

Pursuant to Decision ICC-02/18-84 dated 24/11/2023, this document is reclassified as Public

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

Nº: ICC-02/18

Date: 18 September 2023

APPEALS CHAMBER

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

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

CONFIDENTIAL *EX PARTE*

**only available to the Office of the Prosecutor and Venezuela
The Bolivarian Republic of Venezuela's Request for Leave to Reply to the
Prosecution's Response Brief (ICC-02/18-62-Conf-Exp_**

Source: Bolivarian Republic of Venezuela

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

The Office of the Prosecutor

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Ms Nazhat Shameem Khan
Ms Alice Zago

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for
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States Representatives

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Counsel Support Section

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Detention Section

**Victims Participation and
Reparations Section**

Other

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I. INTRODUCTION

1. On 13 September 2023, the Prosecution filed its ‘Response to the Bolivarian Republic of Venezuela’s Appeal against the Pre-Trial Chamber I’s ‘Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute’ (ICC-02/18-59-Conf-Exp- AnxII)’ (‘the Response’).¹

2. In their Response, the Prosecution acknowledges that the Bolivarian Republic of Venezuela (‘BRV’) provided over “30, 000 pages”,² concerning approximately 891 cases,³ and that this information includes: “case numbers, dates and location of events, their “gravity”, legal qualification, victims, alleged perpetrators and their State security units (if identified), start dates of investigations and procedural status”.⁴ The Prosecution further acknowledges that the BRV provided English translations of courts records and investigative steps pertaining to a “representative” sample of “115 victims and 62 cases”,⁵ which “related to approximately half of the 124 incidents (amounting to 118 cases) which the Prosecution listed in its 13 January 2022 letter”.⁶

3. It should be clear from this backdrop that unlike the *Philippines* situation, which turned on the absence of concrete evidence that State authorities had investigated cases that overlapped with the Prosecution’s investigation, the Court is currently seized of proceedings where a State has provided a considerable volume of probative documentation concerning actual prosecutions and convictions pertaining to conduct that overlaps with the Prosecution’s intended investigations. Indeed, the Prosecution has conceded that the Pre-Trial Chamber’s ultimate decision to approve the Prosecution’s continued investigation was not based on any of the following factors:

- The number of suspects currently identified or arrested by domestic authorities;⁷

¹ ICC-02/18-62-Conf-Exp.

² Response, para. 9.

³ Response, para. 12.

⁴ Response, para. 11. See also para 12 concerning the content of Summaries: “The Summaries contained more detailed descriptions of the features and status of 262 cases including their case file numbers, concise descriptions of facts, legal qualifications, victims and suspects (if identified), and the types of investigative or other measures taken”.

⁵ Response, fn. 12, para. 8. See also Response, para. 46, where the Prosecution described these cases as being ‘representative’.

⁶ Response, para. 49.

⁷ Response, para. 109: “Finally, the Chamber did not require the GoV to have identified perpetrators or secured their arrest. The Prosecution respectfully submits that the description of the Decision as included in the Appeal is incorrect. The paragraph of the Decision relied on for this ground simply describes the general features of the

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- The question of sufficiency of investigations of crimes of a sexual nature;⁸
- The issue as to whether domestic investigations and prosecutions covered issues pertaining to discriminatory intent;⁹ or
- The questions as to whether there unreasonable periods of investigative inactivity and whether such periods (arising in earlier junctures) were relevant”.¹⁰

4. Instead, the Prosecution characterized the Decision as relying on two determinative factors:¹¹

namely: that the GoV was not investigating factual allegations underlying the contextual elements of crimes against humanity, and that the general focus of the domestic proceedings was on low-level/direct perpetrators.

5. While the Prosecution maintains that a State need only furnish ‘representative samples’ regarding the existence of domestic proceedings,¹² the Prosecution nonetheless claims that the Pre-Trial Chamber correctly found that the ‘representative samples’ provided by the BRV did not sufficiently demonstrate that the BRV was investigating the factual allegations underlying ‘contextual’ elements, or individuals, who were not low-level/direct perpetrators.¹³

6. In terms of the procedural aspects of the proceedings that led to the Decision, the Prosecution has asserted that the BRV was afforded a fair opportunity to be heard because it

GoV’s proceedings based on the records transmitted. It observed that “in relation to about three-quarters of the cases, no (specific) suspect has been identified yet”. This, together with other factors led the Chamber to observe that the GoV appeared “to have taken limited investigative steps” and “there appear to be periods of unexplained investigative inactivity”. However, the Chamber considered that these valid observations—also noted by the Prosecution in its Request—were not determinative of its Decision. Even if more suspects had been identified, further arrest warrants had been issued, or more final decisions on criminal responsibility had been rendered, this would not have impacted the Decision: such proceedings did not investigate or prosecute factual allegations underlying crimes against humanity and generally focused on low- level/direct perpetrators.” See also Response, para. 138.

