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THE APPEALS CHAMBER

Before: **Judge Marc Perrin de Brichambaut, Presiding Judge**
Judge Piotr Hofmański
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

Public
with Confidential *Ex Parte* Annexes A and B only available to the Prosecution and the Bolivarian Republic of Venezuela

Public redacted version of " Prosecution 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)", 13 September 2023, ICC-02/18-62-Conf-Exp

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INTRODUCTION

1. On 27 June 2023, Pre-Trial Chamber I authorised the resumption of the Prosecution's investigation in the Bolivarian Republic of Venezuela following the Prosecution's request to resume the investigation pursuant article 18(2) of 1 November 2022[1] and the Government of Venezuela's ("GoV's") request for deferral of 15 April 2022.[2] This is the Prosecution's submission in response to the Appeal by the GoV against that Decision.[3] The Prosecution submits that the Decision is correct and reasonable, and consistent with the Court's complementarity jurisprudence. For the reasons set out below, the Prosecution respectfully submits that the GoV's six appeal grounds fail to show any error, nor do they demonstrate any impact of such purported errors on the Decision. As such, the Appeal should be dismissed.

2. First, the Chamber correctly determined that the GoV, in requesting the deferral, bears the burden of proof to demonstrate that its proceedings sufficiently mirror the scope of the Prosecution's intended investigation, by providing evidence of a sufficient degree of specificity and probative value. Further, the Chamber decided that the Prosecution had provided sufficiently specific information regarding the scope of its intended investigation for the GoV to exercise its right to request a deferral under article 18(2).[4]

3. Second, in order to make its complementarity determination, the Chamber reasonably relied on the English translations of court records and records of investigative steps provided by the GoV. [REDACTED] this sample was representative of its domestic proceedings, and essential to its Deferral Request. Moreover, the matters addressed in the Memorandum of Understanding of 3 November 2021 between the Office of the Prosecutor[5] and the GoV ("MoU") are not related to the complementarity assessment, which is conducted based on the facts as they existed at the time of the Court's assessment.[6] Thus, the fact that the Chamber did not consider the MoU in its assessment could not have impacted the Decision.

4. Third, the Chamber correctly applied the complementarity test, as confirmed in the *Philippines* Appeal Judgment. Based on a holistic assessment of the material before it, the Chamber reasonably and correctly concluded that the GoV's domestic criminal proceedings did not sufficiently mirror the scope of the Prosecution's intended investigation. The Chamber relied on two recurrent features of the GoV's proceedings, namely (i) Venezuela is not

[1] ICC-02/18-18 ("Request" or "Article 18(2) Request"). ICC-02/18-45 ("Decision"). The Prosecution will refer to "Pre-Trial Chamber I" or the "Chamber" interchangeably.
[2] *See* ICC-02/18-17, ICC-02/18-17-Conf-AnxA, ICC-02/18-17-Conf-AnxB ("Deferral Request"), VEN-OTP-0002-7051, VEN-OTP-0002-7092. The Prosecution received the Deferral Request dated 15 April 2022 on 16 April 2022.
[3] ICC-02/18-59-Conf-Exp-AnxII (public redacted version: ICC-02/18-59-AnxII-Red) ("Appeal").
[4] *See* Prosecution's response to Grounds 1 and 3.
[5] "OTP" or "Office".
[6] *See* Prosecution's response to Ground 2.

investigating the factual allegations underlying the contextual elements of crimes against humanity; and (ii) the focus of the domestic investigations appears generally to be directed at direct/low-level perpetrators. The GoV's submissions in its Appeal confirm these features. The Chamber also reasonably and correctly identified other features of the Venezuelan domestic proceedings that confirmed that they insufficiently mirrored the Prosecution's intended investigation, in particular: (i) the limited investigative steps taken; (ii) the periods of unexplained investigative inactivity; and (iii) the insufficient investigation of forms of criminality that the Prosecution intends to investigate, in particular relating to the discriminatory intent underlying the alleged crimes, and sexual violence crimes. The Chamber applied a fact-driven analysis and only considered legal qualifications where appropriate.[7]

5. Finally, the Prosecution submits that the GoV's request to admit as additional evidence on appeal the English translations of court records and records of investigative steps for five cases should be rejected. This material was not before the Chamber in one of the Court's working languages when the Chamber conducted its complementarity assessment under article 18. The GoV submits no convincing reason to explain why it did not provide this material during the proceedings. In any event, even if this material had been submitted before the Chamber, it could not (and would not) have led to a different conclusion by the Chamber. The five cases relate to convictions of low-level/direct perpetrators, and the investigative steps taken do not demonstrate that the factual allegations underpinning crimes against humanity, discriminatory intent or acts of sexual violence were being (or are being) investigated.

6. The GoV's Appeal fails to show that the Chamber erred in the Decision. Further, even if any of the grounds had any merit, this would not have had a material impact on the Decision. This is because the GoV has not demonstrated that it is investigating the factual allegations underlying the contextual elements of crimes against humanity or the discriminatory intent of the alleged crimes, or sufficiently investigating acts of sexual violence. Moreover, the domestic proceedings are focused, at present, on low-level/direct perpetrators. The Prosecution respectfully requests the Appeals Chamber to dismiss the GoV's Appeal, reject its Additional Evidence Request and uphold the Pre-Trial Chamber's Decision.

CLASSIFICATION

7. Pursuant to regulation 23*bis* (2) of the Regulations of the Court,[8] the Prosecution files this response as confidential *ex parte* because it refers to material that bears this classification. The Prosecution will file a public redacted version as soon as practicable.

[7] *See* Prosecution's response to Grounds 4, 5 and 6.
[8] "Regulations" or "RoC."

OVERVIEW OF THE DEFERRAL MATERIAL AND ADDITIONAL EVIDENCE

8. In its Appeal the GoV challenges the Chamber's assessment of the material provided by it to support its Deferral Request of 15 April 2022. To assist the Appeals Chamber, the Prosecution first provides a brief overview of this material. From 30 November 2020 to 18 October 2022, the GoV transmitted to the Prosecution 14 tranches of information ("Submissions"), mostly in Spanish. This material was assessed by the Prosecution in its Article 18(2) Request of 1 November 2022. On 1 March 2023, the GoV provided further material (mostly in Spanish), in 13 annexes to its Observations to the Prosecution Request ("13 Annexes").[9] This material was assessed by the Prosecution in its Response to the GoV's Observations of 21 March 2023.[10] As authorised by the Chamber,[11] on 22 March 2023 the GoV filed 65 annexes containing English translations of a representative sample of case files, including court records and records of investigative steps, most of which had been previously submitted in Spanish (the "Translated Material").[12] The Prosecution assessed the Translated Material and came to the same conclusion as it had reached previously.[13]

9. The above material provided by the GoV to support its Deferral Request (the "Deferral Material") comprised approximately over 30,000 pages.[14] It can be divided into three categories: (i) reports, memoranda, correspondence, press reports and tweets mostly unrelated to domestic proceedings ("Reports");[15] (ii) tables, lists and charts providing limited information for 628 cases ("Charts"),[16] brief notes with further information about some of these cases, in narrative form ("Summaries");[17] and (iii) copies of case files, including court records and

[9] ICC-02/18-30-AnxII-Red-Corr ("GoV's Observations"); ICC-02/18-30-Conf-Exp-AnxIII ("13 Annexes")
[10] ICC-02/18-31-Red ("Prosecution Response" or "Prosecution Response to GoV's Observations"). *See* Annexes A and B to the Prosecution Response in which the Prosecution assessed the updates on the cases.
[11] ICC-02/18-29 ("Time Extension Decision").
[12] In these 65 Annexes (annexed to ICC-02/18-32 (the "Translated Material")), the GoV gave court records relating to 115 victims and 62 cases. This is because four annexes (Annexes 33, 40, 53, 54) relate to two cases: [REDACTED] (Annexes 53, 54) and [REDACTED] (Annexes 33, 40). Annex 1 includes the list of 115 victims mentioned in the court records, [REDACTED].
[13] *See* Prosecution's assessment in Annex A to this Response. This updates Annex B to the Article 18(2) Request and Annex A to the Prosecution Response.
[14] The Prosecution has identified a higher number of total pages than those initially accounted for in the Request.
[15] VEN-OTP-0001-1250 and VEN-OTP-0001-0007, VEN-OTP-0001-2028 and VEN-OTP-0001-1378, VEN-OTP-0001-2133, VEN-OTP-0001-2978, VEN-OTP-0001-3799, VEN-OTP-0001-5144, VEN-OTP-0001-5035, VEN-OTP-0001-5267. *See also* Annexes 1 to 8 of the 13 Annexes.
[16] *See* First, Second, Third, Fifth and Eighth Submissions: VEN-OTP-0001-0124 and VEN-OTP-0001-1363, VEN-OTP-0001-1533, VEN-OTP-0001-2274, VEN-OTP-0001-3849, VEN-OTP-0001-3886. The Prosecution did not consider cases before the military jurisdiction, where civilians were sought for alleged crimes against military personnel: VEN-OTP-0001-0384, VEN-OTP-0001-1250 at 1345 to 1352. *See also* Annexes 10 to 12 of the 13 Annexes.
[17] *See* Fifth, Seventh, Ninth, Tenth, Eleventh, Thirteenth and Fourteenth Submissions: VEN-OTP-0001-3799 at 3805 to 3844, VEN-OTP-0001-3900, VEN-OTP-0001-5035 at 5041 to 5080, VEN-OTP-0001-5082, VEN-OTP-0001-5086, VEN-OTP-0001-5090, VEN-OTP-0001-5094, VEN-OTP-0001-5104, VEN-OTP-0001-5112, VEN-OTP-0002-7069, VEN-OTP-0002-7119, VEN-OTP-0002-9653, VEN-OTP-00001969, VEN-OTP-00002048. The documents are called *fichas*, *asuntos* or *minutas* in Spanish. *See also* Annex 13 of the 13 Annexes.

records of investigative steps taken in the context of domestic criminal proceedings ("court and investigative records" or "court records and records of investigative steps").[18]

10. The Reports contained information on various aspects, including (i) the GoV's views on the Prosecution's preliminary examination ("PE"), and its opinion on why crimes against humanity have not been committed in Venezuela; (ii) Venezuela's legal framework; (iii) a description of the structure of State security forces and other bodies; (iv) legislative, administrative and judicial initiatives and reforms; and (v) memoranda, press reports and Twitter posts purporting to show a communication strategy disseminated via social networks against the Venezuelan State. Some of the Reports incorporated and explained the charts and tables attached as annexes.

11. The Charts contained succinct information about domestic proceedings, such as 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 The Charts contained information for 628 cases.

12. The Summaries contained more detailed descriptions of the features and status of 262 cases[19] 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. The GoV did not include material supporting the information in the Charts and the Summaries. In total, the Charts and the Summaries referred to 891 cases,[20] and included conduct which had not been part of the Prosecution's Preliminary Examination assessment (*i.e.*, imprisonment, torture, rape and other forms of sexual violence, and persecution).[21] The Prosecution translated into English and provided to the Chamber the material in the Ninth, Tenth and Eleventh Submissions, which included 112 Summaries.

13. The court records and records of investigative steps included judicial records produced in the context of domestic proceedings such as indictments, verdicts and appeals, and records of

[18] VEN-OTP-0001-0698, VEN-OTP-0001-1509, VEN-OTP-00000081 to VEN-OTP-00000582, VEN-OTP-00000590 to VEN-OTP-00001966, VEN-OTP-00002066 to VEN-OTP-00002801. *See also* Annex 9 of the 13 Annexes.

[19] The figures regarding the total number of cases, and cases for which Summaries and court records were provided, have changed slightly from the Prosecution's Article 18(2) Request due to information subsequently provided in the GoV's Observations and Translated Material, from which the Prosecution could identify duplicates.

[20] The information in the Charts and the Summaries did not use the same or a consistent methodology. In some instances, the Charts and the Summaries were included in the body of a Report, in others as separate annexes. Some cases were reported in both the Charts and the Summaries, and updates were provided with respect to some previously reported cases in several sequential submissions. The figure of 891 cases excludes overlaps and includes the most updated information. Given the volume and complexity of the material provided by GoV, the Prosecution notes that it could not exclude a minimal margin of error in its calculations: Article 18(2) Request, fn. 28.

[21] The Prosecution did not limit its assessment of the GoV's information and materials to conduct and crimes it had assessed during the PE, *ie.* imprisonment, torture, rape and other forms of sexual violence, and persecution. Since its investigation would not be so limited, the Prosecution also considered cases in relation to other conduct and crimes which could potentially fall within the parameters of the situation.

investigative measures, such as witness statements (mostly from victims), medical and psychological assessments (mostly of victims), and requests to conduct internet searches or to obtain phone records and financial information of victims.[22] The GoV provided such records for 204 cases.[23] Of these, 85 related to the 124 sample incidents identified by the Prosecution in its 13 January 2022 letter which gave further information to the GoV in response to its request under rule 53(2) of the Rules.[24] In the 65 annexes of Translated Material, the GoV gave English translations for 62 of these 85 cases.[25]

14. In its Appeal, the GoV requests the admission into evidence of five case files under regulation 62 of the Regulations. The original Spanish versions of these files were previously provided in the GoV's Eleventh and Twelfth Submissions, and were assessed by the Prosecution in its Request.[26] If these five additional translations are considered, the GoV has provided copies of case files for 204 cases, of which 67 have been translated into English.

SUBMISSIONS

15. The GoV advances six grounds of appeal, and requests the admission of five copies of case files (in English) as additional evidence on appeal pursuant to regulation 62. The Prosecution addresses below the six grounds of appeal, and responds to the GoV's request for additional evidence after its response to Ground 2 below.

A. Ground 1: The Chamber was correct in attributing the burden of proof, and on the applicable deadline

16. In Ground 1, the GoV submits that the Chamber erroneously placed the burden of 'persuasion' on it to demonstrate that its domestic cases sufficiently mirrored those encompassed by the article 18(1) notification.[27] The GoV further submits that the Chamber

[22] *See* Request, para. 118 (third item).
[23] In the Twelfth, Thirteenth and Fourteenth Submissions, the GoV submitted most of the copies of court records and records of investigative steps VEN-OTP-00000081 to VEN-OTP-00000582, VEN-OTP-00000590 to VEN-OTP-00001966 and VEN-OTP-00002066 to VEN-OTP-00002801. *See also* VEN-OTP-0001-0698 (First Submission) and VEN-OTP-0001-1509 (Second Submission).
[24] ICC-02/18-16-Conf-Exp-AnxD ("13 January 2022 letter") at pp. 3-8. *See* Annex B to this Response in which the Prosecution lists the 204 cases for which GoV provided court records and records of investigative steps. The 85 cases corresponding to the 124 incidents mentioned in the 13 January 2022 letter are highlighted in yellow. The 62 cases for which GoV provided English translations, which the Chamber analysed in the Decision are highlighted in blue. From the 62 cases for which records were provided, 59 cases related to the 124 incidents. The three cases which did not feature in the 13 January 2022 letter are [REDACTED], [REDACTED] and [REDACTED], the court records for which are provided in Annexes 56, 29 and 62 of the Translated Material. The five cases submitted as additional evidence are highlighted in orange.
[25] In the 65 annexes of Translated Material, the GoV provided court records relating to 115 victims, listed in Annex 1. The remaining 64 annexes relate to 62 cases because four annexes (Annexes 33, 40, 53, 54) relate to two cases: [REDACTED] (Annexes 53, 54) and [REDACTED] (Annexes 33, 40).
[26] VEN-OTP-0002-9653, VEN-OTP-00000081 to VEN-OTP-00000582.
[27] Appeal, paras. 32-41. The GoV describes in its own terms the Chamber's finding that it challenges in this ground, but has not provided the reference to the relevant finding of the Chamber in the Decision, as required under rule 154(2) of the Rules of Procedure and Evidence ("Rules" or "RPE").

erred in finding that the GoV received sufficiently specific information to exercise its right to request a deferral under article 18(2),[28] and in finding that the Prosecution had no deadline for filing an article 18(2) application.[29] The Prosecution respectfully submits that Ground 1 should be dismissed. The Chamber's approach and findings were logical, consistent with the terms of article 18(2) read in their proper context and in light of the object and purpose of the Statute, and consistent with the jurisprudence of the Court. Moreover, even if the Chamber had erred, this would not have had any impact on its Decision.

A.1 The Chamber correctly attributed the burden of proof and substantiation

17. The Chamber correctly outlined the two limbs of the article 18(2) complementarity assessment[30] and held that the State requesting deferral bears the burden of proof under the first limb to provide the Court with evidence demonstrating that it is investigating cases that sufficiently mirror the content of the article 18(1) notification to States. If this is established, the Prosecution then bears the onus to show, under the second limb, that the State is either unwilling or unable genuinely to carry out investigations or prosecutions.[31] The GoV submits that the Chamber erred in law by placing the burden of 'persuasion' under the first limb on the GoV.[32] However, the logical operation of the article 18(2) procedure requires that the State bears the burden of proof under the first limb. This is consistent with the terms of article 18(2) and the Court's jurisprudence, and is appropriately tailored to the differing postures of the Prosecution and the State in article 18(2) proceedings. The Chamber did not err.

18. First, the Prosecution submits that the GoV's interpretation of the shifting of the burden of proof in article 18(2) proceedings is erroneous. The GoV submits that once the State substantiates the existence of relevant domestic investigations (i.e., the *burden of production or substantiation*), the burden of persuasion shifts to the Prosecution to prove that the domestic cases do not sufficiently mirror those that the Prosecution intends to investigate.[33] The Prosecution respectfully disagrees. The Appeals Chamber in the *Philippines* situation held that the burden in article 18(2) proceedings is allocated to the State in accordance with the general

[28] Appeal, paras. 42-61.
[29] Appeal, paras. 62-65. *See* Decision, para. 57.
[30] The assessment involves determining whether there are ongoing investigations or prosecutions, or whether there have been investigations in the past and the State having jurisdiction has decided not to prosecute the person concerned (the first limb); and, if so, whether the State is unwilling or unable to genuinely carry out any such investigation or prosecution (the second limb): Decision, para, 95. *See also* ICC-01/21-56-Red ("*Philippines* Article 18(2) Decision"), para. 11 (affirmed in ICC-01/21-77 ("*Philippines* Article 18(2) Judgment"), para. 211). Complementarity findings in the *Philippines* Article 18(2) Judgment were made by a majority of three judges. The remaining two judges did not decide on these matters because they did not consider that the Court exercised valid jurisdiction in the situation. *See also* ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD") para. 78.
[31] Decision, para. 66.
[32] Appeal, paras. 32-41. The GoV describes in its own terms the Chamber's finding that it challenges in this ground, but has not provided the reference to the relevant finding of the Chamber in the Decision, as required under rule 154(2) of the Rules of Procedure and Evidence ("Rules" or "RPE").
[33] Appeal, paras. 32, 34-38. *See also* para. 44.

principle of *onus probandi incumbit actori* (the party alleging a fact is the party that bears the burden of proof),[34] comprising both the burden of persuasion and the burden of production.

19. While it may be appropriate to allocate the burden of production and burden of persuasion on different parties in some contexts,[35] there is no logical basis for doing so in article 18(2) proceedings. This is evident from the nature of the inquiry that the State must undertake to substantiate its claim that it is conducting relevant domestic investigations. In particular, the State's exercise of transmitting proof of relevant domestic investigations will inherently require, at a minimum, that it: analyse its case records against the parameters of the Prosecution's intended investigation; identify cases falling within those parameters; and present those cases in its deferral request so as to allow the reader to compare the cases against the parameters of the Prosecution's intended investigation. Thus, by showing the existence of relevant domestic investigations, the State provides proof of the overlap between those and the Prosecution's intended investigation. Both burdens are therefore subsumed in the exercise which the State needs to carry out in seeking a deferral.

