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Corrigendum to
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ICC-02/18-30-AnxII-Red

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No: **ICC-02/18**
Date: **27 March 2023**

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

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)'

with Annexes 4, 5, 6, 7 and 8 PUBLIC and Annexes 1, 2, 3, 9 to 13 CONFIDENTIAL *EX PARTE* only available to the Office of the Prosecutor

Source: Bolivarian Republic of Venezuela

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

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Counsel for the Defence

Legal Representatives of the Victims

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INTRODUCTION

1. The **Government of the Bolivarian Republic of Venezuela** ('GoV') hereby submits its **observations** as part of the procedure outlined in **Article 18(2) of the Rome Statute**, within the time limit set by the Pre-Trial Chamber ('PTC').

2. The GoV would like to make clear from the outset that it rejects all the assertions made by the Office of the Prosecutor of the International Criminal Court ('OTP') in its request of 01/11/2022, in which the capacity and willingness of its legislative institutions and executive, and the alleged lack of independence and impartiality of its judicial authorities are questioned.

3. Grounded on a solid legal basis, the observations demonstrate that:

   i. the preliminary examination ('PE') in the situation in the Bolivarian Republic of Venezuela ('Venezuela I') experienced a mutation, as it was originally initiated *proprio motu* but then followed by a politicised and irregular States referral that exempted it from the **authorisation** provided for in Article 15(3) and 15-(4) (paras. 35-48);

   ii. there is a **clear lack of material jurisdictiou** regarding the alleged acts (Art. 5) (paras. 49-115);

   iii. the situation is **inadmissible** due to a lack of complementarity, gravity, and interest of justice (Arts. 17 and 53) (paras. 116-183); and

   iv. finally, the OTP's conduct of the PE as well as the transition to the investigation phase are marked by **breaches of due process** (paras. 184-195).

4. **The PE in this situation uuderweut a mutation**. First initiated by the OPT *proprio motu* on 08/02/2018, it was then the object of a referral made by six States on 27/09/2018. As a result, the OTP was able to avoid the judicial control of the PTC established in Article 15(3) and 15(4). As outlined below, the six States in question, clearly acting politically against the GoV, intended to facilitate the conclusion of the PE in a precarious, terse and legally unjustified manner and thereby allow the opening of the investigation. By circumventing the aforementioned judicial control, there was no analysis of the fundamental elements that ought to have been considered by a Chamber, such as the existence of material jurisdiction (Art. 5) or the fulfilment of admissibility criteria (Arts. 17 and 53). As a result, the GoV respectfully submit the Chamber should consider these elements at this point in accordance with the procedure of Article 18(2).

5. The first element that the PTC should review as part of the procedure referred to in Article 18(2) relates to **whether the Court has material jurisdiction**, i.e. whether or not there is actually a reasonable basis to consider that crimes within its jurisdiction have been committed (Art. 5). In this regard, the GoV hereby shows that crimes against humanity (Art. 7) were not committed, not even superficially, within its jurisdiction. As set out below, the contextual elements of crimes against humanity and the underlying types of the offence are both inexistent. In 2014 and 2017, Venezuela experienced demonstrations and public disorder during a period of domestic upheaval and riots with evident damage to essential properties, which were controlled in a legitimate and proportionate manner by the State's security. The harmful results for victims, not all of which are attributable to State officials, cannot be categorised as crimes against humanity.

6. Subsidiarily, the second aspect that the PTC should review concerns **admissibility**, based on the criteria provided for Articles 17 and 53. Firstly, the principle of complementarity (Art. 17(1)(a), (b) and (c)) does not apply, as national jurisdictions are active and provide a sufficient and effective jurisdictional response to the specific cases of police abuse that may have been committed during the demonstrations that took place during the aforementioned period. While ample information on the above has been made available to the OTP, it has been used negatively to the detriment of the domestic jurisdiction.

7. The PTC shall therefore confirm with a brief analysis of the domestic jurisdiction that the scope of cases investigated by the GoV – the primary jurisdiction cover those that the OTP could potentially investigate – the complementary jurisdiction –which is evidenced by the information transmitted. In addition, **the criteria of gravity is not satisfied** (Art. 17(1)(d)) since only individual and isolated incidents of police abuse are recorded, all of which are subject to investigations and/or proceedings in Venezuela. Moreover, there is no legal basis to invoke the existence of an **interest of justice** (Art. 53).

8. The last element the GoV brings up under Article 18(2) concerns the **violations of due process and judicial guarantees** in the incomplete PE and the irregular transition to the investigation phase. As set out below, the GoV argues there is clear uncertainty in the time period established by the OTP in the 'Venezuela I' situation, which generated evident legal uncertainty throughout the PE i.e. the fact that the OTP did not conclude the PE in accordance with the criteria specified in the legal texts; or the fact that irregularities marked the notifications, deadlines and extensions of information, including the one established to regulate the procedure of Article 18(2).

which we have now reached. Another section is dedicated to the issues that have arisen during the situation concerning the 'burden of proof'.

9. Finally, the present observations on the OTP's request from 01/11/2022 ends with several requests. The GoV specifically asks the Chamber to find that it does not have material jurisdiction since there is no reasonable basis to consider that crimes against humanity were committed in Venezuela (Art. 7); alternatively, to find that the 'Venezuela I' situation is inadmissible according to Articles 17 and 53; and finally, in the absence of the above, to reject the request made by the OTP on 01/11/2022 and, therefore, defer the investigation to the State. Similarly, the PTC is requested to rule on several breaches of due process that may have occurred during the PE and the current investigation phase.

BACKGROUND

10. On 08/02/2018, the OTP opened a PE *proprio motu* to consider the situation in Venezuela from at least April 2017, resulting in the present process identified as 'Venezuela I'.[1]

11. Subsequently, on 27/09/2018, the International Criminal Court ('ICC' or 'the Court') received a referral from a group of States Parties, namely Argentina, Canada, Colombia, Chile, Paraguay, and Peru, regarding the situation in Venezuela since 12/02/2014.[2]

12. On 02/10/2020, the OTP submitted a special questionnaire (OTP 2020/019873) to the Permanent Mission of the GoV in order to ascertain information relevant to 'Venezuela I'. [REDACTED].

13. Between 30/11/2020 and 29/10/2021, the GoV submitted eight reports (30/11/2020,[3] 04/02/2021,[4] 30/04/2021,[5] 06/07/2021,[6] 18/05/2021,[7] 09/06/2021,[8] 14/06/2021[9] and, 29/10/2021[10]) to set out in detail the progress made in the relevant judicial proceedings. Likewise, it also provided copies of documentation relating to the corresponding judicial proceedings.

[1] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.
[2] Notification. Referral from a group of six States Parties pursuant to article 14(1) of the Rome Statute regarding the situation in Venezuela ICC-02/18-1-AnxI, 27 September 2018.
[3] VEN-OTP-0001-1250 (ENG); VEN-OTP-0001-0007 (SPA).
[4] VEN-OTP-0001-2028 (ENG); VEN-OTP-0001-1378 (SPA).
[5] VEN-OTP-0001-2133.
[6] VEN-OTP-0001-2978.
[7] VEN-OTP-0001-3799.
[8] VEN-OTP-0001-5144.
[9] VEN-OTP-0001-5035.
[10] VEN-OTP-0001-5267.

14. On 14/12/2020, the OTP concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed in Venezuela, at least since April 2017. The OTP announced its plan to conclude the PE in the first half of 2021 in order to determine whether there was a reasonable basis to initiate an investigation.[11]

15. On 25/05/2021, unaware of the content of the PE, the GoV introduced a written submission to the PTC following Regulation 46(2) of the Regulations of the Court. It alleged potential breaches of Articles 15 and 21(3). The GoV requested the Chamber to review complementarity, access to evidential material, and sources of evidence. On 14/06/2021, the Chamber dismissed the application. Still, it noted the willingness of the GoV to cooperate with the OTP and made clear that this cooperative approach was consistent with the principle of complementarity. The PTC also condemned the 'silence' of the OTP and urged it to engage in 'constructive dialogue' with Venezuela.[13]

16. On 25/05/2021 and 14/07/2021, several requests were submitted, according to Articles 93(10) and 96 and Rule 194 of the Rules of Procedure and Evidence. The GoV asked the OTP to share the material and relevant evidence that it had obtained in connection with the PE, in order to further the collaboration. The OTP responded that the requests had been received and would be considered; however, the requested items have not yet been produced.[14]

17. Her successor, Karim A. A. Khan QC, sat down with the Venezuelan authorities on 28/07/2021 and announced that he would travel to Venezuela to determine whether to uphold his predecessor's decision.[15] The GoV requested more information from the OTP, which agreed to issue the draft decision of Prosecutor Bensouda. However, no such action was taken until 19/10/2021 [REDACTED]. During his visit, Prosecutor Khan surprisingly announced his decision to open an investigation without waiting for the results of the EP.[16] The Prosecutor and the

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[11] Report on Preliminary Examination Activities 2020, 14 December 2020, § 202.
[12] 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, ICC-02/18-6-Conf-AnxIV, 28 May 2021.
[13] Decision on the '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', ICC-02/18-9-Red, 14 June 2021.
[14] OTP/INCOM/VEN/VEN-I/JCCD-evstpt
[15] OTP2021-015856.
[16] The Prosecutor of the International Criminal Court, Mr Karim A.A. Khan QC, commences official visits to Colombia and Venezuela, 25 October 2021.

President of the GoV[17] signed a Memorandum of Understanding (MOU)[18] in which both parties undertook to promote mutual dialogue and cooperation.[19]

18. The decision to proceed to the investigation phase was notified on 16/12/2021 to the GoV and the other States Parties in a meagre six-page document.[20]

19. On 03/01/2022, in order to exercise its right to deferral provided for in Article 18(2) and Rule 52(2), the GoV asked for additional information from the OTP concerning the acts to be investigated. The State was indeed still in procedural 'blindness'. The OTP responded by producing two documents. The first document reiterated its desire to engage in dialogue with a view to 'ending impunity for–and thereby helping to prevent–criminal acts within the jurisdiction of the ICC'.[21] The other was addressed to the Permanent Mission of the GoV and comprised two annexes with additional information including a list of reports of international bodies on which its findings were based (Annex I), and a very basic list with the names of alleged victims of the corresponding crimes (Annex II).[22]

20. By a written submission of 15/04/2022, the GoV exercised its right of deferral under Article 18(2), which has been notified to the PTC.[23]

21. The GoV subsequently transmitted five further communications on 14/06/2022,[24] 04/07/2022,[25] 26/07/2022,[26] 16/09/2022[27] and 14/10/2022,[28] which informed the OTP of the progress made in the domestic judicial proceedings. A communication was sent to the OTP on 21/04/2022, underlining that the procedure referred to in Rule 54 had yet to be undertaken before announcing the application to the PTC.

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[17] OTP2021/019381.
[18] Memorandum of Understanding between the Bolivarian Republic of Venezuela and the Office of the Prosecutor of the International Criminal Court., 3 November 2021.
[19] ICC Prosecutor Mr Karim A.A. Khan QC, opens an investigation into the Situation in Venezuela and concludes Memorandum of Understanding with the Government, 5 November 2021.
[20] OTP VEN1/SPs/Notif/1612217KK.
[21] OTP 2022/000764.
[22] OTP2022/000764/TL/OEA-rev; Annex I to OTP2022/000764; Annex II to OTP2022/000764.
[23] ICC Prosecutor, Karim A.A.Khan QC, notifies Pre-Trial Chamber I of a request from the Bolivarian Republic of Venezuelato defer his investigation under article 18(2) of Rome Statute and confirms intention to apply for authority to resume investigations, 21 April 2022. *See* also: Notification of the Bolivarian Republic of Venezuela's deferral request under article 18(2) of the Rome Statute, ICC-02/18-17, 20 April 2022.
[24] VEN-OTP-0002-7119; VEN-OTP-00002001.
[25] VEN-OTP-0002-9653; VEN-OTP-00001984.
[26] VEN-OTP-00000081 to VEN-OTP-00000582.
[27] VEN-OTP-00000590 to VEN-OTP-00001966.
[28] VEN-OTP-00002066 to VEN-OTP-00002801.

22. On 01/11/2022, the GoV was formally notified that, on the same date, the OTP had filed an application to resume its investigation pursuant to Article 18(2).[29] Meanwhile, the Office of Public Counsel for Victims ('OPCV') filed on 03/11/2022 a request to submit observations regarding the request filed by the OTP.[30] The PTC invited the GoV to present any additional observations by 28/02/2023 at the latest.[31]

I. PROCEDURAL FRAMEWORK. FROM THE SITUATION *PROPRIO MOTU* TO THE REFERRAL BY SIX STATES: THE CIRCUMVENTION OF THE REQUIREMENT TO SEEK A JUDICIAL INVESTIGATION AUTHORISATION PURSUANT TO ARTICLE 15 OF THE STATUTE

23. Among the forms of activation of the Court provided for in the Statute (Art. 13), the only one for which judicial control is imposed, through an authorisation to investigate by the PTC, is the Prosecutor's *proprio motu* action (Art. 15(3) and 15(4)). In the case of Security Council referrals (Article 13(b)) – which are subject to political control in the form of a right of veto –and in the case of States referrals (Art. 13(a) and 14), no such authorization is required. The OTP can thus move from the PE to the investigation phase without any prior judicial authorization from the PTC.

