

Public redacted version of
ANNEX II
ICC-02/18-46-Conf-Exp-AnxII

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No: **ICC-02/18**

Date: **12 July 2023**

APPEALS CHAMBER

Before: Judge Piotr Hofmański
Judge Marc Pierre Perrin de Brichambaut
Judge Luz del Carmen Ibáñez Carranza
Judge Solomy Balundi Bossa
Judge Gocha Lordkipanidze

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

PUBLIC REDACTED

**With Annex I Confidential Ex Parte only available to the Prosecution
The Bolivarian Republic of Venezuela's Notice of Appeal against Pre-Trial
Chamber I's "Decision authorizing the resumption of the investigation
pursuant to article 18(2) of the Statute" (ICC-02/18-45) and request for
suspensive effect**

Source: Bolivarian Republic of Venezuela

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

The Office of the Prosecutor

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

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for
The Defense**

States Representatives

Minister of Foreign Affairs of the
Bolivarian Republic of Venezuela

Amicus curiae

Registry

The Registrar

M. Osvaldo Zavala Giler

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and
Reparations Section**

Other

I. INTRODUCTION

1. On 27 June 2023, the Pre-Trial Chamber I rendered its decision authorising the resumption of the investigation pursuant to Article 18(2) of the Statute ('PTC I Decision').¹
2. On 27 June 2023, the Permanent Mission of the Bolivarian Republic of Venezuela to OPCW, ICC and other International Organizations and Courts based in the Kingdom of the Netherlands received a copy of the Decision from the Registry.
3. According to Rule 154(1) of the Rules of Procedure and Evidence, an appeal against a decision concerning jurisdiction and admissibility as provided under Article 82(1)(a) of the Statute may be filed with the Registry no later than five days from the date on which the party filing the appeal is notified of the decision.
4. Regulation 64(1) of the Regulations of the Court requires the appellant to file a notice of appeal that contains the following:
 - a. The name and number of the case or situation;
 - b. The title and date of the decision being appealed;
 - c. Whether the appeal is directed against the whole decision or part thereof;
 - d. The specific provision of the Statute pursuant to which the appeal is filed;
 - e. The relief sought.

II. CLASSIFICATION

5. Pursuant to Regulation 23 *bis* of the Regulations of the Court, this filing has been submitted on a confidential basis due to the fact that it cites the contents of confidential documents. A public redacted version will be filed forthwith.

¹ Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, ICC-02/18-45, 27 June 2023.

III. NOTICE OF APPEAL

6. Following Article 18(4), Article 82(1) of the Statute, Rule 154(1) of the Rules of Procedure and Evidence, and Regulation 64(1) of the Regulations of the Court, the Government of Venezuela ('GoV'), in the *Situation in the Bolivarian Republic of Venezuela I*, ICC-02/18, hereby gives notice of appeal against the PTC I Decision dated 27 June 2023.
7. The Appeal is directed against the whole decision.
8. In authorising the OTP's request to resume its investigation into the Venezuelan situation, the Pre-trial Chamber I held that:
 - a. the issues of jurisdiction (material and temporal) cannot be examined at this stage of the proceedings;
 - b. the GoV's argument regarding the circumvention of the Pre-Trial Chamber's authorisation to investigate through a subsequent States' referral is invalid;
 - c. the temporal jurisdiction comprises the dates used in the referral made by the States ("since 12 February 2014"), clarifying the indeterminacy and uncertainty left by the Prosecutor during the Preliminary Examination;
 - d. the GoV's argument regarding gravity should be raised at a later stage;
 - e. the new Memorandum of Understanding had not been taken into account;
 - f. the OTP "did not provide detailed information" on the existence of crimes within the Court's jurisdiction, but that this information was "sufficient";
 - g. the GoV's internal investigation does not reach the investigation planned by the OTP since it does not include "crimes against humanity", consists of very few high-ranking cases and gives insufficient weight to allegations of sexual violence;
 - h. following the OTP's failure to submit all communicated documents in a working language, certain documents had been excluded from the Chamber's consideration.
9. The GoV contests the aforementioned Pre-Trial Chamber's findings and hereby seeks their reversal.

10. The relief sought is thus a reversal of the decision and the denial of the OTP's request to resume the investigation regarding the *Situation in the Bolivarian Republic of Venezuela I*.

IV. REQUEST FOR SUSPENSIVE EFFECT

11. Article 82(3) of the Statute provides that an appeal shall not have suspensive effect unless the Appeals Chamber orders so, upon request, in accordance with the Rules of Procedure and Evidence. Rule 156(5) of the Rules of Procedure and Evidence provides that the party appealing may file such a request simultaneously with the filing of the appeal.

12. The GoV hereby requests that the implementation of the PTC I Decision be suspended pending the final resolution of this appeal.

13. In the present situation, there are "particularly strong reasons" for granting suspensive effect to the appeal.²

14. The Appeals Chamber has often summarised the circumstances under which it may exercise to grant suspensive effect:

In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has 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'.³

15. It is clear that the circumstances to be examined by the Appeals Chamber are not cumulative, as indicated by the use of the word "or".

