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PRE-TRIAL CHAMBER I

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

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

Public

with Confidential *EX PARTE* Annexes A-B available to the Prosecution and the Bolivarian Republic of Venezuela only and public Annex C

Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2)

Source: **Office of the Prosecutor**

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

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Introduction

1. The Office of the Prosecutor,[1] pursuant to article 18(2) of the Rome Statute,[2] respectfully requests Pre-Trial Chamber I[3] to authorise the resumption of the Prosecution's investigation[4] into the Situation in the Bolivarian Republic of Venezuela I[5] notwithstanding the request to defer the investigation submitted by the Government of Venezuela[6] on 15 April 2022.[7]

2. The Prosecution has followed a path of fulfilling its statutory mandate while seeking to continue cooperating in good faith and supporting the efforts of the Venezuelan authorities to conduct domestic proceedings that satisfy the Rome Statue's complementarity requirements. The Prosecution remains committed to that twin-track approach. Nonetheless, admissibility must be assessed on the basis of the facts as they exist at present, not as they might materialise in the future. The question for the Court is thus whether now, at this very initial stage, the Prosecution's investigation in this Situation should be deferred in their entirety on the basis of the Deferral Request.

3. The Prosecution has carefully analysed all the information communicated by Venezuela in support of the Deferral Request and as a result of an independent and objective assessment of this information, concluded that the GoV has not adequately demonstrated, in accordance with article 18(2), that it has investigated or is investigating 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 in the notification to States.

4. Although the GoV reports that it has undertaken certain criminal proceedings, these do not sufficiently mirror the scope of the Prosecution's intended investigation. Additionally, the information provided shows that in those criminal proceedings the GoV has taken or is taking very limited progressive investigative steps to ascertain facts and criminal responsibility relevant to this Situation. It is thus not currently conducting an investigation capable of displacing the Court's jurisdiction within the meaning of article 17(1)(a).

5. If the Chamber decides to assess the genuineness of the reported proceedings, the Prosecution has identified several factors indicating that these largely appear to be conducted,

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[1] "OTP" or "Prosecution".
[2] "Statute".
[3] "PTC" or "Chamber".
[4] "Prosecution Request".
[5] "Venezuela Situation" or "Situation".
[6] "Venezuela" or "GoV".
[7] *See* ICC-02/18-17, ICC-02/18-17-Conf-AnxA, ICC-02/18-17-Conf-AnxB, VEN-OTP-0002-7051, VEN-OTP-0002-7092 ("Deferral Request"). The Deferral Request dates 15 April 2022 and was received on 16 April 2022.

or have been conducted, with an intent to shield the persons concerned from criminal responsibility within the meaning of article 17(2)(a). Likewise, there are indicia that the proceedings have not been or are not being conducted independently or impartially, and that they have not been or are not being conducted in a manner which, in the circumstances, is consistent with an intent to bring the persons concerned to justice, considering article 17(2)(c).

6. Although the Prosecution has taken the position that at present deferral is not currently warranted, this does not mean that the admissibility assessment cannot be revisited at a later stage in the proceedings. In particular, both the Prosecution and the GoV have committed to cooperate with each other, including by supporting efforts of Venezuela to ensure the effective administration of justice, in accordance with article 17. If and when the investigation is resumed, the Prosecution will continue to identify meaningful ways to continue cooperating and actively engage with the Venezuelan authorities and other stakeholders in the search for the truth. For this purpose, the Prosecution has committed to strive towards agreeing on means and mechanisms that will effectively contribute to the efforts of Venezuela to carry out genuine national proceedings in accordance with article 17.[8] The principle of complementarity is the foundation of the Rome Statute system and remains an important principle during the investigation stage.

Background

7. On 3 November 2021, the Prosecutor opened an investigation into the Situation in Venezuela[9] and on 16 December 2021 notified all States Parties, including Venezuela, of his decision, annexing a summary of findings, and invited them to inform the Court within one month whether they were investigating, or had investigated, their nationals or other individuals within their jurisdictions with respect to the crimes allegedly committed in the Situation.[10]

8. Following consultations with the Prosecutor, including in person in Caracas,[11] on 15 April 2022 the GoV informed the Prosecutor that "[Venezuela] is investigating or [has] investigated its nationals or others within its jurisdiction with respect to alleged punishable acts against human rights, in concordance with the information provided in the notification received from the Office of the Prosecutor on December 16, 2021", and, *inter alia*, "request[ed] the

[8] In this respect, *see* Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Prosecutor of the International Criminal Court signed in Caracas on 3 November 2021 ("MoU").
[9] ICC-OTP press release dated 5 November 2021.
[10] *Venezuela* Article 18(1) Notification: ICC-02/18-16-Conf-Exp-AnxA.
[11] ICC-CPI press release dated 31 March 2022.

Office of the Prosecutor to formally defer its investigation in favour of the actions carried out by the appropriate national authorities of Venezuela".[12]

9. On 20 April 2022, the Prosecutor notified the Chamber of the Deferral Request and of his intention to seek the Chamber's authorisation to resume his investigation under article 18(2) of the Statute as soon as possible.[13]

Confidentiality

10. This document and Annex C are filed publicly. Annexes A and B are filed confidential *ex parte* available to the Prosecution and the Bolivarian Republic of Venezuela only since they reference confidential communications with the GoV and details of investigations and prosecutions. Moreover, if filed publicly, Annexes A and B could place victims, witnesses and other individuals at risk.

Submissions

11. The Prosecution respectfully submits that the Chamber should order the resumption of the Prosecution's investigation,[14] notwithstanding the Deferral Request. As set out below, the Prosecution's assessment of the cases referred to by the GoV is that, despite the volume of information provided, most cases are not adequately substantiated and do not sufficiently mirror the scope of the Prosecution's intended investigation. Should the Chamber decide to assess genuineness, the Prosecution respectfully submits that the reported proceedings have not been conducted genuinely within the meaning of article 17(2)(a) and (c).

12. Since the beginning of the preliminary examination on 8 February 2018[15] until now, the Prosecution has engaged in a meaningful process of consultations with the Venezuelan authorities to understand, *inter alia*, the nature and content of relevant domestic proceedings. This has involved multiple meetings at the ICC and in Caracas and receiving and considering voluminous material provided by the GoV which included extensions of statutorily prescribed time limits in order to properly consider these materials. These engagements are reflected in previous submissions on the record in the Situation.[16]

13. The Prosecution seeks below to give an overview of the information provided by the GoV to date in support of its Deferral Request, which is also communicated in its entirety to

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[12] VEN-OTP-0002-7051, VEN-OTP-0002-7092; *see also* ICC-02/18-17, paras. 1-2.
[13] ICC-02/18-17, para. 8.
[14] The Prosecution will use "Court's investigation" and "Prosecution's investigation" interchangeably.
[15] "PE". Statement of ICC Prosecutor 8 February 2018. The Prosecution has kept the GoV appraised of the PE progress and requested relevant information to inform its assessment: *see* VEN-OTP-00001988, VEN-OTP-0002-6873, VEN-OTP-0001-4304, ICC-02/18-16-Conf-Exp-AnxD.
[16] ICC-02/18-10; ICC-02/18-16; ICC-02/18-17.

the Chamber. It then sets out its submissions on the law applicable to analysing this information under articles 17(1)-(2) and 18(2), followed by its analysis and conclusions on the information provided against the applicable law.

I. OVERVIEW OF INFORMATION SUBMITTED BY THE GOV AND ASSESSED BY THE OTP

14. This section provides an overview of the information and material submitted to the Prosecution by the GoV between 30 November 2020 and 18 October 2022 in fourteen different tranches.[17] Of these fourteen tranches, the first eight were made during the PE, while the last six were made at the time of or after the Deferral Request. The GoV referred to this material in its Deferral Request as the basis of its request.[18] This information also includes material provided in response to the Prosecution's request for additional information under rule 53. The Prosecution has carefully studied all of this information, which it communicates to the Chamber under rule 54(1).[19] It also briefly refers below to additional sources consulted.

I.A. Information submitted by the GOV

15. The Deferral Material is voluminous (comprising over 18,200 pages), complex and organised differently across the fourteen tranches. Although the information does not always correspond to the level of detail or the categories requested by the Prosecution,[20] the GoV has made considerable efforts to share information about its proceedings.

16. The Deferral Material can be divided into four categories: (i) Reports;[21] (ii) Charts listing domestic proceedings;[22] (iii) Summaries of domestic proceedings listing investigative

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[17] Collectively "Deferral Material". The Deferral Material is listed and hyperlinked in Annex A.
[18] VEN-OTP-0002-7051 at 7052-7053 and VEN-OTP-0002-7092 at 7094.
[19] *See* Annex A. The Deferral Material is uploaded into the Court record in its entirety and original form. While the correspondence and submissions of the GoV are in English, the vast majority of the supporting documents are in Spanish (*see* VEN-OTP-0001-1250 at 1256 para. 12). These were reviewed by the Prosecution in their original language by staff with the necessary language skills. 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. To facilitate the Chamber's assessment, the Prosecution provides English translations of some information received at the time or after the Deferral Request (Ninth, Tenth, and Eleventh Submissions).
[20] *See e.g.* the Prosecution's request for information of 2 October 2020: VEN-OTP-0001-4304 and VEN-OTP-00001988; *see also* rule 53 request: VEN-OTP-0002-9793 and VEN-OTP-0002-9799.
[21] VEN-OTP-0001-1250 and VEN-OTP-0001-0007, VEN-OTP-0001-2028 and VEN-OTP-0001-1378, VEN-OTP-0001-2133, VEN-OTP-0001-2978, VEN-OTP-0001-3799, VEN-OTP-0001-5144, VEN-OTP-0001-5035, VEN-OTP-0001-5267.
[22] *See* First, Second, Third, Fifth and Eighth Submissions: VEN-OTP-0001-0124 and VEN-OTP-0001-1363, VEN-OTP-0001-1533, VEN-OTP-0001-2274, VEN-OTP-0001-3849, VEN-OTP-0001-3886. The Prosecution has not considered cases before the military jurisdiction, where civilians were sought for alleged crimes against military personnel: VEN-OTP-0001-0384, VEN-OTP-0001-1250 at 1345 to 1352.

and other judicial measures taken;[23] and (iv) Court records.[24] The Prosecution has endeavoured to describe each category in a succinct and readily understandable manner below and in Annex A to assist the Chamber in its determinations on the applicable law.[25]

17. Furthermore, to facilitate the Chamber's examination of the Deferral Request, the Prosecution has prepared Annex B which describes each case reported by the GoV and the Prosecution's assessment.

I.A.1. Reports

18. During the PE, the GoV submitted eight Reports, each containing numerous annexes. The Reports provide information on various aspects, including (i) the GoV's views on the Prosecution's PE and its own interpretation of the ICC Statute to set out why crimes against humanity have not been committed in Venezuela; (ii) Venezuela's legal framework; (iii) proceedings before Venezuelan criminal and military courts; (iv) the structure of State security forces; (v) legislative, administrative and judicial initiatives and reforms; and (vi) the existence of a communication strategy disseminated via social networks against the Venezuelan State.

I.A.2. Charts and Summaries listing domestic proceedings

19. The GoV has submitted written information on 893 cases that it states were being investigated or have been investigated in tables, charts and lists (collectively, "Charts"),[26] and in narrative documents with different titles (collectively, "Summaries").[27] The Summaries contain a more detailed description of the status of the proceedings in 265 cases, namely the type and nature of investigative or other measures taken. Only Charts containing succinct information about the domestic proceedings are provided for 628 cases. The Charts and the Summaries are not original records issued by the judicial authorities in the course of their official activities.

20. The information contained in these items does not use the same or consistent methodology. In some instances, the Charts and Summaries were included in the body of a

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[23] *See* Fifth, Seventh, Ninth, Tenth, Eleventh, Thirteenth and Fourteenth Submissions: VEN-OTP-0001-3799 at 3805 to 3844, VEN-OTP-0001-3900, VEN-OTP-0001-5035 at 5041 to 5080, VEN-OTP-0001-5082, VEN-OTP-0001-5086, VEN-OTP-0001-5090, VEN-OTP-0001-5094, VEN-OTP-0001-5104, VEN-OTP-0001-5112, VEN-OTP-0002-7069, VEN-OTP-0002-7119, VEN-OTP-0002-9653, VEN-OTP-00001969, VEN-OTP-00002048. The documents are called in Spanish *fichas*, *asuntos* or *minutas.*

[24] VEN-OTP-0001-0698, VEN-OTP-0001-1509, VEN-OTP-00000081 to VEN-OTP-00000582, VEN-OTP-00000590 to VEN-OTP-00001966, VEN-OTP-00002066 to VEN-OTP-00002801.

[25] Annex A has four tabs. The first lists all the submissions; the second, third and fourth list the ERNs for the Twelfth, Thirteenth and Fourteenth Submissions which include court records.

[26] *See above* fn. 22.

[27] *See above* fn. 23.

Report, in others as separate annexes. Some cases are reported in both the Charts and the Summaries, and updates are provided with respect to some previously reported cases in several sequential submissions.[28]

21. Having reviewed this material, the Prosecution has concluded that of the 893 cases reported, 765 cases (85.67%) relate to events arising from the April 2017 political demonstrations. Of the cases arising from the 2017 events, 25 cases appear not to relate to crimes within the Court's jurisdiction. 738 of the reported cases (82.64%) appear to have been opened when an individual filed a complaint, and 117 cases (13.10%) were opened *proprio motu*. In some cases, the authorities initiated proceedings in response to allegations reported by international bodies such as OAS,[29] IACHR, OHCHR and FFM.[30]

I.A.3. Copies of court records

22. In addition, the GoV submitted copies of court records relevant to 177 of the 893 reported criminal cases.[31]

I.B. Other information assessed

23. In addition to the Deferral Material, the Prosecution has also assessed information from other sources relevant to Venezuela's national proceedings, such as reports from international and regional organisations and from civil society and legal representatives.[32] They include, but are not limited to reports and statements from the FFM,[33] OHCHR,[34] OAS,[35] and IACHR[36] and

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[28] The figure of 893 cases reflected in Annex B excludes overlaps and includes the most updated information received from the GoV. The percentages provided are calculated with respect to the total number of cases (893), unless indicated otherwise. In light of the complexity of the material submitted, the Prosecution cannot exclude a minimal margin of error in its calculations.

[29] VEN-OTP-0001-3799 at 3805-3835, VEN-OTP-0001-3886.

[30] VEN-OTP-0001-5035 at 5041-5075.

[31] In the Twelfth, Thirteenth and Fourteenth Submissions, the GoV submitted most of the copies of court records: VEN-OTP-00000081 to VEN-OTP-00000582, VEN-OTP-00000590 to VEN-OTP-00001966 and VEN-OTP-00002066 to VEN-OTP-00002801. *See also* VEN-OTP-0001-0698 (First Submission) and VEN-OTP-0001-1509 (Second Submission).

[32] The reports are publically available and some were also submitted to the OTP during the PE.

[33] FFM Summary 2021 Report, FFM Detailed 2021 Report, FFM Summary 2020 Report, FFM Detailed 2020 Report, FFM Summary 2022 Report, FFM Detailed 2022 Report.

[34] *See e.g.* OHCHR 2017 Report, OHCHR 2018 Report, A/HRC/50/59, HCHR 2022 updates the HRC, A/HRC/48/19, A/HRC/47/55, OHCHR 2020 Report.

[35] OAS 2018 Report, OAS 2020 Report. In 2017, the Secretary General of the OAS announced the appointment of an independent panel of international experts to assess whether the situation in Venezuela should be referred to the ICC for consideration (*see* OAS Press Release of 14 September 2017). The OAS 2018 Report includes information collected on the possible commission of crimes against humanity in Venezuela and whether the situation merits referral to the ICC. The OAS 2020 Report expands on the first report.

[36] IACHR: Annual Report 2010–Chapter IV, Annual Report 2013–Chapter IV, Annual Report 2015–Chapter IV, Democratic Institutions, the Rule of Law and Human Rights in Venezuela 2017, Annual Report 2021–Chapter IV.

reports from domestic organisations such as *Foro Penal* and *Acceso a la Justicia*, which monitor and document human rights and other types of violations committed in Venezuela since 2014 and in many cases represent victims in legal proceedings.[37]

II. APPLICABLE LAW

24. In deciding on the merits of the Deferral Request, the Prosecution respectfully submits that the Chamber should consider four legal issues: (i) the required substantiation and the relevant burden of proof, (ii) the nature of the assessment that it must undertake to determine whether the Deferral Request would justify a deferral of the Prosecution's investigation, (iii) the comparators which are to be analysed in order to carry out that assessment, and (iv) whether the domestic proceedings lack genuineness within the meaning of article 17(2).

25. In the Prosecution's submission, the State requesting deferral under article 18 has the burden of satisfying the Prosecution and, if applicable, the Chamber, that deferral is justified. Since the Chamber must consider the factors in article 17 during these proceedings, the Court's established practice in resolving admissibility challenges to specific cases under article 19(2), and in assessing the admissibility of situations (based on potential cases) when deciding upon requests to authorise investigations under article 15(3), provides guidance.

II.A. The State requesting deferral must substantiate its request and demonstrate that deferral is justified

26. Article 18(2) provides that the Prosecutor shall defer to a "State's *investigation*", and rule 53 requires that the State requesting deferral must do so in writing and "*provide information* concerning its investigation".

27. Accordingly, the State requesting deferral not only bears the "evidential burden" of substantiating its request with relevant arguments and evidence, but also the "burden of proof"[38]— in the sense that it is for the State to satisfy the Prosecution and, if applicable, the Chamber, of the existence of a national investigation which meets the requirements of articles

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[37] VEN-OTP-0006-0872, VEN-OTP-0007-1502, VEN-OTP-00001986 (all but four domestic proceedings identified by FP appear in the GoV submissions); *see also* AJ: Status and analysis judicial reforms, 6 June 2022, AJ: El "nuevo" TSJ, 29 April 2022; AJ: Informe Anual 2021, AJ: El Régimen Jurídico del Poder Judicial; VEN-OTP-0004-0320, VEN-OTP-0004-0324, VEN-OTP-0004-0411, VEN-OTP-0004-0443.

[38] *Cf.* ICC-01/09-01/11-1334-Anx-Corr ("*Ruto and Sang* Conduct Decision, Judge Eboe-Osuji's Separate Opinion"), paras. 79-80 (distinguishing between persuasive burden and evidential burden). The person/entity with the "evidential" burden may not coincide with the person/entity with the "burden of proof": ICC-01/11-01/11-565 ("*Al-Senussi* Admissibility AD"), para. 167.

17 and 18(2) and thus justifies deferral. If the State fails to demonstrate this, then the Chamber must authorise the resumption of the Prosecution's investigation.

II.A.1. The State requesting deferral must substantiate its request

28. A State requesting a deferral must substantiate its request. It must provide *sufficient information* to support the request to enable a determination that the deferral is justified.[39] This is required by rule 53, which stipulates that the State requesting deferral "shall make this request in writing and *provide information concerning its investigation*", and rule 54(1), which requires the Prosecution to transmit such information to the Chamber when acting under article 18(2). Since the State is in a unique position to provide information about its own proceedings, this requirement is consistent with the article 18 procedure, which conditions any deferral upon an assessment of its merits—initially by the Prosecution, and ultimately by the Chamber.

