

Appeals Hearing

(Open Session)

ICC-02/18

1 International Criminal Court

2 Appeals Chamber

3 Situation: Bolivarian Republic of Venezuela

4 ICC-02/18

5 Presiding Judge Marc Perrin de Brichambaut, Judge Piotr Hofmanski,

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

7 Gocha Lordkipanidze

8 Appeals Hearing - Courtroom 1

9 Wednesday, 8 November 2023

10 (The hearing starts in open session at 9.00 a.m.)

11 THE COURT USHER: [9:00:13] All rise.

12 The International Criminal Court is now in session.

13 Please be seated.

14 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:00:48] Good morning, to all.

15 *Bonjour. Buenas días.*

16 Court officer, could you please call the case.

17 THE COURT OFFICER: [9:00:58] Good morning, Mr President, your Honours.

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

19 And for the record, we are in open session.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:01:12] I now invite the parties

21 and participants to introduce themselves for the record, beginning with the

22 authorities of the Bolivarian Republic of Venezuela. You have the floor.

23 MR EMMERSON: [9:01:29] Our representation today is the same as yesterday. My

24 name is Ben Emmerson and I'm lead counsel. To my right is Minister Gil Pinto, and

25 to his right is Mr Devoe. And again in the second row, Ms Alagendra, Mr Martínez,

1 Mr Marchand.

2 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:01:54] Thank you very much.

3 Counsel for the Prosecution, please.

4 MS BRADY: [9:02:00] Yes. Good morning, your Honours. The appearances for
5 the Prosecution remain the same today as well. Next to me, Ms Meritxell Regue,
6 appeals counsel; beside her Ms Nivedha Thiru, associate appeals counsel; and behind
7 me Ms Alice Zago, who is the trial lawyer and head of the Venezuela unified team;
8 and Cara Pronk-Jordan, senior legal coordinator in pillar A of the OTP. And I am
9 Helen Brady, senior appeals counsel. Thank you.

10 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:02:34] Thank you very much.

11 And now the Office of Public Counsel for Victims, please.

12 MS MASSIDDA: [9:02:40](Interpretation) Good morning, Mr President, your
13 Honours. (Speaks English) Your Honours, for the Office of Public Counsel for
14 Victims appearing today, Ms Ludovica Vetrucchio, legal officer; Mr Enrique Carnero
15 Rojo, legal officer; and myself, Paolina Massidda, principal counsel.

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:02:58] Thank you very much.

17 If the composition of any team were to change during the different sessions of today, I
18 would ask the parties and participants to inform the Chamber about this at the
19 beginning of each session.

20 We will continue today with the submissions on the appeal brought by the state
21 authorities of the Bolivarian Republic of Venezuela.

22 Before we move to the submissions, I would like to ask the State Representatives to
23 kindly file at the earliest convenience the list of authorities they referred to in court
24 yesterday. It will be very useful for everyone if the State Representatives could file
25 the documents which they presented in the courtroom yesterday. We would be very

1 grateful for that.

2 MR EMMERSON: [9:03:43] And just to say, your Honour asked a question
3 yesterday about the *ficha* that was displayed in the course of argument, particularly in
4 closed session, as to whether it was one of the five documents that -- or was part of
5 one of the five documents that was the subject of the application to admit evidence,
6 fresh evidence on appeal. The answer is no. It is in the Court file and has been
7 since the Pre-Trial Chamber proceedings and was filed in response to the
8 Prosecution's request to resume its investigation.

9 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:04:24] Thank you very much
10 for that.

11 As we mentioned yesterday, we will finish this morning the extra questions which we
12 may have had on yesterday's debate, and Judge Ibáñez has an extra question which
13 we will address before we move to the next group of issues. (Speaks Spanish)

14 JUDGE IBÁÑEZ CARRANZA: [9:04:50] Thank you very much Mr Presiding Judge.
15 (Interpretation) Thank you. My question will be in Spanish. So this is principally
16 directed to the state, but the parties can also comment hereon.

17 So, yesterday, we were listening -- on the part of the Venezuelan State, we were
18 listening to new information about the 124 incidents with these so-called *fichas*.

19 Now, the first clarification that I would like to make is with regards to the
20 124 incidents; how many of them are contained in the 65 translated annexes?

21 And the second consultation is: From these 124 incidents, which documents,
22 original documents do you have? Of what kind -- interviews -- interviews with
23 victims, et cetera, original documents, do you have?

24 Furthermore, how many investigations from these 124 incidents identify supposed
25 perpetrators or alleged perpetrators, suspects, as well as if these documents from

1 124 incidents they identify the conduct that is being investigated, and what type of
2 investigation is this; is it criminal, is it administrative or is it other?

3 And, furthermore, how many of these investigations from 124 incidents have finished
4 or resulted in sentences with convictions? This is with regards to the incidents
5 themselves.

6 Now, the second major consultation that I'd like to make is with regard to the *fichas*
7 themselves, these information sheets. It's very important that we discuss this at this
8 hearing.

9 Now, the *fichas*, what they show, I understand it's not an official translation, but it's
10 not clear if it is. You don't have a stamp, you don't have a date, you don't have an
11 *apostille* in accordance with The Hague Convention with regards to translation.

12 So with regards to this information in these information sheets, is that an
13 interpretation by the State of Venezuela of who is the person who carried this out or
14 wrote this information or consolidated this information in the information sheet
15 itself?

16 And finally, it would be interesting for us to know, and if you could give me
17 clarification in this regard, if these information sheets identified suspects or only they
18 have the title of a -- human rights violations without identifying suspects.

19 Thank you.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:07:32] I would like to thank
21 Judge Ibáñez for a very broad and important question.

22 Counsel, would you like to give us a first answer to this?

23 MR EMMERSON: [9:07:45](Microphone not activated)

24 THE INTERPRETER: [09:07:45] Microphone.

25 MR EMMERSON: [09:07:46] I was going to answer the second question briefly first,

1 when we'll certainly provide you with copies of the original of a *ficha* to see its
2 appearance, which is exactly the point that I was making yesterday.
3 But, no, these are not summaries, and that's the error that the Pre-Trial Chamber
4 made. These are not summaries by Venezuela of other documents. This is a
5 contemporaneous working record issued pursuant to a legal instruction issued by the
6 prosecutor, the general prosecutor, requiring all employees to report back on a
7 day-to-day basis on the progress of a case. It certainly does, and the one that you
8 saw in translation did, identify the victims, but it also, in that particular case,
9 identified the perpetrator, because the perpetrator had been the subject of
10 investigation and had been discovered.

11 So it's a very important - it's a fulcrum, if I may respectfully say so - question, and it's
12 the very error that caused the Trial Chamber to mischaracterise this volume of
13 material and fail to appreciate that it was in exactly the same category as a police or
14 court record. It was a contemporaneous document compiled in multiple -- in the
15 original, by multiple of the senior representatives of the office of the general
16 prosecutor. But it's -- because, of course, handling of the case may change, but
17 fundamentally it was reporting along the line at the time on each development as it
18 occurred.

19 So you saw in the passage that I took you to, an entry -- I can't remember the exact
20 date, but it was for, I don't know, 3 April, and then another entry for 20 April. And I
21 can read to you again, or provide to the Court directly, the text of the 2003 instruction,
22 the legal instruction issued by the general prosecutor requiring that practice to be
23 followed.

24 It had always been followed, but according to the order, people were not -- in 2003,
25 employees were not, if I might say, put it this way, keeping up -- keeping up with the

1 timetable. And so the order says very clearly to all of those case handling -- those
2 handling cases, not just in relation to this investigation or the allegations that we've
3 been discussing here, but in relation to any crime -- ordinary crime, organised crime
4 and so forth -- that there be a contemporary reporting system.

5 So it is true that in some respects it will say, you know, the defendant appeared in
6 court today and was remanded on bail, and there'll be an equivalent bail judgment in
7 the papers that were untranslated. But what it will tell you much better than the bail
8 judgment is exactly where the periods of alleged activity or inactivity are, what
9 decisions were being taken to investigate whom, and of course in some cases there
10 will be a suspect identified; in other cases, there won't be because the investigation
11 hasn't got that far.

12 But until a case is closed, as in any other jurisdiction, it remains open, and so there's
13 none of those cases, I think, in which it was closed entirely, I'll be corrected if I'm
14 wrong -- that any of the investigations were closed, because they're important
15 allegations and are the subject of continuing investigation.

16 But there are certainly cases where there were prosecutions and convictions, and
17 again I'm looking around me, but one of the cases I know involved two relatively
18 senior police officials who had been interviewing a suspect who fell to his death and
19 they were prosecuted -- investigated, identified, prosecuted, charged, convicted and
20 sentenced to 20 years in prison.

21 So the suggestion that those documents were in any way other than of central
22 contemporaneous relevance is, we respectfully submit, a complete misreading of the
23 documents.

24 That's exactly how the Prosecution ended up -- I'm not saying deliberately but
25 misleading the Trial Chamber into believing that these were just summaries, and the

1 consequence of that is that they weren't relevant, as opposed to the original
2 underlying material.

3 But if the Court had had both, as they should have done, then that submission could
4 not possibly have been made, because for every one of the 124 cases there's a *ficha*,
5 and for every one of the 124 cases there's a case file in the material that was
6 untranslated.

7 As you'll see, the Pre-Trial Chamber said these *fichas* don't relate to actual cases; but,
8 in fact, they did relate to actual cases, but because of the multiple ways that the
9 Pre-Trial Chamber had blinded itself to the body of evidence, they weren't able to
10 determine that and made an entirely baseless, false and inaccurate finding of facts on
11 which they based, in part, their judgment.

12 I'm going to yield to Mr Martínez to deal with the other part of the question, if I may.

13 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:14:01] Thank you, Counsel.

14 Mr Martínez, you have two minutes.

15 MR MARTÍNEZ JIMÉNEZ: [9:14:07] Two minutes. Thank you, Mr President.

16 I will address the Court in Spanish.

17 (Interpretation) In order to answer the question with regards to the 66 cases, which
18 were — they were part of the 124 — the answer is yes, they are. And in order to
19 clarify this, these five annexes correspond to a note verbale, and the five files related
20 to the specific victim concerned, and these reflect 66 cases.

21 Now, with regards to the data on these 124, who were called "incidents" by the
22 Prosecutor, these are as follows. A lot of them are in the investigation phase and
23 they were individualised as possible responsible, and they are with regards to
24 different public civil servants. It is a significant number.

25 Now, there are three of them which are at an intermediate phase with a formal

1 accusation. There are three which are at judge trial stage and there are five
2 convictions which have 14 civil servants who have been sentenced.
3 Now, in relation to the ranks that they have, among these 124 incidents, in annex 2 we
4 find that there are 15 officials which are currently sentenced. And they could be
5 police officers to *guardia nacional* officers as well, and they are subject to investigation
6 at this current time.

7 And within this framework of 124 incidents, we also have among the security forces
8 18 commissioners, inspectors as well, nine detectives and two -- 24 officials as well.
9 And in the military body as well, we have three colonels and seven majors, and six
10 captains and sergeants as well.

11 And with regards to the document that was presented in the annexes which
12 correspond to 64 alleged victims around 62 cases, the documentation is original and
13 the documentation comes from the investigation file; and, furthermore, the minutes as
14 well.

15 And I'm going to make a statement with regards to the minutes, if I may, in this
16 regard.

17 The Public Prosecution Office in Venezuela exercises public action on behalf of
18 the State and it is led by an organic law and this organic law comes from the Public
19 Prosecutor's Office. And in -- articles 1, 6, 8, 9, 12 and 13 establish certain principles,
20 and among these principles you find, obviously, the principle of hierarchy and
21 coordination as well.

22 With regards to the Public Prosecution Office, all states of law have this.

23 Now, in order to organise this hierarchy and this coordination, in addition to having
24 an investigative file, there is also what we call an administrative file with a view to
25 coordinating all the different prosecutors in the country. So if there's any

1 duplication with regards to the different cases, then they can inform their hierarchical
2 superior, or if there is a request for information from an international body - for
3 example, working groups, et cetera, United Nations groups --

4 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:17:30] Mr Martínez, could
5 you please conclude, please.

6 MR MARTÍNEZ JIMÉNEZ: [9:17:31](Interpretation) This administrative file sums
7 up the case and gives it a heading and this is the information which it contains, which
8 is contained therein. And this is regulated by a regulation which is the circulation of
9 2011 which refer -- was referred to by Mr Emmerson.

10 Thank you very much.

11 THE INTERPRETER: [9:17:50] The interpreter didn't have the information so didn't
12 get all the figures.

13 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:17:54] Thank you very much.
14 I would encourage Spanish speakers to take into account the interpreters, which have
15 a hard time following them.

16 Could I now give the floor to the Prosecutor, please, briefly, because we do have to
17 move to today's agenda. Thank you very much.

18 MS REGUE: [9:18:12] So we -- responding to your first question, Judge Ibáñez, we
19 provide the figures in footnote 24 of our response brief * and in paragraph 67. So we
20 have calculated that 50 out of the 62 cases, that the 60 -- that the 65 annexes provide,
21 59 of them match with the 124 incidents.

22 With respect to your questions about the figures, yeah, we have calculated that out of
23 the -- out of the 62 cases, we found that 47 of them, the perpetrators were not
24 identified, so three-quarters were not identified.

25 Also, for 57 of them they were in preparatory phase, which is what my colleague

1 actually -- matches what my colleague says. Basically, preparatory phase is the first
2 phase of the proceedings where still there has not been an *acta de acusación*, a kind of
3 indictment.

4 And for 21 cases, the Prosecution found that there was inadequate legal
5 characterisation.

6 Then responding to your second question, I would like to make some clarifications.

7 First, it was the Prosecution who used the term "summaries" as a shorthand to define
8 the *fichas*, because Venezuela has used different terms -- it has used "*minutas*", it has
9 used "*asuntas*", has used "*fichas*". So the Prosecution used that shorthand with no
10 intention to mislead anyone and the Pre-Trial Chamber used our shorthand, short
11 cite.

12 Also, it's not our recollection that Venezuela has ever said that these summaries -- I
13 will call it "summaries" as we have done during the proceedings -- have been issued
14 as a consequence of these instructions. The first time that we heard it, it was
15 yesterday. We've not seen it in the observations. We've not seen it in the appeal
16 brief and, in any event, it doesn't matter because the Pre-Trial Chamber did not
17 consider whether the *fichas* were or were not contemporaneous.

18 If you look at the paragraph 88 where this issue has been raised, the Pre-Trial
19 Chamber deals with two sets of information: The 13 annexes to the observations and
20 then the summaries. And it says the 13 annexes are unrelated to domestic criminal
21 proceedings, and this is correct, because there are -- it's mostly reports, memoranda,
22 photos, tweets.

23 And then it says the summaries are not * court and investigative records, and they are
24 not. So this is what the Pre-Trial Chamber said; it's not what my colleague says that
25 the Pre-Trial said. He's reading between the lines, but it's not in the Chamber's

1 reasoning.

2 And then I also wanted to make a comment. Yesterday, we saw one of their *fichas*,
3 which for your Honours' information corresponds to the case 624 in our annex A or B
4 attached to our response brief, because it appears in both. It was submitted
5 in the-- it's the first *ficha* that appears in the 11 -- in the 11 submissions. And I have
6 the original before me in Spanish and the heading of the original, it says
7 (Interpretation) * "Third sample with 50 examples", (Speaks English) basically which
8 was transferred to the International Criminal Court.

9 So the heading of the document, it says that it was done for us. I'm just saying, I'm
10 not making any inference or submission whether it was contemporaneous or not, I'm
11 just describing what the original says.

12 And, yeah -- and that's with respect to your question, your Honour. And I would
13 have -- if I could have your Honour's leave to address one issue that yesterday was
14 raised. I will try to do my best and do it in two minutes.

15 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:22:24] Please, do, briefly.

16 MS REGUE: [9:22:26] Thank you very much.

17 I just would like to briefly respond to some remarks made by my learned colleague
18 yesterday about the Prosecution giving evidence before your Honours or before the
19 Pre-Trial Chamber when we were basically only explaining the assessment of the
20 material that Venezuela submitted to us.

21 I would like to recall the Prosecution's obligations under the Statute, under the
22 Rules -- under Article 18(2), under Rule 54(1), which says that the Prosecution, when
23 it files an application under Article 18(2), it needs to provide the basis of the
24 application.

25 As I said yesterday, we need to explain why the criteria under Article 17 are not met

1 on the basis of the information that we have received, and why the investigation
2 should not be deferred and why we should be allowed to continue.

3 This is what we submitted, what we argued before the Pre-Trial Chamber; so, in other
4 words, providing * evidence, it's explaining to your Honours the assessment of the
5 material that we have received.

6 And also, yesterday, Venezuela submitted that the Spanish court records and the
7 summaries would have led the Chamber to reach another conclusion; in other words,
8 that there was an impact. So we were responding to those arguments, saying that
9 there is no impact because we have assessed the material and we have concluded, like
10 the Chamber, that the domestic proceedings do not sufficiently mirror the
11 Prosecution's intended investigation. Again, we were responding to their
12 submissions.

13 And, on the other hand, when Venezuela talks about impact, they have not
14 demonstrated this -- this impact. All that we have seen is a presentation with
15 statistics, with figures, with numbers. But complementarity is not only about
16 numbers; it's about quality, it's about assessing the factual allegations.

17 We also saw one of the summaries. As I mentioned yesterday, in the summaries, we
18 don't see any evidence regarding the accuracy of the information listed there. We
19 don't see any evidence that all those bullet points were indeed being affected? And
20 actually, your Honours, if you compare the summaries for the five cases that you
21 have been provided to be admitted on appeal with the summaries, there are some
22 inaccuracies between the two that we have identified in footnotes 275 and 287 of our
23 response brief.

24 So, basically, we have only heard general arguments about numbers, but we have not
25 seen any substantiating information about their impact.

1 But, your Honours, you don't need to go there. Actually, Venezuela is right that you
2 don't need to even consider our arguments about the lack of impact because there was
3 no error in the Chamber's decision.

4 If you look at the record before the Chamber reached the decision and if you look at
5 the decision, there was no error. The Pre-Trial Chamber conducted the proceedings
6 in a fair and reasonable manner. It gave Venezuela every opportunity to provide
7 submissions, to provide additional material and issue a decision based on a large pool
8 of information which was representative, which was essential to the deferral request
9 and which was related to the information that we listed in our January 2022 letter.

10 And it's not because the Prosecution says it; Venezuela said it when they transmitted
11 the material.

12 So, to conclude, your Honours, the Pre-Trial Chamber had sufficient information
13 before it, information that in accordance to the jurisprudence is sufficiently specific,
14 has probative value to issue the decision.

15 And with that I conclude. Thank you.

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:26:33] Thank you very much.
17 Would OPCV like to add something at this stage?

18 MS MASSIDDA: [9:26:40] Thank you, your Honour, very briefly. We do not have
19 access to the documents underlined in the deferral request; therefore, obviously, we
20 cannot make any comments on that -- on the question by Judge Carranza. We rely
21 on the clear explanation by the Prosecution on that.

22 The only thing that we would like to express respectfully to the Chamber this
23 morning is we have one concern, which is the victims' concern, and the concern is that
24 we are assisting to new arguments by the Venezuela government which are not in
25 their appeal. We have learned yesterday about a list of authorities. We have not

1 seen it so we have had no opportunity to eventually argue on some of the arguments
2 put forward by Venezuela and we have now learned about the general prosecutor
3 instruction requiring employees to report back on a day-to-day basis, which could
4 have been important information to be put before the Pre-Trial Chamber, so why this
5 information was not put before the Pre-Trial Chamber at the time of the deferral
6 request. Thank you very much.

7 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:27:51] Thank you very much.
8 Some of the documents which were referred to today, of course, are in the case file
9 and accessible to this Chamber, which we will do due diligence. Judge Ibáñez, are
10 you satisfied?

11 JUDGE IBÁÑEZ CARRANZA: [9:28:09] Yes.

12 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:28:10] Well, thank you very
13 much. So we can now close this particular topic and move on to the following group
14 of issues.

15 I wish to recall that the following issue was identified for guidance to the parties and
16 participants as follows: Whether the requirement that the domestic proceedings
17 cover "the same types of conduct" as the Prosecutor's investigation extends to
18 contextual elements of crimes against humanity, including in particular: the
19 organisation policy and the widespread or systematic nature of the attack.

20 I would like to start with the submissions of the State Representatives. You have
21 15 minutes, please.

22 MR EMMERSON: [9:28:58] Your Honours, the answer to that question is, in itself,
23 determinative of this appeal because it was the basis and the sole sustainable
24 in-principle basis of the Pre-Trial Chamber's decision that Venezuela was at fault for
25 not investigating the contextual elements but confining themselves to the

1 investigation of the perpetrators of the crimes and their immediate associates and
2 superiors.

3 We have a crime base. The issue, if those crimes are properly investigated and the
4 relevant people prosecuted, is whether or not the contextual elements that the
5 question refers to needs to be investigated by Venezuela or whether the appropriate
6 settlement at the Rome Statute level is that if the same conduct is subject to
7 criminalisation and penalty at the national level and within national law then it is
8 immaterial whether or not national law uses the concept of an international crime.
9 That is not a submission made by Venezuela. It is the law. It is the binding finding
10 of the Appeals Chamber in the Gaddafi and Senussi case -- the joined appeals of
11 Gaddafi and Senussi. It's unequivocal, it is utterly clear in its content, it is of general
12 application and it reflects the position also of the International Court of Justice and
13 prior jurisprudence.

14 The complementarity principle applies to the conduct being criminal, not to the
15 conduct being categorised domestically by the elements of an international crime.

16 Let me take you first of all to the key finding — which, as I say, is not context or
17 fact-specific but of general application — of the Appeals Chamber in those two linked
18 appeals.

