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**No. ICC-02/18 OA
Date: 24 November 2023**

THE APPEALS CHAMBER

Before: Judge Marc Perrin de Brichambaut, Presiding
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 document

***Amicus Curiae* Observations by the Organization of American States Panel of Independent International Experts on the Venezuelan Government's Appeal against the Decision authorising the resumption of the investigation**

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

The Office of the Prosecutor

Mr Karim A. A. Khan, Prosecutor

Ms Helen Brady

The Office of Public Counsel for Victims

Ms Paolina Massidda

Mr Enrique Carnero Rojo

States Representatives

Competent authorities of the Bolivarian Republic
of Venezuela

Amicus curiae

The Organization of American States Panel
of Independent International Experts

REGISTRY

Registrar

Mr Osvaldo Zavala Giler

Victims Participation and Reparations Section

Mr Philipp Ambach

I. INTRODUCTION

1. In accordance with the Appeals Chamber’s decision of 3 November 2023,¹ and pursuant to Rule 103 of the Rules of Procedure and Evidence, the Organization of American States Panel of Independent International Experts (“OAS Panel of Experts”) here by submits its observations to the appeal brought by the Bolivarian Republic of Venezuela (“GoV” or the “Appellant”)² against the decision of Pre-Trial Chamber I (the “Chamber”) authorising the Prosecutor to resume the investigation into the Situation in Venezuela I (the “Impugned Decision”).³
2. The OAS Panel of Experts notes at the outset that the GoV's compliance with the Prosecutor's procedural requests for information, which is referred to repeatedly in the Appeal Brief,⁴ does not in itself, constitute fulfilment of the Government's primary obligation to provide accountability to the numerous victims who have endured the purported crimes against humanity. On the contrary, the Panel is of the view that the GoV has adopted a contradictory stance concerning its approach to accountability. On one side, it presents itself as a compliant state, ostensibly upholding its responsibilities for domestic accountability. On the other, it persists in the commission of ongoing crimes and the suppression of dissent, including through the persecution of those victims who report offences committed by state agents.
3. The OAS Panel of Experts refers here to the findings of the Report of the Independent International Fact-Finding mission on the Bolivarian Republic of Venezuela (“Fact-Finding Mission”) which has been referred to by the VPRS in its ‘Observations on behalf of victims on the Venezuela Government Appeal against the Decision authorising the resumption of the investigation’:⁵

50. In its 2020 report, the mission concluded that the Venezuelan State’s policy of targeting real or perceived opponents to the Government included targeted repression of civil society actors and political leaders. This was carried out through physical attacks, threats, defamation and stigmatization campaigns, administrative reprisals

¹ ICC-02/18-78 OA Decision on the Organization of American States Panel of Independent International Experts’ request for leave to submit amicus curiae observations pursuant to rule 103 of the Rules of Procedure and Evidence, 3 November 2023.

² The Bolivarian Republic of Venezuela’s Appeals Brief against the Pre-Trial I’s Decision, 14 August 2023. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

³ ICC-02/18-45, PTC I, Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, 27 June 2023. Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1804e8166.pdf>

⁴ The Bolivarian Republic of Venezuela’s Appeals Brief against the Pre-Trial I’s Decision, 14 August 2023, paras 5, 40, 61, 70, 72, 82, 88, 111-112, 125 -128, 138, 144. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

⁵ ICC-02/18-61, VPRS, Observations on behalf of victims on the Venezuela Government Appeal against the Decision authorising the resumption of the investigation, 13 September 2023, para 111. Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1805a43fd.pdf>

(notably the removal of politicians, judges or public officials from their posts), arbitrary criminal prosecutions, harassment and threats to family members of real or perceived opponents of the Government.

51. The mission has reasonable grounds to believe that, since 2020, the policy of targeting real or perceived opponents of the Government has continued in a more selective manner by focusing on individuals that serve as examples to dissuade others from expressing dissenting views. This has been done both through the main human rights violations mentioned in the previous chapter, as well as through other mechanisms of repression documented by the mission, namely: attacks, threats, surveillance and harassment; defamation and discrediting statements; criminalization; political disqualification; censorship and arbitrary restrictions on the media; and restrictions on the creation and functioning of civil society and political parties.⁶

4. As at March 2023, the UN fact Finding mission reported that:

“Arbitrary detentions on political grounds continue to be of serious concern. According to human rights organizations, at least 282 people are still in detention - including both civilians and military personnel. These individuals and their families continue to be subject to threats and reprisals, family and lawyers’ visits are often denied and access to food and medical treatment is limited. Violations of the right to due process persist. (...) In its oral update to the Human Rights Council, the FFMV also drew attention to other developments regarding the human rights situation in Venezuela - among them, the persistence of a high number of deaths due to clashes with law enforcement officials. According to estimates from non-governmental sources, there were 716 such deaths in 2022.”⁷

5. The GoV proclaims its "goodwill to advance the consolidation and expansion of the standard of justice,"⁸ a claim which the OAS Panel of Experts contests. The OAS Panel of Experts refers to its previous findings regarding the institutional reforms undertaken by the GoV, which have been presented to the Pre-Trial Chamber by the VPRS.⁹ Upon reviewing the legal amendments

⁶ Human Rights Council, Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, 18 September 2023, A/HRC/54/57, paras. 50-51. Available at:

https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session54/advance-versions/A_HRC_54_57_AdvancedUneditedVersion.pdf

⁷ Venezuela: UN Experts warn of persisting attacks on civil society, media and trade union leaders, 22 March 2023. Available at <https://www.ohchr.org/en/press-releases/2023/03/venezuela-un-experts-warn-persisting-attacks-civil-society-media-and-trade>

⁸ The Bolivarian Republic of Venezuela’s Appeals Brief against the Pre Trial I’s Decision, 14 August 2023, para 12. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

⁹ ICC-02/18-40-AnxI-Red, VPRS, Public Redacted Version of “Final Consolidated Registry Report on Article 18(2) Victims’ Views and Concerns Pursuant to Pre-Trial Chamber’s Order ICC-02/18-21”, 20 April 2023, Annex I, 20 April 2023 para. 32 and 34. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd180441579.pdf>

implemented by the GoV, the Panel concluded as follows:

“The Panel expresses grave concern that the institutional reforms presented by the State of Venezuela to satisfy the complementarity assessment of the ICC actively shields those most responsible perpetrators from domestic and ultimately international accountability and entrenches impunity for high level perpetrators, demonstrating a clear and systematic lack of genuine political will to seek accountability for crimes against humanity under the ICC jurisdiction allegedly committed by state perpetrators, in particular for high-level perpetrators. The Panel finds that the proposed institutional reforms, enacted without the due diligence or consultation with the stakeholders and members of the National Assembly required by the Venezuelan Constitution, are largely cosmetic in nature, seeks to protect high-level perpetrators and shield them from accountability, while further entrenching impunity.

The Panel is of the view that the measures include several amendments that blatantly violate the Venezuelan Constitution and when assessed holistically: i) further erodes the already insufficient judicial system – plagued by a lack of independence and impartiality and endemic corruption – and undermines its capacity to investigate and prosecute alleged perpetrators, ii) does not create effective and viable accountability mechanisms, to bring alleged perpetrators to justice, both in substance and in practice, and iii) fails to establish accessible and transparent remedies, whether judicial, administrative or quasilegal for victims. In addition, these proposed reforms deliberately avoid addressing the structural mechanisms which actively shield from investigation and prosecution, the alleged perpetrators in high-level positions, who are at the center of the allegations of direct perpetration and the accused state-policy of indirect perpetration of crimes against humanity that fall under ICC jurisdiction.”¹⁰

6. It is imperative to underscore that, in the current context, the GoV is not only the alleged principal offender of most of the crimes against humanity purported to fall within the jurisdiction of the ICC, but it also continues to openly and blatantly deny that crimes against humanity have been committed,¹¹ in direct contradiction to the findings of numerous United

¹⁰ OAS, “Venezuela’s Institutional Reform Reinforcing Impunity: Capitalizing on The ICC’s Complementarity To Avoid Accountability”, 16 May 2023. Available at:

https://www.oecpaneldeexpertos.org/files/ugd/56aada_4ee37f935c0244eea1c346d1df92232a.pdf