29. The information provided by the State must be relevant, probative, and sufficiently specific to enable the Prosecution—and the Chamber, if applicable—to ascertain the stage of the domestic proceedings, assess the investigative steps taken, and determine whether deferral is justified considering the State's proceedings as a whole.[40]

30. In other procedural contexts (such as under articles 15 and 19), when carrying out article 17 admissibility assessments, Chambers have required evidence with a "sufficient degree of specificity and probative value"[41] that establishes "tangible, concrete and progressive investigative steps" seeking to ascertain a person's criminal responsibility,[42] such as "by interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses".[43] Relevant evidence is not confined to "evidence on the merits of the national case

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[39] ICC-02/17-196 ("*Afghanistan* Article 18(2) Decision"), paras. 43, 45, 50.
[40] ICC-01/15-12-Anx-Corr ("*Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op."), para. 41; J. Stigen, The Relationship between the International Criminal Court and National Jurisdictions - The Principle of Complementarity (Martinus Nijhoff Publishers, 2008) ("Stigen"), p. 133; J. Holmes *Complementarity: National Courts* versus *the ICC* in Cassesse A., Gaeta P. and Jones J. (ed), The Rome Statute of the International Criminal Court, Vol. I (Oxford, 2002) ("Holmes 2002"), p. 681.
[41] ICC-01/09-01/11-307 ("*Ruto et al.* Admissibility AD"), paras. 2, 62-63; ICC-01/09-02/11-274 ("*Muthaura et al.* Admissibility AD"), paras. 2, 61-62; ICC-02/11-01/12-75-Red ("*Simone Gbagbo* Admissibility AD"), para. 29; ICC-01/11-01/11-662 ("*Gaddafi* Second Admissibility Decision"), para. 32; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 48 (unsigned documents should have been found lacking probative value); *Afghanistan* Article 18(2) Decision, para. 45.
[42] *Simone Gbagbo* Admissibility AD, paras. 122, 128; ICC-01/17-9-Red ("*Burundi* Article 15 Decision"), paras. 148, 162. *See also* ICC-02/17-33 ("*Afghanistan* Article 15 Decision"), para. 72; ICC-01/11-01/11-344-Red ("*Gaddafi* First Admissibility Decision"), para. 73; ICC-01/11-01/11-239 ("*Gaddafi* Further Submissions Decision"), para. 11; *Afghanistan* Article 18(2) Decision, para. 45.
[43] *Ruto et al.* Admissibility AD, paras. 41, 69; *Muthaura et al.* Admissibility AD, paras. 1, 40; *Burundi* Article 15 Decision, para. 148.

that may have been collected as part of the purported investigation to prove the alleged crimes",[44] but also extends to "all material capable of proving that an investigation or prosecution is ongoing".[45] This includes "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]".[46]

31. By contrast, mere evidence of a State's *preparedness or willingness* to investigate or prosecute is not sufficient in and of itself to establish that it is actually carrying out a relevant investigation or prosecution.[47] Nor is it enough for a State to rely on judicial reform actions and promises for future investigative activities.[48] Likewise, it will never suffice for a State *merely to assert* that investigations are ongoing.[49] These same principles apply, *mutatis mutandis*, to an assessment of State requests for deferral under article 18(2).

II.A.2. The State requesting deferral bears the burden of proof

32. A State requesting deferral must demonstrate, on the basis of the information provided, the existence of domestic proceedings justifying deferral under article 18(2).[50] The State concerned must: firstly, satisfy the Prosecution that deferral is consistent with the applicable law and thus warranted; and secondly, if the deferral request is submitted for judicial scrutiny under article 18(2), the State must equally satisfy the relevant Chamber of its claim.

33. This follows in part from the evidentiary burden expressly placed on the State, and its unique appreciation of the investigation that it is actually conducting.[51] After all, it is the State which conducts the relevant investigations, prosecutions, and court proceedings, and therefore

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[44] ICC-02/11-01/12-47-Red ("*Simone Gbagbo* Admissibility Decision"), para. 29; *Gaddafi* Further Submissions Decision, para. 10-11. *Contra* D. Nsereko and M. Ventura, *'Article 18'*, in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Nsereko/Ventura"), p. 1025, nm. 42, *but see* p. 1027, nm. 49.
[45] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, paras. 10-11.
[46] *Simone Gbagbo* Admissibility Decision, para. 29; *Gaddafi* Further Submissions Decision, paras. 10-11. Mere instructions to investigate were not considered enough: ICC-01/09-01/11-101 ("*Ruto et al.* Admissibility Decision"), para. 68.
[47] *Ruto et al.* Admissibility AD, para. 41; *Muthaura et al.* Admissibility AD, para. 40. Nor can admissibility be assessed with respect to non-existing proceedings: ICC-02/04-01/15-156 ("*Kony et al.* Admissibility Decision"), paras. 51-52. Nor is a State allowed to amend or provide additional information just because it requested the deferral prematurely: *Ruto et al.* Admissibility AD, para. 100; *Muthaura et al.* Admissibility AD, para. 98.
[48] *Ruto et al.* Admissibility Decision, para. 64; *see also Burundi* Article 15 Decision, para. 162.
[49] *Ruto et al.* Admissibility AD, paras. 2, 62-63; *Muthaura et al.* Admissibility AD, paras. 2, 61-62; *Simone Gbagbo* Admissibility AD, paras. 29, 128.
[50] *Afghanistan* Article 18(2) Decision, para. 45.
[51] *See above* para. 28.

has the best access to relevant records.[52] If the burden of proof were reversed, the Prosecution would be obliged to demonstrate the *absence* or lack of genuineness of such activities, and to do so *without* necessarily being able to access to the underlying materials. Instead, the logic of the evidentiary burden is that, since the State is best equipped to show that its proceedings justify the requested deferral, it should do so. This is confirmed by rule 52(2), which provides that the State may request additional information "to assist it in the application of article 18, paragraph 2", meaning that it can properly justify its deferral request.

34. Placing the burden of proof on the State requesting deferral is also consistent with the object and purpose of the Statute. Since a successful deferral request may lead to indefinitely suspend the Court's investigation into a situation—where potential criminality warranting investigation has already been determined by the Court—it is appropriate to place the onus on the requesting State to ensure that deferral of the ICC's investigation will not result in impunity.

35. This approach is consistent with the burden of proof under article 19(2), by which a State may challenge the admissibility of particular cases.[53] Indeed, the Statute creates certain interlinkages between article 18 and 19, such as under article 18(7)[54] which restricts a State's subsequent challenge under article 19 to "additional significant facts or significant change of circumstances".[55]

36. A State's request for deferral under article 18(2) does not automatically trigger a determination by the Chamber: this only occurs on application of the Prosecutor—and only *if* the Prosecutor has assessed that deferral is not warranted. However, the fact that the Prosecution may seek a ruling under article 18(2) does not mean that the requesting State is relieved of its burden to set out the basis for its deferral request.[56]

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[52] This is consistent with human rights jurisprudence which places upon States the burden of proof to determine the adequacy of the investigations when States are involved, since the events lie wholly or in part within the exclusive knowledge of the authorities. ECtHR, *Varnava and Others* v. *Turkey*, Judgment, para. 184.

[53] *Al-Senussi* Admissibility AD, para. 166; *Ruto et al.* Admissibility AD, para. 62; *Simone Gbagbo* Admissibility AD, para. 128. Trial Chamber III held that the standard to determine admissibility is balance of probabilities: ICC-01/05-01/08-802 ("*Bemba* Admissibility Decision"), para. 203. The Appeals Chamber has not delved into the matter and only confirmed that the challenging party must present evidence of "sufficient degree of specificity and probative value" (*see above* fn. 41).

[54] *Cf.* W. Schabas, The International Criminal Court: a Commentary on the Rome Statute, 2nd Ed. (Oxford: OUP, 2016) ("W. Schabas 2016"), p. 481.

[55] Holmes 2002, p. 682; W. Schabas 2016, p. 475 (quoting US Ambassador David Scheffer).

[56] *Contra* Nsereko/Ventura, p. 1027, nm. 48; *see also* Stigen, p. 137.

37. The purpose of this procedural mechanism is the dialogue that article 18 seeks to encourage between the Prosecution and relevant States.[57] The Prosecution is best placed to appreciate the range of potential cases which fall within the parameters of the situation, while the State can inform on what it is/has been doing. Nothing in these considerations implies that, having determined that the State's request for deferral should indeed proceed to adjudication by the Chamber, the Prosecution supplants the State's burden of proof. To the contrary, if the Prosecution seises the Pre-Trial Chamber of an application under article 18(2), the Prosecution's function is not analogous to that of a moving party, but rather as a *respondent* to the deferral request made by the State. This is implicit, for example, in the duty on the Prosecution under rule 54(1) to forward to the Chamber "[t]he information provided by the State under rule 53"—which then forms the primary context for the Chamber's examination of the relevant issues, together with the submissions of the Prosecution.[58]

II.B. The core principles for assessing admissibility under article 17(1) apply equally to the Chamber's preliminary ruling on admissibility under article 18(2)

38. Notwithstanding the procedural context of article 18(2), the Prosecution submits that the same core principles for assessing admissibility under article 17 at other procedural stages (such as articles 15 and 19) remain applicable.[59] Indeed, in making its preliminary ruling on admissibility under article 18(2), rule 55(2) expressly requires the Chamber to "consider the factors in article 17".[60] Accordingly, the Prosecution submits that the Chamber should: (i) assess the State's proceedings based on the facts as they currently exist; (ii) adopt a two-step process; and (iii) determine that there is a conflict of jurisdiction only if the State's proceedings sufficiently mirror those of the Court.

39. A closely related question is that of *what* the article 17 assessment should be applied *to*. As explained below,[61] the practice of the Court demonstrates that the appropriate "comparators" for the article 17 assessment should be tailored to the procedural context of article 18.

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[57] *See* Holmes 2002, p. 681; C. Stahn, *'Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?'* in C. Stahn (ed.), The Law and Practice of the International Criminal Court (Oxford, 2015), p. 240. *See also* Stigen, p. 132.

[58] This follows from rule 55(2), which states that "[t]he Pre-Trial Chamber shall examine the Prosecutor's application and *any* observations submitted by a State that requested a deferral" (emphasis added)—and thus implies that further observations *may* be received from the State requesting a deferral in accordance with the Chamber's power under rule 55(1), but that such observations are not essential.

[59] *Afghanistan* Article 18(2) Decision, paras. 44, 46.

[60] *Ruto et al.* Admissibility AD, para. 38.

[61] *See below* paras. 48-52.

II.B.1. The assessment must be conducted on the basis of the facts as they exist

40. For the purposes of article 17, the Chamber must consider the relevant facts as they exist at the time of the Deferral Request or, at the latest, as at the date of filing of this Request.[62] In the context of a requested deferral under article 18, this requires that relevant domestic proceedings must already have existed at the time when the State requests the deferral.[63] In this situation, the Prosecution respectfully submits that the Chamber should consider the domestic proceedings that existed as of 15 April 2022, the date of the Deferral Request—or, at the latest, as of the date of filing of this Request. The Prosecution has nonetheless considered additional information submitted by the GoV beyond the Deferral Request, which was received by the Prosecution on 23 April, 14 June, 4 July, 26 July, 19 September and 18 October 2022, some further to a Prosecution's request under rule 53.[64] This information does not alter the Prosecution's assessment.

II.B.2. Complementarity assessments entail a two-step process

41. Article 17 entails two inquiries:

- First, whether the State with jurisdiction is conducting—or has conducted—relevant domestic proceedings within the meaning of article 17(1)(a) to (c). The Court must determine whether there is an apparent conflict of jurisdiction between the ICC and the State concerned. This is assessed in accordance with the three-part scheme in article 17.[65]

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[62] *Ruto et al.* Admissibility Decision, para. 70; *Ruto et al.* Admissibility AD, para. 83; *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 58 ("Article 17 of the Statute is drafted in a manner where the relevant Chamber is duty bound to make a determination on the basis of facts as they exist"); *see also* ICC-01/04-01/07-1497 ("*Katanga* Admissibility AD"), para. 56. This refers to the proceedings before the first instance chamber and does not include subsequent proceedings on appeal: ICC-01/09-01/11-234 ("*Ruto et al.* Updated Investigation Report AD"), para. 10; ICC-01/11-01/11-547-Red ("*Gaddafi* First Admissibility AD"), paras. 41-43; *Al-Senussi* Admissibility AD, paras. 57-59. *See also Kony et al.* Admissibility Decision, paras. 51-52 and *Afghanistan* Article 18(2) Decision, para. 47 (referring to the facts as they exist at the time of the proceedings before the Court).

[63] Stigen, p. 134 ("In order for a request for deferral under article 18(2) to succeed, the state must have started an investigation when it makes the request, i.e. no later tha[n] one month from the time it was notified or otherwise acquired knowledge of the Prosecutor's intention to investigate.").

[64] *See* Annex A, Ninth to Fourteenth Submission. Since at times the GoV submitted material during several days, for brevity the latest date is referred to in the filing.

[65] *See below* para. 44; *see Katanga* Admissibility AD, para. 78; *Simone Gbagbo* Admissibility AD, para. 27; ICC-01/11-01/11-695 ("*Gaddafi* Second Admissibility AD"), para. 58.

- Second—and only if the first question is answered in the affirmative[66]—whether the domestic proceedings are not, or were not, "genuine" within the meaning of articles 17(2) and (3) of the Statute.[67]

42. Chambers have consistently followed this two-step process in determining admissibility. This has been done when considering the admissibility of cases *proprio motu* under article 19(1), in resolving article 19(2) challenges by States or suspects and accused persons,[68] and in assessing the admissibility of potential cases under article 15(3).[69]

43. The Prosecution submits that this same two-step process should be applied when deciding upon a State's deferral request under article 18(2), given that it entails a "[p]reliminary ruling regarding admissibility" and requires consideration of "the factors under article 17".[70] There is no reason to depart from the consistent jurisprudence of the Court in this respect.

- First, this interpretation is consistent with the criteria of treaty interpretation under the VCLT. It best suits the stated purpose of article 18 (expressly referring, in its title, to "admissibility"), the context provided by the general terms in which article 17 is expressed (applying to "[i]ssues of admissibility" without further specification), and the object and purpose of the Statute, namely, to end impunity while respecting States' primary responsibility to investigate and prosecute crimes under the Statute.[71]
- Second, neither the drafting history of article 18 nor any other provision of the Statute suggests that article 17 should be interpreted differently for the purpose of deferral requests. To the contrary, the drafting history shows that the belated proposal to create article 18 was not

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[66] *Katanga* Admissibility AD, paras. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27. *See also* W. Schabas and M. El Zeidy, '*Article 17*', in K. Ambos, Rome Statute of the International Criminal Court, Article-by-Article Commentary, 4rd ed. (Hart, Beck, Nomos, 2022) ("Schabas/El Zeidy"), p. 963, nm. 30.
[67] Statute, article 17(2)-(3); *see also* article 20(3) (if there has been a final decision).
[68] *See e.g. Katanga* Admissibility AD, paras. 75, 78; *Simone Gbagbo* Admissibility AD, para. 27.
[69] ICC-01/09-19-Corr ("*Kenya* Article 15 Decision"), paras. 53-54; ICC-02/11-14-Corr ("*Côte d'Ivoire* Article 15 Decision"), paras. 192-193; *Burundi* Article 15 Decision, paras. 145-146; ICC-01/15-12 ("*Georgia* Article 15 Decision"), paras. 36-50. Although the Appeals Chamber has since clarified that this assessment is not required by article 15(4), and that such matters should be left to any proceedings under article 18, it did not question the manner in which Chambers have conducted the assessments. The Appeals Chamber only opined on the procedural stage in relation to when this assessment should be undertaken by the Chamber: ICC-02/17-138 ("*Afghanistan* Article 15 AD"), paras. 35-45; *see also* ICC-01/19-27 ("*Bangladesh/Myanmar* Article 15 Decision"), paras. 115-116. The Pre-Trial Chamber may still be potentially called upon to apply this two-step process in reviewing the Prosecution's own assessment of the admissibility of potential cases within referred situations under articles 53(1)(b) and 53(3)(a): ICC-01/13-34 ("*Comoros* First Review Decision"), paras. 8-12.
[70] Rules, rule 55(2); *Afghanistan* Article 18(2) Decision, para. 44 (endorsing the two-step process).
[71] *Katanga* Admissibility AD, para. 79; *see also* ICC-01/14-01/18-678-Red ("*Yekatom* Admissibility AD"), para. 42 (referring to the States' primary duty to exercise criminal jurisdiction); *Gaddafi* Second Admissibility AD, para. 58; *see also Ruto et al.* Admissibility AD, para. 44 (finding that article 17(1)(a)-(c) "favour national jurisdictions, […] to the extent that there actually are, or have been, investigations and/or prosecutions at the national level").

intended to reopen the compromise reached on complementarity.[72] Rather, article 18 was intended to be consistent with the framework of complementarity in article 17.[73]

44. Further, articles 17(1)(a) to (c) describe three different stages of domestic proceedings which might be relevant:

- Article 17(1)(a) is concerned with ongoing domestic investigations or prosecutions. Since the fundamental purpose of the Court is to prosecute those responsible for the most serious crimes of international concern in a manner complementary "to national criminal jurisdictions",[74] this provision relates to domestic proceedings seeking to determine *criminal responsibility* as opposed to alternative mechanisms of justice.[75] Hence, "national investigations that are not designed to result in criminal prosecutions"[76] or "national proceedings designed to result in non-judicial and administrative measures rather than criminal prosecutions" do not meet the admissibility requirements.[77] Likewise, a "national investigation merely aimed at the gathering of evidence does not lead, in principle, to the inadmissibility of any cases before the Court".[78] This determination may require an assessment of the mandate, functions, and powers, as well as the operation and processes, of the relevant domestic bodies.[79]
- Article 17(1)(b) relates to final decisions on the merits terminating an investigation and preventing a prosecution against a suspect or accused person before a domestic court.[80]
- Article 17(1)(c) relates to a full domestic trial which has been completed, resulting in a final acquittal or conviction.[81] A first-instance decision which has not become final,[82] or the termination of proceedings without prejudice due to lack of evidence or technical reasons, does

[72] 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.
[73] Nsereko/Ventura, p. 1012, nm. 4.
[74] Statute, Preamble, para. 10.
[75] Schabas/El Zeidy, p. 975, nm. 51.
[76] *Burundi* Article 15 Decision, para. 152.
[77] *Burundi* Article 15 Decision, para. 152; *Afghanistan* Article 15 Decision, para. 79.
[78] *Burundi* Article 15 Decision, para. 152.
[79] *See e.g. Burundi* Article 15 Decision, paras. 153, 154, 158, 159, 166.
[80] Schabas/El Zeidy, pp. 973-974, nm. 48-49. This however does not include decisions closing domestic proceedings in order to surrender a person to the ICC for prosecution: *Katanga* Admissibility AD, paras. 82-83; ICC-01/05-01/08-962-Corr ("*Bemba* Admissibility AD"), para. 74.
[81] *Gaddafi* Second Admissibility AD, para. 63.
[82] Schabas/El Zeidy, p. 979, nm. 57; *Gaddafi* Second Admissibility Decision, para. 36; *Gaddafi* Second Admissibility AD, para. 58.

not render a case inadmissible.[83] Nor do domestic proceedings undertaken *in absentia* where these may be re-instituted once the person appears or is apprehended.[84]

45. Finally, domestic law need not label the criminal conduct as an international crime, as long as the underlying conduct investigated domestically substantially corresponds to, and adequately captures, the relevant Rome Statute conduct.[85]

II.B.3. There is an apparent conflict of jurisdiction between the State and the Court if the State's relevant national proceedings sufficiently mirror those of the Court

46. To establish the potential inadmissibility of proceedings before the Court based on complementarity, it is not required that the overlap between the domestic proceedings and the case before the Court be absolute. Rather, according to the Appeals Chamber in the *Gaddafi* case, what is required is a "judicial assessment of whether the case that the State is investigating *sufficiently mirrors* the one that the Prosecutor is investigating".[86] While this case-specific and fact-dependent assessment allows for some flexibility, it still requires a considerable overlap between the incidents investigated by the national authorities and those investigated by the Prosecution.[87]

47. Again, in the Prosecution's submission, this principle applies equally to article 17(1) assessments at all procedural stages, including under article 18(2).

II.C. The procedural context defines the appropriate comparators for the article 17(1) determination

48. To date, the Court has considered the threshold question under article 17(1) —whether there is a conflict of jurisdiction between the Court and the State concerned—in two distinct procedural contexts: for the purpose of assessing cases under article 19, and for assessing situations under article 15.

