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No.: ICC-02/18  
Date: 17 July 2023

**THE APPEALS CHAMBER**

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

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

**Public**

Public redacted version of "Prosecution response to the Bolivarian Republic of Venezuela's request for suspensive effect (ICC-02/18-46-Conf-Exp)", 11 July 2023,  
ICC-02/18-50-Conf-Exp

**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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**Unrepresented Victims**

**Unrepresented Applicants for Participation/Reparation**

**The Office of Public Counsel for Victims**

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

**States' Representatives**

Competent authorities of the Bolivarian Republic of Venezuela

**Amicus Curiae**

**REGISTRY**

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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

## Introduction

1. The Prosecution respectfully requests the Appeals Chamber to dismiss the application made by the Bolivarian Republic of Venezuela pursuant to article 82(3) of the Statute and rule 156(5) of the Rules of Procedure and Evidence for suspensive effect of Pre-Trial Chamber I's decision authorising the resumption of the Prosecution's investigation in Venezuela under article 18(2).<sup>1</sup> Venezuela has not shown that implementation of the Decision would create an irreversible situation, or one that would be very difficult to correct or that could potentially defeat the purpose of the appeal. No such grounds for granting suspensive effect exist.

## Classification

2. Pursuant to regulation 23*bis* (2) of the Regulations of the Court, the Prosecution files this response confidential *ex parte* because Venezuela's request for suspensive effect bears this classification. However, Venezuela provides no basis to justify this confidentiality level.<sup>2</sup> Once Venezuela's request is re-classified to public or it files a public redacted version, the Prosecution will file a public redacted version of this response.

## Submissions

3. The granting of suspensive effect leads to the "non-enforcement of a decision, the subject of the appeal".<sup>3</sup> In this case, Venezuela seeks suspension of the Decision. If suspensive effect is granted, the Prosecution would be required to suspend its investigation pending the resolution of Venezuela's appeal against the Decision.

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<sup>1</sup> ICC-02/18-46-Conf-Exp-AnxII (in which the Bolivarian Republic of Venezuela ("Venezuela") filed its "Notice of Appeal against Pre-Trial Chamber I's 'Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute' (ICC-02/18-45) and request for suspensive effect") ("[Request](#)"). *See also* Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, 27 June 2023, ICC-02/18-45 ("[Decision](#)").

<sup>2</sup> The Prosecution notes that the Government of Venezuela has reported the filing of its appeal against the Decision in social media: *see* [Yvan Gil on Twitter: "#Comunicado| Gobierno de Venezuela informa que ha notificado a la Sala de Apelaciones de la CPI su apelación contra la decisión de la Sala de Cuestiones Preliminares que autorizó la reanudación de la investigación en el asunto denominado 'Venezuela I'". <https://t.co/dXDqXAAhJ2>" / Twitter.](#)

<sup>3</sup> [ICC-02/04-01/05-92 OA](#), para. 3.

4. As the Appeals Chamber has held, “[s]uspensive effect is the exception, not the rule”.<sup>4</sup> Furthermore, decisions of the Appeals Chamber deciding on applications for suspensive effect are discretionary.<sup>5</sup> In exercising its discretion, the Appeals Chamber will consider “the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under these circumstances”.<sup>6</sup> In so doing, the Appeals Chamber has consistently considered whether the implementation of the decision under appeal: “(i) ‘would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant’, (ii) would lead to consequences that ‘would be very difficult to correct and may be irreversible’, or (iii) ‘could potentially defeat the purpose of the appeal’”.<sup>7</sup>

5. Venezuela advances three arguments in support of its request for suspensive effect. It argues that:

- *First*, the resumption of the investigation would have consequences on the Memorandum of Understanding signed between the Government of Venezuela and the Office of the Prosecutor [REDACTED].<sup>8</sup>
- *Second*, the immediate enforcement of the Decision would defeat the purpose of Venezuela’s appeal because Venezuela will argue that the events investigated by the Prosecution do not fall within the Court’s jurisdiction, and the Appeals Chamber’s judgment could nullify the OTP’s investigations.<sup>9</sup>
- *Third*, concurrent investigations entailing multiple interviews with the same witnesses and alleged victims may generate unnecessary re-traumatisation and taint the integrity of the evidence, including by memory contamination. This “would lead to consequences that ‘would be very difficult to correct and may be irreversible’” and “could potentially defeat the purpose of the appeal”.<sup>10</sup>

<sup>4</sup> [ICC-01/09-01/11-1370 OA7 OA 8](#), para. 10.

