

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No. **ICC-02/18**

Date: **27 June 2023**

**PRE-TRIAL CHAMBER I**

**Before: Judge Péter Kovács, Presiding Judge  
Judge Reine Adélaïde Sophie Alapini-Gansou  
Judge María del Socorro Flores Liera**

**SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I**

**PUBLIC**

**Decision authorising the resumption of the investigation pursuant to article 18(2)  
of the Statute**

Decision to be notified, in accordance with regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

Mr Karim A. A. Khan  
Ms Nazhat Shameem Khan  
Ms Alice Zago

**Counsel for the Defence**

**Legal Representatives of Victims**

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

**The Office of Public Counsel for the Defence**

**States Representative**

**Amicus Curiae**

Competent authorities of the Bolivarian  
Republic of Venezuela

**REGISTRY**

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**Registrar**

Mr Osvaldo Zavala Giler

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

Mr Philipp Ambach

**PRE-TRIAL CHAMBER I** (the ‘Chamber’) of the International Criminal Court (the ‘Court’) with the present decision authorises the resumption of the investigation pursuant to article 18(2) of the Statute.

## I. PROCEDURAL HISTORY AND OVERVIEW OF SUBMISSIONS

1. On 27 September 2018, the Office of the Prosecutor (the ‘Prosecution’) received from a group of States Parties to the Rome Statute (the ‘Statute’) a referral under article 14 of the Statute for investigation of possible crimes against humanity committed in the Bolivarian Republic of Venezuela (‘Venezuela’) since 12 February 2014.<sup>1</sup>

2. On 28 September 2018, the Presidency assigned the situation in the Bolivarian Republic of Venezuela (the ‘Situation’) to this Chamber.<sup>2</sup>

3. On 14 June 2021, the Chamber dismissed *in limine* a request submitted by Venezuela for judicial control (the ‘Decision on Request for Judicial Control’).<sup>3</sup>

4. On 17 January 2022, the Prosecution filed its ‘Notification on the status of article 18 notifications in the Situation in the Bolivarian Republic of Venezuela I’ (the ‘17 January 2022 Notice’),<sup>4</sup> informing the Chamber that, on 16 December 2021, it had notified all States Parties, including Venezuela, and ‘other states with jurisdiction’ of its decision of 3 November 2021 to initiate an investigation into the Situation (the ‘First Article 18(1) Notification’).<sup>5</sup> In this notification, the Prosecution invited States to inform the Court, within one month of receipt thereof, whether they were investigating,

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<sup>1</sup> [Annex I to the Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I](#), 28 September 2018, ICC-02/18-1-AnxI.

<sup>2</sup> [Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I](#), ICC-02/18-1, p. 3. On 19 February 2020, the Presidency assigned the situation to the Pre-Trial Chamber III (see [Decision assigning the Situation in the Bolivarian Republic of Venezuela II and reassigning the Situation in the Bolivarian Republic of Venezuela I to Pre-Trial Chamber III](#), ICC-02/18-2, p. 4). On 16 March 2021, the Presidency of the Court re-assigned the Situation to this Chamber ([Decision assigning judges to divisions and recomposing Chambers](#), ICC-02/18-4, pp. 6-7).

<sup>3</sup> Decision on the ‘Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the Regulations of the Court’, ICC-02/18-9-Conf, public redacted version notified on 2 March 2022, [ICC-02/18-9-Red](#).

<sup>4</sup> [ICC-02/18-16](#), with confidential *ex parte* annexes A-D, only available to the Prosecution, the Registry, and Venezuela (ICC-02/18-16-Conf-Exp-AnxA, ICC-02/18-16-Conf-Exp-AnxB, ICC-02/18-16-Conf-Exp-AnxC, and ICC-02/18-16-Conf-Exp-AnxD, respectively).

<sup>5</sup> ICC-02/18-16-Conf-Exp-AnxA, containing a copy of the notification pursuant to article 18(1) of the Statute, as sent to all States Parties and other States with jurisdiction.

or had investigated, their nationals or others within their jurisdictions with respect to crimes allegedly committed in the Situation, and annexing a summary of findings of its preliminary examination.<sup>6</sup> The Prosecution further informed the Chamber that, on 13 January 2022, it had provided Venezuela with additional information about the acts that may constitute crimes referred to in article 5 and had also granted Venezuela an extension until 16 April 2022 to inform the Court of its investigations (the ‘Second Article 18(1) Notification’).<sup>7</sup>

5. On 21 April 2022, the Prosecution notified the Chamber that Venezuela, through correspondence dated 15 April 2022, had: (i) stated that it is ‘investigating or [has] investigated its nationals or others within its jurisdiction with respect to alleged punishable acts against human rights [...] in [accordance] with the [First Article 18(1) Notification]’, and (ii) requested the Prosecution to defer its investigation ‘in favour of the actions carried out by the appropriate national authorities of Venezuela’ (the ‘Deferral Request’).<sup>8</sup>

6. On 1 November 2022, the Prosecution requested the Chamber to authorise the resumption of its investigation into the Situation pursuant to article 18(2) of the Statute (the ‘Request’).<sup>9</sup> The Prosecution submits that the criminal proceedings undertaken by Venezuela ‘do not sufficiently mirror the scope of the Prosecution’s intended investigation’.<sup>10</sup> It further contends that Venezuela has taken ‘very limited progressive investigative steps’ and is therefore ‘not currently conducting an investigation capable of displacing the Court’s jurisdiction’.<sup>11</sup> In the alternative, the Prosecution avers that there are ‘several factors’ indicating that the criminal proceedings ‘largely appear to be conducted, or have been conducted’ with an intent to shield persons from criminal responsibility within the meaning of article 17(2)(a) of the Statute, as well as with a

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<sup>6</sup> First Article 18(1) Notification.

<sup>7</sup> ICC-02/18-16-Conf-Exp-AnxD.

<sup>8</sup> [Notification of the Bolivarian Republic of Venezuela’s deferral request under article 18\(2\) of the Rome Statute](#), ICC-02/18-17, with confidential and public redacted versions of [annex A](#) and [annex B](#), para. 1.

<sup>9</sup> [Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18\(2\)](#), ICC-02/18-18, with confidential *ex parte* annexes A and B, only available to the Prosecution and Venezuela, and public [annex C](#).

<sup>10</sup> [Request](#), para. 4.

<sup>11</sup> [Request](#), para. 4.

lack of independence and impartiality and in a manner inconsistent with an intent to bring the person to justice within the meaning of article 17(2)(c) of the Statute.<sup>12</sup>

7. On 3 November 2022, the Office of Public Counsel for Victims (the ‘OPCV’) requested leave to present, together with four Venezuelan lawyers, the views and concerns of victims on the Request.<sup>13</sup>

8. On 15 November 2022, the Registry transmitted to the Chamber a communication from Venezuela, dated 10 November 2022, in which Venezuela submitted proposals on the procedure to be set out by the Chamber, pursuant to rule 55(1) of the Rules of Procedure and Evidence (the ‘Rules’).<sup>14</sup>

9. On 18 November 2022, the Chamber issued the ‘Order inviting observations and views and concerns of victims’ (the ‘Order on the Conduct of Proceedings’).<sup>15</sup> In its order, the Chamber: (i) invited Venezuela to provide observations on the Request by no later than 28 February 2023;<sup>16</sup> (ii) instructed the Prosecution to submit a response, if any, to these observations, within three weeks of their notification, or by no later than 21 March 2023;<sup>17</sup> and (iii) invited potential victims and their legal representatives to present their views and concerns on the Request through the Victims Participation and Reparations Section (the ‘VPRS’), which was in turn instructed to collect such views and concerns and to transmit them to the Chamber, together with a short report summarising them, by no later than 21 March 2023.<sup>18</sup>

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<sup>12</sup> [Request](#), para. 5.

<sup>13</sup> [OPCV Request to Submit Observations on the Prosecutor’s Request to Resume the Investigation under Article 18\(2\) of the Statute](#), ICC-02/18-19, paras 3, 26.

<sup>14</sup> [Transmission of a communication from the Bolivarian Republic of Venezuela on the ‘Prosecution’s request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18\(2\)’ \(ICC-02/18-18\)](#), ICC-02/18-20 (filed on 14 November 2022) (with confidential annex I and public annex II); [Annex II to the Transmission of a communication from the Bolivarian Republic of Venezuela on the ‘Prosecution’s request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18\(2\)’ \(ICC-02/18-18\)](#), ICC-02/18-20-AnxII, paras 1, 21-42, pp. 13-14.

<sup>15</sup> [ICC-02/18-21](#).

<sup>16</sup> [Order on the Conduct of Proceedings](#), para. 9, p. 7.

<sup>17</sup> [Order on the Conduct of Proceedings](#), para. 9, p. 7.

<sup>18</sup> [Order on the Conduct of Proceedings](#), paras 10-11, p. 7.

10. On 19 January 2023 and 20 February 2023, the Registry transmitted to the Chamber 96 consultation forms containing the views and concerns of potential victims,<sup>19</sup> together with its first and second report.<sup>20</sup>

11. On 27 February 2023, the Chamber granted a request by Venezuela for an extension of time for the submission of translations into one of the working languages of the Court of the material upon which it intended to rely.<sup>21</sup>

12. On 1 March 2023, the Registry transmitted the observations submitted by Venezuela ('Venezuela's Observations').<sup>22</sup> In its observations, Venezuela submits that the Court lacks material jurisdiction insofar as crimes against humanity 'were not committed, not even superficially'.<sup>23</sup> Venezuela argues, '[s]ubsidiarily', that the scope of cases investigated by its authorities cover those that the Prosecution could potentially investigate and that this is 'evidenced by the information transmitted'.<sup>24</sup> In this regard, it notes that the Court is complementary to national jurisdictions and that the latter 'is identified as the primary and preferential jurisdiction for the purpose of investigating

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<sup>19</sup> [First Registry Transmission of Victims' Views and Concerns in the Article 18\(2\) Proceedings](#), ICC-02/18-22 (with 16 confidential *ex parte* annexes, only available to the Registry); [Second Registry Transmission of Victims' Views and Concerns in the Article 18\(2\) Proceedings](#), ICC-02/18-26 (with 80 confidential *ex parte* annexes, only available to the Registry; corrigenda of annexes 6, 14, 15, and 78 notified on 12 June 2023).

<sup>20</sup> First Registry Report on Article 18(2) Victims' Views and Concerns Pursuant to Pre-Trial Chamber's Order ICC02/18-21, ICC-02/18-23-Conf (with confidential *ex parte* Annex I, only available to the Registry, and confidential Annex II); public redacted version notified on 20 January 2023, [ICC-02/18-23-Red](#); Second Registry Report on Article 18(2) Victims' Views and Concerns Pursuant to Pre-Trial Chamber's Order ICC-02/18-21, ICC-02/18-27-Conf (with confidential *ex parte* Annex I, only available to the Registry, and confidential Annex II), public redacted version notified on the same date, [ICC-02/18-27-Red](#).

<sup>21</sup> [Decision on Venezuela's request for an extension of time and other procedural matters](#), ICC-02/18-29. See also [Annex II to Transmission of 'Request for modification of the deadline for submission of translations of the files related to the State's observations on OTP requests ICC-02/18-18', received from the Authorities of the Bolivarian Republic of Venezuela](#), 24 February 2023, ICC-02/18-28-AnxII (the 'Request for Extension of Time to File Translations').

<sup>22</sup> Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation (ICC-01/18-18 [*sic*]), 28 February 2023, ICC-02/18-30-Conf-Exp-AnxII; public redacted version notified on 28 March 2023, ICC-02/18-30-AnxII-Red ([corrigendum filed on 26 June 2023, ICC-02/18-30-AnxII-Red-Corr; see also the corresponding explanatory note, ICC-02/18-30-AnxII-Red-Corr-Anx](#)). While Venezuela submitted its observations to the Registry on 28 February 2023, due to technical issues with the filing of the documents, the Chamber authorised the Registry to transmit the observations on 1 March 2023 (email from the Chamber, 1 March 2023, at 10:02). See also [Transmission of the observations communicated by the Authorities of the Bolivarian Republic of Venezuela, pursuant to Pre-Trial Chamber I's Order ICC-02/18-21 of 18 November 2022](#), ICC-02/18-30 (with confidential *ex parte* annexes I to III, only available to the Prosecution and Venezuela).