49. While Chambers have consistently required appropriate "comparators" in order to carry out this analysis, the nature and specificity of the comparators used have been adapted to reflect the procedural stage—especially having regard to the degree to which the Court's investigation

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[83] Schabas/El Zeidy, pp. 979-980, nm. 57- 58; *Bemba* Admissibility Decision, para. 248.
[84] Schabas/El Zeidy, p. 980, nm. 58; *cf. Gaddafi* Second Admissibility Decision, paras. 61-79. In *Gaddafi*, Pre-Trial Chamber I noted, *obiter*, that amnesties and pardons impeding or interrupting judicial proceedings and punishment would in principle mean that a case remains admissible before the Court: *Gaddafi* Second Admissibility Decision, paras. 77-78: *see also*, ICC-01/11-01/11-695-Anx ("Concurring Separate Opinion Judges Eboe-Osuji and Bossa"), paras. 8-9.
[85] *Al-Senussi* Admissibility AD, paras. 119-122; *Gaddafi* First Admissibility Decision, para. 108.
[86] *Gaddafi* First Admissibility AD, paras. 72-73 (emphasis added).
[87] Schabas/El Zeidy, p. 968, nm. 36-37.

can reasonably be expected to have advanced at that time. As the Appeals Chamber has stated: "[t]he meaning of the words 'case is being investigated' in article 17(1)(a) of the Statute" must "be understood in the context to which it is applied".[88] Therefore:

- Under article 19, the admissibility assessment is more concrete, due to the more advanced stage of the proceedings, and entails comparing the domestic proceedings with a particular *case before the Court*—in which a specific person, alleged conduct, modes of liability, and underlying facts have been articulated.[89] Specifically, the Appeals Chamber has held that for this purpose the domestic proceedings must "cover the same individual and substantially the same conduct as alleged in the proceedings before the Court".[90]
- Under article 15, by contrast, the admissibility assessment is more preliminary in nature, consistent with the fact that the Prosecution has not yet had any opportunity to investigate.[91] Consequently, the domestic proceedings have been compared with *potential cases*,[92] identified provisionally by the Prosecution based on the limited information available during the PE, and characterised by criteria or parameters such as: (i) the groups of persons involved, and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping future case(s).[93] For example, as noted in the context of article 17(1)(d), Chambers have stressed that "[i]n considering the groups of persons likely to be the object of the investigation, the […] assessment 'should be general in nature and compatible with the pre-investigative stage'".[94]

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[88] *Ruto et al.* Admissibility AD, para. 39; *see also* *Kenya* Article 15 Decision, para. 48.
[89] Statute, article 58(1) (setting out the content of applications for arrest warrants and summons to appear); Regulations of the Court, regulation 52 (setting out the content of documents containing the charges).
[90] *Ruto et al.* Admissibility AD, para. 40. The relevant conduct encompasses the personal conduct of the suspect and conduct "which is imputed to the suspect", and to carry out this assessment, it has been considered "necessary to use as a comparator, the underlying incidents under investigation both by the Prosecutor and the State, alongside the conduct of the suspect under investigation that gives rise to his or her criminal responsibility for the conduct described in those incidents": *Gaddafi* First Admissibility AD, paras. 62, 70, 73. "Incidents" have been defined as "a historical event, defined in time and place, in the course of which crimes within the jurisdiction of the Court were allegedly committed by one or more direct perpetrators": *Gaddafi* First Admissibility AD, para. 62.
[91] *See e.g.* Schabas/ El Zeidy, p. 966, nm. 34; *Ruto et al.* Admissibility AD, para. 39.
[92] *Kenya* Article 15 Decision, para. 48; *Côte d'Ivoire* Article 15 Decision, para. 190; *Georgia* Article 15 Decision, para. 36 (*see also* *Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., paras. 37, 44, 47, Judge Kovács agreed with the Majority on the test but he disagreed with its application to the facts); *Burundi* Article 15 Decision, para. 144; *see also* ICC-01/19-7 ("*Bangladesh/Myanmar* Prosecution Request"), para. 228; Schabas/El Zeidy in, p. 966, nm. 34. This is further consistent with the requirements of regulation 49(2) of the Regulations of the Court.
[93] *See generally* *Kenya* Article 15 Decision, paras. 49-50; *Côte d'Ivoire* Article 15 Decision, paras. 191, 204-205; *Georgia* Article 15 Decision, paras. 37, 39; *Burundi* Article 15 Decision, para. 143; *see also* *Bangladesh/Myanmar* Prosecution Request, paras. 224-225.
[94] *See e.g.* ICC-01/13-111 ("*Comoros* Third Review Decision"), para. 19; *see also* para. 41.

50. Importantly, Chambers have also cautioned that potential cases provisionally identified by the Prosecution for the purpose of the preliminary examination are for the narrow purpose of ascertaining whether the legal conditions for opening an investigation under article 53(1) are met[95]—and, consequently, are merely *illustrative* of the criminality in the situation. Indeed, considering its limited powers[96] and low evidentiary threshold at this very early stage,[97] the Prosecution cannot be expected to have conducted an exhaustive assessment of all the possible crimes, actors, and incidents.[98] Accordingly, Chambers have recalled that the Prosecution is neither limited, nor obliged, to investigate the potential cases provisionally identified for the purpose of opening an investigation.[99] To do otherwise would be to pre-determine the direction of the investigation and improperly narrow its scope based on the limited information available at the preliminary examination stage. It would also be inconsistent with the Prosecution's duty to carry out independent and objective investigations and prosecutions, as set out in articles 42, 54, and 58 of the Statute,[100] and inhibit the Prosecution's truth-seeking function.[101]

51. As the Appeals Chamber has emphasised, the Prosecution must carry out an investigation into the situation *as a whole*.[102] With this in mind, in the comparable context of

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[95] *See e.g.* Statute, article 53(1)(b). This factor is applicable to the Prosecutor's assessment under article 15 pursuant to rule 48: *see* *Georgia* Article 15 Decision, para. 46.

[96] *See* Statute, article 15(2) and Rules, rule 47. States have no obligation to cooperate during the preliminary examinations: *see* article 86 (referring to the State's obligation to cooperate during investigations and prosecutions). *See* *Kenya* Article 15 Decision, para. 27.

[97] The standard of proof to open an investigation is "reasonable basis to believe" that a crime within the jurisdiction of the Court has been or is being committed. This standard has been interpreted to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'." (*Kenya* Article 15 Decision, para. 35; *Burundi* Article 15 Decision, para. 30). The information available at such an early stage is "neither expected to be 'comprehensive' nor 'conclusive'" and need not necessarily "point towards only one conclusion" (*Kenya* Article 15 Decision, paras. 27, 34; *Burundi* Article 15 Decision, para. 30). This reflects the fact that the standard under article 53(1)(a) "has a different object, a more limited scope, and serves a different purpose" than other higher evidentiary standards provided for in the Statute, which is "to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations" (*Kenya* Article 15 Decision, para. 32).

[98] *Côte d'Ivoire* Article 15 Decision, para. 24; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Kenya* Article 15 Decision, para. 27; *Georgia* Article 15 Decision, paras. 3, 63; *see also* *Afghanistan* Article 15 AD, para. 39.

[99] *Kenya* Article 15 Decision, para. 50; *Georgia* Article 15 Decision, para. 37; *Burundi* Article 15 Decision, para. 143; *Bangladesh/Myanmar* Article 15 Decision, para. 126; *Philippines* Article 15 Decision, paras. 113-118.

[100] *Afghanistan* Article 15 AD, para. 61; *Bangladesh/Myanmar* Article 15 Decision, para. 128; *Georgia* Article 15 Decision, paras. 63-64; *see also* *Kenya* Article 15 Decision, paras. 74-75, 205.

[101] *Afghanistan* Article 15 AD, para. 60; *Philippines* Article 15 Decision, para. 117.

[102] The Appeals Chamber has stressed the Prosecutor's duty, pursuant to article 54(1), "to establish the truth", "to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally" and "to [t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court": *Afghanistan* Article 15 AD, para. 60; *see also* *Philippines* Article 15 Decision, para. 117. The Prosecutor can investigate allegations that fall within the parameters of the situation or are sufficiently

article 15 proceedings, Pre-Trial Chambers have authorised investigations into whole situations where one or more potential cases have been deemed admissible, even if one or more other potential cases were deemed to be inadmissible.[103]

52. Since it is premised on the Prosecution's statutory obligations, this course of action equally applies to situations initiated pursuant to article 53(1) of the Statute upon referral by a State or the UN Security Council.

II.D. Article 18(2) requires determining whether the State's investigation sufficiently mirrors the Court's intended investigation

53. Applying all the above principles, the Prosecution respectfully submits that the Chamber must make its preliminary ruling on admissibility based on an assessment of whether the State's investigation sufficiently mirrors the Court's intended investigation. If it does not, then the Chamber should authorise the resumption of the Court's investigation, without prejudice to any further admissibility challenges under article 19(2) made in due course.

54. In assessing this question, the Chamber should compare the State's proceedings with the Court's intended investigation as defined by the parameters of the situation as a whole.

II.D.1. The Court's intended investigation is defined by the parameters of the situation that the Prosecution may investigate

55. Consistent with the Court's established approach to identifying appropriate comparators for the purpose of admissibility assessments under article 17(1), and taking account of the procedural context, the Prosecution submits that the Chamber should be guided by the plain terms of article 18(2) and consider the particular framing of the State's deferral request.

56. Specifically, article 18(2) refers to "the *State's investigation*" relating to the alleged acts material to the "information provided in the notification" by the Prosecutor under article 18(1)—and, in this instance, the GoV has requested deferral of the *entirety* of the Court's investigation. Accordingly, in resolving this specific deferral request the Chamber is required to make a preliminary ruling on the admissibility of the Court's investigation *as a whole* in light of the State's investigation as it exists at the material time.

57. In defining the Court's investigation for this purpose, the Prosecution respectfully submits that the Chamber should take into account the procedural context of the Statute.

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linked to the situation and were committed on the territory of a State Party: *Afghanistan* Article 15 AD, para. 79; *Georgia* Article 15 Decision, para. 64.

[103] *Georgia* Article 15 Decision, para. 39; *see also* paras. 50 and 57.

Chambers have already observed that the approach to admissibility for the purpose of article 15 and/or article 53(1) may be a sound starting point in considering article 18 of the Statute.[104] It follows that the Chamber should compare the domestic proceedings with the scope of the *Prosecution's intended investigation*, as defined by the sum of potential cases within the parameters of the situation which could be pursued by the Prosecutor in the exercise of his broad discretion under articles 53, 54, and 58.[105]

58. Importantly, the definition of the investigation for the purpose of article 18(2) should not be limited to those potential cases which were already *expressly* identified by the Prosecutor for the purpose of the preliminary examination. This follows not least from the fact that, if the Court's exercise of jurisdiction was triggered by a State Party referral for example, the Prosecutor is not obliged to have publicly referenced any potential case he identified for the purpose of his initial assessment of admissibility under article 53(1)(b).

59. More broadly, while the admissibility assessments for the purpose of opening an investigation under article 53(1)(b) and for deferring an investigation under article 18(2) are both addressed to the situation, rather than a particular concrete case, they materially differ in the nature and scope of the analysis required. Article 53(1)(b) requires that the Prosecutor identify at least one potential case which is admissible to justify opening an investigation as a threshold requirement. But it would clearly be contrary to the object and purpose of the Statute if that entire investigation could then be deferred by a State demonstrating merely that one such potential case was subject to national proceedings. Accordingly, for the purpose of article 18(2), the scope of the Prosecutor's intended investigation must be defined not just by reference to provisionally identified potential cases, but rather by reference to the parameters of the situation that the Prosecutor may investigate as a whole, as notified to States under article 18(1). The potential cases that the Prosecution may subsequently identify and investigate may go beyond those identified during the preliminary examination. This is the logical corollary of the Prosecutor's duty not to pre-emptively limit his intended investigation to certain potential cases before his investigation has even begun, but rather, to investigate the situation as a whole.[106]

60. This approach is consistent with the article 18 stage:

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[104] *Kenya* Article 15 Decision, para. 51; *see cf. Ruto et al.* Admissibility AD, para. 39; *Muthaura et al.* Admissibility AD, para. 38; *Gaddafi* First Admissibility AD, para. 60; *see also* H. Olásolo and E. Carnero-Rojo, *The admissibility of 'situations'*, in C. Stahn and M. El Zeidy (ed.), The International Criminal Court and Complementarity, From Theory to Practice, Vol.I, (Cambridge UP, 2011), pp. 414-415.
[105] *See similarly Afghanistan* Article 18(2) Decision, paras. 46, 55.
[106] *Cf. Comoros* Third Review Decision, para. 42.

- First, States which receive notification under article 18(1) will be aware of the limited purpose and scope of the preliminary examination, compared to the Prosecutor's duty under article 54 to establish the truth once an investigation is opened. Typically, as here, this will be mentioned in the relevant article 18 notification letter.[107]
- Second, the Statute expressly foresees that the information provided to States in the Prosecution's notification under article 18(1) may be limited in certain circumstances, such as to ensure the protection of persons and preservation of evidence or to avoid the absconding of persons, without this necessarily impacting on the ability of a State to request deferral.[108]
- Third, article 18 is not conclusive of admissibility and only seeks to provide a preliminary ruling to determine whether the Prosecution's investigation into a broadly defined and still open set of inquiries in a situation should be allowed to proceed. Where an investigation is authorised notwithstanding a deferral request, the admissibility of any concrete case that may arise from the investigation remains open to challenge under article 19, subject to the requirements in article 18(7) of the Statute.[109]

61. Conversely, to limit the Chamber's assessment under article 18(2) to potential cases identified during the preliminary examination would be inconsistent with the above principles.

- First, it would artificially limit the scope of the 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.[110]
- Second, such an approach would be likely to lead the Prosecution to conduct more protracted preliminary examinations in an attempt to exhaustively capture and map all relevant potential cases to a high degree of specificity. This would not only risk the loss of evidence due to the passage of time, but the assessment would be limited by the Prosecution's constrained investigative powers at this stage. Pre-Trial Chambers have urged the opposite—a faster, more streamlined approach to preliminary examinations.[111]

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[107] *See* *Venezuela* Article 18(1) Notification: ICC-02/18-16-Conf-Exp-AnxA. In the context of article 15 proceedings this will also be set out in the accompanying PTC decision, *see e.g.* *Philippines* Article 15 Decision, paras. 116-118 and p. 41; *Georgia* Article 15 Decision, paras. 63-64; *Bangladesh/Myanmar* Article 15 Decision, paras. 126-130. *See also* Rules, rule 52(1).
[108] Statute, article 18(1); *see also* Rules, rule 52(1).
[109] Hence, the State is not precluded from continuing its proceedings and from challenging the admissibility of a case under article 19(2), if applicable; *see also* *Afghanistan* Article 18(2) Decision, para. 60.
[110] The very purpose of an investigation is that "the Prosecutor investigates in order to be able to properly assess the relevant facts", which may previously have been unclear or difficult to establish on the basis of the information available: *Comoros* First Review Decision, para. 13; *Georgia* Article 15 Decision, para. 63; *Bangladesh/Myanmar* Article 15 Decision, para. 128.
[111] *See* ICC-RoC46(3)-01/18-37 ("*Bangladesh/Myanmar* article 19(3) Decision"), para. 88; *Bangladesh/Myanmar* Article 15 Decision, para. 130.

- Third, States seeking deferral would not be able to rely on genuine domestic proceedings regarding other crimes, persons, and incidents in the situation which have not been identified by the Prosecution during the preliminary examination.

II.D.2. The Court's investigation should be deferred if sufficiently mirrored by the State's investigation

62. Consistent with the general approach to article 17(1), the degree of overlap required between domestic proceedings and the Prosecution's intended investigation to defer a situation should not be determined purely in the abstract. In this respect, the approach adopted by the Appeals Chamber in the *Gaddafi* case provides guidance.

63. Accordingly, the Prosecution respectfully submits that the Pre-Trial Chamber should assess whether the domestic proceedings "sufficiently mirror" the Prosecution's intended investigation, defined by the parameters of the situation or the sum of potential cases within it.[112] This comparison is fact-specific and case-dependent and involves both a quantitative and qualitative assessment.[113] It allows for a pragmatic degree of flexibility and strikes a balance between the competing interests involved, namely, the State's prerogative to assert its primary responsibility, while also ensuring that there are no impunity gaps and the Prosecution is able to fulfil its statutory mandate expeditiously.[114]

64. The Prosecution stresses that this does not necessarily mean that domestic investigations must be finalised and suspects identified in order to warrant deferral. Yet, domestic proceedings must genuinely address criminal conduct which substantially mirrors the scope of the Prosecution's intended investigation with respect to both criminal incidents and categories of potential perpetrators.[115]

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[112] *Gaddafi* First Admissibility AD, paras. 72-73; *see also Afghanistan* Article 18(2) Decision, para. 56 (noting that Afghanistan has not demonstrated that it has investigated or it was investigating "in a manner that covers the full scope of the Prosecutor's intended investigation and that would justify even a partial deferral of the Court's investigations").

[113] *Cf. Côte d'Ivoire* Article 15 Decision, para. 203; *see e.g.* Stigen, pp.131-132 ("the pertinent question will rather be whether the ICC should deal with a given situation at all, i.e. *whether there appear to be (sufficiently many) cases within a given situation that the ICC may and should handle*. If very few cases appear to be admissible, it might not serve 'the interests of justice' to interfere in the situation at all, unless these are particularly important cases, e.g. against the most responsible"), p.135 ("If, however, the Prosecutor finds that a *sufficient number of admissible cases within the situation remain*, he or she shall seek an authorisation") (emphasis added).

[114] Holmes 2002, p. 681; Holmes 1999, p. 70 (noting the need to strike a balance between the complementarity principle and the danger of creating a regime which would inadvertently allow States to protect perpetrators by frustrating and delaying the Prosecutor's investigations).

[115] This is a fact-dependant and case-specific assessment. *See e.g. Georgia* Article 15 Decision, Judge Péter Kovács Sep. Op., para. 47. In order to determine whether domestic authorities focus (or not) on the same category of perpetrators as the ICC, the Court may consider the type of allegations being investigated, including patterns or

II.E. The domestic proceedings must be genuine

65. If the Chamber is satisfied that the State is actively conducting domestic proceedings that sufficiently mirror the Prosecution's intended investigation, it should then consider whether those proceedings possess or lack genuineness.[116] The drafting history indicates that the term "genuine" in article 17(1)(a) and (b) was chosen among other qualifiers in an effort to identify the most objective and least disagreeable term.[117] It entails determining whether the national authorities are (un)willing or (un)able to conduct the relevant proceedings pursuant to article 17(2) and (3) of the Statute, respectively.[118] This section examines the meaning of (un)willingness under article 17(2).

66. Article 17(2) describes three possible scenarios which would render the relevant proceedings admissible before the Court. They all refer to circumstances which show the intent of the State not to bring the person concerned to justice. The provision serves to ensure that the principle of complementarity is not abused as this would be detrimental to the Statute's overall objective to ensure that perpetrators of the most serious crimes of concern to the international community do not go unpunished.[119] As such, article 17(2) applies to national proceedings that "are conducted in a manner which would lead to a suspect evading justice as a result of a State not willing genuinely to investigate or prosecute".[120]

67. In making this assessment, the jurisprudence of international human rights bodies may assist the Court in defining the contours of certain terms set out in article 17.[121] The *chapeau* of article 17(2) requires the Court to interpret the matters therein by "having regard to the principles of due process recognized by international law".[122] And, pursuant to rule 51, in

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policy aspects that could involve the most responsible. It is not necessary that domestic proceedings have identified a concrete suspect. This approach is consistent with the drafting history: *contra* Stigen, p. 133 (incorrectly citing Holmes to suggest that it suffices that the State investigates only the crime in question genuinely); *see also* *Afghanistan* Article 18(2) Decision, paras. 46, 55 (endorsing the same persons/same conduct test).

[116] *Katanga* Admissibility AD, para. 78; *Al-Senussi* Admissibility AD, para. 68.

[117] Holmes 1999, p. 50.

[118] Statute, article 17(1)-(3). In addition to article 17(1)(a) (i.e. ongoing proceedings) the issue of genuineness may also arise in the context of article 17(1)(b) (decision not to prosecute) and 17(1)(c), and 20(3) (final decision).

[119] *Al-Senussi* Admissibility AD, para. 217.

[120] *Al-Senussi* Admissibility AD, para. 217.

[121] *See e.g.* Informal expert paper—*The principle of complementarity in practice*, annex 7; M. El Zeidy, *The Principle of Complementarity in International Criminal Law Origin, Development and Practice* (Brill/Nijhoff, 2008), pp. 169, 209, 236; H. van der Wilt and S. Lyngdorf, 'Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle', 9 *ICLR* (2009), pp. 39-75.