24. The drafters of the Statute believed that the referrals provided for in Articles 13(a) and 14 would not have an operational effect, as it is the case before some human rights bodies.[32] States Parties referrals may be considered an ineffective and politically biased method of triggering an investigation. So far, there have only been 'self-referrals' by States, a formula that was not foreseen by the authors of the Statute.[33]

25. In addition, it should be noted that the PE of the situation 'Venezuela I' began on 08/02/2018 at the initiative of the OTP.[34] This means that if the OTP considered that the

[29] Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2), ICC-02/18-18, 1 November 2022.
[30] OPCV Request to Submit Observations on the Prosecutor's Request to Resume the Investigation under Article 18(2) of the Statute, ICC-02/18-19, 3 November 2022.
[31] Order inviting observations and views and concerns of victims, ICC-02/18-21, 18 November 2022.
[32] W.SCHABAS, *An Introduction to the International Criminal Court* (6th ed.), Cambridge, Cambridge University Press, 2020, at 154.
[33] P. GAETA, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?',*Journal of International Criminal Justice*, vol. 2, n° 2, 2004, pp. 949-52, at 949.
[34] *See* the declaration of the OTP: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018.

requirements of that phase had been met, it could subsequently proceed to the investigation phase in order to examine specific cases. To do so, it would first need to conclude the PE based on a comprehensive set of findings. More importantly, it would need to seek the PTC's authorisation to initiate an investigation into specific cases (Art. 15(3) and 15(4)).

26. In reality, the PE in the 'Venezuela I' situation had been opened *proprio motu*, **strategic referral presented by six States on 27/09/2018** in relation to the 'Venezuela I' situation (Arts. 13(a) and 14) was made as part of an irregular and strategic procedural manoeuvre.[35] Therefore, the PE was distorted, the OTP was no longer required to seek the PTC authorisation and was able to move directly to the investigation phase of specific cases directly.

27. Several meetings had previously been convened by the Organization of American States ('OAS') involving a 'panel of experts' [REDACTED] with the explicit aim of presenting a State referral to the OTP. In this regard, it should be noted, as a contextual element, that Venezuela has been hit by *coups d'Etat*, as evidenced since 2013. Most notably, from the arrival of President Donald Trump to the US Presidency in which a multiform offensive was launched against Venezuela to try to provoke the fall of the president of the GoV (rewards for his capture) and a change of regime. In the words of President Trump himself, 'all options are on the table', which evidently included the domestic and international judicial route. In short, the strategic referral of those States was clearly politically motivated (*lawfare*). Conservative parties governed Canada, Paraguay, Chile, Argentina, Colombia, and Peru at that time. Alongside other countries such as the United States, they entertained animosity towards the GoV. This is evidenced by the extremely severe sanctions imposed in those areas and persisting today, which are the subject of the EP in the 'Venezuela II' situation. Evidence of their politically motivated actions came to light when a progressive government was subsequently elected in one of those countries, Argentina. Its referral was withdrawn,[36] and its president, Alberto Fernández, explicitly stated that the ICC should not be used for political purposes.[37] Others [REDACTED] are pending to do so, with statements to that effect [REDACTED].[38] In this context, the exact words of President Fernández were:

> The Trump years were dreadful for Latin America. It was during that period that the Lima Group was established. When we came to power, we withdrew from the Lima Group. I

[35] *See* the declaration of the OTP: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, onthe referral by a group of six States Parties regarding the situation in Venezuela, 27 September 2018.
[36] A. ALVARADO, Argentina se retira de demanda presentada por el Grupo de Lima contra el gobierno de Venezuela ante la Corte Penal Internacional, *CNN*, May 2021.
[37] Presidente argentino pide a CPI no ser usada políticamente por caso Venezuela, *Swissinfo*, 5 November 2022.
[38] [REDACTED]

> received the president of the International Court of Justice [sic] a few days before and asked him not to politicize the International Court of Justice. Do you know why I asked him that? Because the Lima group had made a complaint against Venezuela in the International Court of Justice – a complaint from which we had withdrawn Argentina's support when we were elected. And I asked him to bear in mind that the complaint was part of a manoeuvre orchestrated by Donald Trump, to the detriment of a Latin American country, and that it was made solely for political reasons, which were to marginalize and ostracise the Bolivarian Republic of Venezuela.[39]

28. Evidence that the referral was politically motivated is provided in the communication published by the US State Department on 31/03/2020, titled 'Democratic Transition Framework for Venezuela'. In that document, the US expressly offers to withdraw the referral made in 2018, provided that Venezuela renounces the exercise of its sovereign rights. Indeed, according to point 10 of that communication:

> A Truth and Reconciliation Commission is established with the task of investigating serious acts of violence that occurred since 1999, and reports to the nation on the responsibilities of perpetrators and the rehabilitation of victims and their families. The Commission has five members, who are selected by the Secretary General of the United Nations with the consent of the Council of State. The AN adopts amnesty law consistent with Venezuela's international obligations, covering politically motivated crimes since 1999 except for crimes against humanity. **Argentina, Canada, Colombia, Chile, Paraguay, and Peru withdraw support for the International Criminal Court referral.**[40]

29. The 'Venezuela I' situation is an example of the instrumental use of criminal law for political purposes. This is shown by the systematic actions of some mainstream media, social media (especially Twitter) [REDACTED], which are having a hugely influential impact on the ICC in this situation, according to the accompanying expert analysis [REDACTED][41] These actions are being directed by a perfectly structured 'community' of identifiable agents coordinated to act with a double political objective: i) create the impression that crimes against humanity are being committed in Venezuela while drawing attention away from, or minimising, institutional reforms and; ii) seek to influence the OTP by interacting with it and maintaining relationships that compromise its impartiality.[42]

30. As a result, the GoV considers that the referral of those six States occurred in clear abuse of the powers conferred to States Parties by the Statute to refer situations to be investigated. It was

[39] Participación junto a Evo Morales de la 5ª Feria del Libro Nacional y Popular, *YouTube*, 4 November 2022 [free translation].
[40] United States Embassy in Panama, Democratic transition framework for Venezuela, 31 March 2020.
[41] [REDACTED]
[42] [REDACTED]

filed with the unambiguous intention of facilitating the OTP's decision to initiate an investigation in breach of PE requirements. Most importantly, it allowed the OTP to circumvent the obligation to seek the authorisation of the PTC (Arts. 15(3) and 15(4)).

31. The new State referral scenario allowed the OTP to quickly and loosely conduct a precarious EP without examining in-depth some fundamental elements, such as whether crimes within the Court's jurisdiction were committed (Art. 5), as well as admissibility considerations such as complementarity (Art. 17(1)(a), (b) and (c)) or gravity (Art. 17(1)(d)), and interests of justice (Art. 53). More substantively, the OTP bypassed the procedure requiring the PTC to review these elements before an investigation could be initiated. As such, given the unilateral power of the OTP, the reports submitted by the GoV were neither duly considered nor analysed, as shown in its request dated 01/11/2022.

32. The GoV hereby raises all these questions based on its previous request submitted on 25/05/2021.[43] In its subsequent ruling issued on 14/06/2021, the PTC opened the door to a review of these matters during the present procedure under Article 18(2):

> The chamber notes that Article 18 of the Statute is applicable both when the Prosecution initiates an investigation pursuant to Articles 13 (c) and 15 and when 'a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be reasonable basis to proceed with an investigation'. This norm provides the procedural opportunity to submit the type of challenges that are being introduced by Venezuela. However, for this provision to become available, the Prosecutor must have determined that there would be a reasonable basis to proceed with an investigation. This step is to date missing with respect to the Situation. It may or it may not be taken in the future. However, at this juncture, Venezuela's request is premature and must be rejected 'in limine'.[44]

33. In addition to being mentioned in the cited PTC's decision, this possibility is largely endorsed by the doctrine. SCHABAS, for instance, affirms that the assessment of the elements of admissibility (Arts. 17 and 53) must be made in such cases where the investigation phase has been initiated based on a referral from States that circumvented the authorisation of an investigation by

[43] 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, ICC-02/18-6-Conf-AnxIV, 28 May 2021.

[44] Decision on the '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', ICC-02/18-9-Red, 14 June 2021.

the PTC following Article 15(3) and 15(4).[45] Furthermore, issues of admissibility (Arts. 17 and 53) are of such an unavoidable character that, even in situations and cases arising from referrals of the Security Council, admissibility filters have been applied by the OTP.[46] This demonstrates their imperative burden.

34. Thus, the PTC decision of 14/06/21 confirms the need to clarify the issues of jurisdiction and admissibility at that point in the procedure. The PTC should therefore issue an opinion on: **the existence of material jurisdiction or, in other words, on the existence of a reasonable basis to believe that crimes within the jurisdiction of the Court (Art. 5) have been committed, as outlined in *SECTION II*; and, in the alternative, on issues of admissibility relative to complementarity (Art. 17(1)(a), (b) and (c)), gravity (Art. 17(1)(d)) and interest of justice (Art. 53 and Rule 55(2)), as set out in *SECTION III*.**

II. ABSENCE OF CRIMES WITHIN THE JURISDICTION OF THE COURT (Article 5)

II.A. Material jurisdiction

35. The GoV argues the ICC lacks material jurisdiction. The OTP failed to show that the facts outlined in its request of 01/11/2022 amount to crimes against humanity (Art. 7).

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.

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

[45] 'Article 18 of the Rome Statute [...] contemplate challenges based on admissibility only in the case of a State Party referral or a case based upon the Prosecutor's *proprio motu* authority' *in* W. SCHABAS, *An Introduction to the International Criminal Court* (6th ed.), Cambridge, Cambridge University Press, 2020, at 182.

[46] Regarding the situation in Darfur, the OTP considered that, even though it was referred by the Security Council, it had to analyse the elements of admissibility. *See* UN Doc. S/PV.5216, 29 June 2005, at 2; UN Doc. S/PV.5321, 13 December 2005, at 3; UN Doc. S/PV.5459, 14 June 2006, at 4; UN Doc. S/PV.5589, 14 December 2006, at 2.

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*).

38. The GoV considers that the PTC must review and conclude the fulfilment of Article 5 requirements regarding the ICC's material jurisdiction (the existence of a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed). As with Article 15, this control and assessment should take place at the current stage of the procedure under Article 18(2). This is because the 'Venezuela I'situation began with a PE initiated *ex oficio* by the OTP (on 08/02/2018), but the legal framework subsequently changed following the strategic referral of six States Parties (on 27/09/2018). Moreover, the majority doctrine holds that 'if there is no jurisdiction, the Court cannot proceed. The Court must address the issue of jurisdiction even if the parties do not raise it'.[47]

39. The justification for granting the PTC the power of intervention to open an investigation under Article 15 lies in the concern of States Parties to avoid political or frivolous investigations:

> [...] The mechanism is designed to set boundaries to and restrain the discretion of the Prosecution acting proprio motu, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments.[48]
>
> [The Chambers have interpreted the standard] to be 'construed and applied against the underlying purpose of the procedure in article 15(4) which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility'.[49]

40. In determining whether there is a reasonable basis to proceed under Article 53(1), the OTP and the PTC should consider whether:

> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
>
> (b) The case is or would be admissible under article 17; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

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[47] W.SCHABAS, *An Introduction to the International Criminal Court*(6th ed.), Cambridge, Cambridge University Press, 2020, at 181.

[48] 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, § 32. *See* also Corrigendum to the Decision on the Authorisation of an Investigation in the Situation in the Republic of Côte d'Ivoire Pursuant to Article 15 of the Rome Statute, ICC-02/11-14-Corr, 15 November 2011, § 21.

[49] 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.

41. For that reason, in this case, the PTC must consider whether there is a reasonable basis to believe that crimes within its jurisdiction have been committed and to examine whether: (i) they fall into one or more of the categories under Article 5 (*ratione materiae*); (ii) they comply with the temporal requirements under Article 11 (*ratione temporis*); and (iii) they meet the alternative jurisdiction criteria under Article 12 (*ratione personae*). This is made explicit by the PTC in the ***situation in the Republic of Côte d'Ivoire***.[50]

42. Indeed, the standard of proof under Article 15(4) is low. It is simply necessary to establish whether there are indications that the facts could fall within the material competence of the Court. Regardless, the PTC should be convinced that there is at least a reasonable basis to believe that the contextual elements of the crimes and the underlying offences that the OTP wishes to investigate are met. This preliminary determination of alleged facts and elements of the crime in which those acts are subsumed is the minimum requirement for judicial control under Article 15. As noted by Judge Hans-Peter KAUL:

> [...] that the investigation may bring about the missing pieces of his determination under article 53(1) (a) of the Statute is not enough. It is even more crucial to determine that there is a reasonable basis to believe that the contextual elements of crimes against humanity appear to be present as it is this decisive element which triggers the jurisdiction of the Court, elevates the acts concerned, which otherwise would fall exclusively under the responsibility of national jurisdictions, to international crimes and sets aside considerations of State sovereignty.[51]

43. Besides the PTC's statutory obligation to determine whether it has material jurisdiction, it is a substantial prerequisite to legitimise the procedural activity of any judicial body as a principle.

44. According to Article 21, the ICC shall apply *et al*:

> [...] (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
>
> (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not

[50] Corrigendum to the Decision on the Authorisation of an Investigation in the Situation in the Republic of Côte d'Ivoire Pursuant to Article 15 of the Rome Statute, ICC-02/11-14-Corr, 15 November 2011, § 22. *See* also Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-01/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 9 November 2017, § 31.

[51] Decision on the Request for Authorisation to Initiate an Investigation in the Situation in the Republic of Kenya under Article 15 of the Rome Statute, ICC-01/09-19-Corr, 31 March 2010, § 18.

inconsistent with this Statute and with international law and internationally recognized norms and standards.