20. Second, the appellate decision in the *Philippines* situation squarely addressed this issue. Contrary to the GoV's assertion that the Appeals Chamber in that case did not consider which party bears the burden of proving/disproving an overlap between the domestic cases and the cases encompassed by the article 18(1) notification, the Appeals Chamber in fact affirmed that the burden proof in article 18(2) proceedings rests on the party which seeks to establish the existence of a fact.[36] In the context of an article 18(2) deferral request, this is the State, since it is alleging that it is investigating or has investigated those within its jurisdiction with respect to acts relating to the article 18(1) notification.[37] The State must therefore "demonstrate the degree of mirroring".[38] The burden of proof does not shift to the Prosecution simply because the latter seises a pre-trial chamber with an article 18(2) application,[39] or because rule 54(1) requires the Prosecution to set out the basis for its article 18(2) application.[40] The Appeals Chamber thus did not distinguish between a burden of substantiating the existence of domestic

[34] *Philippines* Article 18(2) Judgment, para. 78. *See below* para. 20. *See also* C. Tapper, *Cross and Tapper on Evidence*, 12th Ed. (New York: OUP, 2010), pp. 128-129; ICC, "Informal Expert Paper: The principle of complementarity in practice" (2003) ("Complementarity Expert Paper"), fn. 18.
[35] *See e.g.* ICC-01/09-01/11-1334-Anx-Corr ("*Ruto & Sang* Judge Eboe-Osuji Sep. Op"), paras. 79-80; K. Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part*, 2nd Ed. (Oxford: OUP, 2021), pp. 414-415.
[36] Appeal, paras. 33-34.
[37] *Philippines* Article 18(2) Judgment, para. 74. *See also* ICC-02/17-196 ("*Afghanistan* Article 18(2) Decision"), para. 45.
[38] *Philippines* Article 18(2) Judgment, para. 107.
[39] *Philippines* Article 18(2) Judgment, para. 77.
[40] *Philippines* Article 18(2) Judgment, para. 77. *Contra* Appeal, para. 32. The GoV cites regulation 38(2)(b)(c) of the RoC as requiring the Prosecution to set out the basis for its application under article 18(2), however there is no such sub-provision of regulation 38, which concerns page limits of specific filings.

investigations and a burden of substantiating that such domestic investigations sufficiently mirrored the scope of the Prosecution's intended investigation. In the Prosecution's respectful submission, the Appeals Chamber's holding equally applies to this situation.[41]

21. Third, the allocation of the burden of proof to the State is both appropriate and necessary given that the State is uniquely placed to know and have access to all information concerning its domestic proceedings—including information not publicly known—that may overlap with the Prosecution's intended investigation.[42] This accords with the possibility contemplated by an early OTP informal expert paper, cited by the GoV,[43] that the burden of proof may be attributed to the party with *particular* or *sole* knowledge of the facts.[44]

22. The Rules of Procedure and Evidence recognise the differing postures of the Prosecution and the State in article 18(2) proceedings and are relevant to the allocation of the burden of proof in two key respects. *First*, rules 53 and 54(1) establish that it is the State's material on which the Prosecutor, and (if necessary) the Pre-Trial Chamber, will base their assessments as to whether a deferral is justified.[45] *Second*, it is in the hands of the State as to the quantity and quality of material available to the Court showing the existence of relevant domestic investigations. While the Prosecution may request additional information from the State under rule 53 regarding its deferral request, the State is not obliged to provide it.[46] The Prosecution has no procedural mechanism to compel the State to provide any material.

23. These provisions thus recognise that it is the State which has access to, and is best placed to provide, information on the totality of its domestic investigations and prosecutions which it claims mirror the scope of the Prosecution's intended investigation.[47] If the burden of proof were reversed, the Prosecution would be obliged to demonstrate the absence of relevant domestic investigations without necessarily being able to access (or even know about) the underlying materials. Allocating the burden of proof to the State seeking to defer the

[41] *Contra* Appeal, para. 33. The GoV does not identify any convincing reasons for the Appeals Chamber to depart from its recent case law: ICC-02/11-01/15-172 ("*Gbagbo & Blé Goudé* Victims Participation Reasons for Decision"), para. 14; ICC-01/09-02/11-728-Anx3-Corr2-Red ("*Kenyatta* Judge Eboe-Osuji Sep. Op."), para. 91; *see also* ICTY: *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 24 March 2000, paras. 106-109.
[42] *Philippines* Article 18(2) Judgment, para. 79. *Contra* Appeal, para. 40.
[43] Appeal, para. 35.
[44] Complementarity Expert Paper, para. 56. This 2003 informal policy paper was prepared to assist the work of the OTP and does not bind the Office or the Court.
[45] When a State requests a deferral under article 18(2), rule 53 requires it to "provide information concerning its investigation, taking into account article 18, paragraph 2". When the Prosecution seises the Pre-Trial Chamber under article 18(2), rule 54(1) requires the Prosecution to communicate all information provided to it by the State under rule 53 to the Chamber.
[46] *See* J.T. Holmes, 'Jurisdiction and admissibility', in R.S. Lee *et al.* (eds.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational: 2001), p. 341.
[47] *See also* *Philippines* Article 18(2) Judgment, para. 79; *Afghanistan* Article 18(2) Decision, para. 56 (finding that the material transmitted by Afghanistan did not show that it had investigated or was investigating in a manner that covered the full scope of the Prosecutor's intended investigation that would justify a deferral of the Court's investigations).

investigation strikes a fair balance between the State's prerogative to frame and support a deferral request, the Prosecution's role in first assessing the request, and the Pre-Trial Chamber's role in determining it.

24. Fourth, the GoV's submission that the burden of proof must be applied to the Prosecution which seeks to change the *status quo* is not supported by the Statute.[48] The Appeals Chamber previously rejected the same argument raised by the Government of the Philippines.[49] The GoV's argument is based on the premise that a deferral request automatically triggers a deferral which the Prosecution seeks to reverse when seising the Chamber under article 18(2). Rather, it is for the State to request deferral of the Prosecution's investigation pursuant to article 18(2), and for the State to provide supporting information pursuant to rule 53. It is for the Prosecution then to assess the material provided by the State in support of its deferral request. Where the Prosecution decides a deferral is not warranted, such assessment is then made by the Pre-Trial Chamber. The wording of articles 18(5) and (6) ("[w]hen the *Prosecution has deferred* an investigation") also shows that a deferral is triggered upon a decision of the Prosecutor, and is not automatically triggered once a State transmits its deferral request. Therefore, the Prosecution's application to the Pre-Trial Chamber under article 18(2) is not a request to change the *status quo*. This is because no decision will have yet been made to defer the Prosecution's investigation.[50] Rather, it is an application by the Prosecution for the Chamber's authorisation to continue the investigation despite the deferral request. Pending the assessment of the deferral request by the Prosecutor and/or the Pre-Trial Chamber, the Prosecution suspends its investigative activities in good faith in order not to prejudice the outcome of the assessment.[51] This approach is the logical interpretation of article 18(2), consistent with articles 18(3) and (5),[52] while also preserving the rights of the State.[53]

25. The logic of this interpretation is reinforced by the fact that the State already bears the burden of proof when requesting a deferral from the Prosecution in the first instance. The GoV

[48] *Contra* Appeal, para. 35.
[49] *Philippines* Article 18(2) Judgment, paras. 70, 80.
[50] ICC-02/17-156 ("*Afghanistan* Deferral Status Decision"), para. 23. *Contra* Appeal, para. 35.
[51] *See e.g.* ICC-01/21-14 ("*Philippines* Article 18(2) Notification"), para. 3.
[52] In particular, if the State's deferral request automatically triggered a deferral, then the six-month period in article 18(3) would also commence, following which the Prosecution would be permitted to *review* whether the continued deferral is warranted. This possibility to review would arise regardless of when the Prosecution may have completed its assessment of the *initial* deferral request and could take place even before the Pre-Trial Chamber—if seised by the Prosecution under article 18(2)—issues its ruling on the initial deferral request. Likewise, potential conflict or overlap would arise between the Prosecutor's powers to request further information from the State under rule 53 and article 18(5). By contrast, these conundrums are solved if the deferral—and hence the application of articles 18(3) and (5)—becomes effective at the time it is accepted either by the Prosecutor or, alternatively, the Pre-Trial Chamber.
[53] The Prosecution's suspension of its investigative activities in good faith, pending the assessment of the deferral request, also accommodates the absence of any specific time frame in the Court's legal texts for the Prosecutor to carry out that assessment and decide whether to seise the Pre-Trial Chamber under article 18(2). *See below* paras. 41-45.

does not contend otherwise. It is consistent with the GoV's view that the burden applies to the party seeking to change the *status quo*, which, in the first instance, is the State when requesting the Prosecution to defer its investigation.[54] It would be inconsistent to then require that the burden of proof be bifurcated between the State and the Prosecution once the Prosecution seises the Pre-Trial Chamber under article 18(2) and transmits the State's material to the Chamber.

26. Fifth, the references in the Appeal to the drafting history of article 18(2) and accompanying academic commentary do not support this sub-ground.[55] This commentary does not consider whether or how the burden of proof is differently allocated across the first and second limbs of the article 18(2) inquiry (as the Chamber had correctly held[56]), let alone whether it should be differently allocated within the first limb.[57] Moreover, the Appeals Chamber has now clarified that it is the State seeking deferral that "has an interest in persuading" the Court that it is investigating or has investigated the criminal acts relevant to the article 18(1) notification to States.[58]

27. Sixth, the Prosecution submits that no prejudice would be suffered by the GoV if the Prosecution's investigation was to resume. The State would not be precluded from continuing its investigations while the Prosecution investigates.[59] It is implicit in articles 18(7) and 19(2) that the State may continue to exercise jurisdiction in parallel to the Court, and later mount admissibility challenges to specific cases investigated by the Prosecution.[60] Indeed, the MoU signed between the GoV and the OTP in this situation emphasises a twin-track approach to complementarity, and is founded on the mutual understanding that domestic and ICC

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[54] *See* Appeal, para. 35.

[55] The GoV relies on an intervention made by the United States during the debate concerning, *inter alia*, its proposal to introduce article 18 (then, article 16), in which its delegate explained that the Prosecutor should "persuade" the Judge to allow the investigation to proceed: *see* Appeal, para. 36 (citing United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Summary Record of the 11th Meeting, 20 November 1998, U.N. Doc. A/CONF.183/C.1/SR.11, para. 25). But the draft wording of the United States' proposal for the provision shows that its focus was on the Prosecution assessing the factors relating to the second limb of the complementarity test (i.e. unwillingness/inability), and not the first limb (whether the State is investigating/has investigated cases that sufficiently mirror the scope of the Prosecution's intended investigation): *see* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, 14 April 1998, U.N. Doc. A/CONF.183/2/Add.1, p. 42 (Article 16(2) reads: "[…] At the request of [the State seeking deferral], the Prosecutor shall defer to the State's investigation of such persons unless the Prosecutor determines that there has been a total or partial collapse or unavailability of the State's national judicial system, or the State is unwilling or unable genuinely to carry out the investigation and prosecutions").

[56] Decision, para. 66.

[57] Appeal, para. 37, citing D. Nsereko & M.J. Ventura, "Article 18 Preliminary rulings regarding admissibility", in K. Ambos (Ed.), *The Rome Statute of the International Criminal Court: Article-by-Article Commentary*, 4th Ed. (München/Oxford/Baden: C.H. Beck/Hart/Nomos, 2022), p. 1027, mn. 48.

[58] *Philippines* Article 18(2) Judgment, para. 79.

[59] *Contra* Appeal, para. 39.

[60] *See e.g.* ICC-01/11-01/11-547-Red ("*Gaddafi* First Admissibility AD"), paras. 51-52; ICC-01/11-01/11-466-Red ("*Al-Senussi* Admissibility Decision"), paras. 13, 22.

investigations may proceed simultaneously so as to close impunity gaps.[61] Further, the Prosecution respectfully submits that it would not be a waste of resources to continue parallel investigations.[62] For example, the Prosecution may decide not to pursue certain lines of inquiry which are being pursued by the State, or not to proceed with an investigation into a situation on complementarity grounds. In this situation, the Prosecutor has stated that he will endeavour to revisit his assessment if there is a change of relevant facts and circumstances.[63]

28. Finally, even if the Chamber had incorrectly applied the article 18(2) burden of proof, the GoV's Appeal does not demonstrate how such error would have impacted the Decision.[64] To the contrary, the GoV accepts that it has the burden of providing information of cases *relevant* to the scope of the article 18(1) notification to States.[65] This required it to provide the material on which the Prosecution and the Chamber would assess whether the domestic investigations sufficiently mirrored the scope of the Prosecution's intended investigation. Moreover, the GoV's submission that it was forced to prove that it was investigating a nebulous and shifting target because of the erroneous allocation of the burden of proof is unsubstantiated.[66] Indeed, it is demonstrable from the GoV's submissions in the course of the article 18(2) proceedings that it clearly understood the nature and parameters of the information it had to transmit to substantiate its deferral request. The GoV was given and availed itself of the opportunity to submit extensive materials and observations, and provided approximately over 30,000 pages of documentation to show that it was carrying out relevant investigations.[67] It confirmed that it had "carried out an exhaustive exploration of all the issues referred to in the list presented by the Office of the Prosecutor."[68] Finally, the GoV engaged constructively with the Prosecution both before and after the Prosecution issued its article 18(1) notification to States on 16 December 2021[69] and provided information in relation to its domestic investigations.[70]

29. The Prosecution respectfully submits that this sub-ground of appeal on the allocation of the burden of proof should be dismissed.

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[61] Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court, 3 November 2021 ("MoU"), p. 3. *See also* Article 18(2) Request, paras. 6, 166; 13 January 2022 letter, p. 7.
[62] *Contra* Appeal, para. 39.
[63] Article 18(2) Request, para. 166; *see also* Prosecution Response to GoV's Observations, paras. 6, 57.
[64] *Contra* Appeal, para. 41.
[65] Appeal, para. 38.
[66] Appeal, para. 41.
[67] *See above* para. 9.
[68] Deferral Request, p. 6. The GoV referred to the list annexed to the Prosecutor's 13 January 2022 letter in which the Prosecution gave a non-exhaustive list of 124 alleged incidents extracted from open sources "to provide a sample of concrete examples of allegations within the jurisdiction of the Court" that were "of a nature and gravity similar to those that the Office has relied upon in reaching its determination with respect to the treatment of persons in detention: 13 January 2022 letter, pp. 11-19 (Annex II).
[69] ICC-02/18-16-Conf-Exp-AnxA ("Article 18(1) Notification").
[70] *See above* paras. 8-13.

A.2 The Chamber applied a correct standard of specificity to the article 18(1) notification

30. The Chamber correctly found that the information provided by the Prosecution to the GoV was sufficiently specific for the latter to seek deferral of the investigation.[71] The Chamber relied on the Prosecution's "multiple exchanges with Venezuela", including the Prosecution's Article 18(1) Notification and 13 January 2022 letter[72] responding to the GoV's request of 3 January 2022 for further information pursuant to rule 52(2) regarding the acts which would be the object of the Prosecution's investigation.[73] The GoV submits that the Chamber: erroneously characterised, and relied upon, information provided in the 13 January 2022 letter as a *second* article 18(1) notification;[74] and erroneously accepted the open-source reports of hypothetical cases in the 13 January 2022 letter as amounting to sufficiently specific information for the purposes of article 18(1).[75] The Prosecution respectfully disagrees. The GoV's submissions adopt an artificially narrow reading of the relevant provisions of the Statute and Rules. In any event, the alleged errors would not have had a material impact on the Decision.

A.2.a. The Chamber correctly considered the information in the 13 January 2022 letter

31. First, the GoV submits that the *Philippines* Appeals Judgment supports the notion that it is *solely* the article 18(1) notification which forms the basis of the State's assessment of its domestic investigations.[76] This is incorrect. The Appeals Chamber held only generally that it is the "information provided in the notification to States" that is relevant to the State discharging its burden of proof that it is carrying or has carried out relevant investigations.[77] In the *Philippines* situation, it found that the general parameters of the situation were defined *both* by the Pre-Trial Chamber's article 15 decision and the Prosecution's notification to the Philippines under article 18(1) of the Statute.[78] It also considered the information provided in the Prosecution's article 18(2) request, to conclude that the Philippines had received sufficiently specific details of the Prosecution's intended investigation.[79] The Appeals Chamber thus accepted that details of the parameters of the Prosecution's intended investigation may be conveyed elsewhere than in the Prosecution's article 18(1) notification. It prioritised the content of the information provided to the State over its form. The Chamber in this situation likewise correctly focused its inquiry in this manner.[80]

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[71] Decision, paras. 68-80.
[72] 13 January 2022 letter.
[73] ICC-02/18-16-Conf-Exp-AnxC ("GoV Rule 52(2) Request").
[74] Appeal, paras. 43-56. The GoV labels it a "Second Article 18(2) Notification". However, this appears to be a typographical error, as the Chamber referred to it as the "Second Article 18(1) Notification".
[75] Appeal, paras. 57-61.
[76] Appeal, para. 44.
[77] *Philippines* Article 18(2) Judgment, paras. 74-75.
[78] *Philippines* Article 18(2) Judgment, para. 107.
[79] *Philippines* Article 18(2) Judgment, paras. 107, 191-192.
[80] Decision, paras. 79-80.

32. Second, the Court's legal framework does not envisage the article 18(1) notification to constitute the sole source of information relevant to a State seeking to exercise its article 18(2) right. The Prosecution is required to provide information in its article 18(1) notification that may be relevant for the purposes of article 18(2), including information about the alleged criminal acts and the groups or categories of individuals believed to be responsible.[81] The Court's legal texts also provide for dialogue and exchange of information between the Prosecution and the State seeking deferral in this process.[82] Thus, rule 52(2) provides that the State may request from the Prosecution additional information to assist it in the application of article 18(2). Further, rule 53 states that the Prosecution may request additional information from the State in connection with the State's deferral request. These provisions demonstrate that the process of determining whether a deferral is warranted is not strictly confined to the terms of the intended investigation as expressed by the Prosecution in its article 18(1) notification.[83] It may be further elucidated in subsequent communications with the State under rule 52(2). Notably, rule 52 itself is entitled "Notification provided for in article 18, paragraph 1" and contains sub-rules 52(1) and (2), demonstrating that the information provided pursuant to both sub-rules form part of or are relevant to the article 18(1) notification.

33. Third, the Prosecution respectfully submits that the GoV's arguments as to prejudice are not established.[84] The Prosecution provided the GoV with the 13 January 2022 letter one month after it sent its Article 18(1) Notification on 16 December 2021. It allowed the GoV a three-month extension to respond to the Notification, which the Government did in April 2022.[85] Thus, after receiving the 13 January 2022 letter, the GoV had two months to determine the terms in which it would frame its deferral request. Moreover, after receiving the 13 January 2022 letter, the GoV demonstrated that it understood the scope of the Prosecution's intended investigation in order to seek a deferral under article 18(2). [REDACTED].[86] The Prosecution had also informed the GoV of the potential cases assessed during the PE and the parameters of the situation on several occasions before sending its Article 18(1) Notification.[87]

[81] *Philippines* Article 18(2) Judgment, para. 106.
[82] ICC-02/17-165 ("*Afghanistan* Rule 55(1) Decision"), para. 16.
[83] *Contra* Appeal, para. 47.
[84] Appeal, paras. 60-61.
[85] Deferral Request.
[86] [REDACTED].
[87] *See e.g.* 2 October 2020 letter and Request for Information (VEN-OTP-00001988).

