions, also considering the ample explanation by the Office of the Prosecutor, we share the lines of reasoning.

And on this specific question, our position is that the Pre-Trial Chamber reasonably

excluded material that was not accompanied by "original police or court records" because they were not "relevant substantiating documentation" for the purposes of Article 18(2) of the Statute.

And in reaching this conclusion, as also indicated by the Prosecutor, the Pre-Trial Chamber referred to a finding in the Philippines situation, a finding by the Pre-Trial Chamber.

In that decision the Pre-Trial Chamber found that "relevant substantiating documentation" for an Article 18 determination includes, and I quote, "any 'material capable of proving that an investigation or prosecution is ongoing' such as 'directions, orders and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file'".

And this is the Philippines pretrial decision, 18 in our list of authority, paragraph 15.

Applying this standard to the Venezuela situation, the Pre-Trial Chamber correctly found that translations not accompanied by original police or court records were not capable of proving that investigations or prosecutions were ongoing in Venezuela.

The pretrial approach was, in our submission, reasonable. Documents which are not original, or are not based on original documents, do not allow to distinguish allegations from facts. Permitting otherwise would leave it open for States to make Article 18(2) challenges based on inexistent national proceedings.

In fact, the Appeals Chamber has recently found in the Philippines situation that for the purpose of admissibility challenges under Article 18, a State is required to demonstrate, as also indicated by the Prosecution, an advancing process of domestic investigations and prosecutions.

Our last point relates to whether or not the Pre-Trial Chamber should have assessed each document.

Under Article 69 of the Statute, the Pre-Trial Chamber in our position did not have to justify its determination for each document at hand.

Pursuant to Rule 64(2) of the Rules, a "Chamber shall give reasons for any ruling it makes on evidentiary matters".

This obligation has been interpreted by the Appeals Chamber as requiring that a Chamber must explain with sufficient clarity the basis of its decision, identifying "which facts it found to be relevant in coming to its conclusion" in admitting or rejecting evidence.

Applying this principle, the Pre-Trial Chamber provided sufficient reasons for the exclusion of the material which did not contain "original police or court records" considering them together because of their common feature, namely the fact that they were not accompanied by the original version.

In concluding, the Pre-Trial Chamber correctly found that translations not accompanied by original police or court records were not relevant for its determination of the Article 18(2) challenge, and it provided sufficient reasons for this conclusion in the impugned decision.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:22:43](Microphone not activated) I would now like the State Representatives to respond to the Prosecutor and to the OPCV. Thank you.

MR EMMERSON: [14:22:59] Mr Martínez is going to respond on behalf of Venezuela, addressing in particular the impact of these absent areas of evidence.

MR MARTÍNEZ: [14:23:12] Thank you, Mr President.

I will address the Court in Spanish.

(Interpretation) In order to respond to the question with regards to the impact that the decision of the Pre-Trial Chamber had in excluding probative material, we shall

project on the evidentiary channel a presentation.

Now, in this presentation we're going to look at the real impact that the exclusion of this material had in the analysis that the Pre-Trial Chamber had with regards to Venezuela when Venezuela was indeed investigating the acts which the Prosecutor proposed to investigate.

Now, if we look at the information here, we can see that between 2018 and 2021, with regards to the preliminary examination, Venezuela in the first moment transferred 780 cases at the time of the -- when there was the 18(2) deferral request, 15 April 2022.

Now, first of all, when there was a first transfer of -- there was 704 cases that were initially referred in response to the questionnaire sent by the Office of the Prosecutor on the 30th, and the rest of the cases which come to -- it was showing that there were different cases which were denunciated in reports of -- for our different bodies, human rights bodies, but which had not been denounced within the country itself following the general legal principle that the complainant has firstly to go to the domestic jurisdiction, which is something you can see in the Inter-American Court of Human Rights, in the European Court of Human Rights and in different committees of the United Nations.

Now, in total it transmitted 18,200 pages, coming up to 30,000 in total. And all this was done taking into account the time frame, because, first of all, when it came to the preliminary examinations, they said that the acts occurred at least since 2017 and since the notification Article 18(1) and that they had occurred since 12 February 2014.

Now you will see, ladies and gentlemen, what the presentations were of Venezuela during the preliminary examination. There were eight different presentations where you have the content -- the date on the left and the content in the middle, and the register of the International Criminal Court on the right.

Now, all this information came from -- firstly, from the initial report about the system to follow the different cases. And this is from the public ministry, Public Prosecution Office, in addition to the documents referred to, which are in accordance with the circular from the Public Prosecutor's Office. And in addition to that there were official reports that were sent.