45. Article 21(1)(b) provides that the primary source for interpretation purposes is the Statute itself, the Elements of Crimes and the Rules. This does not imply that the ICC should not apply the principles and rules of international law as well as the domestic law of States, where a gap exists in its legal system.

46. The ICC frequently makes specific reference to the principle of effectiveness:

> [...] the Court, in line with other international tribunals, has referred multiple times to the principle of effectiveness in rejecting any interpretation that would nullify or render inoperative a provision of the Statute. In the case of The Prosecutor v. Jean-Pierre Bemba Gombo, Pre-Trial Chamber III noted that:
>
> [A] teleological interpretation which is mirrored in the principle of effectiveness and based on the object and purpose of a treaty means that the provisions of the treaty are to be 'interpreted so as to give it its full meaning and to enable the system [...] to attain its appropriate effects', while preventing any restrictions of interpretation that would render the provisions of the treaty 'inoperative'.[52]

47. ICC judges should interpret the provisions of the Statute in an 'effective' way, i.e.:

> Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.[53]

48. In this respect, following Article 21(1)(c), the PTC must rule on the alleged lack of material jurisdiction, given the facts set out in the OTP's request of 01/11/2022.

II.B. On the material jurisdiction: absence of a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed

II.B.1. The contextual elements of the crime against humanity: there is not even a hint of 'a widespread or systematic attack directed against any civilian population, with knowledge of the attack'

49. The GoV **denies, in the strongest possible terms**, that crimes against humanity within the jurisdiction of the ICC (Art. 7) were committed on its territory during the (highly mutable) periods identified by the OTP, specifically in February 2014 and between 30/03/2017 and 30/07/2017.

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[52] Decision on the Prosecution's Application under Article 19(3) of the Statute for a determination of the Court's territorial jurisdiction in Palestine, ICC-01/18-143, 5 February 2021, § 105, *citing Bemba*, Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, ICC-01/05-01/08-388, 3 March 2009, § 36.

[53] South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 21 December 1962, I.C.J. Report, 1962, p. 319, at 336.

50. In 2014 and 2017, a wave of violent protests broke out in Venezuela, [REDACTED]. Their purpose was to ramp up the political pressure to force the resignation of the President and the rest of the authorities. Most of the demonstrations turned violent and were characterised by the use of firearms and other potentially lethal weapons, such as Molotov cocktails, mortars and homemade weapons, against civilians or security officials.

51. Between 12/02/2014 and 25/05/2014, a total of 971 street protests were recorded, of which 85%(829) were violent and 15% (142) were peaceful. [REDACTED].[54]

52. Furthermore, between 30/03/2017 and 31/07/2017, a total of 7,493 demonstrations were recorded, of which 5,878 were violent (78.45%) and 1,615 were peaceful (21.55%). [REDACTED]

- Attached as **Annex No. 4** are the official statistics relating to the victims of violence in that period. Also attached as **Annex No. 5** is a collection of photographs which depict the violence perpetrated by the protesters against law enforcement agencies.

53. [REDACTED]. The Government nevertheless implemented measures to assist all victims, regardless of their political motivation. Measures for reconciliation and peace were also adopted, such as alternative penalties to imprisonment for 235 individuals.

54. The violent demonstrations that broke out during that period plunged the country into a complex situation. When the country's security forces (police and military) had to re-establish public order, they made legitimate use of force proportionate to the violence of the situation.

55. The GoV does not dispute there may have been excesses and, even the commission of unlawful acts by public officials. In this context, the domestic judicial authorities addressed each and every complaint filed by citizens who contended that their rights had been violated during the demonstrations.

56. [REDACTED][55]

57. For that reason, the facts described above **cannot be classified as 'crimes against humanity'** (Arts. 5(b) and 7), which is why the PTC's control is necessary.

58. In fact, the referral made by the six States Parties focuses on the civil unrest that occurred in Venezuela in 2014 and between 30/03/2017 and 30/07/2017. These protests [REDACTED] led to the death of many public security officials and civilians, and caused considerable damage to property, as indicated above. Yet, in respect of events of a greater gravity, such as those which

[54] [REDACTED]
[55] [REDACTED]

occurred in the Republic of Chile in October 2019, the OTP decided not to initiate a PE, despite stating:

[REDACTED].[56]

- Attached as **Annex No. 6** is the resolution of the OTP in relation to Chile, as well as an analysis of the demonstrations and unrest that those countries faced.

59. In addition, the domestic legislation of the referral countries is not, strictly speaking, in line with international obligations, and the jurisprudence of their courts has not always satisfied the requirements of binding international standards on persecution.

- Attached as **Annex No. 7** is an analysis of the legislation and case law of the countries that presented the referral.

60. One case highlights the lack of jurisdiction of the ICC: the case of [REDACTED] as a perfect illustration of its claims. On [REDACTED], during the Prosecutor's investigation, the aforementioned citizen declared that he has not been tortured. [REDACTED][57]

61. Crimes against humanity are not an immutable category, but the product of a complex, and not always clear, crystallisation of a customary norm that has survived to the present day and which is expressly codified with its underlying elements and types in Article 7.

62. It is important to note that, to be categorised as crimes against humanity, the underlying acts must be committed as part of a 'widespread or systematic attack' directed against 'any civilian population' pursuant to a 'State or organisational policy', and always with intent, i.e., 'with knowledge of the attack'. These contextual elements, established under Article 7, are practically constant, with some exceptions, through the evolution of the definition of a crime against humanity. This is why it can be affirmed that these elements are part of customary law, even outside of Article 7.

63. Article 9(1) identifies the Elements of Crimes as a fundamental document that 'shall assist the Court in the interpretation and application of articles [...] 7 [...]'.[58] The actual purpose of the

[56] [REDACTED]
[57] [REDACTED]
[58] Precisely, the Elements of Crimes were adopted because of criticism from some States regarding the mere enumeration of the criminal offences in the Statute, together with a few definitions, and the problem this would pose for the principle of legality. *See* A. GIL GIL, 'Los Crimenes contra la Humanidad y el Genocidio en el Estatuto de la Corte Penal Internacional a la luz de los "Elementos de los Crímenes"', *in* K. AMBOS (coord.), *La Nueva Justicia Penal Supranacional*, Valencia, Tirant Lo Blanch, 2002, at 65-157. In relation to the principle of legality in international criminal law, *see* M. OLLÉ SESÉ, *Justicia Universal para Crímenes Internacionales*, Madrid, La Ley, 2008, at 161-183; M. JAÉN VALLEJO, *Legalidad y extraterritorialidad en el Derecho penal internacional*, Madrid, Atelier, 2006,

'Elements of Crimes' is to set out and specifies as accurately as possible the objective and subjective elements of every crime to guarantee that the principle of legality is duly respected.[59]

64. The ICC's case law indicates in various decisions, such as in the ***situation in the Republic of Côte d'Ivoire***, the ***Mudacumura case,*** the ***Katanga case*** or the ***Bemba case***, that the criteria of an 'attack'against the civilian population must be interpreted as directed *principally* against the civilian population, as opposed to the civilian population being subjected to a coincidental or accidental attack.[60] Moreover, as noted by the doctrine, case law has interpreted that the attack should be directed against an unprotected and defenceless civilian population. This feature cannot be applied to the context of violent demonstrations where security forces were deployed to maintain public order. As asserted by WERLE and JESSBERGER, '[i]n some of their early decisions concerning membership in a civilian population, the Tribunals have thus rightly concentrated on the victims' need for protection, which resulted from their defencelessness against governmental, military, or any other form of organized violence'.[61]

65. In the 'Venezuela I' situation, as the national security forces simply restored order, their actions can hardly be qualified as an attack directed *principally* against the civilian population. The GoV asserts that if there were violations of citizens' rights, they were isolated. It is, in any case, impossible to affirm that they followed a common pattern, bearing in mind that the possible perpetrators have been subject to domestic criminal law.

66. Similarly, in respect of the 'attack' against the 'civilian population', PTC II considered in the ***Bemba case*** that:

> The Chamber notes that the phrase 'attack directed against any civilian population' is further developed in the definition provided for in article 7(2)(a) of the Statute, which reads: 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

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at 25-43. *See* also, ECtHR, Decision as to the admissibility of Application No.23052/04 by August Kolk, Application No.24018/04 by Petr Kislyiy, against Estonia, 17 January 2006.

[59] E. GADIROV, reviewed by R. S. CLARK, 'Article 9', *in* O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, London, C. H. Beck, Hart, Nomos, 2008.

[60] Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC-02/11-14-Corr, 15 November 2011, §§ 32-33. *See* also *Mudacumura*, Decision on the Prosecutor's Application under Article 58,ICC-01/04-01/12-1-Red, 13 July 2012, § 20; *Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-0107-3436-tENG, 7 March 2014, § 1104; *Bemba*, Judgment pursuant to Article 74 of the Statute, ICC-01/05-01/08-3343, 21 March 2016, § 154.

[61] G. WERLE & F. JESSBERGER, 'Crimes Against Humanity', *in Principles of International Criminal Law* (4th ed), Oxford, Oxford University Press, 2020, at 381.

> This article specifies that the two cumulative elements, i.e. the multiple commission of acts and the attack being pursuant to or in furtherance of a State or organizational policy to commit such attack, should also be present. Thus, the Chamber has to explore these additional legal requirements.
>
> The legal requisite of 'multiple commission of acts' means that **more than a few isolated incidents or acts** as referred to in article 7(1) of the Statute have occurred. The requirement of 'a State or organizational policy' implies that the attack follows **a regular pattern**. Such a policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. **The policy need not be formalized**. Indeed, an attack which is planned, directed or organized –as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[62]

67. Having established the deficiency of a State policy, it is relevant to note that Article 7 stipulates that a crime against humanity refers to an attack that must be 'widespread or systematic', a concept that has been defined specifically by the case law of *ad hoc* and hybrid tribunals and by the ICC itself.

68. According to the settled case law of the *ad hoc* tribunals, it is established that any attack against the civilian population, described as being widespread or systematic, effectively excludes isolated or sporadic acts.[63]

69. This interpretation has also been upheld in ICTR case law. For instance, in the ***Akayesu case***, the ICTR held that the concept of 'widespread' is connected to massiveness, repetition or an action undertaken on a large scale, collectively, with serious effects and affecting a multiplicity of victims. The term 'systematic' refers to the existence of a pre-conceived plan or policy.[64]

70. The interpretations of *ad hoc* tribunals were confirmed by the Special Court for Sierra Leona (SCSL). In the ***Moinina Fofana and Allieu Kondewa case,*** it was held that the expression 'widespread or systematic attack' cannot be used to characterise isolated or sporadic acts.[65]

71. The ICC maintained this prevailing case law. In the ***Katanga case***: 'the adjective "widespread" adverts to the large-scale nature of the attack and to the number of targeted persons, whereas the adjective "systematic" reflects the organised nature of the acts of violence and the improbability of their random occurrence'.[66] Therefore, according to the definition given by the

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[62] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, §§ 79-81.
[63] ICTY, *Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997, § 646.
[64] ICTR, *Akayesu*, Judgement, ICTR-96-4-T, 2 September 1998, § 580. *See* A. ZAHAR & G. SLUITER, *International Criminal Law*, Oxford, Oxford University Press, 2007, at 157-196.
[65] SCSL, *Fofana and Kondewa*, Appeals Chamber Judgment, SCSL-04-14-A, 28 May 2008, § 307.
[66] *Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, § 1123.

ICC, 'widespread and systematic' are not synonymous. 'Widespread' refers to the large-scale nature of the attack, while 'systematic' refers to the organised nature of the attack. In all cases, the attack cannot involve random or isolated acts.[67]

72. In the ***situation in the Republic of Côte d'Ivoire***, PTC III narrowed down even further. It defined the term 'widespread' regarding the investigation authorisation following Article 15, as follows:

> [S]hould be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims. This element refers both to the large-scale nature of the attack and the number of victims. The assessment is not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts. Accordingly, a widespread attack may be the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude".[68]

73. Meanwhile, in decisions on the authorisation of an investigation under Article 15 in the ***situation in the Republic of Kenya*** (PTC II) and the ***situation of the Republic of Côte d'Ivoire*** (PTC III), the Chambers interpreted the term 'systematic' in the following terms:

> [T]he 'organized nature of the acts of violence and the improbability of their random occurrence'. An attack's systematic nature can 'often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis'. The Chamber notes that the 'systematic' element has been defined by the ICTR as (i) being thoroughly organized, (ii) following a regular pattern, (iii) on the basis of a common policy, and (iv) involving substantial public or private resources, whilst the ICTY has determined that the element requires (i) a political objective or plan, (ii) large-scale or continuous commission of crimes which are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political and/or military authorities.[69]
>
> [T]he term 'systematic' refers to the 'organized nature of the acts of violence and the improbability of their random occurrence'. An attack's systematic nature can 'often be expressed through patterns of crimes', in the sense of non-accidental repetition of similar criminal conduct on a regular basis.[70]

74. In the ***situation in the Republic of Kenya***, the judges further precise that the expression 'widespread or systematic' evidently aims 'to exclude isolated or random acts from the notion of crimes against humanity'.[71]

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[67] *Katanga*, Judgment pursuant to article 74 of the Statute, ICC-0104-01/07-3436-tENG, 7 March 2014, § 1123.
[68] Corrigendum to the Decision on the Authorisation of an Investigation in the Situation in the Republic of Côte d'Ivoire Pursuant to Article 15 of the Rome Statute, ICC-02/11-14-Corr, 15 November 2011, § 53.
[69] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, § 96.
[70] Corrigendum to the Decision on the Authorisation of an Investigation in the Situation in the Republic of Côte d'Ivoire Pursuant to Article 15 of the Rome Statute, ICC-02/11-14-Corr, 15 November 2011, § 54.
[71] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr, 31 March 2010, § 94.