A.2.b. The Pre-Trial Chamber correctly relied upon the open-source information in the 13 January 2022 letter and found that the GoV received sufficiently specific information

34. First, the GoV submits that the "sample acts" annexed to the 13 January 2022 letter could not provide notice of the alleged incidents which the Prosecution intended to investigate.[88] In its 13 January 2022 letter, the Prosecution annexed a table of alleged incidents extracted from open sources "to provide a sample of concrete examples of allegations within the jurisdiction of the Court" and which "reflect allegations that are of a nature and gravity similar to those that the Office has relied upon in reaching its determination with respect to the treatment of persons in detention".[89] The Prosecutor "invit[ed] the Government of Venezuela to inform [the] Office of any national proceedings that it has undertaken with respect to alleged acts against persons in detention set out in such publicly available sources, as well as any other proceedings that the Government of Venezuela considers relevant, and to describe the scope and progress of those proceedings […]".[90] These statements demonstrate that the Prosecution considered these incidents described in open-source reporting (along with others) as relevant to assessing whether the GoV was carrying out investigations that would warrant a deferral.[91]

35. Second, the article 18(1) notification serves the limited purpose of enabling a State to exercise its right to request a deferral of the investigation and provide supporting material.[92] The notice therefore does not require a level of detail which identifies all possible crimes, perpetrators and incidents. Nor would it be possible since the Prosecution would have only just opened its investigation. Rather, the Prosecution will rely on the limited information gathered during the preceding PE stage, which is aimed at determining whether there is a reasonable basis to believe that "a crime" has been committed in order to proceed with an investigation.[93] Thus, at the article 18(1) stage the Prosecution will only be able to identify the parameters of the potential investigation and the *potential cases* that are *illustrative* (or "representative enough"[94]) of the criminality in the situation to allow comparison with the State's investigations.[95] These potential cases are shaped by: (i) the groups of persons involved, and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that

[88] Appeal, paras. 57-58.
[89] 13 January 2022 letter, p. 5 and pp. 11-19 (Annex II).
[90] 13 January 2022 letter, p. 5.
[91] *Contra* Appeal, para. 51.
[92] Decision, para. 77.
[93] ICC-01/09-19-Corr ("*Kenya* Article 15 Decision"), paras. 49-50; ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15 Decision") paras. 191, 204; ICC-01/15-12 ("*Georgia* Article 15 Decision"), paras. 37, 39; ICC-01/17-9-Red ("*Burundi* Article 15 Decision") para. 143.
[94] Decision, para. 77.
[95] *Kenya* Article 15 Decision, para. 48; *Côte d'Ivoire* Article 15 Decision, paras. 191, 204; *Georgia* Article 15 Decision, paras. 37, 39; *Burundi* Article 15 Decision, para. 143. *See also* Complementarity Expert Paper, fn. 10; ICC-02/17-138 ("*Afghanistan* Article 15 Judgment"), para. 59.

are likely to be the focus of an investigation.[96] As to the former, Chambers have stressed that "[i]n considering the groups of persons likely to be the object of the investigation, the […] assessment 'should be general in nature and compatible with the pre-investigative stage'".[97] The Prosecution's prerogative to investigate criminality post-dating the opening of an investigation also confirms that the article 18(1) notification is not expected to capture all potential cases that the Prosecution intends to investigate.[98]

36. Accordingly, while the Prosecution will outline the relevant parameters of its intended investigation, it will not be able to comprehensively or exhaustively enumerate specific cases or identify specific targets. The Prosecution may also limit the information it provides if necessary, *inter alia*, to protect victims and witnesses in accordance with its statutory duty.[99] As the Pre-Trial Chamber found, and the Appeals Chamber has confirmed,[100] the Prosecution must provide information that is *specific enough* for the State to exercise its right under article 18(2),[101] while carefully balancing the Prosecution's duty to protect persons, sources or information.[102] The Chamber correctly found that the Prosecution had complied with these requirements and informed the GoV of the relevant parameters of its intended investigation. This included the categories of alleged crimes it had identified, the alleged State policy pursuant to which they had been committed and their systematic nature, and the perpetrator groups allegedly responsible.[103]

37. Third, the absence of judicial authorisation to open the investigation in this State Party-referred situation does not mean that the article 18(1) notification must contain a higher degree of specificity as to the scope of the intended investigation.[104] The Statute and the Rules do not support this assertion, and the *Philippines* Appeal Judgment did not impose any such requirement.[105] Rather, the sufficiency of detail given under article 18(1) must be assessed on a case-by-case basis,[106] taking into account the need to withhold certain information to protect

[96] *Burundi* Article 15 Decision, para. 143; *Georgia* Article 15 Decision, para. 37; *Kenya* Article 15 Decision, paras. 50, 59; *Côte d'Ivoire* Article 15 Decision, para. 191. *See also* Decision, paras. 64-65. Even if in *Afghanistan* the Appeals Chamber ruled that Pre-Trial Chambers need not assess complementarity as part of an article 15(4) assessment, it did not rule on the complementarity test. In *Philippines* the Appeals Chamber has upheld its application at the article 18 stage: *Philippines* Article 18(2) Judgment, paras. 101-110, 211-213.
[97] *See e.g* ICC-01/13-111 ("*Comoros* Third Review Decision"), para. 19; *see also* para. 41.
[98] *See below* para. 108.
[99] Articles 18(1) and 68, Statute.
[100] *Philippines* Article 18(2) Judgment, para. 107.
[101] Decision, para. 77.
[102] Decision, para. 78.
[103] Article 18(1) Notification; VEN-OTP-00001988; VEN-OTP-0002-6873; ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.
[104] *Contra* Appeal, para. 48.
[105] *Philippines* Article 18(2) Judgment, paras. 191-193.
[106] Decision, para. 78; *see above* para. 31.

victims and witnesses.[107] In this situation, the Chamber was satisfied that the GoV received sufficiently detailed information, including through the Article 18(1) Notification, the 13 January 2022 letter, and the annexed sample of alleged criminal incidents from open sources which identified victims and provided dates and locations of incidents.[108] The Chamber's finding was limited to the circumstances of this situation, and does not mean that the Prosecution must identify victims in every article 18(1) notification.

38. Fourth, the GoV submits that the Chamber needs greater detail to formulate a reasoned decision under article 18(2).[109] The Prosecution respectfully disagrees. The Chamber's decision under article 18(2) is based on the Prosecution's application under article 18(2) and not on its notification to States under article 18(1). The Chamber in this case correctly appreciated the contours of the Prosecution's intended investigation without difficulty.

39. Fifth, the Prosecution submits that the Chamber did not impose asymmetrical standards on the Prosecution and the GoV by requiring the GoV to produce evidence substantiating its investigation of the cases falling within the parameters described by the Prosecution.[110] A State's article 18(2) deferral request serves a different purpose than the Prosecution's article 18(1) notification. The State has full access to and awareness of the domestic cases that fall within the parameters described by the Prosecution.[111] It must provide in support of its deferral request "'material capable of proving that an investigation or prosecution is ongoing' such as 'directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file […]'".[112] It is also irrelevant whether the Prosecution's parameters are supported by reference to a sample of cases from open-source information or obtained through other means. Once the Prosecution has identified the parameters of its intended investigation, including by provisionally identifying potential cases, the State must provide information of specific domestic investigations and prosecutions that fall within those parameters.

40. Finally, the Prosecution respectfully submits that even if the Chamber had erred in considering the information in the 13 January 2022 letter and finding that it, together with the Article 18(1) Notification, provided sufficient notice to the GoV of the scope of the Prosecution's intended investigation, this would not have had any impact on the Decision.[113] The GoV fully exercised its right to provide information during the PE, in its Deferral Request

[107] Article 18(1), Statute; Decision, para. 78.
[108] Decision, paras. 79-80.
[109] *Contra* Appeal, para. 48.
[110] *Contra* Appeal, para. 60.
[111] *See above* paras. 21-23.
[112] Decision, para. 88, citing *Philippines* Article 18(2) Decision, para. 15.
[113] *Contra* Appeal, paras. 60-61.

and subsequently up until 22 March 2023. It provided approximately over 30,000 pages of supporting material.[114] [REDACTED]. Even if the Pre-Trial Chamber had required the Prosecution to provide more specific information for the purposes of its article 18(1) notification, the information concerning domestic investigations and prosecutions provided by the GoV did not sufficiently mirror the Prosecution's intended investigation. The Prosecution can confirm this since it has assessed the totality of the information provided by the GoV, including proceedings related to crimes beyond those assessed during the PE and the 124 incidents described in the 13 January letter.[115] Finally, the GoV has not submitted that it is or was investigating other potentially relevant cases which it excluded from its submissions because of doubts about their relevance to the scope of the Prosecution's intended investigation. The Prosecution respectfully submits that this sub-ground should be dismissed.

A.3 The Chamber correctly found the Prosecution had no deadline to request a deferral

41. The GoV submits that the Chamber erred in law in finding that the Prosecution had no deadline for filing an article 18(2) application and that accordingly, the Prosecution was out of time to submit its application.[116] The Prosecution respectfully disagrees with the GoV's interpretation of article 18, and requests the Appeals Chamber to dismiss this sub-ground.

42. First, as the Chamber correctly stated, article 18(2) does not stipulate any time frame within which the Prosecution must seise the Pre-Trial Chamber to determine a State's deferral request.[117] This does not mean that the Prosecution considers this an 'open-ended' timeframe.[118] The Prosecution must act expeditiously to resolve deferral requests and did so in this instance, as recognised by the Chamber.[119] Moreover, the Prosecution has an interest in resolving article 18(2) deferral requests expeditiously. Having just opened an investigation and then suspending action pending resolution of the deferral request,[120] as it had in this situation, the Prosecution is motivated to proceed at an appropriate pace to resume the investigation, if justified. A deadline is unnecessary in these circumstances.

43. Second, article 18(3) does not impose a six-month deadline for the Prosecutor to file an article 18(2) application.[121] Article 18(3) states that Prosecutor may review the deferral to a State's investigation *six months after the date of deferral* or at any other time when there has been a significant change of circumstances. It therefore stipulates the minimum period after

[114] *See above* paras. 8-13.
[115] *See* Annex A to this Response.
[116] Appeal, paras. 62-65. *See* Decision, para. 57.
[117] Decision, para. 57.
[118] *Contra* Appeal, para. 64.
[119] Decision, para. 58.
[120] *See above* para. 24.
[121] *Contra* Appeal, para. 62.

which the Prosecutor may review whether it is warranted to continue the deferral, once it has been established that there are relevant domestic investigations that warrant the deferral.[122] This requires an active decision by the Prosecutor whether to defer after assessing the material provided by the State, and if it considers deferral is not warranted, a decision by the Pre-Trial Chamber seised by the Prosecution under article 18(2). The deferral is not automatically triggered as soon as a State requests a deferral, as shown above.[123] In this situation, there had been no deferral from which the six-month period in article 18(3) would have started to run: the Prosecution did not consider a deferral was warranted, prompting it to seise the Chamber pursuant to article 18(2). The Chamber concurred, leading it to authorise the resumption of the Prosecution's investigation. The Prosecution clarified its interpretation of these provisions in its communications with the GoV.[124]

44. Finally, even if the Chamber had erred, the Prosecution submits that this error would not have had any impact on the Decision.[125] It is unclear from the Appeal how the Chamber would have decided the Article 18(2) Request differently had a six-month deadline applied for its filing. If it is suggested the Chamber would have declined to entertain the Prosecution's Article 18(2) Request, this would be incongruous with the goals of complementarity, the interests of burden-sharing between States and the Court, and the process of dialogue and exchange envisaged in article 18, as recognised by Chambers.[126] And even if the Chamber had rejected the Prosecution's Article 18(2) Request for being filed out of time, the Prosecution would have been able to bring its request under article 18(3) seeking a review of the deferral and relying on the same grounds as in its Article 18(2) Request. A six-month deadline would therefore not have prevented the Prosecution from bringing the issues to the Chamber to request its authorisation to continue the investigation.

45. The Prosecution respectfully requests the Appeals Chamber to dismiss Ground 1 of the Appeal.

B. Ground 2: The Chamber reasonably relied on a representative sample of case files

46. The main issue raised in Ground 2 is whether the Chamber erred in its Decision by relying solely on the English translations of a sample of 62 case files, comprising copies of court records and records of investigative steps which the GoV considered were representative of its

[122] *Philippines* Article 18(2) Judgment, para. 220. *See also above* para. 24.
[123] *See above* paras. 24-25.
[124] Article 18(1) Notification, p. 3; 13 January 2022 letter, pp. 5-7.
[125] *Contra* Appeal, para. 65.
[126] *Afghanistan* Rule 55(1) Decision, para. 16.

proceedings and essential to its Deferral Request. The GoV submits that the Chamber should have considered other material (in particular, the GoV's Summaries which had been translated into English by the Prosecution, and the 13 Annexes to the GoV's Observations), or alternatively requested the Prosecution to translate all the material into one of the Court's working languages. The GoV also submits that the Decision is unreasoned and that the Chamber's directions to the GoV were unclear. Finally, the GoV submits that the Chamber should have considered the MoU of 3 November 2021 between the OTP and Venezuela.

47. As shown below, the Decision is reasonable and correct. The Prosecution respectfully submits that Ground 2 should be dismissed for the following reasons:

- First, the Chamber correctly relied on copies of case files, containing court records and records of investigative steps, as relevant substantiating information. The remaining material transmitted by the GoV could not prove the existence of ongoing investigations or prosecutions. The Decision was adequately reasoned and consistent with the Court's jurisprudence.
- Second, the Chamber reasonably relied on English translations of a representative sample of 62 case files, rather than asking the Prosecution (or the GoV) to provide further translations. The GoV itself provided the sample of cases for the Chamber to review, and acknowledged its representativeness. The Chamber drew appropriate inferences from that sample. It also issued adequate directions to the parties.
- Third, the MoU is unrelated and irrelevant to the complementarity assessment required under article 18, which must be conducted based on the facts "as they exist" at present. The Chamber did not err by not considering it in its assessment.

48. Most significantly, the Prosecution respectfully submits that the GoV's submissions do not demonstrate any error that would have materially impacted the Decision. Even if the Chamber had erred in respect of the issues raised by the GoV in Ground 2, the Chamber's conclusion would have been the same. If the Chamber had considered the totality of the material provided by the GoV (in Spanish or in English) and the MoU, it would still have concluded that the Venezuelan domestic criminal proceedings did not sufficiently mirror the scope of the Prosecution's intended investigation.[127] The Chamber's Decision was based on two determinative factors that affected all the domestic investigations and prosecutions, 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. Neither of these would have changed upon a review of the entirety of

[127] Decision, para. 130.

the material. As shown below, the GoV's submissions in Grounds 4 and 5 relating to these specific factors further confirm the lack of impact of any purported error.[128]

49. Another reason why any alleged error would not have materially impacted the Decision is because the 62 case files translated into English and assessed by the Chamber were, [REDACTED], a "representative" sample of the Venezuelan proceedings.[129] They related to approximately half of the 124 incidents (amounting to 118 cases) which the Prosecution listed in its 13 January 2022 letter.[130] The Chamber could draw adequate inferences about the features of the Venezuelan domestic proceedings from these representative samples.

50. The Prosecution also assessed *all* the material transmitted by the GoV (in both English and Spanish), and reached the same conclusion, as set out in the charts annexed to its Article 18(2) Request and its Response to the GoV's Observations. To assist the Appeals Chamber, in Annex A to this response, the Prosecution provides an updated version of these charts. In Annex B, it provides a chart reflecting the cases for which court records and records of investigative steps were provided by the GoV.[131]

51. The Prosecution respectfully submits that Ground 2 should be dismissed.

B.1 The Chamber correctly considered court records and records of investigative steps taken as relevant substantiating documentation

52. The Chamber's decision to only consider copies of case files including court records and records of investigative steps taken in the context of domestic criminal proceedings was adequately reasoned, reasonable and consistent with the Court's jurisprudence.[132] After recalling the jurisprudence,[133] the Chamber observed that since "the translated material transmitted by the Prosecution and the material contained in the annexes attached to the Venezuela's Observations do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela, they cannot be relied upon as relevant substantiating documents for the determination of the Chamber".[134] It concluded that "for the

[128] *See* Prosecution's response to grounds 4 and 5, *below* paras. 102-145.
[129] [REDACTED].
[130] Of the 62 cases, 59 relate to the 124 incidents (118 cases) mentioned in the 13 January 2022 letter, pp. 11-19.
[131] Annex A to this Response is an updated version of Annex B to the Article 18(2) Request and Annex A to the Prosecution Response. It incorporates the Prosecution's assessment of the Translated Material of 22 March 2023. Annex B to this Response contains the 204 cases for which the GoV has provided court and investigative records. It highlights: (i) in yellow the cases that correspond to the 124 incidents referred to in the 13 January 2022 letter (85 cases); (ii) in blue the cases for which English translations were provided (62 cases); and (iii) in orange the five cases which the GoV seeks to admit on appeal. In case of overlap between categories (i) and (ii), the latter prevails and the case is highlighted in blue. The categories can also be identified by searching in column Q "Submissions", the categories of (i) OTP incidents, (ii) Translated Material, and (iii) Additional Evidence.
[132] In this response the Prosecution first addresses the GoV's arguments in Ground 2.2 at paras. 83-91 (*see* this Section B.1) and secondly, responds to the GoV's arguments in Ground 2.1. at paras. 67-82 (*see below* Section B.2). It will also respond to para. 86 of the Appeal in Section B.2 below.
[133] Decision, para. 88 referring to *Philippines* Article 18(2) Decision, para. 15, referring to previous jurisprudence; *see also* Decision, para. 66.
[134] Decision, para. 88.

purpose of its analysis, [it would] focus on the material deemed most essential by Venezuela that consists of court records and other records of investigative steps taken in the context of domestic criminal proceedings".[135]

53. The Chamber's conclusion that only the latter category of information, namely, court records and records of investigative steps taken in the context of the Venezuelan proceedings, was capable of proving whether domestic investigations or prosecutions were ongoing was reasonable and correct. While the GoV submits that the Chamber erred in its approach, the Prosecution respectfully disagrees with the GoV's interpretation of the Decision and the Court's jurisprudence.

54. First, the Decision was adequately reasoned and clearly identified the basis of the Chamber's conclusion.[136] The Chamber relied on the Court's jurisprudence which has consistently underscored that a State must submit relevant substantiating documentation to enable a Chamber to conduct its complementarity inquiry and to determine whether progressive investigative steps are being taken in the context of criminal proceedings.[137] Given the material provided by the GoV, the Chamber reasonably did not rely on: (i) the GoV's Summaries which had been translated by the Prosecution, and (ii) the 13 Annexes to the GoV's Observations.[138] The Chamber's approach was reasonable and correct because:

- The 112 Summaries of cases prepared by the GoV contained limited information regarding the cases, such as case file numbers, victims, suspects (if identified), legal qualifications, short descriptions of the relevant facts, and investigative and judicial steps taken. No underlying evidence collected or any court records that would support the information in the Summaries were provided.[139]
- The 13 Annexes to the GoV's Observations contained: (i) correspondence between the Office and the GoV;[140] (ii) memoranda attaching tweets, photographs and press articles

[135] Decision, para. 89 (referring to fns. 32 and 168 which cite the Translated Material).
[136] *Contra* Appeal, paras. 85, 90. The Appeals Chamber has held that "'[t]he extent of the reasoning will depend on the circumstances of the case'. Such reasoning 'will not necessarily require reciting each and every factor that was before the […] Chamber to be individually set out, but it must identify which facts it found to be relevant in coming to its conclusion.' 'Relatively sparse' reasoning will not amount to an error if it is nonetheless 'sufficiently clear to discern the basis' for the finding challenged on appeal". ICC-01/14-01/21-111-Red ("*Said* Restrictions AD"), para. 45, and jurisprudence cited therein.
[137] Decision, para. 88; *see also* Philippines Article 18(2) Judgment, paras. 71-79, 106.
[138] Decision, paras. 82, 88. *Contra* Appeal, paras. 83-85. The Prosecution understands the GoV's reference to the "summaries prepared by the OTP of records transmitted by the RBV" means the Prosecution's translations of the GoV's Summaries provided in the Ninth, Tenth and Eleventh Submissions.
[139] Note however that the GoV provided court and investigative records for 28 of the cases in the Translated Materials, which were considered by the Chamber: *see* Annex B to this response: Cases No.57; No.53; No.3; No.68; No.61; No.34; No. 812; No.467; No.52; No.11; No.16; No.172; No.525; No.369; No.132; No.195; No.163; No.115; No. 339; No.46; No.60; No. 59; No.35; No.58; No.38; No.111; No.9; No.341.
[140] 13 Annexes: Annex 1 [REDACTED], Annex 2 [REDACTED].

unrelated to the domestic proceedings;[141] (iii) information about the Human Rights Directorate;[142] (iv) an "interview report" of a person who had been detained for over four years who asserted that his due process rights were respected;[143] (v) tables and lists with limited information;[144] and (vi) the Summaries already provided in the Ninth, Tenth, Eleventh, Thirteenth and Fourteenth Submissions.[145] The lists and tables in Annexes 10 to 12 were not accompanied by original court records or samples of evidence supporting the information. The interview report in Annex 9 related to a victim but not to any investigation of suspects. The Prosecution nevertheless assessed this information in its Response to the GoV's Observations, and considered that it did not alter its earlier assessment. For similar reasons, the information would not have affected the Decision.[146]

55. Accordingly, the Chamber correctly found that the Summaries did not include "original police or court records" and that the 13 Annexes were "often unrelated to any domestic investigation in Venezuela". It reasonably decided not to rely on them for its determination because the material did not assist the Chamber's inquiry regarding the existence of ongoing investigations and prosecutions. Instead, the Chamber reasonably considered that only the case files containing copies of court records and other records of investigative steps taken in the context of domestic criminal proceedings were relevant to the Chamber's inquiry. [147]

56. Second, the Chamber's approach accords with the Court's jurisprudence.[148] Chambers have consistently held that a State must "provide the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case".[149] It must show that "tangible, concrete and progressive investigative steps" have been undertaken.[150] As the Chamber recalled,[151] this requires "any material capable of proving that an investigation or prosecution is ongoing", such as "evidence on the merits of the national case that may have been collected as part of the purported domestic investigation to prove the

[141] 13 Annexes: Annex 3 [REDACTED], Annex 4 [REDACTED], Annex 5 [REDACTED], Annex 6 [REDACTED], Annex 7 [REDACTED].
[142] 13 Annexes: Annex 8 ("[REDACTED]," in English and Spanish).
[143] 13 Annexes: Annex 9.
[144] 13 Annexes: Annex 10 ("[REDACTED]"), Annex 11 ("[REDACTED]"), Annex 12 [REDACTED].
[145] 13 Annexes: Annex 13.
[146] Prosecution Response to GoV's Observations, paras. 42-46, 49.
[147] Decision, paras. 88-89.
[148] *Contra* Appeal, paras. 83, 89.
[149] *Philippines* Article 18(2) Decision, para. 14, citing ICC-01/09-02/11-274 ("*Muthaura et al.* Admissibility AD"), paras. 2, 61, 68; ICC-01/11-01/11-344-Red ("*Gaddafi* First Admissibility Decision"), para. 54; *Afghanistan* Article 18(2) Decision, para. 45; *see also* para. 56.
[150] *Philippines* Article 18(2) Decision, para. 14, fn. 52 citing *inter alia* *Afghanistan* Article 18(2) Decision, para. 45, ICC-02/11-01/12-47-Red ("*Simone Gbagbo* Admissibility Decision"), paras. 30, 65; ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility AD"), para. 122; *Burundi* Article 15 Decision, para. 148; *Al-Senussi* Admissibility Decision, para. 161; *Gaddafi* First Admissibility Decision, para. 55.
[151] Decision, para. 88.

alleged crimes" but also "depending on the circumstances, directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]".[152] These may include "police reports, charges or other official allegations, copies of evidence, referrals to prosecutors or other bodies, relevant court filings and court records, of incidents within the Court's authorised investigation".[153] Such information is capable of assisting a chamber to determine the existence and contours of any ongoing investigations and prosecutions.

