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ANNEX

MISIÓN PERMANENTE
DE LA REPÚBLICA
BOLIVARIANA DE VENEZUELA
ANTE OPAQ-CPI

NV/No. 027/2023

The Permanent Mission of the Bolivarian Republic of Venezuela to the OPCW, the ICC and other International Organizations and Tribunals based in the Kingdom of the Netherlands, presents its compliments to the Pre -Trial Chamber I of the ICC, has the honour to transmit herewith a copy the comunications N. ICC-02/18, dated 20 April 2023, from H.E. Yvan Pinto Gil, Minister of Foreign Affairs of The Bolivarian Republic of Venezuela, with the Reply of the Goverment of the Bolivarian Republic of the Venezuela to the "Prosecution's Response to the "Observation request to resume the investigation" (ICC-02/18-31- Conf- Exp-Anx II).

The Permanent Mision of the Bolivarian Republic Of Venezuela to OPCW, ICC and other International Organizations and Courts based in the Kingdom of the Netherlands, avails itself of this opprtunity to renew the Office of the Register of the International Criminal Court, the assurances of its highest consideration.

The Hague, April 20th, 2023

To:

Office of the Register of the
International Criminal Court
Oude Waalsdorerweg 10, 2597 KA
The Hague.

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PRE-TRIAL CHAMBER I

Before: Judge Peter Kovács, Presidente
Judge Reine Alapini-Gansou
Judge María del Socorro Flores Liera

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

PUBLIC

Reply of the Government of the Bolivarian Republic of Venezuela to the 'Prosecution's Response to the "Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution request to resume the investigation" (ICC-02/18-31-Conf-Exp-AnxII)

Source: Bolivarian Republic of Venezuela

REPÚBLICA BOLIVARIANA DE VENEZUELA
Ministerio del Poder Popular para Relaciones Exteriores
DESPACHO DEL MINISTRO

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. The Government of the Bolivarian Republic of Venezuela ('GoV') hereby submits its reply to the Prosecution's 'Response to the "Observations of the Government of the Bolivarian Republic of Venezuela to the Prosecution's request to resume the investigation (ICC-02/18-30-Conf-Exp-AnxII)", as part of the procedure outlined in Article 18(2) of the Rome Statute and following Regulation 24(5) of the Regulations of the Court, within the time limit set by the Pre-Trial Chamber ('PTC').

2. Inits 3 April 2023 Decision,[1] the PTC decided that '[t]he first issue identified by Venezuela warrants a reply. Indeed, the Prosecution's argument regarding the comparison between the assessment by the Prosecution under Article 53(1) of the Statute and the assessment by a pre-trial chamber under Article 15 of the Statute could not have been anticipated by Venezuela.'[2]

3. This issue is of the utmost importance as it will be examined by the International Criminal Court ('ICC') for the first time. There has never been a referral from States (apart from self-referrals) when the Prosecutor had already initiated a Preliminary Examination ('PE') *proprio motu*. This led the OTP to proceed to the investigation phase circumventing the preliminary judicial control provided for in Article 15(4). As a result, we find ourselves in a procedure under Article 18(2), which the PTC will elucidate, but without a prior decision on the ICC's jurisdiction.

II. SUBMISSIONS

4. In its observations, the GoV argued extensively that the ICC lacks substantive jurisdiction and that the PTC should review its jurisdiction before proceeding further.

5. The GoV underlined notably:

> 36. In the 'Venezuela I' situation, the ICC acts for the first following a referral of several States Parties (without prejudice to what has been explained above). Article 14 does not establish any control to distinguish the actions of States Parties with political interest and legitimate actions unburdened by such interests. It simply allows the referrals of State without any filter as to the intention behind such actions, through which it could be verified, *inter alia*, that crimes within the jurisdiction of the Court have been committed.

[1] Decision on Venezuela's request for leave to reply, ICC-02/18-37, 3 April 2023.
[2] Decision on Venezuela's request for leave to reply, ICC-02/18-37, 3 April 2023, § 11.

