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**International
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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
with Confidential *EX PARTE* Annexes A and B
available to the Prosecution and the Bolivarian Republic of Venezuela

Public redacted version of "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)'" , 21 March 2023, ICC-02/18-31-Conf-Exp

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I. Introduction

1. In the “Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation”,¹ the Bolivarian Republic of Venezuela² requests the Chamber to rule that 1) the Court lacks material jurisdiction, alternatively 2) the admissibility criteria are not satisfied, alternatively 3) the GoV itself has investigated and prosecuted the alleged crimes or is currently doing so, and 4) the Prosecution’s Preliminary Examination³ is in breach of due process. As set forth below, the Prosecution respectfully submits that none of those requests have merit.

2. First, the GoV’s challenges to jurisdiction and gravity are not properly before the Court. Article 18 of the Rome Statute⁴ provides a narrowly limited mechanism for States to bring a preliminary admissibility challenge on complementarity grounds. There 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 proceedings. This is because a jurisdictional assessment is *already* a prerequisite for the opening of an investigation, whether by the Pre-Trial Chamber under article 15(4) or by the Prosecutor under article 53(1)(a), and so there is no need for this to be repeated under article 18. Likewise, the Prosecutor is always obliged to make a threshold assessment of sufficient gravity and consider interests of justice under article 53(1)(b) and (c) or rule 48 of the Rules of Procedure and Evidence.⁵

3. Second, regarding jurisdiction, the GoV’s request that the Chamber review the Prosecution’s jurisdictional assessment or issue a decision under article 15(4) lacks merit. Since on 27 September 2018 a group of State 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). Moreover, the GoV’s contention that there was no systematic attack on the civilian population, and that no crimes were committed in furtherance of any State policy are unsupported and at odds with the Prosecution’s determination in its thorough PE.

4. Third, regarding gravity, the GoV’s submission that the alleged crimes are not sufficiently grave ignores the limited purpose of article 17’s gravity requirement, which is only to exclude “those rather unusual cases when conduct that technically fulfils all the elements of

¹ ICC-02/18-30-Conf-Exp-AnxII (“[GoV Observations](#)”).

² “GoV” or “Venezuela”.

³ “PE”.

⁴ “[Statute](#)”.

⁵ “[Rules](#)”.

a crime under the Court’s jurisdiction is nevertheless of marginal gravity only”.⁶ The Prosecution’s assessment pursuant to article 53(1) makes plain that there is a reasonable basis to believe that crimes against humanity have been committed in Venezuela and that they are serious, and demand investigation and prosecution.⁷

5. Fourth, and of most direct relevance to this litigation under article 18, the GoV 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 as defined in the Article 18(1) Notification. While the Prosecution appreciates the updated information submitted by the GoV in its Observations and annexure, after a careful analysis it concludes that this information does not change the Prosecution’s conclusions in the Article 18(2) Request,⁸ rather it confirms these conclusions. Although the GoV argues that its criminal justice system generally functions well,⁹ and that its national criminal proceedings are ongoing,¹⁰ it concedes that these proceedings do not relate to crimes and facts that could support charges of crimes against humanity domestically because these have not occurred on its territory. Furthermore, although the GoV has provided updates on a number of criminal proceedings (all of which were already known to the Prosecution and addressed in its Request), these remain 1) very few in number compared to the volume of alleged crimes and the type of harm identified as having been committed in the situation, 2) focused exclusively on low-ranking members of the security forces (and seemingly physical perpetrators), with no apparent investigation of higher-level perpetrators and private individuals or groups, and 3) framed in terms of “isolated instances”¹¹ without inquiry into larger patterns of conduct or underlying policy.

6. For all of these reasons, the Prosecution submits that deferral is not warranted at this stage, and respectfully asks the Pre-Trial Chamber¹² to authorise the resumption of the Court’s investigation. This does not prejudice the possibility for the Court to revisit admissibility at a later stage of the proceedings upon a change in relevant facts and circumstances, in accordance with the Court’s legal texts. The Prosecution stands ready to do so, and in parallel will continue to pursue fruitful interactions with the GoV with regard to future cooperation in support of the

⁶ [ICC-01/12-01/18-601-Red](#), para. 53.

⁷ [ICC-02/18-16-Conf-Exp-AnxA](#) (“[Venezuela Art. 18\(1\) Notification](#)”), [ICC-02/18-16-Conf-Exp-AnxD](#), pp. 22-35.

⁸ ICC-02/18-18 (“[Request](#)” or “[Article 18\(2\) Request](#)”).

⁹ [GoV Observations](#), paras. 133, 139.

¹⁰ [GoV Observations](#), paras. 6, 121 and 139.

¹¹ [GoV Observations](#), paras. 7, 65, 76, 87, 130 and 139.

¹² “Chamber” or “PTC”.

Venezuelan authorities' efforts to enhance accountability and facilitate the discharge of the Prosecutor's own mandate.

II. Level of confidentiality

7. This response and its Annexes A¹³ and B¹⁴ are classified as confidential *ex parte* pursuant to regulation 23bis(2) of the Regulations of the Court¹⁵ as they refer to the GoV Observations and annexure with the same classification. Once a public redacted version of the latter is filed, there will be no basis to maintain this response as confidential *ex parte* and the Prosecution will file a public redacted version with confidential *ex parte* Annex A and B, unless otherwise directed. Annex A and B should however remain confidential since they reflect information received from the GoV confidentially and include personal details of individuals, which if revealed publicly could place them or others at risk.

III. The GoV's jurisdictional and gravity challenges are not properly before the Court

8. The GoV requests the Chamber to rule that the Court has no material jurisdiction,¹⁶ and that the gravity criterion is not met.¹⁷ It argues that "crimes against humanity (Art. 7) were not committed, not even superficially, within its jurisdiction"¹⁸ and that "the contextual elements of crimes against humanity and the underlying types of the offence are both inexistent".¹⁹ It also submits that "this case does not meet the criteria of gravity" since "only individual and isolated incidents of police abuse [were] recorded, all of which are subject to investigations and/or proceedings in Venezuela".²⁰

9. The Prosecution respectfully submits that the Chamber should summarily dismiss these arguments as they fall outside the scope of a determination under article 18(2). While the Chamber invited the GoV "to submit any additional observations arising from the Prosecution's Request",²¹ these must relate to the article 18 procedure itself and not to other issues arising

¹³ Annex A lists [REDACTED] individual cases for which the GoV provided updated information. *See infra*, para. 43.

¹⁴ Annex B lists all individual cases for which the GoV provided information during the late stages of the PE and in the course of the article 18(2) process, including the GoV Observations; *cf.* [ICC-02/18-18-Conf-Exp-AnxB](#). For ease of reference, in Annex B, the [REDACTED] individual cases for which updates were provided in the GoV Observations are shaded in blue.