57. The Chamber's decision to only rely on copies of court records and records of investigative steps fully aligns with these principles. In the *Philippines* situation, the same Pre-Trial Chamber likewise relied on court filings and records from trial courts, including evidence collected by domestic prosecution services.[154] It declined to rely on charts and lists of cases with limited information which did not attach underlying documentation of the investigative activities taken. This was because such material did not allow it to assess whether any concrete and progressive investigatory steps or prosecutions were being undertaken by competent national authorities in respect of those cases.[155] The Chamber also declined to rely on case files regarding potential victims rather than perpetrators since they did not relate to the conduct of the law enforcement agents involved,[156] and on media articles.[157] The Appeals Chamber upheld the Pre-Trial Chamber's assessment of this information and considered that its approach did not reflect the application of a heightened legal standard.[158]

58. The Pre-Trial Chamber's approach in this situation and in the *Philippines* is not new. In 2013, Pre-Trial Chamber I adopted the same approach in finding that the case against Mr Al-Senussi was inadmissible before the Court. The Pre-Trial Chamber relied on items of evidence collected by the Libyan judicial authorities as part of their domestic investigations[159] and on

[152] ICC-01/11-01/11-239 ("*Gaddafi* Further Submissions Decision"), para. 10-11; ICC-02/11-01/12-44 ("*Simone Gbagbo* Further Submissions Decision"), para. 7; *Philippines* Article 18(2) Decision, para. 15; *Simone Gbagbo* Admissibility Decision, para. 29. However, mere instructions to investigate were not considered sufficient: ICC-01/09-01/11-101 ("*Ruto et al*. Admissibility Decision"), para. 68.
[153] *Philippines* Article 18(2) Decision, para. 15; *see also* para. 92.
[154] *Philippines* Article 18(2) Decision, para. 92.
[155] *Philippines* Article 18(2) Decision, paras. 34, 43, 74, 75, 79-81, 88-90.
[156] *Philippines* Article 18(2) Decision, para. 91.
[157] *Philippines* Article 18(2) Decision, paras. 58, 95.
[158] *Philippines* Article 18(2) Judgment, paras. 123-125, 128-129.
[159] *Al-Senussi* Admissibility Decision, paras. 101-148 (relying on items such as witness statements, flight documents, medical documents and written orders issued by Al-Senussi and transcripts of intercepted telephone communications); *see also* para. 98 (transcript of a speech of Mr Al-Senussi to a group of followers),

court records[160] which Libya had translated and provided in English.[161] The Appeals Chamber upheld the decision.[162] In 2014, Pre-Trial Chamber I in the *Simone Gbagbo* case considered court records and records of the limited investigative steps taken to find the case against her admissible before the Court.[163] The Appeals Chamber also upheld that decision.[164]

59. The Prosecution submits that the jurisprudence cited by the GoV confirms the correctness of the Chamber's approach that court records and evidence collected in the context of domestic investigations are necessary for a chamber's complementarity assessment.[165] In clarifying the concept of 'evidence' in the context of admissibility proceedings, the Pre-Trial Chamber in *Gaddafi* set out the same precedents recalled and applied by the Chamber in the Decision.[166] The *Gaddafi* Pre-Trial Chamber confirmed that "[a]s for the evidence on the merits of the domestic case, provision to the Chamber of *samples of such evidence is necessary*".[167] It referred to "witness statements, intercept evidence, speeches of Mr Gaddafi, [and] telephone calls of Mr Gaddafi," as examples of evidence on the merits of the domestic case collected by Libya "as part of the domestic investigation," but reasonably declined to take in the abstract a "position at this stage as to its probative value".[168]

60. The GoV submits that its press articles and tweets should have been considered based on this precedent. However, such material cannot be considered to relate to, or have been collected in the context of concrete domestic proceedings.[169] Moreover, while the *Gaddafi* Pre-Trial Chamber disagreed with the Defence's contention that the summaries of witness statements were akin to mere "assertions of a State" and have "some probative value", it noted that "in the absence of the actual text of the statements, it is not possible to determine whether the summaries accurately reflect the content of the actual statements".[170] It concluded that "the

[160] *Al-Senussi* Admissibility Decision, paras. 156-157 (referring to minutes of a hearing before the Accusation Chamber to which the case had been transferred). Other material translated into English such as summaries of witness statements, opinions, letters, memorandum and speeches of a UN staff member were generally considered irrelevant or unable to assist in the Pre-Trial Chamber's determination of whether steps were taken to investigate the same case as the ICC: *Al-Senussi* Admissibility Decision, paras. 83-97, 99-100, 149-155.
[161] ICC-01/11-01/11-307-Red2 ("*Al-Senussi* Admissibility Challenge"), pp. 95-97 (listing all the annexes).
[162] ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), paras. 70-123
[163] *Simone Gbagbo* Admissibility Decision, paras. 50-78.
[164] *Simone Gbagbo* Admissibility AD, paras. 81-140.
[165] Appeal, para. 89.
[166] *Compare* *Gaddafi* Further Submissions Decision, paras. 10-11 *with* Decision, para. 88 (recalling that "relevant substantiating documentation should include any 'material capable of proving that an investigation or prosecution is ongoing' such as 'directions, orders and decisions issued by authorities in charge […] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]'").
[167] *Gaddafi* Further Submissions Decision, para. 12 (emphasis added).
[168] *Gaddafi* Further Submissions Decision, para, para. 12; *contra* Appeal, para. 89 (stating that a Chamber relied on "photographs and media reports comprising evidence (i.e., speeches)") and in fn. 67 (citing the same decision).
[169] *See* 13 Annexes; *see* Decision, para. 88.
[170] *Gaddafi* First Admissibility Decision, paras. 121, 123; *contra* Appeal, para. 89 (stating that a Chamber relied on summaries of witness statements) and fn. 68 (citing the same decision).

scant level of detail and the lack of specificity of the summaries does not allow the Chamber to draw conclusions as to the precise scope of the domestic investigation".[171]

61. Likewise in the *Kenya* situation, the Pre-Trial Chamber observed in the *Muthaura et al.* case that of all the material transmitted by the Government of Kenya, only three annexes were of "some direct relevance to the investigative process alleged by the Government of Kenya".[172] It also concluded that the Government of Kenya had "presented no concrete evidence of such steps" and that "its challenge relied mainly on judicial reform actions and promises for future investigative activities".[173] Further, merely because the Pre-Trial Chamber in those cases found the Government of Kenya's assertion that "the six suspects are currently being exhaustively investigated" plainly insufficient to prove that the suspects were indeed being investigated[174] does not mean that the GoV's reports, lists and summaries may be relied on to discharge its burden; the Chamber was correct to find that they cannot. Moreover, the *Kenya* precedents—requiring evidence of a sufficient degree of specificity and probative value—have been applied beyond that factual scenario.[175] Chambers have consistently relied on this case law to assess diverse material submitted in different factual contexts such as *Côte d'Ivoire*,[176] *Libya*,[177] *Afghanistan*[178] and most recently the *Philippines*.[179] The *Kenya* precedents are applicable in this situation.[180]

62. In sum, whether certain documentation can prove the existence of ongoing domestic investigations and prosecutions (and their contours) is a case-specific determination that depends on the circumstances of each case. Evidence obtained in the context of domestic proceedings, or related court and police records, may be highly relevant and probative. Some degree of flexibility and discretion is afforded to judges. Some chambers have assessed material provided in a working language of the Court but considered them irrelevant or unhelpful and given them little or no weight. Others have focused on material found to be sufficiently probative. The reasonableness of the approach depends on the circumstances of each case.

63. In this instance, the Chamber's focus on the "relevance of the materials" "capable of proving that an investigation or prosecution is ongoing", rather than on "the form of the

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[171] *Gaddafi* First Admissibility Decision, para. 123; *see also* *Al-Senussi* Admissibility Decision, paras. 85-87.
[172] ICC-01/09-02/11-96 ("*Muthaura et al.* Admissibility Decision"), para. 60 and *Muthaura et al.* Admissibility AD, paras. 63-69. *Contra* Appeal, para. 89 and fn. 66.
[173] *Muthaura et al.* Admissibility Decision, para. 60.
[174] ICC-01/09-01/11-307 ("*Ruto et al.* Admissibility AD"), paras. 59-62; *Muthaura et al.* Admissibility AD, paras. 58-61.
[175] *Contra* Appeal, para. 89, fn. 63 (citing *Muthaura et al.* Admissibility AD, para. 61).
[176] *Simone Gbagbo* Admissibility AD, paras. 29, 128-131.
[177] *Gaddafi* First Admissibility Decision, para. 54; ICC-01/11-01/11-662 ("*Gaddafi* Second Admissibility Decision"), paras. 32-33.
[178] *Afghanistan* Article 18(2) Decision, para. 45.
[179] *Philippines* Article 18(2) Decision, para. 14.
[180] *Contra* Appeal, para. 89, fn. 63 (citing *Muthaura et al.* Admissibility AD, para. 61).

information" was correct.[181] It accorded with the principles in article 69(4) of the Statute and the Court's jurisprudence. It was also fairer to the State, since the Chamber did not take a blanket and formalistic approach to the material it reviewed. Instead, it considered the features and content of the material to determine if it was pertinent to the Chamber's complementarity assessment. The Chamber also correctly focused on material relevant to "proving that an investigation or prosecution is ongoing", and not on "the existence of criminal acts".[182] This is logical given that the focus of an inquiry under article 17 is whether there are genuine domestic proceedings and not whether the evidence is sufficient to convict a person. As held in *Gaddafi*, a "Chamber's finding as to the [former] would not be negated by the fact that, upon scrutiny, the evidence may be insufficient to support a conviction by the domestic authorities".[183] Finally, while article 61(5) of the Statute may allow for summary evidence to be presented in confirmation proceedings, it is inapposite to the type of material capable of proving the existence of ongoing domestic proceedings.[184]

64. Third, the GoV submits that the Chamber "applied its standard of evidence in an asymmetrical and arbitrary manner" by not requiring the Prosecution to provide in its article 18(1) notification the same type of information "to establish the existence of alleged criminal acts" as the GoV had to provide to establish that it was actively investigating such acts.[185] However, as explained in response to Grounds 1 and 4 (where similar arguments appear), in its article 18(1) notification, the Prosecution need not provide information to demonstrate that there is a reasonable basis proceed with an investigation under article 53(1) of the Statute. Nor must it identify the information that it assessed during the PE. Rather, the purpose of an article 18 notification is to inform States about the opening of the investigation and to provide information about its parameters in a sufficiently specific manner to enable one or more of them to request a deferral.[186] Additionally, a balance must be struck between this information and the Prosecution's duties of confidentiality and protection under the Statute. The latter will limit the amount of information that the Prosecution can provide.[187]

65. In sum, the Chamber's assessment of and reliance on "court records and other records of investigative steps taken in the context of domestic criminal proceedings" to reach its Decision was reasonable and correct. The Prosecution submits that the Chamber did not err, much less in a manner which would have materially impacted its Decision. Even if the Chamber had

[181] *Contra* Appeal, paras. 84, 87.
[182] *Contra* Appeal, para. 87; Decision, para. 88.
[183] *Gaddafi* First Admissibility Decision, para. 122.
[184] *Contra* Appeal, para. 84.
[185] Appeal, paras. 87-88.
[186] *Philippines* Article 18(2) Judgment, para. 107; *see also* *Philippines* Article 18(2) Decision, para. 16. *See also* paras. 35-36, 39 *above* and para. 108 *below*.
[187] Statute, art. 93(10)(b)(ii); Rules, rule 46.

considered the Summaries and the 13 Annexes to the GoV's Observations, or indeed the entirety of the Deferral Material (in English and in Spanish), it would have reached the same conclusion: the GoV has not and is not investigating or prosecuting factual allegations underpinning the contextual elements of crimes against humanity, and it has or is generally focusing on low-level/direct perpetrators. As such, its domestic proceedings do not sufficiently mirror the Court's intended investigation. In addition, the GoV has not and is not investigating or prosecuting the discriminatory intent relevant to the crime of persecution, nor sufficiently investigating or prosecuting crimes of rape and sexual violence. The Prosecution has reviewed the totality of the material (in both English and Spanish) and can confirm this conclusion.[188]

66. In sum, the Chamber reasonably relied on court records and records of investigative steps.[189] The Prosecution respectfully requests the Appeals Chamber to dismiss Ground 2.2.[190]

B.2 The Chamber was reasonable in considering a representative sample of case files in English instead of requiring the Prosecution to translate all GoV materials into English

67. The Chamber was reasonable in considering a representative sample of 62 case files, including court records and records of investigative steps translated into English by the GoV, to reach its Decision.[191] As noted, the GoV transmitted the files of 204 cases. These included 85 cases involving 124 of the sample incidents (amounting to 118 cases) which the Prosecution had referred to in its 13 January 2022 letter. Of these 85 cases, the GoV provided English translations of 62 case files (59 of which related to the 124 alleged incidents/118 cases), which [REDACTED] representative of the Venezuelan proceedings and "essential" to its Deferral Request.[192] The Prosecution submits that the Chamber did not err in its approach.

68. First, [REDACTED] the 62 case files constituted a "representative group [REDACTED].[193] From this representative sample of files, the Chamber could draw appropriate inferences about the features and scope of the Venezuelan proceedings. This approach accorded with how Chambers have approached complementarity assessments under article 19 in the context of a case. A State which challenges the admissibility of a case need not provide *all* the evidence collected or *all* the court records related to its domestic proceedings. Rather, a State can provide "samples" of this information.[194] Chambers may draw necessary inferences and decide on the admissibility of a case based on such samples of evidence and

[188] *See* Annex A to this Response.
[189] Decision, paras. 88-89.
[190] Appeal, paras. 83-91.
[191] Decision, para. 89 (referring to fns. 32 and 168, which relates to the Translated Material); *contra* Appeal, paras. 67-82 (Ground 2.1.) and 86.
[192] *See above* para. 13. *See* Annex B to this Response.
[193] [REDACTED].
[194] *See e.g.*, *Gaddafi* Further Submissions Decision, para. 12 (referring to "samples" of evidence on the merits of the domestic case); *Al-Senussi* Admissibility Challenge, para. 162 (Libya stated that it attached "[s]amples of evidential material that are specific and probative").

records provided, and need not assess the entirety of the material related to the relevant proceedings. By analogy, the same approach is appropriate for complementarity assessments in the context of a situation.

69. This approach is also consistent with other non-criminal proceedings before the Court. For example, Chambers in reparation proceedings follow a similar approach. In estimating the cost to repair the harms incurred by the victims (and in calculating a reparations award against the convicted person), Chambers have considered the harms suffered by a representative pool of victims and do not require that all victims and their harms be identified and assessed.[195] In this exercise, the sample must be sufficiently representative[196] and the convicted person must be able to provide observations on it.[197] Similarly here, the GoV provided the sample of cases and [REDACTED] of its broader pool of domestic proceedings.[198]

70. On appeal, the GoV submits that the translated records "did not reflect the totality of relevant investigations and prosecutions."[199] But [REDACTED][200] and as confirmed by the Prosecution's assessment, even if the court and investigative records of the 62 cases did not encompass the totality of the proceedings, they were representative of them. While the Chamber did not review the files of two (out of three) cases that could be prosecuted as rape, this would not have altered the Chamber's conclusion as to "the [GoV's] insufficient investigation of crimes of a sexual nature."[201] The number of three cases is patently below the number of possible cases of rape and other acts of sexual violence assessed by the Prosecution during the PE.[202] Moreover, the GoV has affirmed that it does not intend to prosecute other criminal conduct that could qualify as sexual and gender based crimes as such.[203] Instead, "[t]he remaining cases – more than 400 – are to be prosecuted as acts of cruel treatment, despite their sexual nature".[204] Likewise, just because the materials translated by the Prosecution may have constituted "only a very small fraction of the material presented by Venezuela" does not mean that all such untranslated materials were relevant to the Chamber's determination.[205] To the

[195] ICC-01/04-01/06-3379-Red-Corr-tENG ("*Lubanga* Reparations Award"), paras. 35, 36, 239-240, 244, 259, 279-281. The Appeals Chamber upheld this approach: ICC-01/04-01/06-3466-Red ("*Lubanga* Reparations Award AD"), paras. 2, 86-92, 221; *see also* ICC-01/04-02/06-2782 ("*Ntaganda* Reparations Appeal Judgment"), para. 10.
[196] *Lubanga* Reparations Award, para. 36; *Ntaganda* Reparations Appeal Judgment, para. 10.
[197] *Lubanga* Reparations Award AD, paras. 3, 90.
[198] [REDACTED].
[199] Appeal, para. 81.
[200] [REDACTED].
[201] Decision, para. 131. *See also* Article 18(2) Request, para. 108, fn. 219. Based on the information transmitted by the GoV, by the time it filed its Request, the Prosecution had identified two cases of rape.
[202] During the PE the Prosecution found a reasonable basis to believe that the security forces, at times with the involvement of the *colectivos*, committed different forms of sexual and gender-based violence, including rape, against more than 100 persons who were perceived or actual opponents of the GoV from at least April 2017 onwards: *see* Article 18(2) Request, para. 109.
[203] Decision, para. 124.
[204] GoV's Observations, para. 103, cited in Decision, para. 124.
[205] *Contra* Appeal, para. 79 citing Decision, para. 84.

contrary, only the last three Submissions (Twelfth to Fourteenth) contained court records and other records of investigative steps. Further, as noted, the Chamber considered the records of 62 cases—59 of which related to the 124 incidents (118 cases) referred to in the 13 January 2022 letter. [206]

71. Second, the Chamber did not err by not requiring the Prosecution to translate the GoV's material into one of the Court's working languages.[207] The Chamber reasonably held that "the requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution".[208] This matched the Chamber's holding that the State has the "onus" to provide the Court "with evidence of a sufficient degree of specificity and probative value".[209] The GoV submits that rule 54(1) and regulation 24(1) of the RoC place the burden of persuasion on the Prosecution, which should have filed (or been required to file) the GoV's material in one of the working languages. Yet, as confirmed by the *Philippines* Appeals Chamber, the State bears the burden of proof to demonstrate to the Prosecution and, if necessary the Pre-Trial Chamber, that the deferral is warranted.[210] To do so, and unless otherwise authorised, the State must provide its information in one of the Court's working languages, so that a chamber may assess in accordance with the procedure in article 18. The onus does not shift to the Prosecution, even though it files an article 18 application with the Chamber. This is because the material communicated pursuant to rule 54 remains that of the State.[211] As Pre-Trial Chamber II held in *Afghanistan*, "it is for the State 'to ensure that the Chamber can analyse the materials submitted in support of a request for deferral".[212] While the GoV submits both in this ground and sub-ground 1.1 that this precedent is "legally flawed",[213] the Prosecution respectfully disagrees. The *Philippines* Appeals Chamber also confirmed this approach.[214]

72. The Chamber's decision not to require the Prosecution (or the GoV) to provide further translations before issuing its Decision struck the right balance. It was reasonable, considering the GoV's burden of proof; that court and investigative records assessed by the Chamber in English were representative and deemed essential to the Deferral Request by the GoV; the large

[206] *See* Annex B to this Response, blue highlights.
[207] *Contra* Appeal, paras. 68-71.
[208] Decision, para. 86; *contra* Appeal, paras. 68-70.
[209] Decision, para. 66; *contra* Appeal, para. 71.
[210] *Philippines* Article 18(2) Judgment, para. 79; *see also* paras. 74-80, 107. *See also above* para. 20.
[211] *Philippines* Article 18(2) Judgment, para. 77. Significantly, the GoV itself acknowledges that it has the burden "to demonstrate that it is exercising jurisdiction by conducting investigations": Appeal, para. 38.
[212] *Afghanistan* Article 18(2) Decision, para. 50.
[213] *Contra* Appeal, para. 71. *See above* Section A.1.
[214] *Philippines* Article 18(2) Judgment, paras. 77, 79.

amount of irrelevant material provided by the GoV; and the Chamber's duty to ensure a fair and expeditious resolution of the Prosecution's Request following the Deferral Request.