⁸ Response, para. 133: “Finally, the Chamber’s observation regarding the GoV’s insufficient investigation of crimes of a sexual nature was not determinative for its Decision”.

⁹ Response Para 127: “In any event, the Chamber’s observation about the lack of investigation of the discriminatory intent at the domestic level was not a determinative factor for its Decision”

¹⁰ Response, para. 147: “The Chamber’s observation regarding the period of investigative inactivity was not a determining factor in its decision”.

¹¹ Response, para. 48.

¹² Response, para. 73: “Such a request need not be accompanied by unmanageable amounts of documentation; instead, a State need only provide representative samples of specific and probative material capable of showing that there are ongoing domestic proceedings regarding the scope of the Prosecution’s intended investigation. The State is “uniquely placed” to forensically identify such material”.

¹³ Response, paras. 48, 65.

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had the opportunity to submit documents and translations, which were ‘representative’ samples.¹⁴

7. The Prosecution’s arguments concerning both the substance of the appeal and the procedure which led to the outcome rely heavily on the Prosecution’s stance that ‘representative’ samples can be employed in connection with the information set out in the Article 18(1) Notification,¹⁵ and the information transmitted by a State pursuant to Article 18(2).¹⁶ In some arguments, the Prosecution appears to argue that the admissibility evaluation, based on ‘representative samples’ should be assessed by reference to qualitative features,¹⁷ and in others, the Prosecution relies on quantitative thresholds.¹⁸ The term ‘representative’ is also used interchangeably to refer to samples which ‘represent’ features of domestic proceedings,¹⁹ and samples, which ‘represent’ the characteristics of the Prosecution’s Article 18(1) notification.²⁰

8. This issue as to the notion of ‘representative samples’ cuts across the different appellate grounds and will likely influence the Appeals Chamber’s adjudication of the matters before it. In particular, a proper resolution of the Prosecution’s appellate arguments will require the Appeals Chamber to determine:

- If the mirroring test should be based on a comparison of ‘representative samples’ of domestic investigative activity;
- If that is the case, does the State discharge its burden of proof by submitting samples which are ‘representative’ of domestic proceedings, or ‘representative’ of the incidents set out in the Article 18(1) Notification;
- If the latter, given that the Prosecution is responsible for identifying and setting out representative samples in its Article 18(1) Notification, who properly bears the

¹⁴ Response, paras. 3, 8, 46-47, 49, 67-69.

¹⁵ See Response, para. 112, where the Prosecution argues that the Prosecution need only include ‘representative’ samples in its Article 18(1) notification. See also para. 95.

¹⁶ Response, para. 73, “a State need only provide representative samples of specific and probative material capable of showing that there are ongoing domestic proceedings regarding the scope of the Prosecution’s intended investigation”

¹⁷ Response, para. 117: “Instead, the elements of crimes against humanity (and war crimes) are not neutral as concerns the qualitative legal evaluation of the charged conduct, and require proof of specific facts and seek to protect distinct legal interests”

¹⁸ See Response, para. 70, arguing that number of domestic cases concerning rape/sexual violence is insufficient.

¹⁹ Response, para. 49.

²⁰ Response, para. 112

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burden of persuasion as concerns the assessment as to whether the samples furnished by the State are ‘representative’ of the incidents set out in the Article 18(1) Notification;

- How is the notion of ‘representation’ defined: is it a qualitative or quantitative assessment and should the same definition apply to samples used in the Article 18(1) Notification and the samples furnished by a State;
- If the quantitative approach is adopted, should this assessment be conducted on the basis of the underlying conduct featured in each case, or the label attached to that conduct;²¹ and
- If a qualitative approach is adopted, how does this approach apply to the identification of appropriate suspects targets within the groups described in the Article 18(1) Notification in circumstances where the Prosecution has not itself identified specific suspects (i.e. is ‘low-level’ an appropriate qualitative criterion as compared to considerations based on the degree of involvement in the alleged crime)?