75. In its Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission ('ILC') had already interpreted the term 'systematic' as referring to 'a plan or a systematic policy'.[72] In other words, according to the ILC, 'the important thing about this requisite' of systematic nature, is 'to exclude a random act which was not committed as part of a broader plan or policy'. The ILC adds that for 'inhumane acts [to] be committed on a large scale', they must be directed 'against a multiplicity of victims'.

76. In the ***Ongwen case***, the term 'systematic' is seen as reflecting the organised nature of criminal acts and improbability of their accidental or isolated occurrence.[73] In the ***Harun case*** the judges held that the systematic nature might be inferred from the analysis of the characteristics of the attack.[74] In view of the above, a systematic and planned attack, as part of a government policy, cannot be inferred, from the response of the Venezuelan security forces during the disturbances in the country. Any specific violations of protesters' rights that may have occurred are merely accidental or isolated incidents processed by the criminal justice system.

77. Furthermore, it should be noted that 'systematic', as a concept, is clearly distinguished from the existence of a particular 'policy' pertaining to the commission of acts considered as against humanity.[75] Therefore, it cannot be claimed that a 'preconceived plan or policy' had been formulated, since the State structure itself, through its supreme authority, President Nicolás MADURO, as well as other public authorities, made repeated public appeals for the restoration of order, requesting that the violence in the streets be reversed in the most peaceful way possible. Therefore, if any law enforcement officer committed an excessive use of force on those dates, it was not part of a systematic plan of commission. In addition, the victim has the protection of the national criminal authorities. For example, during the 2017 events, the President of the Republic stated:

> A number of reports were filed yesterday alleging an abuse of authority by some officials. I have ordered an immediate investigation. Any official who is found to have physically abused a citizen will be punished. Abuse will not be tolerated on my watch! But I also call for an investigation into and the punishment of the incitement of a coup, the burning of a

[72] 'Draft Code of Crimes against Peace and Security of Mankind with Commentaries', *Yearbook of the International Law Commission*, 1996, Vol. II, Part 2, pp.17-56, p. 45.
[73] *Ongwen*, Trial Judgment, ICC-02/04-01/15-1762-Red, 4 February 2021, §§ 2681-82.
[74] *Harun and Abd-al-Rahman*, Decision on the Prosecution Application under Article 58(7) of the Statute, ICC-02/05-01/07-1-Corr, 27 April 2007, § 62.
[75] *Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436-tENG, 7 March 2014, § 1111.

> school and acts of permanent aggression against the National Guard and Police Force. May there be balance in justice.[76]

78. The Head of State also reiterated that firearms are banned at demonstrations:

> Firearms are banned! [...] whenever a case is detected, and some have been, the person responsible [the official] is immediately apprehended and turned over to the authorities.[77]

79. In turn, the Minister of Defence, Vladimir PADRINO LÓPEZ, was explicit in his message to the military officers engaged in maintaining public order:

> If anyone deviates from the State's official position, fails to respect the sanctity of human rights, violates human rights or behaves unprofessionally, they will be held accountable for their acts. If a member of the National Bolivarian Armed Forces is ever found to have used excessive force, the State always takes appropriate action.[78]

80. Moreover, case law stresses underlying acts which, by definition, shall be committed in a 'widespread or systematic' manner, shall be part of a State 'policy'. For that reason, under Article 7(2)(a) 'attack directed against a civilian population' means 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. The Elements of Crimes clarify that 'the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack'.[79] The corresponding footnote (Footnote 6) explains that 'the existence of such a policy cannot be inferred solely from the absence of governmental or organizational action'.

81. Similarly, concerning the existence of a 'policy' by a State, in its decision on the confirmation of the charges in the ***Katanga and Ngudjolo Chui case***, PTC I took the view that:

> [T]he requirement of an **organisational policy** pursuant to article 7(2)(a) of the Statute ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic

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[76] Statements by the President of the Bolivarian Republic of Venezuela, Nicolás Maduro Moros, during the graduation ceremony of the first graduating class of secondary education teachers of the Simón Rodríguez Micro Mission, Bicentennial Plaza of the Miraflores Palace, Caracas, 11 May 2017 *in* Maduro en graduación de profesores educ media micromisió n Simón Rodríguez, *YouTube*, 12 May 2017, [free translation].

[77] Press conference with national and international media by the Head of State in the Ayacucho Hall of the Miraflores Palace, Caracas, 22 June 2017 *in* Maduro: En ninguna condición se usan armas de fue go en manifestaciones, *Telesur*, 23 June 2017, [free translation].

[78] Declaraciones del Ministro del Poder Popular para la Defensa durante el Ciclo de conferencias en el Teatro de la Academia Militar, Fuerte Tiuna, Caracas, 6 June 2017, [free translation].

[79] Elements of Crimes, Article 7.3, *in fine*.

> attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organized– as opposed to spontaneous or isolated acts of violence – will satisfy this criterion.[80]

82. In this respect, Judge Geoffrey HENDERSON, in his arguments on the patterns of criminality, noted 'the weakness of the Prosecutor's arguments in relation to the existence of patterns of criminality', highlighting in particular:

> 1888. [...] The main flaw in the Prosecutor's argument is that no attempt has been made to demonstrate that the 24 incidents she relies upon to prove the existence of a pattern are representative of what happened in Abidjan during the post-election crisis. Anyone can claim the **existence of a pattern** by cherry-picking examples that fit preconceived characteristics and ignoring all other information that does not conform. The burden is upon the Prosecutor to show how and why she selected the incidents relied upon in her Response.
>
> [...]
>
> 1890. Since the **policy** relates to an alleged attack against a civilian population in the sense of article 7(2)(a) of the Statute, only those instances where article 7(1) crimes were allegedly committed can be considered for the existence of the relevant pattern(s). Instances where other behaviour vis-à-vis pro-Ouattara civilians is evidenced, such as extortion, stealing, or less serious forms of physical ill-treatment, may be relevant for determining the existence of discriminatory intent and potentially persecution. However, the fact that sums of money may have been or were extorted from many people to cross roadblocks does not qualify as relevant evidence in support of the existence of a policy to kill, rape, and/or injure civilians.
>
> 1891. It should be noted also that, in order to establish the existence of a pattern covering a prolonged period and a large area, what matters is not so much the total number of victims as the number of incidents. For example, when during a singular attack on a particular location three people are killed and seven injured, however tragic this is, this would only count as one instance for the purposes of the existence of a pattern of physical violence. If, on the other hand, there are ten different incidents where a single individual is killed or injured, this counts as ten instances of a potential pattern.
>
> 1892. Based on these considerations, it is absolutely clear that, even if all of the Prosecutor's allegations concerning the charged and uncharged incidents were accepted at face value, still no reasonable trial chamber could find that there existed a veritable pattern of criminal conduct that could support an inference that a policy to commit such crimes must have been in place. Indeed, according to the Prosecutor, the relevant period lasted 137 days and the relevant location was Abidjan. According to the Prosecutor, Abobo alone held 1.5 million inhabitants and the entire city's population probably totalled more than 4 million. The Prosecutor did not provide any information as to how many of these belonged to the relevant categories according to her case theory, but it is probably safe to assume that there were at least 1 million Muslims, northerners and foreigners combined. On the side of the alleged

[80] *Katanga*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 14 October 2008, § 396. In the same sense, *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009,§ 81.

perpetrators, it is also not entirely clear how many members of the different regular and irregular forces were in Abidjan at the time, nor what their respective weaponry was. Nevertheless, it is beyond doubt that there were several thousand-armed individuals in Abidjan during the relevant period. According to the Prosecutor, all these individuals belonged to organisations that were controlled by the accused. These thousands of so-called 'pro-Gbgabo forces' had ample opportunity to commit violent crimes against the relevant civilian population(s) of Abidjan. Yet, even if the Prosecutor's alleged total number of victims (528) was fully accepted and were all counted as single incidents, this would still only represent 0.052% of the relevant potential victim population.

[...]

1894. The point here is not that there is a minimum threshold in terms of the implementation rate of the alleged policy. Nor is there any issue of principle with the idea that a policy can be inferred from its alleged implementation. The point is purely an evidentiary one. In this case, the Prosecutor is asking us to infer the existence of the Common Plan/policy, inter alia, from the claimed pattern of crimes. This is not a viable inference when the 'pro-Gbagbo forces' ignored the alleged policy more than 90% of the time. This is especially the case when those forces were, as alleged by the Prosecutor, an 'organised and hierarchical apparatus of power' that was characterised by automatic compliance with superior orders.

1895. Again, this is not a matter of reducing the legal definition of an attack against a civilian population to a specific ratio. This would clearly be inappropriate. However, it would equally be irresponsible to ignore basic realities. No reasonable trial chamber could conclude on the basis of these numbers that there was an attack against a civilian population in Abidjan during the post-election crisis. And it is even less possible to infer that there was a Common Plan, much less an actual policy, to commit killings and rapes on this basis.

1896. This conclusion in no way diminishes the scale of suffering that was endured by the civilian population. However, grave though the excesses of the 'pro-Gbgabo forces' may have been, based on the evidence that was presented to the Chamber, it is not possible to characterise them as a deliberate attack against a civilian population.[81]

83. In addition, following Judge Hans-Peter KAUL in his dissenting opinion concerning the ***situation in the Republic of Kenya***, the requirement of the existence of a State 'policy' could not be regarded as part of the 'systematicity'. For him, the existence of a designed, planned and hierarchical state 'policy' for the commission of the acts must instead be understood as the fundamental and determining element of the crime against humanity.[82] Along these lines, the PTC

[81] *Gbagbo*, Public Redacted Version of Reasons of Judge Geoffrey Henderson *in* Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit prononcée and on the Blé Goudé Defence no case to answer motion, ICC-02/11-01/15-1263-AnxB-Red, 16 July 2019; *Gbagbo*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, and on the Blé Goudé Defence no case to answer motion, ICC-02/11-01/15-1263, 16 July 2019.

[82] Dissenting opinion Judge Hans-Peter Kaul *in* Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, § 63.

even dismissed the charges of crimes against humanity in the ***Mbarushimana case*** due to insufficient evidence that a 'policy' has been formulated to that end.[83]

84. The OTP has also previously closed PE into crimes against humanity (Art. 7) because the State in question had not formulated a 'policy' to this end. In the ***situation in Honduras***, the OTP stated as follows: 'While it appears that the de facto regime developed a plan to take over power and assert control over the country, the design of this plan and implementation of measures pursuant to this plan did not entail or amount to a policy to commit an attack against the civilian population in question within the meaning of article 7 of the Statute'.[84]

85. The most specialised doctrine adopted similar readings of Article 7. BASSIOUNI indicated that: 'It is understood that "policy to commit such attack" requires that the State or organization actively promote or encourage such an attack against a civilian population'.[85] WERLE and JESSBERGER, basing their analysis on the case law, assert that: '[t]he term [policy] is instead interpreted in a broad sense as a planned, directed, or organized crime, as opposed to spontaneous, isolated acts of violence'.[86] In other words, as specified by CRYER *et al*, '[t]he random acts of individuals are not sufficient'.[87] This is precisely what happened in Venezuela during those months of demonstrations: a legitimate response that could occasionally have given rise to spontaneous and isolated abuses which, moreover, have been investigated, prosecuted and condemned when appropriate in internal judicial proceedings.

86. Moreover, by no means can a State 'policy' exist when the State itself – through the specialised unit of the Public Prosecutor's Office– investigates potential abuses by officials against private individuals. The Human Rights Directorate (*Dirección de Derechos Humanos*) (attached as **Annex No. 8** is the organisational chart and functions of this task force), is assigned to investigate potential acts of abuse committed by public officials against civilians. It institutes criminal proceedings when civilians file complaints, launches investigations and petitions the judicial authorities to pass sentences on individual acts of abuse. A State 'policy' would have contained a specific order not to process victims' complaints filed against agents of the authority

[83] *Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10-465-Red, 16 December 2011, § 263.
[84] Situation in Honduras: Article 5 Report, October 2015, §§ 103, 125.
[85] C.M. BASSIOUNI, *Crimes Against Humanity. Historical Evolution and Contemporary Application*, Cambridge, Cambridge University Press, 2011, at 365.
[86] G. WERLE & F. JESSBERGER, 'Crimes Against Humanity', in *Principles of International Criminal Law* (4th ed.), Oxford, Oxford University Press, 2020, at 388.
[87] R. CRYER, D. ROBINSON & S. VASILIEV, *An Introduction to International Criminal Law and Procedure* (4th ed.), Cambridge, Cambridge University Press, 2019, at 234.

who took part in such an effectively structured and planned 'policy'. It can be shown that nothing of the kind occurred in Venezuela.

87. Furthermore, the National Executive (*Ejecutivo Nacional*) has designed a whole regulatory framework to ensure that all actions of State security agencies are carried out in strict compliance with human rights. For example, the National Executive issued a set of rules in 2011 (*Normas sobre la Actuación de los Cuerpos de Policía*) to govern the actions of police forces in their various political divisions, whenever they are deployed to maintain public order, social peace and civility in public meetings and demonstrations.[88] Likewise, a set of rules was issued in 2015 to govern the actions of the National Bolivarian Armed Forces (*Normas sobre la Actuación de la Fuerza Armada Nacional Bolivariana*) whenever they are deployed to maintain public order, social peace and civility in public meetings and demonstrations.[89] Both sets of rules require strict adherence to human rights and expressly prohibit any conduct that may violate the right to personal integrity.