<sup>5</sup> See e.g. [ICC-01/04-01/06-1347 OA9 OA10](#), para. 10; [ICC-01/04-01/06-1290 OA11](#), para. 7.

<sup>6</sup> [ICC-01/04-01/06-1347 OA9 OA10](#), para. 10; see also [ICC-01/04-01/06-1290 OA11](#), para. 7; [ICC-01/11-01/11-387 OA4](#), para. 22.

<sup>7</sup> See e.g. [ICC-01/05-01/08-817 OA3](#), para. 11; [ICC-01/11-01/11-387 OA4](#), para. 22, and authorities cited therein.

<sup>8</sup> [Request](#), para. 18; [REDACTED].

<sup>9</sup> [Request](#), para. 19.

<sup>10</sup> [Request](#), paras. 20-22.

6. The Prosecution submits that granting suspensive effect is not necessary in the circumstances of this case. Venezuela has not shown that implementation of the Decision would create an irreversible situation, or one that would be very difficult to correct or that could potentially defeat the purpose of the appeal. No such grounds for granting suspensive effect exist.

7. The Prosecution will address the three arguments raised by Venezuela in turn:

8. *First*, [REDACTED]. The Office of the Prosecutor has on many occasions and publicly stated that it remains committed to cooperation under the MoU I (and its implementation) in the event that the investigation were to resume.<sup>11</sup>

9. [REDACTED],<sup>12</sup> [REDACTED].<sup>13</sup> [REDACTED].<sup>14</sup> [REDACTED].

10. *Second*, even if the Appeals Chamber were to find that the Court lacks jurisdiction in the Situation in Venezuela I, resumption of the Prosecution's investigation would not cause an irreversible situation or lead to consequences that would be very difficult to correct and may be irreversible. Nor would it defeat the purpose of the appeal.<sup>15</sup> The Appeals Chamber is able to reverse, confirm or amend the Decision irrespective of the Prosecution's investigation.<sup>16</sup> Thus, even if the Appeals Chamber were eventually to decide that the Court lacks jurisdiction in this Situation, any relevant investigation by the Prosecution would be discontinued. Significantly, while the Appeals Chamber decides on the merits of the appeal, Venezuela can continue with its investigations and domestic proceedings irrespective of the

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<sup>11</sup> See e.g. [Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan KC, following the application for an order under article 18\(2\) seeking authorisation to resume investigations in the Situation in Venezuela I](#); [ICC Prosecutor Karim A.A. Khan KC concludes official visit to Venezuela, signing MoU on establishment of in-country office](#); see also [ICC-02/18-31-Red](#), paras. 6, 57; [ICC-02/18-18](#), paras. 2, 99.

<sup>12</sup> [REDACTED].

<sup>13</sup> [REDACTED].

<sup>14</sup> [Request](#), para. 18 (emphasis added).

<sup>15</sup> *Contra* [Request](#), para. 19.

<sup>16</sup> [Rules](#), rule 158(1). See e.g. [ICC-01/05-01/08-817 OA3](#), para. 11. Depending on the circumstances, the Appeals Chamber may also remand a decision to the first-instance Chamber for that Chamber to issue a new decision in light of the Appeal Judgment. See e.g. [ICC-01/04-01/06-774 OA6](#), paras. 64-66 (where the Appeals Chamber reversed a decision and directed the Pre-Trial Chamber to decide the matter anew), [ICC-01/14-01/22-70-Red OA](#), para. 69.