19 A word or two about the context, because it was a slightly unusual dialectic. The
20 Prosecutor had issued arrested warrants against three people initially: Muammar
21 Gaddafi; his son, Saif Gaddafi; and his nephew and head of security, Mr Al-Senussi.
22 Muammar Gaddafi, we know, died and never came within the jurisdiction of this
23 Court, but the other two did. By the time the case came here, they were both in
24 custody in Libya, in different parts of the country. Saif Gaddafi was in custody in
25 Zintan in the east of the country, and Mr Al-Senussi was in custody in Tripoli, the

1 area controlled by the United Nations — recognised government at the time.
2 They wanted opposite things. Saif Gaddafi wanted the arrest warrant cancelled on
3 grounds that included complementarity grounds, but because Mr Al-Senussi was
4 being held, if you like, by the opposition and was facing the death penalty if
5 convicted, as perhaps was at that stage of the development highly likely, his
6 instructions to his lawyers — and I can say this because I was one of them — was to
7 seek to achieve his transfer to The Hague for trial where he considered he
8 would -- and it's made quite clear in the pleadings, where he considered that he
9 would have a much better chance of a fair trial and avoiding the death penalty.
10 So they were looking for opposite results both relying on the principle of
11 complementarity, and the Appeals Chamber had to consider the general principle of
12 whether or not it's sufficient that you're being prosecuted under domestic criminal
13 law for the same conduct or whether it needs to contain the elements that would be
14 appropriate for an international Prosecution under international criminal law of the
15 same acts.
16 Now, Mr Al-Senussi argued it's crucial that you should have the contextual elements
17 and not just the crimes; and, therefore, the Prosecution in Tripoli did not meet the
18 requirements of the Statute in complementarity terms because it lacked the capacity
19 to deal with the contextual elements.
20 The case for Mr Gaddafi was the precise inverse of that submission. So the Appeals
21 Chamber in its very recent and, we would submit, binding or, at the very least, highly
22 persuasive judgment was faced with, in a sense, the ideal scenario for a fair and
23 objective judgment -- a principle that needed to be understood and capable of
24 applying generally and in both directions.
25 So can we now look at the -- and it's really one paragraph that we need to look at,

1 which is paragraph 119, but we're starting with 118 just to give the matter its proper
2 context in the disposition of the Senussi argument.

3 So you have 118 on the screen to start with:

4 "The Appeals Chamber notes that the Defence essentially argues that the fact that the
5 international crime of persecution cannot be charged at the national level, as no
6 corresponding provisions under Libyan law exist, but, if at all, can only be considered
7 at the sentencing stage, should have led the Pre-Trial Chamber to conclude that Libya
8 is not investigating the same case and that the case is therefore admissible before the
9 Court."

10 Exactly what the Trial Chamber -- Pre-Trial Chamber found here:

11 "For the reasons that follow, the Appeals Chamber is not persuaded by this
12 argument."

13 And the reasons, which will follow in paragraph 119, are, we say, binding of general
14 application and dispositive not just of questions 4 and 5 and all their aspects, but of
15 the whole appeal:

16 "First, there was no need for Libya to charge Mr Al-Senussi with the international
17 crime of 'persecution' per se. As argued by Libya and the Prosecutor, there is no
18 requirement in the Statute for a crime to be prosecuted as an international crime
19 domestically. This is" --

20 And one could interpolate, prosecuted or investigated with a view to Prosecution; it's
21 exactly the same:

22 "This is because, in line with the previous jurisprudence of the Appeals Chamber in
23 relation to what constitutes the same case, what is required is that the crimes
24 prosecuted at the domestic level cover 'substantially the same conduct'" --

25 Substantially the same conduct --

1 "as those charged by the Court."

2 In this case, those the Prosecutor proposes to investigate:

3 "In determining whether they do, the Pre-Trial Chamber is required to assess whether
4 the domestic case sufficiently mirrors the case before the Court."

5 Exactly the same test here:

6 "As argued by both Libya and the Prosecutor," --

7 Interestingly, the Prosecutor argued this in that case --

8 "it is the alleged conduct" --

9 Now, I don't mean the Prosecutor personally, I'm saying the Prosecution -- this was
10 the Prosecutor's position. So I will read that sentence again:

11 "As argued by both Libya and the Prosecutor, it is the alleged conduct, as opposed to
12 its legal characterisation, that matters."

13 In terms of the definition of conduct in the Gaddafi -- the linked Gaddafi appeal, the
14 Prosecution argued that that should be defined by reference to the jurisprudence of
15 the European Court of Human Rights concerning the term "*idem*" in the Latin
16 expression *ne bis in idem*. So it's exactly the issue that, again, is being addressed here.

17 This is a *ne bis in idem* provision that we are considering.

18 The Appeals Chamber accepted that proposition and explained that conduct should
19 be defined by reference to two aspects: First, the personal actions of the
20 defendant — in this case the alleged perpetrators — and, second, the underlying
21 incidents, which are comprised of historical events defined in time and place during
22 the course of which the alleged crimes were committed. In terms of the first aspect,
23 the Appeals Chamber emphasised that it was the conduct of the defendant and no
24 other persons that was relevant to its assessment.

25 Similarly, the only incidents that were relevant were those that related to the personal

1 conduct of the defendant.

2 In contrast, the contextual elements in crimes against humanity as defined under the
3 Statute concern conduct and incidents that are not necessarily related to the personal
4 actions or conduct of either the defendant or the presumed or proposed suspected
5 perpetrator. Such conduct and incidents thus fall outside the scope of the same
6 person, same conduct test.

7 And so in the Gaddafi case, the Pre-Trial Chamber had examined the drafting history
8 of the complementarity and *ne bis in idem* provisions of the Rome Statute as a whole
9 and concluded that states had expressly chosen not to include ordinary crimes as an
10 exception to the application of the *ne bis in idem* principle. What that means in
11 practice is that if a person has been convicted for murder or rape by the domestic
12 courts, it is simply not possible to try them again before the ICC for the same
13 underlying conduct of murder or rape as either a war crime or a constituent element
14 of crimes against humanity. The *ne bis in idem* applies to the conduct, not to its legal
15 classification, and so the fact that the domestic courts didn't include allegations of a
16 widespread or systematic attack is completely irrelevant.

17 Now, that statement in paragraph 118 — and I invite you to study it with care — is
18 unqualified. It is of equal application in the present case and it is supported also by
19 the ICJ in the Belgian Congo arrest warrant case, where it described the underlying
20 purpose of international criminal justice in this way:

21 "The underlying purpose of designating certain acts [...]"

22 THE COURT OFFICER: [9:43:25] You have one minute left, counsel.

23 MR EMMERSON: [9:43:30]

24 "[...] as international crimes, is to authorise a wide jurisdiction to be asserted over the
25 persons committing them." That's the only purpose; it's to ensure that an impunity

1 gap is closed.

2 In other words, the crimes, if they are not punished by the domestic courts, we need a
3 jurisdiction in order to punish them. And that's exactly why the Rome Statute was
4 signed and why this court was set up, because people were getting away with war
5 crimes and crimes against humanity in their national jurisdictions, and that's the only
6 reason it was set up, from a legal perspective. And in the absence of any indication
7 that there could be some jurisdictional impediment, legal jurisdictional impediment to
8 pursuing crimes the Prosecutor wishes to investigate, unless they are qualified as
9 crimes against humanity, the overarching goal of eliminating impunity is equally met
10 if the conduct is prosecuted as an ordinary crime.

11 There is simply no other way of interpreting and reading paragraph 118 and the
12 Gaddafi decision.

13 So, of course --

14 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:44:46] Would you kindly
15 conclude, please, counsel.

16 MR EMMERSON: [9:44:49] Yes, I was just doing so.

17 Of course, it is not necessary for Venezuela to investigate the elements -- contextual
18 elements, because that is not the question for a national authority under the whole
19 complementarity system. Of course, it is unnecessary to include discriminatory
20 elements in rape or anything else. All of questions 4 and 5 fall. But, more
21 importantly, the judgment of the Pre-Trial Chamber falls because that is the sole basis
22 of their decision.

23 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [9:45:27] Thank you very much.

24 The Prosecution now has the floor for 15 minutes, if you please. MS BRADY:

25 [9:45:50] Good morning, your Honours.

1 On issue 4, the sufficiently mirror test for Article 18(2) requires that the domestic
2 proceedings cover the same types of conduct that the Prosecution's intended
3 investigation is designed to cover. The question in this issue is whether the test
4 extends to the contextual elements of crimes against humanity, including the policy
5 element and the element of widespread and systematic nature of the attack.
6 In the Prosecution's submission, yes, it does so extend and the Pre-Trial Chamber was
7 correct in this regard.
8 When the Prosecution has notified a state that crimes against humanity fall within the
9 scope of its intended investigation, as it did here, the state is required to demonstrate
10 that it is investigating the factual allegations — the facts — underlying the contextual
11 elements of crimes against humanity in order to succeed in its deferral request.
12 This is necessary to show that it is investigating or has investigated or prosecuted the
13 same or substantially the same conduct as in the Prosecution's intended investigation.
14 Now, at the outset, we recognise that this might seem to raise a potential tension for
15 states, or at least some of them. Not all states will have crimes against humanity in
16 their domestic criminal law or, indeed, criminal offences which contain these specific
17 legal contextual elements. But, your Honours, on closer inspection, any such tension
18 is more apparent than real.
19 So, firstly, to successfully challenge the admissibility of a situation before the Court,
20 the State need not investigate and prosecute alleged criminal acts as -- and I *
21 emphasise -- as crimes against humanity. That is, it does not need to do so under the
22 legal qualification of "crimes against humanity", or by using the same legal elements
23 or terms. * And this is -- as my friend points out -- this is the holding of the Appeals
24 Chamber in the Gaddafi and Senussi case.
25 But the State's domestic proceedings do need to extend to the factual assertions

1 reflected in those contextual elements, because if they do not, if they don't, they won't
2 be able to adequately examine and assess, and potentially determine, the breadth of
3 potential criminal liability, culpability in the situation, and the scope of the harms and
4 the interests protected by those contextual elements. And in this regard, the harm
5 was aptly identified and described by the Trial Chamber in the Ongwen case and
6 affirmed by this Chamber on appeal as, and I quote from the Trial Chamber judgment
7 at paragraph 2820, the harm is "protect[ing] persons where there is a widespread or
8 systematic attack against a civilian population".

9 If they don't, they would be an insufficient mirror, an inadequate reflection of the
10 criminal conduct in the Prosecution's intended investigation.

11 Now, for states that don't have crimes against humanity incorporated in their
12 domestic law, their domestic criminal law, this does not mean that they would be
13 unable to investigate these factual assertions underlying the contextual elements. It
14 doesn't place them in some impossible situation.

15 For example, if a state investigates the commission of a multiplicity of crimes, the
16 connections between them, their pattern of occurrence and their coordination by
17 perpetrators at a higher level, it may, depending on the facts, be able to show that it is
18 adequately investigating the existence of a systematic attack against a civilian
19 population pursuant to a policy, even if it's not characterised domestically like that
20 under their own domestic laws.

21 However, here the Venezuelan materials which the Chamber assessed did not show
22 that they have investigated these factual matters underlying these elements. And
23 the Chamber made this finding based on the materials it assessed, the Venezuelan
24 materials, as well as Venezuela's own submissions. This is in paragraph 104 and 106.
25 And then it relied on this factor, as well as — it's not the only factor, there's a related

1 factor, so it's not the sole, as my friend had suggested — a related factor, they're
2 interconnected, the finding that domestic investigations generally focused on direct
3 and low-level perpetrators as key reasons for concluding that the domestic
4 proceedings, the Venezuelan ones, did not sufficiently mirror the same types of
5 conduct and same groups of perpetrators as in the Prosecution's intended
6 investigation.

7 In our submission, your Honours, the Chamber was both reasonable and indeed
8 correct to do so.

9 Just a brief recap. After the preliminary examination by the Prosecution — it lasted
10 some three and a half years — the Prosecutor concluded that there were reasonable
11 grounds to believe that crimes against humanity had occurred, had been committed.
12 The Prosecution made it clear to Venezuela in its Article 18(1) notification, its
13 additional information provided in January 2022 and in its multiple exchanges with
14 the State that crimes against humanity would fall within its investigation.

15 Yet, Venezuela's position, both with the Prosecution and before the Pre-Trial
16 Chamber, was that no crimes against humanity occurred; there was no attack against
17 a civilian population, let alone a widespread or systematic one; and no state policy.
18 Indeed, for them, there could not have been one. At most, any alleged acts could
19 only be isolated incidents of abuses by public officials who had acted to quell violent
20 demonstrations by protesters and investigated accordingly at the domestic level.

21 Now, as I said, the Chamber's determination was made -- this determination about
22 the domestic investigations, was made after having assessed Venezuela's materials as
23 well as considering Venezuela's own submissions. And it underscored — and this is
24 in paragraphs 106 and 107 — it underscored that Venezuela has consistently and
25 vigorously rejected such facts. In their words, they've said, they've used the term

1 *"a priori"*, and without having conducted any specific criminal investigations to
2 support its conclusions.

3 The Chamber found, based on the materials that it looked at, a lack of investigation
4 into possible patterns and systematicity. And, your Honours, I direct your Honours
5 to the paragraphs, in particular, 112 to 116 of the decision. For example, the
6 domestic authorities have not taken steps to ascertain why different incidents
7 followed similar patterns of victimisation and mistreatment, or whether superiors of
8 low-ranking officers gave orders or instructions before the demonstrations, or why
9 many people were taken to the same detention centres.

10 From the 62 cases for which there were court or investigative records with
11 translations, the Chamber found that in the few cases where a suspect or an accused
12 person had been identified, they were direct and low-level perpetrators.

13 Most of the investigation steps instead focused on accessing information about the
14 victims and not alleged perpetrators. And if you look at the materials, your
15 Honours, you will see that security force members were questioned in only three
16 cases, and for those the lines of questioning reveal no intention of going higher up, as
17 it were, or to ascertain whether orders had been issued or meetings had taken place
18 before the events. A common investigative step, for example, for the domestic *
19 authorities, was to request the duty roster and the daily report log for the dates of the
20 incidents, without * more. And for this, the Chamber found it was another indicator
21 that the focus of domestic proceedings was on direct low-level perpetrators only.

22 This Chamber -- same Chamber, PTC, Pre-Trial Chamber I -- took a similar approach
23 in the Philippines situation. It recognised in its Article 18(2) decision that domestic
24 investigations "may follow different approaches" and that a State "need not
25 investigate conduct as crimes against humanity [...] to still investigate the persons and

1 conduct." That's at paragraph 68 of that decision.

2 But it was the lack of inquiry by the Philippines authorities into patterns of

3 criminality or the systematic nature of crimes, or of persons who would appear to be

4 the most responsible, that were the main factors that the Chamber in the Philippines

5 matter relied upon to conclude that the domestic proceedings in that situation did not

6 sufficiently mirror the Prosecution's investigations into crimes against humanity.

7 On appeal, the majority -- when this matter came on appeal, as your Honours will

8 know, the majority of the Appeals Chamber endorsed this reasoning and upheld the

9 Pre-Trial Chamber's conclusions. It held that to succeed on an Article 18 challenge, a

10 state must demonstrate an advancing process of domestic investigations and

11 prosecutions of the same groups or categories of individuals, and I quote, "in relation

12 to the relevant criminality, including the patterns and forms of criminality, within a

13 situation." End of quote.

14 That's one of the key holdings in the appeals judgment, paragraph 2, and it's also in

15 paragraph 106.

16 The majority approved the Chamber's approach in having expected that the

17 Philippines domestic proceedings would have encompassed high-ranking officials,

18 and by their reliance on the lack of domestic inquiries into any pattern of criminality

19 or the systematic nature of crimes. That's at paragraph 163.

20 Now, Venezuela argues on appeal that the existence of this widespread or systematic

21 attack would be covered if domestic investigations pursue several crimes in different

22 locations in the same period or in the same location over a period of time. And also

23 they argue that, well, an organisational policy really just simply concerns knowledge,

24 intent, modes of liability, irrelevant to this situation stage. That's at paragraph 125 of

25 their appeal brief.

1 Your Honours, investigating isolated acts of detention and physical assaults allegedly
2 perpetrated by direct low-level perpetrators, without more, will not necessarily
3 capture the distinct legal interests inherent in crimes against humanity, especially
4 when only limited steps have been taken to investigate, as was the Chamber's finding
5 in this case. This -- doing so would not clarify the potential liability of more
6 senior-ranking individuals or capture the links and the patterns among such crimes or
7 their systematic nature, nor would it help assess whether they were carried out
8 according to a policy, in the sense that a state or organisation encouraged them either
9 actively or by deliberate omissions.

10 And I invite your Honours to review our response brief, paragraph 119, where we
11 outline the kinds of investigative steps and evidence that an investigative body may
12 need to pursue to meet these contextual elements. And, also, and I draw your
13 Honours' attention to the Pre-Trial Chamber's admissibility decision in Al-Senussi,
14 paragraphs 161 to 162, they're in our response brief.

15 There, as my friend has indicated, Libya did not have the international crime of
16 crimes against humanity. He was pointing to the persecution aspect. But also
17 Libya did not have crimes against humanity in their domestic law at the relevant
18 time.

19 Nevertheless, the Chamber in that case was able to assess from the material that was
20 submitted and it examined that the domestic authorities had pursued multiple lines
21 of investigations to ascertain evidence relating to the attack against a civilian
22 population and state policy.

23 And the argument by Venezuela is that the Chamber here, the Pre-Trial Chamber in
24 this matter, did not assess or assessed somehow the investigations by Venezuela
25 differently from that case.

1 THE COURT OFFICER: [10:01:14] Counsel, you have one minute left.

2 MS BRADY: [10:01:18] Thank you.

3 But if you review the steps taken in that case by the domestic authorities and compare
4 it with the ones in the Venezuela case, it reveals clear differences.

5 Finally, your Honours, the policy element, it's not only relevant to *mens rea* and
6 modes of liability at the case stage, as Venezuela suggests, it represents the collective
7 dimension of the alleged crimes and goes to why crimes against humanity are of
8 international concern, and that's why it's relevant at the submission stage. It's
9 relevant to admissibility considerations at the submission stage.

10 A lack of inquiring by a state into such facts as widespread or systematic attack and
11 policy would not cover substantially the same criminality as the Prosecutor's
12 investigation. Essential aspects would remain unaddressed.

13 And to conclude, your Honours, this approach will help ensure that the distinct
14 harms and interests protected by crimes against humanity will be sufficiently
15 accounted for by the state, and if not by the state, then by this Court; and, in turn, this
16 will help prevent impunity for these crimes, which have been called the most serious
17 crimes of concern to the international community. And this is, after all, your
18 Honours, the whole point of the Rome Statute system.

19 Thank you.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:03:00] Thank you very
21 much.

22 I now give the floor to the OPCV for 10 minutes. You have the floor.

23 MS MASSIDDA: [10:03:06] Thank you, Mr President.

24 Your Honours, we agree with the Prosecution that the contextual -- the
25 complementarity test extends to the contextual elements of crimes against humanity.

1 In our submission, a national investigation shall encompass contextual elements of
2 crimes against humanity such as the widespread or systematic nature of the attack
3 and the policy element.

4 Since the contextual elements are essential for establishing the existence of crimes
5 against humanity, the State should show that the investigation includes not only the
6 conduct elements — meaning the specific acts constituting the crimes — but also, one,
7 the existence of an attack, a course of conduct involving the multiple commission of
8 criminal acts directed against any civilian population; two, that the attacks take place
9 to or in furtherance of a state's organisational policy; and, three, the widespread or
10 systematic nature of the attack.

11 In order for the State to demonstrate that it is taking the necessary steps to ensure that
12 relevant crimes are effectively addressed, a genuine investigation should, in our
13 position, encompass both aspects.

14 Therefore, the State needs to bring proof about its consideration of the contextual
15 elements to show that it is investigating criminal acts that may qualify as crimes
16 against humanity.

17 In this regard, in the Philippines situation, the Appeals Chamber has observed that
18 when the Prosecution intends to investigate crimes against humanity, the domestic
19 authority must also demonstrate that they are investigating patterns to make a
20 successful deferral request. It's decision 19 on our list of authorities, paragraph 163.

21 Investigating the contextual elements, such as the attack directed against a civilian
22 population in this case, is indeed crucial, because it ensures that the ones responsible,
23 especially the ones in a position of authority, are held accountable.

24 As amply discussed yesterday, for a successful challenge under Article 18, what is
25 required is that the crimes prosecuted at the domestic level cover substantially the

1 same conduct as the one investigated by the Prosecution, and the Chamber needs to
2 assess whether the domestic case sufficiently mirrors the potential cases before the
3 Court.

4 Now, the parameters of a case are defined by the suspect under investigation and the
5 conduct that gives rise to criminal liability under the Statute.

6 The Appeals Chamber have already considered that to carry out this assessment, it is
7 necessary to use as a comparator, one, the underlying incidents under investigation
8 both by the Prosecutor and the state; and, two, the conduct described in the incidents
9 under investigation which is imputed to the suspect. And, ironically, my reference is
10 also, as for Venezuela, to the Gaddafi Appeals Chamber judgment, decision 11 on our
11 list of authorities, paragraph 62.

12 In its decision, the Pre-Trial Chamber correctly applied this test and properly found in
13 paragraph 107 that on the basis of the material submitted by the state, I quote:

14 "It appears that Venezuela is indeed not investigating the factual allegations
15 underlying the contextual elements of crimes against humanity". End of quote.

16 The evidence presented by a state must be of a "sufficient degree of specificity and
17 probative value", demonstrating that it is indeed genuinely investigating.

18 And in this regard, the Appeals Chamber in the Ruto case has indicated, and I quote:

19 "[...] 'a statement by a Government that is this actively investigating is not [...]
20 determinative. In such a case the Government must support its statement with
21 tangible proof to demonstrate that it is actually carrying out relevant investigations'.

22 In other words, there must be evidence with probative value". End of quote.

23 Decision 6 on our list, paragraph 62.

24 Consequently, and by constant jurisprudence of this Court, it will never suffice for a
25 state merely to assert that relevant investigations are ongoing or to rely on judicial

1 reform actions and promises for future investigative activities. As an example,
2 decisions 5, 6, 14 and 16 on our list.

3 In any case, your Honours, on this point, it is worth noting that the Pre-Trial Chamber
4 properly assessed the lack of relevant domestic investigations on this point and drew
5 the correct conclusion about the non-existence also from other factors. In particular,
6 Venezuela's multiple and unsubstantiated statements: One, that the incidents
7 occurring during the protest do not qualify as crimes against humanity; two, the
8 violations of protester rights were, in their words, "isolated incidents"; and, three, that
9 the policy element within the meaning of Article 7(2)(a) of the Statute was not
10 compatible with public statements made by high-level authorities of Venezuela and
11 with the existence of the human rights directorate.

12 To conclude, your Honours, I would like to come back to the question by
13 Judge Carranza yesterday, to which I started answering, in relation to what is the
14 point of view of victims on the establishment of the contextual elements of crimes
15 against humanity, and I hope that I have summarised correctly your question.
16 For the victims, it is crucial that investigations encompass not only the conduct,
17 consequences and circumstances of crimes against humanity, but also their contextual
18 elements. Only through this comprehensive approach the pursuit of justice becomes
19 truly meaningful. In other words, the interests of victims goes beyond the mere
20 prosecution of individual acts. It involves unravelling the broader context in which
21 the crimes occurred, the different categories of victims targeted, the reasons for the
22 targeting, and the reasons for the commission of the crimes.

23 For victims, only this comprehensive approach will allow: one, to uncover the truth,
24 to reveal not only the immediate perpetrators, but also the ones who wielded power,
25 organised or condoned these heinous acts; two, recognise the context of violence in

1 which the crimes occurred, the systematic nature and the patterns; three, shed light
2 on the actual extent of the victimisation.

3 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:11:53] Thank you very
4 much.