88. Besides the abovementioned elements, a crime against humanity, according to Article 7, must be perpetrated 'with knowledge of such an attack', i.e with intent. Undeniably, during the disturbances in Venezuela in 2014 and between 30/03/2017 and 30/07/2017, the sovereign response to restore public order showed that there was no State plan or policy in place. Further proof is provided by the action of the Head of the State, President Nicolás MADURO, as well as other authorities, who frequently called for public order to be maintained without violating human rights in any way whatsoever.

89. Moreover, the President of the Republic created the National Fund for the Comprehensive Care of Victims of Violence (*Fondo Nacional para la Atención Integral de Víctimas de la Violencia* - FONAIVIV), through which 221 indirect victims and 7 direct victims benefited from a total of 704 comprehensive assistance measures.

90. In addition to the preceding, the OTP indicated in its first communication on 02/10/2020 that it considered that there was a reasonable basis to believe that crimes against humanity had been committed across our territory in light of the following underlying acts.

II.B.2. The underlying acts of crimes against humanity

[88] OfficialState Gazette of the Bolivarian Republic of Venezuela No. 39,657, 15 April 2011, reprinted in Official State Gazette of the Bolivarian Republic of Venezuela No. 39,658, 18 April 2011.
[89] Official State Gazette of the Bolivarian Republic of Venezuela No.40,5 89, 27 January 2015.

II.B.2.a) The underlying act of 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law' (Article 7(1)(e))

91. Article 7(1)(e) identifies the underlying act of 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'. However, while the Statute does not define the crime, the Elements of Crimes require two cumulative elements to be met: '1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; 2. The gravity of the conduct was such that it was in violation of fundamental rules of international law'.

92. In the ***situation in the Republic of Burundi***, in its decision on the authorisation of the investigation (Art. 15), PTC III stated that 'imprisonment', which is part of the underlying act, refers to the unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution. It would therefore represent, not a temporary detention, but a restriction of a person's physical movement to a specific area. In addition, according to PTC III, when referring to 'other severe deprivation of physical liberty', this would refer to an unlawful restriction of a person's movements in a particular location, such as a residence or even a ghetto where a person is not allowed to move freely. Yet, in both cases, 'imprisonment' and the 'severe deprivation of physical liberty' shall occur 'in violation of fundamental rules of international law', i.e. in breach of domestic due process and, in particular, in breach of judicial guarantees and procedural standards established under international law.[90]

93. More relevantly, according to the case law of some *ad hoc* tribunals, 'imprisonment' or 'severe deprivation of physical liberty', occurs when the perpetrator intends to deprive liberty arbitrarily.[91] For that reason, such deprivation must be qualified as confinement or severe restriction of movement, with a discernible degree of 'gravity' and of 'arbitrary nature'.

94. These criteria can hardly be applied to the 'Venezuela I' situation concerning complaints qualified as 'imprisonment or other severe deprivation of physical liberty'.The first report of 30/11/2020 indicated that, according to a search of the Case Monitoring System (*Sistema de Seguimiento de Casos* - SSC) of the Public Prosecutor's Office, [REDACTED].[92] All those

[90] Public Redacted Version of 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi', ICC-1/17-X-9-US-Exp, 25 October 2017, ICC-01/17-9-Red, 25 October 2017, § 68.
[91] ECCC, *Kaing Guek Eav, alias Duch*, Judgment, 001/18-07-2007/ECCC/TCE188, 26 July 2010, § 350.
[92] [REDACTED]

complaints were received by the Human Rights Directorate of the Prosecutor's Office and were duly investigated. Some of them were prosecuted and sentenced. Moreover, most complaints concerning the unlawful deprivation of liberty (Article 176 of the Venezuelan Criminal Code), referred to detentions of a very short transitory period in the context of the demonstrations.

95. Until then, the GoV could only report the totality of the cases filed in the SSC as it was blindly operating within the framework of the 'Venezuela I' PE. Following multiple requests from the State, the OTP finally provided generic information on certain cases on 13/01/2022 – leaving behind the indeterminate rhetoric it maintained during the entire EP – in a document entitled 'Annex II'.[93]

II.B.2.b) The underlying act of 'torture' (Article 7(1)(f))

96. Concerning the underlying crime of torture (Art. (7)(1)(f)), the elements are established in Article 7(2)(e). On the one hand, it must involve 'the intentional infliction of severe pain or suffering, whether physical or mental'. On the other hand, there must an element of 'gravity' (or 'acuteness' of the trauma). The latter is interpreted in relation to various circumstances such as the repetition of acts, the prolongation of the trauma, the effects of these acts on the victim, the vulnerability of the victim, etc.[94]

97. In this regard, it should be noted that the first report submitted by the GoV on 30/11/2020 – when the country was blindly facing an open PE without limits and without information – indicated, after consulting the SSC of the Prosecutor's Office, that [REDACTED].[95] [REDACTED].[96] All the reported cases were investigated, prosecuted and punished where appropriate.

98. It should be noted that the domestic criminalisation of torture and other cruel, inhuman or degrading treatment is based on a special Venezuelan law, the 'Law to Prevent and Punish Torture and Other Cruel, Inhuman or Degrading Treatment' (*Ley para Prevenir y Sancionar la Tortura y Otros Tratos Crueles, Inhumanos o Degradantes*), which transposes three main categories of criminal offence: i) torture, ii) cruel treatment, and iii) inhuman or degrading treatment; classified

[93] Annex II to OTP2022-000764.
[94] *Al Hassan*, Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, ICC-01/12-01/18-461-Corr-Red, 30 September 2019, § 230.
[95] [REDACTED]
[96] [REDACTED]

in reference to international standards.[97] These criminal offences, especially the first two, provide for very high penalties, showing that the domestic criminal legal system more than complies with international standards and obligations.[98]

99. As indicated above, on 13/01/2022, the OTP specified some of the cases it was examining (Annex II). The GoV provided detailed information about their respective status in subsequent reports filed with the OTP, such as those of 15/04/2022,[99] 14/06/2022,[100] 04/07/2022,[101] 26/07/2022,[102] 16/09/2022,[103] and 14/10/2022.[104]

100. The Statute qualifies the underlying offence of torture as a crime against humanity if the act is committed against 'a person in the custody or under the control of the accused'. As such, 'custody' can be interpreted as referring to a formalised deprivation of liberty, mainly through a judicial decision while 'control' refers to a situation of deprivation of liberty in the absence of a formal custody order by the State's judicial authority.

101. In the present situation, all the cases reported against the security forces in the domestic jurisdiction were transmitted to the OTP.From the first report of 30/11/2020, based on all the information in the SSC of the Prosecutor's Office, when the GoV was still operating blindly, [REDACTED]. At that time, when all the cases reported were transferred, a large percentage concerned alleged abuses committed in the context of the demonstrations, and predominantly as a result of the actions of security forces on the streets, and not in a context where individuals were held in 'custody' or under their 'control'. For instance, among the [REDACTED] complaints referred by the GoV in the aforementioned first report of 30/11/2020, it can be mentioned the case of [REDACTED], who was struck only a couple of times and sustained no injuries; the case of [REDACTED], who sustained very minor injuries to her left arm; and the case of [REDACTED] or [REDACTED], who sustained a minor injury after being struck by a tear-gas grenade.

[97] Official State Gazette of the Bolivarian Republic of Venezuela No. 40,212, 22 July 2013.
[98] Article 17 of the aforementioned Law provides for the offence of torture committed by a public official with a sentence of 15 to 25 years' imprisonment; Article 18 of the same Law provides for the offence of cruel treatment with a sentence of 13 to 23 years' imprisonment; finally, Article 21 provides for the offence of inhuman or degrading treatment with a sentence of 3 to 6 years' imprisonment. The maximum penalty applicable in Venezuela is 30 years.
[99] VEN-OTP-0002-7069 (SPA); VEN-OTP-00001981 (ENG).
[100] VEN-OTP-0002-7119; VEN-OTP-00002001.
[101] VEN-OTP-0002-9653; VEN-OTP-00001984.
[102] VEN-OTP-00000081 to VEN-OTP-00000582.
[103] VEN-OTP-00000590 to VEN-OTP-00001966.
[104] VEN-OTP-00002066 to VEN-OTP-00002801.

Respectively, in the Annex II of 13/01/2022, the OTP refers, by way of a significant example, to the case of [REDACTED] who, [REDACTED], only sustained minor injuries.

102. According to the submitted information about the cases investigated by the State, a significant number concerns investigations and accusations of offences classified as **cruel treatment** in accordance with the 'Law to Prevent and Penalise Torture and other Cruel, Inhuman or Degrading Treatments'.[105] Under this Law, if a public official inflicts cruel treatment on anyone or subjects anyone to such treatment, whether or not that person is deprived of liberty at that time, to punish or break their physical or moral resistance, or causes suffering, physical or mental damage, the offending official shall face a penalty of between 13 and 23 years imprisonment, and disqualification from holding public or political office for the same period, among other penalties (Art. 18 of the Law).

II.B.2.c.) The underlying act of 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity' (Article 7(1)(g))

103. In relation to the sexual violence alleged by the OTP (Art. 7(1)(g)), the GoV points out that acts of a sexual nature (other than rape) have been qualified as cruel treatment in domestic criminal proceedings. Under domestic criminal law, such acts (threats of rape, obligations to undress, etc.) constitute psychological or mental coercion or ill-treatment. While the classification of the domestic criminal justice system may differ from the qualification of the OTP, on no account does that mean that the alleged facts are not being investigated. Among the cases of rape mentioned by the OTP in its request of 01/11/2022, the Public Prosecutor's Office has only detected [REDACTED] cases that could be prosecuted as such in accordance with domestic legislation. The remaining cases – [REDACTED] – are to be prosecuted as acts of cruel treatment, despite their sexual nature. Moreover, cruel treatment is punishable by a higher penalty than the crime of rape or sexual abuse under the Venezuelan Code of Criminal Procedure. Among the cases of rape, in the strict sense, within the cases referred to in the Annex II submitted by the OTP, features the notable case of [REDACTED]. While the case was initiated under the qualification of cruel treatment, after due analysis of the circumstances of the facts, it has been recently reclassified as

[105] Official State Gazette of the Bolivarian Republic of Venezuela No. 40,212, 22 July 2013.

rape, and an indictment has been filed. The Annex also features the case of [REDACTED], and the case of [REDACTED], who have been convicted.

II.B.2.d) The underlying act of 'persecution' (Article 7(1)(h))

104. The OTP also invokes the underlying offence of 'persecution' (Art. 7(1)(h)). In its first response, the State noted the lack of specificity of this criminal offence given that it has not been transposed into the country's domestic criminal law. To date, the GoV has no precise knowledge of the classification of the acts that the OTP introduces into this category outside of domestic criminal law.

105. Moreover, given the uncertainty surrounding this underlying offence, it has often been criticised by international criminal courts. For example, the ICTY defined it on several occasions as 'expansive'.[106] This sentiment was echoed by the doctrine, highlighting that even the drafters of the Statute warned that this underlying act was 'ambiguous' and 'vague'.[107]

106. Similarly, BASSIOUNI, has also concluded that '[t]here is no comprehensive list of acts that may constitute persecution', and therefore, '"persecution" is not a crime *per se* in most of the world's legal systems', which is why '"persecution" is more likely to take the form a motive, policy, or goal; it is not an act in and of itself'.[108]

107. Remarkably, the request submitted by the OTP to the PTC on 01/11/2022 pursuant to Article 18(2), indicates that the legal system of GoV includes a Constitutional Act Against Hate, for Peaceful Coexistence and Tolerance (*Ley Constitucional Contra el Odio, por la Convivencia Pacífica y la Tolerancia*).[109] Expressly, the OTP indicated:

> 111. The Prosecution notes that the 2017 Law against Hate, for Peaceful Coexistence and Tolerance acknowledges that any criminal act that is committed due to the victim's membership of a particular ethnic, racial, religious or political group shall be considered as an aggravating circumstance in determining the appropriate sentence. There is, however, no indication that the Venezuelan authorities have reflected the discriminatory nature of the facts in the reported proceedings.

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[106] ICTY, *Kvocka et al.* Judgement, IT-98-30/1-T, 2 November 2001, § 185; ICTY, *Kupreskic et al.*, Judgement, IT-95-16-T, 14 January 2000, §§ 618-19; ICTY, *Kordic et al.*, Trial Chamber Judgement, IT-95-14.2-T, 26 February 2001, §§ 193, 195; ICTY, *Kordic et al.*, Appeals Chamber Judgement, IT-95-14.2-A, 17 December 2004, § 102.

[107] W. SCHABAS, *An Introduction to the International Criminal Court* (6th ed.), Cambridge, Cambridge University Press, 2020, at 113.

[108] C.M. BASSIOUNI, *Crimes Against Humanity. Historical Evolution and Contemporary Application*, Cambridge, Cambridge University Press, 2011, at 399, 405.

[109] Official State Gazette of the Bolivarian Republic of Venezuela No. 41.274, 8 November 2017.

108. Yet, the OTP omits to indicate (except in a footnote) that that Law entered into force in November 2017,i.e., after the alleged acts in 2014 and 2017. Following the OTP this would imply a retroactive application of the Law to the detriment of the alleged perpetrator and contrary to Article 24 of the Statute.