<sup>23</sup> [Venezuela's Observations](#), para. 5.

<sup>24</sup> [Venezuela's Observations](#), paras 6-7.

crimes within the jurisdiction of the Court’.<sup>25</sup> Venezuela further makes arguments on: (i) the alleged lack of gravity within the meaning of article 17(1)(d) of the Statute; (ii) the alleged absence of a ‘legal basis to invoke the existence of an interest of justice’; and (iii) alleged violations of due process and judicial guarantees during the preliminary examination phase and the opening of an investigation by the Prosecution.<sup>26</sup>

13. On 21 March 2023, the Prosecution filed its response to Venezuela’s Observations (the ‘Response to Venezuela’s Observations’).<sup>27</sup> It submits that Venezuela’s ‘challenges to jurisdiction and gravity are not properly before the Court’.<sup>28</sup> It further contends that since the Situation was referred to the Court by a group of States Parties, Venezuela’s request to ‘review the Prosecution’s jurisdictional assessment or issue a decision under article 15(4) [of the Statute] lacks merit’.<sup>29</sup> In addition, the Prosecution avers that Venezuela’s submissions ‘that there was no systematic attack on the civilian population, and that no crimes were committed in furtherance of any State policy’ are ‘at odds’ with its preliminary examination findings.<sup>30</sup> It submits that Venezuela’s Observations and information provided confirm the Prosecution’s conclusion that Venezuela ‘has not demonstrated that it has conducted or is conducting national investigations or prosecutions that sufficiently mirror the scope of the Court’s intended investigation’.<sup>31</sup>

14. On 22 March 2023, the Registry transmitted translations into English of those documents ‘deemed essential to [the] Deferral Request’ prepared and submitted by Venezuela.<sup>32</sup>

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<sup>25</sup> [Venezuela’s Observations](#), paras 128-129.

<sup>26</sup> [Venezuela’s Observations](#), paras 7-8.

<sup>27</sup> Prosecution’s Response to the “Observations of the Government of the Bolivarian Republic of Venezuela’s to the Prosecution request to resume the investigation” (ICC-02/18-30-Conf-Exp-AnxII), ICC-02/18-31-Conf-Exp; public redacted version notified on 30 March 2023, [ICC-02/18-31-Red](#).

<sup>28</sup> [Response to Venezuela’s Observations](#), para. 2.

<sup>29</sup> [Response to Venezuela’s Observations](#), para. 3.

<sup>30</sup> [Response to Venezuela’s Observations](#), para. 3.

<sup>31</sup> [Response to Venezuela’s Observations](#), para. 5.

<sup>32</sup> [Transmission of Translated Documents Communicated by the Authorities of the Bolivarian Republic of Venezuela](#), ICC-02/18-32 (with Annexes 1-65 confidential *ex parte*, only available to the Registry and Venezuela) (the ‘Transmission of Translated Material’). See also [Decision on Venezuela’s request for an extension of time and other procedural matters](#), ICC-02/18-29, para. 11.

15. On 3 April 2023, the Chamber granted in part a request by Venezuela for leave to reply to the Response to Venezuela's Observations.<sup>33</sup>

16. On 20 April 2023, the Registry transmitted Venezuela's reply to the Response to Venezuela's Observations (the 'Reply').<sup>34</sup> Venezuela argues that, contrary to the Prosecution's submission, the judicial review provided for in article 15(4) of the Statute is not equivalent to the Prosecution's assessment under article 53 of the Statute.<sup>35</sup> It reiterates the need to exercise judicial control over the Prosecution's exercise of discretion to open an investigation into the Situation.<sup>36</sup> Venezuela further submits that 'it is a general principle of law [...] that any judicial body has to review its own jurisdiction *ex officio*'.<sup>37</sup>

17. Also on 20 April 2023, after having been granted an extension of time,<sup>38</sup> the Registry submitted its third transmission of the views and concerns of potential victims,<sup>39</sup> together with its final consolidated report.<sup>40</sup> In its report, the VPRS notes the 'overwhelming engagement' of potential victims with the Court in these proceedings, indicating that the VPRS received 1,875 submissions of views and concerns by way of 1,746 standard forms, 5 videos and 124 emails, or other written forms, including those transmitted by the OPCV.<sup>41</sup> Following an assessment by the VPRS, a total of 1,819 forms and other written documents, as well as five videos, were transmitted to the

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<sup>33</sup> [Decision on Venezuela's request for leave to reply](#), ICC-02/18-37.

<sup>34</sup> [Annex to Transmission of 'Reply of the Government of the Bolivarian Republic of Venezuela to the "Prosecution's Response to the 'Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation' \(ICC-02/18-31-Conf-Exp-AnxII\)'"](#), ICC-02/18-41-Anx. See also [Transmission of 'Reply of the Government of the Bolivarian Republic of Venezuela to the "Prosecution's Response to the 'Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation' \(ICC-02/18-31-Conf-Exp-AnxII\)'"](#), ICC-02/18-41.

<sup>35</sup> [Reply](#), paras 8-21.

<sup>36</sup> [Reply](#), paras 22-27.

<sup>37</sup> [Reply](#), paras 28-35.

<sup>38</sup> Email from the Chamber, 10 March 2023, at 15:24.

<sup>39</sup> [Third Registry Transmission of Victims' Views and Concerns in the Article 18\(2\) Proceedings](#), ICC-02/18-39 (with 1,723 confidential *ex parte* annexes, only available to the Registry).

<sup>40</sup> Final Consolidated Registry Report on Article 18(2) Victims' Views and Concerns Pursuant to Pre-Trial Chamber's Order ICC-02/18-21, ICC-02/18-40-Conf, with confidential Annex I (the 'VPRS Report'), confidential annex III and confidential *ex parte* Annex II, only available to the Registry; public redacted version notified on the same date and a corrigendum thereof on 22 June 2023, [ICC-02/18-40-Red-Corr](#) (see also the corresponding explanatory note, [ICC-02/18-40-Red-Corr-Anx](#)); public redacted version of the VPRS Report (contained in annex I) also notified on 20 April 2023, [ICC-02/18-40-AnxI-Red](#).

<sup>41</sup> [VPRS Report](#), para. 2.



Chamber on behalf of approximately 8,900 individuals, two organisations, and approximately 630 families.<sup>42</sup>

18. With the exception of the views contained in four of the transmitted forms,<sup>43</sup> the totality of the potential victims indicates that they want the Prosecution to continue its investigation for the following main reasons:<sup>44</sup> (i) a need for an urgent investigation by an impartial international court due to the lack of genuineness in the domestic proceedings, referring, *inter alia*, to a perceived lack of judicial independence and impartiality of the Venezuelan judiciary and unjustified delays in domestic proceedings;<sup>45</sup> (ii) the limited nature of the judicial reform measures adopted in Venezuela and their failure to address the lack of genuine proceedings;<sup>46</sup> (iii) the shielding from criminal responsibility of those most responsible;<sup>47</sup> and (iv) the ‘unique opportunity’ that an investigation by the Court could offer in terms of victims’ voices being heard, finding out the truth, ending impunity, and preventing future crimes.<sup>48</sup>

19. The only reason invoked by the four potential victims who indicated that they do not want the Prosecution to resume its investigation is the concern for their security.<sup>49</sup> Finally, the majority of potential victims, including those in favour of a resumption of the Prosecution’s investigation, raised security concerns, including notably: (i) fear of retaliation;<sup>50</sup> (ii) fear of different means of repression (culture of blacklisting and publishing of personal information, surveillance and monitoring, stripping of citizenship, extortion, and expropriation);<sup>51</sup> and (iii) the use of extreme violence by the authorities, including sexual and gender based crimes.<sup>52</sup>

20. On 4 May 2023, the Chamber rejected a request by Venezuela to respond to the VPRS Report.<sup>53</sup>

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<sup>42</sup> [VPRS Report](#), paras 18, 23.

<sup>43</sup> [VPRS Report](#), n. 44.

<sup>44</sup> [VPRS Report](#), para. 27.

<sup>45</sup> [VPRS Report](#), paras 28-31.

<sup>46</sup> [VPRS Report](#), paras 32-33.

<sup>47</sup> [VPRS Report](#), paras 34-36.

<sup>48</sup> [VPRS Report](#), para. 36.

<sup>49</sup> [VPRS Report](#), n. 44.

<sup>50</sup> [VPRS Report](#), para. 52.

<sup>51</sup> [VPRS Report](#), paras 53-55.

<sup>52</sup> [VPRS Report](#), paras 56-58.

<sup>53</sup> [Decision on Venezuela’s request for leave to respond to the VPRS report](#), ICC-02/18-43.

## II. ANALYSIS

21. The Chamber sets out its analysis of the issues raised in these proceedings as follows: (i) preliminary issues (Venezuela's request for the Chamber to consider the material and temporal jurisdiction as well as the requirement of sufficient gravity pursuant to article 17(1)(d) of the Statute and the interests of justice; and other alleged procedural irregularities); (ii) legal arguments concerning the interpretation of article 18 of the Statute; (iii) acts that may constitute crimes referred to in article 5 of the Statute for the purpose of article 18(2) of the Statute in this Situation; (iv) the material to be considered to determine the merits of the Request; and (v) whether Venezuela 'is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5' and which relate to the information provided in the First and Second Article 18(1) Notification.

### A. Preliminary Issues

22. In addition to its arguments on the proper interpretation of article 18 of the Statute and those addressing the merits of the Request, Venezuela raises a number of issues that are not directly related to the assessment that must be carried out pursuant to article 18(2) of the Statute. These are: (i) its request for the Chamber to consider the material and temporal jurisdiction as well as the requirement of sufficient gravity pursuant to article 17(1)(d) of the Statute and the interests of justice; and (ii) other alleged irregularities. These preliminary issues are set out and considered in turn below.

#### *1. Arguments concerning jurisdiction (material and temporal), gravity of the alleged crimes, and interests of justice*

##### **(i) Arguments regarding material jurisdiction**

23. Venezuela submits that the Prosecution 'failed to show' that the crimes allegedly committed in the Situation amount to crimes against humanity.<sup>54</sup> It contends that the Chamber must determine whether the Court has material jurisdiction over the alleged crimes in these article 18(2) proceedings because the Situation originated with a preliminary examination by the Prosecution 'but the legal framework subsequently

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<sup>54</sup> [Venezuela's Observations](#), para. 35.

changed following the strategic referral of six States Parties’, which was ‘politically motivated’.<sup>55</sup>

24. Venezuela notes that, in case of State referrals, the Prosecution can ‘move from the [preliminary examination] to the investigation phase without any prior judicial authorization from the [Pre-Trial Chamber]’.<sup>56</sup> It questions the concept of State referrals as it ‘may be considered an ineffective and politically biased method of triggering an investigation’.<sup>57</sup> It submits that the referral in this Situation ‘occurred in clear abuse of the powers conferred to States Parties’.<sup>58</sup> In addition, Venezuela submits that the previous Prosecutor ‘had already decided to attach [the referral of States] to the [preliminary examination] and not to proceed with the investigation phase’.<sup>59</sup>

25. By reference to article 15 of the Statute, Venezuela recalls that the rationale for the pre-trial chamber’s ‘power of intervention to open an investigation [...] lies in the concern of States Parties to avoid political or frivolous investigations’.<sup>60</sup> It further contends that the Chamber’s duty to determine whether it has material jurisdiction ‘is a substantial prerequisite to legitimise the procedural activity of any judicial body as a principle’.<sup>61</sup> It contends that the Decision on Request for Judicial Control ‘confirms the need to clarify the issues of jurisdiction and admissibility’.<sup>62</sup>

26. On this basis, Venezuela submits that the Prosecution has not established: (i) the contextual elements of crimes against humanity;<sup>63</sup> and (ii) the acts underlying the crimes of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law (article 7(1)(e) of the Statute), torture (article 7(1)(f) of the Statute), rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity (article 7(1)(g) of the Statute), and persecution (article 7(1)(h) of the Statute).<sup>64</sup> In

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<sup>55</sup> [Venezuela’s Observations](#), para. 38. See also paras 26-29, 110.