¹⁵ "[Regulations](#)".

¹⁶ [GoV Observations](#), para. 41; *see* more generally, paras. 49-11.

¹⁷ [GoV Observations](#), paras. 171-181.

¹⁸ [GoV Observations](#), para. 5.

¹⁹ [GoV Observations](#), paras. 5, 49-90 (contextual elements), and paras. 90-111 (underlying offences).

²⁰ [GoV Observations](#), paras. 7, 130, 139, 171-181.

²¹ ICC-02/18-21 ("[Order](#)"), para. 9.

from the Chamber being seised of the situation. Moreover, since a group of State Parties had referred the situation to the Court pursuant to article 14, no judicial authorisation under article 15 was necessary for the Prosecutor to initiate an investigation. Rather, the procedure to be followed is as set out in article 53.²²

10. In any event, the GoV's submissions that there is not a reasonable basis to believe that crimes against humanity have occurred in Venezuela and that the situation is not sufficiently grave lack merit. As set forth below, the GoV misapprehends the elements of the crimes and does not present evidence or concrete information undermining the Prosecution's PE determination that there is a reasonable basis to believe that the alleged crimes in the situation took place as part of a systematic attack on a civilian population pursuant to or in furtherance of a State policy.²³

A. Jurisdiction

11. Article 18(2) of the Statute does not allow a State to challenge the Court's jurisdiction with respect to a situation. The provision unequivocally states that a State can request a deferral of the Prosecution's investigation if "it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute [article 5] crimes". This is consistent with the drafting history of the provision which sought to ensure that the Prosecutor "defer investigations where the same matter was being investigated by a State, unless the case would be admissible under the *complementarity provisions* of the Statute".²⁴

12. Nevertheless, a jurisdictional assessment is still carried out prior to the opening of the investigation.²⁵ Indeed, a jurisdictional assessment is a prerequisite for the opening of an investigation, whether by the Pre-Trial Chamber under article 15(4) or by the Prosecutor pursuant to article 53(1). Thus, there is no need for this assessment to be repeated under article 18. As such, as in all situations under PE, including Venezuela's, the Prosecution conducted a thorough analysis of the information available over a period of more than three years before it concluded that there was a reasonable basis to believe that crimes within the Court's jurisdiction had been or were being committed.²⁶ Further, because there had been a referral of State Parties under articles 13(a) and 14, the Prosecution was not required to seek judicial authorisation

²² ICC-02/17-138 ("[Afghanistan AD](#)"), paras. 29, 33.

²³ [ICC-02/18-16-Conf-Exp-AnxA](#).

²⁴ J. Holmes in R. Lee (ed.), *The International Criminal Court: the making of the Rome Statute, The Principle of Complementarity* (Martinus Nijhoff Publishers, 1999) ("[Holmes 1999](#)"), p. 69 (emphasis added).

²⁵ *Contra* [GoV Observations](#), paras. 31, 38, 191.

²⁶ [Statute](#), article 53(1); [Rules](#), rule 48.

pursuant to article 15(3). To the extent that the GoV argues that the Prosecution automatically opened the investigation because of the States' referral,²⁷ this is incorrect. While a referral obliges the Prosecution to exercise discretion upon receipt, it does not oblige the Prosecution to open an investigation automatically. The Prosecution must always assess (independently and objectively) the criteria under article 53(1) before deciding to initiate an investigation. It did so in this situation.²⁸

13. Moreover, the Prosecution respectfully submits that it is irrelevant that the PE was opened *proprio motu* prior to the States' referral.²⁹ This does not alter the procedure in the Statute that allows the Prosecution to initiate an investigation upon a State's referral, without having to seek prior judicial authorisation, once article 53(1) criteria have been assessed to be met.³⁰ This has been the Court's practice in other situations where States referred situations to the Court which were already under PE.³¹ In those instances, no judicial authorisation was sought before opening the investigation.³²

14. This, however, does not mean that the GoV cannot raise jurisdictional challenges at a later stage of the proceedings. Article 19(2) of the Statute allows States to challenge the Court's jurisdiction with respect to a "case", that is, after the issuance of an arrest warrant or a summons to appear against an individual for defined acts and crimes.³³ However, article 19 provides no similar authority for a State to challenge jurisdiction at the article 18 stage.

15. Furthermore, in its Judicial Control Decision, the PTC did not "[open] the door to a review" of jurisdictional matters in the context of the article 18 proceedings.³⁴ This extract of the Decision is, with respect, taken out of context.³⁵ In fact, therein the Chamber emphasised that it was the *Prosecutor* who should determine that there was a reasonable basis to proceed

²⁷ Cf. [GoV Observations](#), paras. 26-30, 38.

²⁸ Chaitidou in Ambos (ed.), *Rome Statute of the International Criminal Court, Article-by-Article Commentary* (Beck, Hart, Nomos, 4th ed.) ("Ambos (ed.)"), Article 14, p. 870, nm. 26; O. Frouville in J. Fernandez, X. Pacreau et M. Ubéda-Saillard (ed.), *Statut de Rome de la Cour pénale internationale, Commentaire article par article* (Pedone, 2019), Article 14, pp. 798, 808; cf. [Afghanistan AD](#), para. 29; see also [OTP Regulations](#), reg. 25 (1)(c).

²⁹ *Contra* [GoV Observations](#), paras. 25-26, 30, 38.

³⁰ [Afghanistan AD](#), paras. 29, 33. Bergsmo/Bekou in Ambos (ed.), Art. 53, p. 1630, nm. 13 and p. 1632, nm. 19.

³¹ See [Palestine situation](#), [Ukraine situation](#).

³² See [Palestine situation](#), [Ukraine situation](#) and [CAR 2](#). In *Palestine*, the OTP requested the PTC to confirm its assessment regarding the geographical scope of the Court's jurisdiction, pursuant to article 19(3): ICC-01/18-12.

³³ In *Palestine*, the PTC noted that the reference to 'case' in article 19(1)-(2) restricts the scope of application of these provisions, while article 19(3) does not have such a limitation and the OTP may seek a ruling from the Court regarding jurisdiction and admissibility before there is a 'case': [ICC-01/18-143](#), paras. 73-74, 82.

³⁴ *Contra* [GoV Observations](#), paras. 32 (quoting ICC-02/18-9-Red ("[Judicial Control Decision](#)"), para. 14) and 34.