¹¹ Corrigendum to the Public redacted version of 'Observations of the Government of the Bolivarian Republic of Venezuela to the
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Nations¹² and Inter-American Commission findings,¹³ local¹⁴ and international non-governmental organisations' reports,¹⁵ as well as the conclusions drawn by this very Panel of International Independent Experts.¹⁶

7. The OAS Panel of Experts respectfully submits that the GoV's admission that: "there may have been excesses and, even the commission of unlawful acts by public officials"¹⁷ is understated. Indeed, at the same time as the GoV denies the commission of crimes, the OAS Panel of Experts notes that the regime of GoV did not hide its intentions to infringe upon the

Prosecution request to resume the investigation (ICC-01/18-18), 27 March 2023. Venezuela brief *ICC-02/18-30-AnxII-Red-Corr 26-06-2023* para 49, Available at: <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd1804df817.pdf>; Human Rights Council, Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, 18 September 2023, A/HRC/54/57, paras. 11. Available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session54/advance-versions/A_HRC_54_57_AdvancedUneditedVersion.pdf; Venezuelan People's Ministry of Foreign Affairs, Press release: Venezuela rejects unfounded and false accusations from the so-called Fact-Finding Mission. 25 September 2023. Available in Spanish at: <https://mppre.gob.ve/comunicado/venezuela-rechaza-acusaciones-falsas-fundamento-mal-llamada-mision-determinacion-hechos/>

¹² OHCHR, Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017, Geneva, August 2017, Available at: https://www.ohchr.org/Documents/Countries/VE/HCReportVenezuela_1April-31July2017_EN.pdf pp. 8 ss. In the same vein OHCHR, Human rights in the Bolivarian Republic of Venezuela, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela, 5 July 2019. Available at:

https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18.docx&ved=2ahUKewjQu6fbsezjAhUaBGMBHd-HDSIOFjAAegQIBRAB&usq=AOvVaw0m3sYu_ifVfl3DEB7w2V9N&cshid=1565033852969, In the same vein, Human Rights Council, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", 16 September 2021, A/HRC/48/CRP.5. Available at:

https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMV/A-HRC-48-CRP.5_EN.pdf, Human Rights Council, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", 20 September 2022, A/HRC/51/CRP.2. Available at: <https://www.ohchr.org/es/hr-bodies/hrc/ffmv/index>, Human Rights Council, Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, 18 September 2023, A/HRC/54/57. Available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session54/advance-versions/A_HRC_54_57_AdvancedUneditedVersion.pdf

¹³ IACHR, Situation of human rights in Venezuela, 31 December 2017, Available in Spanish at:

<http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf>. In the same vein IACHR Annual report 2021, Chapter IV B, available at: <https://www.oas.org/es/cidh/docs/anual/2021/capitulos/ia2021cap4b.venezuela-es.pdf>; IACHR Annual report 2022, available at: https://www.oas.org/es/cidh/docs/anual/2022/capitulos/9-IA2022_Cap_4B_VE_ES.pdf and IACHR Migrants and Refugees from Venezuela, 2023, available at: <https://www.oas.org/es/cidh/informes/pdfs/2023/informe-migrantesVenezuela.pdf>

¹⁴ Foro Penal, Reporte sobre la represión política en Venezuela, 2020. Available in Spanish at:

https://mcusercontent.com/f47d15a453ae761428607dc45/files/1085a3e2-51aa-4721-91fb-47dbf0decf3a/REPORTE_ANUAL_2020.pdf; Foro Penal, Reporte sobre la represión en Venezuela. March 2023. Available in Spanish at: <https://foropenal.com/reportesobre-la-represion-en-venezuela-marzo-2023/>

¹⁵ Human Rights Watch. Venezuela: Responsabilidad de los altos mandos en los abusos. Las autoridades deberían prevenir y juzgar abusos. 15 June 2017. Available at: <https://www.hrw.org/es/news/2017/06/15/venezuela-responsabilidad-de-los-altos-mandos-en-los-abusos>, Human Rights Watch, World report 2021, Events of 2020. Available at:

https://www.hrw.org/sites/default/files/media_2021/01/hrw_world_report_2021.pdf, Human Rights informe 2023 Venezuela available at: <https://www.hrw.org/es/world-report/2023/country-chapters/venezuela>. In the same vein, Amnistía Internacional, Venezuela: Silencio a la fuerza: Detenciones arbitrarias por motivos políticos en Venezuela. 26 April 2017. Available at: <https://www.amnesty.org/download/Documents/AMR5360142017ENGLISH.PDF> and Amnistía Internacional, Informe 2017/2018, La Situación de los Derechos Humanos en el Mundo. Available at: <https://www.amnesty.org/download/Documents/POL1067002018SPANISH.PDF>

¹⁶ OAS, "Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the possible commission of Crimes Against Humanity in Venezuela". 29 May 2018. Available at:

https://www.oepaneldeexpertos.org/files/ugd/56aada_41aace2447444ac19771886a432cde02.pdf and OAS, "Venezuela's Institutional Reform Reinforcing Impunity: Capitalizing on The ICC's Complementarity To Avoid Accountability", 16 May 2023. Available at: https://www.oepaneldeexpertos.org/files/ugd/56aada_4ee37f935c0244eea1c346d1df92232a.pdf

¹⁷ Corrigendum to the Public redacted version of 'Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation (ICC-01/18-18), 27 March 2023. Venezuela brief *ICC-02/18-30-AnxII-Red-Corr 26-06-2023* para 55, Available at: <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd1804df817.pdf>

human rights of its populace and to engage in the killing of civilians. President Maduro personally made a number of statements calling upon violence on so-called dissents, those who perceived to disagree with the GoV's state policies.¹⁸ For instance, he stated: "That's why I say, we have to confront the betrayal, the coup, head on, actively. The order is given: to the traitors, stop them, to the coup plotters, reject them and stop them too; and the Armed Forces, united, cohesive under the supreme command of the laws and the Constitution."

8. In April 2017, President Maduro personally announced the Zamora Plan,¹⁹ a strategy aimed the joint deployment of a million armed civilian militias working with and in support with state security forces, known as colectivos, with GNB, the National Police (PNB), the Bolivarian Intelligence Service (SEBIN), and local police units, that systematically employed the excessive use force as a policy to quell anti-government demonstrations.
9. The implementation of the Zamora Plan that escalated in May 2017²⁰ led to a marked escalation in violence against protestors. state security forces, with the assistance of civilians armed by the GoV and operating in coordination with state security forces. These actions resulted in the murder, imprisonment, and torture of Venezuelan citizens who opposed the Maduro administration.
10. The acts of murder, imprisonment, and torture perpetrated by state security forces and civilians armed by the GoV and operating in coordination with state security forces were neither sporadic nor incidental. These violations were executed consistently across thirteen states and the capital city of Caracas, including in regulated settings such as military facilities and other state institutions, from April to August 2017.
11. The OAS Panel of Experts identifies an untenable incongruity and duplicity in the stance of the Venezuelan state since it cannot be anticipated that a state which fails to recognise the perpetration of crimes will subsequently ensure accountability. This persistent denial coupled with the state's actions in continuing to commit crimes undermines the very essence of justice and accountability and casts a shadow over the sincerity of its engagements and the likelihood of bringing forth genuine accountability measures.

¹⁸ Youtube, Maduro llama a los militares a combatir frente a los golpistas. 2 May 2019. Available in Spanish at: <https://www.youtube.com/watch?v=RH8fCPxmGx8> Unofficial translation: and YouTube Video, Noticias 24, Con el Mazo Dando 17/05/2017, live streamed 17 May 2017, minute 22:00, available at: <https://www.youtube.com/watch?v=p9uBb8fPyQI>.

¹⁹ Watch Nicolás Maduro's public statement at: <https://www.youtube.com/watch?v=oZpacKwRybo&feature=youtu.be>

²⁰ OHCHR, Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017, Geneva, August 2017. Available at: https://www.ohchr.org/Documents/Countries/VE/HCReportVenezuela_1April-31July2017_EN.pdf, p. 8. IACHR, Situation of human rights in Venezuela., 31 December 2020. Available at: <http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf>, para. 378.