> 37. However, when the OTP acts *proprio motu*, such a filter aims to prevent politically motivated referrals and abuse. Article 15(4) provides that the PTC shall determine whether there is effectively a reasonable basis to believe that crimes within its jurisdiction have been committed (Art. 5). This judicial control of material jurisdiction aims to distinguish if the alleged facts appear genuine and fall within the jurisdiction of the Court. This control may only take place when the OTP launches an investigation on its own initiative (*proprio motu*).[3]

6. In its reply, the OTP argues, notably, that:

> 12. Nevertheless, a jurisdictional assessment is still carried out prior to the opening of the investigation. Indeed, a jurisdictional assessment is a prerequisite for the opening of an investigation, whether by the Pre-Trial Chamber under article 15(4) or by the Prosecutor pursuant to article 53(1). Thus, there is no need for this assessment to be repeated under article 18. As such, as in all situations under PE, including Venezuela's, the Prosecution conducted a thorough analysis of the information available over a period of more than three years before it concluded that there was a reasonable basis to believe that crimes within the Court's jurisdiction had been or were being committed. Further, because there had been a referral of States Parties under articles 13(a) and 14, the Prosecution was not required to seek judicial authorisation pursuant to article 15(3). To the extent that the GoV argues that the Prosecution automatically opened the investigation because of the States' referral, this is incorrect. While a referral obliges the Prosecution to exercise discretion upon receipt, it does not oblige the Prosecution to open an investigation automatically. The Prosecution must always assess (independently and objectively) the criteria under article 53(1) before deciding to initiate an investigation. It did so in this situation.

7. The OTP argues that it is irrelevant that the PE was opened *proprio motu* before the States referral. Furthermore, it argues that this fact did not alter the procedure foreseen in the PE, which allows the OTP to initiate an investigation following a State referral without having to seek prior judicial authorisation (Article 15(4)), as for that purpose, the OTP itself would have determined that the criteria of Article 53(1) are met. The OTP, therefore, equates to the judicial review carried out by the PTC under Article 15(4) with the OTP's examination of elements under Article 53, on the understanding that the assessment of jurisdiction is already covered.[4]

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[4] Prosecution's Response to the 'Observations of the Government of the Bolivarian Republic of Venezuela's to the Prosecution request to resume the investigation' (ICC-02/18-30-Conf-Exp-AnxII), ICC-02/18-31-Conf-Exp, 21 March 2023.

III. JUDICIAL REVIEW UNDER ARTICLE 15(4) IS NOT THE SAME AS OTP REVIEW UNDER ARTICLE 53

8. The OTP, in its reply, compares its evaluation under Article 53 as equivalent to the control exercised by the PTC under Article 15(4).

9. However, none of the guarantees and rights attached to a judicial review, as operated by the PTC under Article 15(4), is present in the adoption by the OTP of its decision based on Article 53. Although the same criteria apply in both cases, these two exercises cannot be compared.

10. Judicial review under Article 15(4) of the Statute is carried out by a judicial body, impartial and vertically erected between the parties in dispute, ruling on an adversarial process. However, the OTP's assessment under Article 53 is an analysis by an investigative body, horizontal or inter-partes body in litigation. It does not correspond to an adversarial process but to the judgement of a body exercising the institution of the prosecution.

11. This issue also hinges on the inherent limits found in the very nature of the PE. These limitations include the impossibility of comparing the OTP's assessment under Article 53 of the Statute as equivalent to the judicial review exercised by the PTC under Article 15(4). And these limitations of the PE were correctly underlined by the Report of the Independent Expert under the rubric 'Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report', dated 30 September 2020 ('the Expert Report').[5]

12. As underlined in the Expert Report, whether to open a PE and the procedure to be applied are not regulated by the Rome Statute or the Rules of Procedure and Evidence and are left to the discretion of the Prosecutor.[6]

13. As noted in the report, the absence of a regulatory framework in the Rome Statute has led some to suggest that the Court appears to have established its own form of procedure, one not envisaged by the drafters of the Statute. In the Expert Report, criticism was also levelled at the

[5] Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report, 30 September 2020.
[6] *Ibid.*, § 696.

OTP for using PEs for purposes other than determining whether to initiate an investigation.[7] This was the case with the PE in Venezuela I.

14. Two aspects of the PE are of specific concern in the Expert Report: (i) the absence of a time limit and, therefore, the length of a high number of PE and (ii) the lack of transparency.