Now, if you look at the points in red, you have all the material which was not taken into account by the Pre-Trial Chamber. That is all the presentations during the preliminary examination.

On 13 November 2021 you had the investigation phase that started. The State was notified under 18(1) in December that it would go to the investigation phase. But 18(1) is not taken up when it comes to different perpetrators or victims, but there is information transmitted which was vague. So in -- when Venezuela asked for more information, there was a transmission where you had, in annex 1, 18 open source reports, and in annex 2, which was a sample of supposed or alleged incidents cited in open sources, so a sample of incidents in open sources. And it didn't just talk about the conduct, it only indicated the alleged victim, a date and a location.

Venezuela deployed this list and, well, it had different errors in it. For example, 20 people were identified under a pseudonym, there were 12 people that were duplicated, and after this annex it could be concluded that in fact we were actually talking about 124 incidents.

And there, ladies and gentlemen, if we look at the investigation phase, you can see that there were eight new submissions that were made, or new presentations, that the Bolivarian Government of Venezuela provided. And then the sources of these presentations were the minutes or official records that the Office of the Prosecutor in Venezuela had internally within the country, and that is the circular of 2011. These

are detailed documents which we can subsequently exhibit. And, furthermore, there were official reports.

Now, newly, with a -- there's a part in red. You will see that there's the documentation which was not taken into account by the Pre-Trial Chamber. And as you can see, that is the almost entire totality of the documentation transferred by the State of Venezuela.

If we could go to the next slide, please.

The Pre-Trial Chamber only took into account 23. The Pre-Trial Chamber did not assess any of the minutes submitted when they were -- when we talk about these 124 incidents in annex 2, either in Spanish or in English. And in addition to this, it only assessed 64 official court files in English out of the 124 incidents in annex 2. Only information which was specific and concrete which the country received from the opening of the case till now.

And if we go on to next slide, please, this is, ladies and gentlemen, the question that we still have to ask ourselves. The Office of the Prosecutor (indiscernible) that when there were these different means of evidence that had to be taken into account, the PTC had to assess it, but this, according to this scheme if they had taken into account all these different materials then they could have accredited that 124 incidents referred in accordance with Rule 52(2) were covered by the internal jurisprudence of Venezuela.

And as you can see in this scheme, on the left part you have the number of incidents - and we have not put the names of any alleged victim - and on the right side you have the register number of the internal case that existed in the Venezuelan legislation. And as you can see as well you cannot speak about -- well, what you can say is that there is an absolute mirror specific inexcusable, there is no incident

reported about Rule 52(2) and annex 2 thereof which is not being investigated by Venezuela.

Thank you very much, ladies and gentlemen.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:31:49] Thank you very much.

You have no further comments?

MR EMMERSON: [14:31:52] No further comments.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:31:53] Thank you very much.

Now, we still have some time, so we could take some questions on this particular topic, which is a very important topic altogether.

I will turn to my colleague judges, Judge Hofmański? Judge Ibáñez, at this stage? Judge Gocha Lordkipanidze? Judge Bossa?

Well, perhaps then allow me to raise one or two questions:

When a State requests a Prosecutor to provide additional information regarding his notification under Article 18 of the Statute and it does not receive such information before the time of making its deferral request, can this information be relied upon for other purposes? Can the Pre-Trial Chamber rely on it when making its determination on whether to authorise the Prosecutor's investigation?

I might read it again to facilitate the discussion.

When a State requests a Prosecutor to provide additional information regarding his notification under Article 18 of the Statute, and it does not receive such information before the time of making its deferral request, can this information be relied upon for other purposes? Can the Trial Chamber rely on it when making its determination on whether to authorise the Prosecutor's investigation?

I might ask the views of the OTP first, if you wish, but would be happy to hear the views of the counsel also from the State.

MS REGUE: [14:34:06] Your Honour, can I ask a clarification: It's -- is your Honour's question when the State requests under Rule 52 further information from the Prosecution?

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:14] Yes, indeed.

MS REGUE: [14:34:15] And the Prosecution does not provide the information or provides the information?

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:20] Does not provide the information.

MS REGUE: [14:34:21] If the fact that the Prosecution does not provide the information to the State, the absence --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:27] Exactly.

MS REGUE: [14:34:28] -- can be considered to draw any kind of inferences --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:31] Indeed.

MS REGUE: [14:34:32] -- about the -- about the scope of the Prosecution's investigation --

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:38] Indeed.

MS REGUE: [14:34:39] -- and the notice.

Okay.