5 The State Representatives are now invited to respond to the Prosecutor and the OPCV
6 for 10 minutes. Thank you very much.

7 MR EMMERSON: [10:12:04] We, without calling it up again, return, and the Court,
8 we would respectfully submit, must return again and again to paragraph 118 of the
9 Senussi judgment.

10 It cannot be the case that if it is not a requirement of complementarity that the legal
11 qualification and elements -- the contextual elements, as they've been described, of
12 crimes against humanity are not necessary in a national legal jurisdiction, that a state
13 can be fully in conformity with its obligations of sufficiently mirroring without those
14 contextual elements, that that, nonetheless, allows the satellite question of
15 investigation to mandatorily require the contextual elements specified by crimes
16 against humanity in the Statute to be the subject of direct investigation.

17 Now, I understand, of course, the point that if it's conduct we're focusing on rather
18 than legal classification, then the focus is on the, as it was suggested by the Prosecutor,
19 patterns, potential links, potential senior commanding officers and whether they
20 knew each other, their minutes of meetings, their conversations, inside witnesses and
21 so on. That's how a typical trial prosecution case is built in a
22 crimes-against-humanity context.

23 But the first thing to note here is we've heard a great deal about how Venezuela
24 denies that there was a state policy in operation or that there were crimes against
25 humanity committed in Venezuela and that, therefore, it's prejudged the issue.

1 That's the suggestion -- it was made again by the Prosecutor and by counsel for the
2 victims.

3 Let me just say one or two words about that. First of all, as the Prosecutor in another
4 part of her submission has rightly acknowledged, there is no reason why Venezuela
5 needs to categorise these crimes as crimes against humanity so long as they are
6 investigating the conduct. Venezuela, the State of Venezuela, which is here
7 represented by this delegation -- this is, we are the State of Venezuela, and we do
8 deny that there was any policy of that kind, and there is not a slightest shred of
9 evidence, nor even a particularised allegation from the Prosecutor, that there was.
10 This engages the sovereign rights of states to speak on their own behalf. To have
11 that then be used against them in this disgraceful manner, to suggest that by saying
12 that we somehow open the door to an investigation by a foreign court, that is not the
13 law at any level. And, indeed, the Senussi judgment makes that crystal clear, and
14 the Prosecutor conceded that in another part of her submission. So I would invite
15 you to just disregard that.

16 But, more importantly, if it's suggested that the investigation — the facts, the conduct,
17 the people — should have gone higher, where's that allegation in the Article 18(1)
18 notification?

19 All the Prosecutor did was to include the words of Article 7(1) -- 3 -- the definition of
20 widespread and systematic attack; namely, the existence of a state policy. It's not
21 based on any investigation of his. There's no particularisation. It doesn't say if it
22 means a policy within the military, a policy within a different branch of the military,
23 the security services, the civilian government. It doesn't say how high up that
24 preliminary investigation indicates that that policy was. How can Venezuela
25 respond to that? It's just -- they use this language to obscure the meaning.

1 You need to ask the question. In reality, if the Prosecutor wanted to make an
2 allegation that there was at some level within some part of the state an agreement,
3 they need to specify what they're alleging. How can the complementarity system
4 work if the allegation just recites the words of the Statute?
5 And when we asked for further information, none was given -- just a group of
6 open-source reports from which the Prosecutor distilled a list of crimes he is not
7 investigating. That's nothing to do with this issue.
8 It was perfectly open to him to say, "From our preliminary examination, we think that
9 in one branch of the military or the national guard or the police, or two branches, or
10 there was some coordination here and we think it went as high as, I don't know,
11 general level." They don't say anything about that. They don't say it in the 18(1)
12 notice and they don't say it in their response to information.
13 Now, the question is: If that's the case, how did the Court lawfully apply the mirror
14 test?
15 They didn't know what they were trying to mirror against. I mean, this is a
16 nonsense process if it's being allowed to stand like this. There's no mirror test going
17 on. There's no comparison going on. The Prosecutor never conducted, as
18 Mr Marchand, I think, explained, a proper preliminary examination here, because
19 although the first Prosecutor began one *proprio motu*, the state referral intervened.
20 And then, for all that time the matter remained the subject of inter --
21 of state prosecutor communication until a judgment comes down saying, "You know
22 what you can do, you can apply without even having the documents in front of the
23 Court, translated in a language they understand", and two weeks later they launch it
24 and reopen the investigation. This begins to look like more than just an
25 incompetence approach.

1 But with the greatest of respect to the Prosecutor and all those involved in the
2 situation that has brought Venezuela in front of the Court today, it is completely
3 inconceivable that your Honours could properly uphold the Pre-Trial Chamber's
4 decision when it, (a), didn't know what the policy it was trying to judge was. It
5 could have been a policy between four police officers at one police station, four at
6 another, and a senior officer together conspiring. I mean, it could have been much
7 more widespread. We have no idea. We have no idea what's being alleged. You
8 have no idea and the Pre-Trial Chamber had no idea.

9 So the idea that somebody's conducted a mirror test against material they haven't
10 even read in a language they understand is, frankly, ludicrous.

11 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:20] Thank you very much,
12 counsel.

13 We still have a few minutes for questions on this issue. I would turn to my
14 colleagues to find out whether they would like to ask any questions. No.

15 MS BRADY: [10:20:32] Your Honour.

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:34] Excuse me.

17 MS BRADY: [10:20:36] Your Honour, may I make a submission just in response to
18 that very last point made by my friend?

19 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:43] With your permission,
20 I would like to ask a question --

21 MS BRADY: [10:20:47] Yes, sure; of course, your Honour.

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:48] -- and you might
23 come in at a later stage.

24 MS BRADY: [10:20:50] Of course, your Honour. Of course, yes. Thank you.

25 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:20:54] Thank you very

1 much.

2 The practice of the parties taking the floor on their own is getting a little bit out of
3 hand. I would encourage you to wait until I give you the floor. Thank you very
4 much.

5 So my question is really addressed to Venezuela.

6 As you know, Venezuela signed and ratified the Rome Statute in the year 2000.

7 When it did so, it undertook a number of commitments, including as part of the Rome
8 Statute to respect the possibility that the International Criminal Court, which is not a
9 foreign court but part of the Rome Statute, if I may remind you, might be called upon
10 to act in certain circumstances.

11 While the principle of complementarity does not compel the State of Venezuela to
12 faithfully adopt the Statute's offences into its domestic laws, the initial requirement
13 for Venezuela to fulfil its obligations and actively participate in the global effort to
14 combat impunity does involve seeking to have domestic legislation that at the very
15 least encompasses a definition of fundamental crimes, general legal principles and
16 procedures for collaboration with the ICC. All this is part of the Rome Statute
17 system.

18 Unfortunately, it seems that the crimes falling under the jurisdiction of the Court have
19 yet to be incorporated into the domestic legislation of Venezuela. Therefore, there is
20 currently no assigned penalties or established prosecution procedures for these
21 crimes. In other words, under current conditions, it is not possible to prosecute
22 anyone in Venezuela for the specific commission of crimes against humanity.

23 My question is, therefore, as follows: What has been the obstacles which have made
24 it difficult in the course of the last 23 years for Venezuela to adopt legislation which
25 should have incorporated crimes against humanity into its own legal order? Is this

1 at some stage going to be overcome in the near future? What are the perspectives?

2 You have the floor.

3 MR EMMERSON: [10:23:13] Let me answer that question because I actually am
4 qualified to answer it, as it happens.

5 The short answer is -- I feel a slight hint of a criticism in the last sentence to the
6 reference of 23 years, which I don't with regret, with respect, consider to be fair in the
7 light of paragraph 118 of the Senussi judgment and the concession from the
8 Prosecution that we're not required in faithfully fulfilling the Rome Statute
9 obligations on Venezuela, which -- may I say, Venezuela was the first country in the
10 region to ratify -- sign or ratify the Rome Statute, and has faithfully implemented its
11 relationship with the Court and its obligations ever since.

12 But the point that you raise is there would be absolutely no reason for Venezuela to
13 have to consider its own domestic criminal legislation, and there's no obligation in the
14 Statute for them to do that. Compliance with the Statute, as you see in the judgment,
15 does not require having in your own law international crimes that mirror those of the
16 Rome Statute in terms of legal qualification.

17 And if your criminal law is doing just fine, in the sense that it's catering for the crimes
18 that occur generally, including those allegedly committed by public officials, then the
19 acute issue is not going to arise. It has arisen now.

20 And when I say "foreign court", no disrespect is intended. But to Venezuela,
21 Venezuelan population, Venezuelan judges and lawyers, and Venezuelan political
22 leaders on all sides, this is a foreign court seeking to intervene in their own sovereign
23 national rights.

24 And it is a sovereign right to prosecute your own nationals within your own territory
25 for crimes committed in your own territory, and it is a sovereign right that isn't given

1 away when you sign the Rome Statute. It's a sovereign right that is subject to a
2 procedure for attenuating when it should be overridden.

3 All states mutually agree in a multi-lateral treaty that there are some circumstances
4 where they've been demonstrably shown unwilling or unable, whereas they recognise
5 that it will be necessary for an international court to intervene. And a condition of
6 state collapse is an extreme example, a situation where it's clear that the justice system
7 has broken down or there's artificial protections designed to achieve impunity, the
8 states agreed.

9 But they didn't just say the ICC Prosecutor can do it whenever he wants or however
10 he wants, and the Pre-Trial Chamber is just a rubber stamp for the Prosecutor's
11 decision. They weren't willing to agree to that.

12 The States Parties of the ASP that are the authority for this Court considered a
13 procedure was necessary with considerable guarantees -- guarantees that the judges
14 would look at the evidence, for example; guarantees that the Prosecutor has to make
15 it clear what he's proposing to investigate. All of the things that make this current
16 situation such a farce in terms of procedure, they were the very qualifications that the
17 states agreed upon.

18 Now, in answer to the second part of the question, the legislation in issue has been
19 approved in principle. The penalties have not yet been determined. It's an
20 extremely technical issue in any country when this includes most countries which
21 have constitutional provisions forbidding retrospectivity. And there is ongoing and
22 has been ongoing discussions for a very considerable amount of time with the Office
23 of the Prosecutor — indeed, myself, I've taken part in them — about how to
24 implement the legislation in a manner that satisfactorily either overcomes the
25 non-retrospectivity principle or, at a domestic level, because that involves the

1 relationship between this ordinary criminal law and the fundamental constitution
2 which prohibits retrospectivity. An international court can say, "Well, your
3 constitution may prohibit retrospectivity, but it's not retrospective as far as
4 international law is concerned." But that doesn't wash in the national courts of every
5 country.

6 So we have been in discussion, and that's why two technical assistance
7 agreements -- one of the main reasons why two technical assistance agreements have
8 been signed with the Prosecutor to try to thrash these issues out. The Prosecutor has
9 made some very helpful suggestions about a colloquium of states in the region with
10 similar constitutions to see how they've gone about it. There have even been
11 informal suggestions made in the direction of some form of tribunal specifically to
12 deal with the crimes that are alleged here at the national level.

13 All of that, the Prosecutor has fully participated in, has signed two memoranda of
14 understanding. The State has agreed to open up a Prosecutor's technical assistance
15 office in Caracas to bring that forward. It's all in process, but it is in process hand in
16 hand with the Prosecutor. That is complementarity in its pure form. It's dynamic
17 complementarity, as the current Prosecutor himself likes to call it, working
18 constructively with Venezuela to -- I'm sorry, it looks as though I'm saying something
19 that amuses you.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:29:35] No, I'm just asking
21 you to please conclude.

22 MR EMMERSON: [10:29:39] Fine. Well, I think -- I hope that provides the answer
23 to your question.

24 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:29:46] May I ask OTP for its
25 point of view?

1 MS BRADY: [10:29:52] Your Honours, we won't comment, obviously, on the process
2 that is happening at the domestic level.

3 I would like to say, though, in my submissions I did not suggest that Venezuela
4 should not incorporate these crimes. Obviously, it is taking steps. That was not the
5 point of my submission.

6 I was suggesting that they did not necessarily need to have those crimes necessarily
7 on the statute books * to still -- in the domestic law -- to still be able to do the
8 necessary investigations.

9 So my comment was not actually about, you know, whether it was a good idea or not.
10 Of course, that is a matter for the State, and every state who is a State Party to this
11 Statute will make the decision for themselves whether or not to adopt the crimes in
12 the Rome Statute.

13 If they don't, though, there could be consequences as to whether they are able to
14 perform their obligations that are under the Statute to prosecute -- investigate and
15 prosecute the crimes in the Rome Statute, including crimes against humanity. And
16 that's the only point I was making on that. I'd like to correct if there was any
17 suggestion that -- that I was suggesting otherwise.

18 MR EMMERSON: [10:31:18] (Microphone not activated)

19 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:31:20] Thank you very
20 much.

21 Do you have any other point?

22 MR EMMERSON: [10:31:25] (Microphone not activated)

23 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:31:26] No. Please, no. The
24 floor is with the OTP.

25 MS BRADY: [10:31:28] Yes. Sorry. And thank you, your Honour.

1 And I apologise, Mr President, for having risen to my feet prior to your questions
2 before. I had not realised that there would be questions at that point, and I
3 thank you for your indulgence in allowing me to speak on this point which also arises
4 from what my friend has just said.

5 His assertion is that somehow the Prosecutor never properly informed Venezuela that
6 it would encompass crimes against humanity or that we did so in a deficient manner
7 such that Venezuela could not understand that crimes against humanity would fall
8 within the scope of our investigation.

9 Your Honours, that is just not correct. And I have to say it like that because it wasn't
10 just that we said, oh -- in the letter, in the notification in December in 2021, which the
11 Prosecutor, Mr Karim Khan, signed, we didn't just say that crimes falling within
12 Article 7 would fall within the scope of the investigation. We, in fact, attached a
13 summary to that first notification letter.

14 And just to point out, your Honours, the summary — and I can refer to this because it
15 is not -- it is something I can refer to in public. That summary which was attached to
16 the December notification says in paragraph 3, specifically, the office concluded that
17 the information available provided a reasonable basis to believe that since at least
18 April 2017, civilian authorities, members of the armed forces and pro-government
19 individuals have committed the crimes against humanity, and then listing those
20 crimes against humanity. That's paragraph 3 of the summary.

21 That goes to patterns of crimes and links necessary for both policy, for attack, for
22 widespread, for systematic.

23 Now I take your Honours to paragraph 5 of that summary attached to the December
24 notification. I'm reading: In particular, the office reported that the information
25 available provided a reasonable basis to believe that the members of the security

1 forces allegedly responsible for the physical commission of these alleged crimes
2 included -- and then listing -- Bolivarian national police, national intelligence service,
3 directorate general of military counterintelligence and a number of other bodies and
4 units of Bolivarian national armed forces.

5 What is that going to? That is a description of patterns of actors across multiple state
6 agencies.

7 Next, paragraph 6 of that letter, or that summary attached to the letter. It goes to
8 patterns of seniority, which will form the focus of the investigation.

9 And I read further: The information available indicated that pro-government
10 individuals also participated in the repression of actual perceived opponents of the
11 government of Venezuela, principally by acting together with members of the
12 security forces or with their acquiescence.

13 And then there's more, your Honours, because that's not where it ended.

14 In January of 2022, as you know, the Prosecutor provided a further update in
15 accordance with Rule 52, more information. And attached to that you'll find a letter
16 which actually had been sent back in -- apart from the list, apart from the sample list
17 of incidents -- it attached a letter which set out -- I'll just get to the letter.

18 It attached a letter dated 19 October 2021 to the State -- the Government of Venezuela,
19 and then, attached to that, there was a very lengthy, quite a lengthy summary of the
20 findings of the preliminary examination, an even more thorough summary of what
21 I've just read out in relation to the December notification.

22 And here, your Honours, I point to specifically paragraph -- paragraph 5, which,
23 again, speaks about civilian authorities, members of armed forces and
24 pro-government individuals committing the crimes against humanity; paragraph 6,
25 which relates to state policy; and paragraph 7, referring to the systematic nature of the

1 attack; and paragraph 9, speaking about the groups involved and potentially
2 responsible.

3 And, your Honours, all of that material you can find attached to the filing that we
4 made on 17 January 2022, which was our notification on the status of Article 18
5 notifications in the situation of Venezuela. We filed it on 17 January 2022, and all of
6 the annexes -- annexes A, B, C, D. Some of it's confidential -- I can't read it out in the
7 courtroom at the moment. But you will see that, actually, we gave quite -- a lot of
8 information.

9 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:37:14] Thank you very
10 much.

11 I will give a chance to the OPCV to make a few points and then we will adjourn for a
12 break and perhaps come back if there are more questions from colleagues on this
13 particular issue.

14 May I remind all of you that we have a session this afternoon dedicated to any other
15 issues and concluding statements, when all the parties and participants will also have
16 a chance to refer to points which they strongly care about. Please.

17 MS MASSIDDA: [10:37:42] Thank you very much, your Honour. I wanted just to
18 briefly comment on the point of view of victims on your question to Venezuela in
19 relation to, I would say, the adequacy of the national legislation or any future steps
20 eventually taken in the near future by Venezuela.

21 Now, I would like just to recall a few facts. The Venezuelan penal code and the
22 special law for the prevention and punishment of torture and other cruel, inhuman or
23 degrading treatments are the two legislative bodies that contain criminal offences
24 similar to the ones described in the Rome Statute, including assassination, torture and
25 forced disappearances, imprisonments, and others. However, neither of them

1 specifies the penalties applicable in cases where such crimes are determined to be
2 committed as part of a widespread or systematic attack against the civilian
3 population.

4 The inclusion of crimes falling under the jurisdiction of the Court has been proposed
5 in Venezuelan national legislation but was never successful.

6 The organic criminal procedural court, Venezuelan organic criminal procedural court,
7 mentions crimes against humanity, war crimes and serious violation of human rights.
8 However, it does not establish a special procedure for this case, does not link them to
9 the Rome Statute, and also does not specify clear modes of liability or the penalties
10 that would eventually apply for these types of crimes.

11 These are simply factual elements that, in our submission, show that at the moment
12 there is no prospect in Venezuela to pursue justice for the crimes under the
13 jurisdiction of the Court.

14 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [10:40:09] Thank you very
15 much.

16 We will now take a break until 10 past 11. Thank you very much for being back at
17 that time.

18 THE COURT USHER: [10:40:19] All rise.

19 (Recess taken at 10.40 a.m.)

20 (Upon resuming in open at 11.18 a.m.)

21 THE COURT USHER: [11:18:51] All rise.

22 Please be seated.

23 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:19:18] Thank you very
24 much.

25 We shall resume our work on group of issues number 3. We have some questions

1 yet.

2 But before we address those questions, I would like to make a brief statement on
3 behalf of this Chamber. It is my duty to remind all counsels here present of the
4 normal practices that are in effect in this Court. Disrespectful language and
5 excessive qualifications are inappropriate as a means of expressing the views of the
6 parties or participants and will not be recognised as valid arguments. Our debates
7 are inspired by the principles of respect for the law and mutual respect among
8 parties.

9 The Chamber hopes that this is understood.

10 Judge Ibáñez, I think you have a question.

11 JUDGE IBÁÑEZ CARRANZA: [11:20:21] Thank you very much, Mr President.

12 Again, my question in Spanish.

13 (Interpretation) Bearing in mind -- well, the question is for the State of Venezuela.

14 Taking into account your answers with regards to the contextual element and the
15 answer that was given to the previous question of the Presiding Judge with regards to
16 the issue of the interpretation of law, taking also into account the objective of the
17 system of the Rome Statute and this Court is to end impunity, and that this can only
18 be achieved with synergies and complementary efforts of different national courts
19 with this Court and with this system, as well, taking into account also that the crimes
20 that are under the jurisdiction of this Court are atrocious crimes, atrocities, and they
21 are international crimes, which is not an arbitrary nomination, but because they are
22 concerns of the entire international community and they affect the conscience of
23 humanity.

24 As such, when we interpret the law concerning crimes, so-called atrocious crimes
25 which always bring about terrible human rights violations, you always have to take

1 into account not only the specific regulations and norms, but also the treaties
2 concerning the protection of human rights, as was pointed out in 21(3) of the Rome
3 Statute, and the interpretation of law should be as follows.

4 Now, this is a generalised practice in the interpretation of law at national level, and I
5 don't know if Venezuela is an exception to this, you can tell me, but when you
6 interpret law, you have to -- beyond interpreting the regulation itself, you have to
7 make a test of constitutionality with regard to see if the interpretation accords with
8 constitutional elements, basic constitutional elements.

9 And furthermore, you have to have a test of conventionality to see if the
10 interpretation is in agreement with the requirements of conventions, treaties that have
11 been signed and, in this case, with regards to crimes against humanity.

12 Now, I understand that a lot of the conventions in human rights law for the
13 protection, they have been ratified by Venezuela, such as the Convention against
14 Torture and the Prevention against Disappeared Persons, et cetera, the Rome Statute,
15 such legislation. I want to make a couple of points and questions with regards to
16 this.

17 Now, the first question I want to put is with regards to the Venezuelan constitution.
18 I understand in Article 23 that, I don't know if you will state the opposite, but the
19 status of international law and treaties and conventions is considered domestic law,
20 they are understood as ratified as domestic national law and they prevail over
21 national legislation. And as such, they are of immediate application.

22 According to the text that I have here - I don't know if you have a different reading
23 or -- in this regard - and that they are immediately applied by the national courts and
24 the organs of public authority.

25 So my question in this regard is: Is this the status that the Rome Statute has within

1 the constitutional framework that you have, or am I making an error in this?

2 And if this is the case, why did you not prefer in the interpretation, the principles, but
3 you did not prefer the norms and all the criteria which come from the Rome Statute
4 when you interpret your national law and, as such, there isn't a need to go into the
5 contextual element? Because it comes from a human rights treaty. So please could
6 you explain more in this regard.

7 And I hope I've been clear in this regard, but please feel free to ask if you haven't
8 understood completely.

9 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:24:35] Thank you very much,
10 Judge.

11 I believe this question is addressed to the State of Venezuela and therefore you have
12 the floor, sir.

13 MR EMMERSON: [11:24:42] And if I may say so, it's not only an interesting but a
14 very important helpful question.

15 The -- obviously, if I can say, most generally, different states adopt a different
16 relationship with international law. There are monist states in the -- that's a very
17 crude classification for me, but it's monist states which have direct application, and
18 dualist states, like the United Kingdom and others, that require domestic legislation
19 to incorporate an international obligation. That's the first simple dichotomy and it
20 has enormous implications.

21 But within both, there is a huge -- within both groups there is a huge variety of ways
22 in which international treaties come to be implemented. So, for example, the
23 European Convention on Human Rights is implemented in the United Kingdom
24 through domestic legislation incorporating its substantive provisions but imposing
25 very specific limitations on how those provisions can be used. For example, you

1 cannot create a criminal offence in the United Kingdom based on a violation of the
2 European Convention on Human Rights.