15. Regarding the absence of a time limit, the Expert Report noted that 'keeping PEs open for lengthy periods may be perceived as unfair to the states concerned and might reduce their willingness to cooperate with the OTP'.[8] But it is equally unfair to unexpectedly close the PE and open an investigation without the minimally solid basis required by the Statute.

16. As to the lack of transparency, the issue is precisely going to the core nature of the PE, which is held in confidentiality. Announcements of the opening and closing of each PE, annual report to the Assembly of States Parties ('ASP'), situation-specific updates and statements are made by the OTP. Still, the details of the PEs in terms of object, nature and precise scope of the investigations are naturally kept confidential.

17. These critical aspects highlighted by the Expert Report, relating to the shortcomings of the PE, underline the impossibility of considering the assessment carried out by the OTP under Article 53 as equivalent to the judicial control exercised by the PTC under Article 15(4). This would profoundly violate the rights of the defence (in this case, the State, acting on behalf of unidentified persons, but who are the starting point for the investigation) and would be contrary to an impartial administration of justice, as well as contrary to the intentions of the drafters of the Statute.

18. Furthermore, the position put forward by the OTP is contrary to the principle of equality between the parties and a lack of due process. Indeed, should the OTP decide not to initiate an investigation following its review under Article 53(1), the referring State could request the PTC to review this decision under the judicial review of Article 53(3). The PTC could even review ex officio a decision of the OTP not to initiate an investigation under Article 53(1)(c) and (2)(c) when it is based on the interests of justice. In contrast, under the logic put forward by the OTP in its response, a decision to initiate an investigation based on Article 53(1) would not be subject to

[7] *Ibid.*, § 699.
[8] *Ibid.*, § 713.

judicial review under Article 15(4), thus evidencing clear procedural discrimination against the principles of the Statute.

19. Also, it should be recalled that on 14 June 2021, as the PE was still processing, the PTC had already ruled that these arguments raised by the GoV should be resolved in the procedure established in Article 18(2), which is the ongoing procedure.

20. For the above reasons, the OTP's review under Article 53 cannot be compared to a judicial review under Article 15(4). Therefore, the OTP's assumption that there is no need to repeat a jurisdictional assessment in the current Article 18(2) procedure must be rejected because such an assessment for initiating an investigation already exists under Article 53. There is no such jurisdictional assessment under Article 53, as the mandate of the OTP under the PE does not include legal safeguards for such an assessment, as would perform an impartial and independent judicial body.

21. The process suggested by the OTP in its response would create discrimination between similar situations without any justification. States subject to a State referral would remain defenceless, without judicial protection, leading to a violation of the sovereign rights and rights of defence by the OTP, which would assume the role of judge and party, without a judicial body protecting the State which would be submitted to the jurisdiction of the ICC. If this position were accepted, the Chambers would only be able to review admissibility.

IV. PROSECUTORIAL POLICY CONTRADICTS THE PRINCIPLE OF LEGALITY AND SHOULD THEREFORE BE SUBJECT TO JUDICIAL REVIEW

22. The principle of legality should guide the OTP's discretion to open an investigation. However, in practice, the OTP's discretion is driven by the criterion of opportunity guided by strategic and geopolitical motives. Therefore, the jurisdictional control provided for in Article 15(4) was established by the drafters of the Statute to avoid political investigations so that jurisdictional control must be exercised by the PTC in all types of situations, without exception.

23. As explained by Héctor Olásolo,

> Except for the unlimited political discretion that the R.S. seems to have implicitly attributed to the ICC Prosecutor to continue with her preliminary inquiry after the Pre-Trial Chamber, or even the Appeals Chamber, has opposed the initiation of the

> investigation, the drafters of the R.S. have clearly chosen the principle of legality over the principle of political discretion to direct the activity of the Prosecutor at this early stage of the proceedings. This choice is the direct result of the intention of the drafters of the R.S. to avoid, as far as possible, the initiation of politically motivated investigation due to abuse of political discretion by the Prosecutor, and their correlative rejection of a conception of the investigative and prosecutorial functions as tools to implement the specific policies of the States Parties that sit in the Assembly of States Parties.[9]