<sup>56</sup> [Venezuela’s Observations](#), para. 23. See also paras 26, 137, 190.

<sup>57</sup> [Venezuela’s Observations](#), para. 24.

<sup>58</sup> [Venezuela’s Observations](#), para. 30.

<sup>59</sup> [Venezuela’s Observations](#), para. 191.

<sup>60</sup> [Venezuela’s Observations](#), para. 39. See also paras 40-42.

<sup>61</sup> [Venezuela’s Observations](#), para. 43. See also paras 44-48.

<sup>62</sup> [Venezuela’s Observations](#), paras 32, 34. See also [Reply](#), para. 19.

<sup>63</sup> [Venezuela’s Observations](#), paras 49-90.

<sup>64</sup> [Venezuela’s Observations](#), paras 91-111.

addition, Venezuela contends that the documents relied upon by the Prosecution to reach its conclusions present shortcomings regarding ‘their evidential value, their quality, and their representativeness’.<sup>65</sup>

27. The Prosecution responds that ‘[s]ince on 27 September 2018 a group of States Parties referred the situation to the Court, the Prosecution may decide to investigate once it has determined that the requirements under article 53(1) are met, without requesting judicial authorisation under article 15(3)’ of the Statute.<sup>66</sup> It notes that article 18 of the Statute ‘provides a narrowly limited mechanism for States to bring a preliminary admissibility challenge on complementarity grounds’.<sup>67</sup> It contends that ‘[t]here is no provision in the Statute allowing a State to challenge the opening of an investigation on jurisdictional or gravity grounds, or on the grounds of interests of justice, at this stage of the proceedings’.<sup>68</sup>

28. The Prosecution further submits that Venezuela can challenge the Court’s jurisdiction ‘at a later stage of the proceedings’, namely with respect to a ‘case’, noting that ‘article 19 provides no similar authority for a State to challenge jurisdiction at the article 18 stage’.<sup>69</sup> By reference to previous jurisprudence of the Chamber, it submits that ‘article 18 proceedings are not an avenue to litigate the Prosecution’s jurisdictional and gravity assessment under article 53(1)’ of the Statute.<sup>70</sup> The Prosecution contends that Venezuela takes an extract of the Decision on Request for Judicial Control out of context.<sup>71</sup> In the alternative, the Prosecution avers that Venezuela’s jurisdictional submissions ‘are not supported in substance’.<sup>72</sup>

29. In its Reply, Venezuela challenges the Prosecution’s comparison between the assessment by a pre-trial chamber under article 15(4) of the Statute in case of *proprio motu* investigations with the Prosecution’s assessment pursuant to article 53(1) of the Statute in cases of referrals by States Parties or by the UN Security Council.<sup>73</sup>

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<sup>65</sup> [Venezuela’s Observations](#), para. 113.

<sup>66</sup> [Response to Venezuela’s Observations](#), para. 3. See also paras 2, 12.

<sup>67</sup> [Response to Venezuela’s Observations](#), para. 2. See also para. 11.

<sup>68</sup> [Response to Venezuela’s Observations](#), para. 2. See also para. 19.

<sup>69</sup> [Response to Venezuela’s Observations](#), para. 14.

<sup>70</sup> [Response to Venezuela’s Observations](#), para. 21.

<sup>71</sup> [Response to Venezuela’s Observations](#), para. 15.

<sup>72</sup> [Response to Venezuela’s Observations](#), para. 22. See also paras 23-24.

<sup>73</sup> [Reply](#), paras 8-17.

Venezuela further submits that since the referring States may seek a review by the pre-trial chamber in cases where the Prosecution decides not to initiate an investigation, the principles of equality and due process equally require judicial review of a decision to open an investigation.<sup>74</sup> It also maintains that its contention that the Chamber should determine the material jurisdiction of the Court ‘is in line with the position of the [Prosecution] and the [Chamber]’ in the situation in the State of Palestine.<sup>75</sup>

30. The arguments advanced by Venezuela are premised on its submission that the Situation should be treated as a *proprio motu* investigation. Indeed, throughout its submissions, Venezuela makes several references to article 15 of the Statute and the role of the pre-trial chambers in those situations.<sup>76</sup> However, it is recalled that, since the Situation was referred to the Prosecution by States Parties pursuant to article 14 of the Statute, the Prosecution was not required to seek the authorisation of the Chamber prior to opening its investigation. Venezuela acknowledges this<sup>77</sup> but seems to challenge the referral itself as having been politically motivated. Arguments of this nature go beyond the legal parameters of the Statute, are legally irrelevant and will thus not be considered by the Chamber. The legal framework of the Court is clear in requiring the authorisation of a pre-trial chamber only with respect to *proprio motu* investigations.<sup>78</sup> Upon receipt of the States referral, the Prosecution subsequently proceeded under articles 14 and 53(1) of the Statute and decided to formally open an investigation on 3 November 2021.<sup>79</sup>

31. In a previous decision, the Chamber recalled the ‘clear distinction between article 53 of the Statute, governing situations that are referred to the Prosecutor by a State Party or the Security Council, on the one hand, and article 15 of the Statute, which deals with *proprio motu* investigations, on the other hand’.<sup>80</sup> In case of referrals by States Parties or by the United Nations Security Council – apart from the judicial control

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<sup>74</sup> [Reply](#), para. 18.

<sup>75</sup> [Reply](#), paras 34-35.

<sup>76</sup> See, by way of example, the submissions advanced by Venezuela in paragraphs 22 to 26 of its [Reply](#).

<sup>77</sup> See, for example, [Venezuela’s Observations](#), paras 14-15, 190-191.

<sup>78</sup> Articles 13(c) and 15 of the Statute.

<sup>79</sup> [17 January 2022 Notice](#).

<sup>80</sup> [Decision on the ‘Request for review of the Prosecutor’s decision of 28 October 2021 to close the preliminary examination of the situation in Colombia’ and related requests](#), 22 July 2022, ICC-RoC46(3)-01/22-6, para. 6.

envisaged in article 18(2) of the Statute – the pre-trial chamber may review the Prosecution’s determination *only* in case the latter decides *not* to proceed with an investigation and within the parameters set out in article 53(3) of the Statute.

32. Indeed, in situations such as the present one where States Parties have referred a situation to the Court under article 14 of the Statute, pursuant to article 53(1) of the Statute, at this stage of the proceedings it is for the Prosecution (and not the pre-trial chamber) to determine whether: (i) crimes within the jurisdiction of the Court may have been committed, (ii) the cases would be admissible under article 17 of the Statute; and (iii) the investigation would not serve the interests of justice.<sup>81</sup> As found by the Appeals Chamber in the *Afghanistan* situation, in case the Prosecution determines that there is a reasonable basis to proceed, the Prosecution ‘shall’ initiate an investigation.<sup>82</sup>

33. Venezuela’s attempts to argue that a judicial review is always needed as otherwise ‘States subject to a State referral would remain defenceless, without judicial protection, leading to a violation of the sovereign rights and rights of defence’<sup>83</sup> are without merit. It is recalled that this Court does not investigate States but deals with individual criminal responsibility and its jurisdiction is accordingly limited to the most serious crimes of international concern allegedly committed by individuals.<sup>84</sup> At this stage of the proceedings, the sovereign rights of States are therefore only concerned with their prerogative to investigate pursuant to the principle of complementarity. Such right is given effect in article 18 of the Statute as the present proceedings illustrate.

34. Furthermore, according to article 19(2) of the Statute, States may challenge the jurisdiction of the Court ‘over a case’. The Chamber, in a previous composition, held that ‘challenges to the jurisdiction of the Court [...] pursuant to article 19(2)(a) of the

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<sup>81</sup> Appeals Chamber, [Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan](#), 5 March 2020, ICC-02/17-138 (the ‘*Afghanistan* Appeal Judgment’), para. 28: ‘In deciding whether to initiate an investigation, article 53(1) obliges the Prosecutor to consider three factors: (i) whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (ii) whether the case is or would be admissible; and (iii) whether, ‘[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice’.

<sup>82</sup> [Afghanistan Appeal Judgment](#), para. 28: ‘[i]f a situation is referred by a State Party or the Security Council, article 53(1) of the Statute places, in principle, an obligation on the Prosecutor to open an investigation’.

<sup>83</sup> [Reply](#), para. 21.

<sup>84</sup> See Articles 1, 5, and 26 of the Statute.

Statute may only be made by an accused person or a person for whom a warrant of arrest or a summons to appear has been issued under article 58'.<sup>85</sup> The Chamber recalls that whether a State is investigating or prosecuting a case has no bearing on the Court's jurisdiction, only on the admissibility of the case.<sup>86</sup>

35. Venezuela's reliance on the Chamber's previous decision rendered in the situation in the State of Palestine on a request by the Prosecution for a ruling on the Court's territorial jurisdiction<sup>87</sup> is misleading. A plain reading of the decision shows that it was concerned with the right exclusively afforded to the Prosecution pursuant to article 19(3) of the Statute to seek a ruling from the Court regarding a question of jurisdiction or admissibility. In this context, the Chamber clarified that 'the structure of article 19 of the Statute [...] distinguishes between three distinct procedural mechanisms'.<sup>88</sup> It noted that only 'the third paragraph of article 19 of the Statute is not restricted to a case', whereas 'the references to "case" specifically restrict the scope of application of the mechanisms set forth in article 19(1)-(2) of the Statute'.<sup>89</sup>

36. In light of the above, and considering that the Prosecution has not yet identified any suspects, a jurisdictional challenge by Venezuela pursuant to article 19(2) of the Statute is, at this juncture, premature. The current article 18 proceedings are limited to determining whether Venezuela 'is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States'. The limited scope of such assessment does not include a review of the Prosecution's conclusions on material jurisdiction.

37. Moreover, as to Venezuela's reference to secondary sources of law,<sup>90</sup> the Chamber recalls that pursuant to article 21 of the Statute, the Court shall apply in the first place the Statute, Elements of Crimes, and the Rules of Procedure and Evidence

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<sup>85</sup> Situation in the Democratic Republic of the Congo, [Decision following the consultation held on 11 October 2005 and the Prosecution's submission on jurisdiction and admissibility filed on 31 October 2005](#), 9 November 2005, ICC-01/04-93, p. 4.

<sup>86</sup> See generally Articles 11-13 and 17 of the Statute.

<sup>87</sup> [Reply](#), paras 34-35.

<sup>88</sup> [Decision on the 'Prosecution request pursuant to article 19\(3\) for a ruling on the Court's territorial jurisdiction in Palestine'](#), 5 February 2021, ICC-01/18-143 (the '*Palestine* Decision'), para. 72.

<sup>89</sup> [Palestine Decision](#), paras 72-73.

<sup>90</sup> See, for example, [Venezuela's Observations](#), paras 43-48; [Reply](#), paras 28-35.

(the ‘Rules’). Since the Court’s legal framework exhaustively regulates when a pre-trial chamber may review a decision of the Prosecution to initiate an investigation and the extent to which it may do so, no recourse to secondary sources is required in the present context.

38. Venezuela’s reliance on the Decision on Request for Judicial Control is also misplaced. Said decision was issued by the Chamber following a request by Venezuela wherein it sought the Chamber’s intervention in order to determine the following three issues:

- a. whether the Prosecution has sufficiently engaged in a “constructive dialogue” with Venezuela at the Preliminary Examination phase, pursuant to the principle of complementarity;
- b. whether Venezuela must be granted access to information in the possession of the Prosecution, in order to guarantee the right of defence, the principle of contradiction and the control of evidence; [and]
- c. whether the Prosecution can examine and/or rely upon materials that were allegedly illegally obtained or are “partial, in bad faith or without any evidentiary rigour”.<sup>91</sup>

39. It is thus clear that the Chamber’s indication that article 18 ‘provides the procedural opportunity to submit the type of challenges [...] introduced by Venezuela’ referred to those specific alleged irregularities in the Prosecution’s conduct of its preliminary examination. Indeed, several of these issues were raised again by Venezuela in its observations in these proceedings and are partially addressed in the present decision.

40. However, the issue of a potential lack of jurisdiction *ratione materiae* was not raised by Venezuela in its request for judicial control and accordingly the Chamber did not make any pronouncements in its Decision on Request for Judicial Control on this matter.<sup>92</sup>

41. To the extent that Venezuela may be understood as arguing that the occurrence of crimes against humanity has not been established and that this conclusion is based

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<sup>91</sup> [Decision on Request for Judicial Control](#), para. 4, referring to the request submitted by Venezuela, p. 3.