³⁵ The GoV did not challenge the Court's jurisdiction: rather it took issue with how the OTP had conducted its PE. See [Judicial Control Decision](#), para. 4 (summarising Venezuela's challenges); see [ICC-02/18-6-Conf](#).

with an investigation³⁶ and, only then, could Venezuela inform the Court that it was investigating or has investigated its nationals pursuant to article 18(2).³⁷ Nor does the commentary cited support the GoV's request for a jurisdictional ruling now.³⁸ Instead, commentators agree that judicial authorisation is not necessary to start an investigation after a State referral³⁹ and that article 18 relates to complementarity matters.⁴⁰ In sum, as several Chambers have held in other instances, "judicial review powers cannot expand beyond, or overwrite, the procedural framework of the Court."⁴¹

16. Finally, the GoV suggests that the Prosecution should have further explained its decision to open an investigation.⁴² The Prosecution respectfully submits that there have been extensive communications between the Prosecution and the GoV during the PE (and beyond) and that the Prosecution kept the GoV apprised of its progressive assessment of the situation as well as of its decision to open an investigation. It bears noting that, in the *Venezuela* Article 18(1) Notification, the Prosecution went beyond the minimum requirement of the Court's legal framework⁴³ and informed the GoV of the categories of alleged crimes it had identified, the alleged State policy according to which they had been committed as well as their systematic nature, and the perpetrator groups allegedly responsible.⁴⁴

17. In conclusion, the GoV's request for the PTC to review the Prosecution's PE findings on jurisdiction or issue a decision under article 15(4) should be summarily dismissed.

B. Gravity and interests of justice

18. Similarly, the GoV's submissions on gravity and interests of justice are not properly before the Court and, as such, should be summarily dismissed.

19. The Prosecution respectfully submits that no statutory provision authorises a State to challenge gravity at this stage of the proceedings. As noted above, the Statute permits States to bring preliminary admissibility challenges under article 18(2), but only on the ground that the

³⁶ [Judicial Control Decision](#), paras. 14, 16.

³⁷ [Judicial Control Decision](#), para. 16; *see also* para. 15.

³⁸ [GoV Observations](#), para. 33 (fn. 45). Rather, the commentator cited therein refers to the OTP's admissibility assessment before the start of an investigation regardless of the triggering mechanism.

³⁹ *See e.g.* Chaitidou in Ambos (ed.), Article 14, p. 870, nm. 26; Frouville in Fernandez, Pacreau et Ubéda-Saillard (ed.), Article 14, p. 798.

⁴⁰ *See e.g.* Sana in Fernandez, Pacreau et Ubéda-Saillard (ed.), Article 18, pp. 900, 902, Holmes (1999), p. 69.

⁴¹ [Judicial Control Decision](#), fn. 33, para. 15.

⁴² [GoV Observations](#), para. 137.

⁴³ [Statute](#), article 18(1); Rules, rule 52(1). *Compare with* the OTP's obligation to inform and provide reasons to the referring State or Security Council if it decides not to open an investigation into a situation triggered by a State or Security Council referral: rule 105.

⁴⁴ [ICC-02/18-16-Conf-Exp-AnxA](#), [VEN-OTP-00001988](#), [VEN-OTP-0002-6873](#), and [Statement of ICC Prosecutor 8 February 2018](#).

State “is investigating or has investigated its nationals and others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5” and which relate to the opened investigation.⁴⁵ This is therefore limited to complementarity matters under article 17(1)(a)–(c), not to the issue of gravity under article 17(1)(d). It should also be noted that even article 19(2)(b), which provides for challenges to the admissibility of a “case” (but, by implication, not a situation),⁴⁶ limits the basis for a State to challenge admissibility to “the ground that it is investigating or prosecuting the case or has investigated or prosecuted” a case.⁴⁷ Moreover, even in *proprio motu* article 15 situations where judicial authorisation is necessary, the Appeals Chamber has made it clear that the Prosecution’s admissibility assessment under article 53(1) (including both complementarity and gravity) as well as interests of justice are not reviewable by the PTC deciding upon a request to investigate.⁴⁸

20. For the same reasons, the Chamber should not consider interests of justice in the context of the proceedings under article 18(2) which, as noted, are limited to complementarity matters.⁴⁹

21. This approach is consistent with the *Philippines* Article 18(2) Authorisation, where the Chamber did not consider the jurisdictional and gravity arguments raised by the Republic of the Philippines as “material to the article 18(2) proceedings”.⁵⁰ The Chamber further noted that “article 18 proceedings are not an avenue to re-litigate what has already been ruled on as part of the article 15 proceedings”.⁵¹ Likewise, for situations triggered by State referrals such as Venezuela I’s, article 18 proceedings are not an avenue to litigate the Prosecution’s jurisdictional and gravity assessments under article 53(1).

C. The Court has jurisdiction over the alleged crimes

22. Even if, for the sake of argument, the GoV’s jurisdictional submissions were properly before the Court, the Prosecution respectfully submits that they are not supported in substance. First, the GoV appears to misapprehend the elements of the crimes against humanity of

⁴⁵ [Statute](#), art. 18(2).

⁴⁶ Cf. [ICC-02/04-01/15-156](#), para. 14.

⁴⁷ Compare with article 19(2)(a), without this limitation when the accused challenges admissibility.

⁴⁸ ICC-01/21-12 (“[Philippines Article 15 Decision](#)”), paras. 14–15; [Afghanistan AD](#), paras. 1, 34–35, 37, 40, 46.

⁴⁹ The GoV posits that since “there is no material jurisdiction (reasonable basis)” and “the criteria of admissibility – namely, the principle of complementarity and the gravity of the facts – are not met” the PTC should not analyse the question of interest of justice: see [GoV Observations](#), para. 182.

⁵⁰ ICC-01/21-56-Red (“[Philippines Article 18\(2\) Authorisation](#)”), paras. 18–27 (under the heading “Preliminary issues”). In the *Philippines* Article 15 Decision, the PTC had found that there was a widespread and systematic attack against civilian population. Since in its article 18 observations the Philippines had argued that the potential cases were not grave because there was not such an attack, the Philippines’ gravity submissions were dismissed.

⁵¹ [Philippines Article 18\(2\) Authorisation](#), para. 25.

imprisonment, torture, rape, and persecution. Second, the GoV does not provide information that contradicts the Prosecution's determination under article 53(1)(a).