24. This is confirmed in the Triffterer commentary:

> Despite the use of the mandatory 'shall', which indicates that the principle of legality is applicable, there is a lot of debate as to whether the discretion found in the factors to be considered by the Prosecutor regarding whether or not to initiate an investigation or prosecution of a case, in fact, indicates that the Prosecutor's operation is conducted under the principle of opportunity.[10]

25. The justification for granting the PTC the power to intervene to open an investigation under Article 15(4) lies in the concern of States Parties to avoid political investigations opened by the OTP. [11] However, since the discretion of the OTP is guided by criteria contrary to the principle of legality, the opening of investigations is necessarily political and driven by strategic reasons. It, therefore, needs to be judicially controlled to comply with the spirit of the Statute.

26. In the present situation, the mutation that occurred in the PE (from *proprio motu* to State referral) is the perfect illustration of the political aspect that surrounded the activity of the OTP and led to the opening of a prospective investigation. The subsequent referral of several States (guided by political interests) should, in any case, have been subordinated to the *proprio motu* nature of the process and subjected to the judicial control of Article 15(4) and not mutated to avoid it. It cannot be ignored, as the OTP does in its reply, that the president of one of the referring States (Argentina) denounced the political nature of the referral.[12]

27. In conclusion, to admit, as the OTP claims, that the assessment under Article 53(1) is equivalent to the assessment of the PTC under Article 15(4) would lead to: (i) serious violations of the principle of legality and the principles of equality between parties and due process guarantees;

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[9] H. OLÁSOLO, 'The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?', *International Criminal Law Review*, vol. 3, 2003, pp. 87-150, at 131.
[10] M. BERGSMO, P. KRUGER & O. BEKOU, 'Article 53', *in* O. TRIFFTERER & K. AMBOS, *The Rome Statute of the International Criminal Court: A Commentary*, C.H. Beck/Hart/Nomos, 2016, pp. 1365-1380, at 1368.
[11] Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, 12 April 2019, § 31.
[12] Observations of the Government of the Bolivarian Republic of Venezuela's to the Prosecution request to resume the investigation, § 27.

(ii) it would open the door to the ICC becoming a space for political confrontation between States; and (iii) it would prevent States from questioning the proceedings carried out by the OTP. In fact, it suffices to compare the terse and unmotivated decision adopted by the OTP in this situation to initiate an investigation based on Article 53(1) without having made, for example, among other omissions, any reference to contextual elements, with the detailed and concrete judicial decisions adopted by the PTCs based on Article 15(4) in other situations.

V. THE ASSESSMENT OF JURISDICTION AS A GENERAL PRINCIPLE OF INTERNATIONAL AND NATIONAL LAW OF ANY JUDICIAL BODY IN ITS PROCEEDINGS

28. Finally, it should also be noted that the GoV considers indisputable that it is a general principle of law, both national and international, that any judicial body has to review its own jurisdiction *ex officio* – as a presupposition or jurisdictional requirement prior to any procedural activity –, as such is the case with the domestic courts of any State.

29. In this sense, Article 21 identifies the 'Applicable Law' by the ICC. Apart from the application of its own law (Article 21(1)(a)) and when the legal texts of the Court do not regulate the question, the ICC will also apply 'treaties, principles and rules of international law' (Article 21(1)(b)), which connects the normative sources of the ICC with the sources of public international law (Article 38 of the Statute of the International Court of Justice). And it is undoubtedly one of the 'general principles of the law of civilised nations' (Article 38(3) of the Statute of the International Court of Justice) that judicial bodies, both at the domestic and international level, agree to have jurisdiction to be able to hear a case as a preliminary step to their jurisdictional action.

30. In addition to the above, Article 21(1)(c) also points out that 'the general principles of law derived by the Court from the domestic law of the legal systems of the world, including, where appropriate, the domestic law of the States which would normally exercise jurisdiction over the crime' are sources of law. And it is indisputable that, in the domestic legal systems of states, with regard to the actions of their judicial organs, the review of their jurisdiction is a prerequisite for judicial activity.