3 So the general principle in Article 26 is of the direct effect of international law, but the
4 foundation under the constitution for a criminal offence to be constituted in national
5 law is that there must be an offence in the criminal code or a related piece of criminal
6 legislation. It must be defined, as required by human rights law, with sufficient
7 specificity to enable the individual concerned to know what conduct is and isn't
8 illegal before the act is committed.

9 And so it is considered necessary in Venezuela to have implementing legislation, and
10 that's why it's in the process of being taken through the legislative process with the
11 advice and assistance of the Office of the Prosecutor, who is monitoring the process
12 actively. Well, when I say "actively", I'm talking about regular meetings, coming to
13 Caracas himself, and being reported, you know, discussion, able to have
14 conversations with the president of the supreme court and with the parliamentarians
15 involved, and his officials do, and opening an office in Caracas with the consent of the
16 government under a memorandum of understanding to bring this law into effect.
17 That is the objective.

18 But what you cannot do under the Venezuelan legal system, and again I'm answering
19 on the hoof and I can see one of my colleagues might want to add something, what
20 you cannot do is found a criminal offence in national law on an international treaty.
21 And that's common in, I would say -- I mean, I can't give you a statistical analysis, but
22 common in most jurisdictions. It's certainly the position in the United Kingdom.
23 You cannot prosecute anyone in the United Kingdom for a violation of the Rome
24 Statute. What you can do is prosecute them for a violation of the Criminal Court Act,
25 which was enacted to make the Rome Statute domestically applicable. But that still

1 raises questions of retrospectivity.

2 So we need in the UK, and in a number of European countries, domestic
3 implementing legislation, before you could use the Rome Statute to create an offence
4 on which someone was tried within the UK jurisdiction. So we don't have it directly
5 effective in the way that would enable a criminal offence to be founded.

6 I hope that's an answer. I think it may be that Mr Martínez has some detail he
7 wished to add.

8 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:29:15] Mr Martínez, please.

9 MR MARTÍNEZ JIMÉNEZ: [11:29:17] Thank you, Mr President. I will address the
10 Court in Spanish.

11 (Interpretation) Your Honour, in order to answer the question with regards to
12 Article 23 of the national constitution, I would like to say firstly that Venezuela is a
13 dualist country, in the sense it incorporates international law into its own domestic
14 law.

15 In general terms, there is an exception, and that's true, and this is the exception that
16 you find regulated in Article 23 of the national constitution. But Article 23 refers
17 literally to the treaties and conventions, that is to say the agreements, international
18 sources related to human rights, their criteria, they are subscribed to by Venezuela
19 and they prevail over domestic law, to the extent that they contained norms for their
20 exercise which are more favourable to those established by this constitution and the
21 laws of this republic.

22 And here you have a direct effect in -- a monistic effect, but when the constitution
23 speaks about treaties and conventions related to human rights, then the internal
24 organs distinguish between domestic law on human rights to international criminal
25 law, and particularly because of the next provision, which is more favourable to those

1 established by this constitution and in the laws of the republic, and as such these
2 sources, these conventional sources and treaties which have hierarchies in domestic
3 law refer to this spectrum of conventional laws which -- in the domestic law on
4 human rights. For example, United Nations committees, the Inter-American system
5 as well, but not the international laws, which require transposition into domestic law,
6 as is the case if you have a dualistic legal country, as is the Bolivarian Republic of
7 Venezuela.

8 I would also like to point out the difference that there is for the entire international
9 community, this is something that doesn't just affect Venezuela, when it comes to the
10 regulation on genocide, for example, and on crimes against humanity. Now, with
11 regards to genocide, that's from the year 1948 and it has a clear convention and its
12 express definition which has been transferred into internal -- domestic legislation of
13 almost all countries in the international community. And some of them have also
14 added genocide, but there is consensus on the definition.

15 Now, you have an obligation to incorporate a clear definition which is expressed in
16 domestic law, but that doesn't yet exist in crimes against humanity. That is the
17 difference that I would like to make in this regard, to add to the arguments that have
18 already been given by Mr Emmerson.

19 Thank you very much.

20 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:32:32] Thank you very much,
21 Mr Martínez.

22 Albeit this question from Judge Ibáñez was really addressed to Venezuela, maybe the
23 Prosecutor would like to have a word on this? And the OPCV.

24 MS BRADY: [11:32:45] No, no, your Honours, there's nothing further from the
25 Prosecution.

1 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:32:49] Thank you very
2 much.

3 OPCV.

4 MS MASSIDDA: [11:32:51] We do not have any comment on this. Thank you very
5 much.

6 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:32:53](Microphone not
7 activated)

8 JUDGE LORDKIPANIDZE: [11:32:59] Thank you.

9 My question goes to the State of Venezuela. So I would seek clarification whether it
10 is your position that the Gaddafi/Al-Senussi test, the same person, the same conduct,
11 applies in the same way at the situation stage despite Philippines appeals judgment.
12 Thank you.

13 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:33:31] Thank you very
14 much.

15 Counsel, you have the floor.

16 MR EMMERSON: [11:33:34] The answer to that question is that it governs the entire
17 process.

18 Now, whether it applies in exactly the same way to an identified accused and a
19 potential unidentified accused or a potential accused that the Prosecutor wishes to
20 investigate, the Prosecutor here, it still needs -- any investigation still needs to be
21 focused on the issue which is defined in paragraph 119. That is the wellspring from
22 which the complementarity analysis derives.

23 If it were the case, let us say, that the drafters had considered that it had to involve the
24 same contextual elements in order to achieve complementarity, in order to achieve a
25 satisfactory outcome of the mirror principle, then they could not have included

1 ordinary crimes in the *ne bis in idem* list. And just test that through for a moment.
2 The drafters made a decision, and it's discussed in the jurisprudence, very clearly
3 there was a debate about whether to include ordinary crimes or exclude them from
4 the rule that prevents the ICC from having jurisdiction if there has already been a
5 conviction or acquittal for the same conduct in national law.
6 Now, if the drafters had decided no, no, one of the exceptions - there's a list of
7 exceptions - one of the exceptions is if it's not the same legal offence, then it's not
8 double jeopardy. And that was the subject of debate. And the decision was taken,
9 no, it doesn't have to be the same legal offence if it's the same underlying conduct.
10 So that is why in ordinary crimes non-international definitions are not one of the
11 exceptions. So if somebody has been prosecuted for murder or for incitement to
12 murder or conspiracy to murder, even conspiracy to commit racially motivated or
13 community motivated murder against a community, let us say, of which -- I mean,
14 certainly Venezuelan law is replete with provisions, as you would expect, like any
15 other criminal justice system, for joint enterprise prosecutions. I mean, they have
16 law for tackling gang crime and organised crime, of course.
17 So the question is what is it exactly then that was the reason why that was excluded.
18 And the answer is obvious, because the whole philosophy of the Rome Statute is
19 based on the proposition it doesn't matter about the contextual elements or whether
20 you call it crimes against humanity or anything else, it matters, it matters only
21 whether this Court has jurisdiction. You have no jurisdiction whatsoever over any
22 of these crimes that have been alleged by the Prosecutor in terms of the examples that
23 he has given, or any of those that have been investigated, unless they form part of
24 crimes against humanity as defined in the legislation. Otherwise, the law,
25 international and national, leaves the national authorities to deal with it.

1 So the actual conduct, the crime base is only your -- I don't mean this rudely, but it's
2 only the concern of an international court if you can qualify that crime base as either a
3 state or an organisation or policy.

4 Now, how do you do that? Well, as the Prosecution agree, and I've just clarified that
5 over the break, this is not a case where the suggestion is, as it was for example in the
6 Philippines, that there's a specifically identified policy to target drug traffickers with
7 summary execution and that is emanating from public statements that had been made
8 by President Duterte. That is a top-down. Or, for example, the cases based in
9 Serbia against the Serbian authorities that are based on a document or meetings, or an
10 insider, very often, who has turned to the other side, saying that was our policy, we
11 were going to move through the country one mile a day and kill everybody who was
12 in our way. And that's what happened. So that's a top-down investigation.

13 And then there's the other way, which is a bottom-up investigation. And as the
14 Prosecution confirmed, they have just agreed with me, this is a bottom-up
15 investigation that they contemplate. It's based on the crime base. Indeed, when
16 you were referred to the annexes, as you were just before the break but by counsel,
17 appeal counsel for the Prosecution, and you were taken to various details of
18 organisations -- I mean, I leave aside the comment that those -- the list includes every
19 organisation in the State's apparatus, but the point is there's nothing alleged in any of
20 those documents to particularise a policy that's top down if all there is is they have
21 more information of the categories of crime base. All of which are triable in
22 Venezuela.

23 So the answer to your question is: The application of paragraph 118 may or may not
24 result in a different outcome in the Philippines case, but it is very clearly the
25 wellspring from which all decisions have to be made. And even though it's the same

1 constitution of the Court, you cannot avoid confronting the fact that that is central to
2 the decision you have to take in this case. And if you consider it requires a
3 departure from the Philippines judgment, or a modification of how it was approached,
4 that is obviously a matter for the Court, I wouldn't be the one to comment on that.

5 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:40:32] Thank you very much,
6 counsel. This was your conclusion.

7 Does the OTP want to comment on this, very briefly? Because we do have to move
8 forward. Thank you very much.

9 MS BRADY: [11:40:40] Yes, thank you.

10 Yes, your Honour has asked whether or not the Gaddafi same person/same conduct
11 test applies in the same way at the situation stage. Your Honour, yes and no. It
12 doesn't apply in exactly the same way at the case stage.

13 Let me -- allow me to explain. Preliminary challenges to admissibility under
14 Article 18 are not at that individual case level, and that is why the test is somewhat
15 different. It's whether the domestic * investigations sufficiently mirror the
16 Prosecution's intended investigation insofar as it covers the same - and these words
17 are important - or substantially the same conduct. So this is a modification on the
18 test that you might see which applies at the case stage for -- and that's why it is
19 difficult, it's not correct to necessarily collapse the concept of *ne bis in idem* with the
20 concept which is at the heart of Article 18 on complementarity.

21 When it comes to *ne bis in idem* and we ask can somebody be prosecuted, can they be
22 tried again * for conduct. For example, if someone was convicted of murder and then
23 could they be also convicted of murder as crimes against humanity, the principle of
24 *ne bis in idem* goes to -- what lies at the heart of this are other concepts that may be of
25 importance for an accused person in terms of due process, fair trial, not to be twice

1 tried for the same offence.

2 We saw this in the same debate that we had when we talked about -- in the discussion
3 on cumulative convictions in the Ongwen case. The decision on whether or not you
4 can cumulatively convict for crimes does not necessarily revolve around the same
5 question in Article 20 on whether or not a person can be tried twice for the same
6 conduct.

7 And, your Honours, the submission of the Prosecution is that, similarly, I do not think
8 you can necessarily collapse the question of *ne bis in idem* in -- into the question which
9 is at the heart of this decision, which is on the admissibility, on admissibility and
10 complementarity. They're very similar, but they're not identical, and I think those
11 words "same or substantially the same conduct" mean something.

12 Just I would like to also clarify one point just made by my friend, and perhaps there
13 was -- we had a brief discussion on the break, but the discussion in the break was
14 where in the material that I had referred to in my response, where in those summaries
15 it could be found the elements regarding, say, systematic attack and policy. And
16 I pointed my friend to those matters. Of course, it is not an iron cast guarantee
17 because at this stage the Prosecution has not commenced its investigation, so we do
18 not make a comment at this stage as to whether our investigation is proceeding in a
19 bottom-up or whether it would - let me use the conditional because we haven't
20 started the investigation at this point because we have suspended at this point, given
21 these proceedings - but whether or not we go on a bottom-up or a top-down, that may
22 be something quite * different. And pointing to the features -- what I was doing was
23 pointing to the features which showed building blocks of systematic attack and state
24 policy.

25 And that is all, your Honours. Thank you.

1 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:44:54] Thank you very
2 much.

3 OPCV, any further comments briefly?

4 MS MASSIDDA: [11:44:59] Your Honour, we have comments, but we will make all
5 the outstanding comments on our side in point 6 so that we accumulate for I think
6 maybe a more reasonable use of time. Thank you.

7 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:45:13] Which I appreciate
8 greatly.

9 So if colleagues have no more (Microphone not activated).

10 I suggest we move to the next topic which is on our agenda.

11 In the Appeals Chamber's directions, the following issues were identified for
12 guidance to the parties and participants:

13 (a) Whether the domestic investigations and prosecutions of criminal acts pertaining
14 to sexual and gender-based crimes must cover the same legal qualifications or
15 elements of the relevant crimes in the Court's Statute.

16 (b) Whether the domestic investigations also need to cover the element of
17 "discriminatory intent" in connection with the underlying acts of the crime of
18 persecution, despite the absence of a domestic legislation that penalises persecutions.

19 On these two issues we shall start with the submission of the State Representatives.

20 You have 15 minutes, please.

21 MR EMMERSON: [11:46:22] Ms Alagendra will address these issues.

22 MS ALAGENDRA: [11:46:32] Mr President, your Honours, in response to
23 question (a), it's Venezuela's position that there is no requirement that the domestic
24 investigations and prosecutions of criminal acts pertaining to sexual and
25 gender-based crimes must cover the same legal qualifications or elements of the

1 relevant crimes in the Court's Statute.

2 In response to question 4(a) earlier this morning, we sought to explain that in

3 accordance with the legal framework for admissibility, States must demonstrate that

4 factual incidents sufficiently mirror the incidents investigated by the Prosecution.

5 States do not need to show that the investigations cover the same legal qualifications.

6 We say this for three reasons -- three main reasons.

7 First, Article 23 of the Statute establishes a *ne bis in idem* bar in relation to conduct and

8 not crimes. This is absolutely key. This is a deliberate choice, following

9 negotiations in Rome, where States were opposed to the inclusion of ordinary crimes

10 as an exception to the *ne bis in idem* principle. It follows from this that the Chamber's

11 assessment must focus on the existence of an overlap of factual incidents rather than

12 legal elements.

13 Second, in accordance with both customary law and Article 21(3) of the Statute, the

14 notion of conduct in the context of *ne bis in idem* turns on an objective assessment of

15 the alleged facts and not the legal qualification of these facts.

16 In the Van Esbroeck judgment from the Court of Justice of the European Union, the

17 court emphasised that the principle of mutual trust implied that the court should

18 respect the validity of other domestic criminal systems even if they might produce a

19 different outcome. For this reason, the possibility of different legal classifications or

20 different protected interests should not be taken into consideration for the purposes

21 of extradition.

22 This is at item 22 of our list.

23 This approach is consistent with the Bemba admissibility judgment where the

24 Appeals Chamber underscored that when a Trial Chamber must determine the status

25 of domestic judicial proceedings, it should accept prima facie the validity and

1 effective decisions of domestic courts, unless presented with compelling evidence
2 indicating otherwise.

3 This decision is at item 9 of our list of authorities.

4 The same approach was also adopted by the Grand Chamber of the European Court
5 of Human Rights in *Sergey Zolotukhin v Russia*. The Chamber notably cited
6 Article 20(3) of the Rome Statute before reaching the conclusion that the notion of
7 conduct must be interpreted in a manner that benefits the person being tried, an
8 approach which emphasises that the legal characterisation of the charges was thus too
9 restrictive and risked undermining the effective protection of the overarching
10 principle of *ne bis in idem*.

11 Third, the Chamber's reliance on the Prosecutor's legal descriptions of the incidents as
12 a fixed parameter for ascertaining the scope of the charges is inconsistent with the
13 principle of *iura novit curia*. This principle specifies that judges have the power to
14 assess the most appropriate legal qualification of the charges, provided they fall
15 within the scope of the confirmed facts and circumstances of the charges.

16 This principle has been recognised through the adoption of Regulation 55, which
17 allows the Trial Chamber to requalify the legal characterisation of the facts. This
18 regulation has in fact been used in the context allegations of sexual violence in a
19 detention environment.

20 Specifically in the Al Hassan case, which is at item 25 of our list, the Trial Chamber
21 invoked Regulation 55 to give notice that allegations of rape in a detention setting
22 could be requalified as the crime of other inhumane acts or the crime of cruel
23 treatment. In reaching this conclusion, the Chamber observed that the act of rape
24 does not exist separately from the context of other inhumane acts and cruel treatment,
25 but aggravates that context. And this is at paragraph 12.

1 It is clear from this that the conduct underpinning a charge of cruel treatment can also
2 be the same conduct underpinning allegations of rape or sexual violence. The fact
3 that domestic authorities have classified such cases under the charges of cruel
4 treatment does not mean that they are not investigating the conduct described in the
5 Article 18(1) notification.

6 It is also clear that it would be inappropriate for the Pre-Trial Chamber to make a
7 determination as to the appropriate legal qualification for conduct which could be
8 requalified at a later stage by an ICC Trial Chamber or by domestic courts.

9 It is for this reason that the European Court of Justice and the Europe Court of
10 Human Rights have found the notion of conduct for the purpose of examination of
11 concurrent jurisdiction on *ne bis in idem* should be defined by reference to objective
12 facts and not the legal qualifications of these facts.

13 And in support of this I will refer to items 22, 23, 24 of our list of authorities.

14 The same approach is taken in the EU framework decision, more specifically Article 3,
15 which specifies that an assessment of a conflict in jurisdictions should be based on the
16 question as to whether the respective proceedings concern the same historical events
17 rather than the same crimes or offences.

18 This is at item 4 of our list of authorities.

19 In terms of relevance of these legal principles to the impugned decision, the Pre-Trial
20 Chamber made no finding that domestic authorities had failed to investigate specific
21 incidents of rape or sexual violence which had been set out in the Article 18(1)
22 notification. Indeed, the Prosecution has failed to describe any specific incident of
23 rape in its Article 18 notification or in subsequent correspondence. The Chamber has
24 also made no finding the legal qualification of such cases as sexual violence or cruel
25 treatment resulted in impunity or lack of genuine accountability.

1 As previously explained by Venezuela, the charge of cruel treatment can in fact result
2 in higher sentence. And this is at paragraph 103 of Venezuela's observations to the
3 Prosecution's request to resume investigations.

4 The fact that domestic authorities did not qualify certain conduct as rape, as such, was
5 therefore entirely irrelevant to the Chamber's assessment as to whether Venezuelan
6 authorities were investigating the acts set out in the Article 18(1) notification.

7 In terms of impact of this error, at paragraph 124 of the impugned decision, the
8 Chamber observed that it appeared that Venezuela did not intend to investigate
9 certain allegations as sexual and gender-based crimes as such. When describing its
10 conclusion that the domestic investigations did not sufficiently mirror the scope of the
11 Prosecutor's intended investigations, the Chamber noted at paragraph 131 of the
12 impugned decision that the domestic investigations did not sufficiently mirror the
13 form of criminality the Prosecutor intends to investigate.

14 The Chamber then referred specifically to its findings concerning sexual and
15 gender-based crimes and discriminatory intent. The Chamber's legal error thus had
16 a direct influence on its assessment that the mirroring test was not fulfilled.

17 It's our submission that if the Chamber had not made this error, there would have
18 been no basis to conclude that the sufficient mirroring test was not fulfilled as
19 concerns incidents which were notified with a sufficient degree of specificity.

20 I will demonstrate this by going through the relevant documents.

21 First, the annex to the Article 18(1) notification – and this is at item 8 of our
22 authorities – contained only a fleeting reference to sexual and gender-based violence.

23 The summary of findings simply asserted that since at least April 2017, civilian
24 authorities, members of the armed forces and pro-government individuals had
25 committed rape and/or other forms of sexual violence of comparable gravity pursuant

1 to Article 7(1)(g). No details or numbers of incidents were provided.

2 Turning to the January 2022 correspondence, the Prosecution explained that the
3 incidents attached to the letter were of a nature and gravity similar to those that the
4 office has relied upon in reaching its determination with respect to the treatment of
5 persons in detention.

6 Annex 2 sets out a list of names, dates and locations with no accompanying
7 description as to the alleged conduct or type of harm linked to the victim. Many
8 victims were referred to by pseudonym.

9 The cover note verbale also provided no information as concerns the manner in which
10 the Prosecutor had characterised the type of conduct pertaining to these incidents or
11 any breakdown as concerns the likely number of incidents related to particular types
12 of conduct.

13 These incidents provide no basis for either Venezuela or the Chamber itself to identify
14 specific conduct or potential cases involving sexual and gender-based crimes.

15 Turning to the 2019 preliminary examination report, which is at item 26, specifically
16 paragraph 79 described allegations of sexual violence in a vague and unquantified
17 manner. There was no specific reference as to cases of rape.

18 Mr President, your Honours, in annex A to the Prosecution's resumption request, the
19 Prosecution acknowledged that Venezuela authorities had provided concrete and
20 specific details concerning effective investigations into three cases of rape. This is at
21 paragraph 144 of the appeal brief. This is in addition to the cases that were classified
22 as cruel treatment. There simply is no foundation to conclude that these
23 investigations do not sufficiently mirror the incidents that were notified to Venezuela.

24 I'll move on now to the question at 5(b), your Honours.

25 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:58:13] Yes, but please be

1 brief because I think we are nearing the end of your time.

2 MS ALAGENDRA: [11:58:22] Yes.

3 We submit that the -- in short, your Honours, we submit there is no need for domestic
4 investigations specifically to cover the element of discriminatory intent. It is not
5 necessary for domestic authorities to charge an international crime as such, such as
6 persecution. It is required, however, that domestic investigation addresses the
7 essence of persecution, which is the targeting of an individual by reason of their
8 membership of a particular defined group.

9 Our position remains that this has already been adequately addressed by the
10 domestic investigations. The short answer to this question is that it has already been
11 determined by the Appeals Chamber in the Al-Senussi admissibility appeal, as your
12 Honours heard earlier this morning.

13 We stand by that position, your Honours. Thank you.

14 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [11:59:07] Thank you very much
15 indeed.

16 Would the Prosecution now like to take the floor for 15 minutes.

17 MS BRADY: [11:59:19] Your Honours, issue -- the issue number 5 consists of two
18 parts and both of them relate to whether the Chamber allegedly erred in requiring
19 Venezuela to investigate international crimes to meet the test in Article 18.

20 I'll first address the sub-issue * (a). And the question is: Whether domestic
21 investigations and prosecutions of criminal acts pertaining to sexual and
22 gender-based crimes need to cover the same legal qualifications or elements of the
23 relevant crimes in the Statute.