Prosecution's ongoing investigation.<sup>17</sup> Pending resolution of the appeal, the Prosecution would not be acting *contra legem* in continuing its investigation.<sup>18</sup> To the contrary, the Prosecution would be proceeding in accordance with the Court's legal framework and pursuant to a decision of the Pre-Trial Chamber authorising the resumption of its investigation. The Appeals Chamber has dismissed similar arguments, most recently in the *Philippines* situation where the Appeals Chamber rejected the Government of Philippines' request for suspensive effect of the article 18(2) decision.<sup>19</sup>

11. *Third*, Venezuela has not demonstrated that the Prosecution's investigation would re-traumatise victims who have been/will be interviewed by both Venezuelan authorities and the Prosecution, or that it would result in contamination of the evidence. Venezuela does not identify a single investigative step that it has taken/will take or that the Prosecution intends to take that would lead to these consequences. Such general submissions are speculative and insufficient to demonstrate an irreversible situation or a consequence which is difficult to correct and which is irreversible.

12. This is more so the case given that the Pre-Trial Chamber has concluded that Venezuelan domestic proceedings do not sufficiently mirror the scope of the Prosecution's intended investigation because, among others, Venezuela is not investigating/has not investigated the factual allegations underlying the contextual elements of crimes against humanity and the crime of persecution; only focuses on low-level/direct perpetrators; and has carried out insufficient investigations of crimes of a sexual nature.<sup>20</sup> As the Pre-Trial Chamber noted, based on the Government of Venezuela's observations on the Prosecution's request to resume its investigation, it appears that Venezuela does not intend to prosecute conduct qualifying as sexual and

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<sup>17</sup> [ICC-01/11-01/11-387 OA4](#), paras. 24-26; *see also* [ICC-01/11-01/11-480 OA6](#), paras. 16-17.

<sup>18</sup> *Contra* [Request](#), para. 19.

<sup>19</sup> [ICC-01/21-67 OA](#), para. 17; *see similarly* [ICC-01/11-01/11-387 OA4](#), paras. 26-27, [ICC-01/11-01/11-480 OA6](#), paras. 16-17, [ICC-01/05-01/08-817 OA3](#), para. 11.

<sup>20</sup> [Decision](#), paras. 130-132.

gender based crimes as such.<sup>21</sup> Moreover, OTP staff possess the required expertise to work with potentially vulnerable witnesses and abide by the highest standards in the conduct of the Office's investigations.

13. Finally, there is no similarity between the current situation and the consequences resulting from the implementation of the reparations order in the *Lubanga* case.<sup>22</sup> In that case, had the Appeals Chamber not suspended the order pending the resolution of the appeal, the Trust Fund for Victims would have proceeded to engage with victims for the purpose of awarding reparations.<sup>23</sup> If the order was subsequently reversed by the Appeals Chamber (as it was), this would have created a situation very difficult to correct due to the resources spent, the reparations awarded to victims and the expectations raised. There is no similar risk in the current situation. Accordingly, Venezuela's reference to the Appeals Chamber's decision suspending the implementation of the reparations order in *Lubanga* is without merit.<sup>24</sup>

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<sup>21</sup> [Decision](#), para. 124.

<sup>22</sup> [Request](#), para. 20 citing [ICC-01/04-01/06-2953 A A2 A3 OA21](#), para. 83.

<sup>23</sup> [ICC-01/04-01/06-2953 A A2 A3 OA21](#), para. 83 ("the Appeals Chamber finds that implementing the Impugned Decision, which may be reversed or amended on appeal, could result in considerable time being spent and resources being allocated by the Trust Fund, as well as raised expectations of victims. In this connection, the Appeals Chamber finds persuasive the argument put forward by the Trust Fund that it would be undesirable for engagement with victims and their communities to commence, only to have to be halted or revised as a result of a later determination of the Appeals Chamber, potentially leading to re-traumatisation of victims").

<sup>24</sup> [Request](#), para. 20 citing [ICC-01/04-01/06-2953 A A2 A3 OA21](#), para. 83.

## Conclusion

14. The Prosecution respectfully requests the Appeals Chamber to reject Venezuela's request for suspensive effect of the Decision.



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**Karim A.A. Khan KC, Prosecutor**

Dated this 17<sup>th</sup> day of July, 2023

At The Hague, The Netherlands