12. While the GoV states that it “has brought justice to numerous victims and is in the course of doing so for others”²¹ and that it is effectively exercise of primary jurisdiction,²² the OAS Panel of Experts expresses serious concerns about the integrity, independence and impartiality of the judicial process in Venezuela which is currently implementing the domestic investigation and prosecutions under review.
13. The OAS Panel of Experts notes that in the context of its monitoring of domestic accountability efforts by the GoV, victims and legal representatives of victims and civil society actors have reported that domestic investigations and prosecutions were being used as a means to threaten and persecute victims who have reported crimes. The OAS Panel of Experts received complaints of a number of victims, their family members and legal representatives who were threatened, and subjected to undue influence after filing complaints. Victims reported being coerced into signing complaints that did not accurately reflect the facts as witnesses by them and that the Public Prosecutor’s office refused to accurately register the complaint of the victim relating to the involvement of high level members of the GoV in the commission of the crimes against humanity, despite the fact they publicly made statements on live television against the victim ordering the commission of crimes by GoV’s security forces and armed civilians acting with and in support of the GoV’s security forces.
14. The OAS Panel of Experts observes with concern that, notwithstanding its professed commitment to the administration of justice, the GoV has not enacted any legislative measures to provide protective mechanisms for victims. Such measures are crucial, particularly in the context of legal proceedings involving crimes against the state. The absence of provisions for anonymity when reporting such crimes against state officials significantly impedes the participation of victims in the domestic legal process. The OAS Panel of Experts is of the view that this failure to establish a framework that safeguards the interests and security of victims also suggests a lack of genuine willingness on the part of the GoV to bring about substantive justice.
15. The Maduro regime in Venezuela has over the years effectively consolidated control over the judiciary, undermining the constitutional division of powers. This process began in 2004 under President Hugo Chávez, who, along with his supporters, expanded the Supreme Tribunal of Justice (TSJ) and filled new positions with allies to the Maduro regime. The TSJ's control extends to lower courts, influencing the appointment and removal of judges. In 2010 and 2012, numerous judges were appointed without adherence to constitutional requirements for open competitions, compromising judicial independence. The regime's influence has eroded the

²¹ The Bolivarian Republic of Venezuela’s Appeals Brief against the Pre Trial I’s Decision, para 12, 14 August 2023. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

²² The Bolivarian Republic of Venezuela’s Appeals Brief against the Pre Trial I’s Decision, para 5 August 2023. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

impartiality and independence of judges and prosecutors. The International Commission of Jurists (ICJ) notes the lack of tenure security and transparency in appointments, leading to ineffective and unequal criminal justice administration.

16. As stated by the International Commission of Jurists in a September 2017 report:

“The judiciary, as the result of judgments that advanced the political interests of the executive branch, has lost its essential and characteristic attributes, such as autonomy, independence, and legitimacy. The executive branch has blatantly used the judiciary, through the Supreme Court, to suppress the NA [Asamblea Nacional (National Assembly)] and the Attorney General’s Office (Fiscalía General de la Nación) by means of a clear power struggle between these branches of the State(...) The Supreme Court has been coopted by the ruling party, becoming an appendage of the executive branch, and has ceased to exercise its constitutional function as the guarantor of the rule of law, human rights, and fundamental freedoms.”²³

17. Several international NGOs have reported politically motivated judicial proceedings²⁴ which entail “the use of the justice system to facilitate human rights violations, such as arbitrary detention, and crimes under international law, such as persecution.”²⁵

18. The Special Rapporteur on the promotion and protection of human rights while countering terrorism and Clément Nyaletsossi Voule, Special Rapporteur on the rights to freedom of peaceful assembly and of association have both reported in August 2023 the “chronic misuse of counter-terrorism measures” and stated that “Venezuelan authorities were using the language of counter-terrorism to ostracise and undermine legitimate human rights work” in what they described as “a legal process marked by irregularities and exceptionalities.” They collectively reached the conclusion that “such abuse of counter-terrorism measures is entirely contrary to international law.”²⁶

19. The Fact-Finding Mission has also found that the Venezuelan Prosecutors Office that is leading the domestic proceedings that are being considered before the Appeal Chamber has itself “informally accused a number of people through social media, compromising their human rights, such as the right to a fair trial and the presumption of innocence. Among those accused

²³ From previous OAS report footnote 89 90

²⁴ Acceso a la Justicia. Eliminada la carrera funcional en el Ministerio Público. 21 September 2018. Available at: <https://accesoalajusticia.org/eliminada-la-carrera-funcional-en-el-ministerio-publico/>; Acceso a la Justicia. El observatorio venezolano de la justicia. “El sistema de justicia agoniza en Venezuela: claves para la reinstitucionalización judicial”. 24 May 2019. Available at: <https://accesoalajusticia.org/el-sistema-de-justicia-agoniza-en-venezuela-claves-para-la-reinstitucionalizacion-judicial/>; Amnesty International, available at: <https://www.amnesty.org/en/location/americas/south-america/venezuela/report-venezuela/> World Justice Project. Venezuela ranks 140 out of 140 in the Rule of Law Index. Available at: https://worldjusticeproject.org/sites/default/files/documents/Venezuela_Spanish.pdf

²⁵ Amnesty International, available at: <https://www.amnesty.org/en/location/americas/south-america/venezuela/report-venezuela/>

²⁶ OHCHR, Venezuela: UN experts condemn use of counter-terrorism laws to convict trade unionists and labour leaders, 11 August 2023. Available at: <https://www.ohchr.org/en/press-releases/2023/08/venezuela-un-experts-condemn-use-counter-terrorism-laws-convict-trade>

were children and adolescents.”²⁷

20. It is respectfully submitted that the GoV's assertion of possessing "better access to evidence, witnesses, and suspects, and greater capacity to conduct sustained and thorough investigations, thereby bringing justice to a greater number of affected individuals,"²⁸ is markedly incongruent with the OAS Panel of Expert's findings from reviewing previous and ongoing domestic investigations and prosecutions in Venezuela that indicate that:

- a) the observable reality is that the GoV has neglected to initiate investigations or prosecutions in the majority of murder and torture cases purportedly committed since 2014. Furthermore, it is imperative to acknowledge that while the OAS Panel of Experts recognises the Appeal Chamber's concentration on those example cases presently under review by the Office of the Prosecutor, the Panel feels compelled to underscore the fact that the cases allegedly subjected to domestic proceedings in Venezuela represent a negligible fraction of the total incidents. Regrettably, most of the perpetrators of murder and torture alleged to have occurred over the last ten years continue to enjoy impunity.
- b) the GoV's domestic accountability efforts has resulted in blanket *de facto* impunity gap for all crimes against humanity of sexual violence, imprisonment and persecution that occurred in Venezuela since 2014.
 - i) The Panel observes with great concern that the GoV's failure to treat rape as a distinct and serious crime, is a failure that profoundly affects victims' rights and the pursuit of justice. By categorizing rape merely as a form of cruel treatment or an aggravating factor in other crimes, particularly in the context of detention, the GoV's approach significantly undermines the unique and severe impact of rape. This not only diminishes the trauma and violation experienced by the victims but also impedes the delivery of justice by failing to recognize and prosecute rape in its own right. Treating rape as a subsidiary aspect of another crime fails to address the full scope of the perpetrator's criminal behavior and the distinct nature of the

²⁷ Venezuela's Public Prosecutor's Office. Strong response from Attorney General Tarek William Saab in Geneva, 11 October 2023. Available at: <http://www.mp.gob.ve/index.php/2023/10/11/respuesta-contundente-del-fiscal-general-tarek-william-saab-en-ginebra/>; Venezuela's Public Prosecutor's Office. Statements from the Attorney General of the Republic regarding the Gedeón case, 21 May 2020. Available at:

https://www.youtube.com/watch?v=mpnSO40BQHQ&ab_channel=LuiginoBracciRoadesdeVenezuela. In the same vein, The arrest of a university student on charges of terrorism raises concerns among NGOs in Venezuela, 7 September 2023. Available at: <https://elpais.com/internacional/2023-09-08/la-detencion-de-un-universitario-bajo-acusaciones-de-terrorismo-pone-en-alerta-a-las-ong-en-venezuela.html> and The Venezuelan prosecutor's office announces a criminal investigation against the organizers of the opposition primaries, 25 October 2023. Available at: <https://elpais.com/internacional/2023-10-25/la-fiscalia-venezolana-anuncia-una-investigacion-penal-contra-los-organizadores-de-las-primarias-de-la-oposicion.html>

²⁸ The Bolivarian Republic of Venezuela's Appeals Brief against the Pre Trial I's Decision, para 12, 14 August 2023. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

violation. This approach hinders the possibility of holding perpetrators fully accountable for the complete range of their criminal actions. In failing to prosecute rape as a distinct crime, the GoV neglects its duty to impose penalties that reflect the true gravity of the offence, thereby contributing to a broader impunity gap. The GoV's failure to address rape as a standalone offence is a grave omission, undermining the principles of accountability and justice, and failing to deter future violations of such a serious nature.