24 In our submission, where the Prosecution has informed the State that allegations of
25 rape and other forms of sexual violence of comparable gravity to the crimes in Article

1 7(1)(g) fall within the scope of its intended investigation, as it did here, the State does
2 need to investigate the factual conduct underlying the legal elements of the relevant
3 crimes in the Statute in order to meet the sufficient mirroring test in Article 18(2).
4 Domestic authorities need not necessarily use identical legal qualifications or
5 elements of the relevant crimes as in the Statute, but they do need to investigate and
6 prosecute for the same or substantially the same conduct.
7 And on this question, your Honours, how domestic authorities have legally qualified
8 the conduct being investigated may assist in assessing whether the State is
9 investigating that same conduct. And I'll come back to that point in just a moment.
10 But firstly, just to briefly recap, and in response to the submissions of my learned
11 friend, following the conclusion of its preliminary examination into the situation, the
12 Prosecutor informed Venezuela of his preliminary findings on alleged crimes,
13 including on forms of sexual and gender-based violence against over a hundred
14 persons.
15 Now, for further detail about these acts I draw your Honours' attention to the
16 Prosecution's notification dated -- to the Pre-Trial Chamber dated 22 January on the
17 status of the Article 18(1) notifications - that is the document I referred to in the
18 previous session - and, in particular, to confidential *ex parte* Annex D. It's not *ex parte*
19 to Venezuela, it was to other participants, but Annex D and, in particular, your
20 Honours, paragraphs 29 to 30.
21 I'm not at liberty to go into the details of what is in -- in open court of what is
22 contained in those paragraphs in Annex D, but I do invite your Honours to look at
23 that to see the sufficiency of the information we gave at that stage, and bearing in
24 mind where we were in the end point of the preliminary examination and without
25 having started the investigation proper.

1 And the Article 18 notification itself likewise referred to rape and other forms of
2 sexual violence of comparable gravity to those in Article 7(1)(g). And in the update,
3 the additional information we gave under Rule 52, in January 2022 the Prosecution
4 gave further details by way of the sample incidents. And these also, your Honours,
5 are in Annex D. And, your Honours, I can't go into great detail about those sample
6 incidents for similar reasons related to confidentiality, but of them at least 22 of the
7 124 on the list included acts involving sexual and gender-based violence, rape and
8 acts of sexual and gender-based violence.

9 And it also has to be borne in mind, your Honours, that when we are giving this
10 information, we ourselves are also bound by our duties under Article 68 to the
11 victims and to not -- to take into account security and other issues which could affect
12 their personal interests. So we gave this detail, but it has to be seen why the
13 Prosecution doesn't perhaps * perhaps give last detail about all of these crimes
14 because of its duties under Article 68.

15 So that's what we had provided and yet when the Chamber looked into this aspect
16 regarding Venezuela's investigation, it found that Venezuela had only referred to
17 three specific cases involving sexual and gender-based * crimes, and of them, only one
18 was in English and substantiated - that was more to the point, substantiated - with
19 court or investigative records. That's at paragraph 124.

20 And while the case did refer -- while the Chamber recognised that that case did refer
21 to rape and other acts that could qualify as sexual and gender-based crimes, the
22 Chamber noted that the legal, what they called, pre-qualification and conviction did
23 not include any crimes with a sexual or gender component. And the Chamber also
24 likewise noted that there was information in other cases suggesting that criminal
25 conduct could qualify as sexual and gender-based crimes but said it was unclear --

1 they were the words used, unclear – whether this conduct was being investigated as
2 such by the domestic authorities.

3 And in this regard, your Honours, they paid particular regard to Venezuela's own
4 observations made in paragraph 103 of the Venezuelan observations before the
5 Pre-Trial Chamber, stating that its authorities intended to prosecute these crimes as
6 acts of cruel treatment despite their sexual nature.

7 And in our submission, your Honours, it was reasonable and correct for the Chamber
8 to have then found that it appeared not, in their words, that the Venezuelan domestic
9 investigation appeared not to sufficiently mirror the forms of criminality in the
10 Prosecution's intended investigation based on their, as they called it, insufficient
11 investigation of crimes of a sexual nature.

12 Now, in finding that the investigative steps taken by the authorities in this regard
13 were insufficient, in making that finding that was both -- in our respectful submission,
14 both reasonable and correct, it was found not only because of the limited number of
15 actual cases - and I remind your Honours that it found only one substantiated
16 case - but it was also based on its observation that they were * going to, or the
17 domestic authorities intended to prosecute acts of a sexual nature as cruel treatment.

18 Now, two points to make on this.

19 Firstly, in relation to the alleged other cases that were referred to, *your Honours,
20 decisions on admissibility of course must be made based on the current state of
21 investigations, what they show, the facts as they presently exist and not at some point
22 as they may be determined in the future. So the Chamber is looking at what is
23 substantiated in front of it with the substantiating court and other investigative
24 records.

25 But, secondly, your Honours, investigating these crimes as cruel treatment or, I could

1 add, even * as torture, may not necessarily capture the same conduct and harms and
2 interests protected by the crimes of rape and other forms of sexual violence in the
3 Statute. Rape requires, among other things, a sexual invasion and the Appeals
4 Chamber in Ongwen captured the fundamental nature of that crime by stating that it
5 involves the invasion of a sexual nature of a person's body and the attack on his or her
6 sexual autonomy. And likewise, other forms of sexual violence require, among other
7 things, acts of a sexual nature of a comparable harm to the other crimes set out in
8 Article 7(1)(g).

9 Now, we recognise that under Venezuelan law, cruel treatment is a serious crime
10 with particular elements and may be punished with a high penalty. You can see this
11 in the Special Law on Torture and Cruel Treatment, the 2013 act. But proceeding
12 with investigations on these lines alone may not necessarily reflect the grave harms
13 and distinct interests suffered by victims of sexual and gender-based crimes.
14 Your Honours, in the absence of further details on those domestic investigations, the
15 Prosecution could only make submissions on this in the abstract because ultimately,
16 your Honours, much will depend on how the underlying facts are examined in
17 investigations and then reflected in later prosecutions at the domestic level. What
18 facts are coming to the fore, as it were, during the investigations.

19 And in this regard, I come back to the comment I made at the beginning of my
20 remarks that the labelling of crimes can be an important factor to consider. It's not
21 necessarily always determinative, but it's an important factor. And, your Honours,
22 in the case against Simone Gbagbo, the Pre-Trial Chamber in that case had to decide
23 whether Simone Gbagbo was being prosecuted domestically for the same conduct as
24 the case against her at the Court, and found ultimately that she was not. It
25 was -- that it was different. The Chamber in that case focused -- said it had focused

1 on the factual conduct alleged against her domestically, like the actual conduct, and
2 not how the domestic authorities had legally characterised and charged her conduct,
3 i.e., as crimes against the state and security. But it said a very interesting thing in
4 footnote 87 of its decision. It said it considered the legal characterisation of her
5 crimes at the domestic level to be, quote, "a significant indicator of the actual subject
6 matter of those domestic proceedings".

7 So in a similar vein, if -- and we are talking here somewhat in the abstract, but if the
8 Venezuelan authorities were to investigate and prosecute crimes involving sexual or
9 gender-based violence as cruel treatment only and not as - and I'm talking about the
10 investigation in particular - and not as rape or sexual violence, this could indicate that
11 they are not being sufficiently investigated or prosecuted, especially when we see
12 from the pleadings, in fact, that Venezuela has laws such as Article 374 of their
13 Criminal Code and the Law on Women's Rights which penalise rape and other forms
14 of grave sexual violence and indeed contain elements very similar to the ones in the
15 Rome Statute. And also, as we see, that domestically and the way we understand
16 the criminal justice system in Venezuela is that prosecutors are obliged to investigate
17 all relevant facts then in order to decide what crimes were committed and their
18 qualifications.

19 Finally, your Honours, I'll address sub-issue (b) and whether or not domestic
20 investigations must cover discriminatory intent in connection with the persecutory act.
21 And you've said -- you've pointed out in the issue despite --

22 THE COURT OFFICER: [12:13:10] Excuse me, counsel, you have one minute left.
23 MS BRADY: [12:13:14] Thank you.

24 Despite the absence of Venezuelan domestic legislation on that, the answer again is
25 yes, they do need to cover the aspect in a factual sense. And again I won't repeat

1 where we have notified that persecution will fall -- would fall within the scope of the *
2 investigation. But if they don't, they won't sufficiently address the same or
3 substantially the same conduct as the Prosecution's investigation.
4 Now, your Honours, the critical question is what does it mean that domestic
5 investigations have to cover it, cover that element. It doesn't mean that the State's
6 investigation must examine -- sorry, in our submission, it means that the State's
7 investigation must examine factually whether the alleged criminal acts were carried
8 out by perpetrators on discriminatory * grounds. In other words, to conduct
9 investigations, to clarify, ascertain and potentially reveal these factual aspects.
10 It does not mean that acts being investigated must be legally qualified as persecution
11 nor that the State has to have a specific criminal offence in its domestic law of
12 persecution.
13 So we do recognise that many countries, including Venezuela, does not have the
14 specific crime of persecution. But even without such laws, a State may take steps to
15 ensure that its investigations cover the reasons why the perpetrator committed the
16 crime and thereby capture the intent.
17 And this, your Honours, in our opinion, in our * submission, balances two factors: a
18 State's ability to fairly pursue its domestic proceedings in conformity with
19 complementarity and the goals of the Rome Statute to ensure accountability.
20 And before the Chamber, Venezuela did not even suggest it was investigating such
21 facts. In fact, it said it had not done so, positively said it had not because of its law,
22 2017 Law Against Hate, and for Peaceful Coexistence, which allowed -- it said it did
23 not have the crime under its domestic criminal law, number one; and number two, its
24 law on peaceful coexistence which allows discriminatory grounds to be considered an
25 aggravating factor in sentencing only * came into force in November 2017 and

1 couldn't be retroactively applied to earlier acts.

2 We've already spoken about the argument that the Chamber didn't follow previous
3 case law in Al-Senussi and Gaddafi. I'll rest on my brief -- we rest on the brief on
4 that point.

5 But to conclude, your Honours, the Chamber, in our submission, was correct to
6 consider whether the domestic authorities had covered discriminatory intent in their
7 investigations. And on the material it assessed, it was reasonable to find that they
8 had not.

9 Thank you very much. And I also realised I went a little bit over and I thank you for
10 your indulgence in that. Thank you.

11 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:16:25] Thank you very much.

12 We had two points.

13 Now OPCV, please, you have the floor.

14 MS MASSIDDA: [12:16:29] Thank you, Mr President. Before addressing question 5,
15 I wanted to put on the record the references to what I refer to in response to your
16 question on point 4, which I did not before because I wanted to check the level of
17 confidentiality of the document.

18 So, for the record, the references were to document 81, filed on 6 November 2023,
19 annex 3 publicly redacted, paragraph 27 and 28. And on the same issue I would like
20 also to refer your Honours inter alia, there are a number of submissions on that, to
21 document 69, annex 1 redacted, filed on 17 October 2023. This is the -- this is the
22 VPRS transmission of the views and concerns of the victims, in particular paragraph
23 21(b) referring to Venezuela changes in law in its favour in order to try to escape
24 international justice.

25 Now, turning to question 5, your Honour.

1 We submit that the matter again falls under the requirements that the State
2 investigations substantially include the same conduct.

3 In the context of complementarity assessments, the Chamber's evaluation are
4 primarily fact driven. However, legal qualifications may in certain situations serve
5 as an additional indicator to help determine whether the domestic authorities are
6 indeed investigating conducts that substantially align with the Prosecution's
7 investigation.

8 While the core of the matter lies in the factual alignment, the legal elements involved
9 can provide valuable context in the assessment process. Legal qualifications may
10 encompass different aspects such as the mental state of the alleged perpetrator, the
11 physical elements of the offence, and any accompanying circumstances or elements
12 necessary for a verdict.

13 Consequently, legal qualifications or elements, although not the sole determinants,
14 can be considered as supplementary indicators in the process of evaluating whether
15 domestic investigations and prosecutions correspond to the legal standards defined in
16 the Statute.

17 In this regard, the Appeals Chamber determined that, while a State is not obliged to
18 use identical legal labels as the Statute, it is imperative that its investigations
19 substantially address the same underlying conduct, taking into account that different
20 crimes have distinct legal qualifications. It's the Al-Senussi judgment, decision 12,
21 paragraph 119.

22 Now, what does it mean? This, in the present situation, this means that the
23 requirements of investigations -- that the requirement of investigations substantially
24 addressing the same underlying conduct cannot be fulfilled by investigating crimes
25 such as rape and other forms of sexual violence as instances of cruel treatment or

1 torture. We strongly disagree on that. We, the submission of our learned colleague
2 from the State of Venezuela. This is because rape and other forms of sexual violence
3 have unique constitutive elements that differ from the ones of cruel treatment and
4 torture. These crimes safeguard distinct interests and for the victims encompass
5 different types of harm.

6 And it doesn't matter, your Honours, if subsequently there will be a requalification, as
7 Venezuela seems to suggest in referring to Regulation 55 of the Regulations of the
8 Court, if I understand correctly their reasoning, because in any case the Pre-Trial
9 Chamber has to evaluate the facts as they exist at the time of a deferral request.
10 This principle underlies the importance of ensuring that the core elements of the
11 crimes being investigated align with the conduct identified in the Statute rather than
12 merely focusing on the legal levels attributed to said crimes.

13 Turning now to the second prong of question 5.

14 In our view, domestic investigations have to address the element of discriminatory
15 intent in connection with the underlying acts of a crime of persecution even in the
16 absence of domestic legislation that penalises persecution.

17 In cases involving crimes against humanity as persecution, proving discriminatory
18 intent is a critical element. An act referred to in Article 7(1) of the Statute or any
19 crime within the Court's jurisdiction qualifies as persecution when it is perpetrated
20 against any identifiable group or collectivity on political, racial, national, ethnic,
21 cultural, religious, gender or other grounds that are universally recognised as
22 impermissible under international law. Discriminatory intent is therefore a
23 fundamental element of a crime of persecution.

24 The existence of domestic legislation that explicitly addresses discriminatory intent
25 can be helpful but is not always a requirement.

1 In fact, as discussed also in question 4 before, for a successful deferral request it is not
2 even enough for a State to rely on the mere existence of relevant legislation.

3 While having specific laws that criminalise discrimination and hate crimes can be a
4 valuable legal basis, the absence of such laws does not preclude the investigation of
5 discriminatory intent.

6 In the decision in paragraph 125, the Pre-Trial Chamber correctly recognised that
7 different legal qualifications do not influence the assessment on whether Venezuela
8 appears or not to be investigating the same conduct.

9 In its brief, Venezuela indicates at paragraph 135 that the existing domestic legislation
10 provides that criminal acts, I quote, "committed due to the victim's membership of a
11 particular ethnic, racial, religious or political group shall be considered as an
12 aggravating circumstance in determining the appropriate sentence." End of quote.

13 Your Honours, this is not sufficient at all to satisfy the preliminary admissibility test
14 under Article 18 proceedings.

15 Even assuming the appellant's position that the Constitutional Law against Hate, for
16 Peaceful Coexistence and Tolerance, in force since November 2014⁷, substantially
17 covers the discriminatory conduct of the crime of persecution, this legislation could
18 not be applied to the events occurred between February 2014 and July 2017 because
19 criminal law is not retroactive in Venezuela pursuant to Article 24 of the constitution.

20 In our submission --

21 THE COURT OFFICER: [12:25:13] Excuse me, counsel, you have one minute left.

22 MS MASSIDDA: [12:25:18] Okay. Okay.

23 In our submission, the discriminatory intent may generally be proven by a
24 combination of evidence, context and legal analysis.

25 And very briefly I would like to list a few points for your consideration:

1 Evidentiary consideration is first: Discriminatory intent is a mental element or state
2 of mind which can be challenging to establish through direct evidence. It often
3 requires a comprehensive review of factual evidence, including documents, witness
4 statements and other records showing the intent of the perpetrators.

5 Two, contextual elements: Discriminatory intent is typically established by
6 examining the broader context in which the alleged crimes were committed.

7 Three, types of criminal acts: The nature of the criminal acts, the context and the
8 patterns of behaviour can be indicative of discriminatory intent.

9 Four, prosecutorial strategy: Insofar the Prosecutor plays a critical role in shaping
10 the strategy for showing discriminatory intent.

11 And five, the international legal framework: International tribunals and the Court
12 have established jurisprudence on proving discriminatory intent.

13 In sum, while having domestic legislation that explicitly addresses discriminatory
14 intent can be advantageous, it is not the sole basis for proving intent during
15 investigation.

16 In light of the material provided by Venezuela, the Pre-Trial Chamber was correct in
17 concluding: One, that domestic investigation must encompass the discriminatory
18 intent element of a crime of persecution, as well as sexual and gender-based crimes;
19 and two, that Venezuela did not address adequately the factual allegation related to
20 discriminatory intent and crimes of a sexual nature.

21 Thank you very much.

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:27:19] Thank you very
23 much.

24 I would like now to invite the State Representatives to respond to the Prosecutor and
25 the OPCV, if you wish. Ten minutes.

1 MR EMMERSON: [12:27:32] I'm going to ask Mr Martínez to address you first.

2 MR MARTÍNEZ JIMÉNEZ: [12:27:44] Thank you, Mr President. I'll address the
3 Bench in Spanish.

4 (Interpretation) First of all, your Honours, I would like to highlight that the internal
5 typification of the constellation of different legal categorisations that a country
6 registers with regard to its jurisdiction of the International Criminal Court in
7 evaluating it, this is something that's always done when there's a structure with
8 regards to legal structures to prevent impunity.

9 Now, when you have internal different characterisations, it can be subject to revision
10 on the part of United Nations commissions, working groups, special regulators,
11 et cetera, within the framework of its recommendations, or in its general observations,
12 it indicates to the country if they have to adjust the legal classification in order to
13 comply with conventions and treaties in international law. But these different -- if
14 they are not available to generate impunity -- to fight impunity, then we consider that
15 the Prosecution of the International Criminal Court cannot enter into the internal
16 sovereignty of the Venezuelan legislation.

17 When it comes to legal characterisation, this isn't configured by -- in order to generate
18 impunity. And I'm going to describe what is the sentence for each one of them.

19 If you have violation and rape, this is 374 of the Criminal Code, and you have prison
20 for 10 to 15 years.

21 In Article 57 of the organic law on the rights of women to a life free from violence,
22 and this is -- has a sentence of 12 to 18 years in prison.

23 Now, the crime of torture, Article 17 of the special law to prevent and sanction torture
24 and other cruel treatment or degrading treatment has 15 to 25 years as a sentence.

25 For depriving liberty, which is homologous with arbitrary detention in international

1 law, is covered by Article 166 with sentences that go from 10 months to two and a half
2 years.

3 Cruel treatment has 23 years -- 13 to 23 years.

4 Inhuman treatment sentences from three to six years.

5 And now we are going to analyse within the framework of each legal type what is the
6 punitive measure taken by Venezuela in this regard.

7 Sexual crimes within the framework of the 124 incidents using the denomination in
8 annex 2 of the Prosecution, then within the Venezuelan legislation we've identified
9 three cases which registered two sentences. Ten civil servants have been sentenced
10 by the commission on violations. And a third case which can be found in trial phase
11 where they have been submitted, 13, that means 23 civil servants who have been
12 formally accused within the Venezuelan legislation.

13 And why have there only been three cases within the domestic legislation of
14 Venezuela is because there were a lot of these cases which were denounced as threats
15 of rape. And there is the assumption that's made by the prosecution within
16 Venezuela which would seem to be coherent in terms of the general part of the law,
17 and there weren't even preparatory acts, that they didn't commence the act, but
18 nevertheless, they were derived for figures of cruel treatment. And that is why you
19 have figures of 13 to 23 years for that.

20 Now, torture. We have two cases which were submitted to our investigation.

21 And illegitimate deprivation of liberty, out of the 124 incidents, we have 17 cases
22 which were submitted for investigation with multiple civil servants included.

23 Cruel treatment, 29 cases, which were submitted currently for investigation; 15 civil
24 servants who were convicted in two cases; another four cases more were submitted
25 for prosecution before the judges.

1 That is to say, that by way of conclusion, your Honours, we consider that the
2 Prosecution should not enter into evaluating the sovereignty of a country unless it is
3 available to generate impunity. And it is clear that these figures and the sentences
4 which have been generated for each are not generating impunity.

5 Thank you very much.

6 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:33:16] Thank you very much.

7 No further comments from Venezuela. Well, thank you.

8 We can now move to the question time. I turn to my colleagues to verify if they have
9 any questions on these topics.

10 No questions?

11 Judge Bossa?

12 Judge Ibáñez, please.

13 JUDGE IBÁÑEZ CARRANZA: [12:33:39] Thank you very much, Mr President. In
14 Spanish, please.

15 (Interpretation) As we know, the Rome system is a system which is based on victims,
16 and you can read it from the first paragraphs of the preamble.

17 Now, the question that I wanted to put is considering that the issue of victim
18 reparations is the same in the case of a classification of investigation, determination of
19 subsequent criminal responsibility and reparations for victims is the same as what
20 could be given in the case of crimes against humanity, for example, the other crimes
21 which are under the jurisdiction of the Rome Statute. And do you find that it's the
22 same or do you find there's differences between them?

23 This is very important when you are determining that a crime is only considered as
24 an ordinary crime, as a simple violation or as a sexual violation, or whether it is a
25 crime against humanity.

1 So we would like to have your clarifications in that regard.

2 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:34:47] Thank you very
3 much.

4 Mr Martínez.

5 MR MARTÍNEZ JIMÉNEZ: [12:34:50] Thank you, Mr President.

6 (Interpretation) Just to clarify the question, this is within the framework of
7 reparations and we are speaking about reparations, state reparations for a violation of
8 human rights or if --

9 JUDGE IBÁÑEZ CARRANZA: [12:35:12] (Interpretation) The last one.

10 THE INTERPRETER: [12:35:13] Overlapping speakers.

11 JUDGE IBÁÑEZ CARRANZA: [12:35:12] It appeared -- when it comes from a crime
12 where there were concrete perpetrators.

13 MR MARTÍNEZ JIMÉNEZ: [12:35:20] (Interpretation) Within the Venezuela's
14 system, as occurs also within the framework of continental Europe, what you have is
15 you have the criminal field and with the -- what you always have or what always
16 arises in this case is civil responsibility to repair the crime. That is to say, when you
17 have the commission of a punishable crime, at the same time, you have the
18 responsibility for reparations of this crime which could be a personal responsibility
19 on the part of the individual or it could be a public responsibility. But within the
20 framework of the Venezuelan law, the criminal responsibility later gives rise to civil
21 responsibility in the case where you have a crime. And that is why you have a
22 retributive system and you also have a civil answer to repair for -- provide
23 reparations for the victim as well.

24 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:36:30] Thank you very
25 much.

1 Judge Ibáñez, any further questions?

2 JUDGE IBÁÑEZ CARRANZA: [12:36:35] (Interpretation) Yes, just a small
3 clarification because the question is if you consider that the content of the reparations
4 for ordinary crimes, and we're talking about rape here, for example, in the cases that
5 you've mentioned, it said that they treated as a crime, cruel treatment, inhuman
6 treatment.

7 Now, reparation for an ordinary crime of cruel treatment, would that be the same as
8 reparations for rape as an international crime? That's what I would like to know. If
9 you could provide clarification on that.