73. Third, that a State requesting deferral under article 18 may often be in transition or be suffering from economic instability does not relieve it from translating the materials underpinning its deferral request.[215] 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.[216] The Prosecution had informed the GoV of the type of information it needed to provide, and had given examples in its Request for Information (RFI) dated 2 October 2020[217] and again in its letter to the GoV on 4 June 2022.[218] The GoV transmitted copies of court records and records of other investigative steps only in its last three Submissions, more than two months after it had sent its Deferral Request to the OTP.[219] Further, a State can always request that the one-month deadline in article 18(2) be extended to enable translation of relevant material; in this case, the GoV's deadline was extended for three months.[220]

74. Fourth, the Chamber did not err when it did not inform the parties before its Decision that the Deferral Material had to be in one of the Court's working languages.[221] Regulation 39(1) of the Regulations is clear. The Chamber was not obliged to advise parties of the applicable law. Further, rule 42 of the Rules and the annex to a non-binding 2003 OTP policy paper "on some policy issues" on "Referrals and Communications" are inapposite.[222] They do not relieve parties and participants from their obligation to provide the material filed with the Registry in one of the Court's working languages, unless otherwise authorised. The Pre-Trial Chambers adjudicating the *Afghanistan* and *Philippines* article 18 proceedings likewise did not instruct the States to provide supporting documentation in one of the Court's working languages before rendering their decisions under article 18.[223] This was notwithstanding that in *Afghanistan*, most of the material provided was in Dari or Pashto.[224]

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[215] *Contra* Appeal, para. 75.
[216] *Philippines* Article 18(2) Judgment, para. 79.
[217] VEN-OTP-0001-4304 at p. 6 (fn. 1); *see also* VEN-OTP-00001988 at p. 6 (fn. 1).
[218] VEN-OTP-0002-9793 at p. 2.
[219] In the Twelfth, Thirteenth and Fourteenth Submissions, the GoV submitted most of the copies of court records and records of investigative steps: VEN-OTP-00000081 to VEN-OTP-00000582, VEN-OTP-00000590 to VEN-OTP-00001966, VEN-OTP-00002066 to VEN-OTP-00002801.
[220] ICC-02/18-16, para. 6. *Contra* Appeal, para. 72. The GoV also erroneously submits that the Prosecution has a six-month deadline to file its article 18(2) request: *see above* Section A.3 (paras. 41-45).
[221] *Contra* Appeal, para. 73, referring to ICC-02/18-21 ("Conduct of Proceedings Order").
[222] *Contra* Appeal, para. 72.
[223] ICC-01/21-47; ICC-02/17-165, ICC-02/17-171, ICC-02/17-182, ICC-02/17-194.
[224] *Afghanistan* Article 18(2) Decision, para. 48.

75. To the extent that the issue of translations is linked to the legal question of which party bears the burden of proof, the Appeals Chamber has confirmed that a chamber need not set out its interpretation of the law at a specific time in the proceedings.[225] In any event, the consistent complementarity jurisprudence places the burden of proof squarely on the party challenging admissibility. In its Request, the Prosecution relied on this jurisprudence and argued that it applied to the article 18 process.[226] Pre-Trial Chamber I confirmed the Prosecution's understanding in the *Philippines* Article 18(2) Decision, which the GoV relied upon in its Observations.[227]

76. The Chamber was not misleading on the issue of translations either.[228] In its decision granting the GoV's request for an extension of time to file English translations of the records, the Chamber reasonably "encourag[ed] Venezuela to ensure that translations are provided only for those documents deemed essential to its Deferral Request".[229] This suggestion was consistent with the above jurisprudence, which allows a chamber to assess complementarity based on a sample of relevant substantiating information.[230] Furthermore, considering the large amount of information provided by the GoV in Spanish which was unrelated to criminal proceedings, the Chamber reasonably sought to assist the GoV by focusing the scope of its translations on a relevant sample. In *Afghanistan*, Pre-Trial Chamber II likewise noted that it would have been helpful if Afghanistan had explained "which of the materials [in Dari or Pashto] it regarded as being most important".[231]

77. Moreover, the Chamber did not limit the translations to those records solely related to the GoV's Observations. Rather, it included in this pool of material all the court records and records of investigative steps which had been communicated by the Prosecution in its Request under rule 54.[232] The Chamber was referring to this latter material when it encouraged the GoV to translate "those documents deemed essential *to its Deferral Request*".[233] In granting the extension of time requested by the GoV, it noted that there was no prejudice to the Prosecution because "the Prosecution has examined the material in its original language".[234] The Chamber's reference to the "material upon which Venezuela intends to rely in its Observations" does not

[225] The Appeals Chamber has held that, as a matter of law, there is no rule in the Court's legal framework requiring a trial chamber to pronounce on its interpretation of the law at a specific time during the proceedings: ICC-02/04-01/15-2022-Red ("*Ongwen* AJ"), para. 346.
[226] Request, paras. 26-37.
[227] GoV's Observations, para. 113, item (iii) at fn. 116.
[228] *Contra* Appeal, paras. 67, 76-78.
[229] Time Extension Decision, para. 11; *contra* Appeal, para. 67.
[230] *See above* paras. 56-62.
[231] *Afghanistan* Article 18(2) Decision, para. 48.
[232] *Contra* Appeal, paras. 76-78.
[233] Time Extension Decision, para. 11 (emphasis added).
[234] Time Extension Decision, para. 11.

suggest otherwise.[235] In its Observations, the GoV was expected to provide submissions "arising from the Prosecutor's Request", which itself was based on the totality of the material provided by the GoV and communicated by the Prosecution to the Chamber.[236] Although not entirely clear,[237] the GoV had requested an extension of time to provide "the English translation of the proceedings conducted by the Public Prosecutor's Office and the courts in the course of the criminal proceedings in Venezuela", without qualifying or limiting its request to material only related to the GoV's Observations.[238] In any event, it is artificial to distinguish between the court and investigative records related to the GoV's Observations, and those related to its Deferral Request. The GoV's Observations related to *all* the material it had previously transmitted to the Prosecution and which the latter communicated to the Chamber in its Request under rule 54. The Prosecution respectfully submits that the GoV would have been aware of its obligation to provide materials relevant to its Deferral Request in one of the Court's working languages at least by the time of its Extension Request.[239]

78. Fifth, merely because requests for cooperation and communications with the Prosecution may be in a State's language does not mean that the State may use the same (non-working) language in its filings and material filed in proceedings before the Court.[240] Regulation 39(1) of the RoC requires all documents and materials to be filed in English or French, unless otherwise authorised. Likewise, it does not follow that the GoV was permitted to provide material to the Court in a non-working language merely on the ground that the Chamber allowed the VPRS to collect and submit victims' forms in a non-working language, annexed to a VPRS report summarising their views and concerns in a working language.[241]

79. Finally, the Prosecution notes the Chamber's remark that the Prosecution had only translated a limited part of the GoV's material, that the criteria used to decide which materials to translate was unclear, and that it should have requested the GoV to transmit the material in one of the Court's working languages.[242] The Prosecution respectfully submits that it proceeded in good faith and mindful of its obligation to facilitate expeditious proceedings before the Court.[243] When it decided to translate the Summaries received in the Ninth, Tenth and Eleventh Submissions, the Prosecution had not yet received court records and records of investigative

[235] *Contra* Appeal, paras. 76-78; Decision, para. 11, p. 7.
[236] Conduct of Proceedings Order, para. 9.
[237] ICC-02/18-28-AnxII ("GoV Extension Request"), para. 8 (referring to "all the proceedings carried out by the Public Prosecutor's Office and the courts in cases related to the State's observations").
[238] GoV Extension Request, para. 7 (emphasis added); *see also* paras. 3, 13. *Contra* Appeal, para. 77.
[239] *Contra* Appeal, para. 76.
[240] *Contra* Appeal, para. 72.
[241] *Contra* Appeal, para. 73. Conduct of Proceedings Order, para. 11, p. 7. *See* the VPRS reports: ICC-02/18-23-Red; ICC-02/18-27-Red; ICC-02/18-40-AnxI-Red (*see* fns. 37 and 45).
[242] Decision, paras. 82, 84.
[243] Decision, para. 57.

steps. The GoV only provided these in its Twelfth, Thirteenth and Fourteenth Submissions on 26 July, 19 September and 18 October 2022.[244] Furthermore, in its letter to the GoV on 4 June 2022, the Prosecution had asked it to provide, under rule 53 of the Rules,[245] any further material no later than 4 July 2022 so that the Prosecution could adequately assess the material and decide on any necessary course of action.[246] However, as noted, after this deadline the GoV provided three tranches of material, including court records and records of investigative steps (approximately 20,800 pages in Spanish), in three separate Submissions. After assessing the material, the Prosecution decided to file its Request so as not to further delay the proceedings, and enclosed its analysis of the material therein. In the future, greater recourse to article 50(2) and rule 41, enabling conduct of proceedings in other official languages (such as Spanish) could be made, in appropriate circumstances.

80. In conclusion, the Prosecution respectfully submits that the Chamber did not err. Rather than requiring either party to translate the remaining material, it reasonably considered the English translations of the 62 representative cases identified by the GoV. From this sample of 62 cases, the Chamber could (and did) reasonably draw the necessary inferences to conduct its complementarity assessment. Even if the Chamber had requested and considered translations of the remaining material (or reviewed the material in Spanish), its Decision would have been the same. The untranslated material is largely irrelevant and unrelated to the Venezuelan domestic proceedings. The untranslated court records and investigative records confirm that the GoV is not investigating or prosecuting factual allegations underpinning crimes against humanity, and that domestic proceedings are focused on low-level/direct perpetrators. They also show that the discriminatory aspect of the crime of persecution has not been investigated/prosecuted, and allegations of sexual violence have been insufficiently investigated.[247] The Prosecution has assessed the totality of the material (English and Spanish) and reached this conclusion, as set out in Annexes A and B.

B.3 The MoU is irrelevant to the Court's complementarity determination

81. Finally, the Chamber correctly dismissed the GoV's argument that the Prosecutor "surprisingly" announced the opening of an investigation into Venezuela during his visit in 2021, which the GoV alleged demonstrated a lack of good faith dialogue between the OTP and the GoV. The Chamber's decision not to consider the MoU signed between the GoV and the OTP on 3 November 2022 since "no memoranda of understanding ha[d] been officially notified

[244] *See* Annex A to Article 18(2) Request.
[245] Rules, rule 53 ("[…]The Prosecutor may request additional information from that State").
[246] *See* 4 June 2022 letter from the OTP to the GoV pursuant to rule 53: VEN-OTP-0002-9793 at p. 3.
[247] *Contra* Appeal, para. 86 (fns. 54 to 59).

and filed before it,"[248] and to instead "consider[] the material and submissions filed before it" was reasonable and correct.[249]

82. First, the Prosecution referred to the MoU in its Request as contextual information.[250] It did not communicate it to the Chamber under rule 54 as part of the material provided by the GoV in support of its Deferral Request. This was because it was irrelevant and unrelated to it.[251] Likewise, although the GoV referred to the MoU in its Observations, it did not attach it in its 13 Annexes.[252] The authority cited by the GoV does not support its proposition.[253] In *Al-Hassan* the Trial Chamber held that "it [was] not necessary for the parties and participants to submit into evidence items they seek to use *in support of their legal arguments*".[254] This implies that parties and participants must request the submission into evidence of material that they seek the Chamber to factually consider.

83. Second and most significantly, even if the Chamber should have considered the MoU, it would not have affected the Decision. The MoU was unrelated to the Chamber's complementarity inquiry under article 18 as it did not show the existence of ongoing domestic proceedings.[255] The MoU facilitates the OTP's provision of support to the GoV, to help strengthen the latter's capacity to conduct genuine domestic proceedings. Yet, a complementarity assessment must be conducted based on the facts "at present"[256] or "as they exist" at the time of the Court's complementarity analysis.[257] Any positive future impact from the OTP's support to the GoV's capacity to conduct genuine proceedings is irrelevant and unrelated to the Chamber's present analysis in resolving the Article 18(2) Request.

84. Finally, the Prosecution submits that it did not operate in bad faith or obstruct the GoV in opening the investigation.[258] Prior to the Prosecutor's mission to Venezuela, the OTP shared with the GoV a summary of its subject-matter and complementarity assessments. The Prosecutor indicated that he was reviewing this assessment and intended to travel to Caracas to continue meaningful dialogue and to deepen cooperation.[259] During his visit to Caracas between 31 October to 3 November 2021, the Prosecutor conveyed the results of his internal review in person to the authorities. At the same time, the Prosecutor stressed that

[248] Decision, para. 60 (referring to GoV's Observations, para. 17). *see* MoU.
[249] Decision, para. 60; *contra* Appeal, paras. 92-96.
[250] GoV's Observations, para. 17 (fn. 18).
[251] *See* Annex A to Article 18(2) Request.
[252] GoV's Observations, para. 17.
[253] Appeal, para. 94 (fn. 72) referring to ICC-01/12-01/18-2496 ("*Al Hassan* Corrigendum Decision"), para. 17.
[254] *Al Hassan* Corrigendum Decision, para. 17 (emphasis added), cited in Appeal, para. 94 (fn. 72).
[255] *Contra* Appeal, paras. 95-96.
[256] *Philippines* Article 18(2) Judgment, paras. 161, 167
[257] .*Philippines* Article 18(2) Decision, paras. 17, 40; *see also Ruto et al.* Admissibility Decision, para. 70; *Ruto et al.* Admissibility AD, para. 83.*Ruto et al.* Admissibility AD, para. 83.
[258] *Contra* GoV's Observations, para. 17.
[259] 13 January 2022 letter, pp. 20-21.

complementarity and cooperation would continue to be hallmarks of any investigation undertaken. After several rounds of consultations and dialogue, an agreement was made to conclude a MoU that would encapsulate both the effective discharge of the Prosecutor's mandate and a commitment to work with the authorities to strengthen domestic capacity.[260] The fact that the MoU refers to the Prosecutor's decision to open an investigation underscores that his decision predated the MoU's signing.[261]

85. In sum, the Chamber's decisions not to address the GoV's arguments about a purported lack of good faith dialogue between the OTP and the GoV, and not to consider the contents of the MoU as relevant to its complementarity determination, were reasonable. The Prosecution respectfully submits that this sub-ground should be dismissed.

C. The GoV's request for additional evidence

86. The GoV requests the admission on appeal of the English translation of five case files, under regulation 62 of the Regulations ("Additional Evidence" and "Additional Evidence Request").[262] Its reason for not earlier submitting the English translation of these files mirrors its arguments in sub-ground 2.2 above.[263] Accordingly, the Prosecution responds to the GoV's Additional Evidence Request herein.

87. The Additional Evidence relates to five cases, namely [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED].[264] For each case, the GoV provides English translations of the Summaries[265] and English translations of the court records and records of investigative steps, which it had previously provided in Spanish in the GoV's Eleventh and Twelfth Submissions, with updated information about these materials given in the 13 Annexes to the GoV's Observations.[266] In addition to the Summaries, the Additional Evidence includes the following for these case files:

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[260] ICC Press Release, "ICC Prosecutor, Mr Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government", 5 November 2021.
[261] MoU, p. 1 ("Considering that the Prosecutor of the International Criminal Court has concluded the preliminary examination of the situation in Venezuela I and has determined that it is appropriate to open an investigation to establish the truth in accordance with the Rome Statute").
[262] Appeal, paras. 22-25.
[263] Appeal, para. 24. The GoV's reference to Ground 2(a) appears to be section "1. Untranslated documents" in Appeal, paras. 67-82. The Prosecution has responded to the GoV's arguments in section B.2 above.
[264] *See* Annex B to this Response (highlighted in orange): cases No. 727, 733, 94, 783, 799.
[265] Annex III to Appeal, pp. 4-5, 40-41, 53-54, 257-258, 288-289.
[266] VEN-OTP-00000081 to VEN-OTP-00000582; VEN-OTP-00000590 to VEN-OTP-00001966; Annexes 10, 11, 12 in the 13 Annexes, pp. 2950–2954, 2955-2957, 2958-2996, and 2997-3572, respectively. This information was presented in tables and lists describing domestic proceedings without original court records or other investigation records substantiating the information. Regardless of its form, this information did not change the Prosecution's assessment set out in its Request: *see* Prosecution Response to GoV's Observations, paras. 42-46.

- Case [REDACTED].[267]
- Case [REDACTED]:[268] [REDACTED];[269] [REDACTED];[270] [REDACTED].[271]
- Case [REDACTED]:[272] [REDACTED];[273] [REDACTED].[274]
- Case [REDACTED]:[275] [REDACTED].[276]
- Case [REDACTED]:[277] [REDACTED].[278]

88. The Prosecution respectfully submits that the GoV's Additional Evidence Request should be rejected for the reasons below.

89. First, the Additional Evidence was not before the Chamber in the English language (one of the working languages) when the Chamber conducted its complementarity assessment under article 18. As a result, the Chamber was not able to consider it. In rejecting similar requests, including in the context of appeals against admissibility decisions, the Appeals Chamber has recalled its corrective function and held that "it would not be appropriate for it to consider this information when the Pre-Trial Chamber has not done so".[279] The Appeals Chamber has rejected requests by States to submit material on appeal which post-dated the impugned decision.[280] Further, it has rejected, in the context of admissibility appeals, material which pre-dated the first instance decision which pertained "to the investigation during the period in relation to which the Admissibility Decision was made" on the basis that it had not been filed before the Pre-Trial Chamber.[281] This is directly apposite to the present Additional Evidence Request. The Prosecution submits that the Additional Evidence Request may be rejected on this basis alone.

90. In addition, the requirements for admitting evidence on appeal under regulation 62 are not met:

[267] Annex III to Appeal, pp. 6-38; *see* Annex B to this Response, case no. 727.
[268] Annex B to this Response, case No. 733. The offences are only mentioned in the Summary: Annex III to Appeal, p. 40.
[269] Annex III to Appeal, pp. 45-46.
[270] Annex III to Appeal, pp. 47-50.
[271] Annex III to Appeal, pp. 51.
[272] Annex B to this Response, case No. 94. Annex III to Appeal, pp.53-255.
[273] Annex III to Appeal, pp. 55-58. The translation of this record is not very clear.
[274] Annex III to Appeal, pp. 59-255.
[275] *See* Annex B to this Response, case No. 783. The Prosecution notes that the Summary [REDACTED]: Annex III to Appeal, pp. 257, 264, 285-286.
[276] Annex III to Appeal, pp. 259-286.
[277] *See* Annex B to this Response, case No. 799. Annex III to Appeal, pp. 288-303.
[278] Annex III to Appeal, pp. 290-303.
[279] *Gaddafi* First Admissibility AD, para. 43; ICC-01/09-01/11-234 ("*Ruto et al.* Updated Investigation Report AD") para. 10; *Al-Senussi* Admissibility AD, para. 57-59.
[280] *Ruto et al.* Updated Investigation Report AD, paras. 13.
[281] *Gaddafi* First Admissibility AD, paras. 37-38, 43, recalled in *Al-Senussi* Admissibility AD, para. 57.