- ii) The Panel notes that despite the classification of imprisonment as a crime against humanity under Article 7 (1) (e) of the Rome Statute, the GoV has until now disputed the context in which the alleged crimes against humanity has happened and has failed to acknowledge that since 2014 civilians have been arrested and detained without due process or legitimate legal basis, in violation of the right to a fair trial rights, domestic and international human rights provisions. In a number of cases, these arrests were legitimized by the judiciary currently under the GoV's control as a result of the lack of independence and impartiality of the Venezuelan Judges. As a result, the crime against humanity of imprisonment has not formed part of the type of criminal conduct addressed by domestic criminal proceedings initiated by the GoV Prosecutor's office. The OAS Panel of Experts identifies a *de facto* impunity gap and a marked failure of the GoV to deliver justice for crimes against humanity pertaining to imprisonment.
- iii) Similarly, despite the explicit categorisation of persecution as a crime against humanity, the GoV has notably failed to implement corresponding domestic legislation to criminalise such conduct fully. The Panel views this omission as a critical factor in perpetuating a comprehensive *de facto* impunity gap for one of the most widespread forms of crimes against humanity committed within Venezuelan borders since 2014. The Panel is also of the view that establishing discriminatory intent -discerned through contextual evidence and legal analysis, focusing on the mental element of the perpetrator's conduct, the intention behind the actions, the elements of the context in which they occurred, the nature of the criminal acts, and the discernible patterns of behaviour, is a crucial aspect of such investigations.

- c) the GoV has failed to initiate proceedings for the bulk of the crimes against humanity that happened between 2014 and 2017²⁹ despite the significant number of complaints filed by victims, their family members and legal representatives to the Public Prosecutor's Office and the Office of the Ombudsman. The OAS Panel of Experts expresses concern at the fact that, regrettably, a concerning pattern has emerged, where these complaints filed by victims, their family members and representatives have been disregarded by the relevant Venezuelan authorities for a number of years. In addition, the GoV has blatantly failed to investigate the contextual elements of the crimes despite its acknowledged ability to do so.
- d) the GoV's failure to investigate or prosecute any of the high-level individuals who have defined and implemented the state policy underlying the widespread and systematic attack against the civilian population. The OAS Panel of Experts raises serious concerns regarding the absence of high-level accountability within Venezuela's state security apparatus.
21. Continuing in the same vein, it is equally incongruous to reconcile the GoV's professed capabilities in accessing evidence with the alarmingly high rate of delayed investigations and prosecutions. This disparity further undermines the GoV's position and casts significant doubt on its commitment to the principles of justice and due process. In a significant number of cases where investigations were ongoing, but no charges have been brought despite the years that have elapsed. In addition, the OAS Panel of Experts notes that among the cases of domestic investigations and prosecutions that it was able to analyse, there are a number of cases where the Public Prosecutor's Office has failed to execute arrest warrants against alleged state perpetrators despite the fact that these perpetrators have been identified and charged. The OAS Panel of Expert also notes that in a number of cases the Public Prosecutor's Office has failed to enforce request for information between different state authorities in the context of ongoing investigations relating to the specifics of detention of alleged victims.
22. Nevertheless, the GoV persists in asserting that it is the subject of political prejudice and continues to employ political stratagems and narratives, both domestically, hindering free and democratic legal process³⁰ and internationally³¹ to evade examination. It strategically withdraws from its international human rights commitments and fails to bring justice to

²⁹ ICC-02/18-45, PTC I, Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute, para. 130, 27 June 2023. Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1804e8166.pdf>

³⁰ The Venezuelan prosecutor's office announces a criminal investigation against the organizers of the opposition primaries, 25 October 2023. Available at: <https://elpais.com/internacional/2023-10-25/la-fiscalia-venezolana-anuncia-una-investigacion-penal-contra-los-organizadores-de-las-primarias-de-la-oposicion.html>, in the same vein, The Venezuelan Court of Justice suspends the opposition's primary elections won by María Corina Machado, 30 October 2023, Available at: <https://www.bbc.com/mundo/articulos/cqejnde7e61o>

³¹ The Bolivarian Republic of Venezuela's Appeals Brief against the Pre Trial I's Decision, paras 2, 12, 14 August 2023. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

thousands of victims over a period of almost a decade while portraying itself as the aggrieved party and the undue victim of the Rome Statute mechanism that it has voluntarily joined and that is meant to serve precisely the purpose of intervening when the state firstly fails in protecting its citizens and secondly fails to implement justice for the victims.

23. The OAS Panel of Experts notes in this regard that while the GoV seeks to portray itself as a champion for human rights, it has in the last year elected to abrogate its commitments to various international human rights instruments. These instruments have historically established international human rights protection systems, designed to offer individuals recourse to an external adjudicatory body in instances where justice and reparation for human rights infringements are unattainable within their own nation's jurisdiction. Over the years, the Inter-American human rights system, through the Inter-American Commission and Court, has served as the only avenue available to a significant number of victims and their family members to seek redress for state perpetrated crimes, as a result of the deprivation of domestic judicial remedies by their own State. The decision of Venezuela to withdraw from the American Convention on Human Rights as of 10 September 2013,³² effectively strips Venezuelan nationals of the opportunity to have recourse to the Inter-American Commission and Court, thereby significantly limiting the remedies available to victims.
24. In the Observations below, the OAS Panel of Experts sets out the reasons why the Appeals Chamber should dismiss the GoV's Appeal on all 6 grounds, reject its Additional Evidence Request, and affirm the Pre-Trial Chamber's Decision.

II. OBSERVATIONS ON THE GROUNDS OF APPEAL

A. Ground 1

1. Sub-Ground 1.1

25. The OAS Panel of Experts notes that the GoV's contentions regarding the allocation of the burden of proof by the Pre-Trial Chamber under Article 18(2) are inconsistent, selectively biased, and do not take into account whether such an interpretation aligns with the overarching intent of the statute. As acknowledged by international criminal experts since "the Rome Statute does not expressly allocate burdens of proof for admissibility determinations, (...) this must be developed in the practice and jurisprudence of the Court."³³ This Court has indeed exhaustively examined the question and established principles in the Philippines situation.³⁴

³² OAS, IACHR Deeply Concerned over Result of Venezuela's Denunciation of the American Convention, September 10, 2013. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2013/064.asp

³³ Bergsmo, Rackwitz and Song, Historical origins of international law, p 765 – 766.

³⁴ ICC-01/21-77, The Appeals Chamber, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's Authorisation pursuant to article 18(2) of the Statute to resume the investigation, 18 July 2023. Available at <https://www.icc->

26. Not only does the GoV fail to present cogent and persuasive grounds to justify why this precedent should be disregarded, but it also erroneously refers to the existence of a presumption in favour of national investigations under Article 18 without specifying that the presumption is in fact a qualified one, relying on three different aspects. The state's request for deferral must be made in writing, must be supported by information concerning the domestic investigations and in line with the principles set out by the Appeal Chamber in the Philippines situation must sufficiently mirror the scope of the Prosecutor's investigation. It is only when the state submits a request that complies with these three elements that the Prosecutor must refrain from exercising jurisdiction.
27. In the context of the situation in the Philippines, the Appeals Chamber comprehensively tackled the issue of who bears the onus to demonstrate that the State is undertaking "relevant investigations," that is, to show there is a congruence between the State's information regarding its inquiries and the cases included in the Prosecutor's Notification under Article 18(1). The OAS Panel of Experts submits that the stipulation in Rule 54 of the Rules that mandates the Prosecutor to furnish "the grounds for the application" under Article 18(2) of the Statute should not be construed as an obligation for the Prosecutor to establish that "the domestic investigations do not adequately reflect the cases outlined in the Article 18(1) Notification."³⁵
28. The OAS Panel of Experts is of the view that this allocation of the burden of proof is in fact not only logical but the only viable way to satisfy the test to determine whether an investigation can proceed since the GoV is the only party that has access to complex multidisciplinary data relating to domestic proceedings that require a normative dimensions of understanding of legislation, jurisprudence, procedures and norms – and empirical dimensions relating to the handling of a case by the criminal and martial courts. As a result, it is the only party able to determine and argue whether and to what extent the cases that it has engaged in reflect the proceedings of the Prosecutor's office.
29. The OAS Panel of Experts further contends that imposing the burden on the Prosecution instead, would imply that the Prosecutor would have to prove a negative- that the GoV's investigations or lack thereof is insufficient to require the suspension of the investigation. This would be inherently problematic and impose a disproportionately onerous burden on the Prosecution because of the absence of a body of evidence to show that no legal steps have been undertaken by the GoV in specific cases.
30. The OAS Panel of Experts is of the view that GoV's burden to provide credible and specific