I think, your Honours, that this should be -- should be looked in light of -- should be put into context, so the answer is that it depends on the circumstances of each case. Like in this case, we, for example, take into consideration the fact if there have been previous engagements between the State and the Prosecutor where the Prosecutor has given information and has put the State on notice with respect of the scope of

the preliminary examination and the scope of the intended investigation that should be taken into account. And even if the Prosecutor does not provide the information requested because, for example, it has concerns about security of witnesses and security of evidence, we submit in that respect that no inferences should be drawn, still the Chamber should consider the information that was provided to the State, should look at the content of the information that was provided to the State, and see whether this information is sufficiently specific to inform the State and to enable the State to exercise its right to request the deferral.

The focus has always to be on whether the State receive sufficiently specific information to allow the State to exercise its right to request the deferral. So the absence of the Prosecutor providing this information might not have an impact if the Article 18 notification, if previous engagements or if subsequent engagements show that the State has received sufficient information to exercise its right. We submit that the importance is always in the content, not in the form.

Thank you, your Honours.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:36:38] Thank you very much.

I think the OPCV might be willing to intervene in this before I give the floor to the State.

MS MASSIDDA: [14:36:46] Thank you, your Honour. Very briefly.

I actually share 100 per cent the Prosecution, when it was presented now by the Prosecution. We also think that the focus in this case is on whether or not the Prosecution provided already enough information considered "sufficient" for the State to eventually activate its rights under Article 18(2) of the Statute.

So the focus is on the, I would say, completeness of information. If the Prosecution

consider the information provided is complete and match with the threshold which is required at this stage, then the Pre-Trial Chamber could still continue to consider the information focusing on the specific aspect of the complementarity test at that stage of the proceedings.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:37:43] Thank you very much, Counsel.

MR EMMERSON: [14:37:44] I think there may be an unusual degree of overlap between the parties on the right approach to this question, in the sense that the structure of the Statute is prescribed and the scope -- but the scope of the particulars provided in the Article 18(1) notice that has kicked this procedure off, that has begun the procedure, will obviously vary enormously. You might have a case such as the present, where there were no particulars at all in the Article 18(1) notification other than to allege that there were crimes under Article 7 that had been committed since 2017, with no particulars that the State can investigate or even identify that it intends to investigate as a response in the normal complementarity way.

Or you could have, at the other extreme: we intend to investigate the culpability of General Pinochet for crimes against humanity committed by the junta in Argentina between X date and Y date.

Now, in the latter context the State may say: well, tell us what the detailed crimes are in order that we can establish if we are already investigating those. And if the State -- if the Prosecutor refused to answer that question, it would certainly be a basis for the drawing of an inference.

But in a case such as the present where the Article 18(1) notice is nude of detail that's capable of throwing any light for the authorities in Venezuela, the question then

arises -- two questions arise:

If the Prosecutor is asked to provide more information in order to show what he intends to investigate, and he declines to do that, then the State is deprived of its Article 18(2) right to seek a deferral, or that right is infringed by the Prosecutor's unreasonable refusal to provide particulars. And so at that stage the question would be a deferral request or a deferral allowance in order for the Prosecution to start playing its part in the complementarity process.

What we have here is a variation on that theme, where there was no information provided by the Prosecutor in his Article 53(4) response about the investigation he did intend to conduct, because he says in terms the examples I have given you are not intended to be the -- they will form no part of my decision to seek to resume.

But they give you some idea, because I've distilled 24 out of a vast range of human rights allegations in these 18 reports, some criminal, some noncriminal, some falling with the Article 7 list of crimes, some not. I've distilled 124 as it turns out, as you've just seen, instances of events that though they're not my cases that I'm investigating, because they're in the public domain, they will give you a flavour of the sort of crimes that are.

Now, that is in a sense precisely the situation that your Honour envisages, albeit with a small modification that he is giving Venezuela the opportunity to show that it is willing and able to investigate cases of that category. So it doesn't -- it's exactly the same as being asked for the particulars by Pinochet's lawyers and just not reply, Argentina, when the Pinochet case does not reply, but what it was intended to do was to say: okay, this is not our group of cases, but here's 124 that are in the public domain, show us what you've done about those or what you're going to do about them.