91. *First*, the GoV has not given reasons as to why it did not provide the Additional Evidence to the Pre-Trial Chamber.[282] It was available to the GoV during the article 18(2) proceedings, but the GoV did not translate it into English.[283] Instead it translated 62 other case files which [REDACTED] representative and essential to its Deferral Request. Nor has a source been given to show that the Court's legal framework imposes the responsibility to translate the material on the Prosecution.[284] Furthermore, the State must ensure that the Chamber can analyse the materials transmitted in support of its deferral request.[285]

92. *Second*, even if the Additional Evidence had been considered by the Chamber, it could not (and would not) have led to a different conclusion.[286] The five cases relate to convictions of low-level/direct perpetrators,[287] and the investigative steps taken do not demonstrate that the national authorities are investigating or have investigated the factual allegations underpinning crimes against humanity, the discriminatory aspect of persecution or acts of sexual violence. The Prosecution assessed this information and reached the same conclusion.[288]

93. In conclusion, the Prosecution respectfully requests the Appeals Chamber to reject the Additional Evidence Request.

D. Ground 3: The Chamber correctly found that the temporal scope of the Prosecution's intended investigation commenced from 12 February 2014

94. In Ground 3, the GoV submits that the Chamber erred in finding that the temporal scope of the Prosecution's intended investigation was clear.[289] The Chamber assessed the information communicated by the Prosecution to the GoV under article 18(1) and rule 52(2), namely, the Article 18(1) Notification and the 13 January 2022 letter, and found that the GoV was sufficiently informed that the temporal scope encompassed incidents occurring from 12 February 2014.[290] The GoV argues that the Chamber erred in law by (i) conflating issues of

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[282] *Contra* Appeal, paras. 23-24.
[283] See ICC-01/04-02/06-2617-Red A ("*Ntaganda* Additional Evidence AD"), para. 15 (identifying as a first principle relevant to assessing applications for the admission of additional evidence on appeal: "(i) additional evidence on appeal will generally not be admitted unless such evidence was unavailable at trial or, with due diligence, could not have been produced").
[284] Appeal, para. 24; *see above* paras. 71-75.
[285] *Afghanistan* Article 18(2) Decision, para. 50.
[286] *Contra* Appeal, para. 23. *Ntaganda* Additional Evidence AD, para. 15 (identifying as a second principle that: "(ii) it must be demonstrated that the additional evidence could have led the trial chamber to enter a different verdict, in whole or in part").
[287] No.727 [REDACTED]: *see* Annex III to Appeal, pp. 10-12; No.733 [REDACTED]; No.94 [REDACTED]: *see* Annex III to Appeal, pp. 59-60; No.783 [REDACTED]: *see* Annex III to Appeal, p. 264; No.799 [REDACTED]: *see* Annex III to Appeal, p. 290.
[288] *See* Article 18(2) Request, para. 97 and fn 205 ("Note however that in all these cases there is no evidence that the contextual elements of crimes against humanity have been investigated. Also, the legal qualification of the cases may not always reflect the alleged conduct. The Prosecution's assessment that progressive investigative steps have been taken with respect to 28 cases has been solely made with respect to the persons identified and for the crimes alleged").
[289] Decision, paras. 43-50.
[290] Decision, paras. 43-50.

temporal jurisdiction with the temporal scope of alleged incidents relevant to the article 18(2) proceedings; and (ii) finding that the alleged incidents set out in the 13 January 2022 letter were capable of resolving the ambiguity regarding the temporal scope.[291] The Prosecution respectfully requests the Appeals Chamber to dismiss this ground of appeal. It is inconsistent with the nature and purpose of the article 18(1) notification and the Prosecution's investigation.

95. First, simply because the temporal scope of the allegations considered by the Prosecution in opening an investigation is narrower than the temporal scope of a situation, the Prosecution's investigation is not confined to the narrower timeframe.[292] As the Prosecution has consistently publicly stated—and specifically in the context of the Venezuela PE[293]—a PE's purpose is to determine whether the threshold has been met to open investigations, not to engage in a comprehensive mapping of all alleged crimes within a situation.[294] To reach its threshold-setting determination, the Prosecution focuses on a cluster of alleged criminality which appears representative of the broader pattern of victimisation warranting investigation and is best supported by the available information, as it expressly did in this situation.[295] It is not unusual for the temporal scope of the situation to be broader than the specific findings on jurisdiction made by the Prosecution as part of its threshold-setting determination in the article 53(1) stage.

96. This does not mean that the Prosecution blindly accepts the terms of a situation referred to it by a State Party/Parties or the Security Council, or that it opens an investigation automatically on the terms referred or in an open-ended manner.[296] The Prosecution independently and objectively assesses the consistency of the parameters of the referral with the Statute,[297] and the criteria under article 53(1) before deciding to initiate an investigation,[298] as it did in this situation.[299] The *Mbarushimana* jurisdiction decision cited by the GoV does not assist it.[300] There, the Pre-Trial Chamber observed that a situation can include crimes

[291] Appeal, paras. 97-105.
[292] *Contra* Appeal, paras. 100-104.
[293] OTP, Report on Preliminary Examination Activities (2020), para. 213.
[294] *Contra* Appeal, para. 98.
[295] Article 18(1) Notification, p. 1 ("[I]n light of the scope and range of the different crimes allegedly committed in the situation, and considering the specific and limited purpose of a preliminary examination—namely to determine whether the threshold for proceeding has been met—my Office focussed its assessment on a sub-set of crimes related to the treatment of persons in detention that are alleged to have been committed since at least 2017").
[296] *Contra* Appeal, para. 103.
[297] This includes ensuring that the Prosecution is not improperly bound by personal limitations contained in the referrals. *See e.g.* *Uganda* situation: ICC-02/04-01/05-68 ("*Uganda* Status Conference Decision"), paras. 4-5 (noting that Prosecution's view that while the State Party letter of referral concerned crimes allegedly committed by the Lord's Resistance Army ("LRA"), the Prosecution considered the scope of the referral to include all crimes committed in the context of the ongoing conflict involving the LRA); Prosecutor Statement 14 October 2005, p. 2; *Libya* situation: Third Report of the Prosecutor of the ICC to the UNSC pursuant to UNSCR 1970 (2011), 16 May 2012, para. 54 (stating that the Prosecution has a mandate to investigate crimes by *all* actors. This is notwithstanding the terms of the referral in Resolution 1970 (2011), para. 6.
[298] *Afghanistan* Article 15 Judgment, para. 29.
[299] Article 18(1) Notification, pp. 1-2.
[300] *Contra* Appeal, para. 103.

committed at the time of the referral and subsequent crimes that were *sufficiently linked* to the situation of crisis which was ongoing at the time of the referral.[301] The purpose of this link is to avoid States using referrals to "abdicate [] responsibility for exercising jurisdiction over atrocity crimes for eternity".[302] This decision, and the *Afghanistan* Appeal Judgments, confirm that the Prosecution's investigation is not necessarily limited to crimes pre-dating the referral.[303] Consistently with this, the Pre-Trial Chamber correctly held that the requirement to provide specific information in the article 18(1) notification concerns article 18 proceedings and does not limit the Prosecution's future investigations.[304]

97. Second, provided the State requesting deferral receives sufficiently specific information on the parameters of the intended investigation to exercise its right under article 18(2)[305]—including the temporal parameters of the situation, generally without end date[306]—it suffers no prejudice from the fact that the Prosecution may have considered a narrower range of crimes to make its threshold-setting determination. In this case, the Chamber correctly found that the GoV received sufficient details regarding the temporal scope of the alleged cases relevant to the Prosecution's intended investigation.[307]

98. While the Article 18(1) Notification referred to timeframes commencing from 12 February 2014 and April 2017,[308] any perceived ambiguity as to the temporal scope of the intended investigation that may have arisen was in any event resolved in other related documents provided or made available to the GoV. In particular, (i) the Article 18(1) Notification attached the summary of the PE findings which stated that the investigation concerns cases "sufficiently linked to the situation, which will encompass all Rome Statute crimes allegedly committed in Venezuela since 12 February 2014";[309] (ii) the list of alleged incidents annexed to the 13 January 2022 letter included cases dating from February 2014;[310] (iii) the 13 January 2022 letter informed the GoV that it was expected to provide information regarding domestic investigations with respect to these alleged incidents;[311] and (iv) the

[301] ICC-01/04-01/10-451 ("*Mbarushimana* Jurisdiction Decision"), para. 16.
[302] *Mbarushimana* Jurisdiction Decision, para. 16. *See also* para. 21.
[303] *Afghanistan* Article 15 Judgment, paras. 57-64. *See also* ICC-02/17-218 ("*Afghanistan* Article 18(2) Judgment"), para. 58.
[304] Decision, para. 76.
[305] *Philippines* Article 18(2) Judgment, para. 107.
[306] Most situations do not have an end-date and the Prosecution may investigate criminality post-dating the opening of the investigation as long as it is sufficiently linked to the situation. However end-dates have been specified in situations where the State Party situation country withdrew from the Rome Statute, and the end-date reflects the date on which the withdrawal took effect: *see* *Burundi* Article 15 Decision, paras. 191-192; ICC-01/21-12 ("*Philippines* Article 15 Decision"), paras. 110-111, p. 41.
[307] *Contra* Appeal, paras. 104-105.
[308] Article 18(1) Notification.
[309] Article 18(1) Notification, p. 8, para. 15.
[310] *See e.g.* 13 January 2022 letter, pp. 11, 17.
[311] 13 January 2022 letter, p. 5.

Prosecution's public reports on the Venezuela PE reflected the temporal scope of the referred situation as commencing in February 2014.[312]

99. Third, the GoV submits that the lack of clarity on the scope of the Prosecution's investigation will have a chilling effect on the State's own investigations (as it may lead to a future article 19 clash).[313] However, as shown above, States are not precluded from investigating merely because the Prosecution has commenced an investigation. Indeed, in this situation, the MoU between the OTP and the GoV underlines the Prosecutor's goal of supporting complementarity to function wherever possible , including through the provision of assistance to domestic accountability mechanisms to close the impunity gap.[314] It also recognises the possibility of the Prosecutor revisiting his admissibility assessment to account for any changes in circumstances in this regard.[315]

100. Finally, even if the Chamber erred as submitted under this ground, any such error would not have impacted the Decision.[316] The GoV showed that it understood the temporal scope of the Prosecution's intended investigation to commence from February 2014. It gave its views on the alleged incidents dating from this time and transmitted materials relating to the cases identified by the Prosecution as examples from this time.[317]

101. The Prosecution respectfully requests the Appeals Chamber to dismiss Ground 3 of the Appeal for the above reasons.

E. Ground 4: The Chamber correctly assessed that the domestic proceedings did not sufficiently mirror the scope of the Prosecution's intended investigation

102. In Ground 4, the GoV challenges the Chamber's application of the complementarity test at the situation stage. It argues that the test should be loosely applied by reference to the acts mentioned in the Prosecution's article 18(1) notification, without considering categories or groups of possible perpetrators.[318] The GoV also submits that the Chamber erroneously required that domestic judicial authorities use the same legal labels as the Prosecution had used when concluding that the GoV had not investigated the facts underlying the contextual elements of crimes against humanity and the discriminatory intent for persecution, and when noting that the GoV had insufficiently investigated crimes of a sexual nature.[319]

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[312] OTP: Report on Preliminary Examination Activities (2018), para. 101; Report on Preliminary Examination Activities (2019), paras. 59, 62; Report on Preliminary Examination Activities (2020), para. 199.
[313] Appeal, para. 102.
[314] This MoU was executed on the Prosecutor's first visit to Venezuela and was the result of bilateral meetings between the Prosecutor and the President of Venezuela himself. It marked the beginning of a constructive engagement between the GoV and OTP.
[315] *See above* para. 27.
[316] *Contra* Appeal, para. 105.
[317] Deferral Request, pp. 2, 5-6; GoV's Observations, paras. 50-58.
[318] Appeal, paras. 106-122.
[319] Appeal, paras. 123-139.

103. The Prosecution respectfully submits that the Chamber correctly applied the complementarity test confirmed in the *Philippines* Appeal Judgment. The GoV's arguments do not adequately describe the PE/article 18 process and the test applicable at that stage, when the Prosecution had not yet commenced an investigation.

E.1 The Chamber considered the features of the article 18 process in conducting its complementarity assessment

104. The Chamber appropriately tailored its complementarity assessment to the features of this phase of proceedings. It correctly defined the test, stating that it would consider whether the "domestic investigations [] substantially cover the same conduct and the same persons/groups."[320] It acknowledged that "this assessment requires a comparison of two distinct forms of investigations" and "two very different sets of information".[321] The Chamber then applied the test to this situation, examining (i) whether the GoV had provided documentation capable of proving that an investigation was ongoing;[322] and (ii) whether its domestic investigations and prosecutions sufficiently mirrored the scope of the Prosecution's intended investigation as reflected in the Article 18(1) Notification and the sample of incidents referred to in its 13 January 2022 letter.[323] In these documents, the Prosecution explained that it had focused its assessment on the treatment of persons in detention since April 2017 and found there was a reasonable basis to believe that members of the State security forces, civilian authorities and pro-government individuals may have committed the crimes against humanity of imprisonment or other severe deprivation of physical liberty, torture, rape and/or other forms of sexual violence and persecution on political grounds.[324] It stated that these findings were without prejudice to the scope of the investigation, which would include any conduct amounting to crimes within the Court's jurisdiction alleged to have been committed in Venezuela since 12 February 2014,[325] the start date of the State Parties' referral.[326]

105. The GoV's submissions that the Chamber misapplied the test do not adequately describe the PE and the article 18 process in two ways.

106. First, the Prosecution is not required to identify concrete suspects in its article 18(1) notification; rather, it need only identify categories or groups of possible perpetrators.[327] This stands to reason since the Prosecution has limited powers during the PE and has not yet

[320] Decision, para. 67; see also para. 65.
[321] Decision, para. 65.
[322] Decision, para. 88, citing *Philippines* Article 18(2) Decision, para. 15 and relevant jurisprudence.
[323] Decision, paras. 65, 67; 80; 90-134.
[324] Article 18(1) Notification, pp. 2, 4-5 (paras. 3-6).
[325] Article 18(1) Notification, p. 2.
[326] ICC-02/18-1 and ICC-02/18-1-AnxI. The GoV argues that the temporal scope of the Prosecution's intended investigation was unclear, however this is incorrect: *see above* Section D.
[327] *Contra* Appeal para. 107.

investigated in the situation.[328] This approach also accords with the notion of "a potential case" which applies at this stage. Although the contours of such likely cases will often be relatively vague,[329] they are not abstract concepts. Instead, they are shaped by two criteria: (i) the groups of persons involved, and (ii) the crimes within the Court's jurisdiction allegedly committed during the incidents that are likely to be the focus of an investigation.[330] Furthermore, any investigation, irrespective of its stage, will have certain defining parameters.[331] Thus, to sufficiently mirror the scope of the Prosecution's intended investigation, the domestic investigations or prosecutions must relate to and be compared against the same groups or categories of persons (in addition to relevant criminality) as in the Prosecution's intended investigation.

107. Accordingly, it does not suffice that domestic authorities investigate the same criminal conduct but involving a different group of persons or only one of the groups that the Prosecution intends to investigate.[332] This approach was confirmed in the *Philippines* Appeals Judgment where the Appeals Chamber held that "for the purpose of admissibility challenges under article 18 of the Statute, a State is required to demonstrate an advancing process of domestic investigations and prosecutions of *the same groups or categories of individuals* in relation to the relevant criminality, including the patterns and forms of criminality, within a situation".[333] The Prosecution respectfully agrees. In our submission the contrary position could lead to significant impunity gaps.

108. Second, the Prosecution is not constrained or limited to investigate only the incidents or allegations described in the article 18(1) notification. Nor must it express its "commitment" to investigate those incidents or allegations in the article 18(1) notification.[334] As explained above, the purpose of the notification is not to bind the Prosecution to investigate exactly the same incidents mentioned therein, but to inform States of the general parameters of the Prosecution's intended investigation in a sufficiently specific manner to enable them to request deferral of the investigation.[335] This approach accords with the fact that at this stage 'potential cases' include "the crimes falling within the jurisdiction of the Court allegedly committed during *the incidents that are likely to be the focus of an investigation* for the purpose of shaping the future

[328] *Afghanistan* Article 15 Judgment, para. 59. *See above* paras. 35-36.
[329] *See Ruto et al.* Admissibility AD, para. 39; *Muthaura et al.* Admissibility AD, para. 38.
[330] *Burundi* Article 15 Decision, para. 143; *Georgia* Article 15 Decision, para. 37; *Kenya* Article 15 Decision, paras. 50, 59; *Côte d'Ivoire* Article 15 Decision, para. 191. *See also* Decision, paras. 64-65.
[331] *Philippines* Article 18(2) Judgment, para. 106.
[332] *Contra* Appeal, paras. 107, 109, 110, 111-112, 114, 115.
[333] *Philippines* Article 18(2) Judgment, paras. 106, 110 (emphasis added).
[334] *Contra* Appeal, paras. 113, 119, 120, 122.
[335] *Philippines* Article 18(2) Judgment, para. 107. *See also above* paras. 95-96.

case(s)".[336] The Prosecution opens an investigation precisely to ascertain whether potential cases analysed during the PE can be advanced to prosecution, or whether it should pursue other lines of inquiry. The Prosecution may also decide to investigate criminality post-dating the opening of the investigation so long as it falls within the parameters of the situation or is sufficiently linked to those parameters. The Appeals Chamber in *Afghanistan* confirmed this approach when it held that "in order to obtain a full picture of the relevant facts […] the Prosecutor must carry out an investigation into the situation, as a whole."[337]

109. Finally, the Chamber did not require the GoV to have identified perpetrators or secured their arrest.[338] The Prosecution respectfully submits that the description of the Decision as included in the Appeal is incorrect.[339] The paragraph of the Decision relied on for this ground simply describes the general features of the GoV's proceedings based on the records transmitted.[340] It observed that "in relation to about three-quarters of the cases, no (specific) suspect has been identified yet".[341] 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".[342] However, the Chamber considered that these valid observations—also noted by the Prosecution in its Request[343]—were not determinative of its Decision.[344] 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.[345]

E.2 The Chamber did not assess the GoV's investigations on a heightened test, and provided sufficient reasoning

110. This sub-ground the GoV includes parts of the arguments included in sub-grounds 1.2 and 4.1,[346] and indicates that the Chamber failed to explain the "sufficiently mirror" test in the context of article 18 proceedings.[347] The Prosecution respectfully submits that this sub-ground lacks merit and should be dismissed.

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[336] *Burundi* Article 15 Decision, para. 143; *Georgia* Article 15 Decision, para. 37; *Kenya* Article 15 Decision, paras. 50, 59; *Côte d'Ivoire* Article 15 Decision, para. 191 (emphasis added).
[337] *Afghanistan* Article 15 Judgment, paras. 60- 61.
[338] *Contra* Appeal, paras. 106 (referring to Decision, paras. 65 and 91), 110.
[339] *See below* paras. 136-138.
[340] Decision, para. 91.
[341] Decision, para. 91; *see also* para. 121.
[342] Decision, para. 131; *see also* para. 121.
[343] *See* Request, para. 118 (first item).
[344] Decision, paras. 96, 120.
[345] Decision, para. 91.
[346] Appeal, paras. 119-120.
[347] Appeal, paras. 116-118.