[122] *Al-Senussi* Admissibility AD, paras. 220, 229. The Appeals Chamber has confirmed that the *chapeau* of article 17(2) applies to "all three limbs" of the provision and has also repeatedly held that the Statute is underpinned by the requirement in article 21(3) that the application and interpretation of law under the Statute "must be consistent

assessing the matters in article 17(2), the Court may consider "in the context of the circumstances of the case", *inter alia*, information on how a State's "courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct". This approach is consistent with article 21(3) which applies to all provisions of the Statute.[123]

68. Likewise, violations of the accused's procedural rights are not *per se* grounds to find unwillingness under article 17. To affect the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) of the Statute.[124]

69. Further, the determination of whether a State is (un)willing genuinely to investigate and prosecute should be made with respect to the relevant domestic proceedings (which includes both the investigative and judicial phases)[125] and should consider the State's national law.[126] While article 17 directs the Court's analysis to the (un)willingness of the 'State' as a whole, different national authorities dealing with the proceedings may demonstrate varying and inconsistent degrees of (un)willingness.[127] As such, when analysing the actions, if any, of a State in a given case, the Court will need to also consider the activities of each national authority or body that may bear on the proceedings to determine the extent to which it frustrates the relevant proceedings as defined in article 17(2).[128]

70. Finally, factors relevant to determining the existence of relevant proceedings under article 17(1) may also be relevant to the Chamber's determination under article 17(2),[129] such

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with internationally recognized human rights"; however, the Court's mandate is not to rule upon States' compliance with international standards of human rights: *Lubanga* Admissibility AD, paras. 36-39. *See similarly* the Pre-Trial Chamber I's approach in *Gaddafi* Admissibility Decision, para. 45.

[123] *Gaddafi* Judge Perrin de Brichambaut Separate Concurring Opinion, para. 112.

[124] *Al-Senussi* Admissibility Decision, para. 235.

[125] *Al-Senussi* Admissibility Decision, para. 202.

[126] *Al-Senussi* Admissibility Decision, para. 210.

[127] For instance certain State organs, such as those connected to the security services, might be opposed to or obstructive to the investigative or prosecutorial efforts of other components of the national system; *see e.g.* IACtHR, *Moiwana Community v. Suriname*, Judgment, para. 162; IACtHR, *García Prieto et al. v. El Salvador*, Judgment, paras. 112-116; IACtHR, *Gudiel Álvarez et al. (Diario Militar) v. Guatemala*, Judgment, paras. 248-252. *See also* Informal expert paper—*The principle of complementarity in practice*, para. 45.

[128] *See* K. Ambos, Treatise on International Criminal Law: Volume III: International Criminal Procedure, (Oxford: OUP, 2016), ("Ambos") pp. 308-309 (suggesting that the State cannot argue in favour of genuine domestic proceedings based on the positive actions of one of its domestic organs if other organs manage to frustrate their progress).

[129] *Al-Senussi* Admissibility Decision, para. 210; *Al-Senussi* Admissibility AD, para. 231. For example, lack of proceedings against the most responsible (and a focus only on low level perpetrators) may indicate, along with other factors, an intent to shield under article 17(2)(a): Informal expert paper—*The principle of complementarity in practice*, annex 4, p. 30.

as the type and adequacy of investigative steps and the progression of domestic proceedings.[130] Such factors may also be relevant to one or more of the scenarios in article 17(2).

71. As explained below, the Prosecution has primarily analysed the GoV's proceedings on the basis of the scenarios set out in article 17(2), subsections (a) and (c). However, since some factors in subsection (b) are also relevant to subsections (a) and (c), the Prosecution provides below its assessment of all three sub-paragraphs of article 17(2).

II.E.1. Article 17(2)(a)—Intent to shield

72. The first scenario demonstrating unwillingness under article 17(2) is where a State does not intend to bring a person to justice as it wishes to shield that person from criminal liability and in so doing obstructs the course of justice.

73. The Prosecution respectfully submits that to ascertain whether a State's actions are intended to shield a person from criminal prosecution under article 17(2)(a), the Court must assess the quality, seriousness and effectiveness of the State's domestic proceedings.[131]

74. The ECtHR and the IACtHR, in particular, have articulated international standards and criteria to assess the effectiveness of domestic criminal proceedings, including that the criminal investigations carried out by States must be both serious and effective.[132] This means that they must be capable of leading to a determination of the relevant facts and circumstances and to the identification and punishment of those responsible.[133] This is an obligation of means and not of result,[134] and should be scrutinised and assessed in light of the circumstances of each case.[135] Domestic proceedings cannot be "a mere formality preordained to be ineffective, or [a] step taken by private interests that depends upon the procedural initiative of the victim or his family or upon their offer of proof."[136] On the contrary, the competent authorities must take "the

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[130] *Al-Senussi* Admissibility AD, para. 231.
[131] Schabas/El Zeidy, p. 995, nm. 77 ("Article 17(2)(a) is a test for discerning the bad faith of a State by way of checking the effectiveness of national proceedings. Thus, any intentional deficiency or serious negligence in conducting national proceedings that lead to negative results, through certain acts or omissions, might reflect a State's intention to 'shield [the] person from criminal responsibility'").
[132] ECtHR, *Armani Da Silva v. the United Kingdom*, para. 233; IACtHR, *Velasquez Rodriguez v. Honduras*, para. 177. *See also* Schabas/El Zeidy, p. 996, nm. 77.
[133] ECtHR, *Armani Da Silva v. the United Kingdom*, Judgment, para. 233; ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment, para. 166; ECtHR *Nachova and Others v. Bulgaria*, Judgment, para. 113; *see also Anguelova v. Bulgaria*, Judgment, para. 139-140; ECtHR, *Ikincisoy v Turkey*, Judgment, para. 77; ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, Judgment, para. 175.
[134] IACtHR, *Olivares Muñoz et al. v. Venezuela*, Judgment, para. 120; ECtHR, *Bektaş and Özalp v. Turkey*, Judgment, para. 50.
[135] ECtHR, *Armani Da Silva v. The United Kingdom*, Judgment, para. 234.
[136] IACtHR, *Olivares Muñoz et al. v. Venezuela*, Judgment, para. 120.

reasonable steps available to them" to secure the relevant evidence concerning the incident[137] and the investigation's conclusions must be based on a "thorough, impartial and careful" analysis of all relevant elements.[138]

75. An investigation has been found to be ineffective when the investigative measures: are aimed at obtaining information about the victims only;[139] fail to elucidate the circumstances of a case,[140] fail to act on leads or to identify possible witnesses;[141] fail to explore obvious and necessary lines of inquiry;[142] fail to take statements or question the police and members of the security forces despite their alleged involvement;[143] or lack coordination among the relevant competent authorities.[144] Inertia[145] and delays in launching investigations when crucial evidence could have been secured[146] or upon receipt of complaints[147] undermine the effectiveness of criminal proceedings and, as such, may indicate the State's intention to obstruct the course of justice. Likewise, deviation from established practices and procedures, manifest inadequacies in charging and modes of liability, irreconcilability of judicial findings with evidence tendered, or intimidation of victims, witnesses or judicial personnel may be relevant.[148]

76. The nature and degree of scrutiny which will satisfy the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case, including the practical realities of investigative work. Nonetheless, and considering the States' duties under the human rights instruments, the ECtHR has held that "even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted".[149] Even if the ICC is not tasked with determining whether a State has complied

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[137] ECtHR, *Al-Skeini and Others v. the United Kingdom*, Judgment, para. 166; ECtHR, *Armani Da Silva v. the United Kingdom*, Judgment, para. 233.
[138] ECtHR, *Anguelova v. Bulgaria*, Judgment, para. 136; ECtHR, *Nachova and Others v. Bulgaria*, Judgment, para. 113. *See also* ECtHR, *McCann and Others v. the United Kingdom*, Judgment, paras. 161-163.
[139] IACtHR, *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, Judgment, para. 260.
[140] ECtHR, *Sergey Shevchenko v. Ukraine*, Judgment, paras. 72-73.
[141] ECtHR, *Tepe v. Turkey*, Judgment, para. 179.
[142] ECtHR, *Ogur v Turkey*, Judgment, paras. 90-91; ECtHR, *Tepe v. Turkey*, Judgment, para. 179.
[143] ECtHR, *Tepe v. Turkey*, Judgment, para. 179; ECtHR, *Benzer and Others v. Turkey*, Judgment, para. 188.
[144] ECtHR, *Tepe v. Turkey*, Judgment, para. 178.
[145] ECtHR, *Rupa v. Romania (no. 1)*, Judgment, paras. 123-124.
[146] IACtHR, *Kawas-Fernández v. Honduras*, Judgment, para. 114; ECtHR, *Timurtas v. Turkey*, Judgment, para. 89.
[147] IACtHR, *García Prieto v. El Salvador*, Judgment, para. 115; ECtHR, *Timurtas v. Turkey*, Judgment, para. 89.
[148] OTP PE Policy paper, para. 51.
[149] ECtHR, *Al-Skeini and Others v. The United Kingdom*, Judgment, paras. 164. *See also* ECtHR, *Kaya v. Turkey*, Judgment, paras. 86-92; ECtHR, *Ergi v. Turkey*, Judgment, paras. 82-85.

with its duties to provide an effective remedy or fulfilled a procedural obligation to give effect to a fundamental human right, failure to meet these conditions without adequate justification may lead to a finding that the State is shielding the person from criminal responsibility.[150]

77. Additionally, investigations into complaints of torture or other cruel, inhuman or degrading treatment must be conducted *ex officio*[151] when there is a "well-founded reason" to believe that such acts may have occurred.[152] Likewise, domestic authorities must apply a stringent scrutiny when there is a suspicious death at the hands of security forces or other State agents[153] and "act on their own motion once the matter has come to their attention".[154] They should not leave it to the initiative of the individuals to lodge a formal complaint or to request that particular lines of inquiry be pursued,[155] or to present "conclusive proof".[156]

78. In sum, manifest allegations and formal complaints related to serious crimes such as torture and death at the hands of State authorities, coupled with a State's failure to satisfy the minimum standards of an effective investigation, are also factors which may indicate a State's "intent to shield" pursuant to article 17(2)(a).

II.E.2. Article 17(2)(b)—Unjustified delay

79. This provision requires the following cumulative criteria to be met: (a) a delay in the national proceedings; (b) that is unjustified; and (c) in the circumstances, the delay is irreconcilable with the State's intent to investigate and prosecute.[157] Thus, lengthy proceedings are not sufficient *per se* to render the case inadmissible before the Court.[158] There is also an obvious overlap between this subsection and subsection (a).

80. 'Unjustified delay' is considered a more onerous and objective threshold than 'undue delay' (used in human rights instruments) and affords the State concerned an opportunity to

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[150] Schabas/El Zeidy, pp. 996-997, nm. 77-78.
[151] IACtHR, *Guerrero, Molina Et Al. v. Venezuela*, Judgment, para. 154; IACtHR, *Cabrera García and Montiel Flores v. Mexico*, Judgment, para. 135.
[152] IACtHR, *Vélez Loor v Panama*, Judgment, para. 240.
[153] ECtHR, *Enukidze and Girgvliani v. Georgia*, Judgment, para. 277; *Armani Da Silva v. The United Kingdom*, Judgment, para. 234.
[154] ECtHR *Nachova and Others v. Bulgaria*, Judgment, para. 111; ECtHR, *Hugh Jordan v. The United Kingdom*, Judgment, para. 105
[155] *Al-Skeini and Others v. The United Kingdom*, Judgment, para. 165; IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment, para. 177.
[156] IACtHR, *Godínez-Cruz v.Honduras*, Judgment, para. 190; IACtHR, *Velásquez-Rodríguez v. Honduras*, Judgment, para. 180.
[157] Schabas/El Zeidy, p. 998, nm. 80.
[158] Schabas/El Zeidy, p. 997, nm. 79.

provide relevant explanations.[159] Despite the differences in the terminology, the standards and jurisprudence of human rights bodies on what constitutes 'delay' or 'reasonable time' are relevant to assist the Court in assessing the reasonableness of the length of proceedings.[160]

81. Further, the determination of whether there has been an unjustified delay by the State cannot be assessed in the abstract, but rather should be done in light of the specific factual circumstances of the case and investigation(s) concerned.[161] It requires a case-by-case assessment.[162] Factors to consider in this assessment may include the complexity of the case[163] and the conduct of all relevant authorities (including legislative and executive) throughout the criminal proceedings.[164]

II.E.3. Article 17(2)(c)—Lack of independence and impartiality

82. The third scenario under article 17(2) requires proof that the State's proceedings lacked independence and impartiality. These requirements are cumulative: a State may be found unwilling "when the manner in which the proceedings are being conducted, together with factors indicating a lack of independence and impartiality, are to be considered, in the circumstances, inconsistent with the intent to bring the person to justice".[165]

83. Article 17(2)(c) is not expressly concerned with the violation of a suspect's due process rights.[166] Nevertheless, there may be circumstances where certain violations of these rights may be relevant to assess independence and impartiality under article 17(2)(c),[167] especially when the violations "are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice."[168]

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[159] Schabas/El Zeidy, p. 998, nm. 80; Ambos, p. 311.
[160] *See above* fn.122; Schabas/El Zeidy, pp. 999, nm. 80 (noting that the human rights standards are relevant but should be adjusted to the nature of the ICC judicial procedure).
[161] *Al-Senussi* Admissibility AD, paras. 223, 227, 228. *See also* ECtHR, *König v. Germany*, Judgment, para. 99; ECtHR *Palka v. Poland*, Judgment, para. 28.
[162] *See e.g. Al-Senussi* Admissibility AD, paras. 227-229.
[163] This depends on a wide range of elements, such as the volume of evidence, (ECtHR, *Hagert v. Finland*, Judgment, para. 29); the number of defendants, victims and witnesses (IACtHR, *Furlan v. Argentina*, Judgment, para. 156); and the complexity of the facts and charges (ECtHR, *Neumeister v. Austria*, Judgment, para. 20).
[164] Schabas/El Zeidy, pp. 999, 1000 (also fn. 347), 1001, nm. 80-81.
[165] *Al-Senussi* Admissibility Decision, para. 235.
[166] *Al-Senussi* Admissibility AD, para. 230(2).
[167] *Al-Senussi* Admissibility Decision, para. 235.
[168] *Al-Senussi* Admissibility AD, para. 230.

II.E.3.a. Independence

84. Judicial independence refers to the ability of courts and judges to perform their duties free from undue influence or control by other actors, whether governmental (e.g. the executive and the legislative)[169] or private, or by actors within the judiciary itself. Human rights bodies have considered factors such as: (i) the manner of appointment of members to the judiciary;[170] (ii) the duration of their terms in office and other guarantees including their security of tenure, as well as the conditions governing promotion, transfer, suspension and cessation of their functions;[171] (iii) the existence of safeguards against external pressure;[172] and (iv) whether the judicial body presents an appearance of independence.[173] These factors can usually be found in the State's laws, regulations, decrees and other relevant statutes.[174]

85. The following situations have been deemed incompatible with the notion of judicial independence: when the functions and competencies of the judiciary and the executive are not clearly distinguishable; when the latter is able to control or unduly influence the former;[175] and when there are no sufficient safeguards to ensure that judges are free from pressure by other judges or from those who have administrative responsibilities in the courts.[176]

86. The security of tenure of judges during their term of office has been considered a corollary of their independence.[177] As such, judges may be dismissed only in accordance with fair procedures ensuring objectivity and impartiality set out in the law.[178] A system in which

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[169] Human Rights Committee, *General Comment No. 32*, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, ("*HRC General Comment No. 32*"), para. 18. ECtHR, *Oğur v. Turkey*, Judgement, paras. 91-92; ECtHR, *Giuliani and Gaggio*, Judgement, para. 300; ECtHR, *Mustafa Tunç and Fecire Tunç*, Judgment, para. 177; ECtHR, *Hugh Jordan v United Kingdom*, Judgement, para. 106; IACtHR, *Durand-Ugarte v. Perú*, Judgment, paras. 125-126; IACtHR, *Cantoral- Benavides v. Perú*, Judgment, para. 114; IACtHR, *Castillo Petruzzi et al. v. Peru*, Judgment, para. 130.

[170] IACtHR, *Chocrón v. Venezuela*, Judgment, para. 98; IACtHR, *Lopez Lone y otros v. Honduras*, Judgement, paras.191, 195; IACtHR, *Reverón Trujillo v. Venezuela*, para. 70.

[171] *Ibid.*

[172] *Ibid.*

[173] ECtHR, *Findlay v. the United Kingdom*, Judgment, para. 73; ECtHR, *Brudnicka and Others v. Poland*, Judgment, para. 38.

[174] ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, Judgment, para. 221 (independence is assessed, particularly, on the basis of "statutory criteria").

[175] *HRC General Comment No. 32*, citing UN Human Rights Committee, *Bahamonde v. Equatorial Guinea*, UN Human Rights Committee, Communication No. 468/1991, U.N. Doc. CCPR/C/49/D/468/1991, 10 November 1993, para. 9.4. The ECtHR considered permissible the appointment of judges by the executive, provided that appointees are free from influence or pressure when carrying out their adjudicatory role: *Henryk Urban and Ryszard Urban v. Poland*, Judgement, para. 49.

[176] ECtHR, *Parlov-Tkalčić v. Croatia*, Judgment, para. 86.

[177] ECtHR, *Campbell and Fell v. the United Kingdom*, Judgement, para. 80.

[178] *HRC General Comment No. 32*, paras. 19-20.

judges may be removed from office at will raises legitimate doubts "on the effective possibility to decide specific disputes without fearing reprisals".[179] Likewise, the dismissal of judges by the executive, before the expiry of their term, without specific reasons given and without effective judicial protection being available to contest the dismissal, is incompatible with the independence of the judiciary.[180]

87. Further, the appointment of provisional judges must be the exception as the uncertainty of their position makes them vulnerable to corruption and external pressures.[181] Moreover, even when provisionally appointed, judges should be guaranteed a certain stability during their term as the provisional nature of their appointment should not be utilised as a means to dismiss them at will.[182] In addition, "provisional appointments should not be extended indefinitely in time and should be subject to a condition subsequent, such as a predetermined deadline or the holding and completion of a public competitive selection process, whereby a permanent replacement for the provisional judge is appointed."[183]

88. A lack of independence could also be indicated by specific actions or omissions by national authorities, such as the failure to carry out certain measures which would shed light on the circumstances of the case,[184] giving excessive weight to the statements of the suspects,[185] failure to undertake apparently obvious and necessary lines of inquiry,[186] and inertia.[187]

89. At a more granular level, when the independence of a particular court is called into question, what has been considered decisive is whether an "objective observer" would have cause for concern in the circumstances of the case at hand.[188]

90. Finally, not only must judges and prosecutors be independent, but also the authorities responsible for investigating the alleged crimes.[189] The persons and bodies responsible for the

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[179] IACtHR, *Apitz Barbera et al. ('First Court of Administrative Disputes') v. Venezuela*, Judgment, para. 44.
[180] IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment, para. 43.
[181] UN Special Rapporteur Gabriela Knaul, Report to the General Assembly (2012) UN Doc. A/67/305, para. 52.
[182] IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment, para. 43.
[183] IACtHR, *Álvarez Ramos v. Venezuela*, Judgment, para. 148. Adding that "when provisional judges are in office for a long time, or the majority of judges are provisional, this situation creates major obstacles for the independence of the judiciary."
[184] ECtHR, *Sergey Shevchenko v. Ukraine*, Judgment, para. 72-73.
[185] ECtHR, *Kaya v. Turkey*, Judgment, para. 89.
[186] ECtHR, *Oğur v. Turkey*, Judgment, paras. 90-91.
[187] ECtHR, *Rupa v. Romania*, Judgment, paras. 123-124; *Orhan v. Turkey*, Judgment, para. 344.
[188] ECtHR, *Incal v. Turkey*, Judgement, para. 71.
[189] *See e.g.* the ECtHR has found that independence was lacking in investigations where the investigators were potential suspects (*Bektaş and Özalp v. Turkey*, para. 66; *Orhan v. Turkey*, para. 342, *Hugh Jordan v United Kingdom*, para. 142); or were direct colleagues of the persons subject to investigation or likely to be so (*Ramsahai and Others v. the Netherlands*, paras. 335-341; *Emars* v. Latvia, paras. 85, 95); or were in a hierarchical

investigation need not enjoy absolute independence, but rather must be sufficiently independent of the persons and structures whose responsibility is likely to be engaged.[190] The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case.[191]

II.E.3.b. Impartiality

91. Impartiality normally attaches to the individual exercise of the functions of a public authority, whether as an investigator, a prosecutor or a judge.[192] Impartiality of a tribunal means that its members are free from prejudice or bias, that they do not have a preference for any of the parties involved and that they are not involved in the issues under dispute.[193] Members of the judiciary shall not be—or appear to be[194]—subject to improper influences, inducements, pressures, threats or interferences, and must act exclusively according to the law.[195] Impartiality is key in judicial institutions due to the public confidence they must inspire in a democratic society.[196]

92. Impartiality thus has a subjective and an objective dimension.[197] The former relates to the personal conviction or interest of a judge in a given case,[198] which a court must be free of.[199] This extends to individuals in positions of public authority with influence over the conduct of criminal proceedings in a particular case. The objective aspect determines "whether, quite apart from the personal conduct of any of the members of that body, there are ascertainable facts

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relationship with the potential suspects (*Enukidze and Girgvliani v. Georgia*, paras. 247 et seq.). *Compare* ECtHR, *Jaloud v. the Netherlands*, para. 189 and ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey* para. 254.