[cpi.int/sites/default/files/CourtRecords/0902ebd18051fd37.pdf](https://www.cpi.int/sites/default/files/CourtRecords/0902ebd18051fd37.pdf)

³⁵ ICC-01/21-77, The Appeals Chamber, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's Authorisation pursuant to article 18(2) of the Statute to resume the investigation, 18 July 2023, para 106. Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd18051fd37.pdf>

information relating to potential cases that are currently being investigated as established by the Appeal Chamber in the Philippines situation on the basis of *onus probandi imcumbit actori*, is essential as it would otherwise result in situation whereby states could force the ICC Prosecutor to terminate investigations relating to the entirety of a situation, merely because it is engaged in some unspecified number of investigations, however minimal, and has made a written request. The GoV's interpretation of the burden of proof under Article 18(2) would be completely inconsistent with the overall purpose of the statute in that it would result in states that may want to foster impunity to submit deferral requests with vague information and successfully terminate the Prosecutor's ability to act as a last resort to bring accountability to victims.

31. Regardless of the aforementioned points, the GoV does not demonstrate that the decision in question would have been materially influenced, even if the Chamber had made an error in asserting that the burden of proof was assigned to the Appellant. As a result, the OAS Panel of Experts is of the view that the Appeal Chamber should dismiss this ground of appeal.

2. Sub-Ground 1.2

32. Contrary to the assertions made by the Appellant, the Chamber did not commit a legal error in considering the "Second Article 18(1) Notification" as the foundation for its assessment regarding the specificity of the information provided because the notification must establish sufficient parameters with regards to the scope of the criminal conduct, nature and gravity of the acts, but is not required to indicate specific acts or specific people.
33. The notification is issued upon the completion of the preliminary examination by the Prosecutor's Office. Until this juncture, the Prosecutor's Office has not had the opportunity to engage in comprehensive investigative activities. In considering the crime against humanity of torture as an example, there have been a reported at least 289 instances since 2014,³⁶ including numerous deaths in custody, purportedly at the hands of state security forces such as the DGCIM and the SEBIN. The OAS Panel of Experts particularly notes that the Government has operated several facilities known for torture since 2014, including, but not limited to, El Helicoide in Caracas and DGCIM headquarters in Boleíta, which reportedly houses specialised

³⁶ OAS, "Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the possible commission of Crimes Against Humanity in Venezuela". 29 May 2018. Available at: https://www.oceanpaneldeexpertos.org/files/ugd/56aada_41aace2447444ac19771886a432cde02.pdf

torture cells.³⁷ Other infamous detention centres are also mentioned, where the conditions of detention themselves – encompassing the overcrowding of cells, inadequate sanitary conditions, and the violation of detainees' rights – point to severe maltreatment, as corroborated by various international and local non-governmental organisations.³⁸

34. These instances fall squarely within the purview of the Prosecutor, who, while not expected to conduct a comprehensive review and gather initial evidence for these numerous cases, is tasked with providing indicative sample cases that guide the potential scope of the Prosecutor's investigation. It be illogical to expect the Prosecutor's Office to pinpoint those responsible or to ascertain specific facts at this early stage of the investigation. The nature of such investigations inherently requires a progression beyond the preliminary examination before detailed findings and identifications can be reasonably expected from the Prosecutor's Office. Furthermore, the Prosecution bears specific obligations towards victims, which must not be understated or minimized. This responsibility includes careful consideration of the impact of their actions on the victims and the imperative to not jeopardize the future of potential cases that may fall under the jurisdiction of the ICC. The Prosecution's duties extend beyond the immediate scope of investigation, encompassing a broader mandate to uphold the rights and interests of victims while ensuring the integrity of ongoing and future legal proceedings under the ICC.
35. Conversely, the GoV, having had custody of these alleged victims, is fully cognisant of their identities and the specific incidents of criminal conduct reported. This GoV's intimate knowledge of these incidents and its direct oversight over both the victims and the alleged perpetrators negates any necessity for external parties such as the Prosecutor to inform the GoV of incidents that align with the purview of the sample acts identified by the Prosecutor that bear similarity to the known cases and could be treated as potential cases for investigation.
36. The OAS Panel of Experts submits that same applies for most of the other crimes that have been part of the sample of the Prosecutor which are not only of public knowledge because they have been extensively covered in the local and international media due to the brutal nature of their impact of victims. As a result, there was no need to further substantiate or particularise the incidents of a similar nature which the Prosecutor intended to investigate. The OAS Panel of Experts again wishes to reiterate that the GoV had an extensive amount of time to address the accountability for the crimes for instance almost a decade to address crimes that have happened in 2014.

³⁷ Fact Finding Mission on the Bolivarian Republic of Venezuela, Crimes against humanity committed through the State's intelligence services: structures and individuals involved in the implementation of the plan to repress opposition to the Government A/HRC/51/CRP.3. 20 September 2022, para. 121, 122, 305 and 326.

³⁸ See, for example, Fact Finding Mission on the Bolivarian Republic of Venezuela, Crimes against humanity committed through the State's intelligence services: structures and individuals involved in the implementation of the plan to repress opposition to the Government A/HRC/51/CRP.3. 20 September 2022; and IACHR, Situation of human rights in Venezuela, 31 December 2017, Available in Spanish at: <http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf>.

37. The OAS Panel of Experts also notes that a State that considers the information insufficient is entitled to request the Prosecutor for additional information or for further and better particulars; but it does not affect the one-month time limit referred to in Article 18(2), in line with Rule 52(2).
38. Additionally, the OAS Panel of Experts concurs that the Pre-Trial Chamber's decision to utilise the notification as a benchmark for assessing the congruence between the GoV's investigations and those conducted by the prosecution was judicious. This approach provides a clear and objective standard for evaluating the extent to which the GoV's investigative efforts are in harmony with the scope and depth of the inquiries carried out by the prosecution. Such a methodical comparison is essential for ensuring that the investigations on both fronts are aligned in their pursuit of justice and accountability.

3. Sub-Ground 1.3

39. Contrary to the GoV's contention, the Chamber's decision that neither Article 18(2) of the Statute nor Rule 54 of the Rules sets a six-month deadline for the Prosecutor to file a resumption request is legally sound.
40. Firstly, the OAS Panel of Experts is of the view that the open-ended deadline provided for by the Rome Statute is not to be interpreted as giving a blank card to the Prosecutor to file a request for resumption at any point in time but rather to provide for enough flexibility for the review of domestic proceedings, that can be complex in nature and require an accordingly responsive legal implementation. The Panel is of the view that as long as the Prosecutor's Office can demonstrate that the request was dealt with expeditiously, a point that can reasonably be argued in light of the amount of material submitted by the GoV and the fact that the resumption request was filed merely 15 days (after the 6 months deadline suggested by the GoV would have elapsed), the Pre-Trial Chamber did not err in its findings.
41. Secondly, the OAS Panel of Experts is of the view that the argument that Article 18(2) contains a lacuna requiring the inference of a six-month time limit from Article 18(3) is entirely unfounded and should not be misconstrued as a legislative oversight but rather as a deliberate choice to allow flexibility in the pursuit of justice. Not only do these provisions serve different purposes in different contexts, but conflating them would be a misinterpretation of the Statute's intent.
42. The GoV's submission in favour of a six-month deadline under Article 18(2) is inconsistent with the complementarity principle and overlooks the broader objectives of the ICC which consider that the drafters intended the Pre-Trial Chamber's intervention to counterbalance the

Prosecutor's *proprio motu* powers³⁹ and to ensure accountability in the exercise of those powers when deciding whether the GoV's primacy should be overridden for international justice.