109. Therefore, the GoV considers that the elements of crimes against humanity are not met, nor are the underlying criminal offences identified by the OTP applicable to the events that took place on its territory during the demonstrations between 30/03/2017 and 30/07/2017. Moreover, the GoV stresses that if any violation of protestors' rights were committed, these abuses are being investigated and prosecuted under its jurisdiction.

110. Thus, the 'reasonable basis' criteria under the PE should not have been fulfilled. The Court should have analysed its material jurisdiction (Art. 5) within a judicial review under Article 15 if the PE had continued on a *proprio motu* basis. However, due to the States' referral, Article 15 was circumvented. This led to a situation where the material jurisdiction or the 'reasonable basis' were not subjected to judicial control. In other words, the OTP has thereby circumvented the application of Article 15(3) and (4), in respect of Article 53(1)(a), (b) and (c), as well as Rule 48.

111. To the extent, in the absence of the contextual elements, the crime against humanity cannot be characterised under Article 7. Yet, if the Chamber chose to conduct a more in-depth analysis, the various underlying offences referred to by the OTP in its request of 01/11/2022 would be taken into consideration.

II.B.3. The underlying acts of the offence and inconsistencies of the OTP

112. It seems important to note that the task of the Prosecutor is not to list incidents that might be qualified as underlying acts, but to demonstrate how they meet the criteria for crimes against humanity.

113. There are several issues with the approach that the Prosecutor is currently adopting. The documents on which the OTP's stance is based are flawed in terms of their **evidential value**, their **quality**, and their **representativeness**:

i. The primary sources on which the Prosecutor's allegations are based are not conducive to the purpose he is pursuing. As set out in detail in the judicial control request submitted by the GoV on 28/05/2021, the Independent Fact-Finding Mission ('FFM') is not an impartial

mechanism.[110] Nevertheless, in its request to resume the investigation, the OTP draws primarily on the reports of the FFM, which casts doubt on the validity of the information presented therein.[111] For instance, [REDACTED].[112]

ii. The content presented by the Prosecutor lacks credibility. For instance, in its request, the OTP invokes 'the crime against humanity of torture against 300 to 400 actual or perceived government opponents who were subjected to various forms of physical or psychological abuse during detention'.[113] This assertion is based on the findings of the FFM. If we look closely at this report, specifically at the reference to '33 cases (21 men and 12 women) in which it found reasonable grounds to believe that SEBIN **arrested, detained and/or tortured or ill-treated** political targets and associates',[114] and the assertion that it had investigated '13 cases in which SEBIN agents tortured or subjected detained to cruel, inhuman and degrading treatment or punishment';[115] it is clear that the figures proposed by the Prosecutor are at odds with those featured in the documentation on which its allegations are based. That is very concerning, to say the least, in view of the legal uncertainty and insecurity to which it gives rise.

iii. The figures presented by the OTP **are not representative** of those at the disposal of the Venezuelan State, which is in the best possible position to gather that information. In its decision to allow the OTP to resume its investigation into the ***situation in the Republic of the Philippines***, the Chamber rightly emphasised that it is the State that has easy access to the material of the investigation and the charges. Thus, the State, is in a position to 'confirm or corroborate the [...] reports referenced by the Prosecution'.[116] As such, the Chamber admits that the State is in the best possible position to take stock of the investigations and judicial proceedings, as it has easy access to the corresponding documentation. In this case, the various figures discussed by the OTP are not representative of the data gathered by the Prosecutor of

[110] Transmission of Documents Received from the Authorities of the Bolivarian Republic of Venezuela, ICC-02/18-6-Conf, 28 May 2021, §§ 240-388.
[111] Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2), ICC-02/18-18, 1 November 2022, note 221.
[112] [REDACTED]
[113] Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2),ICC-02/18-18, 1 November 2022, § 108.
[114] Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, A/HRC/45/33,§ 265.
[115] Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela, A/HRC/45/33, § 279.
[116] Public Redacted Version of 'Authorization pursuant to article 18(2) of the Statute to resume the investigation', ICC-0121-56-Red, 26 January 2023, §§ 56, 96.

the GoV. For instance, in relation to complaints qualified as '**imprisonment or other severe deprivation of physical liberty**', the first report of 30/11/2020 indicated that, according to a search of the SSC of the Prosecutor's Office, a total of [REDACTED] complaints of police abuse had been filed during that transitory period of violent demonstrations (between 30/03/2017 and 30/07/2017). Of this number, only [REDACTED] concerned the crime of unlawful deprivation of liberty established and punished pursuant to Article 176 of the Venezuelan Criminal Code (which is the same number reported by the OTP).[117] All those complaints were received by the Human Rights Directorate of the Prosecutor's Office and were duly investigated. Some were also prosecuted and sentenced. Moreover, as reported in the first communication of 30/11/2020, most of the complaints concerning the unlawful deprivation of liberty (Article 176 of the Venezuelan Criminal Code), referred to detentions of a very short transitory period in the context of the demonstrations.[118] All of them have either been processed in accordance with the law or the corresponding investigations or judicial proceedings are still ongoing.

114. The GoV, therefore, submits before this PTC that none of the elements of crimes against humanity is at play:

- There is no attack directed against the civilian population.
- No state policy has been observed as a consequence of the above.
- The nature of the attack is neither widespread nor systematic.
- There is no intent that knowledge of the attack in a generalised or systematic manner would entail.
- There is no confirmation that the State formulated a policy to commit the acts.
- And no acts that can be subsumed in the elements of the claimed underlying offences have been reported.

[117] VEN-OTP-0001-1250 (ENG); VEN-OTP-0001-0007 (SPA).
[118] *Ibid.*, at 80-96. The report analysed deprivations of liberty under the following categories. **Very light deprivation**: police detention for a short period of time (from one to twelve hours) to carry out a verification without formal detention and restoring liberty. **Light deprivation**: complaint of arbitrary police detention until it is brought before a Court. **Serious deprivation**: complaint of arbitrary police detention without being brought before a Court, exceeding the legally established period of 48 hours. **Very serious deprivation**: complaint of deprivation of liberty by means of an arbitrary judicial decision to send to provisional or pre-trial detention.

115. In view and on the basis of the foregoing, the GoV requests the PTC to dismiss the claims that 'crimes within the jurisdiction of the Court have been committed in the territory of the Bolivarian Republic of Venezuela' and that there is material jurisdiction, pursuant to Article 5.

III. IN THE ALTERNATIVE, THE ADMISSIBILITY CRITERIA ARE NOT SATISFIED (Article 17)

116. In addition to the above, and if the lack of jurisdiction is dismissed on grounds that there are no crimes against humanity, the GoV unequivocally states that the admissibility of proceeding from the PE to the investigation phase has yet to be reviewed.

117. Admissibility criteria are clearly set out under Article 17. Articles 17(1)(a), (b) and (c) refer to the **'principle of complementarity'**, although this is not expressly specified. Meanwhile, Article 17(1)(d) refers to **'gravity'**. The **'interest of justice'** is also assumed to be an element of admissibility, despite being regulated under Article 53.

118. According to the doctrine, for instance, O'KEEFE, the admissibility criteria of Article 17 relate to the current procedure as established in Article 18(2):

> Article 17(1) obliges the Court, rather than simply permits it, to determine that a case is inadmissible in the circumstances enumerated in the provision. Article 17 is backed up by the procedures laid down in article 18 ('Preliminary rulings regarding admissibility') and article 19 ('Challenges to the jurisdiction' of the Court or the admissibility of a case') of the Statute.[119]

III.A. The principle of complementarity is inoperative. The primary and principal Venezuelan jurisdiction is applicable and effective

119. As regards the lack of complementarity, it should be noted, for the purpose of the procedure of Article 18(2), that all the 'incidents' (since no cases are identified at this stage), that the PTC ought to consider would exclusively concern those notified by the OTP to the GoV in Annex II of 13/01/2022. The remaining incidents handled by the RBV in its internal criminal institutions, and of which it has informed the OTP in the framework of the EP, simply are one more instance that demonstrates that the investigation is absolutely covered by the domestic jurisdiction in accordance with the provisions of Venezuelan criminal law. The various references to incidents have been set out in Annex A submitted by the OTP alongside its request of 01/11/2022 and add up to [REDACTED] cases for which information has been provided.

[119] R. O'KEEFE, *International Criminal Law*. Oxford, Oxford University Press, 2015, at 555.

120. The GoV adopted a rigorous approach to its jurisdictional response at every stage of the PE and has, if anything, operated with even greater diligence since the procedure was prematurely concluded. The OTP framed its PE in events that occurred during the demonstrations and riots that took place between 30/03/2017 and 30/07/2017, the period for which the OTP initially requested information. On 30/11/2020, the GoV reported that, after consulting the SSC of its Public Prosecutor's Office,[120] [REDACTED] complaints had been processed by the Human Rights Directorate attached to that office (a constitutional body empowered to exercise the country's criminal action in response to any punishable act committed by public officials against citizens).[121]

121. Since the beginning of the PE, Venezuela has cooperated fully and unreservedly with the OTP, despite not knowing what it had set out to achieve because no information has been available for more than a year. It should also be noted that the investigations undertaken by the Prosecutor's Office of the GoV are ongoing and, based on information available via accessible international sources, [REDACTED] cases were prosecuted in 2021, for which information was requested of the OTP under Article 93(10)–a request that has yet to be considered. Following repeated requests, the OTP finally sent Annex II to the country on 13/01/2022. The incidents listed therein lacked specific details and, as it would subsequently emerge, even erroneous in some cases to which the procedure of Article 18(2) basically refers.[122] The GoV submitted a response relating specifically to the situation of each incident on 21/04/2022,[123] 14/06/2022,[124] 04/07/2022,[125] 26/07/2022,[126] 16/09/2022,[127] and 14/10/2022.[128] The reports included references to judicial records and stressed that, for several cases, investigations had been launched, judicial proceedings had been brought, and/or sentences had been rendered insofar as they had been reported to domestic judicial authorities. Yet, some had, quite peculiarly, not been reported internally. For this reason, up to [REDACTED] cases have been initiated *ex officio*. [REDACTED].

122. The GoV has, however, acted in good faith every step of the way and revealed absolutely every reported incident that it considered relevant, even though the OTP did not identify them until

[120] VEN-OTP-0001-1250(ENG); VEN-OTP-0001-0007 (SPA) at §§ 151-59.
[121] *Ibid.*, §§ 160-62.
[122] Notification of the Bolivarian Republic of Venezuela's deferral request under article 18(2) of the Rome Statute, ICC-02/18-17, 21 April 2022.
[123] VEN-OTP-0002-7069 (SPA); VEN-OTP-00001981 (ENG).
[124] VEN-OTP-0002-7119; VEN-OTP-00002001.
[125] VEN-OTP-0002-9653; VEN-OTP-00001984.
[126] VEN-OTP-00000081 to VEN-OTP-00000582.
[127] VEN-OTP-00000590 to VEN-OTP-00001966.
[128] VEN-OTP-00002066 to VEN-OTP-00002801.

January 2022. Moreover, as shown by the content of the request of 01/11/2022, references were added for the sole purpose of criticising alleged shortcomings, even though they had yet to be brought to light. Indeed, had they been revealed, corrective action would have been taken. A more serious charge concerns the failure, on numerous occasions, to conduct a thorough analysis of the status of the incidents. One significant example involves the case of [REDACTED]. That paragraph indicates that the case was dismissed without explaining 'how that conclusion was reached'. The OTP did not consider the relevant judicial documentation sent alongside the written submission on 14/10/2022,[129] specifically the decision on which the dismissal was based. Furthermore, of the cases cited in Annex II sent on 13/01/2022, some contain an incomprehensible error when they are subsequently sent in Annex B of the OTP's request of 01/11/2022. Said Annex includes a column (P) titled "Relevant to OTP". In the cases of [REDACTED]; [REDACTED]; and [REDACTED], it is asserted that the relevance is 'unclear'. It is not understood, therefore, how the OTP qualified certain cases as open to investigation in January 2022 and months later asserts that their relevance is 'unclear'.

123. Notwithstanding the good faith with which the GoV acted by revealing all the incidents reported to the domestic authorities, following repeated claims for the OTP to specify the incidents to which it was referring, Venezuela finally received a response on 13/01/2022. Its attachment (Annex II) indicated a list of alleged victims whose cases were being examined by the OTP.[130] In light of that clarification, the GoV also submitted information relevant to the list of specific incidents revealed by the OTP in Annex II. On this basis, the GoV successively filed reports on 14/06/2022,[131] 04/07/2022,[132] 26/07/2022,[133] 16/09/2022,[134] and 14/10/2022,[135] relating not to the initial comprehensive set of incidents, but specifically to the situation of the new incidents identified by the OTP.

124. Nonetheless, Annex II also contained several serious errors the OTP made in relation to the names provided. One significant example concerns the case of [REDACTED]. One can also note the aforementioned case of [REDACTED].

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[129] VEN-OTP-00002066 to VEN-OTP-00002801.
[130] Annex II to OTP2022/000764.
[131] VEN-OTP-0002-7119; VEN-OTP-00002001.
[132] VEN-OTP-0002-9653; VEN-OTP-00001984.
[133] VEN-OTP-00000081 to VEN-OTP-00000582_.
[134] VEN-OTP-00000590 to VEN-OTP-00001966.
[135] VEN-OTP-00002066 to VEN-OTP-00002801.

125. It should also be noted that some of the names featured in Annex II – relating to the various cases – are pseudonyms. As that is true [REDACTED] of the featured names, it is by no means an easy task to identify the alleged victims. Having said that, the GoV – acting through the Prosecutor's Office – has made a considerable effort to do so. The situation is neatly illustrated by the case of [REDACTED], and who, on the date hereof, has been identified, located and summoned to provide a statement on the incidents under investigation; the case mentioned above of [REDACTED]; or the case of [REDACTED].