[190] ECtHR, *Bektaş and Özalp v. Turkey*, para. 66; ECtHR, *Orhan v. Turkey*, para. 342, ECtHR, *Hugh Jordan v United Kingdom*, para. 142; ECtHR, *Ramsahai and Others v. the Netherlands*, paras. 335-341; ECtHR, *Emars v. Latvia*, paras. 85, 95; ECtHR, *Enukidze and Girgvliani v. Georgia*, paras. 247 *et seq*. *Compare* ECtHR, *Jaloud v. the Netherlands*, para. 189 and ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, para. 254.

[191] ECtHR, *Mustafa Tunç and Fecire Tunç v. Turkey*, Judgment, para. 223.

[192] *See similarly* Statute, article 41.

[193] IACtHR, *Palamara Iribarne v.* Chile, Judgement, para. 146; ECtHR, *Piersack* v. Belgium, Judgment, para. 30; ECtHR, *Hauschildt* v. Denmark, Judgment, para. 47 (also recalling that personal impartiality is to be presumed until there is proof to the contrary).

[194] IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v.* Venezuela, Judgment, para 56.

[195] IACtHR, *Lopez Lone y otros v. Honduras*, Judgement, para**.** 233.

[196] A. Clooney, P. Webb, '*The Right to a Fair Trial in International Law*', (Oxford University Press, 2020), ("Clooney and Webb"), p. 111.

[197] ECtHR, *Oleksandr Volkov v. Ukraine*, Judgment, paras. 104-105; ECtHR, *Ramos Nunes De Carvalho E Sá v. Portugal*, Judgment, paras. 145-146.

[198] *Ibid*. ECtHR, *Warsicka v. Poland*, Judgment, para. 35; ECtHR, *Demicoli v. Malta*, Judgment, para. 40; IACtHR, *Granier et al. (Radio Caracas Televisión) v. Venezuela*, Judgment, para. 304; *Duque v. Colombia*, Judgment, para. 162; *HRC General Comment No. 32*, para. 7.2.

[199] ECtHR, *Kleyn and Others v. the Netherlands*, Judgment, para. 191.

which may raise doubts as to its impartiality",[200] which should be assessed according to a reasonable, objective standard.[201]

93. For example, when a judge publicly makes comments that suggests that he or she has formed an opinion of a case before presiding over it, fears of partiality can be considered objectively justified.[202] Likewise, the free removal of judges raises objective doubts about the ability of such judges to decide specific disputes without fear of retaliation.[203]

94. Finally, judges must recuse themselves from a case when reasonable doubts or other objective motives raise questions about their impartiality. The mere possibility for a judge to do so does not ensure impartiality: parties must be able to challenge the suitability and competence of a judge who, despite having reasons to recuse him or herself, decides not to.[204]

III. ANALYSIS

95. In applying this legal framework to the Deferral Material, the Prosecution has conducted an independent and objective assessment and concluded that the Deferral Request is not warranted at this stage. Thus, the Prosecution should be authorised to resume its investigation.

96. The Prosecution has analysed at considerable length all the information provided by the GoV to determine whether it has substantiated the existence of domestic proceedings envisaged by article 18(2). Of the 893 cases reported, only 265 cases (29.68% of the total) contain some basic information (in the form of a "Summary") in relation to the question of the existence of relevant domestic proceedings. Copies of court records are provided for 177 of these cases (19.82% of the total). The GoV has not substantiated its Request with respect to 628 (70.32%) of the reported cases for which only Charts were provided.

97. Despite these limitations, the Prosecution has assessed all 893 cases reported and, based on the information provided, concluded that, at present, the Venezuelan proceedings do not sufficiently mirror the scope of Prosecution's intended investigation. Even if the Prosecution

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[200] ECtHR, *Warsicka v. Poland*, Judgment, para. 37. It relates to the guarantees offered by a judge to sufficiently exclude any legitimate doubt of impartiality. ECtHR, *Piersack v. Belgium*, Judgment, para. 30; ECtHR, *Grieves v. the United Kingdom*, Judgment, para. 69; ECtHR, *Kyprianou v. Cyprus*, Judgment, para. 118; ECtHR, *Morice v. France*, Judgment, para. 73.

[201] ECtHR, *Ferrantelli and Santangelo v. Italy*, Judgment, para. 58; *Wettstein v. Switzerland*, Judgment, para. 44. *See also* *HRC General Comment No. 32*, para. 21, citing *Karttunen v. Finland*, Communication No. 387/1989, para. 7.2. The Court has endorsed the objective approach when considering requests for disqualification of judges pursuant to article 41(2)(a), *see e.g.*, ICC-01/09-01/20-173-Red.

[202] ECtHR, *Lavents v. Latvia*, Judgement, para 118.

[203] IACtHR, *Reverón Trujillo v. Venezuela*, Judgement, para. 78; IACtHR, *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador*, Judgement, para. 145.

[204] IACtHR, *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Judgment, para. 65.

has identified 28 cases where progressive investigative steps have been taken with respect to the named individuals for the crimes for which they were sought, a deferral of the situation is not warranted at this stage of the proceedings.[205] As described below, despite the GoV's reported efforts towards accountability, the information available shows that the patterns and policies underlining the contextual elements of crimes against humanity are not being investigated, the domestic proceedings focus on direct perpetrators (and seemingly low level members of the State security forces) and mostly on crimes qualified as being of "minor" gravity, while a substantial part of the relevant criminality is not being investigated at all. Notably, only 7.61% of cases relate to crimes identified by the Prosecution during the PE. Further, considering the very limited investigative steps taken the domestic investigations do not qualify as progressive investigations within the meaning of article 17(1)(a). Significantly, 67.86% of the cases (606 cases) are at a preliminary investigation stage despite the alleged criminality having occurred mainly in 2017, 10.53% of the cases (94 cases) have been definitively terminated without evidence of a prior investigation, and in 85.55% of the cases (764 cases), the factual scope of the domestic investigation is unclear or no suspect has been identified.

98. Should the Chamber decide to assess the genuineness of the domestic proceedings, the Prosecution respectfully submits that the proceedings do not satisfy the genuineness criteria in article 17(2)(a) and (c). The legal qualification of the facts largely fail to reflect the gravity of the conduct in question, and the investigative measures taken are inadequate to establish the facts and criminal responsibility for the crimes. Further, there have been unjustified delays in the proceedings.[206]

99. Furthermore, the information available at the time of this filing suggests that despite more recent reform measures adopted by the GoV, these appear to be limited in scope and do not address the considerations related to the genuineness of proceedings outlined below.[207] As noted above, the admissibility assessment may be revisited in the future. The Prosecution also remains committed to supporting efforts of Venezuela to ensure the effective administration of justice, in accordance with article 17. Nonetheless, admissibility must be assessed on the basis of the facts as they exist, not as they might materialise in the future. The Prosecution

[205] Note however that in all these cases there is no evidence that the contextual elements of crimes against humanity have been investigated. Also, the legal qualification of the cases may not always reflect the alleged conduct. The Prosecution's assessment that progressive investigative steps have been taken with respect to 28 cases has been solely made with respect to the persons identified and for the crimes alleged.
[206] *See below* section III.B. Shielding persons from criminal responsibility—article 17(2)(a).
[207] *See below* section III.C. Lack of independence and impartiality—article 17(2)(c).

respectfully submits that at this very initial stage and in light of the information submitted, the Chamber should authorise the resumption of the Prosecution's investigation, notwithstanding the GoV's Deferral Request.

III.A. Domestic proceedings do not sufficiently mirror the Prosecution's intended investigation and there are no progressive investigations—article 17(1)

100. For the reasons set out below, the Prosecution respectfully submits that the Venezuelan proceedings do not sufficiently mirror the Prosecution's intended investigation. In addition, the reported proceedings do not qualify as progressive investigations pursuant to article 17(1)(a).

III.A.1. The domestic proceedings do not sufficiently mirror the Prosecution's intended investigation

III.A.1.a. The domestic authorities have not investigated the alleged State policy and systematic attack against a civilian population nor persons in positions of authority

101. Based on a careful analysis of the information received from the GoV, the Prosecution submits that the facts and circumstances which are relevant to establish the possible existence (or lack thereof) of a State policy to attack civilians—which the Prosecution identified during the PE and intends to investigate—have not been investigated, or are not being investigated.

102. In concluding the PE, the Prosecution determined that there was a reasonable basis to believe that, since at least April 2017, members of the State security forces, civilian authorities and pro-government individuals (members of pro-governmental groups called *colectivos*)[208] may have committed the crimes against humanity of imprisonment or other severe deprivation of physical liberty pursuant to article 7(1)(e); torture pursuant to article 7(1)(f); rape and/or other forms of sexual violence of comparable gravity pursuant to article 7(1)(g); and persecution on political grounds against persons held in detention pursuant to article 7(1)(h).[209]

103. The Prosecution also found that 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; that this attack was systematic and targeted real or perceived opponents of the GoV;[210] and that the policy to attack this part of the

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[208] *See* OTP PE Report 2019, para. 74; OTP PE Report 2020, para. 206. *Colectivos* can be translated as "groups" and are violent groups of pro-government armed civilians deployed together with the regular State forces. Sources available interchangeably use the terms "armed groups", "armed civilians", "motorcyclists" and "paramilitary groups" to refer to them. *See also* FFM Detailed 2020 Report, paras. 216-224.
[209] ICC-02/18-16-Conf-Exp-AnxD at p. 2, para. 5.
[210] ICC-02/18-16-Conf-Exp-AnxD at p. 2, paras. 6, 7, and p. 11, para. 34.

population was at a minimum encouraged or approved by the GoV and carried out primarily by members of State security forces with the possible assistance of pro-government individuals.[211]

104. The Deferral Material shows that, having considered the cases reported, the domestic authorities have not sought to ascertain the possible systematic occurrence of the above mentioned crimes nor the existence of patterns and policies linking the criminal acts. Rather, the GoV has expressly rejected the existence of any such policy and of a systematic attack against any civilian population, and has characterised the instances of criminality investigated as isolated incidents constituting ordinary crimes.[212] The GoV's conclusions in this regard do not appear to have resulted from actual investigations that led its judicial authorities to conclude that no policy or attack existed. Instead, on the basis of the material submitted, there is no evidence that this aspect of the investigation has been actually and genuinely pursued at all.

105. Where identified, the suspects being investigated or (more rarely) prosecuted domestically are direct physical perpetrators who appear to be exclusively low-ranking members of State security forces.[213] It appears that the Venezuelan authorities have not investigated persons in mid-level or high positions of authority in the State apparatus who may also bear criminal responsibility for the commission of the crimes, whether directly or indirectly, including as a superior.[214] Nor are the competent authorities unable to pursue this type of inquiry. For example, the Attorney General may trigger a preliminary hearing on the merits of a case (so-called *antejuicio de mérito*) before the Plenary Chamber of the Supreme Tribunal of Justice ("STJ") to assess the merits of a potential prosecution involving the criminal responsibility of high level State officials.[215] This procedure has been used in recent years to pursue action against 32 members of the opposition-led National Assembly and against the former Attorney General, but not for any alleged conduct relevant to this situation.[216]

106. Since proof of the existence of a State or organisational policy and of an attack against a civilian population is required to prove *any* crime against humanity within the parameters of the Venezuela situation, this element would form part of *all* potential cases that the Prosecution

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[211] OTP PE Report 2020, paras. 202-206 and ICC-02/18-16-Conf-Exp-AnxD at p. 2, para. 7.
[212] VEN-OTP-0001-1250 at 1267, paras. 35-36.
[213] *See e.g.* VEN-OTP-0002-9653 at 9661-9663; 9664; 9665-9667; 9668-9671; 9677-9680. Information regarding the (low) ranks of some of the perpetrators is only provided in the Eleventh, Thirteenth and Fourteenth Submissions.
[214] *See similarly* FFM Detailed 2022 Report, para. 436.
[215] 1999 Venezuelan Constitution, arts. 200, 266 (1)-(2)-(3); 2012 Criminal Procedure Code arts. 376-378, 381. This code was modified in 2021 but the changes do not affect the relevant provisions.
[216] FFM Detailed 2021 Report, para. 463.

might investigate. To the extent that the GoV has not reported on any national proceedings examining the possible existence (or otherwise) of this element, and has expressly refuted its existence without elucidating the existence of relevant investigations,[217] the domestic proceedings undertaken do not sufficiently mirror the scope of the Prosecution's intended investigation such that it should displace ICC jurisdiction. The category of perpetrators being investigated by the Venezuelan authorities (direct and low level perpetrators) further supports this conclusion.

III.A.1.b. The domestic proceedings do not sufficiently mirror the forms of criminality the Prosecution intends to investigate

107. Following a careful analysis of the Deferral Material, the Prosecution respectfully submits that despite the efforts of the Venezuelan authorities, its domestic proceedings do not sufficiently mirror the forms of criminality that the Prosecution intends to investigate.

108. In particular, regarding the types and number of crimes being investigated, the Deferral Material shows that, among the cases reported, only 12 have been opened in relation to crimes of torture,[218] two in relation to rape,[219] none with respect to any other forms of sexual and gender-based crimes and none in relation to persecution. These figures are significantly lower than those identified by the Prosecution during the PE. The Prosecution concluded that there was a reasonable basis to believe that from at least April 2017 onwards members of the State security forces, at times jointly with pro-governmental individuals (or *colectivos*), committed the crime against humanity of torture against 300 to 400 actual or perceived government opponents who were subjected to various forms of physical or psychological abuse during detention.[220] The FFM, whose mandate involves investigating extrajudicial executions, enforced disappearance, arbitrary detentions and torture and other cruel, inhuman or degrading treatment committed since 2014, has reached a similar conclusion.[221]

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[217] VEN-OTP-0001-1250 at 1267, paras. 35-36.
[218] Annex B, column "type of crime". With respect to the 706 cases reported in the First Submission, the GoV has acknowledged that only 5 cases correspond to the crime of torture (*see* VEN-OTP-0001-1250 at 1331, para. 162). Out of the 5, it considered 3 cases to be of minor gravity: *see below* fn. 236. The total number of 12 cases of torture is calculated as a result of subsequent submissions. Notwithstanding the alleged role played by members of the DGCIM and of SEBIN in the alleged commission of the crime of torture (*see* FFM Detailed 2022 Report, paras. 7, 103 and 300), the information submitted does not include any case of torture allegedly perpetrated by members of the DGCIM and only 2 cases of torture allegedly committed by SEBIN members, which are reportedly in preparatory phase.
[219] Annex B, Nrs. 51 and 172. *See also* VEN-OTP-0001-5454 at 5855 (Nr.704) and VEN-OTP-0002-7069 at 7071.
[220] ICC-02/18-16-Conf-Exp-AnxD, p. 8, paras. 23-24 and OTP PE Report 2019, para. 78.
[221] FFM Summary 2020 Report, paras. 139-144. *See also* FFM Detailed 2022 Report, paras. 103-112 and 300-312.

109. Likewise, while the GoV only refers to two cases of rape and no other acts of sexual and gender based violence, during the PE the Prosecution found a reasonable basis to believe that the security forces, at times with the involvement of the above-mentioned *colectivos*, committed different forms of sexual and gender-based violence, including rape, against more than 100 persons[222] who were perceived or actual opponents of the GoV from at least April 2017 onwards.[223] The Prosecution notes that Venezuela has specific legislation concerning these crimes.[224]

110. With respect to the crime of persecution, the GoV asserts that "no cases of persecution have been recorded since there is no express criminal type in national legislation as persecution can be deployed through multiple criminal conducts".[225] As noted above, in the PE the Prosecution found a reasonable basis to believe that, from at least April 2017 onwards, members of the State security forces, at times acting jointly with pro-government individuals, allegedly persecuted on political grounds thousands of persons who were perceived or actual opponents of the GoV by way of their unlawful imprisonment, torture, and rape and/or other forms of sexual violence.[226]

111. The Prosecution notes that the *2017 Law against Hate, for Peaceful Coexistence and Tolerance* acknowledges that any criminal act that is committed due to the victim's membership of a particular ethnic, racial, religious or political group shall be considered as an aggravating circumstance in determining the appropriate sentence.[227] There is, however, no indication that the Venezuelan authorities have reflected the discriminatory nature of the facts in the reported proceedings.

112. Regarding the main perpetrator groups being investigated by the Venezuelan authorities, the Deferral Material indicates that, when cases are opened, they are only against direct physical perpetrators and seemingly low level members of the State security forces, such

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[222] ICC-02/18-16-Conf-Exp-AnxD, p. 10, paras. 29-30; OTP PE Report 2019, para. 79.
[223] ICC-02/18-16-Conf-Exp-AnxD, at p. 10, paras. 29-30. *See also* FFM Detailed 2020 Report, paras. 1949-1960 (referring to 45 incidents that included 89 specific acts of sexual violence and involved multiple victims).
[224] 2005 Criminal Code, art. 374 and Ley Orgánica sobre el Derecho de las Mujeres de una vida libre de violencia ("*Law on Women's rights"*), art. 15. Note however that the GoV submitted that "[…] for the crime of rape or other comparable forms of sexual violence, if the perpetrator is a public official, the Venezuelan criminal type would be the offence of torture [...] if the active subject is not a public official and the passive subject is a woman, it would be the crime of sexual violence […]" (*see* VEN-OTP-0001-1250 at 1327-1328, para. 156 (3)).
[225] VEN-OTP-0001-1250 at 1330, para. 163.
[226] ICC-02/18-16-Conf-Exp-AnxD, p. 7, para. 21 and p. 11, paras. 34-38.
[227] 2017 Ley Constitucional contra el Odio, por la Convivencia Pacífica y la Tolerancia ("*Constitutional Peace Law*"), art. 21. This law was enacted in November 2017, so it would only apply to facts post-dating its enactment. *See also* 2005 Criminal Code, article 77(14) and FFM Detailed 2021 Report, paras. 366-368.

as GNB, CICPC, SEBIN, DGCIM, PNB, FAES, CONAS, State Police, Municipal Police and FANB.[228] However, the Venezuelan authorities do not appear to be investigating the possible involvement of pro-governmental individuals or groups called *colectivos*. This is contrary to the findings made in the PE which, as indicated above, identified them as having been involved in the commission of crimes falling within the scope of the Situation, separately or in collaboration with members of the security forces in the context of demonstrations, such as arbitrary arrests and ill-treatment committed during arrest.[229]

113. A full and effective domestic investigation of members of the *colectivos* appears to be impeded by the Venezuelan criminal law system.[230] Under the applicable Criminal Code these private individuals can only be charged with assault (*lesiones*), but not for crimes of torture, cruel, inhuman or degrading treatment, which are regulated separately by the *Torture, Cruel, Inhuman or Degrading Treatment Special Law*, and can be charged only when the victim suffers as a result of the action or instigation of a public official or another person acting in an official capacity, or with the consent of such a person.[231]

III.A.1.c. The domestic authorities are primarily investigating "minor" offences

114. Finally, a careful analysis of the Deferral Material shows that of the cases for which the GoV assessed gravity (721 of 893 cases reported),[232] the vast majority (84.74%) relate to offences classified as being of "minor" character.[233] This does not mirror the gravity of the acts falling within the scope of the Prosecution's intended investigation.

