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PRE-TRIAL CHAMBER I

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

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

Public

Public redacted version of “Prosecution’s omnibus request in relation to its response to the request by the Bolivarian Republic of Venezuela”, 21 May 2021,
ICC-02/18-7-Conf

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

The Office of the Prosecutor

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INTRODUCTION

1. On 31 May 2021, the Prosecution was formally notified of a request made by the Bolivarian Republic of Venezuela to Pre-Trial Chamber I pursuant to articles 15 and 21(3) of the Rome Statute and regulation 46(2) of the Regulations of the Court (“Regulations”) for the Chamber to exercise judicial control over the preliminary examination in the *Situation in the Bolivarian Republic of Venezuela I* (“Request”).¹

2. The Court’s legal framework does not provide a procedural mechanism for States to make such requests for “judicial control” over the Prosecution’s conduct of the preliminary examination. Rather, the Statute provides specific mechanisms for States to request a Chamber’s judicial control, as may be required, once the Prosecutor has determined whether or not to initiate an investigation into a referred situation. This may happen under article 18 of the Statute, should the Prosecutor initiate an investigation, by enabling any State which would normally exercise jurisdiction over the crimes concerned to seek a preliminary ruling regarding admissibility.² Under article 53(3), a referring State Party (and Venezuela is *not* a referring State Party in this situation) may request judicial review of a decision not to proceed with a situation it has referred. Accordingly, until such time as the Prosecutor announces her decision on an investigation in the *Situation in the Bolivarian Republic of Venezuela I* (“Situation”), the Request is premature and Venezuela lacks the procedural basis and standing to make it. In the circumstances, although the Prosecutor deeply appreciates the fruitful cooperation she has enjoyed with the Government of Venezuela, the Chamber may appropriately decide to dismiss the Request *in limine*, without receiving more detailed submissions from the Prosecution.

¹ ICC-02/18-6-Conf-AnxIV. In accordance with regulation 33 of the Regulations, as the Request was filed on 28 May 2021 after 4pm, it is taken as being notified on 31 May 2021. The Prosecution was also previously copied on the transmission from the Venezuelan authorities to the Court attaching the Request.

² Once a specific *case* is brought before the Court, a State which has jurisdiction over the case may bring an admissibility challenge under article 19 of the Statute.

3. If, however, the Chamber considers that it would be assisted by a response from the Prosecution, the Prosecution makes this omnibus request seeking a maximum of 60 pages to respond to the Request and orders relating to the publicity of the litigation.

4. The Prosecution also notes that the Request has been filed at a time when the Office of the Prosecutor (“Office”) had concluded its preliminary examination of the Situation and was preparing to imminently announce the Prosecutor’s determination as to whether or not to initiate an investigation. Indeed, the Prosecutor’s previous stated commitment that she would aim to reach a final determination on this situation before the end of her term may well have triggered the Request, possibly with the aim to forestall it. Although the Request lacks merit, procedurally and substantively, the Prosecutor nonetheless considers it appropriate, in deference to the Pre-Trial Chamber’s competence which has now been seized, to delay her announcement pending the Chamber’s consideration of the Request. To minimise any such delay, however, the Prosecution proposes to file its response (should the Chamber deem one necessary) by 11 June 2021 (which is within the timeframe ordinarily permitted for responses under the Regulations).³ In order to meet that deadline and to ensure the swift resolution of the Request, the Prosecution respectfully requests the Chamber to issue an expedited ruling on this omnibus request.

5. This filing is without prejudice to the position that the Prosecution will take in any response it files to the Request.

CONFIDENTIALITY

6. This filing is classified as “confidential” pursuant to regulation 23*bis*(2) of the Regulations of the Court as it refers to the contents of the Request which was classified as “confidential” by the Registry. The Prosecution sets out below a request

³ [Regulations](#), reg. 34(2)(b).

for the Chamber to reclassify Venezuela's Request to "public", or in the alternative, to require Venezuela to file a public redacted version of it.⁴ If the Chamber so orders, there will no longer be a basis to maintain this filing as confidential and it may also be reclassified to "public".

SUBMISSIONS

7. Venezuela lacks standing to bring the Request, which has no procedural basis under the Court's legal framework. While Venezuela states that it brings the Request under regulation 46(2) of the Regulations,⁵ this provision only confirms the Pre-Trial Chamber's responsibility for any matter, request or information arising out of the situation assigned to it;⁶ it does not provide States or any other litigant procedural rights beyond those expressly provided for in the Statute and Rules of Procedure and Evidence. Specifically, nothing in the Court's legal framework provides a procedural mechanism for a State to request judicial control over the Prosecution's preliminary examination of a situation, least of all in the manner that Venezuela seeks. By contrast, the Statute does explicitly set out the circumstances in which a State may seek a Pre-Trial Chamber's oversight or judicial control over the Prosecution's assessment, such as in articles 18 and 53(3).⁷ However, in all of these

⁴ See below paras. 12-16.