23. The GoV argues that "crimes against humanity [...] were not committed, not even superficially, within its jurisdiction".⁵² In particular, it argues that crimes were not perpetrated pursuant to a State policy or as part of a widespread or systematic attack against a civilian population.⁵³ This is because, according to the GoV, its national security forces aimed at restoring order following violent demonstrations, with only a few isolated incidents of abuses, which are being investigated or prosecuted domestically.⁵⁴

24. The GoV further disputes that the underlying offences ever occurred.⁵⁵ The GoV submits that only [REDACTED] complaints [REDACTED] were received by the competent national authorities regarding unlawful deprivation of liberty "of a very short transitory period in the context of the demonstrations", which were purportedly investigated or punished under article 176 of the Venezuelan Criminal Code.⁵⁶ The GoV further submits that [REDACTED],⁵⁷ and that most of the abuses did not occur in a context of 'custody' or 'control'.⁵⁸ According to the GoV, its national authorities have only investigated [REDACTED] which have been assigned the legal qualification of rape, while over [REDACTED] cases of sexual violence (other than rape) are being allegedly prosecuted as acts of cruel treatment.⁵⁹ The GoV acknowledges that it has not investigated cases of persecution since the crime is not provided for under Venezuelan law⁶⁰ and suggests that there is "uncertainty surrounding this underlying offence".⁶¹ The GoV also posits that the "figures presented by the OTP are not representative of those at the disposal of the Venezuelan State".⁶²

25. The Prosecution respectfully submits that the GoV Observations do not correctly apply the elements of the crimes and further underscore that the totality of the national investigations and proceedings presented do not sufficiently mirror the scope of the Prosecution's intended investigation, for the following reasons.

⁵² [GoV Observations](#), para. 5; *see also* paras. 49-90.

⁵³ [GoV Observations](#), paras. 49-90, 114.

⁵⁴ [GoV Observations](#), paras. 64, 65, 88.

⁵⁵ [GoV Observations](#), paras. 96-109.

⁵⁶ [GoV Observations](#), paras. 94, 113(iii).

⁵⁷ [GoV Observations](#), paras. 97, 101.

⁵⁸ [GoV Observations](#), para. 101.

⁵⁹ [GoV Observations](#), para. 103.

⁶⁰ [GoV Observations](#), para. 104.

⁶¹ [GoV Observations](#), para. 105.

⁶² [GoV Observations](#), para. 113(iii).

26. First, irrespective of the facts at issue, the alleged “short transitory period” of an act of detention does not disapply the material elements of the crime of imprisonment or other severe deprivation of physical liberty. As Pre-Trial Chamber III has held: “the brevity of detention alone cannot be brought forward as an argument to deny the severity of the deprivation of physical liberty” and “article 7(1)(e) of the Statute does not require the imprisonment or the deprivation of liberty to be for a prolonged period of time”.⁶³

27. Second, that torture as a crime against humanity requires the victim to be in the custody or under the control of the perpetrator does not mean that this crime can only occur when victims are held or confined in detention facilities. This crime has a broader definition than that allowed by the GoV and its application depends on the facts of each case.⁶⁴ Moreover, the GoV fails to take into account that this crime can also be committed by private individuals or groups, such as the *colectivos*.⁶⁵

28. Third, the crimes of “cruel treatment”, or torture or other inhuman acts as crimes against humanity, have different constitutive elements than the crimes of rape or of other forms of sexual violence, and provide for different protected interests and harms.⁶⁶ An investigation or conviction for the former crimes may not necessarily address all of the same facts nor reflect the distinguishable harm suffered by a victim of the crime of rape or of other forms of sexual violence.⁶⁷

29. Fourth, with respect to the crime of persecution, the GoV refers to its alleged “uncertainty” and to ICTY jurisprudence describing it as “expansive”.⁶⁸ Yet, the Prosecution notes that persecution has been recognised as a crime against humanity under customary law at least since 1945, when it was included in the International Military Tribunal’s (“IMT”) and International Military Tribunal for the Far East’s (“IMTFE”) Charters⁶⁹ respectively—which the United Nations General Assembly unanimously considered to reflect general principles of

⁶³ ICC-01/17-9-Red (“[Burundi Article 15 Decision](#)”), para. 68. *Contra* [GoV Observations](#), para. 94.

⁶⁴ Hall/Stahn in Triffterer/Ambos (ed.), *Rome Statute of the International Criminal Court, A Commentary* (Beck, Hart, Nomos, 3rd ed.), Article 7, pp. 271-272, nm. 133. Moreover, the crime of other inhuman acts does not require the victim to be in the custody or control of the perpetrator. *Contra* [GoV Observations](#), para. 101.

⁶⁵ D. Robinson in R. Lee (ed.), *The International Criminal Court, Elements of the Crimes and Rules of Procedure and Evidence* (Trans. Publishers, Inc., 2001) (“Lee (ed.)”), p. 90 (“the definition in article 7 deliberately omits any requirement of a connection to a public official, since crimes against humanity may be instigated, directed or encouraged not only by State actors but also by non-State actors”). See [Request](#), fn. 208 (defining *colectivos*).

⁶⁶ [Ongwen AJ](#), para. 1635 (when two or more crimes have materially distinct elements, their protected interests are necessarily different. Therefore, a conviction for only one of those crimes will not reflect the full culpability).

⁶⁷ [GoV Observations](#), para. 103.

⁶⁸ [GoV Observations](#), para. 105.

⁶⁹ [IMT Charter](#), art. 6(c); [IMTFE Charter](#), art. 5(c).

international law.⁷⁰ Moreover, the Rome Statute provides for a clear definition of the crime of persecution, unlike the legal texts of other tribunals.⁷¹ In any event, the Prosecution respectfully submits that the relevant consideration is whether the persecutory nature of the underlying acts (in this case, conduct against actual or perceived political opponents) is reflected in the conviction or sentence. This outcome could be achieved, for instance, by considering the persecutory nature of the crimes as aggravating sentencing factors.⁷² However, the GoV has not explained how an alleged discriminatory intent would be reflected in its domestic proceedings.

30. Finally, the GoV has not demonstrated that the Court lacks material jurisdiction and has provided no basis to cast doubt on the Prosecution's PE determination pursuant to article 53(1)(a). As detailed in the Prosecution's communications with Venezuela⁷³ and in its annual reports,⁷⁴ after a thorough and detailed PE, the Prosecution concluded that there was a reasonable basis to believe that, from at least April 2017 onwards, thousands of perceived or actual opponents of the GoV were allegedly persecuted on political grounds, arrested and detained without proper legal basis; hundreds were allegedly tortured; and more than 100 were allegedly subjected to forms of sexual violence (including rape).⁷⁵ These findings were made without prejudice to other crimes that may be determined at a later stage. The Prosecution also found that there was 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; that this attack was at the least systematic and targeted real or perceived opponents of the GoV;⁷⁶ and that the policy to attack this part of the population was at a minimum encouraged or approved by the GoV, and carried out primarily by members of specific State security forces (which the Prosecution identified) with the possible assistance of pro-government groups or individuals.⁷⁷

⁷⁰ See ECCC, [Case 001 AJ](#), paras. 109-112; [Case 002/01 AJ](#), para. 576; [UNGA Res. 95\(I\)](#) (1946); ILC, [Nuremberg Principles](#), 1950, principle VI(c).

⁷¹ G. Witschel and W. Rückert in Lee (ed.), pp. 94-95.