<sup>92</sup> [Venezuela’s Observations](#), paras 32, 34.



on investigations carried out domestically, such arguments could be relevant to the admissibility assessment that ought to be carried out pursuant to article 18(2) of the Statute. Accordingly, where appropriate and relevant, arguments of this nature are addressed below when determining whether Venezuela is investigating criminal acts which may constitute crimes referred to in article 5 of the Statute and which relate to the information provided to Venezuela by the Prosecution.

42. On the basis of the above, the Chamber rejects the arguments advanced by Venezuela in relation to material jurisdiction.

**(ii) Arguments regarding temporal jurisdiction**

43. Venezuela submits that the Prosecution has not respected the temporal criteria of the Situation because it ‘was at no point clearly determined or considered’.<sup>93</sup> It submits that, while the Prosecution initially referred to crimes committed ‘at least since April 2017’, it subsequently referred to crimes ‘since 12/02/2014’.<sup>94</sup> Venezuela thus requests the Chamber to ‘also rule on the temporal criteria, given the arbitrary changes of dates’ by the Prosecution.<sup>95</sup>

44. The Prosecution observes that the temporal scope of the Situation ‘encompasses alleged crimes within the jurisdiction of the Court allegedly committed in Venezuela since 12 February 2014’ as recorded ‘in its public notification to the Presidency of the referral pursuant to regulation 45, which was annexed to the Presidency’s assignment decision’.<sup>96</sup> The Prosecution argues that the ‘apparent uncertainty’ seems to arise from the fact that it has ‘focused on a particular sub-set of crimes committed which allegedly occurred within a more focussed time period, namely occurring “at least since April 2017”’.<sup>97</sup>

45. The Chamber recalls that the referral transmitted to the Prosecution by the six States Parties encompasses alleged crimes against humanity committed in the territory

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<sup>93</sup> [Venezuela’s Observations](#), para. 187.

<sup>94</sup> [Venezuela’s Observations](#), para. 188.

<sup>95</sup> [Venezuela’s Observations](#), para. 189.

<sup>96</sup> [Response to Venezuela’s Observations](#), para. 52.

<sup>97</sup> [Response to Venezuela’s Observations](#), para. 52

of Venezuela from 12 February 2014.<sup>98</sup> Therefore, the temporal scope of the Situation as referred by the States concerns alleged crimes committed since 12 February 2014.

46. Notwithstanding the above, the language used by the Prosecution in the First Article 18(1) Notification seems to indeed have caused unnecessary confusion as to the scope of the Prosecution's intended investigation for the purposes of article 18 proceedings. In said document, the Prosecution acknowledges the temporal scope of the Situation pursuant to the States referral and recalls that 'in 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', it 'focussed its assessment on a sub-set of crimes [...] committed since at least 2017'.<sup>99</sup> The Prosecution then indicates that 'these findings are without prejudice to the scope of the investigation now opened'.<sup>100</sup>

47. The Prosecution's reference to its findings made in the preliminary examination followed by an indication that '[t]hese findings are without prejudice to the scope of the investigation now opened'<sup>101</sup> creates some uncertainty as to the temporal scope of the criminal acts that it intends to investigate and on which Venezuela was required to provide information pursuant to article 18(2) of the Statute.

48. While the Prosecution should be sufficiently clear and specific in its communications with States Parties, it is considered that the information subsequently provided to Venezuela by the Prosecution,<sup>102</sup> most notably the list of concrete examples of allegations within the jurisdiction of the Court, clarified the temporal scope of the intended investigation by the Prosecution for the purposes of the article 18 proceedings.<sup>103</sup>

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<sup>98</sup> [Annex I to the Decision assigning the situation in the Bolivarian Republic of Venezuela to Pre-Trial Chamber I](#), 28 September 2018, ICC-02/18-1-AnxI, pp. 4-15.

<sup>99</sup> First Article 18(1) Notification, p. 2.

<sup>100</sup> First Article 18(1) Notification, p. 2.

<sup>101</sup> First Article 18(1) Notification, p. 2.

<sup>102</sup> See paragraphs 68-80 below.

<sup>103</sup> Second Article 18(1) Notification, pp. 11-19.

49. In this regard, from the content of the States' referral and the information provided to Venezuela by the Prosecution, the temporal scope of its intended investigation also covers conduct prior to April 2017, as illustrated in particular by the list of incidents included in the Second Article 18(1) Notification. Indeed, around half of the incidents listed fall at least partly outside the alleged focused temporal scope of 2017. It is noted that all of the incidents listed in the Second Article 18(1) Notification fall within the temporal scope of the Situation.

50. In light of the above, the Chamber rejects the arguments advanced by Venezuela in relation to temporal jurisdiction.

**(iii) Arguments regarding gravity and interests of justice**

51. Venezuela submits that, 'in addition to complementarity, the criteria of gravity is [*sic*] one of the most important elements for determining the admissibility of a situation'.<sup>104</sup> It contends that the Chamber will 'be able to assess the gravity of the acts and conclude that this case does not meet the criteria of gravity according to a specific analysis of the offences in question'.<sup>105</sup> In relation to the interests of justice criteria, Venezuela contends that since 'there is no material jurisdiction' and 'the criteria of admissibility [...] are not met', 'there is no point for the [Chamber] to analyse the interest[s] of justice'.<sup>106</sup>

52. In its Response to Venezuela's Observations, the Prosecution submits that Venezuela's contention that the alleged crimes are not sufficiently grave 'ignores the limited purpose of article 17's gravity requirement'.<sup>107</sup> It further asserts that 'the potential cases identified are of sufficient gravity to justify further action by the Court'.<sup>108</sup>

53. The Chamber recalls that, in cases of investigations opened on the basis of a State referral such as in this Situation, at this stage of the proceedings it is for the Prosecution (and not for the Chamber) pursuant to article 53(1) of the Statute to assess the

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<sup>104</sup> [Venezuela's Observations](#), para. 173.

<sup>105</sup> [Venezuela's Observations](#), para. 181.

<sup>106</sup> [Venezuela's Observations](#), para. 185.

<sup>107</sup> [Response to Venezuela's Observations](#), para. 4. See also para. 33.

<sup>108</sup> [Response to Venezuela's Observations](#), para. 34.

requirement of sufficient gravity and whether an investigation would serve the interests of justice prior to the opening of an investigation.<sup>109</sup>

54. In relation to the requirement of sufficient gravity under article 17(1)(d) of the Statute, it is recalled that rule 55 of the Rules stipulates that, when examining an application by the Prosecution under article 18(2) of the Statute, the Chamber ‘shall consider the factors in article 17 in deciding whether to authorize an investigation’.<sup>110</sup> While 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,<sup>111</sup> there is no need to consider the gravity requirement in these proceedings.

55. In light of the above, the Chamber rejects the arguments advanced by Venezuela in relation to the requirement of sufficient gravity (article 17(1)(d) of the Statute) and considerations of whether an investigation would be in the interests of justice (article 53(1)(c) of the Statute).

## *2. Other alleged irregularities in the present article 18(2) proceedings*

56. Venezuela contends that, since the Prosecution filed its Request more than six months after Venezuela submitted its Deferral Request, the option of requesting an authorisation to resume the investigation ‘was no longer available from a purely legal perspective’.<sup>112</sup> The Prosecution responds that ‘[a]lthough the Statute suggests that a deferral request must be resolved expeditiously, there is no statutory time limit for the Prosecution to apply for authority to resume its investigations’.<sup>113</sup>

57. The Chamber recalls that the Deferral Request was sent to the Prosecution on 15 April 2022 and the Prosecution filed its Request before the Chamber on 1 November 2022. Contrary to Venezuela’s submission, nothing in the legal framework prevented the Prosecution from requesting authorisation to resume its investigation into the Situation pursuant to article 18(2) of the Statute more than six months after Venezuela

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<sup>109</sup> See para. 31 above.

<sup>110</sup> See also [Philippines Article 18\(2\) Decision](#), para. 10; [Afghanistan Article 18\(2\) Decision](#), para. 43.

<sup>111</sup> See paras 97-134 below.

<sup>112</sup> [Venezuela’s Observations](#), paras 192-193.

<sup>113</sup> [Response to Venezuela’s Observations](#), para. 55.

had transmitted the Deferral Request. While the Prosecution is under a continuous obligation to facilitate expeditious proceedings before the Court, neither article 18(2) of the Statute, nor rule 54 of the Rules setting out the procedural requirements of an application by the Prosecution under article 18(2) of the Statute stipulate a time limit for the filing of such an application.

58. It is further recalled that the Prosecution also granted Venezuela a three-month extension to inform the Court of its investigations within the meaning of article 18(2) of the Statute.<sup>114</sup> In the circumstances of this Situation, particularly considering the volume of the material provided by Venezuela in its communication with the Prosecution, the six-month period does not appear to amount to an excessive delay that could suggest that the Prosecution failed to uphold its obligations to resolve the Deferral Request expeditiously. Venezuela's argument is thus without merit.

59. The Chamber also rejects Venezuela's submission that the Prosecution violated regulations 36(3) of the Regulations of the Court (the 'Regulations') by placing substantive submissions in footnotes.<sup>115</sup> Contrary to Venezuela's submission, by referencing the material upon which the Prosecution based its submissions, the Prosecution did not incorporate the submissions contained therein.

60. In addition, the Chamber notes Venezuela's submission that, during the Prosecutor's visit to the State in 2021 in the context of which he signed a Memorandum of Understanding with the President of Venezuela, he 'surprisingly announced his decision to open an investigation'.<sup>116</sup> In this regard, the Chamber notes that no memoranda of understanding has been officially notified and filed before it. For the purposes of the determination of the Request, the Chamber has only considered the material and submissions filed before it.

## **B. Legal arguments on the interpretation of article 18 of the Statute**

61. Venezuela submits that, for the purpose of its assessment under article 18(2) of the Statute, the Chamber should consider 'whether there is a "considerable overlap"'

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<sup>114</sup> Second Article 18(1) Notification, para. 6.

<sup>115</sup> [Venezuela's Observations](#), paras 194-196.

<sup>116</sup> [Venezuela's Observations](#), para. 17.

since ‘the “mirror” mechanism used by the [Court] to determine whether an identity exists between “cases” cannot be used [...] because there are no cases’.<sup>117</sup> It further contends that the approach proposed by the Prosecution places Venezuela ‘in an impossible situation, as there is no way to verify that the national investigations and proceedings comprise all possible investigations that would be covered by the situation’.<sup>118</sup> Venezuela submits that the kind of review proposed by the Prosecution ‘would invalidate the sense and purpose of Article 18’ of the Statute.<sup>119</sup>

62. Venezuela notes that the Court is complementary to national jurisdictions and argues that the latter ‘is identified as the primary and preferential jurisdiction for the purpose of investigating crimes within the jurisdiction of the Court’.<sup>120</sup> It submits that ‘there is a presumption that the State Party is assuming its responsibilities’.<sup>121</sup> Venezuela contends that the burden to establish that a State is unwilling or unable to proceed is ‘imposed on the Prosecutor and not the States Parties’.<sup>122</sup> It ‘acknowledges that requirements to assist in the process are established in both the Statute and the Rules’ but notes that the requirement to provide information about its investigation ‘is not the same as a “burden of proof”’.<sup>123</sup>

63. In its response, the Prosecution submits that Venezuela ‘bears the evidential burden and the burden of proof when making an article 18(2) deferral request’.<sup>124</sup> It contends that ‘[w]hile it is for the Prosecution to initiate an investigation, it is for the State to trigger the deferral procedure [...] on the basis of reasons that the State must advance and facts that it must substantiate’.<sup>125</sup> The Prosecution argues that ‘procedural perfection’ is not required and the State has the onus to submit information concerning any domestic proceedings that it considers corresponds to the scope of the Prosecution’s intended investigation.<sup>126</sup>

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<sup>117</sup> [Venezuela’s Observations](#), para. 153. See also paras 168, 170.

<sup>118</sup> [Venezuela’s Observations](#), para. 154. See also paras 159-160.