⁵ Request, pp. 1 ("Request for judicial control submitted to the Pre-Trial Chamber I of the International Criminal Court by the Bolivarian Republic of Venezuela pursuant to Articles 15 and 21.3 of the Statute and Rule 46.2 of the Rules of the Regulations of the Court"), 2 (stating that the request is made "in accordance with the provisions of art. 46.2 of the Regulations of the Court [...]"), 3 ("It is for this reasons that the following REQUESTS FOR JUDICIAL REVIEW on certain points of law are submitted under Article 46.2 of the ICCPR". The Prosecution considers that the reference to the "ICCPR" in this statement must be a typographical error and was intended as a reference to the "ICCR", which the Request defines on page 2 as the "Regulations of the International Criminal Court").

⁶ [Regulations](#), reg. 46(2) provides that: "The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with regulation 45, paragraph 1. [...] The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice".

⁷ [Statute](#), article 18, permitting any State to seek a preliminary ruling regarding admissibility in respect of *proprio motu* investigations or investigations of situations referred by States Parties, and article 53(3), in relation to a request for review by a referring entity of the Prosecutor's decision *not* to initiate an investigation (although in this Situation the Bolivarian Republic of Venezuela is not the referring entity).

circumstances, it is the Prosecutor's decision as to whether or not to initiate an investigation that triggers the possibility for States to intervene.

8. Accordingly, until the Prosecutor announces her decision on the investigation, the Request is premature and Venezuela lacks the procedural basis and standing to make it. Such rights as Venezuela seeks to be afforded are provided elsewhere in the Statute, should the Prosecutor decide to proceed with an investigation, under article 18 of the Statute, and—once a specific *case* is brought before the Court—under article 19. The Chamber may therefore dismiss the Request *in limine*. However, if the Chamber considers it would be assisted by a response from the Prosecution in determining the Request, the Prosecution stands ready to provide one and requests that the Chamber make the following orders regarding the page limit of the response and the publicity of the litigation.

A. Exceptional circumstances justify a response of maximum 60 pages in length

9. If required to file a response, the Prosecution will endeavour to do so concisely, however the 20-page allowance ordinarily provided for responses under the Regulations will be inadequate.⁸ While, for the reasons it will develop further in its response, the Prosecution will argue that Venezuela lacks a procedural basis and standing to make the Request, the Prosecution requires sufficient scope to give proper attention to the merits of the numerous issues raised in the Request. There are therefore exceptional circumstances justifying a response to the Request of no greater than 60 pages in length. This maximum limit is reasonable, given that the Request itself spans 215 pages, and annexes 13 documents. At this length, the

⁸ See [Regulations](#), reg. 37(1).

Request far exceeds even that reserved for trial and appeal briefs and specific applications by States Parties.⁹

10. In addition to the aforementioned issues regarding standing and admissibility of the Request, the Prosecution must also sufficiently respond to Venezuela's three requests for judicial review which raise discrete issues:

- a. The first request—seeking that the Office be required to engage in “constructive dialogue” with Venezuela¹⁰—raises the question of the scope of the complementarity principle during the preliminary examination phase. In addition, the Request raises a number of factual allegations regarding its interactions with the Office¹¹ and makes detailed factual comparisons with other preliminary examinations conducted by the Office;¹²
- b. The second request makes detailed legal arguments regarding the issue of a State Party's rights during a preliminary examination and whether it can invoke rights under article 21(3) of the Statute, as well as the applicability of fairness requirements and human rights protections to Venezuela, as a State, and examines international and human rights case law;¹³ and
- c. The third request—which concerns whether the Prosecution can examine and/or rely upon materials that are allegedly illegally obtained or are “partial, in bad faith or without any evidentiary rigour” —raises numerous factual and legal allegations regarding the information that it believes has

⁹ See [Regulations](#), reg. 38(1) (allowing a maximum of 120 pages for the pre-trial, trial and closing briefs), regulation 38(2) (allowing a maximum of 60 pages for, *inter alia*, requests by States Parties under articles 19(2) and 53(3)(a) of the Statute), regulation 58(3) (allowing a maximum of 100 pages for appeal briefs).

¹⁰ Request, paras. 18-105.

¹¹ See *e.g.* Request, paras. 36-43.

¹² See *e.g.* Request, paras. 47-48, pp. 38-60.