⁷² ICC-01/11-01/11-565 ("[Al-Senussi Admissibility AD](#)"), paras. 119-122; *see in particular* para. 121.

⁷³ [VEN-OTP-00001988](#), [ICC-02/18-16-Conf-Exp-AnxD](#); *see also* [Venezuela Art. 18\(1\) Notification](#).

⁷⁴ [OTP PE Report 2018](#), paras. 99-124; [OTP PE Report 2019](#), paras. 57-83; [OTP PE Report 2020](#), paras. 198-214.

⁷⁵ [ICC-02/18-16-Conf-Exp-AnxD](#), p. 29, para. 23; p. 31, para. 29; and p. 36, para. 51; *see* [Request](#), paras. 101-103, 117. The temporal scope of the OTP's intended investigation starts as of 12 February 2014, as indicated in the [Venezuela Article 18\(1\) Notification](#). The States' referral requested the OTP to investigate the commission of statutory crimes as of that date. For the purposes of its PE assessment under article 53(1), the OTP assessed the commission of crimes from at least April 2017. However, consistently with the Court's jurisprudence, the OTP's investigation is not limited to the incidents identified during the PE. *See below* para. 52. *See* [Afghanistan AD](#), paras. 57-64.

⁷⁶ [ICC-02/18-16-Conf-Exp-AnxD](#), p. 2, paras. 6, 7, and p. 11, para. 34.

⁷⁷ [OTP PE Report 2020](#), paras. 202-206, and [ICC-02/18-16-Conf-Exp-AnxD](#), p. 2, para. 7.

31. The Prosecutor further stated that this determination only meant that an investigation was now warranted. However, he emphasised that only through a thorough investigation of incriminating and exculpatory circumstances in equal measure, as required by article 54(1)(a), the truth could be determined.⁷⁸

D. The alleged crimes are sufficiently grave

32. Finally, even if the GoV's arguments on gravity were entertained at this stage of the proceedings, the Prosecution respectfully submits that they too should fail.⁷⁹

33. As stated by the Appeals Chamber, the purpose of the gravity requirement in article 17 is to "exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only".⁸⁰ In other words, crimes within the jurisdiction of the Court are presumptively of sufficient gravity to warrant further action, and should be excluded on the basis of gravity only when an assessment of quantitative and qualitative criteria⁸¹ shows that the case is of marginal gravity.

34. In the present situation, the Prosecution concluded that the potential cases identified are of sufficient gravity to justify further action by the Court, in the light of both quantitative and qualitative considerations, including the scale, nature, manner of commission and impact of the crimes. As stated above, the Prosecution found a reasonable basis to believe that hundreds of victims had been subjected to a wide range of criminal acts during prolonged periods of detention, including torture, rape and/or sexual violence from at least April 2017 onwards. Victims were allegedly subjected to acts of violence including beatings, asphyxiation, near drownings, and electric shocks resulting in severe harm to their mental and physical wellbeing.⁸² Moreover, in light of the Prosecution's mandate, as well as the object and purpose of the Statute, and taking into account the gravity of the crimes and the interests of victims, the Prosecution has not identified any reason to believe that the opening of an investigation into the Venezuela I Situation would be contrary to the interests of justice.

35. In conclusion, the GoV's submissions that "crimes against humanity [...] were not committed, not even superficially"⁸³ and that "the criteria of gravity is not satisfied" because

⁷⁸ [Statement of ICC Prosecutor 5 November 2021](#).

⁷⁹ [GoV Observations](#), paras. 7, 171-181.

⁸⁰ [ICC-01/12-01/18-601-Red](#), para. 53.

⁸¹ [ICC-01/12-01/18-601-Red](#), paras. 55, 89-94.

⁸² See also [Request](#), para. 126.

⁸³ [GoV Observations](#), para. 5; see also paras. 49-90.

“only individual and isolated incidents of police abuse are recorded”⁸⁴ support the conclusion that its domestic authorities are not in fact investigating nor prosecuting the alleged crimes arising from the Situation in a manner that would justify deferral, as detailed below.

IV. The Gov has not demonstrated that there are past or ongoing national proceedings which sufficiently mirror the Court’s intended investigation

36. As set forth below, the GoV bears the evidential burden and the burden of proof when making an article 18(2) deferral request. It has the onus of demonstrating that its proceedings sufficiently mirror the scope of the Court’s intended investigation, as defined in the *Venezuela* Article 18(1) Notification.

37. The Prosecution respectfully submits that the GoV has not satisfied this burden as the totality of material provided fails to substantiate the existence of national investigations or prosecutions that sufficiently mirror the scope of the Prosecution’s intended investigation. The additional information provided in the GoV Observations regarding [REDACTED] individual cases does not change the Prosecution’s assessment as detailed in its Request, namely that: 1) the patterns and policies underlining the contextual elements of crimes against humanity are not being investigated, 2) the domestic proceedings focus exclusively on low-ranking members of the State security forces (seemingly direct or physical perpetrators), and 3) a substantial part of the relevant criminality is not being investigated at all. The GoV Observations further confirm the Prosecution’s assessment in the Request of the material submitted. Indeed, the GoV acknowledges that it does not investigate the alleged commission of crimes against humanity since, reportedly, they did not occur on its territory and, instead, there were only a few isolated events of excessive use of force in the context of a national security operation to restore order following violent demonstrations.⁸⁵

38. The Prosecution respectfully submits that the fact that GoV does not contemplate that these 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 OTP’s intended investigation.

A. Burden of proof and assessment under article 18(2)

39. In its Observations, the GoV seeks to reverse the State’s burden of proof to demonstrate that it is conducting genuine domestic proceedings into cases of potential interest to the

⁸⁴ [GoV Observations](#), para. 7; *see also* paras. 171-181.

⁸⁵ [GoV Observations](#), para. 77.

Prosecution.⁸⁶ In the *Philippines* Article 18(2) Authorisation, issued on 26 January 2023, the Chamber held that “for the purpose of admissibility challenges pursuant to article 18(2) of the Statute, the onus is on the State to show that investigations or prosecutions are taking place or have taken place”.⁸⁷ Thus, the State must “provide the Court with evidence of a sufficient degree of specificity and probative value” that it is taking “tangible, concrete and progressive investigative steps” to ascertain the individual criminal responsibility of alleged perpetrators.⁸⁸ While it is for the Prosecution to initiate an investigation, it is for the State to trigger the deferral procedure under article 18(2) on the basis of reasons that the State must advance and facts that it must substantiate.⁸⁹ The State which conducts the relevant investigations, prosecutions, and court proceedings has the best access to the relevant records, including case files, police reports, court dockets or judicial decisions.⁹⁰

40. In this context, the Court does not require “procedural perfection” nor does it impose an impossible burden on the State.⁹¹ Rather, through the article 18(1) notification (or article 15 decision if applicable) the State is made aware of the scope of the Prosecution’s intended investigation and, when making an article 18(2) request, the State must present information concerning any domestic proceedings that it considers correspond to that scope.⁹² The Prosecution, and subsequently the Chamber if seised by an article 18(2) application, will be able thereby to assess the information presented in order to determine whether the domestic proceedings of the State sufficiently mirror the potential cases falling within the scope or parameters of the situation as defined in the aforementioned documents.