<sup>119</sup> [Venezuela’s Observations](#), para. 162.

<sup>120</sup> [Venezuela’s Observations](#), paras 128-129.

<sup>121</sup> [Venezuela’s Observations](#), para. 200.

<sup>122</sup> [Venezuela’s Observations](#), para. 200.

<sup>123</sup> [Venezuela’s Observations](#), paras 201-202.

<sup>124</sup> [Response to Venezuela’s Observations](#), para. 36.

<sup>125</sup> [Response to Venezuela’s Observations](#), para. 39.

<sup>126</sup> [Response to Venezuela’s Observations](#), para. 40.

64. In a previous decision, the Chamber recalled that, since article 17 of the Statute not only applies to determinations of the admissibility of a concrete case (as per article 19 of the Statute), but also to preliminary admissibility rulings pursuant to article 18 of the Statute, the meaning of the words ‘case is being investigated’ found in article 17(1)(a) of the Statute must be understood and construed taking into account the specific context in which the test is applied.<sup>127</sup> It is recalled that, at the time when a chamber must consider preliminary admissibility challenges under article 18 of the Statute, the contours of ‘likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages’.<sup>128</sup>

65. The Chamber also previously found that, if investigations are taking place at the national level, it must consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court.<sup>129</sup> The Chamber acknowledged that this assessment requires a comparison of two distinct forms of investigations, namely specific domestic proceedings or cases with identified individuals versus a so far general investigation of this Court; depending on the situation, this investigation may look into a large number of crimes, and cover a large geographical area and timeframe.<sup>130</sup> Indeed, what is required by the provision therefore is a comparison between two very different sets of information that cannot easily be compared.<sup>131</sup>

66. In order to enable it to carry out the assessment, it is thus of essence for the Chamber to have sufficient information. In this regard, the onus placed on the concerned State consists in providing ‘the Court with evidence of a sufficient degree of specificity and probative value that demonstrates that it is indeed investigating the case’.<sup>132</sup> If this is established, the onus is then indeed on the Prosecution to show that

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<sup>127</sup> Situation in the Republic of the Philippines, [Authorisation pursuant to article 18\(2\) of the Statute to resume the investigation](#), 28 January 2023, ICC-01/21-56-Conf; public redacted version notified on the same date, ICC-01/21-56-Red (the ‘*Philippines Article 18(2) Decision*’), para. 12, referring to previous jurisprudence.

<sup>128</sup> [Philippines Article 18\(2\) Decision](#), para. 12, referring to previous jurisprudence.

<sup>129</sup> [Philippines Article 18\(2\) Decision](#), para. 13, referring to previous jurisprudence.

<sup>130</sup> [Philippines Article 18\(2\) Decision](#), para. 13, referring to previous jurisprudence.

<sup>131</sup> [Philippines Article 18\(2\) Decision](#), para. 13, referring to previous jurisprudence.

<sup>132</sup> [Philippines Article 18\(2\) Decision](#), para. 13, referring to previous jurisprudence.

the State is either unwilling or unable genuinely to carry out the investigation or prosecution.

67. The Chamber previously determined that, in order to satisfy the complementarity principle, the domestic proceedings should also sufficiently mirror the content of the article 18(1) notification.<sup>133</sup> It is unclear in what aspects the ‘considerable overlap’ test proposed by Venezuela differs from the ‘sufficiently mirror’ test established in previous jurisprudence. To 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 argument. To the extent that Venezuela suggests that, in order to show that it is investigating the potential cases that the Prosecution may pursue, its domestic investigations must substantially cover the same conduct and the same persons/groups, this is indeed the correct understanding of the ‘sufficiently mirror’ test adopted in the jurisprudence.

### **C. Acts that may constitute crimes referred to in article 5 for the purpose of article 18(2) of the Statute**

68. Venezuela notes that the Prosecution only provided ‘generic information on certain cases on 13/01/2022’, and that, until then, Venezuela had been ‘blindly operating’.<sup>134</sup>

69. In its response, the Prosecution submits that it ‘went beyond the minimum requirement of the Court’s legal framework and informed [Venezuela] of the categories of alleged crimes it had identified, the alleged State policy [...] as well as their systematic nature, and the perpetrator groups allegedly responsible’.<sup>135</sup> It contends that the Prosecution has informed Venezuela ‘of the analysis conducted during the [preliminary examination]’ and ‘consistently engaged in a meaningful and transparent process’.<sup>136</sup> The Prosecution recalls that it ‘provided additional information’ to Venezuela to further assist it, referring in particular to a list of incidents included in the

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<sup>133</sup> [Philippines Article 18\(2\) Decision](#), para. 16, referring to previous jurisprudence.

<sup>134</sup> [Venezuela’s Observations](#), para. 95. See also para. 97.

<sup>135</sup> [Response to Venezuela’s Observations](#), para. 16.

<sup>136</sup> [Response to Venezuela’s Observations](#), para. 51.



Second Article 18(1) Notification ‘representative of the broader patterns of criminality that the [Prosecution] had analysed during the [preliminary examination]’.<sup>137</sup>

70. In the First Article 18(1) Notification, the Prosecution recalled that the scope of the Situation as referred by the States ‘encompasses any conduct amounting to crimes within the jurisdiction of the Court that are alleged to have been committed in Venezuela since 12 February 2014’.<sup>138</sup> The Prosecution further recalled that, in its preliminary examination, it had focused ‘on a sub-set of crimes [...] that are alleged to have been committed since at least 2017’.<sup>139</sup>

71. The Prosecution attached ‘[a] more detailed summary of [its] findings’ and also explained that ‘[t]here are no targets or suspects identified at this stage of the proceedings’.<sup>140</sup> The summary also referred to specific groups allegedly responsible.<sup>141</sup> Notwithstanding the foregoing, the Prosecution also indicated that its ‘potential cases would not be limited to these persons or groups of persons and would seek to examine the alleged responsibility of those who appear most responsible for such crimes’.<sup>142</sup>

72. The Prosecution noted that its ‘limited powers at the preliminary examination stage have inevitably restricted the scope of its findings’ and that, while it had determined the existence of a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, ‘it ha[d] not been able, nor is it required, to come to a determination on all allegations received’.<sup>143</sup> The Prosecution indicated that ‘the crimes identified during a preliminary examination should be considered as examples of relevant criminality within a situation’.<sup>144</sup>

73. The Chamber notes that, in this First Article 18(1) Notification, the Prosecution did not provide very detailed information regarding, for example, specific dates/locations of incidents, approximate number of victims, or alleged individuals/groups responsible for specific incidents. On 3 January 2022, Venezuela

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<sup>137</sup> [Response to Venezuela’s Observations](#), para. 54, n. 143.

<sup>138</sup> First Article 18(1) Notification, p. 2.

<sup>139</sup> First Article 18(1) Notification, p. 2.

<sup>140</sup> First Article 18(1) Notification, pp. 2-3.

<sup>141</sup> First Article 18(1) Notification, p. 5.

<sup>142</sup> First Article 18(1) Notification, p. 5.

<sup>143</sup> First Article 18(1) Notification, p. 7.

<sup>144</sup> First Article 18(1) Notification, p. 7.

requested, pursuant to rule 52(2) of the Rules, additional information in relation to the acts that would be the object of the investigation.<sup>145</sup> It was as a result of this request that, on 13 January 2022, the Prosecution provided additional information about the acts that may constitute crimes referred to in article 5 of the Statute, indicating that the information provided was ‘subject to the limitations provided for in article 18(1)’ of the Statute.<sup>146</sup>

74. After recalling that ‘certain statutory limitations apply’ to what additional information it could provide (referring to articles 18(1), 68, 93(10)(b)(ii) of the Statute and rules 46 and 51 of the Rules), the Prosecution provided Venezuela with an annex containing ‘several open source documents and reports which catalogue similar patterns of allegations’.<sup>147</sup> It also attached to its letter to Venezuela annex II, containing ‘a table of alleged incidents extracted from these and other public sources to provide a sample of concrete examples of allegations within the jurisdiction of the Court’.<sup>148</sup> The Prosecution then invited Venezuela to inform it ‘of any national proceedings that it has undertaken with respect to [these] alleged acts [...] set out in such publicly available sources’, as well as any other proceedings deemed relevant.<sup>149</sup>

75. Article 18(2) of the Statute refers to the investigation of ‘*criminal acts* which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States’. In order to enable the State to provide the information required by the Statute and thereby give effect to its right to seek a deferral under article 18(2) of the Statute, the Prosecution is placed under an obligation to provide sufficient information to the State in the notification as stipulated in article 18(1) of the Statute. Since, at the article 18 stage, admissibility can only be assessed against the backdrop of a situation and the ‘potential cases’ that would arise from this situation,<sup>150</sup> it is for the Prosecution to identify those ‘potential cases’.

76. In this regard, there is no merit in the Prosecution’s suggestion that the above understanding of article 18(2) of the Statute ‘would artificially limit the scope of the

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<sup>145</sup> See Annex C to the [17 January 2022 Notice](#).

<sup>146</sup> Second Article 18(1) Notification.

<sup>147</sup> Second Article 18(1) Notification, p. 5.

<sup>148</sup> Second Article 18(1) Notification, p. 5.

<sup>149</sup> Second Article 18(1) Notification, p. 5.

<sup>150</sup> [Philippines Article 18\(2\) Decision](#), para. 16, referring to previous jurisprudence.

Prosecution's future investigations on the basis of provisional and untested information which may not necessarily reflect the full scale of criminality within a given situation'.<sup>151</sup> Providing the relevant States with information sufficiently specific to enable them to exercise the right to seek a deferral pursuant to article 18 of the Statute is necessary to give effect to this provision. As this obligation merely concerns article 18 proceedings, this does not limit in any way the Prosecution's future investigations in these proceedings, if the Request is granted.

77. The approach proposed by the Prosecution that 'the definition of the investigation for the purposes of article 18(2) should not be limited to potential cases which were already expressly identified by the Prosecutor for the purpose of the preliminary examination'<sup>152</sup> would effectively make it impossible for States to ever be able to successfully seek a deferral pursuant to article 18(2) of the Statute, thereby rendering this provision meaningless. In order to ensure that the domestic investigations sufficiently mirror the scale of criminality that the Prosecution intends to investigate in a given situation, it is upon the Prosecution to provide information that is specific enough for the relevant States to exercise its right under article 18(2) of the Statute and representative enough of the scope of criminality that it intends to investigate in any future case(s).

78. A careful balance must be struck between the Prosecution's statutory duties to protect persons, sources, or information, as the case may be pursuant to article 18(1) of the Statute, on the one hand, and its duty to furnish the relevant States of information specific enough to give effect to their right under article 18(2) of the Statute to seek the deferral of an investigation, on the other hand. What may be considered sufficient will depend on the specific features of each situation.

79. In the circumstances of this Situation, the information provided by the Prosecution in its multiple exchanges with Venezuela appears to have been sufficiently specific for Venezuela to inform the Prosecution of its domestic proceedings and seek the deferral of the investigation. In particular, the sample of alleged incidents provided by the Prosecution to Venezuela as a result of Venezuela's request for more concrete

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<sup>151</sup> [Request](#), para. 61.

<sup>152</sup> [Request](#), para. 58.

information as to the criminal acts that may constitute crimes referred to in article 5 of the Statute contains the following information for each alleged incident: alleged victim, date, and location.<sup>153</sup>

80. In light of the above, the Chamber rejects the arguments advanced by Venezuela that it did not receive sufficient information to exercise its right under article 18 of the Statute. For the purpose of these article 18 proceedings, the scope of the Prosecution's intended investigation can be discerned from the summary of its preliminary examination findings and, in particular, from the sample of incidents provided by the Prosecution to Venezuela.<sup>154</sup>

#### **D. Material to be considered to determine the merits of the Request**

81. When seizing the Chamber with its Request, the Prosecution communicated to the Chamber the material provided by Venezuela pursuant to rule 54(1) of the Rules. As acknowledged by the Prosecution, 'the vast majority of the supporting documents are in Spanish' and the Prosecution provided English translations of some of the information received.<sup>155</sup> The Prosecution explained that the material provided by Venezuela was 'reviewed by the Prosecution in their original language by staff with the necessary language skills' and this 'enabled the Prosecution to assess the relevance and sufficiency of the supporting documentation and to determine the extent to which national proceedings may mirror the Prosecution's intended investigation'.<sup>156</sup>

82. The only translations provided by the Prosecution consist of some of the correspondence received from Venezuelan authorities and summaries provided by Venezuela of some criminal cases.<sup>157</sup> The criteria used by the Prosecution to decide which documents' translation would 'facilitate the Chamber's assessment' appear to be unclear.<sup>158</sup> It is recalled that, pursuant to regulation 39(1) of the Regulations, '[a]ll documents and materials filed with the Registry shall be in English or French' unless

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<sup>153</sup> Second Article 18(1) Notification, p. 11 et seq.