10 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:37:15] Mr Martínez, please.

11 MR MARTÍNEZ JIMÉNEZ: [12:37:18] (Interpretation) So within civil law where you
12 have these crimes, each reparation is individualised. Not only in the Venezuelan
13 law. For example, in the legal order from where I come, the Spanish legal order, as
14 well, I'm Spanish, it's the same. You have a crime that will have reparations which
15 isn't quantified. You don't have an established figure for that. You have to take
16 into consideration the harm that is caused to the victim. You have to take into
17 consideration a lot of different civil elements which are going to be configured with
18 regards to what is the effective reparation that has to be made. And obviously when
19 the commission of the punishable crime has been serious, then the impact will be
20 greater on the victim, and as such, the reparations in terms of compensation or any
21 other form will therefore appear with regards to the harm caused to the victim. But
22 with regards to -- there isn't a pre-established amount which is accredited to the
23 sentence and with regards to what is repaired. There isn't, if you like, parallels
24 between the two, but you have a crime for a rape which has a reparation in
25 accordance with what is -- according with the harm covered. And on the other hand,

1 cruel treatment or inhuman treatment or degrading treatment has to be repaired as
2 well with regards to the specific harm that happened at the time, within the
3 framework of civil responsibility which goes with the crime.

4 I don't know if that has responded to the question.

5 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:39:03] Would the OPCV like
6 to say something as a complement, please.

7 MS MASSIDDA: [12:39:10] Thank you very much, your Honours, for this
8 opportunity.

9 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:39:13] My apologies.
10 Perhaps counsel would like to say something before the OPCV comes in.
11 Please.

12 MR EMMERSON: [12:39:17] Just 30 seconds.

13 There is a draft in existence of a new framework for the purposes of reparations for
14 victims of a whole range, the full range of human rights violations, and we are
15 working in the context of the technical assistance agreements with the Office of the
16 Prosecutor to ensure that the special features of rape and sexual crime are recognised
17 in that context. And clearly it's an area fraught with huge difficulty because for
18 some, rape is rape is rape, and the job of a judge distinguishing even in sentencing
19 terms between one rape and another is in itself a controversial issue. So there are
20 discussions ongoing to resolve that question and we are taking the -- receiving advice
21 and views from, amongst others, the Office of the Prosecutor.

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:40:18] Thank you for this
23 clarification.

24 I did not ask the OTP whether they wanted to comment, but ...

25 MS BRADY: [12:40:24] No, your Honours, not on this question to Venezuela.

1 Thank you.

2 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:40:28] Thank you very
3 much.

4 Then OPCV, please.

5 MS MASSIDDA: [12:40:30] Thank you very much. I have two comments. The
6 first one is I want to be even much more clear of what I think I was during these
7 hearings in relation to what victims expect and with all due respect for the suffering
8 of the victims for what I am going to say as an example.

9 I have just heard "rape is rape". No. Rape is not always the same. It depends on
10 the circumstances in which the crime is committed. Rape in the context of crimes
11 against humanity has specific elements and has a specific importance for the victims
12 to see that elements recognised because otherwise the victimisation of the victims will
13 not be recognised.

14 So rape in the context of persecution for specific grounds is a very specific type of
15 crime which is different from an ordinary rape. And what is important for a victim
16 is to recognise the context in which she or he suffered the crime. And this, your
17 Honours, goes to reparation. Because reparation in the context of crimes against
18 humanity as a value for the victim also as a symbol. Recognising the context within
19 a sexual and gender-based crime has been committed is already for a victim a form of
20 reparation. It goes to the ultimate goal for victims to seek truth of what happened to
21 them and to seek justice and to obtain justice in a court of law.

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [12:42:26] Thank you very
23 much.

24 I see no further questions from my colleagues. So I would just like, before we
25 adjourn for lunch, to highlight what is going to be the scope and the process of our

1 last session.

2 As you have seen, we envisage that our last session will be dedicated first to other
3 issues which can be raised discretionarily by the parties and participants. Not those
4 questions we have put to you. So you will be free to raise issues you wish. There
5 will be the sequence we have observed. Judges will be also allowed to make some
6 further questions.

7 And following that, we have agreed that there would be three closing statements of
8 seven minutes each, allowing you to make a final message to the Bench and to this
9 Chamber.

10 My final remarks will be of a purely procedural nature and I do not intend to go into
11 any substance whatsoever.

12 So I suggest we now adjourn and meet again within an hour at 13:45 in order to go
13 through this last session.

14 And thank you very much for your input.

15 THE COURT USHER: [12:43:49] All rise.

16 (Recess taken at 12.43 p.m.)

17 (Upon resuming in open session at 1.49 p.m.)

18 THE COURT USHER: [13:49:11] All rise. Please be seated.

19 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [13:49:42] Good afternoon to all.

20 We now have our final session. Having concluded the submissions on the issues
21 which had been identified by the Appeals Chamber, I would now like to invite the
22 parties and participants to make submissions, if they so wish, on other issues which
23 may be arising from this appeal.

24 We shall start with the views of the State Representatives for 15 minutes, please.

25 MR EMMERSON: [13:50:14] The minister will address the Court at this point.

1 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [13:50:18] Thank you very much.

2 Minister, you are welcome.

3 MR GIL PINTO: [13:50:21] (Interpretation) Thank you, your Honour.

4 First of all, I would like to express my sincere thanks to this honourable Chamber for
5 having called this hearing today and for giving the Bolivarian Republic of Venezuela
6 the right to be heard on questions that affect the heart of our state sovereignty.

7 It's the first time that we've been given the opportunity to be heard in person on this
8 matter. Even though today I'm speaking about issues that directly concern
9 Venezuela, I think that all of us are aware that these questions have ramifications
10 which go far beyond this situation.

11 The subjects which are debated today affect the very fundamentals of the Rome
12 Statute and the notions of primacy and complementarity, which led to the historic
13 agreement in Rome. The Bolivarian Republic of Venezuela ratified the statute -- the
14 Rome Statute on 7 June 2000. As the first Latin American country to do so, is, in fact,
15 a founding member, which shows our commitment to justice and the fight against
16 impunity.

17 For that reason, we cannot conclude this hearing without referring to the elephant in
18 the room. This is here, before us all, but many would prefer not to discuss it.

19 The president of one of the States, that participant in the referral against Venezuela,
20 described very well the point, and I would like to take it up if you would like -- to
21 mention it, and I would like to show it on the screen as evidence.

22 And, open *quotes:

23 *"I received the president of the International Court of Justice a few days before and
24 asked him not to politicize the International Court of Justice. Do you know why I
25 asked him that? Because the Lima group had made a complaint against Venezuela

1 in the International Court of Justice -- a complaint from which we had withdrawn
2 Argentina's support when we were elected. And I asked him to bear in mind that
3 the complaint was part of a manoeuvre orchestrated by Donald Trump, to the
4 detriment of a Latin American country, and that it was only made solely for political
5 reasons, which were to marginalize and ostracise the Bolivarian Republic of
6 Venezuela."

7 It is evident that this declaration that I have cited and the president of this State
8 referred to the International Criminal Court, and these statements were given in the
9 framework of the visit of the president of this Court to Argentina to participate in the
10 Consultative Assembly of Parliamentarians on the International Criminal Court and
11 the state of law.

12 Your Honours, Venezuela has denounced that this referral was presented by a group
13 of States in 2018 and it responded to a clear objective. It claimed to utilise the
14 institutionality of the International Criminal Court to politically attack Venezuela on
15 the basis of an accusation for crimes against humanity which never occurred.

16 These were the times of Donald Trump and his strategy of regime change in which all
17 options were on the table, and this is how we put this before the Chamber -- Pre-Trial
18 Chamber.

19 Against Venezuela, they have had 930 unilateral coercive measures which have had
20 a devastating effect on the economy and the rights of the population, as can be seen
21 by the Special Rapporteur of the United Nations on the negative impact of the
22 coercive unilateral measures, which are against human rights, and our national
23 income reduced by 99 per cent and it meant that there was a loss of more than
24 \$242,000 million.

25 And I just bring this to show you that there have not been limits in searching for the

1 objectives against Venezuela.

2 At the same time, from abroad, they have promoted and supported different actions
3 to ensure the democratic institutionality of the country, including demonstrations of
4 street violence. There have also been coups as well and they frustrated the efforts of
5 the President of the Republic.

6 As is logical and can be expected, the State had to act and use all tools under
7 international criminal law to guarantee the constitution and democracy in the
8 country.

9 Your Honours, in Venezuela, we managed to achieve that the plan to bring the
10 country into civil law didn't work. In the development of this strategy of regime
11 change, which I'm referring to now, you have this referral of the States Parties which
12 has brought us here today. If you have any doubts in this respect, I would invite
13 you to look at the framework for democratic transition published by the State
14 Department of the United States in March 2020.

15 In this document from the United States, they offered to this International Criminal
16 Court and its proceedings against Venezuela, as a tip for the government that I
17 represent, if Venezuela renounces the exercise of its sovereign rights, and, I quote,
18 Canada, Colombia, Chile, Paraguay and Peru withdraw their support for the referral
19 before the International Criminal Court.

20 Now this matter, which we are dealing with at the moment, has a fundamental
21 importance because it goes directly to the credibility of this Court. Perhaps -- and in
22 a meeting, recent, of the -- ministerial meeting of the office of coordination for
23 non-aligned countries, which brings together 120 states, including various of them
24 which carried out this referral against Venezuela, the ministers, foreign relations,
25 addressed the situation in Venezuela with the following declaration, which I quote,

1 and I will show it on the screen, which you have in front of you in evidence; so --
2 "The Ministers of Foreign Affairs noted with concern the recent decision of the
3 International Criminal Court to proceed with an investigation on the alleged
4 commission of crimes under its purview in the Bolivarian Republic of Venezuela,
5 despite the demonstrated cooperation with the Prosecutor of the [International
6 Criminal Court] in this regard and the ongoing procedures in place in Venezuela, in
7 exercise of its national criminal jurisdiction and in line with its relevant domestic and
8 international obligations. They further noted that such course of action violates the
9 principle of complementarity, as foreseen in the Rome Statute of the ICC ..."

10 I therefore --

11 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [13:57:38] Minister, could you
12 speak a bit slower for the interpreters, thank you.

13 MR GIL PINTO: [13:57:42] Your Honours, when the Prosecutor announced that
14 we were-- that it was studying the referral of the States against Venezuela, we could
15 have withdrawn from the Statute of Rome as other States have indeed done. This
16 didn't occur. The Bolivarian Republic of Venezuela kept itself firm in its
17 commitment to achieve justice through internal investigations to honour our
18 obligations as a founding State Party of this august Court.
19 Our spirit of compromise with justice also has fulfilled all our interactions with the
20 Prosecutor of the International Criminal Court. We have subscribed to two
21 memorandums of understanding with the Office of the Prosecutor, which have led to
22 the imminent opening of an office in the field to facilitate technical assistance to the
23 Venezuelan authorities and to continue national capacity building to achieve justice.
24 In a simultaneous way, the Bolivarian Republic of Venezuela has adopted a group of
25 reforms, norms, at an institutional level to build capacity at the national level to

1 ensure effective administration of justice in accordance with international standards
2 in this matter.

3 For example, in September 2021, it adopted a reform of the organic code on military
4 justice, establishing particularly the prohibition of trials of civilians by the military
5 court. Furthermore, throughout this process in this matter, we have shared with the
6 Office of the Prosecutor approximately 30,000 folios of documents of different types,
7 including different legal files, which take into account the sustained and productive
8 effort of the judicial system of Venezuela to investigate and sanction the crimes
9 committed in the country from the year 2014.

10 Obviously, the magnitude and intensity of the actions of violence against the
11 democratic institutions in Venezuela could have given rise to isolated incidents of
12 excesses on the part of agents of the State.

13 Whatever the case, these acts, when examined objectively, constitute crimes against
14 humanity, but can -- they are crimes against human rights, but not crimes against
15 humanity.

16 In accordance with the information, there were more than 17,000 investigations which
17 have been carried out by the ministry -- the public prosecutor of Venezuela to search
18 for the truth and the establishing of the responsibilities which correspond to cases of
19 violence -- violations of human rights, which are of interest to this Court and to Office
20 of the Prosecutor.

21 And today, more than 255 officials of the State have been accused -- 64 have been
22 accused and 62 have been convicted for these acts.

23 And furthermore, in Venezuela, they have brought forward all of the investigations in
24 an independent way. And in response to the evidence that has been obtained in
25 each of the cases, what we can never claim is that Venezuela is artificially making

1 accusations against determined objects simply to satisfy the pretensions of specific
2 internal and external actors.

3 And, with all respect, the number of matters resulted satisfactorily by the institutions
4 of the Venezuelan judicial system related to this situation, is more than the number of
5 cases which have been led by the International Criminal Court in over 20 years, and
6 all situations are put into the communication with it.

7 It is not a competition between Venezuela and the International Criminal Court.

8 *Simplemente*, this is a reality nobody can object to. The territorial state is the best
9 place in order to guarantee justice, and this is due to the fact that the investigators and
10 the national police have direct access to evidence and to witnesses.

11 Local justice also has more resonance and guarantees a dissuasive effect. The
12 Prosecution and the International Criminal Court will affirm, of course, that it is not
13 a situation about one or the other that the trials of the International Criminal Court
14 can be carried out parallel to national cases.

15 Mr President, ladies and gentlemen, this equation is not so simple. The Prosecution
16 depends on our help when it carries out its investigations in Venezuela.

17 Furthermore, at a time that we see an incredible confrontation of violence in Gaza, we
18 have to ask ourselves, really, if the limited resources of the Court are best employed,
19 invested in a handful of incidents in a country which is ready and capable to act and
20 carry out this work for itself.

21 Your Honours, the principle of primacy of the national jurisdiction should be there for
22 all State Parties which intend to carry out their duty of investigating these cases.

23 Justice means -- is decided on cases without fear or favouritism. This implies not
24 giving up before the States which threaten the Court or dictate sanctions against it
25 and its operators, much less favouring those who pay the bills.

1 Today, I present myself before you to ask that the Bolivarian Republic of Venezuela
2 be treated as a sovereign state, same as the other states to which complementarity has
3 been able to achieve their duty in order to adopt measures to end impunity. As you
4 know, the Bolivarian Republic of Venezuela has the name of Simón Bolívar, who
5 freed our country and a large part of the American continent from colonialism.
6 This notion of colonialism isn't just political. It can also infect the judicial process
7 and the very infrastructure of international cooperation. Yesterday's session
8 demonstrated the serious irregularities that have been committed in this case against
9 Venezuela, and I am sure that the -- this will be the conclusion that is drawn here.
10 Venezuela has nothing to hide. We are convinced that the truth will always prevail.
11 And for this reason, before you, we ratify our commitment to continue exercising the
12 principal jurisdiction in all, each and every one of our cases, ensuring that the basis
13 that form the structure of international criminal justice are met.
14 We just ask yourselves, ladies and gentlemen, your Honours, for fair treatment,
15 balanced treatment and objective treatment to re-establish the legality which was
16 burnt with the beginning of this process and the decision of the Pre-Trial Chamber
17 which is the subject of this hearing.

18 Thank you very much, your Honour, your Honours.

19 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:05:18] (Interpretation)

20 Thank you, President, for your statement.

21 (Speaks English) I would now like to give the floor to the Office of the Prosecutor.

22 You have the floor, Madam.

23 MS BRADY: [14:05:29] Thank you, your Honours.

24 Your Honours, in this session, in this 15 minutes, the Prosecution will develop only
25 a couple of legal points which emanate from the Pre-Trial Chamber's decision and the

1 issues in the appeal and which are based on the record in these proceedings.
2 In relation to the points made just now by the Minister of Foreign Affairs, Mr Gil
3 Pinto, these were all put forward before the Pre-Trial Chamber. We have responded
4 to them already in the pleadings before the lower court; so we will rest on those prior
5 pleadings on those points, and I will make a few more general points in my final
6 seven-minute conclusion on behalf of the Prosecution at the end of this session.
7 Before I hand over to Ms Thiru and Ms Regue, who will make each one of the points
8 that we would like to raise, I would like to clarify one submission I made this
9 morning, because I have realised, upon examining the transcript, that it may be
10 unclear, what I had said and I would like to make it clear.
11 It's a submission I made at page 64, lines 1 through 8, when I spoke about -- well,
12 your Honours can read it but that the Prosecution -- I was answering -- I was
13 responding to a point that Mr Emmerson had made concerning the summaries, the
14 information that had been given to Venezuela just after the preliminary examination
15 and up -- up until -- well, from the period of after the preliminary examination
16 onwards.
17 And I've reread my submissions and I want to make it clear that I was speaking about
18 the Prosecution's then state of investigation, that is, at the time we sent the
19 information that we did to Venezuela, which means the information in the
20 October 2021 letter, the notification in December 2021, and the information in the
21 January 2022 letter and the attached summary.
22 I didn't want my remark * to be ambiguous, that I may have been speaking about the
23 current state of investigation because, of course, the Pre-Trial Chamber's 2023 decision
24 has authorised us to resume the investigation, and indeed we have. And, in fact,
25 suspensive effect was rejected -- suspensive effect of the decision was rejected by this

1 honourable Chamber.

2 So I just want to make that clear that I was not speaking -- I didn't want there to be an
3 interpretation * that I may have been speaking as if speaking about the situation today
4 when I said that we haven't started the investigation * at this point -- I meant at that
5 point. Thank you, your Honours.

6 So now, with that clarification, I hope, I will pass the podium to Ms Thiru, and then to
7 Ms Regue, who will make some extra legal points.

8 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:09:02] Thank you very much.
9 This point had not escaped us and you're saving a question from me.

10 MS THIRU: [14:09:11] Thank you for your time, your Honours.

11 I will address you on the policy element of crimes against humanity, because there
12 has been some discussion today about whether Venezuela received sufficient notice
13 about the policy and would have been able to show that it was investigating a policy
14 even though it was not a legal requirement of any domestic crimes.

15 And I want to clarify that what we mean when we talk * about policy is, it does not
16 need to be a pre-established design or plan. It can also be a plan that crystalises and
17 develops only as actions are undertaken by perpetrators. This is in the Ntaganda
18 trial judgment at paragraph 674.

19 And then in Ongwen, the Trial Chamber found that this policy requirement ensures
20 that acts which are unrelated or perpetrated by individuals acting randomly on their
21 own are excluded. And that's at paragraph 2678 of the trial judgment.

22 And, your Honours, this is why we say that you can show evidence of a policy not
23 only by investigating facts from the top down, but also, or alternatively, from looking
24 at the facts from the bottom up.

25 I would like to refer your Honours to our response brief at paragraph 118, where we

1 give some examples of factors that might be relevant to establishing a policy. And
2 these factors include, for example, evidence of meetings, communications that show
3 a level of planning, a recurrent pattern of violence, the use of public or private
4 resources et cetera.

5 And my colleague, Ms Brady, today, your Honours, took you to the various parts of
6 the information that the Prosecution provided Venezuela that would have been
7 relevant for it to investigate those types of factors. But Venezuela could not show
8 that it was investigating those, and that's the conclusion the Pre-Trial Chamber
9 reasonably reached as well.

10 To the contrary, Venezuela claimed that any acts it had examined were isolated.

11 And that, as the Pre-Trial Chamber reasonably found, can only be a conclusion that
12 one reaches after properly investigating the facts. So in sum, Venezuela was not able
13 to present any material to show that it had inquired into those types of factors.

14 Those are my submissions on that point, your Honours. With your leave, I will now
15 give the floor to Ms Regue. Thank you.

16 MS REGUE: [14:12:00] Good afternoon, your Honours.

17 Very briefly, I would like to go back to Judge Lordkipanidze's question about the
18 applicability of the Gaddafi test to the current stage of the proceedings. We submit
19 that the test applies, but it applies adjusted to the characteristics of the current stage
20 of the ICC proceedings. At the Article 18 stage, the investigation has just started,
21 and there are therefore no cases. What we have is potential cases.

22 The potential cases have broader parameters, but still the jurisprudence indicates they
23 are defined by concrete criteria. One is the type of criminality, including patterns, if
24 we are investigating crimes against humanity or we are looking into crimes against
25 humanity, as well as the category of groups and -- category of groups and -- sorry,

1 category of perpetrators or groups of perpetrators.

2 So the two parameters are relevant and are equally applicable at this stage, but
3 adjusted to the characteristics of the stage of the proceedings.

4 And this requires that the domestic proceedings must cover substantially the same
5 conduct and also the same group or categories of perpetrators as the ICC intended
6 investigation. And this test is met if the domestic proceedings sufficiently mirror the
7 scope of the Prosecution's intended investigation.

8 This test has been endorsed by Pre-Trial Chamber I in the Venezuela Article 18
9 decision, in the Philippines Article 18 decision, * by Pre-Trial Chamber II in the
10 Afghanistan Article 18 decision, and has been endorsed by the majority of this
11 Appeals Chamber in the recent Philippines judgment at paragraph 106. The
12 majority indicated that this test is factually driven, is case specific and it gives
13 sufficient flexibility for the Pre-Trial Chamber to apply it and to adjust it to the
14 specific circumstances of its situation, such as the current situation.

15 Thank you very much.

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:14:26] Thank you.

17 Thank you very much.

18 OPCV, please.

19 MS MASSIDDA: [14:14:39] Thank you, your Honours.

20 We would like to address four issues in relation to matters discussed yesterday and
21 today.

22 First, regarding the submissions made yesterday by Venezuela on the translation of
23 documents supporting a referral request under Article 18(2) of the Statute, we
24 reiterate that Venezuela had a legal obligation to provide translations of the
25 documents it relied upon for its referral request.

1 Venezuela did not avail itself of the possibility to request the Pre-Trial Chamber to
2 accept documents in Spanish, pursuant to Article 50(3) of the Statute and Regulation
3 39(1) of the Regulations of the Court. Had Venezuela done so, the cost of the
4 translations of the Spanish documents into English or French would have been borne
5 by the Court, pursuant to Regulation 39(3), since this was one of the main
6 preoccupations of the State yesterday.

7 On the contrary, we submit that Venezuela expressly chose to provide itself
8 the translations of the documents in Spanish it relied upon. In fact, as noted in
9 paragraph 14 of the decision of the Pre-Trial Chamber, in March 2023, the Registry
10 transmitted to the Pre-Trial Chamber translations into English prepared and
11 submitted by Venezuela of the documents deemed essential to the deferral request.
12 In turn, the transmission of the 65 translations followed the request for an extension
13 of time made by Venezuela in February for filing the English translation of
14 the proceedings conducted by the Public Prosecutor's Office and the courts in the
15 course of the criminal proceedings in Venezuela.

16 In this context, it is perfectly understandable that the Pre-Trial Chamber did not rely
17 on documents in Spanish for which Venezuela failed to provide a translation. Even
18 if these documents were accompanied by a *ficha*, or summary in English, as Venezuela
19 showed us yesterday.