43. Furthermore, the OAS Panel of Experts contends that the GoV's introduction of an additional criterion or standard pertaining to the submission of a review beyond the alleged six-month deadline is not only entirely unfounded but also indicative of a concerning trend where the GoV appears to be arbitrarily creating rules and standards as it proceeds.
44. The OAS Panel of Experts respectfully submits that Ground 1 of the Appeal should be dismissed in its entirety since all of the three sub-grounds on which it is premised are unfounded and unsubstantiated. Furthermore, it is the OAS Panel of Experts's position that even if these sub-grounds were to be entertained, they would not have materially altered the outcome of the Pre-Trial Chamber's decision.

B. Ground 2

45. The OAS Panel of Experts submits that the GoV's suggestion that the Pre-Trial Chamber committed an error by exclusively relying on the English translations of a selected 62 case files instead of taking into account additional materials, including i) information concerning domestic investigations that were in Spanish; ii) Prosecution summaries of proceedings or records; iii) the Memorandum of Understanding ('MoU'), concluded between the OTP and Venezuela is unsupported.
46. As previously discussed, the OAS Panel of Experts maintains the stance that the Prosecution's duty, as delineated in the Rome Statute and the Rules of Procedure and Evidence, is confined solely to the conveyance of information received from the GoV. It would indeed be inappropriate for the Prosecution to assume responsibility for translating the material, or indeed summarising them both for logistical and normative reasons. The Prosecution cannot be held accountable for substantially handling or altering the materials submitted by the GoV to the Chamber whether by translation or by way of condensing the information because the Prosecution is an adversarial party to the GoV.
47. Unlike the situations where either the Registry or the Prosecution file update reports on issues pertaining to State cooperation, or when the VPRS translates victim's views, where there is no opposition, in this particular case, if the Appeals Chamber was to construe the rules of procedure and evidence as mandating the Prosecution to translate the material of the GoV, this might have led to a prejudicial impact on the GoV's right to present information to the chamber in an independent and impartial manner.

³⁹ Daniel D. Ntanda Nsereko, Commentary to article 18, in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary*, 3rd Edition. page 843, para. 25.

48. The GoV further contends that it has experienced prejudice due to the Chamber's instruction to concentrate on essential documents, arguing that it could not have anticipated the Pre-Trial Chamber's decision to exclude such summaries and consequently did not prepare translations for all materials initially submitted in the deferral. The OAS Panel of Experts maintains that the GoV was appropriately directed by the Chamber to utilise its judgement in identifying what constitutes essential documents in line with precedents established by the Chambers in previous cases.⁴⁰ Given the paramount probative value of official sources, such as court records and investigative step records, the responsibility for choosing not to prioritise the translation of these official documents rests solely with the GoV. Moreover, since the GoV had the opportunity to request additional time for translation, it alone bears the responsibility for its lack of adequate preparation to engage effectively in the court proceedings.
49. The OAS Panel of Experts additionally posits that there exists an inherent contradiction within the arguments presented by the GoV. On one hand, the GoV endeavours to impose a duty upon the Prosecution to translate documents it has submitted to the Chamber,⁴¹ while on the other, it simultaneously asserts that this concession "cannot be interpreted as an acceptance of responsibility by the RBV for documents filed by another party (namely, the Prosecution) in the record."⁴² This contradiction renders the GoV's stance unsustainable, illogical, and entirely without foundation.
50. The Pre-Trial Chamber's decision not to rely on charts, perpetrator files and lists of cases with limited information which did not attach underlying documentation of the investigative activities taken was entirely appropriate considering that there was no supporting documentation showing that the investigative steps had indeed been undertaken. The pervasive lack of investigations of complaints filed by victims is in fact very much supported by local civil society actors which have interacted with the OAS Panel of Experts and as such it is submitted that the Pre-Trial Chamber correctly exercised its judgment pertaining to this issue.
51. As already mentioned above, the Prosecution did not have to be subjected to the same standard of evidence due to the procedural stage during which this assessment is happening which entails that the specific cases to be investigated need not to have been defined yet by the Prosecution.
52. With regards to the MoU, while the OAS Panel of Experts is of the view that the Pre-Trial

⁴⁰ ICC-02/11-01/12-47-Red, PTC I, The Prosecutor v. Simone Gbagbo, Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo, 11 December 2014, paras 30 and 65; ICC-02/17-196, PTC II, "Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation", 31 October 2022, para. 45 Philippines; and ICC-01/21 OA The Appeals Chamber, Judgment on the appeal of the Republic of the Philippines against Pre-Trial Chamber I's Authorisation pursuant to article 18(2) of the Statute to resume the investigation, 18 July 2023. Available at <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd18051fd37.pdf>

⁴¹ The Bolivarian Republic of Venezuela's Appeals Brief against the Pre Trial I's Decision, paras 2, 12, 14 August 2023, para. 67. Available at <https://www.icc-cpi.int/sites/default/files/RelatedRecords/0902ebd18056e88c.pdf>

⁴² ADD footnote

Chamber should have considered the MoU as contextual information in light of the fact that both parties referred to it, it submits that this would not have affected the decision of the Pre-Trial Chamber since it does not relate to details of ongoing domestic legal proceedings, whether past or ongoing, and the alleged lack of good faith between the parties is irrelevant to the determination by the Pre-Trial Chamber.

53. For this reason, the OAS Panel of Experts submits that the GoV's arguments relating to both information concerning domestic investigations that were in Spanish, the Prosecution summaries of proceedings or records and the MoU should be dismissed.

C. Application for admission of additional evidence

54. In this regard, the GoV has made an application to submit additional evidence relating to the now translated information that was previously submitted to the Pre-Trial Chamber in Spanish. The OAS Panel of Experts is of the view that this request should be rejected since firstly the GoV had ample time to review and translate the material and secondly the GoV submits no convincing reason to explain why it did not provide this material for the Pre-Trial Chamber to conduct its complementarity assessment under Article 18.
55. The OAS Panel of Experts draws attention to the fact that the alleged offences, constituting crimes against humanity, have occurred over a protracted period spanning almost a decade. This duration has provided the Government with ample opportunity to establish and operationalise domestic accountability frameworks, which it is duty-bound to implement for the investigation of these cases. Furthermore, in anticipation of the current proceedings, the GoV had sufficient time and access to appropriate legal counsel to judiciously determine the nature and extent of the material to be submitted. The OAS Panel of Experts contends that the GoV's failure to adhere to procedural requirements and to submit sufficient evidence in the form of official records of ongoing proceedings is indicative of the GoV minimal effort to implement accountability, a strategy that is in the OAS Panel's view merely an attempt to circumvent the intervention of the International Criminal Court, rather than a genuine pursuit of justice.
56. The OAS Panel of Expert is of the view that the Rules of Procedure and evidence do not create a burden on the Prosecution to translate and of the material submitted by the GoV but merely has the duty to transmit it without modification.
57. Further and alternatively, should the Appeal Chamber decide to admit the additional evidence, the OAS Panel of Experts maintains that additional translated material that essentially provide the Appeal chamber with 62 cases in English out of the 124 sample incidents covered by the

ICC has already been assessed by the Office of the Prosecutor⁴³ reaching the conclusion that there is no investigation into patterns of crimes, the domestic proceedings focus on low-ranking defendant, there are no investigations of sexual violence offences and, most of the cases relate to crimes committed in 2017. The additional material could therefore not have led to a different conclusion by the Pre-Trial Chamber.

D. Ground 3

58. The OAS Panel of Experts contends that the GoV's argument regarding the temporal scope of the Prosecution's investigation being limited to cases since 2017 is fundamentally flawed because the GoV was well-informed in advance that the scope of the International Criminal Court's (ICC) investigation commenced in 2014. They were fully aware of the number and extent of the allegations that have occurred since 2014, despite their denial that these constitute crimes against humanity.
59. There are three pertinent issues here: the temporal scope of the referral, the temporal scope of the investigation, and the temporal scope of the incidents. The legal hierarchy of jurisdiction dictates that the temporal scope of the investigation cannot exceed that of the referral, but the temporal scope of the investigation does not necessarily need to correspond exactly to that of the referral. However, in this specific case, not only did the Prosecution's decision to open an investigation align with the referral in considering incidents since 2014, but it also matched the open-ended nature of the referral. The OAS Panel of Experts would like to highlight here that there were reasonable grounds in the form of numerous United Nations⁴⁴ and Inter-

⁴³ ICC-02/18-62-Red, OTP, Public redacted version of "Prosecution Response to the Bolivarian Republic of Venezuela's Appeal against the Pre-Trial Chamber I's 'Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute' (ICC-02/18- 59-Conf-Exp-AnxII)", 13 September 2023, para. 50.