<sup>154</sup> Second Article 18(1) Notification.

<sup>155</sup> [Request](#), para. 14; n. 19.

<sup>156</sup> [Request](#), n. 19.

<sup>157</sup> [Request](#), n. 19; Annex A to Request, pp 4-5. VEN-OTP-00002002 (translation of VEN-OTP-0002-7064), VEN-OTP-00001981 (translation of VEN-OTP-0002-7069), VEN-OTP-00001982 (translation of VEN-OTP-0002-7117), VEN-OTP-00001983 (translation of VEN-OTP-0002-9649), and VEN-OTP-00001984 (translation of VEN-OTP-0002-9653).

<sup>158</sup> [Request](#), n. 19.

otherwise provided in the Court's legal framework or authorised by a chamber or the Presidency. Said regulation further indicates that '[i]f the original document or material is not in one of these languages, a participant shall attach a translation thereof'.

83. In the *Afghanistan* situation, Pre-Trial Chamber II was faced with a similar scenario. In that case, the Prosecution reviewed the material submitted by Afghanistan which were in Dari or Pashto and translated some of them into English.<sup>159</sup> Pre-Trial Chamber II found this practice inappropriate, noting that 'it is not for the Prosecution, which is effectively a "party" to the present proceedings, to decide which of the documents transmitted by Afghanistan are worth translating for the purpose of the Chamber's consideration'<sup>160</sup> and indicated that '[i]n the absence of a response from Afghanistan, it would have been appropriate for the Prosecution to seek the Chamber's guidance'.<sup>161</sup>

84. In these proceedings, the Prosecution seems to have proceeded in an identical manner, having decided to translate into English only a very small fraction of the material presented by Venezuela without providing any reasons for its choice. The Chamber considers that this way of proceeding is indeed inappropriate. Having received the material from Venezuela in a non-working language, the Prosecution should have requested the production and transmission of translations into one of the working languages of the Court.

85. In its *Afghanistan* Article 18(2) Decision, Pre-Trial Chamber II noted that it is for the State 'to ensure that the Chamber can analyse the materials submitted in support of a request for deferral'.<sup>162</sup> It further clarified that '[t]hat is not to say that, in case a State is unable to provide the supporting documents in one of the working languages of the Court, it may not consult with the Prosecution and agree that any translation for the purpose of the Chamber's assessment is made by the Prosecution'.<sup>163</sup>

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<sup>159</sup> [Decision pursuant to article 18\(2\) of the Statute authorising the Prosecution to resume investigation](#), 31 October 2022, ICC-02/17-196 (the '*Afghanistan* Article 18(2) Decision'), paras 48-49.

<sup>160</sup> [Afghanistan Article 18\(2\) Decision](#), para. 49.

<sup>161</sup> [Afghanistan Article 18\(2\) Decision](#), para. 49.

<sup>162</sup> [Afghanistan Article 18\(2\) Decision](#), para. 50.

<sup>163</sup> [Afghanistan Article 18\(2\) Decision](#), para. 50.

86. It is immaterial whether the Prosecution has the capacity to analyse the material transmitted by Venezuela in its original language. The requirement of submitting documents to the Chamber in one of the working languages of the Court applies equally to Venezuela and the Prosecution. Venezuela explicitly acknowledged this requirement when submitting its request for an extension of time to file translations into English of those documents deemed relevant to its observations in these proceedings.<sup>164</sup>

87. Considering the above, the Chamber has only considered documents for which English translations have been provided.<sup>165</sup> In this regard, in addition to the translations provided by the Prosecution,<sup>166</sup> Venezuela attached 13 annexes to its observations on 1 March 2023<sup>167</sup> and filed English translations of some of the material supporting the Deferral Request on 21 March 2023, which mainly consists of copies of criminal court records and records of other investigative steps taken.<sup>168</sup>

88. It is recalled that relevant substantiating documentation should include any ‘material capable of proving that an investigation or prosecution is ongoing’ such as ‘directions, orders and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings]’.<sup>169</sup> Since the translated material transmitted by the Prosecution and the material contained in the annexes attached to Venezuela’s Observations do not contain original police or court records and are often unrelated to any domestic investigation in Venezuela, they cannot be relied upon as relevant substantiating documentation for the determination of the Chamber.

89. In light of the above, the Chamber will, for the purpose of its analysis, 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.<sup>170</sup> From this material, it transpires that Venezuela is currently

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<sup>164</sup> [Request for Extension of Time to File Translations](#). See also Annex 1 to [Transmission of Translated Material](#), ICC-02/18-32-Conf-Exp-Anx1.

<sup>165</sup> ICC-02/18-32-Conf-Exp, pp. 2-4.

<sup>166</sup> See paragraph 82 above.

<sup>167</sup> Annexes 1-13 to [Venezuela’s Observations](#).

<sup>168</sup> Annexes 1 to 65 (confidential *ex parte*, only available to the Registry and Venezuela) to [Transmission of Translated Material](#).

<sup>169</sup> [Philippines Article 18\(2\) Decision](#), para. 15, referring to previous jurisprudence.

<sup>170</sup> See paragraph 14, n. 32, and paragraph 87, n. 168, above.

investigating slightly more than half of the incidents provided by the Prosecution as ‘representative of the broader patterns of criminality [...] analysed during the [preliminary examination]’.<sup>171</sup> The Chamber provides below an overview of its analysis of this material.

90. With regard to the conduct investigated, 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.<sup>172</sup> Whereas, in some cases, the criminal conduct or the alleged crimes are qualified in terms of the ‘Law to Prevent and Punish Torture and Other Cruel, Inhuman or Degrading Treatment’ (the ‘Special Law’), primarily as cruel treatment under article 18 of said law,<sup>173</sup> in many cases, the conduct is, if at all, qualified in very broad terms, such as by reference to a ‘human rights violation’.<sup>174</sup>

91. The Chamber further notes the following two patterns. First, in relation to approximately more than half of the cases, investigations were only opened in 2021 or 2022.<sup>175</sup> For approximately two-thirds of these cases (for which investigations were only opened in 2021 or 2022), the alleged criminal conduct occurred in 2017.<sup>176</sup> Second, among those investigations that were opened earlier than 2021, the majority shows a significant period of inactivity without any apparent justification discernible from the relevant material.<sup>177</sup> It would appear that, in these cases, investigations were resumed in 2021/2022. Moreover, and possibly as a direct consequence of the foregoing, in relation to about three-quarters of the cases, no (specific) suspect has been

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<sup>171</sup> [Response to Venezuela’s Observations](#), para. 54, n. 143.

<sup>172</sup> See, for example, Annexes 2, 4, (12: alleged ‘commission of a crime’ provided for in the Special Law), (13: ‘crimes against individuals’), 14-15, 20, 23, 25, 27, 32-34, 36-40, (41: crime ‘against individual liberty’), 45, 46, 48, 49, (50: ‘crimes against the persons’), 51-53, 58, (60: ‘crime against persons’), and 63 to the [Transmission of Translated Material](#). In some of those cases, merely the complaints or interviews with the potential victims or open source material contained in IT forensic expert reports reveal some information on what might have occurred.

<sup>173</sup> See, for example, Annexes 3, 5, 7-8, 10, 16, 18, 21, 24, 28, 30, 35, 44, 47, 54, 56-57, and (possibly) 61 to the [Transmission of Translated Material](#).

<sup>174</sup> See, for example, Annexes 5, 6, 10-11, 17, 19, 30, 35, 42, 44, 47, 54, 56, 59, and 61-62 to the [Transmission of Translated Material](#).

<sup>175</sup> See, for example, Annexes 6, 9, 11-12, 15, 17, 19-20, 23, 25, 27-28, 32, 34-40, 42, 45-46, 48-49, 51-54, 56, 59, and 61 to [Transmission of Translated Material](#). See also Annexes 2 and 3 to [Transmission of Translated Material](#) (however, these annexes refer to incidents that allegedly occurred in 2021 and 2020, respectively).

<sup>176</sup> See, for example, Annexes 17, 19-20, 23, 25, 27-28, 32, 34-40, 42, 45-46, 49, 51, 53-54, and 59 to [Transmission of Translated Material](#).

<sup>177</sup> See, for example, Annexes 4, 7-8, 13, 18, 22, 24, 26, 29, 31, 33, 41, 55, 58, and 64 to [Transmission of Translated Material](#). See also Annexes 21 and 60 to [Transmission of Translated Material](#).

identified yet. Only in a minority of cases, a suspect was identified, an accused charged, and/or a judicial decision on an accused's criminal responsibility taken.<sup>178</sup> Nonetheless, these cases are very limited and, for the reasons set out below, not capable of altering the Chamber's overall determination.

**E. Whether Venezuela 'is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the [notification to Venezuela]'**

92. In support of its Request, the Prosecution advances a number of arguments to show that Venezuela is not investigating or has not investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 of the Statute and which relate to the information provided to Venezuela by the Prosecution. The primary argument of the Prosecution is that the domestic proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation.<sup>179</sup> Failing this, the Prosecution argues that the domestic proceedings 'do not satisfy the genuineness criteria in article 17(2)(a) and (c)' of the Statute.<sup>180</sup>

93. To support its position, the Prosecution refers to a number of factors, namely: (i) that Venezuela is not investigating the patterns and policies underlying the contextual elements of crimes against humanity; (ii) that Venezuela has taken 'very limited investigative steps'; (iii) that there have been unjustified delays in the domestic proceedings; (iv) that the focus of the domestic proceedings is on direct perpetrators and arguably low level members of security forces; (v) that the domestic proceedings fail to sufficiently mirror the forms of criminality that the Prosecution intends to investigate; (vi) the alleged minor gravity of the crimes investigated by Venezuela; and

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<sup>178</sup> Annexes 5, 10, 16, 18, 21, 28/30 (the material contained in these annexes appear to at least partly concern the same incident), 43-44, and 47 to the [Transmission of Translated Material](#). See also Annexes 57 and 64 to the [Transmission of Translated Material](#).

<sup>179</sup> [Request](#), paras 4, 97.

<sup>180</sup> [Request](#), para. 98.



(vii) that the proceedings were not or are not being conducted independently or impartially.

94. The Chamber recalls that, in considering whether to authorise the resumption of an investigation, it must examine the Prosecution's request and any observations submitted by the State seeking a deferral, and 'shall consider the factors in article 17 in deciding whether to authorize an investigation'.<sup>181</sup>

95. As previously found, in considering whether a case is inadmissible under article 17(1)(a) and (b) of the Statute, 'the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned'.<sup>182</sup> Only when both questions are answered in the affirmative, should a chamber consider whether a State is unwilling or unable to genuinely carry out any such investigation or prosecution pursuant to article 17(2) and 17(3) of the Statute.<sup>183</sup> Inaction by the State having jurisdiction means that the question of unwillingness or inability does not arise, and a case would be admissible before the Court.<sup>184</sup>

96. In the below analysis, the Chamber will first focus on the factors that it considers determinative to its ultimate findings on the Request. It will then briefly address the other (non-determinative) factors raised by the Prosecution in the Request.

1. *Whether Venezuela is investigating the patterns and policies underlying the contextual elements of crimes against humanity*

97. The Prosecution argues that Venezuela has not investigated 'the possible systematic occurrence' of the crimes against humanity charged and 'the existence of patterns and policies', having 'expressly rejected' these allegations and characterised instead the incidents as 'isolated [...] constituting ordinary crimes' without any prior investigation into these allegations.<sup>185</sup>

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<sup>181</sup> [Philippines Article 18\(2\) Decision](#), para. 10, referring to previous jurisprudence.