16. There are several areas in which the resumption of the OTP's investigations would generate difficult to correct or irreversible consequences or otherwise defeat the purpose of the appeal, including that:

² Decision on the request of the Prosecutor of 19 December 2012 for suspensive effect, [ICC-01/04-02/12-12](#), 20 December 2012, § 23; Decision on the Prosecutor's request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings, [ICC-02/11-01/15-1243](#), 18 January 2019, § 22.

³ Decision on suspensive effect, [ICC-01/13-43](#), 6 August 2015, § 7; Decision on the Prosecutor's urgent request for suspensive effect of the 'Decision ordering the release of Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido' of 21 October 2014, [ICC-01/05-01/13-718](#), § 5; Decision on the Prosecutor's request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings, [ICC-02/11-01/15-1243](#), 18 January 2019, § 20.

- a. The resumption of the investigation would have irreversible consequences on the Memorandum of Understanding signed between the Government of Venezuela and the Office of the Prosecutor on 3 November 2021 and the one signed on 9 June 2023 and on positive complementarity;
 - b. The judgment of the Appeals Chamber could nullify the investigations of the OTP in the near future; and
 - c. Concurrent investigations entailing interviews with the same witnesses and alleged victims would generate unnecessary trauma and taint the integrity of the evidence.
17. Given the expeditious nature of appellate proceedings, the duration of the requested suspensive effect is likely to short. Any prejudice caused to the OTP is negligible and outweighed by the severe and irreversible prejudice that would be caused through the premature commencement of OTP investigations.

A. Irreversible consequences to the Memorandum of Understanding

18. Firstly, the immediate resumption of the investigation would have consequences [REDACTED].⁴ As stated in its decision, Pre-Trial Chamber I has not taken into consideration any memoranda of understanding signed between the OTP and the State, as for example the one of 3 November 2021⁵ has not “been officially notified and filed before it”.⁶ [REDACTED].⁷ [REDACTED].

B. The Appeals Chamber judgment could render the OTP’s investigation void and null

19. The GoV’s appeal concerns not only the suspension of the OTP’s investigation, but also the very merits of the latter. As it will be argued in its Appeals Brief, the GoV asserts that the events investigated by the Prosecutor do not fall within the jurisdiction of the Court. Furthermore, the GoV is convinced that there should be a judicial control of the material jurisdiction of the Court similar to the one provided for in Article 15(3) of the Statute, as a subsequent political referral by States circumvented it. As it will be demonstrated, not only

⁴ [REDACTED].

⁵ [Memorandum of Understanding between the Government of the Bolivarian Republic of Venezuela \(“Venezuela”\) and the Office of the Prosecutor of the International Criminal Court](#), 3rd November 2021.

⁶ PTC I Decision, § 60.

⁷ [REDACTED]

should the domestic jurisdiction be prevalent following the principle of complementarity, but the OTP should not be able to conduct investigations as the Court does not have jurisdiction over the situation in Venezuela. The immediate enforcement of the PTC I decision would then defeat the purpose of the appeal as it is possible that the Prosecutor's investigation would be *contra legem*.

C. Trauma and tainted evidence

20. The goal of any effective investigation into SGBV crimes should be to “do no harm” and to avoid unnecessary retraumatisation. It is well-recognised that duplication of investigations/investigative interviews has a profoundly negative effect as concerns about the mental welfare of alleged victims. The “Global Code of Conduct for Gathering and Using Information about Systematic and Conflict-Related Sexual Violence” (also known as the “Murad Code”) explains that multiple interviews give rise to risks, including “creating inconsistent accounts which may damage a survivor’s right to access justice, and further exposure to potential retraumatisation, loss of privacy and stigma”.⁸ Similarly, in *Lubanga*, the Trial Chamber suspended the implementation of the reparations order, finding 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 victim”.⁹

21. Once the OTP resumes its investigation, the State has no power to protect individuals from such risks or to protect domestic witnesses from the risks of memory contamination generated through interactions with OTP intermediaries and investigators and exposure to materials that may be presented to them during interviews.

22. Consequently, as the immediate implementation of the PTC I Decision “would lead to consequences that ‘would be very difficult to correct and may be irreversible’” and “could potentially defeat the purpose of the appeal”, the GoV respectfully requests the Appeals Chamber to grant suspensive effect to the appeal.

⁸ Principle 4.8, [Murad Code](#).

⁹ Decision on the admissibility of the appeals against Trial Chamber I's ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings, [ICC-01/04-01/06-2953](#), 14 December 2012, § 83.

V. RELIEF SOUGHT

23. Accordingly, the GoV requests the Appeals Chamber to:

- a.** Grant this appeal against the PTC I Decision pursuant to Article 18(4), Article 82(1)(a) of the Statute, Rule 154(1) of the Rules of Procedure and Evidence, and Regulation 64(1) of the Regulations of the Court;
- b.** Grant suspensive effect to this appeal pursuant to Article 82(3) of the Statute.

Respectfully submitted,



Yván Gil Pinto
Minister of Foreign Affairs of the Bolivarian Republic of Venezuela

Date this 12 July 2023

At Caracas, Venezuela.

[REDACTED]