20 In this regard, after Judge Ibáñez's question this morning, it is still not entirely clear
21 whether the documents used to produce the 124 *fichas* or summaries were translated
22 from the original Spanish language and, if they were translated, who provided that
23 translation.

24 Without an English or French version of these documents, the Pre-Trial Chamber
25 could not take for truth the content of the covering *ficha* or summary provided by

1 Venezuela in English, regardless of the level of detail contained in the latter. This is
2 consistent with the fact that Venezuela, as the State seeking deferral, bears the burden
3 to prove that its investigation and proceedings sufficiently mirror the content and
4 scope of an Article 18(1) notification.

5 Second issue, regarding the need repeatedly alleged by Venezuela for the Prosecutor
6 to identify cases in Article 18(1) notification so that domestic authorities can start
7 investigating or prosecuting them, we submit that contrary to Venezuela's
8 submissions yesterday and this morning, the principle of *ne bis in idem*, as defined in
9 Article 20 of the Statute, cannot find application at the stage of a preliminary
10 examination or at the initiation of an investigation by the Prosecutor.

11 This is also in relation to Judge Lordkipanidze's question this morning on whether the
12 same person -- same conduct test applies now when discussing the admissibility of
13 a situation.

14 The principle of *ne bis in idem*, commonly known as double jeopardy, pertains to
15 concrete cases and should not be conflated with the admissibility of a situation before
16 the Court.

17 It is a principle that prevents the prosecution or punishment of an individual for the
18 same acts in multiple proceedings. However, at the early stages of a situation, such
19 as the commencement of an investigation, the Court is not dealing with specific cases
20 or individuals but, rather, assessing the broader situation itself.

21 As we argued yesterday, the Prosecution cannot have enough evidence to bring the
22 cases against particular persons before starting an investigation. At this stage, as the
23 Prosecutor also indicated this morning, Venezuela was informed in the Article 18
24 notification of the types of person suspected for the alleged crimes.

25 Therefore, the focus at this stage is on whether the Court should intervene to address

1 the alleged crimes within a particular situation, not on the double jeopardy of
2 individual cases.

3 It is important to underline that the principle of *ne bis in idem* is effectively respected
4 by correctly implementing the principles of complementarity and the criteria for
5 admissibility of a case before the Court. States have the right and the opportunity to
6 challenge the admissibility of a case at a later stage, ensuring that the principle is
7 respected in concrete cases.

8 The submissions made by Venezuela conflate the admissibility of a case with the
9 admissibility of a situation. This confusion, in our opinion, needs to be clarified.

10 The admissibility of a situation is determined at the outset of the ICC's involvement,
11 while the admissibility of a case pertains to specific individuals and charges.

12 States can challenge these issues separately and at the appropriate stages of
13 the proceedings.

14 In conclusion, the principle of *ne bis in idem* should not hinder the early stages of ICC
15 proceedings where the focus is on assessing situations rather than specific cases.

16 Regarding question 5, my third point, whether the prosecution of cruel treatment in
17 Venezuela may make inadmissible those crimes before the ICC, we agree with the
18 Prosecutor's statement this morning that much will depend on how the underlying
19 facts are examined in the investigations and then reflected in the subsequent
20 prosecutions at the domestic level.

21 However, we submit that the admissibility assessment of the situation must be made
22 regarding the facts as they stand when the referral request is made, without
23 considering hypothetical further developments.

24 In this regard, Venezuela's submissions regarding future prosecutions and draft laws
25 to be further developed, as the ones made this morning, regarding sub-issue 5(b) are

1 totally inapposite for the resolution of Venezuela's deferral request. Finally, as I did
2 this morning for the crimes against humanity, I would like to present a few
3 considerations on why for victims it is fundamental that the discriminatory element is
4 duly taken into account in investigations.

5 The crimes victims have suffered are intrinsically linked to their identity and political
6 belief or their work in defending human rights. For this reason, it is essential that
7 the analysis of the discriminatory element is included in the investigation.

8 This element sheds light on the full extent of the victims' suffering and the reasons
9 behind their victimisation. It recognises that they are and they were targeted not as
10 random individuals, but because of their political affiliations and activities as human
11 rights defenders, making their suffering distinct from other crimes.

12 Understanding that they were persecuted due to their political belief and their work
13 in defending human rights, sheds light on the real magnitude of the crimes and
14 contributes to the healing of the victims' wounds.

15 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:24:01] Thank you very
16 much.

17 As we always have done, we will ask now for a response from the State
18 Representatives to the submissions of the Office of the Prosecutor and the OPCV.
19 You have 10 minutes, sir.

20 MR EMMERSON: [14:24:15] Mr Martínez.

21 MR MARTINEZ JIMÉNEZ: [14:24:20] (Interpretation) Your Honour, your Honours,
22 Venezuela would like to put before this hearing -- before this Appeals Chamber in the
23 International Criminal Court, that is being heard throughout the entire world, that
24 this State has come to these proceedings without counting on an effective
25 pronouncement on the existence or not of material jurisdiction, that is to say, whether

1 there is a reasonable basis to confirm that in the country, they have committed
2 international crimes alleged by the Office of the Prosecutor. Venezuela denies it and
3 has given sufficient proof of this throughout the entire proceedings, and specifically
4 in this hearing.

5 In the situation, Venezuela 1, the International Criminal Court acts for the first time
6 under a referral from various States Parties, a referral which, from the first moment,
7 as the chancellor said, was shown to be political and interested,

8 And under Article 14 of the Rome Statute does not establish judicial control to filter
9 State referrals with a political interest.

10 This Article simply makes it possible to refer situations by States, but without a legal
11 filter of any kind. Now, probably because the drafters in good faith did not think
12 that they would use this judicial institution to carry out geopolitical actions.

13 Nevertheless, I would like to draw the attention to the fact that the drafters were
14 establishing legal controls on the material competence and jurisdiction when the
15 Prosecutor acted *proprio motu*.

16 If we look at Article 15(4) in this regard, when it comes to the determination of
17 whether there is, indeed, a reasonable basis to believe that they committed crime
18 within its jurisdiction before starting an investigation, let us say that the drafters of
19 this regulation, which was ratified and signed by Venezuela from the first moment
20 and in whose drafting it had a relevant role, took more political actions from the
21 Prosecutor than States, and that is why there is the imposition of judicial control on
22 some, but not others.

23 Now, Venezuela considers -- and if you would like me to put it -- of this -- that the
24 innocence that the drafters had, has made it possible to have a proceeding where
25 a state could be left unable to act without any judicial control, without a reasonable

1 basis to think that it has committed the atrocious crimes mentioned now, is such a
2 situation that the State finds it itself, that is now Venezuela.
3 In the future, it could be any other state. That happens when it has suffered an
4 investigation without any minimal judicial ruling in this regard. You have the
5 decision that we are appealing against, that the International Criminal Court isn't
6 investigating states or persons, but the damage which is caused with arbitrary
7 investigations is very serious at all levels, at an institutional level and also an
8 economic level as well. And, as such, it is important to point out at this time that the
9 situation in Venezuela I started with a preliminary examination, which was carried
10 out ex officio on 8 February 2018, and this supposed that any investigation needed to
11 have judicial authority in accordance with Article 15(4).
12 Nevertheless, within -- this framework changed after the strategic referral -- political
13 referral of the six States Parties on 27 September 2018, for political reasons which have
14 already been explained.
15 Now, this was a procedural moment with the aim of ensuring that the judges of this
16 noble institute could filter what was alleged against Venezuela. But, on the other
17 hand, the States Parties had seen -- when it came to Article 54, this would be done.
18 Now, Venezuela hopes that this Appeals Chamber will affirm as a general principle
19 of law, it is not possible that a legal organ can act without accreditation as regard to
20 its own jurisdiction. With regards to a referral of States, then how they can move
21 forwards without judicial control on the material jurisdiction. This general principle
22 implies that this legal organ must rule expressly on its own jurisdiction in -- on the
23 reasonable basis grounds.
24 Now, if the situation of Venezuela I had followed that *motu proprio* basis, as
25 happened -- would have happened for the six countries, then Article 53 would have

1 implied that the existence of a reasonable basis to believe that crimes within the
2 jurisdiction of the Court were committed, then it would have found itself faced with
3 the filter of justice, established in 15(4) under the Rome Statute.

4 But nevertheless, intentionally it avoided this being the case, and it is certain that
5 there's established proof in 15(4), the standard of proof is reduced and there are -- is
6 evidence that crimes could have happened as -- and they could be within the
7 jurisdiction of the Court.

8 But when it comes to the situation of Venezuela I, this wasn't even -- this minimal
9 standard wasn't applied, and it was determined that the country would be here today
10 before you.

11 But fortunately this Appeals Chamber in this case can, as a general principle of law,
12 rule whether there is a reasonable basis to believe that crimes within its jurisdiction
13 were committed and, respectfully, we consider that this exercise of minimal
14 determination of the crimes denounced is judicial control, which is essential to
15 guarantee that a state does not have to go through long proceedings in which there
16 was never judicial approval of evidence in this regard.

17 And the Pre-Trial Chamber affirmed in its decision, which has recurred, that there
18 was a lack of jurisdiction, but that there has -- damage already done, and the form is
19 probably irreparable, and it has consequences which are disastrous for the country
20 and for all its citizens.

21 And we insist, once again, on the fact that the exercise of jurisdiction in this case, we
22 refer to the material jurisdiction, is a substantial point to legitimate the proceedings of
23 any legal body in the entire world, as a principle, a transversal principle in national
24 courts, but also in international courts without any exception whatsoever. The Rome
25 Statute in Article 21(1)(b) provides that the principle source for its interpretation is its

1 own Statute, elements of crimes, and the Rules of Procedure and Evidence. We don't
2 discuss that. Nevertheless, due to the redaction of the Rome Statute, some countries
3 with political objectives have managed to avoid all legal controls in this regard, and
4 this drafting did not provide for a political movement with these characteristics, with
5 such harmful consequences as this one. Now, the Court has to apply its own sources
6 of law, but it cannot forget the general principles of international law, when there is
7 a norm in the system which provides for its actions. In concrete terms, the Court
8 regularly refers to the principle of useful effect, and this implies that the judges have
9 to interpret the provisions of the Statute in a useful way.

10 In this sense, this Appeals Chamber applying the rules of 21(c) of this Rome Statute
11 should rule, and we would ask respectfully and firmly that it do so whether or not
12 there is material jurisdiction that the Prosecutor alleges with regard to the facts that
13 have been produced.

14 On -- for our part, we consider that we have provided sufficient evidence to show that
15 the Prosecutor's points don't meet the minimum standards for the Court to carry out
16 the investigation against the Bolivarian Republic of Venezuela.

17 Thank you very much, your Honour.

18 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:33:42] Thank you very much
19 for your presentation.

20 I will now confer with my fellow judges to see if we have further questions.

21 (Appeals Chamber confers)

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:34:15] Judge Ibáñez has the
23 floor.

24 JUDGE IBÁÑEZ CARRANZA: [14:34:17] Thank you, Mr President.

25 In Spanish: (Interpretation) So a question, a complementary question to everything

1 that's been discussed in this hearing. I would like to know what other -- well, what
2 is the perspective of Venezuela and the other parties who are also to contribute with
3 regards to this allegation of Venezuela -- that it is in the second page of the factual
4 brief that the Office of the Prosecutor carried out an investigation; that it is
5 inadmissible because it doesn't meet the requisite conditions under Article 17(2) and
6 (3).

7 Now, this refers to the lack of will to investigate, and, 17(3), to the inability to
8 investigate. There are also allegations throughout the file brief with regards to the
9 fact that they didn't take into account the criteria of sufficient gravity under 17(1)(d).
10 And whatever the case, I would like to know what your perspective is with regards to
11 the gravity terms in terms of the language of this article, and, furthermore, what does
12 it mean to you to have sufficient gravity when they are speaking about crimes within
13 the competence of this Court -- within the jurisdiction of this Court. Thank you.
14 First of all for the State, yes.

15 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:35:43] Counsel, you have the
16 floor.

17 MR EMMERSON: [14:35:46] I would respectfully submit that the answer to the
18 question is in the qualification in the final sentence. If a crime is within the
19 jurisdiction of this Court, then it's almost inevitably going to cross a gravity threshold,
20 but that is the very question that is contested in this case. There is nothing about the
21 crimes committed in Venezuela that bring them within the jurisdiction of this Court,
22 unless, there is -- they are shown to have been part of a state or organisational policy.
23 That is denied. There was no state policy.

24 It remains Venezuela's position, just as it has been from the outset, as I said earlier, we
25 represent the state and our case is we deny that there was a state policy, and therefore,

1 the question arises whether the individual crimes alleged and identified -- 124 cases
2 that we've investigated -- crossed the threshold for admissibility in this Court because
3 without that, this Court has no jurisdiction. They're just domestic crimes.
4 The jurisdiction of the Court depends on the question of whether its part of and in
5 pursuance of a policy, because if it isn't, it's - with the greatest of respect as I said
6 earlier - none of this Court's affair.
7 So the question of gravity is the same in the end as the question of policy or crimes
8 against humanity, which is why the critical focus of the Court's attention has to be
9 upon the absence or presence of a clear case from the Prosecutor of what the policy is.
10 Now this is very important because Ms Brady raised it herself and I saw -- I
11 remember the President saying, "Well, the point hadn't escaped my notice" in your
12 submissions. Well, it hadn't escaped my notice either because I had the transcript
13 printed out. And it's exceedingly important - perhaps, the most important thing that
14 has been said in this courtroom in the past two days - and it's not affected by the
15 qualification or explanation that Ms Brady gave for reasons that I will come to. I will
16 read it to you because it's really important to have it clearly on the transcript.
17 My point was take the Philippines as an example, it's clear to everyone from the very
18 outset that the presidential policy was to assassinate -- the allegation is the
19 presidential policy was to assassinate drug dealers without trial. And so it's clear
20 from the outset what is being alleged, the target goes right up to the president, and
21 that is an investigation that inevitably would be top down as well as bottom up.
22 But here, as Ms Brady having considered and reflected on the position and on
23 instructions has told you, and I'll include the qualification:
24 "... I would like to also clarify one point just made by my friend" - that's me - "and
25 perhaps there was -- we had a brief discussion on the break, but the discussion in the

1 break was where in the material -- "

2 Now the material she was referring to was the very -- the short summary explanatory

3 note appended to the Article 18(1) notification, but she also dipped without

4 distinction - and I think she will accept that - back and forth from a document that

5 was included as an illustrative annex, which was the working document in the Office

6 of the Prosecutor as the concluding observations in the preliminary examination.

7 And that was served on the State on 19 October 2021, together with a letter saying the

8 Prosecutor is reviewing that in order to determine whether he wishes to maintain it in

9 its full scope.

10 And then served the memorandum much shorter and with certain things no longer

11 within the scope, which was attached to the Article 18(1) memorandum.

12 So I do urge the Court to read those very, very carefully, bearing in mind that the

13 internal report of the preliminary examination is superseded by the Prosecutor's

14 judgment of what he did want to investigate and could reasonably sustain and what

15 he did not. So it's a deliberate confining of the scope of the case.

16 But let us move on to Ms Brady's answer.

17 She said in relation to that question, she had -- I had asked her to go through the two

18 documents, and show me if she could where the policy was articulated. There's lots

19 of stuff about the crime base, there's lot of things about the individual crimes; so I said,

20 "But is it like, you know, by analogy with Duterte, for example, is this a case where

21 you're setting out a policy?"

22 Because there are lots of cases -- and I'm sure your Honours have been in them, I

23 certainly have, I'm in one know, where there are -- in another court, where there are

24 insiders who are giving evidence about being in the room when the policy was

25 devised and discussed. That's a top-down approach.

1 But there are also cases in which I've been involved where all you have is a very
2 significant number of crimes committed over a time and period and you have to work
3 bottom up. You have to see, does that disclose a pattern? Must there have been
4 some sort of agreement? How high must it have gone? So that's what we mean by
5 top down, bottom up.

6 And then says Ms Brady:

7 I pointed out to my friend various matters -- which were all the crime-based matters.
8 And she continues, this is at page 64, line 4 -- on instructions of the Prosecutor, not
9 qualified over the lunch adjournment in the same -- in the way she qualified the
10 question of whether it applies now or at the time of the case before the Pre-Trial
11 Chamber.

12 Of course, for your Honours' purposes what happens now is irrelevant. The view of
13 the Prosecutor now is irrelevant. What matters is what was the state of the
14 Prosecutor's expectation at the time -- understanding of what he wanted to investigate
15 at the time of the proceedings before the Pre-Trial Chamber or, indeed, at the time of
16 the 18(1) notification. And here, we have it, in unequivocal and despite reflection,
17 unqualified terms.

18 She says:

19 "Of course it is not an iron cast guarantee because at this stage the Prosecution has not
20 commenced its investigation ..." Well, she now told us quite rightly she doesn't
21 mean now, she meant either at the Article 18(1) stage or at the stage of the Pre-Trial
22 Chamber. Quite right.

23 But this is what matters:

24 "so we do not make a comment at this stage as to whether our investigation is
25 proceeding in a bottom up or whether it would" -- I'm sorry, "is proceeding in

1 a bottom up or whether it would let me use the conditional" --
2 That means, the conditional tense --
3 "because we haven't started the investigation at this point" --
4 Again, that's been qualified --
5 "because we have suspended at this point given these proceedings but whether or not
6 we go on a bottom up or a top down..."
7 Now, it's perfectly clear, therefore, unequivocally from the mouth of the Prosecutor
8 on instructions after correcting the time frame to which that statement refers, that at
9 the time of the Article 18(1) notice and at the time of the proceedings before the
10 Pre-Trial Chamber, the Prosecutor had made no decision about whether this should
11 be investigated from the bottom up -- i.e., look at the crime base and see what that
12 discloses or from the top down, i.e., there's a policy we know about, we believe that if
13 the evidence comes up to prove, it will show that Duterte was announcing this policy.
14 Now why does that matter?
15 It matters because the entire basis of -- actually, in closing, I'll deal with some of these
16 issues in conclusion, but I do want to get this point across, because why it matters is
17 because the very reason the Pre-Trial Chamber found that there was insufficient
18 mirroring between what the Prosecutor wanted to investigate and what
19 Venezuela -- or was investigating, is because it wasn't focused high enough at the
20 existence of a potential state policy.
21 Now if they didn't even know at that stage whether they thought it was appropriate
22 to start at the bottom, how can the Trial Chamber have known what they were trying
23 to perform the mirroring test against?
24 How can they find against Venezuela for doing something the Prosecutor considered
25 was a potentially reasonable way of going about it? So how they could have

1 concluded insufficiently serious or insufficiently high-ranking people were involved?

2 I hope that's of assistance generally to the bench.

3 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:47:24] Thank you very much,
4 counsel.

5 Since this was a conversation, we might also hear the other point of view, and may I
6 ask the OTP if it wants to make a contribution?

7 MS BRADY: [14:47:34] Well, your Honour, when I clarified -- let me just be clear that
8 * when I said "this stage", or "this point", and I think I used the word "this stage" --
9 "this stage", * "this point", you can read for that, I was speaking about that stage, that
10 stage, that point. * And I -- I was not -- I was not commenting and I was saying that
11 whether or not we go -- we are bottom up or top down, we gave the sufficient details
12 that we had at that stage, at that point, after the preliminary examination, without the
13 investigation having been given; that was sufficient information in our view upon
14 which we were informing Venezuela that there was a systematic attack based on
15 a state policy.

16 Now, the exact way in which the Prosecution may ultimately reach that inference, I
17 think that is a matter that will -- that is to be developed during investigations.

18 If you will allow me to confer with my colleague and then I will come back?

19 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:48:48] Please do.

20 MS BRADY: [14:48:49] If I can just have one minute to confer?

21 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:48:50] You can have one
22 minute, of course.

23 (Counsel confers)

24 MS BRADY: [14:49:24] Yes, I think at this point, your Honours, I will stop there.

25 Thank you.

1 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:49:28] Thank you very much.
2 So you do not wish to proceed? Thank you very much. OPCV, I understand you
3 might want to put a word. Thank you.

4 MS MASSIDDA: [14:49:37] Yes, your Honour, very, very briefly, telegraphically I
5 would like to actually answer Judge Ibáñez's question, if I may, which seems to me
6 quite straightforward -- maybe it's too simplistic on my side, I don't know, but for me,
7 the situation is clear.

8 First you check if there are national genuine domestic investigation. This is the first
9 step. The Pre-Trial Chamber found that there is no genuine domestic investigation
10 mirroring the intended prosecution investigation. It stops. You do not have to go
11 to the next step which is then to assess willingness, ability or gravity.

12 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:50:28] Thank you very much.
13 I think we are not going to further elaborate.

14 Oh, please, now you've got up --

15 MS BRADY: [14:50:31] Yes --

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:50:32] Thank you.

17 MS BRADY: [14:50:36] -- your Honour, sorry. I was too busy answering the
18 conversation about -- your question about our conversation. But my colleague,
19 Ms Regue would like the opportunity to respond to your Honour, Judge Ibáñez's
20 questions. If she may be given the floor to do so quickly.

21 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:50:55] I assume this will be
22 on gravity basically, because this is the point that has just been mentioned. Thank
23 you, please do.

24 MS REGUE: [14:51:03] Yes, thank you very much.

25 I was going to answer what Ms Massidda said about complementarity, so I will not

1 address the two steps -- the two-steps phase or two-limbs phase. Once the Chamber
2 is satisfied that there is no domestic investigations about the same conduct and the
3 same group of persons, they don't look at their unwillingness and inability; so I will
4 leave it there.

5 Also it's our position -- it has always been our position that in the context of the
6 Article 18 litigation, the Chamber and the State as well -- basically the State, when the
7 * State requests the deferral request and, also, if we seize the Chamber with the
8 application, we always have maintained that the assessment has to be on
9 complementarity only. So only one aspect of admissibility. * Not -- admissibility
10 has two aspects, complementarity and gravity.

11 We consider that at the Article 18 stage, the focus is on complementarity and this is
12 because according to Article 18, the State, when they request a deferral, provides the
13 information about the domestic proceedings. Not about how grave they are. So
14 that's why we think that the focus is complementarity. However, having said that,
15 this situation -- the Prosecution, before deciding to open an investigation, has applied
16 the criteria under Article 53(1)(a), (b) and (c). And (b) admissibility, requires us to
17 look at complementarity and to look at gravity; so we have done our gravity
18 assessment.

19 As the jurisprudence indicates, this requires to consider quantitative and qualitative
20 factors, such as the nature, the scale, the manner of commission of the crimes, the
21 impact, and, according to the jurisprudence of the Appeals Chamber in the Al Hassan
22 case, case 601, this threshold is a relatively low threshold, because the crimes that fall
23 within the Court's jurisdiction are by definition, serious, grave enough.