<sup>182</sup> [Philippines Article 18\(2\) Decision](#), para. 11, referring to previous jurisprudence.

<sup>183</sup> [Philippines Article 18\(2\) Decision](#), para. 11, referring to previous jurisprudence.

<sup>184</sup> [Philippines Article 18\(2\) Decision](#), para. 11, referring to previous jurisprudence.

<sup>185</sup> [Request](#), para. 104.

98. In relation to the investigation of the patterns and policies underlying the contextual elements of crimes against humanity, Venezuela ‘denies, in the strongest possible terms, that crimes against humanity [...] were committed on its territory [...] in February 2014 and between 30/03/2017 and 30/07/2017’.<sup>186</sup> It submits that ‘[t]he violent demonstrations that broke out during that period plunged the country into a complex situation’ and in order to ‘re-establish public order’, the ‘security forces (police and military) [...] made legitimate use of force proportionate to the violence of the situation’.<sup>187</sup>

99. It is Venezuela’s submission that ‘if there were violations of citizens’ rights, they were isolated’ and ‘in any case, it is impossible to affirm that they followed a common pattern, bearing in mind that the possible perpetrators have been subject to domestic criminal law’.<sup>188</sup> It further avers that since the President of Venezuela and other public authorities ‘made repeated public appeals for the restoration of order, requesting that the violence in the streets be reversed in the most peaceful way possible’, it is not possible to claim that a ‘policy had been formulated’.<sup>189</sup> Venezuela submits that the existence of a State policy is also incompatible with the existence of the Human Rights Directorate as an organ tasked with investigating ‘potential acts of abuse committed by public officials against civilians’ and with the ‘regulatory framework’ aimed at ensuring ‘that all actions of State security agencies are carried out in strict compliance with human rights’.<sup>190</sup>

100. In its response, the Prosecution submits that Venezuela’s contention that there was no systematic attack on the civilian population and no state policy ‘are unsupported and at odds with the Prosecution’s determination in its thorough [preliminary examination]’.<sup>191</sup> In addition, it notes that Venezuela ‘concedes’ that the domestic proceedings ‘do not relate to crimes and facts that could support charges of crimes against humanity domestically because these have not occurred in its territory’.<sup>192</sup> The Prosecution contends that the fact that Venezuela ‘does not contemplate that these

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<sup>186</sup> [Venezuela’s Observations](#), para. 49.

<sup>187</sup> [Venezuela’s Observations](#), para. 54. See also para. 85.

<sup>188</sup> [Venezuela’s Observations](#), para. 65. See also paras 75, 109.

<sup>189</sup> [Venezuela’s Observations](#), para. 77. See also paras 78-79, 88.

<sup>190</sup> [Venezuela’s Observations](#), paras 86-87.

<sup>191</sup> [Response to Venezuela’s Observations](#), para. 3.

<sup>192</sup> [Response to Venezuela’s Observations](#), para. 5. See also paras 35, 37.

crimes have been committed in a systematic manner, or that allegations to this effect are worthy of investigation, supports the conclusion that there is no investigation mirroring the [Prosecution's] intended investigation'.<sup>193</sup>

101. The information provided by the Prosecution to Venezuela as to the scope of the intended investigation indicated that 'on the basis of the information available, there is a reasonable basis to believe that the multiple commission of these acts constituted an attack against a civilian population pursuant to or in furtherance of a State policy to commit such an attack'.<sup>194</sup> It was also indicated that

Further, there is a reasonable basis to believe that the policy to attack the targeted population was at a minimum encouraged or approved by the Government of Venezuela and carried out primarily by members of the State security forces. The information available further provides a reasonable basis to believe that pro-government individuals also participated in the violent repression of actual opponents of the Government of Venezuela or people perceived as such, principally by collaborating with State security forces in arresting perceived or actual opponents of the Government of Venezuela. There is a reasonable basis to believe that the attack against the civilian population was at a minimum systematic. Last, the information available demonstrates that there is a nexus between reported crimes and the attack.<sup>195</sup>

102. In its previous article 18(2) decision issued in the situation in the Philippines, the Chamber addressed similar allegations raised by the Prosecution as follows:

The Chamber observes that the Philippines does not contest the Prosecution's suggestion that it has failed to inquire into any pattern of criminality or the systematic nature of crimes, or investigated individuals who would appear to be most responsible. Indeed, most of the cases relied on by the Philippines appear to concern the responsibility of low-ranking police officers. When assessing the merits of an article 18(2) request, the Chamber must consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court. Whereas the Court's investigations concern international crimes, with certain contextual elements, domestic investigations may follow different approaches and a State need not investigate conduct as crimes against humanity, for example, or allege the same modes of liability found in the Rome Statute to still investigate the persons and conduct. [...].<sup>196</sup>

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<sup>193</sup> [Response to Venezuela's Observations](#), para. 38.

<sup>194</sup> Second Article 18(1) Notification, p. 23, para. 6.

<sup>195</sup> Second Article 18(1) Notification, p. 23, para. 7.

<sup>196</sup> [Philippines Article 18\(2\) Decision](#), para. 68.

103. After analysing the material presented by the Philippines, the Chamber found that it was ‘evident that, at present, no investigations or prosecutions covering patterns of criminality [...] are taking place’.<sup>197</sup>

104. Based on numerous submissions made by Venezuela, the Chamber considers that Venezuela appears to admit that it is not investigating the factual allegations underlying the contextual elements of crimes against humanity. In particular, Venezuela argues that ‘case law has interpreted that the attack should be directed against an unprotected and defenceless civilian population’ and that ‘[t]his feature cannot be applied to the context of violent demonstrations where security forces were deployed to maintain public order’.<sup>198</sup> It further asserts that ‘as the national security forces simply restored order, their actions can hardly be qualified as an attack directed *principally* against the civilian population’ and that ‘if there were violations of citizens’ rights, they were isolated’.<sup>199</sup>

105. In addition, Venezuela contends that, ‘by no means can a State “policy” exist when the State itself – through the specialised unit of the Public Prosecutor’s Office – investigates potential abuses by officials against private individuals’ and that ‘[u]ndeniably, during the disturbances in Venezuela in 2014 and between 30/03/2017 and 30/07/2017, the sovereign response to restore public order showed that there was no State plan or policy in place’.<sup>200</sup> Venezuela is of the view that ‘a systematic and planned attack, as part of a government policy, cannot be inferred, from the response of the Venezuelan security forces during the disturbances in the country’.<sup>201</sup> It submits that ‘[a]ny specific violations of protesters’ rights that may have occurred are merely accidental or isolated incidents processed by the criminal justice system’.<sup>202</sup>

106. Venezuela therefore concludes that there is ‘not even a hint of ‘a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>203</sup> However, in making these submissions, Venezuela does not point to *any*

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<sup>197</sup> [Philippines Article 18\(2\) Decision](#), para. 93.

<sup>198</sup> [Venezuela’s Observations](#), para. 64. See also para. 87.

<sup>199</sup> [Venezuela’s Observations](#), para. 65.

<sup>200</sup> [Venezuela’s Observations](#), paras 86, 88.

<sup>201</sup> [Venezuela’s Observations](#), para. 76.

<sup>202</sup> [Venezuela’s Observations](#), para. 76.

<sup>203</sup> [Venezuela’s Observations](#), p. 16.

specific domestic criminal investigations to support its conclusions on the factual allegations underlying the alleged crimes against humanity that the Prosecution intends to investigate.

107. Furthermore, from the relevant material submitted by Venezuela, it appears that Venezuela is indeed not investigating the factual allegations underlying the contextual elements of crimes against humanity. In other words, Venezuela appears to *a priori* conclude that the crimes alleged by the Prosecution were not committed as part of a widespread or systematic attack directed against the civilian population. However, these are factual conclusions that can only be reached after an investigation, either by Venezuela or the Prosecution. No information that such an investigation took place and, if any, how its conclusions were reached, are before the Chamber. For the same reasons, Venezuela's submissions that a policy to commit an attack within the meaning of article 7(2)(a) of the Statute is incompatible with public statements made by high level authorities of Venezuela and with the existence of the Human Rights Directorate are without merit.

108. In the Chamber's view, this is a factor particularly relevant to determine whether the domestic proceedings in Venezuela sufficiently mirror the scope of the Prosecution's intended investigation.

2. *Whether the focus of the domestic proceedings is on direct perpetrators and arguably low level members of security forces*

109. The Prosecution notes that the domestic investigations reported are limited to direct perpetrators and purported low level members of the State security forces, lacking investigative inquiries within the chain of command.<sup>204</sup>

110. Venezuela contends that 'it is untrue that the available information refers only to the direct perpetrators' and notes that '[i]n any event, the perpetrators differ by military or police rank or status'.<sup>205</sup>

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<sup>204</sup> [Request](#), para. 131.

<sup>205</sup> [Venezuela's Observations](#), para. 139.

111. The Prosecution responds that Venezuela ‘provided limited or no information about the perpetrator or perpetrator group(s) involved in the cases presented’.<sup>206</sup>

112. The Chamber notes that Venezuela refers to two cases to support its submissions on this matter.<sup>207</sup> In one case, a GNB Captain was indeed indicted with inhuman and degrading treatment in 2022.<sup>208</sup> However, from the material provided by Venezuela, the current status of the proceedings against the accused following the relatively recent formal reading of the charges is unclear. Furthermore, this case features among those where there appears to be a period of unexplained investigative inactivity between 2017<sup>209</sup> and 2021.

113. With regard to the second case explicitly mentioned by Venezuela, no translation was provided to the Chamber.<sup>210</sup> The Chamber further notes that, whereas Annex 60 to the Transmission of Translated Material refers to an alleged victim with a similar name, the material provided in this Annex also does not allow for the conclusion that high-ranking individuals were formally investigated. On the contrary, the material provided suggests that, whereas some of the alleged victims specifically mentioned a Colonel or ‘commander’ (and a Sergeant) as alleged (direct and/or indirect) perpetrator(s) in their respective complaints from 2018, the investigative steps taken still mainly focused on accessing information on the victims, namely reports of their medical examinations. The file does not contain arrest warrants for, or even documents outlining more preliminary investigations into, these alleged perpetrators.

114. Furthermore, the Chamber notes 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.<sup>211</sup> In one case,

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<sup>206</sup> [Response to Venezuela’s Observations](#), para. 46.

<sup>207</sup> [Venezuela’s Observations](#), para. 139.

<sup>208</sup> See [Venezuela’s Observations](#), para. 139; see also Annex 18 to the [Transmission of Translated Material](#).

<sup>209</sup> During 2018, there is only one procedural step concerning the remission of police records.

<sup>210</sup> See [Venezuela’s Observations](#), para. 139. The case number and the name of the case do not correspond to any of the material for which translations were provided.

<sup>211</sup> See Annexes 43 and 57 to the [Transmission of Translated Material](#). The file in Annex 43 suggests that a disciplinary measure was taken against one of the officers alleged to be a direct perpetrator (namely his dismissal) but no investigative or disciplinary measures are shown with regard to the commanding Lieutenant Colonel.

the commander of a mobile detachment unit in charge of the ‘control, maintenance and restoration of public order’ at the time of the incident, was interviewed in the capacity of witness and does not appear to be investigated as a potential perpetrator. The line of questioning in this interview and other investigative measures taken suggest that the investigative focus was on the direct perpetrators under his command (and, yet, it appears that no suspect has been formally identified thus far).<sup>212</sup>

115. From the material presented by Venezuela, it further transpires that the few arrest warrants and indictments filed, and convictions entered appear to concern one Lieutenant Colonel; three Sergeants and three Second Sergeants; eight military officers; and four police officers.<sup>213</sup> All of these cases appear to concern alleged direct perpetrators.

116. Moreover, in several of the cases provided by Venezuela a common investigative step consists of requesting the duty roster and the daily report log for the date(s) of the incident(s).<sup>214</sup> This appears to be additional indicia that the focus of the domestic investigations is indeed on the direct perpetrators without enquiries, for example, as to the persons to whom those on duty on the day of the incident would respond.