B. The additional information on [REDACTED] individual cases does not alter the assessment in the Prosecution’s Article 18(2) Request

41. The GoV Observations and the material annexed therein do not alter the Prosecution’s assessment in its Article 18(2) Request that the GoV’s domestic proceedings do not sufficiently mirror the scope of the Prosecution’s intended investigation.⁹³ Although the GoV has provided

⁸⁶ [GoV Observations](#), paras. 198-202.

⁸⁷ [Philippines Article 18\(2\) Authorisation](#), para. 14 (and authorities cited in fn. 50).

⁸⁸ [Philippines Article 18\(2\) Authorisation](#), para. 14 (and authorities cited in fns. 51 to 54).

⁸⁹ [Request](#), para. 37.

⁹⁰ [Request](#), paras. 32-37.

⁹¹ *Contra* [GoV Observations](#), paras. 149-163.

⁹² [Philippines Article 18\(2\) Authorisation](#), paras. 16-96.

⁹³ The GoV’s allegations of inaccuracies in the OTP’s assessment are unfounded since the OTP merely reflected the information it had received from the GoV. *See e.g.* [GoV Observations](#), paras. 60 (regarding [REDACTED] case,

updates on a number of cases with its Observations,⁹⁴ the cases investigated and prosecuted domestically remain very few in number in comparison to the number and type of crimes falling within the Court’s jurisdiction.⁹⁵ Moreover, these cases for which updates were received⁹⁶ are—like those previously assessed—focused exclusively on low-ranking security forces personnel, with no apparent investigation of higher-level perpetrators and/or members of the *colectivos*, and are framed as isolated cases without inquiry into larger patterns of conduct or underlying policy.⁹⁷

42. To reach these conclusions, the Prosecution has carefully considered all information and material provided by the GoV both in the body of its Observations and in its annexure—in particular in “ANNEX No. 10”,⁹⁸ “ANNEX No. 11”,⁹⁹ “ANNEX No. 12”,¹⁰⁰ and “ANNEX No. 13”¹⁰¹ (collectively, “Annexure”)—, and compared them with that already analysed in the Request.

43. In its Observations and Annexure, the GoV provides information purporting to reflect updates on [REDACTED] individual cases that are being investigated or prosecuted by the national authorities, all of which were already known to the Prosecution and addressed in its Request.¹⁰² Even if the Annexure had been comprised of underlying material appropriate for consideration in these proceedings (such as original case files, police reports, court dockets or

the OTP reflected the legal characterisation and procedural status given by the GoV); 122 (regarding the case of [REDACTED], the decision cited does not provide the reasons for the case’s dismissal; the “unclear” relevance for the [REDACTED] cases is based on the GoV’s own description of facts under consideration); 124 (regarding the [REDACTED], the OTP recorded the information as received).

⁹⁴ See *infra*, para. 44. Based on clarifications provided by the GoV in its Observations and Annexure, the total number of cases investigated and prosecuted domestically appears to be [REDACTED] instead of 893 as identified in the Request (para. 19). This is because [REDACTED] individual cases were previously identified as [REDACTED] separate ones, see Annex B ([REDACTED]). This quantitative difference is marginal and does not affect the Prosecution’s overall substantive assessment of the totality of the information received, see *infra* para. 49.

⁹⁵ [ICC-02/18-18-Conf-Exp-AnxB](#); see also Annex B [REDACTED].

⁹⁶ [ICC-02/18-18-Conf-Exp-AnxB](#). *Contra* [GoV Observations](#), para. 139. The [REDACTED] individual cases mentioned by the GoV as having been initiated *ex officio* (see [GoV Observations](#), para. 121) were already accounted for in the Request, see [ICC-02/18-18-Conf-Exp-AnxB](#) ([REDACTED]).

⁹⁷ See similarly [Philippines Article 18\(2\) Authorisation](#), paras. 63, 83 (regarding a significant disparity in numbers), paras. 68, 93 (regarding lack of investigation of patterns of criminality and high-ranking officials).

⁹⁸ [REDACTED].

⁹⁹ [REDACTED].

¹⁰⁰ [REDACTED].

¹⁰¹ [REDACTED].

¹⁰² [ICC-02/18-18-Conf-Exp-AnxB](#) [REDACTED].

judicial decisions)¹⁰³ — and it is not — the Prosecution respectfully submits that the assessment in its Request remains unchanged, for the following reasons.

44. First, since the Annexure is mostly comprised [REDACTED], [REDACTED] not of original records issued by the competent judicial authorities in the course of their official activities, these materials provided to date cannot be utilised to substantiate Venezuela’s deferral request.¹⁰⁴

45. Second, the Prosecution is unable to properly assess whether there has been a relevant procedural change in the [REDACTED] individual cases¹⁰⁵ because the terminology employed by the GoV to refer to their status is ambiguous and inconsistent. For example, the GoV employs terms such as cases being “prosecuted” or proceedings “instituted” without further specification of the precise investigative or prosecutorial action entailed by these terms under the applicable law. In other instances, terms are used interchangeably although they are not necessarily synonymous such as, “indictment” and “charges” or “convictions” and “condemned”.¹⁰⁶ Despite these limitations, in Annex A¹⁰⁷ the Prosecution has endeavoured to reflect as best it could the GoV’s updated information on investigative or procedural steps taken in relation to all [REDACTED] individual cases.¹⁰⁸

46. Third, the GoV provided limited or no information about the perpetrator or perpetrator group(s) involved in the cases presented.¹⁰⁹ When information was provided, the proceedings in question remain directed at low-level and seemingly physical perpetrators.¹¹⁰ In the GoV updates, there is also no information suggesting that in any of the [REDACTED] individual cases the Venezuelan authorities investigated the apparently systematic nature of the crimes or

¹⁰³ [Request](#), paras. 32-37, *see also* para. 19.

¹⁰⁴ [Philippines Article 18\(2\) Authorisation](#), para. 90.

¹⁰⁵ In its Request, the Prosecution considered the following stages/categories: preparatory phase, intermediate phase, trial, dismissal, conviction or acquittal, and appeal: *see* [ICC-02/18-18-Conf-Exp-AnxB](#), *see also* Annexes A - B (column “K” entitled “[REDACTED]”).