⁴⁴ OHCHR, Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017, Geneva, August 2017, Available at: https://www.ohchr.org/Documents/Countries/VE/HCREportVenezuela_1April-31July2017_EN.pdf pp. 8 ss. In the same vein OHCHR, Human rights in the Bolivarian Republic of Venezuela, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Bolivarian Republic of Venezuela, 5 July 2019. Available at: https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18.docx&ved=2ahUKewjQu6fbsezjAhUaBGMBHd-HDSIQFjAAegQIBRAB&usq=AOvVaw0m3sYu_ifVfI3DEB7w2V9N&cshid=1565033852969, In the same vein, Human Rights Council, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", 16 September 2021, A/HRC/48/CRP.5. Available at: https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/FFMV/A-HRC-48-CRP.5_EN.pdf, Human Rights Council, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", 20 September 2022, A/HRC/51/CRP.2. Available at: <https://www.ohchr.org/es/hr-bodies/hrc/ffmv/index>, Human Rights Council, Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, 18 September 2023, A/HRC/54/57. Available at: https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/sessions-regular/session54/advance-versions/A_HRC_54_57_AdvancedUneditedVersion.pdf

American Commission findings,⁴⁵ local⁴⁶ and international non-governmental organisations' reports,⁴⁷ confirming the existence of the crimes against humanity that could fall under the ICC jurisdiction.

60. Consequently, since the GoV was clearly informed of the scope of the investigation, no adverse issue arises from conflating the temporal scope of the investigation with that of the alleged incidents, as the latter is derived from the former. Furthermore, through numerous communications with the Prosecution, including several visits by the Prosecutor and correspondence with the Office of the Prosecutor, the GoV had ample opportunity to clarify any doubts that may have arisen. This argument appears to be a mere opportunistic attempt to excuse the GoV's disproportionate and inexcusable neglect of the thousands of victims of crimes against humanity since 2014, while continuing to deny the occurrence of these crimes.
61. The argument by the GoV that the Chamber erred in relying on the temporal scope of State referrals to deduce the temporal scope of the incidents under Article 18(1) Notification is legally untenable. The temporal jurisdiction for the incidents under Article 18(1) arises from the scope of the temporal jurisdiction of the investigation itself. Such an argument by the GoV reveals a misinterpretation of the Rome Statute's jurisdictional basis and the concept of the scope of investigation.

E. Grounds 4.1, 4.2, 4.3, 4.4 and 4.5

62. The OAS Panel of Experts opposes the GoV's challenge of the way in which the Pre-Trial Chamber used the complementarity test in considering that the test should be more focus on the acts the Prosecution mentioned in their Article 18(1) notification, without considering specific categories or groups of potential perpetrators. The OAS Panel of Experts also objects

⁴⁵ IACHR, Situation of human rights in Venezuela, 31 December 2017, Available in Spanish at: <http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf>. In the same vein IACHR Annual report 2021, Chapter IV B, available at: <https://www.oas.org/es/cidh/docs/anual/2021/capitulos/ia2021cap4b.venezuela-es.pdf>; IACHR Annual report 2022, available at: https://www.oas.org/es/cidh/docs/anual/2022/capitulos/9-IA2022_Cap_4B_VE_ES.pdf and IACHR Migrants and Refugees from Venezuela, 2023, available at: <https://www.oas.org/es/cidh/informes/pdfs/2023/informe-migrantesVenezuela.pdf>

⁴⁶ Foro Penal, Reporte sobre la represión política en Venezuela, 2020. Available in Spanish at: https://mcusercontent.com/f47d15a453ae761428607dc45/files/1085a3e2-51aa-4721-91fb-47dbf0decf3a/REPORTE_ANUAL_2020.pdf; Foro Penal, Reporte sobre la represión en Venezuela. March 2023. Available in Spanish at: <https://foropenal.com/reportesobre-la-represion-en-venezuela-marzo-2023/>

⁴⁷ Human Rights Watch. Venezuela: Responsabilidad de los altos mandos en los abusos. Las autoridades deberían prevenir y juzgar abusos. 15 June 2017. Available at: <https://www.hrw.org/es/news/2017/06/15/venezuela-responsabilidad-de-los-altos-mandos-en-los-abusos>, Human Rights Watch, World report 2021, Events of 2020. Available at: https://www.hrw.org/sites/default/files/media_2021/01/hrw_world_report_2021.pdf, Human Rights informe 2023 Venezuela available at: <https://www.hrw.org/es/world-report/2023/country-chapters/venezuela>. In the same vein, Amnistía Internacional, Venezuela: Silencio a la fuerza: Detenciones arbitrarias por motivos políticos en Venezuela. 26 April 2017. Available at: <https://www.amnesty.org/download/Documents/AMR5360142017ENGLISH.PDF> and Amnistía Internacional, Informe 2017/2018, La Situación de los Derechos Humanos en el Mundo. Available at: <https://www.amnesty.org/download/Documents/POL1067002018SPANISH.PDF> OAS, "Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the possible commission of Crimes Against Humanity in Venezuela". 29 May 2018. Available at: https://www.oecpaneldeexpertos.org/files/ugd/56aada_41aace2447444ac19771886a432cde02.pdf and OAS, "Venezuela's Institutional Reform Reinforcing Impunity: Capitalizing on The ICC's Complementarity To Avoid Accountability", 16 May 2023. Available at: https://www.oecpaneldeexpertos.org/files/ugd/56aada_4ee37f935c0244ceac1c346d1df92232a.pdf

to the GoV's allegations that Pre-Trial Chamber erred in by requiring a degree of coverage between the GoV's investigations and the acts notified by the Prosecution, especially with regards to the investigation of the contextual elements of crimes against humanity, including discriminatory intent for persecution and insufficient investigation of sexual crimes.

63. The OAS Panel of Experts considers that the Pre-Trial Chamber reached the right conclusion, in line with what was decided in the Philippines Appeal Judgment which involves assessing whether domestic investigations encompass the same individuals and substantially the same conduct as those before the Court. With regards to the degree of symmetry applicable, the OAS Panel of Experts notes that the Pre-Trial Chamber did not impose a disproportionately high standard by requiring an exact symmetry in terms of the specific identities of alleged offenders between the two investigations. Rather, it required that domestic proceedings target at least the same categories of individuals, focusing on higher-ranking rather than direct and lower-ranking potential perpetrators.
64. Concerning the crime against humanity of persecution, the OAS Panel of Expert is of the view that despite the explicit categorisation of persecution as a crime against humanity under Article 7(1)(h) of the Rome Statute, the Venezuelan State has notably failed to implement corresponding domestic legislation to criminalise such conduct fully. The Panel views this omission as a critical factor in perpetuating a comprehensive *de facto* impunity gap for one of the most widespread forms of crimes against humanity committed within Venezuelan borders since 2014. The Panel is also of the view that establishing discriminatory intent -discerned through contextual evidence and legal analysis, focusing on the mental element of the perpetrator's conduct, the intention behind the actions, the elements of the context in which they occurred, the nature of the criminal acts, and the discernible patterns of behavior, is a crucial aspect of such investigations. Such a policy perpetuates impunity for perpetrators and creates a profound sense of distrust on the part of the Venezuelan victims in the GoV's seriousness in addressing accountability.
65. The Panel observes with great concern that the GoV's failure to treat rape as a distinct and serious crime, is a failure that profoundly affects victims' rights and the pursuit of justice. By categorizing rape merely as a form of cruel treatment or an aggravating factor in other crimes, particularly in the context of detention, the GoV's approach significantly undermines the unique and severe impact of rape. This not only diminishes the trauma and violation experienced by the victims but also impedes the delivery of justice by failing to recognize and prosecute rape in its own right. Treating rape as a subsidiary aspect of another crime fails to address the full scope of the perpetrator's criminal behavior and the distinct nature of the violation. This approach hinders the possibility of holding perpetrators fully accountable for the complete range of their criminal actions. In failing to prosecute rape as a distinct crime, the

Government neglects its duty to impose penalties that reflect the true gravity of the offence, thereby contributing to a broader impunity gap. The GoV's failure to address rape as a standalone offence is a grave omission, undermining the principles of accountability and justice, and failing to deter future violations of such a serious nature.