111. First, the Chamber adequately articulated how it applied the complementarity test.[348] The Chamber rejected similar arguments made by the GoV before it. It held that "[t]o the extent that Venezuela may be suggesting that the mere showing that, on its face, domestic proceedings resemble to some extent the Prosecution's intended investigation would suffice to discharge its onus that it is investigating the same, the Chamber rejects Venezuela's arguments".[349] Further, that the "domestic investigations must substantially cover the same conduct and the same persons/groups, [and that] this is indeed the correct understanding of the 'sufficiently mirror' test adopted in the jurisprudence".[350] The Chamber's approach is reasonable and correct, and shows no error. The Appeals Chamber has confirmed this test and held that it "provides sufficient flexibility for a pre-trial chamber to integrate the specific circumstances and parameters of each situation in its assessment under article 18 of the Statute and gives effect to a State's right under article 18(2) […] to seek the deferral of the Prosecutor's investigation".[351]

112. Second, the Prosecution is not obliged or limited to investigate the specific incidents (or potential cases) assessed during its PE. In its Article 18(1) Notification, it identified samples of the relevant criminality in the situation.[352] The notification must provide sufficiently specific information regarding the general parameters of the situation to enable a State or States to request a deferral under article 18.[353] This is a case by case determination since "[w]hat may be considered sufficient will depend on the specific features of each situation".[354] In some situations, the Prosecution may identify representative temporal and geographical incidents as samples of the criminality that it intends to investigate. In others, a more general descriptions regarding the relevant criminality and groups of possible perpetrators may suffice. In any event, any incident identified in the article 18(1) notification will necessarily be an example or a "sample" and will not limit the Prosecution's investigation if the Prosecutor's request is granted. The scope of the Prosecution's investigation must extend to "the situation as a whole."[355]

113. The GoV submits that more specificity is required for an investigation opened following a State Party or UNSC referral, so that the Chamber can "satisfy itself that there was a reasonable basis to proceed with an investigation."[356] The Prosecution respectfully disagrees

[348] *Contra* Appeal, paras. 116-118.
[349] Decision, para. 67.
[350] Decision, para. 67.
[351] *Philippines* Article 18(2) Judgment, para. 108; *see generally* paras. 101-110.
[352] *Contra* Appeal, paras. 119-120, 122. *See above* para. 34.
[353] *Philippines* Article 18(2) Judgment, para. 107. *See above* paras. 35-36.
[354] Decision, para. 78.
[355] *Afghanistan* Article 15 Judgment, para. 60. *See above* para. 108.
[356] Appeal, para. 120.

with this interpretation for the reasons already advanced.[357] Furthermore, a decision under article 15(4) authorising an investigation must be distinguished from a decision under article 18(2) authorising the resumption of an investigation. In the former, a pre-trial chamber determines whether "there is a reasonable basis to proceed with an investigation, and that a case appears to fall within the jurisdiction of the Court,"[358] based on the information gathered by the Prosecution during the PE and cited and attached to the Prosecution's application. In the latter, a pre-trial chamber must determine whether domestic proceedings "sufficiently mirror the scope of the Prosecutor's intended investigation,"[359] based on the information transmitted by the State and communicated under rule 54. This determination does not require that a pre-trial chamber reviews the Prosecution's prior assessment of the evidence under article 53.

114. Third, the Chamber did not positively determine that the GoV was "investigating slightly more than half of the incidents" *within the meaning of article 17(1)(a)* and find that this figure was numerically insufficient to warrant deferral.[360] The Chamber made this remark when describing the features of the GoV's materials it had assessed, and before it applied the complementarity test to such materials.[361] In applying the test, the Chamber identified gaps in the scope of the GoV's proceedings that did not enable it to find a sufficient overlap between the GoV's proceedings and the Prosecution's intended investigation.[362] Although the number of domestic proceedings may be relevant, it is not always determinative. In some situations the test may be satisfied if the State has conducted only a few proceedings which cover most of the relevant criminality and all categories of possible perpetrators.[363] In other situations the test will not be satisfied despite the State having conducted a large number of cases, if they do not encompass certain criminality or categories of perpetrators, or focus on low-level/direct perpetrators,[364] as in this situation.[365]

E.3 The Chamber correctly concluded that the GoV's proceedings did not cover the factual allegations underlying the contextual elements of crimes against humanity

115. The GoV submits that the Chamber erred in relying on its failure to investigate the contextual elements of crimes against humanity rather than focusing on whether "the acts investigated by the GoV substantially overlapped with the types of alleged criminality set out

[357] *See above* para. 37. Moreover, article 18 does not apply to UNSC referrals. This provision is clear that such a procedure only applies to (i) situations referred to the Court pursuant to article 13(a) by State Parties or (ii) situations initiated *proprio motu* by the Prosecution pursuant to article 13(c) and authorised by a pre-trial chamber pursuant to article 15(4): Statute, article 18(1).
[358] Statute, article 15(4).
[359] *Philippines* Article 18(2) Judgment, paras. 106, 110.
[360] *Contra* Appeal, para. 121 referring to Decision, para. 89.
[361] Decision, paras. 89-91.
[362] Decision, paras. 130-131.
[363] *See e.g. Gaddafi* First Admissibility AD, paras. 72-73.
[364] *See e.g. Philippines* Article 18(2) Decision, paras. 96-98.
[365] *Contra* Appeal, paras. 121-122.

in the article 18 notification".[366] It submits that its domestic investigations pursuing several crimes in different locations during the same time period or in the same location over a period of time necessarily encompass investigation of the contextual elements of crimes against humanity.[367] The Prosecution respectfully submits that these arguments do not adequately reflect the principle of complementarity and the complementarity test.

116. First, the Chamber did not require the GoV to "label" its crimes as crimes against humanity. It found that the GoV was not investigating "*factual allegations underlying the contextual elements of crimes against humanity*."[368] The Prosecution submits that the Chamber correctly focused on conduct and not on legal labels.[369]

117. Second, the Chamber's approach was correct. Investigating crimes against humanity requires domestic authorities to ascertain the existence of specific factual allegations that are not necessarily encompassed by investigating isolated acts of detention and physical assault.[370] Nor is the existence of a State or organisational policy "a matter that concerns knowledge, intent or modes of liability which is irrelevant at the admissibility level".[371] 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.[372] Crimes against humanity require specific facts, factors and information to be considered, to establish: (i) the existence of an attack, namely, a course of conduct involving the multiple commission of criminal acts, directed against any civilian population; (ii) that takes place pursuant to or in furtherance of a State or organisational policy to commit such attack; and (iii) the widespread or systematic nature of the attack.[373]

118. In particular, the requirement for a "State or organisational policy" ensures that an attack against the civilian population has a 'collective' dimension, such that a State or organisation may be said to have encouraged it, by acts or deliberate omissions.[374] From the definition of the term in the various official languages, "policy" relates to "the way in which the plan of a person or group of persons is carried out"[375] and is linked to the existence of "a regular

[366] Appeal paras. 123-124, 130.
[367] Appeal, paras. 125-127.
[368] Decision, para. 107 (emphasis added).
[369] *Contra* Appeal, paras. 123-124, 130.
[370] *Contra* Appeal, paras. 125-126.
[371] *Contra* Appeal, para. 125.
[372] ICC-02/04-01/15-1762-Red ("*Ongwen* TJ"), para. 2820; *Ongwen* AJ, para. 1656; *see also* ICC-01/04-02/06-2359 ("*Ntaganda* TJ"), para. 1203.
[373] *See e.g. Ongwen* TJ, paras. 2673-2682 (legal finding regarding the contextual elements of crimes against humanity) and paras. 2798-2806 (legal characterisation of the facts). *See also* Elements of Crimes, Article 7 Crimes against humanity: Introduction, para. 2 ("The last two elements for each crime against humanity describe the context in which the conduct must take place").
[374] Elements of Crimes, Article 7 Crimes against humanity: Introduction, para. 3; *see also* fn. 6.
[375] ICC-01/04-02/06-2666-Anx3 ("Judge Ibáñez Sep. Op. on Ntaganda's appeal"), paras. 84-85.

pattern".[376] To determine the existence (or lack) of a policy, an investigating body may need to consider, *inter alia*, meetings, communications and preparations that show a level of planning of the attack; a recurrent pattern of violence; the use of public or private resources; the involvement of organisational or State forces in the commission of crimes; statements, instructions or documentation attributable to the State or organisation condoning or encouraging (or denying) the commission of crimes; and an underlying motivation.[377] The Appeals Chamber has likewise observed that when the Prosecution intends to investigate crimes against humanity, the domestic authorities must also demonstrate that they are investigating and prosecuting "patterns", to succeed on a deferral request.[378]

119. The Prosecution respectfully submits that the GoV has not shown that its investigations and prosecutions considered any of these factors and related factual allegations to establish the existence or non-existence of such "patterns". Rather, it has affirmed that it is not investigating crimes against humanity, and appears to have ruled out their possibility *a priori*. According to the GoV, their "security forces simply restored order"; "if there were violations of citizens' rights, they were isolated"; "[i]t is impossible to affirm that they followed a common pattern";[379] and "there was no State plan or policy in place".[380] However, as the Chamber observed, these factual conclusions can only be reached *after* an investigation is conducted—and the GoV has not demonstrated that such an investigation took place or how the conclusions were reached.[381] Even on appeal, the GoV has not provided such information and its arguments do not adequately describe the Decision and rely on erroneous legal propositions.[382]

120. By contrast, in *Al-Senussi*, Libya pointed to witness statements of members of the Libyan military (including very senior officers) who provided information on, *inter alia*, the involvement of Al-Senussi and Saif Al-Islam Gaddafi, among others, in directing and coordinating attacks on revolutionaries in Libyan localities; instructions and encouragement to suppress protestors by all means; and orders to supply logistics and weapons.[383] Libya also referred to evidence of civilian eye-witnesses who gave information about, *inter alia*, multiple deaths and injuries suffered by peaceful protestors and the use of weapons to target them.[384] The Pre-Trial Chamber relied on this and other material to find that "multiple lines of

[376] Judge Ibáñez Sep. Op. on Ntaganda's appeal, para. 92, and jurisprudence cited therein.
[377] *Ongwen* TJ, para. 2679 (identifying factors that permit a chamber to infer the existence of a policy); Judge Ibáñez Sep. Op. on Ntaganda's appeal, para. 153; s*ee* also paras. 89, 92, 98, 115, 204.
[378] *Philippines* Article 18(2) Judgment, paras. 106, 163.
[379] GoV's Observations, paras. 64-65.
[380] GoV's Observations, paras. 86, 88.
[381] Decision, paras. 106-107.
[382] Appeal, paras. 125-126.
[383] *Al-Senussi* Admissibility Challenge, para. 170.
[384] *Al-Senussi* Admissibility Challenge, para. 171.

investigation [were] being followed by Libya's judicial authorities in order to shed light on the repression of the demonstrations against the Gaddafi regime".[385] It concluded that Libya had demonstrated "the taking of identifiable, concrete and progressive investigative steps […] with a view to clarifying or ascertaining […] relevant factual aspects", such as: "(i) the existence at the relevant time of a policy conceived at the highest level of the State government to deter and quell, by any means, the demonstrations against the Gaddafi regime" and "(iv) the carrying out by the Security Forces of numerous attacks on civilian demonstrators" in Benghazi and throughout Libya.[386] In this situation, the Chamber could not have reached such a conclusion based on the material transmitted by the GoV.

121. Third, even though the existence of contextual elements of crimes against humanity (and war crimes) is required for the Court to exercise jurisdiction in a given situation, this does not exclude the State's jurisdiction to investigate and prosecute international crimes in the same situation.[387] Rather, as noted above, in accordance with the principle of complementarity, the Court and the State can "burden-share" the investigation and prosecution of international crimes and work together to address impunity in a situation.[388] This approach is particularly apt given the limited resources of the Court and domestic jurisdictions.

122. Fourth, the Chamber did not "assume" that the domestic investigations would establish the existence of crimes against humanity.[389] The first step of a complementarity assessment seeks to determine whether domestic investigations into certain conduct (including patterns) exist, and not whether a crime is established to a legal threshold. It appears that it is the GoV which "assumes" that there are no crimes against humanity without having conducted the necessary inquiries.[390] Further, that the Chamber required the GoV to substantiate its Deferral Request does not create a perception that the Court unfairly favours one party over another in the proceedings. It merely shows that the Chamber correctly applied the Court's legal framework which require a State requesting deferral to establish the facts supporting its assertions to discharge its burden of proof under article 18 of the Statute.[391]

123. Finally, as to the argument that a looser application of the test should have been adopted because there was no prior article 15 decision authorising the opening of the investigation, this

[385] *Al-Senussi* Admissibility Decision, para. 161.
[386] *Al-Senussi* Admissibility Decision, para. 162.
[387] *Contra* Appeal, para. 124.
[388] *See above* para. 27.
[389] *Contra* Appeal, para. 128, 129.
[390] Decision, para. 107.
[391] *Contra* Appeal, para. 129. *See above* Section A.1.

is incorrect.[392] The Court's legal texts do not so set out a different article 18 process depending on the how an investigation is triggered.[393]

E.4 The Chamber correctly found that the GoV is not investigating factual allegations of discriminatory intent for the crimes investigated

124. The GoV submits that the Chamber erred by disregarding its purported investigations into human rights violations and concluding that "the material provided by Venezuela does not allow for the conclusion to be drawn that the State is investigating factual allegations of discriminatory intent in relation to the crimes investigated".[394] The Prosecution respectfully submits that these arguments do not reflect the Chamber's finding and show no error.

125. First, the Chamber did not exclude as irrelevant the GoV's purported investigations into human rights violations.[395] Rather, in describing the GoV's material, the Chamber observed that "in nearly half of the cases, the criminal conduct in question or the alleged crimes do not appear to be sufficiently specified in the relevant documents, if at all."[396] And further, that "in many cases, the conduct is, if at all, qualified in very broad terms, such as by reference to a 'human rights violation'".[397] This implies that the GoV's material did not enable the Chamber to ascertain the scope of the domestic criminal proceedings. The latter is essential for a chamber to determine whether the domestic proceedings sufficiently mirrored the scope of the Prosecution's intended investigation.[398] In *Gaddafi*, the Pre-Trial Chamber found the case against Mr Saif Al-Islam Gaddafi was admissible before the Court because the Libyan materials did not enable it to ascertain with clarity the contours or parameters of the case being investigated domestically. Consequently, it was unable to meaningfully compare the Libyan domestic proceedings against Mr Gaddafi with the scope of the case before the Court.[399] The Pre-Trial Chamber made a similar observation in the *Simone Gbagbo* case.[400] The Appeals Chamber upheld both findings.[401]

126. Second, the GoV did not submit before the Pre-Trial Chamber that it was investigating the factual allegations underpinning the crime of persecution, either by inquiring into human rights violations or in any other way. It raises this argument for the first time on appeal. As the Chamber observed in its Decision, the GoV explained that there were no cases of persecution

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[392] *Contra* Appeal, para. 129.
[393] *See above* paras. 37, 113.
[394] Decision, para. 125; *see also* para. 131. *Contra* Appeal, paras. 131-132
[395] *Contra* Appeal, para. 132, referring to Decision, paras. 90 and 125.
[396] Decision, para. 90.
[397] Decision, para. 90.
[398] The Prosecution made similar observations in its Article 18(2) Request: Request, para. 118 (second item and fifth item).
[399] *Gaddafi* First Admissibility Decision, para. 135.
[400] *Simone Gbagbo* Admissibility Decision, paras. 70-71.
[401] *Gaddafi* First Admissibility AD, paras. 83, 85-86; *Simone Gbagbo* Admissibility AD, paras. 89, 92.

because this criminal offence was not in its domestic criminal law due to its alleged "lack of specificity".[402] The GoV did not rely on the *Gaddafi* and *Al-Senussi* jurisprudence.[403] Rather, the Prosecution relied on such case law to explain that even though the GoV need not have labelled the conduct as "persecution," and could have reflected the discriminatory intent for example, as an aggravating factor in sentencing, the GoV had not investigated the underlying factual allegations of persecution in any way.[404] Likewise, the GoV did not submit before the Chamber that the 2017 *Law against Hate, for Peaceful Coexistence and Tolerance* (the "Law") could potentially apply to capture the discriminatory intent, at least for criminal acts post-dating the Law's enactment (November 2017).[405] Instead, it submitted that the 2017 Law could not be retroactively applied to the alleged acts in 2014 and 2017.[406] Accordingly, the Chamber did not address the Law in its Decision.[407]

127. In sum, the Chamber's conclusion that the material did not allow it to find that the GoV has investigated factual allegations of discriminatory intent in relation to the crimes investigated was reasonable, correct and sufficiently reasoned.[408] 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.[409] Thus, even if the Chamber had erred in its assessment, the Prosecution respectfully submits that the Chamber would have still reached the same conclusion.

E.5 The Chamber correctly observed the GoV domestic authorities had insufficiently investigated crimes of a sexual nature

128. The GoV submits that the Chamber erred when it noted "the insufficient investigation of crimes of a sexual nature"[410] on the basis that the GoV had only referred to three cases that could be prosecuted as rape (and transmitted court records for one), and intended to prosecute 400 cases involving acts of a sexual or gender component (other than rape) as acts of cruel treatment.[411] The GoV submits that the Chamber erroneously required the GoV to "attach the same label as the OTP to these acts" rather than focusing on the conduct being investigated.[412]

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[402] Decision, fn. 236, citing GoV's Observations, para. 104. *See also* Request, para. 110.
[403] *Contra* Appeal, para. 133.
[404] Prosecution Response to GoV's Observations, para. 29 (fn. 72, citing *Al-Senussi* Admissibility AD, paras. 119-122).
[405] Request, para. 111 and fn. 227 (referring to the 2017 Ley Constitucional contra el Odio, por la Convivencia Pacífica y la Tolerancia ("*Constitutional Peace Law*"), art. 21 and noting that this law was enacted in November 2017, and thus would only apply to facts post-dating its enactment).
[406] GoV's Observations, para. 108.
[407] *Contra* Appeal, para. 135.
[408] *Contra* Appeal, para. 135.
[409] Decision, para. 130; *see* paras. 120 (suggesting this is a non-determinative factor) and 131.
[410] Decision, para. 131.
[411] Decision, para. 124, referring to GoV's Observations, para. 103.
[412] Appeal, paras. 136-137.

129. These arguments again do not reflect the complementarity test and show no error. As the Appeals Chamber has held, although the State need not use the same legal label as the Court, it must investigate *substantially the same underlying conduct*.[413] This requirement is not always satisfied by investigating crimes of rape and other forms of sexual violence as cruel treatment or torture. The crimes of cruel treatment and torture have different constitutive elements than the crimes of rape and other forms of sexual violence, and reflect different protected interests and harms.[414] The same acts may be cumulatively charged under the different legal qualifications, and cumulative convictions entered, when the constitutive elements are met.[415] For example, rape and sexual violence do not require that the victim endured a minimum quantum of pain and suffering, which is required for torture and cruel treatment. Torture and cruel treatment do not require conduct of a sexual nature, as required by the crimes of rape and sexual violence. Thus, an investigation into or conviction for torture or cruel treatment does not necessarily address all the same facts or reflect the distinguishable harms suffered by a victim of rape or other forms of sexual violence.[416] Further, the GoV has not articulated why it did not apply specific domestic legislation criminalising acts of gender violence including "psychological violence", "harassment" or "sexual abuse".[417] It is irrelevant for complementarity purposes that the crimes of torture and cruel treatment attract higher sentences if the same (or substantially the same) underlying conduct is not being investigated.[418]

130. The Chamber's approach accords with jurisprudence which shows that, although a complementarity assessment is factually-driven, legal qualifications may be considered in some circumstances as an additional indicator to determine whether the domestic authorities are

[413] *Al-Senussi* Admissibility AD, para. 119.
[414] *Ongwen* AJ, paras. 1635-1636 (when two or more crimes have materially distinct elements, their protected interests are necessarily different. A conviction for only one of those crimes will not reflect the full culpability). *Compare* elements of torture (art. 7(1)(f)) and cruel treatment (article 8 (2)(c)(i)-3) or other inhumane acts (art. 7(1)(k) *with* rape (art. 7(1)(g)-1) and sexual violence (article 7 (1)(g)-6). For Venezuela, *compare* 2013 Special Law on Torture, Cruel, Inhuman or Degrading Treatment ("*Torture Special Law*"), arts. 17-18 (torture and cruel treatment) *with* 2005 Criminal Code, art. 374 (rape) and Ley Orgánica sobre el Derecho de las Mujeres de una vida libre de violencia ("*Law on Women's rights"*), art. 15 (forms of gender violence).
[415] *See e.g.* Chambers Practice Manual (2023), para. 68 (allowing cumulative charges); *see also Ongwen* TJ, paras. 3073-3074 and 3080 (entering cumulative convictions for torture and rape); *Ongwen* AJ, paras. 1631, 1635-1636 (allowing cumulative convictions). Convictions may be entered cumulatively if the conduct in question violates two distinct provisions of the Statute, each having a 'materially distinct' element not contained in the other, *i.e.*, an element which requires proof of a fact not required by the other.
[416] *Contra* GoV's Observations, para. 103.
[417] The Prosecution noted that the GoV has specific legislation concerning these crimes (Request, para. 109, fn. 224 referring to *Law on Women's rights*, art. 15) and that even though the Summaries contained multiple factual descriptions of what appear to be acts of rape and other forms of sexual violence, this legal qualification is not reflected or it is ultimately excluded (Request, para. 127). Moreover, the GoV had previously submitted that "[…] for the crime of rape or other comparable forms of sexual violence, if the perpetrator is a public official, the Venezuelan criminal type would be the offence of torture [...] [I]f the active subject is not a public official and the passive subject is a woman, it would be the crime of sexual violence […]" (*see* VEN-OTP-0001-1250 at 1327-1328, para. 156 (3)). *But see* 2005 Criminal Code, art. 374.
[418] *Contra* Appeal, para. 137.

investigating substantially the same conduct as the Prosecution's.[419] The Chamber's factually-driven and case-specific assessment can be seen in how it approached the crimes of torture and cruel treatment. It considered that domestic investigations under the "related" legal qualification of cruel treatment did not affect its assessment that the GoV appeared to be investigating the same 'conduct' as that underlying the crime of torture.[420]

131. While the domestic authorities may requalify the conduct as rape in the future, this is irrelevant for the Court's complementarity assessment.[421] The latter is made on the facts "as they exist," "at present."[422] Further, although the GoV refers to one case as an example of such a potential legal re-characterisation, it has provided no documentation to substantiate its assertion.[423]

132. In addition, an article 18(1) notification is designed to provide information to enable States to request a deferral. It is not a vehicle for a pre-trial chamber to review the Prosecution's PE assessment under article 53(1) of the Statute. As such, the Prosecution need not provide "factual matrices underpinning its assessment that there was a reasonable basis to open an investigation into alleged acts of rape or sexual assault" in its article 18(1) notification.[424]

133. Finally, the Chamber's observation regarding the GoV's insufficient investigation of crimes of a sexual nature was not determinative for its Decision.[425] Even if the Chamber had erred in this respect, it would have still reached the same conclusion.