¹⁰⁶ E.g., the GoV Observations state that its national authorities have *charged* [REDACTED] individuals in [REDACTED] cases (para. 147) whilst in its [REDACTED]. Similarly, the GoV Observations state that [REDACTED] individuals have been *indicted* in [REDACTED] cases (para. 147) whilst in [REDACTED], in reference to the same cases, [REDACTED]. As for the term “condemned” ([REDACTED]), the OTP is unable to determine whether it is used synonymously with the term “convicted”, whether it refers to a sentence having been handed down, or whether it is being used in some other sense. The OTP observes that, even if the term is being used to denote that there is a sentence, no information has been provided as to its type and length. For other inconsistencies *compare* [GoV Observations](#), para. 147, with the information in [REDACTED].

¹⁰⁷ *See* in particular columns “K” and “L”.

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED]. The [REDACTED] do not contain information about the perpetrator’s group, except in [REDACTED] cases, *see* [REDACTED].

¹¹⁰ [REDACTED].

possible patterns or policy associated with these crimes. Also noteworthy is the GoV's insistence that the crimes investigated relate to "isolated instances" and the absence of crimes against humanity.¹¹¹

47. Fifth, the GoV Observations confirm that its national proceedings do not encompass the same type of crimes (or forms of criminality) as those that the Prosecution intends to investigate. In particular, the GoV asserts that, out of [REDACTED] complaints of police abuses, only [REDACTED] cases referred to the crime of unlawful deprivation of liberty,¹¹² [REDACTED],¹¹³ [REDACTED] could be prosecuted as rape,¹¹⁴ and none as persecution.¹¹⁵ While the Prosecution is yet to conduct its investigation, it observes that these categorisations and figures fall short of the intended scope of its investigation. In its PE, the Prosecution found that there was a reasonable basis to believe that, at least, thousands of perceived or actual opponents of the GoV were arrested and detained without legal basis;¹¹⁶ several hundred were subjected to acts of torture;¹¹⁷ over a hundred were subjected to different forms of sexual and gender based violence,¹¹⁸ and that those victims were also persecuted on political grounds.¹¹⁹

48. As noted above, the GoV further suggests that there is no crime against humanity of imprisonment or severe deprivation of liberty due to the "short transitory period" of the detention,¹²⁰ that there is no crime against humanity of torture because the victims were not under the custody or control of the perpetrator,¹²¹ that there is no crime of persecution¹²² and that more than [REDACTED] cases of sexual violence are being prosecuted as cases of cruel treatment under the Torture Law.¹²³ However, the Prosecution has assessed that, out of the 265 investigations and prosecutions arguably substantiated by the GoV,¹²⁴ only [REDACTED] relate to cruel treatment under this special law.¹²⁵

¹¹¹ [GoV Observations](#), paras. 49-90.

¹¹² [GoV Observations](#), para. 94, 113(iii)..

¹¹³ [GoV Observations](#), para. 97, 101.

¹¹⁴ [GoV Observations](#), para. 103.

¹¹⁵ [GoV Observations](#), paras. 104-108.

¹¹⁶ [Request](#), para. 117; [REDACTED].

¹¹⁷ [Request](#), para. 117; [REDACTED].

¹¹⁸ [Request](#), para. 117; [REDACTED].

¹¹⁹ [Request](#), para. 117; [REDACTED].

¹²⁰ [GoV Observations](#), para. 94, 113 (iii); *see above* paras. 24, 26.

¹²¹ [GoV Observations](#), paras. 97, 101; *see above* paras. 24, 27.

¹²² *See above* paras. 24, 29.

¹²³ [GoV Observations](#), para. 103; *see above* paras. 24, 28.

¹²⁴ [Request](#), para. 19.

¹²⁵ The OTP assessed the "fichas" or summaries provided in the Fifth, Seventh, Ninth to Fourteenth Submissions, where the applicable legal text was specified in most cases, *see* [VEN-OTP-0002-7069](#), [VEN-OTP-0002-7119](#), [VEN-OTP-0002-9653](#), [VEN-OTP-0002048](#).

49. In sum, the Prosecution respectfully submits that, even assuming that the [REDACTED] individual cases had all been properly substantiated,¹²⁶ the overall conclusions set forth in its Request would not change. It remains that the totality of the national investigations and proceedings presented by the GoV do not sufficiently mirror the Court's intended investigation because there has been no investigation of crimes against humanity, the investigations focus exclusively on low-ranking officers and seemingly physical perpetrators, and the crimes were framed in terms of "isolated instances" without any inquiry into larger patterns of conduct or underlying policy.¹²⁷

V. The GoV's allegations of breaches of due process are not made out

50. The Prosecution will briefly address the GoV's allegations that the OTP committed a series of "irregularities" in the manner in which the PE and article 18(2) processes have been conducted. The GoV requests the Chamber to rule on these purported violations and formally suspend the investigation.¹²⁸ The Prosecution respectfully requests the Chamber to dismiss the GoV's claims for the reasons set out below.

51. First, regarding the GoV's suggestion that it was insufficiently informed of the PE and its focus, the Prosecution respectfully submits that it has consistently engaged in a meaningful and transparent process with the GoV since the opening of the PE. This process involved extensive written and in-person communications with the Venezuelan authorities, through which the Prosecution has informed the GoV of the analysis conducted during the PE and requested relevant information.¹²⁹ These engagements are reflected in previous submissions on the record in the Situation.¹³⁰

52. Second, the Prosecution respectfully observes that the scope of the situation referred to the Court encompasses alleged crimes within the jurisdiction of the Court allegedly committed in Venezuela since 12 February 2014.¹³¹ This temporal scope was recorded by the OTP in its public notification to the Presidency of the referral pursuant to regulation 45, which was

¹²⁶ The Prosecution notes that GoV intends to provide English "translations of original court records of "all proceedings carried out by the Public Prosecutor's Office and the courts in cases related to the State's observations", see [ICC-02/18-28-AnxII](#), para. 8, and [ICC-02/18-29](#), para. 10.

¹²⁷ See e.g. [GoV Observations](#), paras. 7, 65, 76, 87, 130 and 139.

¹²⁸ [GoV Observations](#), paras. 186-202.

¹²⁹ [Statement of ICC Prosecutor 8 February 2018](#). See [VEN-OTP-00001988](#), [VEN-OTP-0002-6873](#), [VEN-OTP-0001-4304](#), [ICC-02/18-16-Conf-Exp-AnxD](#). *Contra* [GoV Observations](#), paras. 95, 31, 97.

¹³⁰ [ICC-02/18-10](#); [ICC-02/18-16](#); [ICC-02/18-17](#).