126. The Human Rights Directorate of the Prosecutor's Office launched official investigations into the cases referred to in Annex II. These cases, and this is an important point to make, were never reported to the national judicial authorities when the offence was allegedly committed, as evidenced, for instance, in the communications filed on 26/07/2022,[136] 16/09/2022,[137] and 14/10/2022.[138] The GoV refers to those [REDACTED] cases indicated above, corresponding to alleged victims who had never reported an offence to the national judicial authorities and who, surprisingly, appeared in Annex II as individuals who had filed their complaints with the OTP.

127. Regarding those specific cases identified in Annex II by the OTP in its communication of 13/01/2022,[139] their current status should also be considered. Following the preparation of this communication, [REDACTED] cases investigated as a result thereof have resulted in various charges, arrest warrants and even convictions. In any event, the up-to-date statistical data are provided later in this document.

128. At this point, it should be noted that the primary objectives and aims of the ICC, upon its creation, included the goal that 'the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation'.[140] In doing so, the ICC shall be **complementary** to national criminal jurisdictions (Preamble of Statute and Arts. 1 and 17),[141] provided that the prerequisite that those crimes have been committed is met, which is not the case of the GoV.

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[136] VEN-OTP-00000081 to VEN-OTP-00000582.
[137] VEN-OTP-00000590 to VEN-OTP-00001966.
[138] VEN-OTP-00002066 to VEN-OTP-00002801.
[139] Annex II to OTP2022/000764.
[140] Preamble, 4° Statute.
[141] Preamble, 10° Statute.

129. That a case falls within the jurisdiction of the ICC is, therefore, an 'exception' to the exercise of jurisdiction by competent national courts. A carefully balanced argument must be proposed to "circumvent" the sovereign criminal jurisdiction of a State. According to the Appeals Chamber in the ***Katanga and Ngudjolo case***, national criminal jurisdiction has 'primacy' over the jurisdiction of the ICC.[142] On this basis, since complementarity underpins the relationship between the ICC and its States Parties (Art. 1), their national jurisdiction is identified as the primary and preferential jurisdiction for the purpose of investigating crimes within the jurisdiction of the Court. That corresponds to Article 2 of the UN Charter, whereby all members of the international community are required to respect each other's sovereignty and not to interfere in internal affairs. Under this peremptory norm (*ius cogens*), by ratifying the Rome Statute on 07/06/2000, the GoV undertook to comply with the provisions of this international treaty, although subject to strict compliance with the principle of *pacta sunt servanda* (Art. 26 of the 1969 Vienna Convention on the Law of Treaties). The ratification was made on the presumption that the provisions of that text, in which the principle of complementarity is enshrined, would be observed, and, consequently, respect for national jurisdiction would be guaranteed. As a matter of fact, the principle of complementarity has served as the legal mechanism by which all the actions of the OTP have been determined since it was formed.[143]

130. The GoV has demonstrated to the OTP, via submitted reports, communications, judicial documentation, and detailed information about the incidents, that, in respect of the isolated acts of abuse, irregularities and offences allegedly committed by public officials during the demonstrations in 2014 and between 30/03/2017 and 30/07/2017, the Venezuelan judicial authorities have launched investigations, have brought judicial proceedings and have passed sentences. Therefore, in compliance with rules of complementarity, the OTP is not responsible for investigating, pursuant to the provisions of the Statute. Notwithstanding the following information about the difficulties of implementing Article 18(2), in this situation, the GoV has fulfilled its obligations under Rules 53 and 55(2) RPE, as interpreted by the case law of the Court.[144] The GoV has submitted 'Relevant substantiating documentation' which includes 'material capable of

[142] *Katanga*, Judgement on the Appeal against the Oral Decision of Trial Chamber II, ICC-01/04-01/07-1497, 25 September 2009, § 85.
[143] Preamble, 10° Statute.
[144] Decision pursuant to article 18(2) of the Statute authorizing the Prosecution to resume investigation, ICC-02/17-196, 31 October 2022, § 45; Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation', ICC-01/21-56-RED, 26 January 2023, § 10.

proving that an investigation or prosecution is ongoing' such as 'directions, orders and decisions issued by authorities in charge [...] as well as internal reports, updates, notifications or submissions contained in the file [related to the domestic proceedings].'[145]

131. Moreover, acting in good faith, the GoV even proposed creating a joint mechanism of positive complementarity to underpin the relations between the GoV and the OTP. Positive complementarity is broadly defined as follows:

> An approach described as 'positive complementarity' has emerged, by which a more benign relationship with national justice system is encouraged. The Court, and other States Parties not involved in the prosecution itself., is to cooperate with the State concerned in provision of technical assistance.[146]

132. The mechanism provides a formula by which the OTP can provide national institutions with technical consultancy services concerning the investigation, prosecution and sentencing of alleged acts of abuse committed by public officials as they sought to restore public order during the aforementioned demonstrations, as indicated in a number of the submitted communications. The signing of the MOU on 03/11/2021 also formalised the conditions under which the OTP would provide technical assistance and even discussed the possibility for the OTP to open an office in Caracas to provide technical consultancy services to the judicial authorities of the country.

133. While the arguments of the OTP to invoke compliance with complementarity are predicated primarily on the unwillingness to conduct investigations (an accusation the GoV categorically rejects), some OTP statements call into question the ability and capacity of the Venezuelan judicial institutions (paras. 140-165 of the OTP's request dated 01/11/2021). Firstly, the GoV would like to make clear that it condemns the OTP's disparaging remarks that the judicial, legislative, and executive institutions are unable to perform their function effectively. Moreover, the purpose of the OTP's arguments seems to be to overhaul the entire institutional framework of the State Party, Venezuela, without having the mandate to assess these aspects, unlike other international bodies such as treaty-based bodies or UN Charter bodies. The role of the OTP is limited to determining whether specific cases within Venezuelan jurisdiction are being duly investigated, prosecuted, and sentenced. It does not have the authority to pass judgement on a State's institutions or use its own criteria to determine whether or not they are effective. Venezuela is not unlike any other democracy

[145] Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation', ICC-01/21-56-RED, 26 January 2023, § 15 and references.
[146] W.SCHABAS, *An Introduction to the International Criminal Court* (6th ed.), Cambridge, Cambridge University Press, 2020, at 183-84.

in that it is governed by the rule of law and has a democratically established political constitution based on a separation of powers. Justice functions impartially and independently, and jurisdictional mechanisms operate in accordance with the law and preserve the rights of all Venezuelans–men and women. The GoV does not accept, even for purely dialectical purposes, the generic charges directed by the OTP at the country's institutional system for the purposes of Article 17(2).[147]

134. It is therefore undeniable that the GoV is able and willing to deploy the domestic judicial resources at its disposal, as evidenced by its current actions.

135. Indeed, during the PE into the 'Venezuela I' situation, by its decision of 14/06/2021 on the application for a judicial control submitted by the GoV, the PTC had noted:

> It is undisputed in the present litigation that Venezuela has been forthcoming in providing a fruitful cooperation with the Court, a course that indeed was 'deeply appreciat[ed]' by the Prosecution.

136. Not only has that approach been recognised by the PTC, but it has also been frequently credited by the OTP, especially in light of the cooperative approach adopted by the GoV in its dealings with the Office during the PE, all of which gave rise to the MOU of 03/11/2021 between the Prosecutor and the President of the State, which provides as follows:

> Considering that the Office of the Prosecutor of the International Criminal Court will recognize any efforts, reforms and investigations carried out in the Bolivarian Republic of Venezuela

137. However, it is striking that while the OTP welcomed the State's cooperation, the principle of complementarity with the GoV was violated as the investigation phase was launched (in the absence of the review under Art. 15) without setting out the reasons for concluding the PE.

138. In assessing its absence of capacity or unwillingness, as that appears to be the point of the argument, the OTP will consider whether any of the factors mentioned above or a combination thereof, carry sufficient weight to delegitimise the GoV's domestic criminal action. However, the GoV authorities have always been willing to institute proceedings against the perpetrators of the offences allegedly committed in the country. Moreover, as indicated in its request of 01/11/2022, the OTP stated that the Venezuelan government had submitted more than 18,200 pages of documentation about ongoing judicial proceedings and the legal, administrative, and judicial efforts and progress that had been made.

[147] In this regard, the GoV has provided detailed information regarding the institutional functioning of the country,e.g. the communications invoked in the background information that has been maintained with the OTP up to the present.

139. There is no doubt that the GoV has, in the past, instituted authentic judicial proceedings internally and even introduced institutional and legislative reforms at the national level, as widely reported during the PE, and continues to do so to the present day. Nor is there any doubt that the GoV is prosecuting perpetrators of alleged crimes that do not qualify as crimes against humanity, thereby addressing the isolated acts of abuse allegedly committed during the violent demonstrations that occurred in the country. Furthermore, the information submitted to the OTP included data and details of [REDACTED] cases, of which [REDACTED] were covered by specific communications, some of which included judicial documentation. Moreover, regarding the individuals investigated, prosecuted and – where warranted – convicted, it is untrue that the available information refers only to the direct perpetrators. In any event, the perpetrators differ by military or police rank or status. Specifically, in the case of [REDACTED]. Other cases in which various officials of varying rank and status are charged include the case of [REDACTED].

140. Pursuant to Article 17(2), to determine the willingness of the State to prosecute the perpetrators of crimes within its jurisdiction, the following three circumstances must be taken into consideration:

> (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice.[148]

141. In its request to resume the investigation, filed on 01/11/2022, the OTP calls into question the willingness of the State to undertake criminal investigations in accordance with the rules of international law and makes several claims, including that the investigations launched by the Venezuelan judicial authorities do not meet the investigation standards required by the OTP. As indicated previously, at no time was the GoV made aware of this stance.

142. As detailed above, the criminal proceedings in the GoV comply with the standards set forth in international human rights law. Any shortcomings that may have been brought to light have not been concealed from – but, conversely, have been revealed to – the OTP, and effective measures are being introduced to address them. Such a response demonstrates the absolute willingness of the authorities to protect victims, shed light on the facts and prosecute perpetrators while providing the

[148] Policy Paper on Preliminary Examination, November 2013, § 50.

proper guarantees. But on no account can that be done without reasonable evidence and proof that the acts which are deemed to be criminal were actually committed. Anyone who submits international reports and files complaints should also furnish evidence in compliance with the principle of complementarity.

143. As to the assessment of the principle of complementarity, the provisions of Article 17 apply to preliminary rulings regarding admissibility,[149] challenges to the ICC's jurisdiction or the admissibility of a case,[150] and to the decisions of the OTP to initiate an investigation.[151]

144. In this initial phase of the investigation, i.e. the juncture reached by the GoV, since no suspect has been identified, it is impossible to refer to specific cases. As such, the review of admissibility, as established under Article 17, should be less stringent and merely seek to analyse any 'potential cases' that the OTP may have identified. It is thus noted in the Appeals Chamber in the ***Gaddafi and Al-Senussi case***:

> The meaning of the words 'case is being investigated' in article 17 (1) (a) of the Statute must therefore be **understood in the context to which it is applied**. For the purpose of proceedings relating to the initiation of an investigation into a **situation** (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear. The relative vagueness of the contours of the likely cases in article 18 proceedings is also reflected in rule 52 (1) of the Rules of Procedure and Evidence, which speaks of 'information about the acts that may constitute crimes referred to in article 5, relevant for the purposes of article 18, paragraph 2' that the Prosecutor's notification to States should contain.[152]

145. Moreover, the judicial control of the admissibility criteria at the phase of a situation should also consider:

> [...] the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation are relevant for both limbs since such aspects, which are significant to the question of whether there is no situation of 'inactivity' at the national

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[149] Article 18 RS.
[150] Article 19 RS.
[151] Article 53 RS.
[152] *Gaddafi*, Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled 'Decision on the admissibility of the case against Saif Al-Islam Gaddafi', ICC-01/11-01/11-547-Red, 21 May 2014, §§ 39-40.

level, are also relevant indicators of the State's willingness and ability genuinely to carry out the concerned proceedings.[153]

146. It is also worth noting that, in respect of the 'Venezuela I' situation, no *accused* has yet been clearly identified. As part of its request of 01/11/2021, the OTP refers exclusively to the complaints filed as part of reports of NGOs or international organisations.[154]

147. Therefore, the ruling of the PTC should refer to the proceedings and overall progress made by the GoV. This 'overall' analysis will show that, to date, the Prosecutor's Office of the GoV, in reference to the initial cases on which information was sent at regular intervals during the PE, has charged [REDACTED] individuals in [REDACTED] cases, indicted [REDACTED] in [REDACTED] cases, instituted proceedings against [REDACTED] in [REDACTED] cases, issued arrest warrants for [REDACTED] in [REDACTED] cases and, finally, sentenced [REDACTED] in [REDACTED] cases. Respectively, out of the [REDACTED] cases referred to in Annex II of January 2022, as things stand, [REDACTED] individuals have been charged in [REDACTED] cases, [REDACTED] have been indicted in [REDACTED] cases, an arrest warrant has been issued for [REDACTED] individuals in [REDACTED] cases and [REDACTED] individuals have been sentenced in [REDACTED] cases. [REDACTED]. While the State has formally submitted this information, the OTP has not provided the national authorities with any information about the specific identities of alleged suspects. This is why it is presumed that no cases have yet been identified, and this presumption is why only one situation or context should be reviewed under Article 18(2).