And as you've just seen from the careful analysis put forward by Mr Martínez, if

the Trial Chamber had not excluded all the evidence that wasn't translated and all the evidence that was translated that gave a proper summary of those reports, you would have had a hundred per cent congruence. All of the examples that the Prosecutor distilled from the public sourced material were investigated in the materials that were put forward by Venezuela to the Prosecution. But instead of that picture being put in front of the Pre-Trial Chamber and say: well, we won't tell you the actual crimes but we will tell you some analogous crimes that -- of a similar character, let's see what you've done or you're going to do about those. And the answer comes back: this is what we've done, we've investigated all of them. Some we can't identify the victim. Some we can't identify the perpetrator. Others we can. There's a problem with -- it's all there. The Prosecutor had it all. According to counsel, they read it all.

But I do -- I mean, I'm going to make a rather obvious point here, and I made it in passing a couple of times, and it happened below as well and it happened in the Trial Chamber's decision, imagine that the Prosecutor was prevented from using the word "representative sample" right, because it's not the Prosecutor's job, it's the Court's job to decide whether it's a representative sample, right, but the Prosecution's entire submission depends on that word, because imagine everything they're saying, if they say it was just a sample, it was a random sample taken by reference to date - which, by the way, is in fact the case - we're not claiming it was representative, it was just that we say there's a pattern, let's say there's lots of unexplained cases, but at the end of the day we don't really know if they haven't read the other material themselves. What would the Court be saying then? Which means the entire line of reasoning depends on counsel in this Court giving unsworn testimony and asking you to take it as gospel truth. Now that is not a proper

judicial -- a proper way to approach a judicial function.

So the short answer to your Honour's question is, in a case where the Prosecution unreasonably refuse to tell Argentina the crimes of the time period they were investigating General Pinochet for, then obviously it would have significant consequences for the authorisation of an investigation, if it was a case of *proprio motu* investigation, or the deferral of an investigation in either a *proprio motu* or a State referral case, because the Prosecution would be obstructing any judicial determination of whether the tests have been met.

The only difference between that case and this is that the Prosecution chose a group of cases he wasn't investigating, give some particulars of those. And here we have that if the Court -- if they'd done their job properly and put the material in front of the Court, and it had been properly analysed, they would have come to exactly the same conclusion that Mr Martínez has just amply demonstrated, which is that every single one of those 124 cases has a detailed case file amongst the material that the Court chose and the Prosecution assisted in to exclude entirely from its considerations.

I mean, it's difficult to think of a clearer and more paradigm example of a failure of the judicial process. I'm sorry to put it that way, but it really is an ultimate failure of fair due process.

And I just wanted to put that in context. You've just heard from Prosecution counsel the reason it didn't matter to look at the *fichas*, even though they were all there, they covered the cases, and they related to the very files that Mr Martínez has told you about which were untranslated, the Court comes to the conclusion they don't relate to any active case file.

Well, how can it come to that conclusion if it doesn't know what

the active case files relate to? In fact they did, they related to all the active case files. But let me just test what was said to you a few moments ago by counsel from the Prosecution, these are just cover sheets, just little notes, they don't name a victim, they don't name a perpetrator, don't give the rank, they just like cover -- they don't add anything. Well, all courts know that, a judge or a tribunal, at any stage, they deal with each stage of the proceeding. I mean, a judge called upon to make a decision on bail is not going to be asking at that stage what the investigative steps were. Everybody is focused on it. But the one thing that really keeps a real-time overview is if someone - and in Venezuela it's the responsibility of the Prosecutor - is keeping a detailed daily record with all of those details.

Now, in order to answer, I'm just going to show you one of the *fichas* that was before the Pre-Trial Chamber in English, because they were all translated to English before the Court decided to disregard them.

Would you be able to call that up on the evidence screen. Evidence 2.

I think it will significantly help your Honours' understanding of the submissions and evaluation of the submissions that the Prosecution has been making.

Is there a problem?

Yes, I'm so sorry, it's quite right, there is a problem. I need to ask you to go into closed session because, contrary to the submission you've heard, it does in fact have the victims' names and details on it.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:48:58] Could I ask to go in closed session.

(Private session at 2.49 p.m.)

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(Open session at 2.53 p.m.)

THE COURT OFFICER: [14:53:02] We are back in open session, Mr President.

MR EMMERSON: [14:53:05] So having seen that particular sample *ficha*, your Honour has asked me the question of whether it relates to one of the five cases, that is something I'm having checked and we'll have the answer for you first thing in the morning.

But what turns on the question with respect this is a sample, for every one of the 124

dummy, decoy cases that the Prosecutor drew to Venezuela's attention, there's a *ficha* - and they were all translated and rejected by the Court - and there is the supporting documents that was never even translated which the Prosecutor kept to himself, because he says he read it all in Spanish, and which he never told the Court was linked to the *fichas*.