¹³¹ *Contra* [GoV Observations](#), paras. 187-189 (suggesting that the temporal scope under analysis was unclear).

annexed to the Presidency’s assignment decision.¹³² Accordingly, the situation assigned to the PTC as a result of this notification on the basis of the referral from the State Parties concerned encompassed this temporal scope. The same temporal scope of the situation is reflected in the Prosecution’s annual PE reports of 2018, 2019 and 2020,¹³³ in the article 18(1) notification informing States of the opening of the investigation in Venezuela I,¹³⁴ and in *inter partes* communications with the GoV, [REDACTED].¹³⁵ The Prosecution appreciates the apparent uncertainty expressed by GoV, which appears to arise from the fact that, in order to determine whether the article 53(1) criteria were met, the OTP focussed on a particular sub-set of crimes committed which allegedly occurred within a more focussed time period, namely occurring “*at least since April 2017*”. This distinction between the scope of the referred situation and the focus of the Prosecution’s threshold-setting assessment is set out consistently in all annual OTP PE reports.¹³⁶ It is not unusual for the scope of a situation to be broader in temporal scope than the specific findings on subject-matter jurisdiction made as part of the threshold-setting determination at the articles 15 and 53(1) stage, including in authorisation decisions issued by Pre-Trial Chambers.¹³⁷

53. Third, the GoV asserts that the PE was not completed and that the Prosecution “failed to analyse all the elements in accordance with PE requirements”, but does not provide grounds to support this assertion.¹³⁸ As indicated above, the OTP conducted an extensive and thorough PE over the course of more than three years, where it diligently assessed relevant material, including that submitted by Venezuela. It did so objectively, impartially and independently.¹³⁹ In the process, the Prosecution methodically considered more than 200 reports, media articles, legal documents, public statements and other sources produced by States, intergovernmental and non-governmental organisations, academic institutions and media as well as over 100 article 15 communications, some of which contained multiple reports and documents.

¹³² [ICC-02/18-1](#) and [ICC-02/18-1-AnxI](#).

¹³³ [OTP PE Report 2018](#), paras. 101, 116, 124; [OTP PE Report 2019](#), paras. 59, 73; [OTP PE Report 2020](#), para. 199.

¹³⁴ [Venezuela Art. 18\(1\) Notification](#).

¹³⁵ [ICC-02/18-16-Conf-Exp-AnxD](#), p. 22, para. 1.

¹³⁶ [OTP PE Report 2018](#), paras. 99, 101, 116, 124; [OTP PE Report 2019](#), paras. 58-59, 73, [OTP PE Report 2020](#), paras. 199, 202, 213.

¹³⁷ [Georgia Article 15 Decision](#), paras. 63-64; [Bangladesh/Myanmar Article 15 Decision](#), paras. 126-130; [Philippines Article 15 Decision](#), paras. 116-118; [Côte d’Ivoire Article 15 Decision](#), para. 180.

¹³⁸ *Contra* [GoV Observations](#), paras. 190-191, 193.

¹³⁹ [OTP Policy Paper on Preliminary Examinations](#) (November 2013), paras. 25-33.

54. Fourth, the GoV's submission that the Article 18(1) Notification "was incompletely and unduly issued" is unclear and unsubstantiated.¹⁴⁰ As noted above, the OTP provided information beyond that required by article 18(1) and rule 52,¹⁴¹ including a detailed summary of its PE findings.¹⁴² Following the Notification, on 13 January 2022 the Prosecution provided additional information to the GoV at the latter's request, in order to further assist Venezuela in exercising its rights under article 18(2).¹⁴³

55. Moreover, the Prosecution was not required to file its Request within six months, as the GoV suggests.¹⁴⁴ Although 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 the investigations. Although article 18(2) reads that "[a]t the request of that State, the Prosecutor shall defer", this cannot mean that the Prosecution immediately decides to defer the investigation once it receives a request by a State to that effect. A careful review and assessment of a deferral request must precede, which often entails a fresh and objective examination of the information submitted by the State concerned. It bears noting that in this situation, the Prosecution received six tranches of material since the GoV submitted its deferral request on 16 April 2023, the last one on 18 October 2023.¹⁴⁵

56. Finally, the Prosecution respectfully submits that the Request complied with regulation 36.¹⁴⁶ There is no merit in the GoV's assertion that the Prosecution infringed this provision because it cited information in support of its assertions in the footnotes of its Request. The Prosecution merely complied with its obligation to substantiate its submissions. This responsibility is incumbent on any party or participant to the proceedings to support the assertions it makes and it enables the Chamber to assess the correctness of the propositions advanced.¹⁴⁷

VI. Conclusions and relief sought

¹⁴⁰ *Contra GoV Observations*, para. 192.

¹⁴¹ [Venezuela Art. 18\(1\) Notification](#).

¹⁴² [Venezuela Art. 18\(1\) Notification](#), pp. 4-9.

¹⁴³ [REDACTED] - as explained therein, this additional information consisted of a list [REDACTED] cases drawn from open sources as merely representative of the broader patterns of criminality that the OTP had analysed during the PE.

¹⁴⁴ *Contra GoV Observations*, para. 193.

¹⁴⁵ [Request](#), para. 14.

¹⁴⁶ [GoV Observations](#), paras. 193-197.

¹⁴⁷ [Al-Senussi Admissibility AD](#), para. 167 confirming PTC I's finding in [ICC-01/11-01/11-466-Red](#), para. 208. Hyperlinks were added in the Request's footnotes to facilitate the GoV's and Chamber's respective assessments.

57. The Prosecution continues to appreciate the efforts and the manner in which the GoV has sought to engage with the Court in providing it with information regarding its national proceedings and domestic judicial architecture. While the Prosecution does not concur with the GoV that deferral is justified at this stage, it continues to seek to work closely with the authorities in pursuance of the joint aims of the 3 November 2021 Memorandum of Understanding,¹⁴⁸ namely to support efforts to enhance accountability in Venezuela and to facilitate the discharge of the Prosecutor's own mandate. Despite the different viewpoints and positions reflected in the Prosecution's submissions and the GoV Observations, the cooperation that this entails will continue. Should the Chamber grant the Request, the Prosecution remains committed to revisiting its assessment in light of new facts and changes in circumstances, in accordance with the Court's legal framework. The complementarity ruling sought at this juncture is not irreversible—it is merely to enable the resumption of the Court's investigations, which will be carried out with all diligence, independence and impartiality, in order to arrive at the truth, as required by the Statute.

58. For the reasons set forth above, the Prosecution respectfully reiterates its request that the Chamber order the resumption of the investigation into the Situation of Venezuela I.



Karim A.A. Khan KC, Prosecutor

Dated this 30th day of March, 2023

At The Hague, The Netherlands

¹⁴⁸ [Request](#), paras. 6, 165.