24 So it's this criteria, this requirement seeks to exclude those very rare cases that would
25 not fall within the Court's jurisdiction.

1 And it was our assessment that this criteria was satisfied under the potential cases
2 that we identified during the PE, were grave enough for us to proceed with an
3 investigation.

4 And then, just two last clarifications. One is about this bottom up, top bottom. I
5 think that my learned colleague is confusing the notion of policy with the required
6 evidence to meet this legal requirement.

7 The notion of policy, as my colleague has explained, simply seeks to link -- to ensure
8 that there are not isolated acts. That there is a connection; that there is a link. How
9 the Prosecution -- how the Chambers establish that this requirement is met is a matter
10 of evidence and there are very different types of evidence on how the Prosecutor
11 conducts its investigation. It's up to the Prosecutor. It can be bottom up, it can be ...

12 But we have -- you never -- and we don't intend actually to share how we conduct our
13 investigations, but what we have shared is how is the policy, we have shared that.

14 In the document that my colleague has mentioned, which is not a working document,
15 it's simply a courtesy informative document that we shared before the Prosecutor
16 travelled to Caracas in October last year, sent a very lengthy document explaining our
17 assessment. And it is in your Honours' -- it's -- the annex D, the filing is

18 ICC-02/18-16, annex D, at page 15, 1-5. At paragraph 51, the policy is defined clearly
19 for Venezuela to know, and your Honours obviously can look at that.

20 That concludes my submissions. Thanks.

21 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [14:55:13] Thank you very much.

22 I believe we will leave it at that, unless there are other questions from my colleagues.

23 We can now move to the final phase of our hearing today.

24 As you remember, we have provided for the parties and participants to be able to
25 make some closing remarks, which we will allow you to recap the main points of the

1 extremely rich and useful - for the Chamber - dialogue we have been having.

2 So I would like to proceed in the following orders, seven minutes for the Prosecution,
3 seven minutes for the OPCV and seven minutes for the State Representatives.

4 Prosecution, let me know when you are ready.

5 MS BRADY: [14:56:02] Thank you, your Honour. I didn't realise I would be first up,
6 but that is fine.

7 Your Honours, in these final minutes, I would like to draw the Prosecution's
8 submissions to a close by making four points.

9 First, a general one about the reasonableness and correctness of the Pre-Trial
10 Chamber's decision. Venezuela has not shown that the Chamber was unreasonable
11 or incorrect in its conduct of the proceedings or in its decision. The Chamber gave
12 Venezuela every opportunity to make submissions and to provide information.

13 And its conclusion that Venezuela's domestic criminal proceedings do not sufficiently
14 mirror the scope of the Prosecution's intended investigation was reasonable and, in
15 our submission, correct.

16 The Chamber endorsed the correct legal principles and applied them to the
17 circumstances of this situation. It based its decision on a voluminous and
18 representative pool of material from Venezuela, material which Venezuela itself has
19 called essential to its deferral request and which related to the allegations identified
20 by the Prosecution in its notification and 13 January 2022 letter.

21 The Chamber conducted a thorough assessment * of the material, which can be seen
22 from the decision, and this led the Chamber to dismiss the request primarily by
23 reference to two main factors; that Venezuela is not investigating the facts underlying
24 the contextual elements of crimes against humanity and, relatedly, that the domestic
25 investigations appear to be generally focused on direct/low-level perpetrators. In

1 this, it was correct to do so.

2 The thorough assessment also led the Chamber to consider that domestic
3 investigations do not appear to sufficiently mirror the forms of criminality the
4 Prosecution intends to investigate, in particular, noting the discriminatory intent
5 underlying the alleged crimes and crimes of a sexual nature.

6 And all of this, the Pre-Trial Chamber's findings, made against the backdrop of its
7 findings that Venezuela had taken limited investigation steps and with periods of
8 unexplained investigative inactivity that * did not indicate an advancing progress in
9 its cases.

10 In our submission, if the Venezuelan proceedings do not encompass these important
11 features, there would be a deficiency insofar as complementarity is concerned. This
12 in itself would give rise to an impunity gap which would not serve the aims of the
13 Rome Statute so neatly expressed in the preamble.

14 The second point, your Honours.

15 Throughout the appeal, Venezuela appears to have framed or viewed the Article 18
16 process as though it operates at the level * of individual cases. And we see this -- or
17 we've seen this in their arguments, such as asserting that the Prosecution's notice
18 must specify the concrete cases that the Prosecution commits to investigation -- to
19 investigate, and that there must be an almost identical symmetry between the
20 information provided by the Prosecution in the Article 18 notice and that to be
21 provided by the State to support its deferral request.

22 And we also saw it and heard it in their arguments based on *ne bis in idem*.

23 But this is an incorrect lens. Preliminary challenges to admissibility under Article 18
24 do not operate on the individual case level. At this stage, the Prosecution has just
25 opened an investigation and has not brought forward concrete cases.

1 Decisions on admissibility * at this stage deal with the broader question of whether
2 the State's domestic investigations and prosecutions as a whole should displace the
3 Court's jurisdiction over the investigation. And that's why the test at this situation
4 stage is whether the domestic investigations sufficiently mirror the same or
5 substantially the same conduct and the same groups or categories of perpetrators as
6 the Prosecutor's intended investigation.

7 The third point -- and this relates to another theme running through Venezuela's
8 submissions * in the appeal -- that the Pre-Trial Chamber's decision to reject the
9 deferral request will prevent or hamper their own domestic investigations and, as
10 such, impede or interfere with their sovereign right as a State to investigate and
11 prosecute alleged crimes that occurred in their own territory.

12 But with respect, your Honours, this appears premised on an overly cramped narrow
13 view of the principle of complementarity. If a State's admissibility challenge
14 succeeds and the situation is deferred -- the Court will be precluded from
15 investigating into the situation, barring a new application by the Prosecutor under
16 Article 18(3) based on a change of circumstances.

17 But if the State's admissibility challenge does not succeed and the situation remains
18 admissible at the Court, the Prosecution and the State may both continue with their
19 respective investigations.

20 In this way, they may share the burden of the obligation to investigate crimes which
21 are of concern to the international community. In other words, if the deferral request
22 is rejected, the State is not precluded from also investigating in the situation.

23 And the Prosecution will monitor the situation and the admissibility of any potential
24 cases and can also reconsider the matter if provided with sufficient and probative
25 information demonstrating that the State is conducting proceedings for the criminal

1 conduct, which sufficiently mirrors that of the Prosecution's intended investigation.

2 And this segues, your Honours, to my final point.

3 In this situation, the Prosecutor has repeatedly and publicly stated his position that

4 the office will step out, if it can be shown that Venezuela is genuinely conducting

5 domestic proceedings which sufficiently mirror the Prosecution's intended

6 investigations.

7 The Chamber found that Venezuela is not yet there. But in the meantime, the office

8 has stated its commitment to working together with the Government of Venezuela to

9 provide support to its domestic justice efforts in a two-track approach encompassing

10 both complementarity and cooperation, applying the MOUs -- the memorandums of *

11 understanding --- between the office and Venezuela.

12 And this is also a nod to the important point made by the Chamber at the very end of

13 its decision, I think it's almost the last sentence, that:

14 "Assessing the state of domestic proceedings is an ongoing process and requires

15 continued dialogue between the State and the Court, to [best] ensure that the

16 principle of complementarity is upheld with respect to" crimes falling within the

17 Court's jurisdiction.

18 And in this way, ultimately, to help ensure accountability and prevent impunity for

19 crimes which are the most serious crimes of international concern.

20 Thank you very much, your Honours, and this concludes the Prosecution's final

21 statement. Thank you.

22 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [15:04:54] Thank you very much.

23 Could we have the closing remarks from the OPCV, please.

24 MS MASSIDDA: [15:05:01] Thank you very much, Mr President. As announced

25 yesterday, the office has been in contact with hundreds of victims, so I will devote my

1 final remarks in trying to present the best I can the views and concerns of the victims
2 and I will make my final remark in Spanish.
3 (Interpretation) Your Honour, your Honours, this is the first time that victims can
4 address orally a Chamber of this Court.
5 I can't stress enough how important this hearing is for all of them. While the issues
6 discussed are purely legal, the underlying matter of this proceeding is for them
7 purely factual.
8 Venezuela is not and will not -- nor will it in the immediate future investigate and
9 prosecute the crimes that they, their families and their friends have suffered. As we
10 talk, crimes continue to be committed in Venezuela with impunity.
11 My following brief remarks are based on victims' contributions. For obvious
12 security reasons, I do not mention their identities, but I wish to publicly acknowledge
13 the invaluable contribution that each of them has made to these proceedings by
14 expressing their views and concerns and providing crucial documentation which
15 shed light on the matter at stake.
16 The victims' contributions to these proceedings mainly focus on grounds 5 and 6 of
17 the appeal; namely, the assessment of national investigations and the conclusion
18 rightly reached by the Pre-Trial Chamber on the nonexistence of national
19 investigations and prosecutions.
20 Victims reported a significant fragmentation and a substantial unjustified delay in
21 undertaking some few proceedings at national level. This makes it impossible to
22 evaluate. The national activities sufficiently mirror the Prosecutor's intended
23 investigation. Some victims indicated that their cases had been summarily
24 dismissed without being properly investigated; thereby introducing a double
25 jeopardy clause and preventing new investigations and prosecutions against the same

1 person for the same facts.

2 Others indicated that their cases were dismissed on the basis that the conduct of the
3 perpetrators was not found to be criminal in nature or that the facts themselves were
4 not showing any element of criminality.

5 Furthermore, the victims also reported that since 2014, numerous individuals have
6 been unlawfully killed during demonstrations, not only for civil and political rights,
7 but also for social and economic rights. In the vast majority of the cases, the alleged
8 perpetrators still have not been prosecuted.

9 A significant number of cases of torture have been reported, including acts of sexual
10 violence mainly in detention facilities where the victims to no avail denounced the
11 crimes they suffered to national judicial authorities.

12 The victims indicated that they had not been contacted by prosecutorial or judicial
13 authorities to provide witness statements, nor notified about any procedural steps or
14 other measures taken or... That they had been threatened for seeking information.

15 Many of the cases of persecution, mostly targeting human rights defenders and
16 political opponents illegally detained with no access to minimal fair trial guarantees,
17 victims have been subjected to unimaginable acts of violence, persecution and human
18 rights abuses. Their families have endured unspeakable tragedies. They have
19 a legitimate interest to see the ones who committed the crimes held responsible.

20 Your Honours, victims are not mere observers; they are invaluable participants in the
21 search for the truth. Their testimonies and accounts of events are crucial in
22 establishing the facts, the circumstances and the context surrounding alleged crimes.
23 Their voices carry the weight of first-hand experiences and are essential to shedding
24 light on what happened. Victims have been waiting for almost 10 years for a proper
25 investigation into the tragic events they suffered.

1 Nevertheless, during all this time, the national authorities have taken no genuine
2 action to identify and prosecute the alleged perpetrators. As such, at present, the
3 Court is the only judicial remedy available to victims to seek justice.
4 Victims look to the Court for justice, comfort and healing. Their expectation is for
5 this Court to deliver on its promise to holds perpetrators accountable for the atrocities
6 victims have suffered. Their voices are a driving force for accountability, and their
7 participation is a testament to the Court's role as a beacon of hope in the pursuit of
8 justice.

9 By allowing their participation, the Court demonstrates its commitment to be
10 a genuine instrument of justice and truth.

11 By way of conclusion, the victims respectfully request that the Appeals Chamber
12 considers their quest for justice and confirms the Pre-Trial Chamber's decision to
13 authorise the resumption of the Prosecutor's investigation into the terrible crimes they
14 have suffered.

15 Thank you, your Honours.

16 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [15:11:55] Thank you very
17 much.

18 I would like now to invite the State Representatives to make their closing remarks.
19 You have seven minutes, sir.

20 MR EMMERSON: [15:12:06] Mr President and honourable judges, I'm going to
21 make a few introductory comments.

22 The submissions you have just heard from counsel for the victims, as persuasive
23 rhetoric I can understand, but they form the subject as I understand it, or drawn from
24 documents filed ex parte confidentially with the Court, and we've never seen them,
25 we've never had an opportunity to look at them, to question them or to evaluate

1 them.

2 Comments, for example, about what is happening today.

3 But if it is just rhetoric and you're disregarding it as evidence, which I'm sure you are,
4 because it hasn't been seen by the other side, if it's just rhetoric, much of what has just
5 been said could be said of rape victims and the victims of other serious crime in the
6 criminal justice system of the United Kingdom, which is almost at breaking point
7 through years of underfunding and is now suffering two to three to four-year delays
8 in the efficient processing of rape prosecutions.

9 Almost everyday in the mainstream press, you hear of stories exactly like the one you
10 have just heard.

11 What's not happening though, as you've just heard submitted to you, is that
12 somebody is inventing a non-existent state policy and saying, "Bring them all to the
13 International Criminal Court then."

14 Many of them -- we have a major problem with rape by police officers in England.
15 We've had many serial rapist police officers in court over the last four years. There
16 was a crisis of confidence in the police because of the number of police rapes in
17 England.

18 But nobody is saying, "That's a state policy, let's bring them all to the International
19 Criminal Court." There has to be a sensible way of fairly reflecting the principles of
20 complementarity and if the Prosecutor can't point to a policy, then this is nothing
21 more than empty guff.

22 Let's look at -- if I may -- the issue we were discussing just before. The interesting,
23 and, we say, critically important concession that Ms Brady made and continues to
24 make.

25 That at the relevant time, the Prosecutor didn't know whether to start from the

1 bottom and see how high up this went before forming a conclusion; or whether some
2 evidence might emerge of an actual plan. None has and none was pleaded. None
3 was in the 18(1) notice; none is in the material that Ms Brady took you to. There is no
4 evidence or even articulated suggestion of a central state policy in relation to the
5 various crimes.

6 And that's important because that's the issue. Never mind the precise question of
7 how the Al-Senussi 118 paragraph -- I'll come to that again -- how that affects these
8 decisions, because to our mind it is the fulcrum issue.

9 But much more importantly, how could the Pre-Trial Chamber apply a mirror test
10 when one side of the mirror was material it couldn't understand and the other side of
11 the mirror is a policy the Prosecutor doesn't even know about because he hasn't
12 decided whether to look at the ground crimes and see where they go, or somehow
13 hope that something will emerge that enables him to say it's a Duterte case.

14 What is the judicial exercise that is going on between comparing those two? Would
15 any judge worthy of the name consider that was a proper judicial exercise of power?
16 Would they?

17 I don't think so. I certainly wouldn't and I sit as a judge. I would consider it a very,
18 very poor exercise of the process.

19 So here we are, we know because you have heard Mr Martínez say it, that the
20 investigations and case files include 18 chiefs of police, chiefs of police in the region;
21 39 inspectors, that's just beneath chief of police; 9 detectives; 9 supervisors, that's
22 supervising detectives; two chief officials and 26 officers.

23 In the army, 3 lieutenant-colonels; 7 lieutenants; 1 major, 6 captains, 31 sergeants.

24 Now who's to say that's not high enough in rank?

25 Not the Prosecutor because if they had a rank in mind, they were obliged to say it.

1 But they don't and they didn't and they don't know where they're going with it.
2 They're looking maybe -- quite legitimate they say, perfectly legitimate tactic to start
3 at the bottom and see where the evidence takes you, which is exactly what Venezuela
4 has done, investigating every one of the 148 cases drawn to their attention by the
5 Prosecutor. Not something the Prosecutor told the Pre-Trial Chamber. Why not?
6 Because they were the ones who read the material and they made the selection of
7 what was before the Trial Chamber.
8 That's why we say what happened below was both a usurpation of a judicial function
9 by the Prosecutor and an abdication of a judicial function by the Trial Chamber and
10 nothing short of that.
11 Returning to the question about the Philippines case and situation, well, the first and
12 most obvious point is the one I have already made, that was a Duterte-focused,
13 top-down investigation. But it's different in every way. It was not an official
14 language of the Court. The policy was, in itself, totally different and it was
15 articulated not here.
16 There's two or three, in fact, important adages relevant to this. Every case turns on
17 its own facts and sometimes statements of principle culled in one case by judges, turn
18 out to have unforeseen and indefensible consequences in other cases and facts.
19 Secondly, hard cases make bad law. At the end of the day, we have a situation here
20 where the Prosecution is arguing the unarguable in defence of the indefensible and
21 asking you to make the same mistake that they persuaded the Pre-Trial Chamber to
22 fall into, which is, "Trust us. We've seen all the material. You don't need to bother
23 your judicial heads about it. The Prosecutor has seen it and we say it's
24 representative.
25 That's the judicial process."

1 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [15:20:26] Counsel, could we
2 have your concluding conclusions.

3 MR EMMERSON: [15:20:30] You already have.

4 PRESIDING JUDGE PERRIN DE BRICHAMBAUT: [15:20:36] Thank you very much
5 for that.

6 Thank you very much to all. We have now reached the end of the two-day hearing.

7 The Appeals Chamber is grateful to the parties and participants for making their
8 submissions. Those submissions will inform the work of the Chamber.

9 I wish to point out that the Chamber will also consider the representations it has
10 received from victims, which helpfully address the issues which the Chamber has
11 identified in this hearing.

12 The Chamber will now assess all the briefs and presentations it has received. It will
13 deliberate. It will prepare its judgment in the most expeditious way possible in
14 order to meet the expectations of all the parties and participants as well as those of the
15 victims.

16 On behalf of Chamber as a whole, I would again like to thank the parties and
17 participants for their presence at this hearing and for their dedication in support of
18 international justice.

19 I would also like to warmly thank all the court officers, interpreters, the security as
20 well as the technicians for their assistance in making this hearing possible in three
21 languages. Thank you very much for that.

22 This hearing is now closed. And I would also like ... The public attendance, which
23 has been numerous and obviously very interested and warm, thank you all.

24 THE COURT USHER: [15:22:04] All rise.

25 (The hearing ends in open session at 3.22 p.m.)

1 CORRECTIONS REPORT

2 The following transcribing corrections, marked with an asterisk *, are brought into the
3 transcript.

4 Page 9 line 19:

5 "in paragraph 67"

6 is corrected to:

7 "and in paragraph 67"

8 Page 10 line 23:

9 "called investigative "

10 is corrected to:

11 "court and investigative"

12 Page 12 line 4:

13 "evidence. It's"

14 is corrected to:

15 "evidence, it's"

16 Page 21 line 21:

17 "emphasise, as crimes against humanity; that is, it does not need to do so under the"

18 is corrected to:

19 "emphasise -- as crimes against humanity. That is, it does not need to do so under the"

20 Page 21 line 23:

21 "And this is -- as my friend points out, this is the"

22 is corrected to:

23 "And this is -- as my friend points out -- this is the"

24 Page 24 line 19:

25 "authorities was to"

1 is corrected to:
2 "authorities, was to"
3 Page 24 line 20:
4 "more, and for this, the "
5 is corrected to:
6 "more. And for this, the"
7 Page 39 line 7:
8 "to still -- in the domestic law to still"
9 is corrected to:
10 " to still -- in the domestic law -- to still"
11 Page 53 line 15:
12 "investigation "
13 is corrected to:
14 "investigations"
15 Page 53 line 22:
16 "for conduct, for example, "
17 is corrected to:
18 "for conduct. For example, "
19 Page 54 line 22:
20 "different and pointing"
21 is corrected to:
22 "different. And pointing "
23 Page 61 line 20:
24 "(a), and"
25 is corrected to:

- 1 "(a). And"
- 2 Page 63 line 13:
- 3 "given every "
- 4 is corrected to:
- 5 " perhaps give"
- 6 Page 63 line 17:
- 7 "crimes and of them only one"
- 8 is corrected to:
- 9 "crimes, and of them, only one"
- 10 Page 64 line 16:
- 11 "going to or the domestic"
- 12 is corrected to:
- 13 "going to, or the domestic"
- 14 Page 64 line 19:
- 15 "your Honours"
- 16 is corrected to:
- 17 "your Honours,"
- 18 Page 65 line 1:
- 19 "as torture may not"
- 20 is corrected to:
- 21 "as torture, may not"
- 22 Page 67 line 2:
- 23 "investigation, but if they "
- 24 is corrected to:
- 25 "investigation. But if they"

- 1 Page 67 line 8:
2 "grounds, in other"
3 is corrected to:
4 "grounds. In other"
5 Page 67 line 17:
6 "submission balances"
7 is corrected to:
8 "submission, balances"
9 Page 67 line 25:
10 "came in to force "
11 is corrected to:
12 "came into force "
13 Page 88 line 22:
14 "to be ambiguous that I may"
15 is corrected to:
16 "to be ambiguous, that I may"
17 Page 89 line 3:
18 "that I may have speaking as if"
19 is corrected to:
20 "that I may have been speaking as if"
21 Page 89 line 4:
22 "at this point, I meant at that point."
23 is corrected to:
24 "at this point -- I meant at that point."
25 Page 89 line 15:

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1 "about policy, is, it does not"
2 is corrected to:
3 "about policy is, it does not"
4 Page 91 line 9:
5 "by Pre-Trial Chamber II; in the "
6 is corrected to:
7 "by Pre-Trial Chamber II in the"
8 Page 105 line 8:
9 "when I said this stage, or this point, and I think I used the word this stage -- this
10 stage,"
11 is corrected to:
12 "when I said "this stage", or "this point", and I think I used the word "this stage" --
13 "this stage","
14 Page 105 line 9:
15 "this point, you can"
16 is corrected to:
17 ""this point", you can"
18 Page 105 line 10:
19 "and I -- I was not"
20 is corrected to:
21 "And I -- I was not"
22 Page 107 line 6:
23 "State requests the federal"
24 is corrected to:
25 "State requests the deferral"

- 1 Page 107 line 9:
2 "Not admissibility has"
3 is corrected to:
4 "Not -- admissibility has "
5 Page 109 line 21:
6 "of the material which can be seen"
7 is corrected to:
8 "of the material, which can be seen"
9 Page 110 line 8:
10 "did not indicate an advance in progress in its"
11 is corrected to:
12 "did not indicate an advancing progress in its"
13 Page 110 line 16:
14 "of individual cases and we see this"
15 is corrected to:
16 "of individual cases. And we see this"
17 Page 111 line 1:
18 "at this stage, deal "
19 is corrected to:
20 "at this stage deal "
21 Page 111 line 7:
22 "in the appeal, that the Pre-Trial Chamber's"
23 is corrected to:
24 "in the appeal -- that the Pre-Trial Chamber's"
25 Page 112 line 11:

- 1 "understanding between the office and Venezuela."
- 2 is corrected to:
- 3 "understanding --- between the office and Venezuela."
- 4 The following interpretation corrections, marked with an asterisk *, are brought into
- 5 the transcript.
- 6 Page 11 line 7:
- 7 "The demonstration with the 50 examples"
- 8 is corrected to:
- 9 "Third sample with 50 examples"