66. Furthermore, the OAS Panel of Experts concludes that the Chamber was correct in finding that the information that the Prosecution shared with GoV - which included specific details about each alleged incident, like who was involved, when, and where - was clear enough for them to know what was expected in their own investigations. As a result, the GoV knew what types of incidents the Prosecutor was looking into and understood that to meet the standards under Article 17 of the Statute, they needed to investigate and prosecute the same considering specific categories or groups of potential perpetrators involved in the types of crimes against humanity highlighted by the Prosecution.
67. The OAS Panel of Experts is also concerned about the failure of the GoV to investigate the contextual elements of the crimes and submits that in this regard the Pre-Trial Chamber was correct in reaching its findings. The pattern of the GoV's domestic investigation and prosecutions that focus exclusively on low level perpetrators fails to align with the incriminating evidence presented in the cases in that it ignores the systematic nature and gravity of the crimes. The Panel concludes that as such the approach of the Public Prosecutor in its charging decisions were grossly inadequate and that the narrow scope of prosecution served to minimise of the extent of systematic involvement of the high level state officials in the alleged criminal activities.
68. The OAS Panel of Experts submits that the absence of investigations and prosecutions regarding the widespread and systematic nature of the crimes does not only result in the GoV's failure to address accountability in a way that is representative of the scope, scale and nature of crimes against humanity that have occurred since 2014 but also a deliberate strategy to ensure that the high-level individuals who have defined and implemented the state policy underlying the widespread and systematic attack against the civilian population will be shielded from justice and facing any consequences for their criminal actions. The OAS Panel is of the view that by treating these all the domestic cases as isolated incidents, in the presence of a backdrop of state policy to commit a widespread and systematic attack against the civilian population, the GoV fails to meet the GoV obligation for accountability against those most responsible for these alleged crimes and is unable to provide for punitive or restorative justice that is reflective of the gravity of the scope of criminality.
69. Furthermore, the Panel has noted with grave concern that while the GoV has failed to reflect the elements of the crimes of the Rome Statute in its domestic legislation, it has instituted procedural roadblocks to prevent investigations against high level perpetrators from happening

for the foreseeable future in the form of a combination of the preliminary trial of merit procedure and the enactment of the Partial Reform Law of the Organic Law of the Supreme Court of Justice. The OAS Panel of Expert has concluded from a review of the legal amendments including for instance the Partial Reform Law of the Organic Law of the Supreme Court of Justice, which reduces the number of Supreme Court Judges from 32 to 20 and extends their term for an additional 12 years in violation of the Venezuelan Constitution that the legislative changes were intended to further entrench the control of the Executive over the Judiciary since the Supreme Court Judges which acts as a gatekeeper to the initiation of investigations and domestic proceedings against high level perpetrators such as the President, the Vice President, the ministers and to the generals and admirals of the National Armed Forces considered as senior officers through the pre-trial examination of merit.⁴⁸

70. As a result, the OAS Panel of Experts is of the view that the Appeals Chamber should dismiss Ground 4.

F. Ground 5

71. The OAS Panel of Experts objects to the GoV's challenge to the Pre-Trial Chamber's assessment of domestic investigations, claiming it focused on irrelevant factors and overlooked important ones. In its decision, the Pre-Trial Chamber followed the Appeals Chamber's guidelines, which require a two-step analysis under article 17(1)(a) of the Statute to decide if a case is inadmissible followed by consideration of the factors relied on by the Prosecutor for its request. These factors included whether the GoV is probing the broader patterns and policies that form the basis of crimes against humanity, and if the domestic proceedings are primarily targeting direct, lower-level perpetrators in the security forces.

72. The OAS Panel of Experts submits that despite the difficulties in comparing ICC at such an early stage and domestic investigations, the Pre-Trial Chamber correctly found that the GoV's proceedings were lacking in that they failed to address high-ranking officials and therefore did not align with the expected scope of the Court's investigation. The GoV has not investigated or prosecuted any of the high-level individuals who have defined and implemented the state policy underlying the widespread and systematic attack against the civilian population.

73. Even though the GoV argues that investigating low-ranking suspects now does not rule out identifying high-ranking suspects later, it is clear that no investigations or prosecutions are

⁴⁸ *The preliminary trial of merit is a mandatory pre-trial procedure provided for in Article 266 of the Constitution and articles 376-381 of the Organic Criminal Code of Procedure that is applicable exclusively in the case of any criminal prosecution against the President of the Republic, or whoever acts on his behalf, as well as of the high officials determined in the Constitution including the Vice President, the ministers and to the generals and admirals of the National Armed Forces considered as senior officials. This pre-trial process is required to be held in the plenary division of the Supreme Court.*

addressing patterns of criminality or the responsibility of higher-level individuals nearly a decade after the incidents. As such taking the current situation into consideration, the OAS Panel of Experts submits that the Pre Trial Chamber reached the correct conclusion.

74. In fact, the OAS Panel of Experts raises serious concerns regarding the absence of high-level accountability within Venezuela's state security apparatus. The cases addressed in the domestic investigations and prosecutions by the GoV focused only on low operatives for their direct participation in incidents, despite evidence suggesting the systematic involvement of high-level perpetrators in crimes against humanity.
75. The OAS Panel of Experts reiterates that by treating these all the domestic cases as isolated incidents, in the presence of a backdrop of state policy to commit a widespread and systematic attack against the civilian population, the GoV fails to meet the GoV's obligation for accountability against those most responsible for these alleged crimes and is unable to provide for punitive or restorative justice that is reflective of the gravity of the scope of criminality.
76. The OAS Panel of Experts contends that the GoV's domestic legal proceedings which it had the opportunity to assess focused narrowly on a limited number of low-level alleged State perpetrators failing to align with the incriminating evidence presented in the cases namely to adequately reflect the widespread, systematicity and gravity of the course of conduct. The OAS Panel of Experts finds that as such the approach of the Public Prosecutor in its charging decisions in specific cases that the Panel considered were grossly inadequate and minimised of the systematic involvement of the high level GoV officials in alleged criminal activities.

G. Ground 6

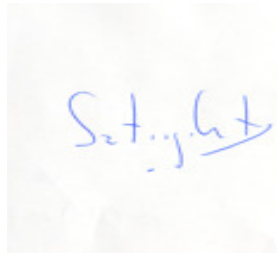
77. The OAS Panel of Experts also disagrees with the GoV's challenge to the Chamber's approach to dismissing certain cases due to 'unreasonable delays'. The GoV asserts that the Chamber erred because of its failure to thoroughly examine if the GoV was truly unwilling or unable to carry out the necessary investigations.
78. The OAS Panel of Experts confirms that the GoV carried virtually no investigation of the alleged crimes before 2021 and understands that the Pre Trial Chamber took note of it but did not rely on this finding to reach its decision. The Pre-Trial Chamber was clear in the wider explanation about the review of the evidence that their decision was primarily based on the actual progress of relevant investigations at the time of review rather than the GoV's willingness or ability to conduct them. Its assessment was confined to the concrete evidence present in the materials supplied by the GoV and not obliged to consider factors such as COVID since the GoV had ample time before the COVID pandemic to have started investigations and prosecutions for a

significant number of cases. Therefore, the OAS Panel of Experts considers that the Pre-Trial Chamber's remarks regarding the periods of inactivity in investigations were not solely confined to the second aspect of the complementarity test, which deals with the GoV's unwillingness or inability. It was deemed that the evidence of inactivity could be pertinent to both facets of the test, thus justifying its inclusion in the assessment.

79. The OAS Panel of Experts notes that the Pre-Trial Chamber reviewing the cases presented impacted by these delays, and substantiated its observations with sufficient reasoning and by referring to specific examples in its analysis.
80. Importantly, the OAS Panel agrees that the Chamber was not obligated to establish specific criteria for judging the extent of the delays, particularly as it did not categorize these delays as "unreasonable" or "unjustified."

III. CONCLUSION

81. In light of the above, the OAS Panel of Experts respectfully requests the Appeals Chamber to dismiss the GoV's Appeal, reject its Additional Evidence Request, and affirm the Pre-Trial Chamber's Decision.



Santiago Canton

Chairperson of the OAS Panel of Experts



Joanna Frivet

Member of the OAS Panel of Experts

Dated this 24th of November 2023