Otherwise, the Trial Chamber could not have come to the conclusion that most of the *fichas* related to cases that were not under investigation, because they all relate to cases that were under investigation in which the police and court documents remained untranslated.

Now, how was that allowed to happen? And what we now know from Mr Martínez' analysis, and there is no getting around this, is that every one of them could be connected to untranslated investigative material.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:54:22] Thank you very much, Counsel. I think you've made your point.

Would the OTP like to comment?

We all reserve the possibility to come back to those issues tomorrow morning, after further thoughts, as part of our question and answer session.

Please, OTP.

MS REGUE: [14:54:39] Thank you, your Honours.

With respect to the presentation that we have seen and the submissions made with respect to the numbers and the quantity of cases open, I would like to recall that a complementarity assessment is based on the facts and based on the substance, based on the quality of the domestic proceedings. We need to look -- we need to determine whether the domestic proceedings, they -- we look in order to determine whether they sufficiently mirror the scope of the Prosecution's intended investigation, we look

at the conduct, we look whether the conduct is substantially the same and we look at the category of perpetrators.

And no matter how many cases were open, if you look at the substance, if you look at the content, you see the same deficiencies and you see the same gaps that were key for the Chamber to reach the conclusion that it reached. No assessment of the patterns, no investigation of the patterns and focus on only direct perpetrators, because opening a case file, it's not the same as conducting, as an advancing, as a progressive investigation. It's not the same.

Then with respect to the comment about the *fichas*, your Honours, I would like also to recall that not all the *fichas* have the same information and my submissions make that point. So some *fichas* had more information, others had less information, but what it was crucial is like none of the *fichas* attach the -- the investigative steps taken. There is no -- there was no information, no evidence that those investigative steps taken, all these bullet points have in fact been taken. With that *fichas* in isolation, that was -- that analysis was not permitted.

Also, your Honours, my colleague has also mentioned that if you put two and two you can see that the *fichas* have court records. Your Honours, we assess all the material and in the annexes that we attach to our Article 18 request and in response to the appeal brief, it's * Annex B of our Article 18 request and Annex A of our response brief, there is one column there where we identify the overlaps, whether the cases were reported in the charts, the 7-0 -- 7-0 cases, 7-0 cases that have been mentioned, whether they were reported in *fichas*, whether reported in court records, in English and Spanish, we did all that assessment and we analysed all the overlap. And the Chamber had that before it, it was part of our thorough assessment that we conducted.

And, as I said, no matter if you look at the *fichas*, you look at the chart, you look at all the court records, the domestic proceedings have the same qualitative gaps that we have mentioned and they were determinative.

And just to conclude, I also wanted to make a point about the issue of notice, about the information that Venezuela had with respect to our preliminary examination and intended investigation, it -- there have been an engage of years where we have informed them over the years about the scope of our preliminary investigation, of the subset of criminality, which was mistreatments in detention. We identify the crimes under the Statute, we identify the category, the groups of perpetrators. We were quite precise in the summary of findings attached to the Article 18 notification, but also in documentation submitted before. Our requests for information of October 2020, a letter that we sent 19 October 2021, just before the visit of the Prosecutor to Venezuela, all this is mentioned in the procedural background in our response brief Article 18 request. So before we even sent our Article 18 notification, Venezuela was well aware of the type of criminality, of the categories and groups of perpetrators that we analysed during the preliminary investigation and that we intended to investigate.

Thank you very much.

MR EMMERSON: [14:58:57] I'm not asking for a right to reply at this stage, because I see the time, I would like to reply to those things tomorrow.

May I simply leave you with this:

In the submission that's just been made, apart from the very last point, everything once again depends on the Prosecutor giving evidence that they consider that the material showed deficiencies without showing the material to the Court to judge whether they were right in their assessment. Everything counsel said, and I

continue to press my objection to counsel for the Prosecutor testifying not under oath about the content of the material, but I know that the bench will totally disregard those submissions, because you haven't seen the material and neither did the Pre-Trial Chamber and you have no way of knowing whether the Prosecutor's assessment was accurate or whether, as Mr Martínez demonstrated to you statistically a few minutes ago, it was so wide of mark that they didn't even know that every case they had mentioned had been already investigated.

PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [15:00:10] Thank you very much, Counsel. You've made your point.

We will now adjourn and resume tomorrow morning at 9 o'clock sharp. I will confer with my colleagues to see whether we have any further questions in order to return some of the important issues which have just been addressed.

Thank you very much.

THE COURT USHER: [15:00:27] All rise.

(The hearing ends in open session at 3.00 p.m.)