115. The GoV has classified these 721 cases according to the gravity of the alleged offence, as: (i) very serious ("*gravísima*"), (ii) serious ("*grave*"), (iii) minor ("*leve*") and (iii) very minor ("*levísima*").[234] In particular:

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[228] VEN-OTP-0001-1250 at 1335-1336, para. 170. However, as noted above and despite public allegations regarding their involvement, no member of DGCIM is investigated for cases of torture while SEBIN members are investigated for two cases of torture; *see above* fn. 218.
[229] ICC-02/18-16-Conf-Exp-AnxD, p. 14, para. 46 and OTP PE Report 2019, para. 74.
[230] *See also* FFM Detailed 2021 Report, para. 356.
[231] 2013 Special Law on Torture, Cruel, Inhuman or Degrading Treatment ("*Torture Special Law*"), art. 5(2).
[232] Annex B, column "gravity".
[233] The GoV has acknowledged that 604 of 706 cases reported in the First Submission correspond to minor offences and only 46 relate to very serious offences. S*ee* VEN-OTP-0001-1250 at 1334-1335, paras. 168-169.
[234] VEN-OTP-0001-1250 at 1332-1333, para. 166.

- 611 cases (84.74%) relate to "minor" offences.[235] Those largely correspond to cases of cruel, inhuman or degrading treatment (556 cases, 91%),[236] and of unlawful deprivation of liberty (19 cases, 3.11%);[237]
- 53 cases (7.35%) relate to serious offences;[238]
- 45 cases (6.24%) relate to very serious offences;[239] and
- 12 cases (1.66%) relate to very minor offences.[240]

116. While the GoV has classified rape and murder as very serious crimes,[241] it has classified the gravity of the crimes of torture and cruel, inhuman or degrading treatment based on the seriousness of the injuries inflicted according to the crime of assault (*lesiones*) in the Criminal Code.[242] The gravity of the crime of unlawful deprivation of liberty depends on several factors, such as the period of detention prior to bringing the person before a court or whether the detention is a result of an arbitrary judicial decision.[243] Penalties for the "minor" offence of assault (*lesiones*) in the Criminal Code range between three to six months.[244]

117. As noted, the Prosecution concluded there was a reasonable basis to believe that from at least April 2017 onwards, thousands of perceived or actual opponents of the GoV were persecuted on political grounds, arrested and detained without any legal basis; hundreds were tortured; and more than 100 were subjected to forms of sexual violence (including rape).[245] The Prosecution conducted a holistic evaluation of all relevant quantitative and qualitative factors, including the nature and scale of the crimes, the manner of commission and the impact of the crimes.[246] It considered, *inter alia*, the multiple commission of these acts and the particular gravity of the crimes of torture and rape and other forms of sexual violence. It has also considered the severe impact of these crimes on the direct victims and their families, as well as on their communities as a whole. Considering that the Court's jurisdiction relates to the most

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[235] Annex B, column "gravity" and column "type of crime".
[236] The GoV has indicated that the cases of minor nature correspond to crimes of cruel, inhuman or degrading treatment and unlawful deprivation of liberty (VEN-OTP-0001-1250 at 1335, para. 169). However, the GoV also considered some cases of torture to be of minor nature (Annex B, Nrs. 5, 420 and 461).
[237] Annex B, column "gravity".
[238] Annex B, column "gravity".
[239] Annex B, column "gravity".
[240] Annex B, column "gravity".
[241] VEN-OTP-0001-1250 at 1332-1333, para. 166.
[242] VEN-OTP-0001-1250 at 1333, para. 166.
[243] VEN-OTP-0001-1250 at 1332-1333, para. 166.
[244] VEN-OTP-0001-1250 at 1333, para. 166. *See also* 2005 Criminal Code, art. 416.
[245] ICC-02/18-16-Conf-Exp-AnxD, p. 29, para. 23; p. 31, para. 29; and p. 36, para. 51; *see above* paras. 108-110.
[246] *See e.g.* ICC-01/12-01/18-601-Red, paras. 2, 89-94; OTP PE Policy Paper, paras. 59-66.

serious crimes of concern to the international community, and that the Prosecution concluded that there was a reasonable basis to believe that crimes against humanity were committed within the Situation, the Prosecution respectfully submits that the domestic proceedings submitted by the GoV (mostly dealing with "minor" offences) do not substantially mirror the Prosecution's intended investigation.

III.A.2. Very limited progressive investigative steps are being undertaken

118. Despite the GoV reporting that 893 cases have been opened domestically, a careful analysis of the Deferral Material shows that at least 700 of the investigations reported (78.39% of the total cases) are not progressive investigations within the meaning of article 17(1)(a).[247] This conclusion can be reached from the following factors:

- Most of the proceedings are at a very preliminary stage. In particular, 67.86% of the cases reported (606 of the total) continue to be in "preparatory phase", even though most of the facts referred to occurred in 2017.[248] Under Venezuelan criminal procedure, the preparatory phase is the first of the four phases of criminal procedure and ends when a prosecutor requests a control judge to issue an indictment (*acusación*) or to dismiss the case without prejudice, with *res judicata* effect (*sobreseimiento*), or with prejudice (*archivo fiscal*).[249] The majority of the cases reported had long delays between the date of the alleged crime and the opening of the investigation, or between the latter and the institution of investigative measures—with no justification provided. For example, in 63 cases the alleged incidents occurred between 2014 and 2017 and the investigations were not initiated until 2021 or more recently in 2022;[250] in approximately 484 cases, although investigations were opened immediately after the events,

[247] This number includes the cases under preparatory phase (606) and under final dismissal (94). As noted above, the Prosecution has identified 28 cases for which the investigation has been concluded further to progressive investigative steps taken with respect to the named individuals for the crimes for which they are sought (see Annex B, column "stage of proceedings").
[248] The vast majority of cases are in the preparatory phase ("fase de investigación con práctica de diligencias", which the GoV translates as "investigation phase with conduct of proceedings"). The GoV defines this phase as: "preparatory phase, with order of commencement of investigation and multiple investigative proceedings requested or agreed to by the prosecutor" (*see* VEN-OTP-0001-1250 at 1338-1339, para. 172).
[249] *See* 2012 Criminal Procedure Code, articles 262-308 (preparatory phase), 309-314 (intermediate phase), 315-352 (trial phase) and 470-503 (enforcement phase). The preparatory phase covers the cycle of the investigation from the initiation, development and to its conclusion. The investigation is carried out by the Public Prosecutor Office and can be triggered by the filing of a criminal complaint (*denuncia*), the filing of a complaint by the victim of a crime (*querella*) or opened *ex officio*. The intermediate phase commences once the Public Prosecutor's Office files the indictment before the control judge.
[250] Annex B, column "incident date" and "investigation starting date".

they appear to have been inactive (no measures taken) until 2021 or 2022 or only very limited measures were reportedly taken despite the lengthy period of time.[251]

- The factual scope of the investigations is unclear. In particular, it is unclear whether the brief "summaries of the facts" provided relate to the facts that are being investigated by the Venezuelan authorities (that is, the scope of the case) or, as explained below, whether they merely replicate the facts as they are reported in open sources.[252] Significantly, in some instances the GoV expressly acknowledges that it does not know the time and place of the allegations.[253] Moreover, in approximately 764 cases reported (85.55%) the suspects are not identified;[254] and if they are, the vast majority of their ranks or positions within the hierarchy or chain of command is not provided.[255]
- The domestic authorities have taken limited and inadequate investigative measures over a protracted period of time. For the cases where the GoV has identified the investigative measures taken, they are largely limited and insufficient, despite the lapse of time since the events occurred. In many cases, the investigative measures have only sought to obtain information about the victims such as their whereabouts, phone records and financial information.[256] Measures seeking to identify the perpetrators have been reportedly taken on only a few occasions.[257]
- Cases have also been dismissed without having been investigated. The Deferral Material shows that 26.65% of the cases opened (238 out of 893) were under some type of *sobreseimiento*.[258] This means that the prosecutor responsible for a case requested to definitively terminate the proceedings at the end of the preparatory phase, or the control judge decided to terminate them *proprio motu* in accordance to the Criminal Procedure Code.[259] A final decision on *sobreseimiento* has *res judicata* effect, ending the proceedings and extinguishing the investigation, and preventing new prosecutions against the same person for

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[251] Annex B, column "investigation starting date" by "2014 to 2017" and column "status of proceedings" by "investigation (preparatory phase)".
[252] VEN-OTP-0001-5454. *See* *Gaddafi* First Admissibility AD, para. 83; *see below* para. 135 (3rd bullet point).
[253] Annex B, Nr. 12, 13, 28, 30, 53, 69, 73, 101, 814, 815, 849, 836, 851, 860, 861, 882 and 875.
[254] Annex B, column "alleged perpetrator name".
[255] *See e.g.* VEN-OTP-0001-5454 at 5456 (Nr. 1), 5480 (Nr. 39), 5518 (Nr. 91), 5523 (Nr. 98), 5544 (Nr. 134).
[256] *See e.g.* VEN-OTP-0001-5454, at 5512 (Nr. 81), 5530 (Nr. 107), 5551 (Nr. 148), 5554 (Nr. 152); *see below* para. 135 (1st bullet point).
[257] *See e.g.* VEN-OTP-0002-9653 at 9661-9663, 9664, 9665-9667, 9668-9671, 9677-9680.
[258] *See also* Annex B, column "stage of proceedings". The Prosecution has identified 238 cases (excluding overlaps) under some type of *sobreseimiento; see also* VEN-OTP-0001-5267 at 5276, para. 19 (by October 2021, the GoV referred to 238 cases under some type of *sobreseimiento*); *see below* para. 133.
[259] 2012 Criminal Procedure Code art. 300 lists the grounds for *sobreseimiento*.

the same facts.[260] Of the cases reported under some type of *sobreseimiento*, in 94 cases the decision is final and in 144 the decision has been appealed, of which four are pending and 140 cases have been returned to the investigation phase.[261]

- Finally, the basis of the legal qualification of the facts is unclear and in many cases it appears inadequate. In 72 cases the legal qualification (*tipo penal imputado*) is not provided;[262] for those where it is provided, it is unclear how the GoV made the determination since in most cases the preliminary investigation has barely commenced, no suspects have been identified and charges have not been filed.[263]

119. In sum, the Prosecution has concluded that 700 of the investigations reported (78.39% of the total of cases reported) are not progressing. The mere opening of an investigation and/or the taking of very limited investigative steps over a lengthy period of time do not amount to an ongoing investigation within the meaning of article 17(1)(a) which would bar the Court from proceeding, even at the article 18 stage.[264] A State must be able to identify the defining parameters of its domestic cases in ICC admissibility proceedings and demonstrate that it has taken *tangible, concrete, progressive* and *effective* investigative steps which seek to meaningfully ascertain the facts and any criminal responsibility.[265] Even if the duty to investigate is one of means and not of result, an investigation cannot be "a mere formality preordained to be ineffective".[266] The Prosecution considers that if a State cannot demonstrate that it has fulfilled its duty to investigate because it is too early to determine the legal and factual scope of its proceedings, it means that the deferral has been prematurely requested and the Court's investigation should resume. If and when a case is presented before the ICC, the State may challenge the admissibility of that case under article 19(2) if it is investigating or has investigated the same person for substantially the same conduct.[267]

III.B. Shielding persons from criminal responsibility—article 17(2)(a)

120. Since the Venezuelan proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation, the Chamber need not assess the second step of the complementarity assessment. However, if the Chamber decides to do so, the Prosecution

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[260] 2012 Criminal Procedure Code art. 301.
[261] VEN-OTP-0001-5267 at 5276, para. 19.
[262] Annex B, column "type of crime".
[263] VEN-OTP-0001-0007 at 0071 (where the GoV states that the prosecutors made a "pre-qualification" of the facts based on diverse factors). Moreover, as explained below, even the legal characterisation provided does not adequately reflect the gravity of the facts: *see below* paras. 122-129.
[264] *Gaddafi* First Admissibility Decision, paras. 115-135; *Gaddafi* First Admissibility AD, paras. 83-84.
[265] *See above* paras. 30- 31. *Gaddafi* First Admissibility AD, para. 83.
[266] IACtHR, *Olivares Muñoz et al. v. Venezuela*, Judgment, para. 120.
[267] *See e.g. Ruto et al.* Admissibility AD, para. 40.

respectfully submits that, based on the facts as they exist, it should find that the GoV is unwilling genuinely to proceed within the meaning of article 17(2)(a) and (c). This should not detract from the importance of efforts to support Venezuela in ensuring the effective administration of justice, in accordance with article 17. Moreover, the assessment could be revisited in the future on the basis of a change of facts or circumstances.

121. As noted, factors relevant to determine the existence (or lack thereof) of relevant proceedings under article 17(1) are also pertinent to assess their genuineness (or lack thereof) under article 17(2).[268] In particular, (i) inadequacies in the legal qualification and gravity assessment; (ii) insufficient steps during investigations and trials; and (iii) unjustified delays in the proceedings may show that the proceedings were (or are being) conducted to shield the persons concerned from criminal responsibility.

III.B.1. Inadequacies in the legal qualification and gravity assessment

122. The Prosecution's assessment of the information provided at the time of this filing is that the GoV's gravity assessment and legal qualification of the allegations investigated appear to be largely inadequate.

123. For example, in a number of cases where the GoV asserts that the allegations investigated relate to "offences of a minor or very minor nature", the Prosecution has found a reasonable basis to believe, based on multiple sources, that the same victims in the same incidents were also subjected to alleged acts of torture after arrest and in detention.[269] However, these more serious allegations do not appear to have been subject to any domestic investigation and are not reported on in the Deferral Material as being subject to investigation.

124. Moreover, as noted above, the number of allegations qualified by the Venezuelan authorities as torture, rape and other acts of sexual violence are noticeably low when compared to those identified by the Prosecution during the PE stage.[270] This is also irreconcilable with

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[268] *Al-Senussi* Admissibility Decision, para. 210.
[269] *Compare e.g.* cases in: VEN-OTP-0001-5454 at p. 11, N. 15 with Incident 61 in OAS 2018 Report, p. 152; VEN-OTP-0001-5454 at Table 2, p. 1, N.1 with Incident 51 in OAS 2018 Report, p. 143; VEN-OTP-0001-5454 at p. 129, N. 202 with Incident 48 in OAS 2018 Report, p. 143; VEN-OTP-0001-5454 at p. 116, N. 183 with Incident 55 in OAS 2018 Report, p. 149.
[270] *See above* paras. 108-109.

publicly available reports which have described a considerably higher number of cases involving torture,[271] as well as cases of rape and other acts of sexual violence.[272]

125. This discrepancy appears to arise not only as a result of inadequate investigative steps,[273] but also from how the authorities have qualified the relevant conduct, which at times appears not to adequately reflect its gravity. In a number of the Summaries provided by the GoV, incidents are described in which alleged acts of torture took place. However, this legal qualification is either not reflected in the domestic proceedings, or is ultimately excluded without explanation.[274] For example, in one case,[275] the legal qualification given by the GoV in its Eighth Submission is "cruel treatment", with the accompanying gravity qualified as "minor".[276] Yet the facts as reported by the GoV in its Seventh Submission about the same incident (said to arise from "an FFM report") allege that the victims: "were taken to the mountainous region where they were forced to walk hours blindfolded barefoot and naked, and they were deprived of food for several days and felt under the influence of the drugs".[277] The FFM qualified these facts as constituting "arbitrary arrest and detention, short term enforced disappearance, torture and other cruel, inhuman or degrading treatment or punishment".[278]

126. Furthermore, for at least 30 cases for which the GoV has provided Summaries, the crime of torture or other serious crimes are not mentioned, even though publicly available information suggests that the same victims were subjected to various forms of torture and other inhuman

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[271] *See e.g.* FFM Detailed 2020 Report, paras. 306, 317 (about 77 cases of torture by the DGCIM in "a social control or security context". In paragraph 317, the FFM noted that "Foro Penal has recorded 250 cases of torture of military dissents and associates between 2014 and 2020"), para. 326 (identifying 24 cases of torture between 2018-2019 in secret detention facilities); *see also* FFM Detailed 2020 Report, para. 265 (about 33 cases "in which it found reasonable grounds to believe the [SEBIN] had arbitrary detained *and/or tortured* or ill-treated people for political motives" (emphasis added)), paras. 284, 290 (noting that people detained in SEBIN facilities were subjected to various forms of torture). *See also* OHCHR 2018 Report, pp. iii, 28 (documenting over 90 cases of persons arbitrarily detained and subjected to one or more forms of cruel, inhuman or degrading treatment, which in many cases could constitute torture); OAS 2018 Report, pp. 93-161, *see also* pp. xii, 369, 454 (noting that the panel of experts received information regarding at least 289 cases of torture since April 2013).

[272] *See e.g.* FFM Detailed 2020 Report, paras. 1949-1960 (discussing 45 incidents of sexual violence), para. 286 (mentioning seven cases of sexual or gender based violence allegedly perpetrated by SEBIN agents), para. 322 (mentioning three cases of perpetrated acts of sexual or gender-based violence by the DGCIM); FFM Summary 2020 Report, paras. 34, 65, 142, 161. *See also* OHCHR 2018 Report, pp. iii, 28; OAS 2018 Report, pp. 162-170 (rape and other forms of sexual violence as crimes against humanity), pp. 379, 454 (noting the documentation of 192 cases of sexual violence against detainees and another 140 of threats of sexual violence).

[273] *See below* paras. 130 - 135.

[274] *See e.g.* Annex B, Nr. 14, 29, 36, 41, 58, 60, 63, 72, 101, 115, 122, 130, 196, 204, 216, 231, 373, 817.

[275] Annex B, Nr. 36; *see also* VEN-OTP-0001-5454 at 5750 and VEN-OTP-0001-5035 at 5058 to 5059.

[276] VEN-OTP-0001-5454 at 5750, N. 508.

[277] VEN-OTP-0001-5035 at 5058. The legal qualification given by the GoV in that submission is arbitrary detention and cruel treatment.

[278] FFM Detailed 2020 Report, paras. 862-864.

acts of a similar character, including heavy beatings with bats and sharp objects, asphyxiation with plastic bags, water, gas or other toxic substances, electric shocks including on sensitive parts of the body, death threats to the victims and their families, sexual violence including forced nudity, rape and threats of rape, very harsh conditions including constant lighting, isolation in a dark room for days, no access to toilets, and deprivation of food and water.[279]

127. Similarly, the Summaries contain multiple factual descriptions of what appear to be acts of rape and other forms of sexual violence. However, this legal qualification is not reflected or it is ultimately excluded.[280] For example in the Eighth Submission the GoV describes the legal qualification[281] and gravity[282] of a case as "not determined", seven years after the events took place. Yet the facts reported by the GoV in its Seventh Submission about this same case (said to arise from "facts denounced by the IACHR") describe that in May 2014 the victim was allegedly suffocated with plastic bags to obtain 'confessions', raped and tortured with beatings that caused her breast lining to detach, causing her excruciating pain, and electricity applied to her breasts.[283]

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[279] *Compare e.g.* Nr. 111 in Annex B with Incident 36 in OAS 2018 Report, pp. 132-133; Nr. 12 in Annex B with Incident 8 in OAS 2018 Report, pp. 104-105 and FFM Detailed 2020 Report, paras. 1673-1674; Nr. 16 in Annex B with Incident 46 in OAS 2018 Report, pp. 141-142; Nr. 25 in Annex B with Incident 41 in OAS 2018 Report, pp. 137-138; Nr. 26 in Annex B with Incident 20 in OAS 2018 Report, pp. 115-116; Nr. 35 in Annex B with Incident 37 in OAS 2018 Report, pp. 133-134; Nr. 38 in Annex B with Incident 31 in OAS 2018 Report, pp. 125-126 and FFM Detailed 2020 Report, paras. 1731-1733; Nr. 40 in Annex B with FFM Detailed 2020 Report, para. 448; Nr. 56 in Annex B with Incident 42 in OAS 2018 Report, pp. 138-139; Nr. 57 in Annex B with Incident 40 in OAS 2018 Report, pp. 130-132; 136-137; Nr. 66 in Annex B with FFM Detailed 2020 Report, para. 757; Nr. 499 in Annex B with Incident 14 in OAS 2018 Report, p.110; Nr.130 in Annex B with Incidents 34, 35, 64 in OAS 2018 Report, pp. 153-154; Nr. 172 in Annex B with Incident 47 in OAS 2018 Report, pp. 142-143; Nr. 282 in Annex B with FFM Detailed 2020 Report, para. 814; Nr. 214 in Annex B with FFM Detailed 2021 Report, para. 282; Nr. 525 in Annex B with Incident 48 in OAS 2018 Report, p. 143; Nr. 571 in Annex B with FFM Detailed 2020 Report, para. 1733; Nr. 818 in Annex B with FFM Detailed 2020 Report, para. 862; Nr. 204 in Annex B with Incident 68 in OAS 2018 Report, p. 157; Nr. 33 in Annex B with Incident 43 in OAS 2018 Report, pp. 139-140; Nr. 46 in Annex B with Incident 72 in OAS 2018 Report, p. 161; Nr. 101 in Annex B with Incident 51 in OAS 2018 Report, pp. 146-147; Nr. 130 in Annex B with Incident 64 in OAS 2018 Report, pp. 153-154; Nr. 291 in Annex B with Incident 11 in OAS 2018 Report, pp. 107-108; Nr. 373 in Annex B with Incident 61 in OAS 2018 Report, p. 152; Nr. 870 in Annex B with Incident 5 in OAS 2018 Report, pp. 101-102 and with FFM Detailed 2020 Report, para. 1643; Nr. 877 in Annex B with Incident 71 in OAS 2018 Report, pp. 159-160; Nr. 886 in Annex B with Incident 29 in OAS 2018 Report, pp. 124-125; Nr. 887 in Annex B with Incident 21 in OAS 2018 Report, pp. 116-117; Nr. 890 in Annex B with Incident 16 in OAS 2018 Report, pp. 112; Nr. 891 in Annex B with Incident 28 in OAS 2018 Report, pp. 123-124; Nr. 892 in Annex B with Incident 12 in OAS 2018 Report, pp.108-109; Nr.893 in Annex B with Incident 66 in OAS 2018 Report, p. 156.