117. In its article 15 decision regarding the situation in Burundi, Pre-Trial Chamber III concluded that

the Burundian authorities have remained inactive in relation to potential cases arising out of the situation in Burundi. The reason is that the documentation made available to the Chamber reveals that these Commissions and proceedings do not concern the same (groups of) persons that are likely to be the focus of an investigation into the situation in Burundi.<sup>215</sup>

118. Similarly, as recalled above, given the Court’s role and purpose, high-ranking officials are expected to be the investigation’s focus.<sup>216</sup>

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<sup>212</sup> See Annex 34 to the [Transmission of Translated Material](#).

<sup>213</sup> See, Annexes 5, 10, 16, 18, 28/30, 44, and 47 to the [Transmission of Translated Material](#).

<sup>214</sup> See, for example, Annexes 3-4, 7, 14, 18, 21, 23-24, 37, 39-40, 42-43, 49, 51, and 58 to the [Transmission of Translated Material](#).

<sup>215</sup> Pre-Trial Chamber III, *Situation in the Republic of Burundi*, [Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”](#), ICC-01/17-X-9-US-Exp. 25 October 2017, 25 October 2017, ICC-01/17-9-Red, para. 181 (emphasis added).

<sup>216</sup> [Philippines Article 18\(2\) Decision](#), para. 68.

119. The Chamber further notes that the general focus of the domestic investigations on direct/low level perpetrators is consistent with Venezuela's assertion that crimes against humanity did not occur in Venezuela insofar as violations of citizens' rights were isolated in what Venezuela describes as 'potential acts of abuse committed by public officials'.<sup>217</sup> Indeed, the Chamber considers that these two factors taken together are determinative of its conclusion that the domestic investigations in Venezuela do not sufficiently mirror the Prosecution's intended investigation.

### 3. *The remaining factors alleged by the Prosecution*

120. In addition to the above determinative factors, the Chamber has also considered the remaining factors alleged by the Prosecution in support of its Request. These are discussed below.

121. In relation to the Prosecution's submissions that Venezuela has taken very limited investigative steps and that there have been unjustified delays in the domestic proceedings,<sup>218</sup> the material provided by Venezuela shows that, in the majority of its domestic investigations, the authorities have, thus far, not identified, and even less formally indicted or charged, any suspects.<sup>219</sup> This is also true for cases where a criminal complaint refers to the alleged perpetrators by name.<sup>220</sup> From the material considered by the Chamber, it is also possible to discern a pattern of periods of investigative inactivity for some years between the first investigative steps and 2021 or 2022.<sup>221</sup>

122. Furthermore, the Venezuelan authorities appear to have focused on identifying, locating, and accessing information on the alleged victims listed in the Second Article 18(1) Notification and have frequently failed to move past this stage in the investigations.

123. The Chamber also notes the Prosecution's submissions that the domestic proceedings fail to sufficiently mirror the forms of criminality that the Prosecution

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<sup>217</sup> [Venezuela's Observations](#), paras 86-87. See paragraph 97 above.

<sup>218</sup> [Request](#), para. 118. See also paras 132-133, 135-136. See also [Venezuela's Observations](#), para. 146.

<sup>219</sup> See paragraph 91 above.

<sup>220</sup> See, for example, Annexes 2 and 43 to the [Transmission of Translated Material](#).

<sup>221</sup> See paragraph 91 above.



intends to investigate<sup>222</sup> and that they do not mirror the gravity of the acts falling within the scope of its intended investigation.<sup>223</sup> In the list of incidents provided to Venezuela, the Prosecution did not indicate which conduct or alleged crimes it may investigate.<sup>224</sup> Similarly, the orders opening the investigations and other investigative material in the court records submitted by Venezuela frequently do not outline the criminal conduct in question or the alleged crimes sufficiently.<sup>225</sup> As a result, it is difficult to assess whether the domestic investigations sufficiently mirror the forms of criminality that the Prosecution intends to investigate and the gravity thereof.

124. With regard to the investigation of sexual and gender based crimes, Venezuela refers to three specific cases but only provides relevant information for one of them.<sup>226</sup> This case contains a reference to a rape in one of the files contained in the Annexes to the Transmission of Translated Material, as well as other acts that could qualify as sexual and gender based crimes, but the legal pre-qualification and conviction do not include any crimes with a sexual or gender component. A few other cases contain information that suggest that the criminal conduct in question could qualify as sexual and gender based crimes, but from the court records it is unclear whether the Venezuelan authorities are also investigating this criminal conduct as such.<sup>227</sup> Based on Venezuela's Observations,<sup>228</sup> it would further appear that the State does not intend to prosecute these incidents as such.

125. In relation to the conduct underlying the crime of torture, from the material provided by Venezuela it transpires that the State is investigating cases of alleged cruel

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<sup>222</sup> [Request](#), paras 108, 111; [Response to Venezuela's Observations](#), paras 28-29. See also [Venezuela's Observations](#), paras 103-107.

<sup>223</sup> [Request](#), paras 114, 117, 123-124, 126-129.

<sup>224</sup> Second Article 18(1) Notification, pp. 11-19.

<sup>225</sup> See paragraph 90 above. In many cases, the case files contain a lot of information regarding police records, arrest warrants, and/or criminal investigations against the victims, as opposed to the alleged perpetrators (see, for example, Annexes 4, 8, 9, 13-15, 20-23, 35, and 54 to the [Transmission of Translated Material](#)).

<sup>226</sup> [Venezuela's Observations](#), para. 103. English translations for two of the cases were not submitted.

<sup>227</sup> See Annexes 28, 37, and 58 to the [Transmission of Translated Material](#).

<sup>228</sup> [Venezuela's Observations](#), para. 103: 'the Public Prosecutor's Office has only detected [...] cases that could be prosecuted as such in accordance with domestic legislation. The remaining cases [...] are to be prosecuted as acts of cruel treatment, despite their sexual nature. Moreover, cruel treatment is punishable by a higher penalty than the crime of rape or sexual abuse under the Venezuelan Code of Criminal Procedure. [...]'].

treatment under article 18 of the Special Law,<sup>229</sup> whereas there do not appear to be any investigations focusing on instances of torture.<sup>230</sup> The fact that Venezuela may be giving a different (yet related) legal qualification to the relevant conduct does not affect the fact that it appears to be investigating the same ‘conduct’ in relation to the conduct underlying the crime of torture. In relation to the conduct underlying the crime of persecution, 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.

126. The Chamber considers that the information before it is insufficient to draw any conclusions on the Prosecution’s allegation that the domestic proceedings do not mirror the gravity of the acts falling within the scope of the Prosecution’s intended investigation.

127. Finally, the Chamber notes the Prosecution’s submissions on the factors that allegedly ‘undermine judicial independence and impartiality’ in Venezuela<sup>231</sup> and Venezuela’s condemnation of the Prosecution’s ‘disparaging remarks that the judicial, legislative, and executive institutions are unable to perform their function effectively’.<sup>232</sup> Pursuant to the wording of article 17(2)(c) of the Statute, in order to establish unwillingness under this sub-provision, the Prosecution needs to show that the specific proceedings referred to by the concerned State are not being conducted independently or impartially.<sup>233</sup>

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<sup>229</sup> See, for example, Annexes 8, 10, 16, 18, 21, 24, 28, 30, 44, 47, 54, and 57 to the [Transmission of Translated Material](#).

<sup>230</sup> The possible exceptions are Annexes 7 and 61, in which investigative records also refer to the crime of torture or article 17 of the Special Law (which concerns the crime of torture).

<sup>231</sup> [Request](#), paras 141-161.

<sup>232</sup> [Venezuela’s Observations](#), para. 133.

<sup>233</sup> See Appeals Chamber, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, [Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled ‘Decision on the admissibility of the case against Abdullah Al-Senussi’](#), 24 July 2014, ICC-01/11-01/11-565 (the ‘Gaddafi and Al-Senussi Judgment’), para. 218: ‘The concept of being “unwilling” genuinely to investigate or prosecute is therefore primarily concerned with a situation in which proceedings are conducted in a manner which would lead to a suspect evading justice as a result of a State not being willing genuinely to investigate or prosecute. This is provided for most specifically in article 17 (2) (a), which expressly states that, in order to determine unwillingness, the Court shall consider whether, “[t]he proceedings were or are being undertaken or the national decision was made *for the purpose of shielding the person concerned from criminal responsibility*” (emphasis added). The fact that

128. In these article 18 proceedings, the Prosecution appears to argue that, as a *general* rule, judges and prosecutors in Venezuela lack independence and impartiality. Venezuela is correct insofar as it suggests that the Prosecution's submissions are inappropriate. It is not for this Court to determine whether the judicial system in Venezuela is generally affected by a lack of independence and impartiality.<sup>234</sup>

129. It is correct, as noted by the Prosecution, that the lack of independence and impartiality in the domestic proceedings may be clear from the circumstances in a given case.<sup>235</sup> However, the Prosecution does not refer to the circumstances that would enable reaching such conclusion in relation to any of the domestic proceedings referred to by Venezuela. Furthermore, an analysis of the material provided by Venezuela does not enable the Chamber to reach any conclusive determination on the matter. The Prosecution's submissions on this point are accordingly rejected.

#### 4. *Conclusion*

130. In light of the above analysis, the Chamber draws the following conclusions. While Venezuela is taking some investigative steps, its domestic criminal proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation. This conclusion is primarily informed by: (i) the fact that Venezuela is not investigating (and does not express any intention to investigate) the factual allegations underlying the contextual elements of crimes against humanity; and, relatedly, (ii) the fact that the focus of the domestic investigations appear to generally be on direct/low level perpetrators.

131. In addition, the Chamber notes that: (i) Venezuela appears to have taken limited investigative steps; (ii) there appear to be periods of unexplained investigative inactivity; and (iii) the domestic investigations appear to not sufficiently mirror the

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the other two sub-paragraphs of article 17 (2) do not expressly refer to shielding or protecting the person concerned cannot detract from the fact that they are sub-paragraphs of a provision defining unwillingness'.

<sup>234</sup> The Appeals Chamber has noted that 'the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights' and that the intention behind article 17 of the Statute is not for the Court to be 'passing judgment generally on the internal functioning of the domestic legal systems of States in relation to individual guarantees of due process' ([Gaddafi and Al-Senussi](#), para. 219. See also paras 225-226).

<sup>235</sup> [Request](#), para. 88.

forms of criminality the Prosecution intends to investigate – noting in particular the discriminatory intent underlying the alleged crimes<sup>236</sup> and the insufficient investigation of crimes of a sexual nature.

132. Considering the above, pursuant to article 18(2) of the Statute, the Chamber concludes that Venezuela is not investigating or has not investigated criminal acts which may constitute crimes referred to in article 5 of the Statute that sufficiently mirror the scope of the Prosecution’s intended investigation. In light of the foregoing, there is no need to consider whether Venezuela is unwilling or unable to genuinely carry out any such investigation or prosecution.

133. The Chamber notes that the above determination is also in line with the views and concerns expressed by the potential victims in this situation.<sup>237</sup>

134. This conclusion does not preclude Venezuela from providing material in the future in order for either the Prosecution or the Chamber to determine inadmissibility on the basis of complementarity, if and when needed within the limits specifically set out in articles 18 and 19 of the Statute. Moreover, when an actual case is brought by the Prosecution, a further admissibility assessment may take place. Assessing the state of domestic proceedings is an ongoing process and requires continued dialogue between the State and the Court, to ensure that the principle of complementarity is upheld with respect to the Court’s authorised investigations and prosecutions.<sup>238</sup>

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<sup>236</sup> In relation to the crime of persecution, Venezuela indicates that it has not transposed this criminal offence into its domestic criminal law due to its alleged ‘lack of specificity’ (see [Venezuela’s Observations](#), para. 104). In this regard, the Chamber notes that, generally, States Parties are encouraged to transpose the Statute into their domestic legislation.

<sup>237</sup> See paragraphs 17-19 above.

<sup>238</sup> See, for example, [Philippines Article 18\(2\) Decision](#), para. 99.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**AUTHORISES** the Prosecution to resume its investigation.

Done in both English and French, the English version being authoritative.



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**Judge Péter Kovács**

**Presiding Judge**



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**Judge Reine Adélaïde Sophie Alapini-  
Gansou**



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**Judge María del Socorro Flores Liera**

Dated this Tuesday, 27 June 2023

At The Hague, The Netherlands