31. In this sense, in the Appeals Chamber's pronouncement regarding the Situation in the Democratic Republic of the Congo, the purpose of inducing national legal systems towards the ICC as a source of law was clearly established in Article 21(1)(c):

> Sub-paragraph (c) of paragraph 1 of article 21 of the Statute is a multipolar provision of the law involving in the same spell an amplitude of factors definitive of its subject-matter. Be that as it may, **there is little doubt** about its basic intent that lies in the **incorporation of general principles of law derived from national laws of legal systems of the world as a source of law.**[13]

32. Therefore, every judicial organ, at the domestic level in any State, but also at the international level, must, as a general principle of law, prove its jurisdiction before taking any action (Article 38 of the Statute of the International Court of Justice and Article 21(1)(b) and (c)). This applies both in the area of the international responsibility of the State as well as in the area of individual criminal responsibility.

33. Thus, the OTP's proposal that the PTC should not proceed to review its own jurisdiction, under the protection of Article 15(4), in the context of a judicial action such as the present Article 18(2) proceedings, would imply an extra-jurisdictional action contrary to general principles. Therefore, it is inappropriate to assimilate the OTP's assessment under Article 53 as comparable to the judicial review to be carried out by the PTC on Article 15(4), as the latter is an imperative jurisdictional review as a general principle of law.

34. The reasoning of the GoV is in line with the position of the OTP and the Pre-Trial Chamber I ('PTC I') in the Palestinian situation. In this situation, which resulted from a State referral, the OTP argued that it was possible to request a decision on the Court's jurisdiction before a case existed.[14] For the OTP, deciding under Article 19(3) at this stage of the proceedings was in accordance with the object and purpose of the Statute. The PTC, for its part, established that a decision on a question of jurisdiction under Article 19(3) could be rendered before the opening of a case. For the Court, this follows from 'the rationale reflected in Article 15 of the Statute, according to which it must be ensured that an investigation proceeds on a sound jurisdictional basis

[13] Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, § 24.
[14] Decision on the 'Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine', ICC-01/18-143, 5 February 2021, § 22.

as early as possible, similarly finds application in relation to an investigation resulting from a referral by a State Party under Articles 13(a) and 14'.[15] The PTC I also stated:

> Under article 53(1) of the Statute, the Prosecutor must consider the same factors, including whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed", in deciding whether to initiate a proprio motu investigation or an investigation resulting from a referral by a State Party. In the event the Prosecutor initiates a proprio motu investigation, her jurisdictional assessment is reviewed by a Pre-Trial Chamber under article 15(4) of the Statute. If article 19(3) of the Statute is interpreted to extend beyond a case, the Prosecutor would be similarly enabled to request, if deemed necessary, judicial review of a question of jurisdiction in relation to an investigation resulting from a referral by a State Party. Conversely, a restrictive reading of article 19(3) of the Statute would create an untenable distinction. On the one hand, a proprio motu investigation would proceed on a sound jurisdictional basis from the outset. On the other hand, an investigation resulting from a referral by a State Party would have to be conducted on an uncertain basis if it gives rise to doubts regarding the Court's jurisdiction. These questions would eventually have to be assessed by a Pre-Trial Chamber in relation to an application under article 58 of the Statute, which could lead to the dismissal of a case following a lengthy and costly investigation.[16]

35. In other words, 'on the basis of the "principe de l'effet utile", the interpretation of Article 19(3) of the Statute must avoid rendering it devoid of practical effect'.[17]

VI. RELIEF

36. Given the above, the GoV respectfully REQUESTS the Chamber to:

I. Consider that the judicial review under Article 15(4) is not the same as the review carried out by the OTP under Article 53(1) and should examine its jurisdiction.

II. Determine the lack of substantive jurisdiction of the ICC, given the absence of a reasonable basis for finding that crimes against humanity (Article 7) were committed in Venezuela.

[15] *Ibid.*, § 78.
[16] *Ibid.*, § 79.
[17] *Ibid.*, § 81.

III. In the alternative, declare that the OTP may not undertake any investigation and defer the investigation to the domestic, primary and principal jurisdiction of the Venezuelan State, following Article 18(2).

Respectfully submitted,

Yván Gil Pinto

Minister for Foreign Affairs of the Bolivarian Republic of Venezuela

Dated 20 April 2023.

At Caracas, Venezuela.