[280] *See e.g.* Annex B, Nr. 13, 29, 41, 112, 169, 196, 203, 231, 282, 311, 512.

[281] Annex B, Nr. 29 *see also* VEN-OTP-0001-5454 at 5863, N. 7; VEN-OTP-0001-5035 at 5047- 5048.

[282] VEN-OTP-0001-5035 at 5048, the ground for inclusion provided is torture and cruel, inhuman or degrading treatment or punishment.

[283] VEN-OTP-0001-5035 at 5047.

128. Likewise, in many cases at the preliminary investigation stage described in the Summaries, the alleged facts are not qualified as rape or other acts of sexual violence, despite publicly available information indicating that the same victims were subjected to various forms of sexual violence including forced undressing, rape and threats of rape.[284]

129. Although very few of the reported cases have reached the charging and verdict stage, the inadequacies in legal qualification at the investigation stage have also resulted in inadequacies in charging and, if a conviction is entered, in sentencing. For example, in one case, state security officials were found criminally responsible for breaching custody obligations, negligent homicide (also known as involuntary manslaughter) and facilitating the escape of a detainee,[285] and sentenced to two years and eight months of imprisonment. The investigation appeared to disregard signs of torture,[286] its scope was limited and the prosecution's theory excluded intentional deprivation of life.[287]

III.B.2. Insufficient steps during investigations and trials

130. Based on the activities reported in the Deferral Material, it appears that the Venezuelan authorities have taken insufficient steps to ascertain the veracity of the alleged facts and to identify individual criminal responsibility. On the basis of the information submitted at the date of this filing, the investigations reported do not appear to be adequate, "serious" or "effective" because they "are not capable of [establishing]" the relevant facts and circumstances or identifying those responsible.[288]

III.B.2.a. Absence of investigative inquiries within the chain of command

131. The investigations reported in the Deferral Material are limited to direct perpetrators and seemingly low level members of the State security forces.[289] The information provided does not show that investigative steps have been taken to ascertain the alleged criminal responsibility

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[284] *Compare e.g.* Nr. 10 in Annex B with Incident 32 in OAS 2018 Report, p. 127; Nr. 57 in Annex B with Incident 40 in OAS 2018 Report, p. 136; Nr. 122 in Annex B with FFM Detailed 2020 Report, para. 757; Nr. 887 in Annex B with Incident 21 in OAS 2018 Report, pp. 116-117; Nr. 890 in Annex B with Incident 16 in OAS 2018 Report, pp. 112.

[285] Annex B, Nr. 818. *See* Statement by Marta Valiñas, Chair of the FFM, at the 49th session of the HRC, 18 March 2022; OHCHR 2022 Report, para. 32.

[286] OHCHR 2022 Report, para. 32; FFM Detailed 2021 Report, paras. 414, 423.

[287] FFM Detailed 2021 Report, para. 422.

[288] *See above* para. 74.

[289] *See generally* Annex B. The FFM, the OHCHR, the OAS and the IACHR also found reasonable grounds to believe that crimes against humanity have been committed in Venezuela since 2014 (*see e.g.* FFM Summary 2020 Report, paras. 5, 160-161, OHCHR 2017 Report, pp. ii; OHCHR 2018 Report, pp. ii, iv, 1, 3; OAS 2018 Report, pp. ix-xi, xv; Annual Report 2021 – Chapter IV, paras. 67, 88. Nevertheless, the GoV has stated that "[t]here is no State policy, planned, organised and directed towards attacking a human group" (VEN-OTP-0001-1250 at 1267).

of superiors in detention centres where subordinates are alleged to have perpetrated alleged crimes, or by persons in positions of authority within the State security forces whose members are consistently alleged to be involved in the commission of crimes. Nor do the materials demonstrate, in cases where low level or direct perpetrators were investigated, that any attempt was made to investigate within the corresponding chain of command. This contrasts with the Prosecution's own findings at the PE stage, and those of other international bodies. The FFM found that "high-level authorities within the [SEBIN and the DGCIM] either committed, ordered or contributed to violations, or they knew that subordinates were committing violations and, despite having the authority to prevent and repress them, failed to do so."[290] The OAS concluded that "crimes against humanity in Venezuela were ordered by high-level regime officials who intended that the crimes be committed".[291] The OHCHR concluded that the Venezuelan authorities have failed to establish chain of command responsibilities.[292]

III.B.2.b. Deficiencies in the investigations

132. The investigative steps mentioned in the Deferral Material, even when they have been fully executed, appear inadequate to ascertain the facts and to establish the criminal responsibility of those allegedly responsible. As set out above, the vast majority of cases, if not definitely dismissed (94 cases, 10.53%), are still in the very first stage of the investigation (606 cases, 67.86%), without an alleged perpetrator having been identified (764 cases, 85.55 %) or where the basis of the legal qualification of the crimes is unclear.[293] The very low number of convictions (23 cases, 2.58%) appears, in part, a consequence of ineffective investigations by the State authorities.

133. As discussed above, for cases that were dismissed (*sobreseimiento*) or suspended (*archivo fiscal*), the GoV does not explain the reasons for the dismissal or suspension of 238 cases (out of the total 893 cases reported in Charts and Summaries),[294] other than a general statement in the First Submission that cases were suspended (*archivo fiscal*) because the victims could not be located.[295] This justification appears insufficient since investigative measures

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[290] FFM Summary 2020 Report, para. 154. *See also* FFM Summary 2020 Report, paras. 40, 52, 164-165. *See also* criticism to the investigations in one case for disregarding officials higher in the chain of command (*e.g.* FFM Detailed 2021 Report, paras. 424-439). *See also* FFM Detailed 2022 Report, paras. 436, 438 (noting that "individuals involved in these crimes and violations have not only escaped investigations and prosecutions but have received career promotions. Several high-ranking DGCIM officers identified as being involved in the direct perpetration of crimes have been promoted to higher military ranks").
[291] OAS 2020 Report, p. 139.
[292] OHCHR 2018 Report, pp. ii.
[293] *See above* paras. 97, 118 (5th bullet point).
[294] *See above* para. 118 (4th bullet point). Out of the reported cases under '*sobreseimiento*', 94 are final.
[295] VEN-OTP-0001-1250 at 1344, para. 175.

(other than locating victims) should be available to the State authorities. Further, without information about the steps taken before dismissal or suspension, it would be speculative to assume that these decisions resulted from genuine investigations. Accordingly, they cannot be considered under article 17(1)(b) as proceedings where the "case has been investigated [..] and the State has decided not to prosecute the person concerned". Rather, such decisions "resulted from the unwillingness [of the GoV] genuinely to prosecute" and should not bar the Court's jurisdiction. A different approach would improperly allow States to stop the Court from proceeding simply by listing cases as having been investigated and marking them as dismissed.

134. Moreover, from the Summaries of cases where *sobreseimiento* was requested or decided, the information shows that dismissal did not result from an effective investigation:[296]

- In one case,[297] the prosecutor requested dismissal on the basis that "the facts have no element of criminality".[298] This is irreconcilable with publicly available information that the victims "were brutally beaten […] all over their bodies, dragged along the pavement as they were kicked. They were locked in armoured vehicles with open teargas canisters thrown in with them and left inside to suffocate. Inside the same armoured vehicle, they were subjected to sexual torture of forced undressing and threats of rape. They were stripped and beaten by the guards, who took turns hitting them, with helmets and punching them in the face".[299]
- Similarly, another case[300] was dismissed because, according to the GoV, the facts were not found to be criminal in nature,[301] without any information explaining how this conclusion was reached. The Summary only refers to the dismissal request by the prosecutor in 2015 and accepted by the control judge in 2022. This decision is irreconcilable with allegations in other publicly available information, such as the findings of the UN Working Group on Arbitrary Detention which concluded that the victim had been subjected to arbitrary detention.[302]

135. With regard to the 606 cases reported to be in the preparatory phase, multiple factors establish that the GoV's proceedings are inadequate:

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[296] Annex B, Nrs. 80, 199, 390, 806, 887, 891, 892.
[297] Annex B, Nrs. 199 and 390 *see also* VEN-OTP-0001-3799 at 3806; VEN-OTP-0001-5454 at 5586.
[298] VEN-OTP-0001-3799 at 3806.
[299] OAS 2018 Report, Incident 46, p. 141.
[300] Annex B, Nr. 80; *see also* VEN-OTP-0002-7119, at 7169-7170, Ficha 25.
[301] VEN-OTP-0002-7119, at 7169-7170, Ficha 25.
[302] A/HRC/ WGAD/2017/87. *See also* FFM Detailed 2020 Report, para. 359; OAS 2018 Report pp. 185, 186, fn. 244; OAS 2020 Report, p. 95.

- In the vast majority of the cases, the investigative measures focus on the victims and seek to ascertain their whereabouts, financial information and data records.[303] For example, in one case,[304] the only investigative measure reported consisted of orders and directions to gather information about the victims.[305] Such measures are insufficient to ascertain criminal responsibility.[306]
- In many cases only requests to take certain measures were issued, without subsequently indicating that the measure was executed and the requested information was provided.[307] For example, in one case,[308] the only reported measure requested by the prosecutor was to locate the victim, and it was reported that other facts were unknown.[309]
- In many instances it is unclear whether the "summary facts" are the factual allegations being investigated, or rather a simple copy of allegations from open sources.[310] For example, in one case,[311] there is no information that the facts were investigated except the date of the incident and one paragraph of "facts" which is replicated from the FFM 2020 Report.[312]
- In other instances the GoV expressly acknowledged that it does not know the time and place of the events.[313] In one case, for example, where the public prosecutor allegedly initiated an *ex officio* investigation in 2022 for alleged human rights violations by State officials, the GoV also indicated that "the circumstances of the manner, place and time in which the events occurred are not known".[314] Merely reproducing the facts from a report of an international organisation in a document prepared for the ICC, or formally opening an investigation without taking measures to ascertain the facts, do not amount to an actual or genuine investigation.

III.B.3. Unjustified delays

136. The Prosecution has assessed the existence of unjustified delays as a further factor in its analysis of article 17(2)(a). The Deferral Material shows that in many cases there have been

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[303] *See above* para. 118 (3rd bullet point); *see e.g.* Annex B, Nrs. 4, 7, 9, 20, 46, 63.
[304] Annex B, Nr. 20; *see also* VEN-OTP-0001-5454 at 5873, N. 17; VEN-OTP-0001-3799 at 3832.
[305] VEN-OTP-0001-5454 at 5873, N. 17.
[306] *See above* paras. 74-78 (on the features of serious and effective investigations).
[307] *See e.g.* Annex B, Nrs. 14, 23, 29, 32, 36, 54, 66, 421, 818. The OHCHR has received information about GNB agents refusal to cooperate with the investigations despite receiving requests from the former Attorney General (OHCHR 2018 Report, p. 10).
[308] Annex B, Nr. 29; *see also* VEN-OTP-0001-5454 at 5863, N. 7; VEN-OTP-0001-5035 at 5047- 5048.
[309] VEN-OTP-0001-5454 at 5863, N. 7.
[310] *See e.g.* Annex B, Nrs. 8, 14, 23, 29, 32, 584, 589, 601.
[311] Annex B, Nr. 32; *see also* VEN-OTP-0001-5035 at 5066.
[312] VEN-OTP-0001-5035 at 5066 (*c.f.* FFM Detailed 2020 Report, para. 1439).
[313] *See e.g.* Annex B, Nrs. 12, 13, 26, 28, 53, 61.
[314] Annex B, Nr. 61; *see also* VEN-OTP-0002-7119 at 7177.

years of delays between the incidents and the opening of the investigation, or due to scattered investigative measures taken over a lengthy period of time.[315] In many instances the investigations appear to have largely been inactive until 2021 or 2022, or were initiated around this time, coinciding with the Prosecution's requests for information.[316] The GoV does not explain this inactivity, which appears unjustified. These prolonged delays in proceedings support the conclusion that they were conducted in a manner intended to shield persons from criminal responsibility. Although presented here as a sub-factor under article 17(2)(a), these same facts may also be considered, in the circumstances, as inconsistent with an intent to bring the persons concerned to justice under article 17(2)(b).

III.B.4. Other factors relevant to shielding

137. There are other factors that appear to indicate that the Venezuelan authorities have acted in a manner incompatible with the intent to bring the persons concerned to justice.

138. First, the domestic authorities appear to have failed to investigate[317] a large number of complaints of torture and acts of sexual violence involving State security forces. The FFM reported a large number of allegations of torture, including acts of sexual violence, raised before judicial authorities, but without an effective response from the Venezuelan authorities.[318] In its First Submission, the GoV asserted that it has provided "all offences reported by individuals in the context of demonstrations from April 2017"[319] arising from complaints. Yet, these complaints included, at that time, only five cases of torture and one case of rape.[320]

139. Second, the number of cases (or alleged investigations) resulting from complaints is disproportionately higher than the number of cases opened *proprio motu* by the Venezuelan prosecutor.[321] This is at odds with the extensive reports of allegations of crimes allegedly committed by State security forces and the Venezuelan authorities' obligation to investigate them *ex officio* under both Venezuelan law[322] and international human rights law.[323]

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[315] *See above* para. 118.
[316] *See above* para. 118 (1st bullet point).
[317] FFM Detailed 2021 Report, paras. 256-268; FFM Summary 2021 Report, paras. 76-79; OHCHR 2018 Report, pp. 32-33.
[318] FFM Detailed 2021 Report, para. 257, FFM Summary 2021 Report, para. 76.
[319] VEN-OTP-0001-1250 at 1327, para. 155.
[320] In subsequent submissions the GoV provided information on 8 more cases of torture and one more of rape.
[321] *See* Annex B. Of the 893 cases reported, 738 were opened further to a complaint and 117 were opened *proprio motu*. In the remaining 38 cases this information is missing or unclear.
[322] *See* Torture Special Law, arts. 12, 13, 15, 24 and 31.
[323] *See above* para. 77.

III.C. Lack of independence and impartiality—article 17(2)(c)

140. The Prosecution acknowledges and is encouraged by the fact that GoV has undertaken legal reforms which aim to address a number of structural and systemic issues—efforts which, if appropriately implemented, offer scope for hope and tangible change. Nonetheless, the Prosecution's independent and objective assessment is that these efforts and reforms remain either insufficient in scope or have not yet had any concrete impact on potentially relevant proceedings.[324]

III.C.1. Factors affecting the independence and impartiality of ordinary judges

141. Two main factors systematically undermine judicial independence and impartiality in Venezuela: (i) the appointment and selection of judges; (ii) their tenure; and (iii) a pattern of intimidation and harassment against them.

142. Although the Venezuelan Constitution requires that judges be selected, removed or suspended solely in accordance with the procedures set out by law, in reality there have been appointments and dismissals outside this legal framework.[325] On the legal framework, access to the judicial profession and subsequent career advancements must occur through a public and competitive process based on the candidates' qualifications and suitability.[326] However, such a process has not taken place for almost 20 years, since it was suspended by the STJ in 2002-2003 without clear reasons.[327] As such, most if not all ordinary judges are now appointed by the STJ (through the Judicial Commission)[328] on a provisional basis after an examination of their credentials, and without a more comprehensive formal process. As a result, their tenure is precarious and the exercise of their functions is susceptible to undue external influence and personal or political allegiances.[329]

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[324] See *below* Section III.C.5.

[325] Other sources support the Prosecution's assessment: FFM Detailed 2021 Report, paras.100-101; OAS 2018 Report, p. 201; ICoJ: Judges on the Tightrope 2021 Report, pp. 28-29; AJ: Informe Anual 2021, p. 13. *See above* Section II.E.3 for the legal basis and jurisprudence.

[326] Venezuelan Constitution, art. 255.

[327] OHCHR 2020 Report, para.8; Laura Louza Scognamiglio, La Revolución Judicial en Venezuela, 2011, p. 28, cited by AJ: El Régimen Jurídico del Poder Judicial 2016, p. 44.

[328] The Judicial Commission is an organ of the STJ formed by a magistrate from each of the STJ Chambers, elected by its Plenary. Among its attributions are the appointment and removal of judges appointed on a provisional basis and the administration of the competitive examinations to become a judge. *See* VEN-OTP-00001995 at 000007, arts. 74-75 and 79; VEN-OTP-0001-9808 at 9823 and 9827, art. 3 and twelfth transitional provision. *See also* FFM Detailed 2021 Report, para. 103; IACHR Annual Report 2021 – Chapter IV, para. 28; ICoJ: Judges on the Tightrope 2021 Report, pp. 26-27.

[329] *See e.g.* FFM Detailed 2021 Report, paras. 101-104; OHCHR 2017 Report, pp. 3-4; OAS 2018 Report, pp. 200-201, 268-269 and 427-428; IACHR Annual Report 2021 – Chapter IV, paras. 27-28; ICoJ: Judges on the Tightrope

143. In 2010, 77% of the Venezuelan judges were provisionally appointed.[330] In 2014, this figure increased to 80%, and by 2019 it had increased again to 85.3%.[331] In 2020, 881 provisional judges were appointed,[332] and in 2021 another 434.[333] These figures are significant in light of the total of number of active judges in Venezuela which, as of January 2019, reportedly amounted to 2,151.[334]

144. Another factor is that provisional judges may be removed or sanctioned without following the disciplinary process set out for ordinary judges in the Venezuelan Judicial Code of Ethics as the latter does not apply to them. Instead, their conduct is subject to the scrutiny of the Judicial Commission only, with a prior report of the General Inspectorate of Courts.[335] Some judges have reported being dismissed summarily by a simple letter without any standard process or evaluation.[336]

145. Moreover, several reports have documented, on the basis of, *inter alia*, interviews with former members of the Venezuelan judiciary, an alleged pattern of intimidation, harassment and undue pressure exercised on individual judges to decide cases a certain way, in particular those against actual or perceived political opponents of the GoV. Individual judges and prosecutors assigned to cases with political resonance reported to have received pressure directly from their hierarchy or high-level political actors.[337] One judge noted that by 2017 such instructions were commonplace.[338]

2021 Report, pp. 28-30 and 48-49; LS, CEPAZ and AJ 2021 Submission to HRC, paras. 7-8 and 11-18; AJ: Informe Anual 2021, p. 13. The STJ has repeatedly affirmed that the removal of a judge appointed on a provisional basis does not need any procedure as Venezuelan judges only acquire tenure after successfully participating in a public and competitive process. *See e.g.* VEN-OTP-00001991 at 000002; VEN-OTP-00001993 at 000009.