9. In light of the various potential nuances in the ‘representative sample’ test and the potential ramifications for the pending grounds of appeal, the BRV seeks leave to introduce a focused reply, addressing this concept in light of the particular manner it is employed in the Response, and the related aspects set out in paragraph 8 above.

II. CLASSIFICATION

10. Pursuant to regulation 23bis(1) of the Regulations of the Court (‘RoC’), the present cover filing is classified as ‘confidential *ex parte*’ because it cites to the Response, which was filed on a confidential *ex parte* basis.

III. SUBMISSIONS

Legal basis of the current request

²¹ See response, para. 70, where the OTP suggest that the number of domestic cases should be counted as ‘3’ based on label of ‘rape’, rather than more than 400, based on underlying conduct of sexual violence.

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11. Although the Regulations of the Court ('RoC') do not expressly regulate the submission of requests for leave to reply in the context of interlocutory appeals, the Appeals Chamber originally determined that the parties may invoke Regulation 28(1) of the RoC, with a request to introduce further submissions that are "necessary for the proper disposal of the Appeal".²² In the context of appeals concerning detention and provisional detention, the Appeals Chamber then determined that Regulation 24(5) could provide a more appropriate basis for seeking leave to reply.²³ In the recent *Philippines* litigation, the Appeals Chamber granted leave to reply pursuant to Regulation 24(5), on the basis that certain issues would assist "would assist in its determination of the appeal".²⁴

The requested reply would assist the Appeals Chamber to resolve the appeal

12. The Prosecution's reliance on the notion of representative samples raises fundamental questions as to the effective operation of Article 18, and the role this provision plays in eliminating impunity gaps while preventing concurrent prosecutions. Indeed, the very broad manner in which the Prosecution construes the notion of 'representative samples' in connection with its Article 18(1) notification obligations raises a broader question as to whether Article 18 should in fact aim to eliminate concurrent investigations and prosecutions. The Appeals Chamber's resolution of these appeal will therefore have profound implications for other States that are pursuing genuine accountability measures, and who wish to exercise their sovereign right to do so. Further submissions on this topic will therefore facilitate the ability of the Appeals Chamber to issue an informed determination as concern a test that is likely to generate profound consequences for Venezuela and other States participating in future admissibility proceedings.

13. The BRV was also unable to anticipate the Prosecution's extensive reliance on this concept, when formulating its own appeal brief. The phrase 'representative sample' was not employed by the Pre-Trial Chamber in connection with State obligations: its use was confined to the obligation of the Prosecution to "provide information that is specific enough for the relevant States to exercise its right under article 18(2) of the Statute and representative enough

²² ICC-01/04-01/06-424, para. 7.

²³ ICC-02/11-01/15-208, para. 1.

²⁴ ICC-01/21-72, paras. 6-7, 9.

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of the scope of criminality that it intends to investigate in any future case(s).²⁵ The Appeals Chamber also did not employ this concept in its recent judgment issued in the *Philippines* situation.²⁶ In the latter situation, the Prosecution also accepted that the lack of appellate precedent as concerns the operation of Article 18 could justify the introduction of further submissions in reply in order to ensure that “all relevant and necessary issues are adequately canvassed for the proper adjudication of the Appeal.”²⁷

14. The introduction of a discrete reply in relation to the concept of representative samples will not delay the proceedings or prejudice the parties. The Appeals Chamber has established a deadline of 17 October 2023 for the submission of a VPRS report concerning the views and concerns of alleged victims.²⁸ If granted leave to reply, the Government of Venezuela will be in a position to file its reply before this date.

IV. RELIEF SOUGHT

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

- ⇒ Grant the BRV leave to reply in order to address the issue as to if and how the notion of ‘representative samples’ should be employed in connection with Articles 18(1) and (2) of the Statute.

Respectfully submitted,



Yván Gil Pinto

Minister of Foreign Affairs of the Bolivarian Republic of Venezuela



Dated this 18 September 2023.

At Caracas, Venezuela.

²⁵ ICC-02/18-45, para. 77.

²⁶ ICC-01/21-77.

²⁷ ICC-01/21-70, para. 80.

²⁸ ICC-02/18-60, para. 15.