¹³ Request, paras. 106-196. [REDACTED]. See ICC-01/09-78 (Decision on the admissibility of the “Appeal of the Government of Kenya against the 'Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence’”), paras. 18-20 (the materiality of a State's request under article 93(10) to other procedural rights has been previously treated by Chambers of this Court).

been considered by the OTP in the preliminary examination, but which appear to be entirely speculative.¹⁴

11. These are novel and complex issues and allegations which the Prosecution must unpack and place in their context in order to set out the Prosecution's position. While the Prosecution will strive to do so concisely, it nonetheless wishes to respond in a comprehensive, accurate and complete manner in order to best assist the Chamber in its determination of the Request. In the exceptional circumstances of this case,¹⁵ a response of no greater than 60 pages is justified.

B. The litigation relating to the Request should be reclassified to “public” in the interests of publicity

12. The Request and its annexes are classified as “confidential”. For the reasons set out below, there is no basis to maintain this classification, and the Prosecution requests pursuant to regulation 23*bis*(3) that the Request and its related annexes be reclassified to “public”, or, in the alternative, that the Chamber order Venezuela to file a public redacted version of the Request and its related annexes as soon as possible.

13. *First*, Venezuela does not appear to have requested that its filing be treated as confidential.¹⁶ Indeed Venezuela has itself designated the Request as “Non Confidential” on its title page.¹⁷

14. *Second*, Venezuela's own actions since transmitting the Request to the Registry are inconsistent with maintaining the confidentiality of the litigation. On 27 May 2021, the Venezuelan Attorney General's office published a written press release from the Attorney General announcing that Venezuela has filed a request for judicial

¹⁴ Request, paras. 197-462.

¹⁵ See ICC-02/04-01/15-1825 (“[Ongwen Page Extension Decision](#)”), para. 10 (where the Appeals Chamber acknowledged that the novelty and complexity of issues may constitute exceptional circumstances warranting an extension in the number of pages of a response).

¹⁶ [REDACTED].

¹⁷ Request, p. 1.

cooperation and a request for judicial control to the Pre-Trial Chamber.¹⁸ This announcement was followed by a series of tweets from the Attorney General's Office detailing the allegedly different treatment received by Venezuela compared to other situation countries during preliminary examinations.¹⁹ In addition, the Attorney General has given a 40-minute press conference relating to the Request.²⁰

15. *Third*, given the attention that Venezuela has sought to draw to the Request, it is in the interests of transparency and fairness that the litigation be conducted openly so that the Prosecution's position can be fully communicated to the public.

16. Should the Chamber grant the requested order regarding the publicity of the Request, there will no longer be a basis to maintain *this filing* as confidential. The Prosecution therefore requests in that event that the Chamber to also reclassify this omnibus request to "public" and to make any other ancillary orders it considers necessary in the interests of publicity of this litigation.

C. Request for an expedited decision

17. The Request and the resulting litigation have already delayed the Prosecutor's announcement on the conclusion of the preliminary examination of this Situation, which the Office had been preparing to announce imminently. The Prosecutor observes that she is not legally bound to restrict the scope of her independent action in reaching relevant determinations on situations under preliminary examination, and indeed must be vigilant against possible efforts to stymie that process. Nonetheless, the Prosecutor also considers that due deference to the Chamber's competence, which has now been seized, militates against proceeding to announce her conclusion prior to the Chamber's consideration of the Request. However, to

¹⁸ Twitter, available at <https://twitter.com/MinpublicoVE/status/1397968299376455681>, 27 May 2021 ("#COMUNICADO El Ministerio Público presentó dos acciones ante la Corte Penal Internacional para asegurar el debido proceso y el derecho a la defensa de Venezuela, en el marco del Examen Preliminar del CASO VENEZUELA I. #27May")

¹⁹ Twitter, available at <https://twitter.com/MinpublicoVE>, 27-29 May 2021.

²⁰ Youtube, available at <https://www.youtube.com/watch?v=mufDZcZXk1M>, 27 May 2021.

minimise the delay, the Prosecution confirms it stands ready to file its response (should the Chamber deem one necessary) by 11 June 2021 (which is within the timeframe ordinarily permitted for responses under the Regulations).²¹ In order for the Prosecution to meet that deadline and to reduce any further delays to the Prosecutor's announcement concerning her determination on the preliminary examination, the Prosecution respectfully requests the Chamber to issue an expedited ruling on this omnibus request.

CONCLUSION AND RELIEF SOUGHT

18. The Prosecution respectfully requests the Chamber to make the following orders on an expedited basis:

- a. permit the Prosecution to file a response to the Request of no longer than 60 pages by 11 June 2021, if the Chamber deems that it would be assisted by a response;
- b. reclassify the Request and its related annexes to "public", or, in the alternative, order Venezuela to file a public redacted version of the Request and its related annexes as soon as possible;
- c. reclassify this filing to "public"; and

²¹ [Regulations](#), reg. 34(2)(b).

- d. make any other ancillary orders the Chamber deems necessary in the interests of the publicity of this litigation.



Karim A. A. Khan, Prosecutor

Dated this 23rd day of July 2021
At The Hague, The Netherlands