[330] VEN-OTP-0002-2101 at 2125.

[331] For 2014 and 2016, VEN-OTP-0002-2101 at 2125; for 2019, ICoJ: Judges on the Tightrope 2021 Report, p. 28 and IACHR Annual Report 2021 – Chapter IV, 26 May 2022, para. 27.

[332] IACHR Annual Report 2021 – Chapter IV, 26 May 2022, para. 27.

[333] OHCHR 2022 Report, para. 15.

[334] Armandoinfo, Los jueces de Venezuela asfaltan calles y firman sentencias, 17 February 2022. Other sources also seem to set the total number of judges in Venezuela as approximately 2,000, and likewise in the previous years. *See* VEN-OTP-0002-2101 at 2125-2126.

[335] *See* STJ, Sentencia 516 de 2013, 7 May 2013 cited by FFM Detailed 2021 Report, para. 111; VEN-OTP-00000900 at 000010-000013; IACHR 2017 Country Report on Venezuela, para. 86; VEN-OTP-00001994 at 000020, art. 51; ICoJ: Judges on the Tightrope 2021 Report, p. 32.

[336] FFM Detailed 2021 Report, para. 107; OAS 2018 Report, p. 268.

[337] FFM Detailed 2021 Report, paras. 138-139, 160-165; OAS 2018 Report, pp. 43-45, 199-204, 269-270 and 431-437; OHCHR 2020 Report, para. 9; ICoJ: Judges on the Tightrope 2021 Report, pp. 7 and 45; *see* also paras. 173-178; AI, Calculated Repression, January 2022.

[338] FFM Detailed 2021 Report, para. 139.

146. This practice has existed since at least 2003,[339] but became more prominent in December 2009 when a judge was arrested after having released a person on the grounds that she had been held in pre-trial custody excessively and allegedly subjected to rape and other serious violations.[340] Thereafter, "numerous and consistent complaints" of harassment of judges have been reported, which have been described as sapping their judicial independence and having a "chilling effect" on other judges and judicial operators.[341] In 2021, this practice was found to be widespread "at all levels" of the judiciary and that cases regarded as political had been assigned purposefully to judges considered compliant with governmental instructions, in breach of the independence of the Venezuelan judiciary.[342]

III.C.2. Factors affecting the independence and impartiality of STJ judges

147. On 19 January 2022, the National Assembly amended the Organic Law of the STJ[343] and cut down the number of judges from 32 to 20 and modified the composition of the Judicial Nominations Committee ("JNC") tasked with the judges' pre-selection.[344] While the Venezuelan Constitution requires the JNC be integrated by "representatives of other sectors of society",[345] this amendment effectively curtailed their participation by decreasing the number of their seats in the JNC and increasing it for National Assembly members.[346]

148. Following this amendment, on 26 April 2022 the National Assembly appointed new STJ judges.[347] The process led to the re-election of 12 STJ judges despite the Venezuelan

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[339] IACHR: Annual Report 2003 – Chapter IV, para. 57; Annual Report 2007 – Chapter IV, paras. 281-283. VEN-OTP-0002-5166 at 5253-5255, paras. 286-296.
[340] VEN-OTP-0002-5166 at 5256, paras. 297-299. IACHR: Annual Report 2010 – Chapter IV, paras. 637-649; Annual Report 2011 – Chapter IV, paras. 469-474; Annual Report 2012 – Chapter IV, paras. 485-489; Annual Report 2013 – Chapter IV; paras. 657-658; Annual Report 2014 – Chapter IV, paras. 562-566; Annual Report 2015 – Chapter IV, paras. 276-277; Annual Report 2019 – Chapter IV, para. 46.
[341] IACHR: Annual Report 2010 – Chapter IV, para. 649; Annual Report 2011 – Chapter IV, para. 475; Annual Report 2013 – Chapter IV, para. 660; Annual Report 2015 – Chapter IV, para. 275; 2017 Country Report on Venezuela, paras. 90-95.
[342] FFM Detailed 2021 Report, paras. 33, 130-131, 141-142, 166; OHCHR 2020 Report, para. 9; ICoJ: Judges on the Tightrope 2021 Report, pp. 45-46.
[343] The GoV referred to this reform in the Deferral Request: ICC-02/18-17-AnxB-Red, p. 11.
[344] "The [JNC] is an advisory organ of the Citizen's Branch for the selection of the candidates to magistrate of the Supreme Court of Justice. […] The Judicial Nominations Committee will be integrated by representatives of the different sectors of society in conformity with the law". *See* Venezuelan Constitution, art. 270. For the mentioned reforms, *see* VEN-OTP-00001971 at 000001-000002, arts. 1 and 7.
[345] VEN-OTP-00001971 at 000001-000002, arts. 1 and 7.
[346] The new JNC is formed by 11 NA members and 10 representatives of "other sectors of society". VEN-OTP-00001971 at 000001-000002, art. 7. Currently, 253 of the 277 seats of the NA are held by PSUV members of parliament: *see* National Electoral Council, Asamblea Nacional 2020, 17 December 2020.
[347] NA, AN designa y juramenta a nuevos integrantes del TSJ, 26 April 2022.

Constitution prohibiting STJ judges from being elected to that post more than once or to serve for more than one term of 12 years.[348]

149. In addition, as many as 12 of the new 20 STJ judges are reported to have connections with the current political party in power. In several cases, some have held high-level governmental positions.[349] This has raised concerns about the appearance of independence and impartiality of these judges and a breach of the separation of powers.[350]

150. According to an STJ judge interviewed by the FFM prior to the 19 January 2022 amendment, STJ judges are appointed because of their perceived loyalty to the government.[351] As noted in the above paragraph, this continues to be the case in the latest April 2022 STJ appointments. Moreover, 13 of the outgoing judges took an early retirement prior to the December 2015 appointments, and several later testified that the then Vice-President of the STJ had pressured them to do so in order to appoint new STJ judges (and thereby ensure a favourable majority in the STJ) before the newly elected opposition-led National Assembly could be sworn-in.[352]

151. STJ judges have also been subject to undue pressure and external interference, as reported in the section above. Between 2015 and 2018, STJ judges had received instructions on how to resolve specific cases, mainly from political actors close to the GoV; and others received drafted judgements for their signature without being able to read them or incorporate their views, facing retaliation if they expressed criticism.[353] These orders were reportedly issued by

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[348] The reform of the Organic Law of the STJ explicitly allowed STJ judges who had not finished their mandate at the time of its approval to be re-elected if they passed the new selection process. *See* VEN-OTP-00001971 at 000002, art. 13; *contra* Venezuelan Constitution, art. 264. *See also* FFM Summary 2022 Report, para. 11; AJ, El «nuevo» TSJ, 29 April 2022.

[349] VEN-OTP-00001996 at 000002-000004; VEN-OTP-00001997 at 000002-000003; ICoJ, Venezuela: the authorities must stop undermining judicial independence, 29 April 2022; AJ, El «nuevo» TSJ, 29 April 2022; El Diario, ¿Quiénes son los magistrados del TSJ?, 26 April 2022; Efecto Cocuyo, Magistrados del TSJ que sancionó Canadá, 30 May 2018.

[350] OHCHR 2022 Report, para. 14; HRW, Venezuela: UN Human Rights Chief Should Support Accountability Efforts, 29 June 2022.

[351] FFM Detailed 2021 Report, para. 95. *See also* DPLF, A New Law and New Justices, 15 March 2022; AJ, El «nuevo» TSJ, 29 April 2022; ICoJ, Venezuela: the authorities must stop undermining judicial independence, 29 April 2022.

[352] FFM Detailed 2021 Report, para. 96. Concerning the previous election of STJ judges in December 2015, it was reported that judges had been "ordered" to retire and received threats from the then STJ President that if they did not retire they would be otherwise removed, *see* OAS 2018 Report, pp. 267-268.

[353] FFM Detailed 2021 Report, paras. 132-137.

the executive branch, with the STJ hierarchy acting as a link between STJ and executive interests.[354]

III.C.3. Factors affecting the independence and impartiality of public prosecutors

152. First, nearly all public prosecutors are appointed on a provisional basis and thus can be easily removed, despite the provision in article 286 of Venezuelan Constitution requiring the State to ensure stability in their mandate, making them independent of political change. [355] This situation is partly the result of an amendment to the Statute of Personnel of the Public Prosecutor´s Office introduced on 13 September 2018, which defined such personnel, including public prosecutors, as holding "positions of trust" accessible through a discretionary appointment which can be terminated at will without a specific procedure, rather than through a competitive selection process.[356]

153. As described below, Venezuelan public prosecutors also appear to face obstacles impairing their full independence and impartiality. These include the instability of their terms in office, the undue pressure they receive to conduct criminal investigations and prosecutions and the high turnover of prosecutors in certain cases.[357]

154. The most recent reforms do not adequately address this situation. For example, even if provisionally appointed prosecutors with at least one year in the position can now apply to become a career prosecutor[358] after a successful evaluation of their career merits and oral/written examinations,[359] they would continue to be in a "position of trust"[360] and, as such, could be removed at will. Moreover, this regularisation would only apply to previously provisionally appointed prosecutors and would not serve to recruit new prosecutors.[361]

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[354] FFM Detailed 2021 Report, paras. 133-137; ICoJ: Sunset of Rule of Law 2015 Report, pp. 12 and 48-49; VEN-OTP-0002-2038 at 2079-2080 and 2092; Judges on the Tightrope 2021 Report, p. 7.
[355] Venezuelan Constitution, art. 286; VEN-OTP-0001-9851 at 9864-9865, art. 3; FFM Detailed 2021 Report, para. 120; FFM Summary 2021 Report, para. 27; AJ: Informe 2020 Sobre el Desempeño del Ministerio Público 2000-2018, pp. 41-42; Eliminada la carrera funcionarial, 21 September 2018.
[356] VEN-OTP-0001-9851 at 9864-9865, art. 3 as opposed to VEN-OTP-00001975 at 000011, art 3; FFM Detailed 2021 Report, para. 123; IACHR Annual Report 2021 – Chapter IV, para. 50; AJ, Eliminada la carrera funcionarial, 21 September 2018; AJ, La «regularización» de los fiscales provisorios, 1 June 2022.
[357] For the relevant international legal basis and jurisprudence *see above* Section II.E.3.
[358] A career prosecutor is one who, having passed a public selective competition, is appointed on a permanent basis to the Public Prosecutor´s Office and could not, until at least 2018, be removed except based on the reasons and following the procedures established by law. *See* VEN-OTP-00001975 at 000011, arts. 3-5.
[359] VEN-OTP-00001973 at 000033, art. 4; ICC-02/18-17-AnxB-Red, p. 10; OHCHR 2022 Report, para. 16.
[360] VEN-OTP-0001-9851 at 9864-9865, art. 3.
[361] VEN-OTP-00001973 at 000033, art. 7(j); AJ, La «regularización» de los fiscales provisorios, 1 June 2022. According to the Deferral Request, 42 provisional prosecutors were made permanent in their positions in 2021, *see*: ICC-02/18-17-AnxB-Red, p. 10.

155. Second, public prosecutors at all levels have reportedly been subject to interference and have purportedly received instructions from their hierarchy on how to proceed with criminal investigations.[362] This situation reportedly worsened in 2017.[363] According to several reports, based on, *inter alia*, interviews with former members of the Venezuelan judiciary, these instructions were mostly issued to prosecutors assigned to investigate and prosecute high-profile cases, including those involving public (including political and security) officials. A former public prosecutor stated that prosecutors could only investigate up to a level above the direct perpetrators but that certain public officials, including *colectivos* and members of the security forces, remained "untouchable".[364]

156. Former public prosecutors have revealed that "political cases" were normally assigned to a specific group of prosecutors. In addition, and when faced with an adverse prosecutorial decision, senior prosecutors would reportedly coordinate with judges to overturn them.[365]

157. Finally, prosecutors continue to be reassigned in some high profile cases arising from the 2017 protests. This is the case, for instance, of an individual killed during a protest in Caracas in April 2017[366] which the GoV is still investigating despite the Public Prosecutor´s Office having already charged 13 members of the GNB.[367] The other is a case of an individual killed during a protest in Miranda in May 2017, allegedly by GNB agents.[368] In both these cases, the prosecutors have been re-assigned at least 15 times for no apparent reason.[369]

III.C.4. Other factors affecting the independence and impartiality of judges and prosecutors

158. Finally, there appears to exist other common factors which further undermine the independence and impartiality of Venezuelan judges and prosecutors.

159. First, judges and prosecutors have reportedly suffered threats and intimidation against them and their families and many feared reprisals if they reported such threats. Many were

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[362] *See e.g.* OAS 2018 Report, pp. 200-204 and 432-433; FFM Detailed 2021 Report, paras. 144-149.
[363] FFM Detailed 2021 Report, paras. 127-129 and 152-154.
[364] FFM Detailed 2021 Report, paras. 131, 144, 148; OAS 2018 Report, pp. 200-204 and 432-433.
[365] FFM Detailed 2021 Report, paras. 145, 149.
[366] VEN-OTP-0002-9653 at 9712.
[367] VEN-OTP-0002-9653 at 9711-9714.
[368] VEN-OTP-0001-5454 at 5739.
[369] OHCHR 2020 Report, para. 20; OHCHR 2022 Report, paras. 37-38; PROVEA, Comunicado Juan Pablo Pernalete, 26 April 2021. More generally, *see also* OHCHR 2022 Report, paras. 37-38; IACHR: Annual Report 2021 – Chapter IV, paras. 78-79; 2017 Country Report on Venezuela, para. 401.

reportedly monitored and their phones were tapped. A significant number of them had to leave Venezuela along with their families due to fears for their safety.[370]

160. Second, and in case of non-compliance with undue instructions, prosecutors and judges can also be threatened with disciplinary or prosecutorial action and with other adverse measures affecting their courtrooms, such as administrative support, access to air conditioning, or workload. Judges and prosecutors have reportedly been reassigned to locations in the countryside or have had their apartments allotted to others.[371]

161. Third, it has been alleged that members of the Venezuelan judiciary, including some judges and prosecutors, may have had a significant role in the commission of crimes identified during the PE which form part of the Prosecution's intended investigation. In particular, the FFM reported that some have played a direct role in the arbitrary arrest, detention and torture of actual or perceived opponents of the GoV by, *inter alia*, issuing arrest warrants, ordering pre-trial detention and bringing serious criminal charges without a sufficient foundation; using evidence obtained as a result of unlawful interrogations and searches; and planting, fabricating or manipulating evidence.[372] If the same judicial and prosecutorial authorities were to investigate crimes that they are alleged to have participated in, legitimate doubts about their impartiality could be raised.

III.C.5. The recent reforms do not alter the Prosecution's assessment

162. In its Deferral Request, the GoV has referred to several "regulatory and institutional reforms to strengthen national capacities" undertaken by Venezuela.[373] These reforms resulted from the work of the Special Commission for the Revolution of the Judicial System set up in June 2021 and placed under the authority of the Council of State.[374]

163. While the GoV efforts are commendable, and should be encouraged and supported,[375] the implementation and scope of these reforms appear to be limited and do not genuinely address the independence and impartiality considerations outlined above. Accordingly, they have not altered the Prosecution's assessment. For instance, the envisaged restructuring of the

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[370] FFM Detailed 2021 Report, paras. 160-162; OAS 2018 Report, pp. 63-64, 201-203 and 431-436.
[371] OAS 2018 Report, p. 270; FFM Detailed 2021 Report, paras. 158-159.
[372] FFM Detailed 2021 Report, at paras. 271-272, 275-290, 290–292, 469.
[373] ICC-02/18-17-AnxB-Red, pp. 9-10. The GoV referred to, *inter alia*, amendments to the Organic Code of Criminal Procedure and the Organic Code of Military Justice.
[374] *See* MINCI, Comisión Especial tendrá 60 días para solucionar retardo procesal, 21 June 2021; NA, AN sancionó bloque de leyes para la reforma del sistema judicial, 17 September 2021.
[375] ICC-02/18-17-AnxB-Red, pp. 9-10.

PNB does not appear to have been fully implemented and is ongoing.[376] Neither has the transfer of prisoners from State intelligence organs (SEBIN and DGCIM) to the People's Power Ministry for Penitentiary Services been completed.[377] The National Commission of Human Rights,[378] the specialised *habeas corpus* tribunals and the Commission for Guarantees of Justice and Reparation for Victims of Crimes against Human Rights do not appear to have been set up.[379]

164. Despite the prohibition to try civilians before military courts resulting from the September 2021 amendments to the Organic Code of Military Justice, in December 2021 the STJ ruled that military courts may still try civilians if there are "founded elements of conviction to establish a causal relation between the military crime charged […] and the participation of the arrested citizens (civilians)".[380] The practical effect of this ruling is unclear, but it could suggest that military courts may continue to judge civilians who have allegedly committed military crimes.[381] Likewise, although the amendments to the Organic Code of Criminal Procedure introduced a maximum of three years of pre-trial detention, between 22 and 114 persons have been in pre-trial detention for more than three years.[382] Other reforms are awaiting further processing and developments have not been publicly reported since October 2021.[383]

165. The Prosecution will continue, to support Venezuela's efforts to reform and revitalise its judicial system, as it has committed to do under the MoU signed with the GoV.[384] Nonetheless, the recent judicial reforms, both in terms of their pending implementation and their scope, are not in and of themselves sufficient to alter the genuineness assessment or to justify deferral of the situation as requested by Venezuela.[385]

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[376] The mandate of the commission tasked with this undertaking expired on 13 April 2022. VEN-OTP-00001979 at 000006-000007; OHCHR 2022 Report, para. 11.
[377] OHCHR 2022 Report, para. 30; FFM Summary 2022 Report, para. 27; Observatorio Venezolano de Prisiones: Informe Anual 2021, pp. 113-114, 118-119 and 121.
[378] MPPRIJP, Organigrama; AJ: Status and analysis judicial reforms, 6 June 2022, p. 7.
[379] AJ: Status and analysis judicial reforms, 6 June 2022, p. 14.
[380] VEN-OTP-00001990 at 000013.
[381] The Prosecution however notes that in June 2022, the STJ declared the ordinary criminal jurisdiction competent to study a case previously handled by the military jurisdiction and involving military members accused of the commission of ordinary crimes. *See* VEN-OTP-00001992 at 000010-000011.
[382] VEN-OTP-0002-6246 at 6248, art. 8. *See also* HCHR 2022 updates the HRC, 17 March 2022; OHCHR 2022 Report, para. 26; FFM Summary 2022 Report, para. 12; AJ: Status and analysis judicial reforms, 6 June 2022, pp. 8 and 9; El Nacional, Foro Penal sobre la reforma del COPP, 27 May 2022.
[383] *See* NA, Reforma de la Ley del Servicio de Policía de Investigación, 27 October 2021; NA, Ley de Víctimas de Violaciones a los DDHH, 27 October 2021.
[384] *See above*, footnote no. 9.
[385] *Ruto et al.* Admissibility Decision, para. 64; *see also Burundi* Article 15 Decision, para. 162.

Conclusion and Relief Sought

166. In conclusion, the Prosecution appreciates the information submitted by Venezuela in response to its requests during the PE and in response to the article 18 notification and rule 53 request. The Prosecution has had and continues to pursue fruitful interactions with the GoV with regard to future cooperation, both in execution of the Prosecutor's mandate and in supporting and strengthening Venezuela's accountability efforts. The assessment made and as reflected in these submissions is whether those domestic efforts should, at this stage, displace an ICC investigation from even commencing. Having carefully analysed all the information supporting the Deferral Request, the Prosecution respectfully submits that, at the date of this filing, deferral of the entire scope of the investigation is not warranted. Consequently, the Prosecution's investigation should be authorised to resume. This does not prejudice the possibility for the Court to revisit admissibility at later stages of the proceedings. The Prosecution itself stands ready to do so upon a change in relevant facts or circumstances.

167. For the reasons set out above, the Prosecution respectfully requests the Chamber to:

(i) issue an order setting out the procedure to be followed in deciding this request, in accordance with rule 55(1) of the Rules, including for the submission of any further observations it considers appropriate; and

(ii) authorise the resumption of the Prosecution's investigation into the Situation of Venezuela I.

Karim A.A. Khan KC, Prosecutor

Dated this 1st day of November, 2022

At The Hague, The Netherlands