134. The Prosecution respectfully requests the Appeals Chamber to dismiss Ground 4.

F. Ground 5: The Chamber reasonably and correctly identified and weighed relevant factors in assessing whether the GoV was conducting investigations

135. In Ground 5, the GoV submits that the Chamber erred by relying on irrelevant factors (the number of identified suspects, the number of arrest warrants, and the rank of possible suspects), and by excluding relevant factors (steps taken by the domestic authorities to identify victims).[426] Its arguments do not adequately describe the Decision and disagree with the

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[419] In the *Simone Gbagbo* case, the Appeals Chamber upheld the Pre-Trial Chamber's conclusion that the domestic case with respect to crimes against the State did not cover the same conduct as the case of crimes against humanity before the Court: *Simone Gbagbo* Admissibility AD, para. 100; *Simone Gbagbo* Admissibility Decision, paras. 48-49 and fn. 87 ("The Chamber considers that, while the assessment of the subject-matter of the domestic proceedings in the context of an admissibility challenge must focus on the alleged conduct and not on its legal characterisation […] in the present instance the legal characterisation of the acts alleged against Simone Gbagbo constitutes a significant indicator of the actual subject-matter of the domestic proceedings under consideration").
[420] Decision, para. 125. *See Torture Special Law*: *compare* articles 17 (torture) and 18 (cruel treatment).
[421] *Contra* Appeal, para. 138.
[422] *See above* para. 83.
[423] *Contra* GoV's Observations, para. 103 and Appeal, fn. 129. *See* Annex A to this Response, No. 12 [REDACTED]; Annex 13 of the 13 Annexes (pp. 3013-3014) referring to the crime of "cruel treatment and concealment"). The GoV has not transmitted court records and/or other investigative records for this case.
[424] *Contra* Appeal, para. 138.
[425] Decision, para. 130; *see* paras. 120 (suggesting that this is a non-determinative factor) and 131.
[426] Appeal, para. 141; *see generally* paras. 141-152.

Chamber's assessment of the GoV's materials. As the Appeals Chamber has held, it "will not disturb the Pre-Trial Chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion. Instead, it will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it".[427] The Prosecution submits that the Decision is both reasonable and correct.

136. First, as noted in Ground 4, the Chamber did not mandate that the GoV must have identified particular suspects or issued arrest warrants to satisfy the complementarity test.[428] It reasonably observed that most of the GoV's domestic proceedings were at an early stage, without a suspect having been identified. It found from this and other factors, that the GoV had taken limited investigative steps, and that there had been periods of unexplained investigative activity.[429] This suggested an absence of progressive investigative steps or an advancing process of investigations or prosecutions in accordance with article 17(1)(a) of the Statute, which requires that "[t]he case *is being* investigated or prosecuted by a State" (or has been).[430]

137. This conclusion was reasonable on the material before it, and consistent with the Court's jurisprudence. In the *Simone Gbagbo* case, the Appeals Chamber upheld the Pre-Trial Chamber's conclusion that, in view of the number and frequency of investigative steps taken by the Ivorian authorities, these were "not tangible, concrete and *progressive*, but on the contrary, sparse and disparate".[431] The Pre-Trial Chamber reasonably considered that "the initiation of these proceedings, still formally opened, and the fact that Simone Gbagbo was placed and maintained in detention and informed of the accusations against her [were] not sufficient *per se* to demonstrate that the case against her '[was] being investigated' within the meaning of article 17(1)(a) of the Statute".[432] Similarly, in the *Philippines* situation, the Appeals Chamber held that for the purpose of article 18 admissibility challenges, a State must demonstrate "*an advancing process* of domestic investigations and prosecutions of the same groups or categories of individuals in relation to the relevant criminality".[433]

138. Further, these observations were not determinative for the Chamber's conclusion.[434] Even when the domestic proceedings had progressed (such that a suspect had been identified, an accused charged and a judicial decision on the person's criminal responsibility taken), the Chamber found that the Venezuelan authorities had not investigated or prosecuted the factual

[427] *Simone Gbagbo* Admissibility AD, para. 38, and jurisprudence cited therein.
[428] *Contra* Appeal paras. 142-143, 146; *see above* paras. 106, 109.
[429] Decision, paras. 89-91, 131. *See* Request, para. 118 (first item).
[430] Statute, art. 17(1)(a) (emphasis added).
[431] *Simone Gbagbo* Admissibility AD, para. 122 confirming *Simone Gbagbo* Admissibility Decision, para. 65 (emphasis added).
[432] *Simone Gbagbo* Admissibility Decision, para. 65.
[433] *Philippines* Article 18(2) Judgment, para. 106 (emphasis added).
[434] Decision, paras. 91, 96, 120, 131. *See above* paras. 48, 109.

allegations underpinning crimes against humanity, and had generally focused on low-level/direct perpetrators.[435]

139. Second, that the domestic proceedings might in the future focus on high-ranking suspects after first securing convictions or evidence from direct perpetrators is irrelevant to the current complementarity assessment.[436] The Appeals Chamber in *Philippines* rejected a similar argument from the Philippines Government, confirming that the complementarity assessment is made on the basis of the facts "at present".[437] It held that, while persons who are not at the very top of an organisation may commit very serious crimes, the Pre-Trial Chamber had not erred in expecting that domestic proceedings encompass high-ranking officials, for the State to succeed in its deferral request.[438] The Pre-Trial Chamber had reasonably held that "given the Court's role and purpose, and the fact that the authorised investigation concerns alleged crimes against humanity, high-ranking officials are expected to be the investigation's focus. The domestic proceedings in the Philippines thus do not sufficiently mirror the expected scope of the Court's investigation, since they only address the physical, low-ranking perpetrators and at present do not extend to any high-ranking officials".[439] The same *rationale* applies to this situation where the Prosecution also intends to investigate crimes against humanity.[440]

140. However, this does not mean that "[t]he *arrest* of high-ranking individuals […] constitutes a legal criterion" to show that the State is investigating crimes against humanity.[441] It only means that domestic investigations should consider the possible responsibility of high-ranking individuals to sufficiently mirror the scope of the Prosecution's intended investigation. This is related to the fact that the Prosecution's investigation of crimes against humanity will necessarily encompass the nature and extent of the requisite State or organisational policy, including across relevant hierarchies; and persons who are the "most responsible" for the alleged crimes, who will often not be limited to the direct/physical perpetrators.

141. Third, the Chamber did not "dr[a]w adverse findings from the information that some high-ranking persons had been interviewed as witnesses, not suspects".[442] The Chamber's remark must be read in its proper context. The Chamber considered the content of the interview of a commander of a mobile detachment unit, together with other measures, and noted that: "the line of questioning in this interview and other investigative measures taken suggest that the

[435] Decision, paras. 96-119, 130.
[436] *Contra* Appeal, para. 148.
[437] *Philippines* Article 18(2) Judgment, para. 161.
[438] *Philippines* Article 18(2) Judgment, para. 163; *Philippines* Article 18(2) Decision, para. 68.
[439] *Philippines* Article 18(2) Decision, para. 68.
[440] *See* Decision, para. 118, citing *Philippines* Article 18(2) Decision, para. 68.
[441] *Contra* Appeal, para. 149 (emphasis added).
[442] *Contra* Appeal, para. 148.

investigative focus was on the direct perpetrators under his command (and, yet, it appears that no suspect has been formally identified thus far)".[443] The Chamber's observation demonstrates its thorough assessment of the material before it, and corresponds to the approach taken by chambers in other cases.[444]

142. Likewise, the Chamber did not suggest that the GoV improperly took steps to identify the victims.[445] Its remark must be read in context. The Chamber observed that "at least in two other cases it appears that, despite the victim(s) clearly identifying higher ranking potential perpetrators, the subsequent investigative steps either focused on lower-ranking perpetrators and/or on accessing information on the victims and not the alleged perpetrators".[446] This was a case-specific observation that led the Chamber to conclude, together with other factors, that the general focus of the domestic investigations was on low-level/direct perpetrators.[447]

143. Significantly, the Chamber's assessment of the investigative steps taken by the GoV authorities is necessary to determine whether the domestic investigations and prosecutions sufficiently mirror the scope of the Prosecution's intended investigation within the terms of article 17(1)(a) of the Statute. This follows from the fact that an investigation may be deferred even if no suspects have been identified, as long as material shows that the domestic investigations sufficiently mirror the same criminality and category of persons as the Prosecution's intended investigation. While the same evidence may also be relevant to determine a State's unwillingness under article 17(2), the Chamber made no such finding under this limb in the Decision.[448] On the contrary, it expressly stated that it considered it was unnecessary to determine whether Venezuela is unwilling or unable to genuinely carry out any such investigation or prosecution under articles 17(2) and (3).[449]

144. Finally, the GoV's submissions do not adequately describe some aspects of the Prosecution's Request and the Decision. In particular:

- The Prosecution did not acknowledge that "there was an effective investigation" in relation to the acts outlined by the GoV.[450] Instead, the Prosecution noted that even if the GoV had provided substantiating information regarding the investigative steps taken with respect to

[443] Decision, para. 114.
[444] Similarly, in *Simone Gbagbo* the Appeals Chamber upheld the reasonableness of the Pre-Trial Chamber's assessment of the content of Ms Gbagbo's interview regarding aspects relevant to the Prosecution's case against her: *Simone Gbagbo* Admissibility AD, paras. 108-113; *Simone Gbagbo* Admissibility Decision, para. 63.
[445] *Contra* Appeal para. 151.
[446] Decision, para. 114.
[447] Decision, para. 114.
[448] *Al-Senussi* Admissibility Decision, para. 210; *see also Philippines* Article 18(2) Judgment, paras. 221-222.
[449] Decision, para. 132.
[450] *Contra* Appeal, para. 144.

the named individuals and for the crimes for which they were sought, the GoV still had not investigated the factual allegations underlying crimes against humanity in those cases.[451]

- The Chamber did consider records of investigative activities that the GoV submits that it did not consider (namely, those focused on victims).[452] However, these did not show that the GoV was investigating or prosecuting the factual allegations underlying crimes against humanity; further, these proceedings generally focused on low-level/direct perpetrators.[453]
- The Chamber did not find that the imposition of disciplinary measures on one officer alleged to be a direct perpetrator shows that the GoV is not actively investigating relevant alleged criminal acts.[454] The Chamber observed that "no investigative or disciplinary measures are shown with regard to the commanding Lieutenant Colonel", who is understood to be the superior of the direct perpetrator sanctioned.[455] This, together with other information, also confirmed that the general focus of the GoV's domestic investigations was on low-level/direct perpetrators.[456]
- Finally, the Chamber did not contradict itself by stating that to satisfy the complementarity test, domestic proceedings should encompass high-ranking officials, while also finding that the limited purpose of article 18 proceedings does not include a review of the Prosecution's conclusions on gravity.[457] The paragraph relied on by the GoV does not refer to gravity but rather to the Chamber's rejection of the GoV's request that the Chamber review the Prosecution's jurisdictional assessment.[458] In any event, a Chamber seised with a request by the Prosecution to resume its investigation need only determine complementarity and not gravity.[459] The Chamber did not contradict itself.

145. The Prosecution respectfully requests the Appeals Chamber to dismiss Ground 5.

G. Ground 6: The Chamber reasonably observed that there had been a period of inactivity in the domestic investigations

[451] Request, para. 97, fn. 205. The Prosecution's determination was made solely "with respect to the persons identified and for the crimes alleged". In some cases the legal qualification did not fully reflect the underlying conduct.
[452] *Contra* Appeal, para. 147 and fn. 149
[453] Decision, para. 119.
[454] *Contra* Appeal, para. 148.
[455] Decision, fn. 211.
[456] Decision, para. 119.
[457] Appeal, para. 150 and fn. 156 (referring to Decision, para. 36, which does not relate to gravity).
[458] Decision, para. 36; *but see* Decision, para. 54 (whereby the Chamber held that "[w]hile in some situations it may be necessary to consider the gravity requirement set out in article 17(1)(d) of the Statute in the context of an article 18(2) assessment, given the determinations reached below, there is no need to consider the gravity requirement in these proceedings"). The Chamber's remark may relate to the Prosecution's submissions that some legal qualifications used by the GoV did not reflect the gravity of the underlying conduct: Decision, para. 126 and Request, paras. 114, 117, 123-124, 126-129.
[459] Prosecution Response to GoV's Observations, paras. 8-21.

146. In Ground 6, the GoV submits that the Chamber erroneously excluded cases from its consideration based on 'unreasonable delays', when it had not made findings under the second limb of the complementarity test on the GoV's unwillingness or inability to investigate.[460] The Prosecution respectfully disagrees with the GoV's interpretation of the Decision, and submits that, even if the Chamber erred, this would not have had an impact on the Decision.

147. First, the Chamber's observation regarding the period of investigative inactivity was not a determining factor in its decision. Before applying the complementarity test in this situation, the Chamber analysed the material submitted by the GoV and observed, *inter alia*, that the majority of investigations showed prior to 2021/2022 "a significant period of inactivity without any apparent justification".[461] The Chamber stated that its observation was *non-determinative* to its decision.[462] The Chamber did not rely on it to assess whether the GoV was unwilling or unable genuinely to carry out investigations[463]— it did not assess unwillingness or inability at all given it had determined the admissibility of the case based on the first limb of the complementarity test alone.[464] But it also did not rely on this observation to conclude under the first limb that the GoV was not carrying out relevant investigations. Rather, it made this finding within its general observations on the material submitted by the GoV,[465] and relatedly in addressing the Prosecution's arguments regarding periods of unexplained inactivity.[466] It found that only in a minority of cases had a suspect been identified, an accused charged, and/or a judicial decision on criminal responsibility taken. It found that this *did not alter* the Chamber's overall determination that Venezuela's investigations did not sufficiently mirror the scope of the Prosecution's intended investigation.[467] Therefore, even if the Chamber had erred in making its observation, the Prosecution submits that this error could not have impacted the decision.[468]

148. Second, it was reasonable for the Chamber to comment on the periods of investigative inactivity even though it did not relate to the second limb of the complementarity test (unwillingness/inability).[469] The same evidence may be relevant to establishing both limbs of the complementarity test,[470] including evidence of inactivity in a case.[471]

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[460] Appeal, paras. 153-160.
[461] Decision, para. 91. *See also* para. 131.
[462] Decision, paras. 96, 120-121.
[463] *Contra* Appeal, paras. 155-159.
[464] Decision, para. 132.
[465] Decision, para. 91.
[466] Decision, paras. 121, 131.
[467] Decision, para. 91.
[468] *Contra* Appeal, para. 160.
[469] *Contra* Appeal, paras. 153, 155.
[470] *Al-Senussi* Admissibility Decision, para. 210. *See also* *Philippines* Article 18(2) Judgment, para. 222 (confirming the *Philippines* Article 18(2) Decision).
[471] *Kenya* Article 15 Decision, paras. 53-54.

149. Third, the Chamber provided sufficient reasoning to explain its observation.[472] It explained which material it reviewed, estimated the number of cases concerned and cited examples in the footnotes.[473] The Chamber was not required to explain by what standards it assessed the degree of delay,[474] particularly as it did not find that the delays were "unreasonable" or "unjustified", and did not rely upon these findings to assess the GoV's unwillingness or inability genuinely to investigate.[475]

150. Fourth, the Chamber did not err by not considering factors such as the purported complexity of the cases or the Covid pandemic.[476] The Chamber was not required to speculate as to the possible reasons for any periods of investigative inactivity, particularly since the GoV did not draw these issues to the Chamber's attention.[477] The Chamber's observations were reasonably limited to what it could glean from the materials provided by the GoV. For example, the Chamber noted that two-thirds of the cases for which investigations were opened in 2021 or 2022 related to criminal conduct allegedly occurring in 2017, i.e. four to five years earlier.[478] And for one such case, there had only been one procedural step on the case file during 2018.[479] These are clear indicia of inactivity and the Chamber reasonably noted them.

151. Fifth, the GoV submits that the Chamber placed undue weight on delays which occurred before the article 18(1) notification was given, and thus failed to appreciate the current status of investigations.[480] However, the period of investigative inactivity bore no relevant weight as it was a *non-determinative* factor in the Chamber's decision.[481] The Chamber acknowledged that investigative activity resumed in 2021/2022,[482] and did not exclude any cases in its assessment of the *determinative* factors on the basis of periods of unexplained investigative inactivity.[483] While the Chamber referred to one case that had such prior unexplained inactivity, it reasonably noted that the *current* status of the case was unclear.[484] Indeed, the GoV accepts that evidence of a failure by the domestic authorities to take steps to progress cases is relevant to the Chamber's admissibility determination.[485]

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[472] Decision, para. 91. *Contra* Appeal, paras. 154-155.
[473] Decision, para. 91 (fns. 175-178).
[474] *Contra* Appeal, paras. 154-155.
[475] *Contra* Appeal, paras. 154-155; *see* Decision, paras. 96, 120-121.
[476] *Contra* Appeal, para. 157.
[477] *See generally* GoV's Observations.
[478] Decision, para. 91.
[479] Decision, para. 112 (fn. 209).
[480] Appeal, para. 158.
[481] *See above* para. 147.
[482] Decision, para. 91.
[483] *See generally* Decision, paras. 97-119.
[484] Decision, para. 112.
[485] Appeal, para. 158.

152. Finally, the GoV submits that the Chamber also "manifestly abused its discretion" in making its observation about delays in the domestic investigations.[486] However, no further explanation is given to substantiate the abuse of discretion, or to show that the Chamber's approach was "so unfair on unreasonable as to "force the conclusion that the Chamber failed to exercise its discretion judiciously".[487] The Prosecution respectfully requests the Appeals Chamber to dismiss this aspect of the ground *in limine*.

153. The Prosecution respectfully requests the Chamber to dismiss Ground 6 of the Appeal.

CONCLUSION

154. The Prosecution respectfully requests the Appeals Chamber to dismiss the GoV's Appeal, reject its Additional Evidence Request, and affirm the Decision.

Karim A.A. Khan KC, Prosecutor

Dated this 5th day of October, 2023
At the Hague, The Netherlands

[486] Appeal, p. 59 ("F. Ground 6: The Pre-Trial Chamber erred in law and manifestly abused its discretion […]").
[487] *Ongwen* AJ, para. 87. *See generally* Appeal, paras. 153-160.