148. Similarly, the SCP was provided with all the files provided to the OTP from April to October 2022 [REDACTED]. The cases to which it refers related both to cases for which information was provided during the EP, as well as to cases relating to the alleged victims listed by the OTP in its Annex II of January 2022. The court documents related to these files will be provided at a later date, as an extension has been requested to allow for their translation into English.

149. Complementarity in the case phase is regulated pursuant to Article 19(1), which determines the admissibility of a case in accordance with Article 17. In other words, under Article 19, having already identified the suspects, the PTC review is more thorough, detailed, and comprehensive,

[153] *Al-Senussi*, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, 11 October 2013, § 210.
[154] See supra Part III. A. c).

transcending context analysis and focusing on an analysis of precise facts and identified individuals. However, we are not, at the present time, addressing specific cases, but a broad and general situation, which implies that the PTC is assessing a context and not specific events. For that reason, it is procedurally incorrect for the request of the OTP of 01/11/2022 to refer repeatedly and persistently to case law pertaining to Article 19, as if it intended to redefine the object of the procedure again and confuse the PTC. As the OTP has identified no individuals in this phase, it cannot be allowed to continue to alter the procedural situation arbitrarily.

150. In the contextual analysis of the capacity and willingness that, under the principle of complementarity, the PTC must undertake in relation to Venezuelan internal jurisdiction, the OTP does not have any 'cases', but information compiled in disparate forms from disparate sources, much of which is manipulated, airbrushed for media purposes by those who have disclosed it, and highly skewed and subjective.

151. On another note, regarding the existence of an apparent conflict in the exercise of criminal jurisdiction between the State and the ICC, and whether the corresponding internal proceedings of the State meet the standards required by the ICC, the Prosecutor states:

> [F]or the purpose of article 18(2), the scope of the Prosecutor's intended investigation must be defined not just by reference to provisionally identified potential cases, but rather by reference to the parameters of the situation that the Prosecutor may investigate as a whole, as notified to States under article 18(1).[155]

152. Nonetheless, since the GoV is in the process of investigating, filing indictments or passing sentences in respect of the incidents reported by the OTP in Annex II of its request of 13/01/2022 and in respect of the incidents referred to in its application submitted on 01/11/2022 to the PTC according to Article 18(2), the request to resume the investigation is now invalid.

153. As such, the criteria to bear in mind in the assessment of this proceeding under Article 18(2) is whether there is a 'considerable overlap' within the parameters of the 'Venezuela I' situation, for there are no specific cases with which to compare the identity of incidents and persons in each case. That is because the 'mirror' mechanism used by the ICC to determine whether an identity exists between 'cases' cannot be used in this proceeding pursuant to Article 18(2). This is because there are no cases, and we cannot, therefore, compare persons and incidents, not even generically. In this respect, in his review of relevant case law, STAHN has clearly identified that '[t]he Court

[155] Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela pursuant to article 18(2), ICC-02/18-18, 1 November 2022, § 59.

has ruled that domestic investigations and prosecutions must mirror the ICC case, in terms of persons and incidents covered'.[156] However, the 'mirror' cannot be employed in this proceeding following Article 18(2) since the OTP has still not presented any 'persons' or 'incidents'. The OTP is acting alone in its hunt for a random investigation.

154. The control process defended by the OTP would place the GoV in an impossible situation, as there is no way to verify that the national investigations and proceedings comprise all possible investigations that would be covered by the situation, or whether they would cover future cases that do not yet exist within the framework of the OTP.

155. Not one of the numerous case law references that form the basis of the OTP's position applies to the 'Venezuela I' situation. Indeed, the request of the OTP only refers to decisions taken under Articles 15 or 19.

156. In the ***situation in the Islamic Republic of Afghanistan***, by virtue of its decision on the request of the OTP under Article 18(2), PTC II similarly refers to the fact that:

> [I]t is appropriate to recall the Court's case law in relation to article 17 of the Statute, as well as to articles 15 and 19, which may both be of assistance.[157]

157. However, it has also considered the limitations of that reasoning and made it clear that:

> When a chamber must consider preliminary admissibility challenges under article 18 of the Statute, the contours of 'likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages'. Nonetheless, if investigations are taking place at the national level, the Chamber is tasked to consider whether the domestic investigations cover the same individuals and substantially the same conduct as the investigations before the Court, even though the two forms of investigations to be compared, namely specific domestic cases with identified individuals versus a so far general ICC investigation into a large number of crimes, covering a large geographical area and timeframe, will require a comparison of two very different sets of information that cannot easily be compared.[158]

158. The PTC reached the same conclusions in the ***situation in the Republic of the Philippines***.[159]

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[156] C. STAHN, *A Critical Introduction to International Criminal Law*, Cambridge, Cambridge University Press, 2018, at 226.
[157] Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, ICC-02/17-196, 31 October 2022, § 44.
[158] Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, ICC-02/17-196, 31 October 2022, § 46.
[159] Public Redacted Version of 'Authorisation pursuant to article 18(2) of the Statute to resume the investigation', ICC-01/21-56-RED, 1 November 2022, § 13.

159. Likewise, still regarding the ***situation in the Islamic Republic of Afghanistan,*** PTC II noted that it had been asked to compare 'non-homogeneous proceedings'.[160] In that case, it considered that it was not in a position to conduct an analysis 'about any overlap, or rather lack of thereof', given the extremely broad scope of the situation. As indicated by PTC II, that is why the cases presented by Afghanistan only cover a 'very limited fraction' of the crimes and alleged perpetrators. [161] Regrettably, the ICC does not consider the point at which the 'fraction' of the offences investigated and prosecuted by the national authorities would be deemed sufficient to cover an entire situation and, on this basis, to pave the way for a decision on admissibility by the ICC.

160. As such, the theoretical framework used by the Prosecutor – and by the PTC in the ***situation in the Islamic Republic of Afghanistan*** – leads to a dead-end for any State Party in the same situation as the GoV. The State may never furnish information that covers as broad a scope as the entirety of the 'Venezuela I' situation, even when steps have been taken to produce all reports and provide updates about their individual status, within a specified period; an exercise that attempted to cover the 'entirety' of the situation. Yet, the OTP requires procedural perfection, which even a State with the best procedural system would find impossible to meet.

161. The OTP asserts that Venezuela may always challenge the admissibility at another stage, if necessary, pursuant to the case law established in reference to the case stage:

> Third, article 18 is not conclusive of admissibility and only seeks to provide a preliminary ruling to determine whether the Prosecution's investigation into a broadly defined and still open set of inquiries in a situation should be allowed to proceed. Where an investigation is authorised notwithstanding a deferral request, the admissibility of any concrete case that may arise from the investigation remains open to challenge under article 19, subject to the requirements in article 18(7) of the Statute.[162]

162. Accepting the kind of review proposed by the OTP would invalidate the sense and purpose of Article 18, which would be meaningless. In other words, that interpretation is clearly at odds with the will of the States that drafted Article 18(2). It would lead to a violation of the rights of the State, which would be deprived of its prerogative to challenge the admissibility at the stage of a situation, as conceived and designed when the Statute was adopted. Indeed, this provision was

[160] Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, ICC-02/17-196, 31 October 2022, § 55.
[161] Decision pursuant to article 18(2) of the Statute authorising the Prosecution to resume investigation, ICC-02/17-196, 31 October 2022, § 55.
[162] Prosecution request to resume the investigation into the situation in the Bolivarian Republic of Venezuela pursuant to article 18(2), ICC-02/18-18, 1 November 2022 , §§ 53, 60.

added by States precisely so they could intervene before the investigation phase of specific cases. As NSEREKO remarks in the TRIFFTERER commentary:

> [...] a number of States, notably the United States, favoured an arrangement where an interested State could stop the Court's involvement at an earlier stage. What eventually became article 18 was inserted at their insistence, as it would help them attain that desideratum.[163]

163. In short, the principle of complementarity does not apply for the following reasons:

- The GoV's national jurisdiction is applicable, and it effectively deploys the judicial resources at its disposal in the interests of the legal and jurisdictional aspects of the cases known to its criminal justice system.
- On the dates specified by the OTP–2014 and the period between 30/03/2017 and 30/07/2017– a number of serious violent acts were perpetrated across Venezuela during the demonstrations against the government for which judicial proceedings were initiated, and all procedural formalities were completed in respect of every reported violation of rights committed by public officials.
- Since the start of the PE, thousands of pages have been submitted by the GoV to the OTP in a total of 13 reports, which confirm that the 'Venezuela I' situation was subject to national jurisdiction.

164. Indeed, the GoV has even reported all the cases investigated on the dates specified by the OTP, relating to the relevant categories of criminal offences, as evidenced by the information extracted from the SSC.

165. In its ruling of 14/06/2021, the PTC acknowledged the good faith and cooperation of the GoV during the PE.

166. In several of its communications with the GoV, the OTP acknowledged the cooperation of the State during the PE. Furthermore, the OTP and the GoV signed an MOU with a view to making technical consultancy services available, including the opening of a local office, in the spirit of positive complementarity.

167. The OTP does not have any 'cases', since it merely referenced several names of victims in Annex II of its communication of 13/01/2022, as well as several other incidents in the body of its request of 01/11/2022 pursuant to Article 18(2).

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[163] D. D. NTANDA NSEREKO, 'Article 18. Preliminary rulings regarding admissibility', *in* O. TRIFFTERER & K. AMBOS, *The Rome Statute of the International Criminal Court. A Commentary* (3rd ed.), Oxford, C. H. Beck/Hart/Nomos, 2016, pp. 832-848, at 833, § 2.

168. For all these cases (Annex II of 13/01/2022 and application to the PTC of 01/11/2022), investigations have been launched, judicial proceedings have been brought, or sentences have been passed by the State's internal judicial authorities. There is no doubt, therefore, that there would be a 'considerable overlap' between any 'potential' cases handled by the OTP and Venezuelan national jurisdiction.

169. The OTP also repeatedly invokes case law pertaining to Article 19, even though we are clearly in the situation stage.

170. The PTC shall therefore assess 'considerable overlap' for there are no 'cases' within the scope of the OTP that may be approached from a 'mirror' perspective with the identity of persons and incidents. The PTC shall assess a 'context', i.e. the context of 'Venezuela I', and reach the conclusion that GoV has jurisdiction and that all judicial resources are being deployed to address the facts.

III.B. Gravity

171. Another element to be analysed in the context of admissibility is gravity (Art. 17(1)(d)).

172. The admissibility criteria of gravity implies that the OTP investigation shall only refer to the 'most serious' offences allegedly committed in the territory of a State. Moreover, even if the ICC takes the view that the alleged offences are not 'of sufficient gravity', pursuant to Article 17(1)(d), that is not to say that those offences have not been committed. It would simply mean that the degree of gravity of those offences does not reach the threshold established under this provision for the ICC to consider them admissible and to initiate a supranational investigation. The State ought to continue to investigate and prosecute, where warranted, the perpetrators of offences that are not sufficiently serious to be referred to the ICC:

> As regards the 'sufficient gravity' threshold in accordance with article 17(1)(d) of the Statute, this Chamber has already found that the gravity threshold contemplated therein 'is in addition to the [Statute] drafters' careful selection of the crimes included in articles 6 to 8 of the Statute'. Hence, 'the fact that a case addresses one of the most serious crimes for the international community as a whole is not sufficient for it to be admissible before the Court'.[164]

173. Under Article 17, in addition to complementarity, the criteria of gravity is one of the most important elements for determining the admissibility of a situation:

[164] *Abu Garda*, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, 8 February 2010, § 30.

> The admissibility test, as established by this Chamber, is composed of two parts: the first relating to national investigations, prosecutions and trials concerning the facts alleged in the case at hand, and the second to the gravity threshold that the case should meet to be admissible before the Court.[165]

174. In practice, for the purpose of assessing 'gravity', as referred to in Article 17(1)(d), a casuistic approach is adopted as a way of analysing a situation's actual gravity. Examples of these analytical criteria include the number of direct and indirect victims, the extent of the damage to property, physical and psychological trauma, the extension in time and space, etc. The 'gravity' of a situation, within the meaning of Article 17(1)(d), is also analysed based on the nature of the offences:

> The manner of commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.
>
> The impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.[166]

175. The concept of gravity within the meaning of Article 17(1)(d) is therefore based not only on quantitative criteria, but also qualitative criteria:

> In the view of the Chamber, several factors may be taken into account in the assessment of the gravity of a case. In this respect, the Chamber agrees with the Prosecution's view that, in assessing the gravity of a case, 'the issues of the nature, manner and impact of the [alleged] attack are critical'. Further, the gravity of a given case should not be assessed only from a quantitative perspective, i.e. by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case.[167]

176. To that end, as indicated *ut supra*, the information submitted to the OTP in the initial communication of 30/11/2020, based on a comprehensive search of the SSC of the Public Prosecutor's Office, included an in-depth analysis of all the complaints filed on those dates pertaining to police abuse [REDACTED]. All of them were investigated and, where warranted, prosecuted and sanctioned. [REDACTED] concerned 'acts of torture', and the vast majority of

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[165] *Abu Garda*, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, 8 February 2010, § 28.
[166] Policy Paper on Preliminary Examinations, November 2013, §§ 64-65.
[167] *Abu Garda*, Decision on the confirmation of charges, ICC-02/05-02/09-243-Red, 8 February 2010, § 31.

complaints [REDACTED] were related to 'cruel, inhuman or degrading treatment'.[168] [REDACTED] complaints referred to the crime of unlawful deprivation of liberty set forth and penalised under Article 176 of the Venezuelan Criminal Code (homologous to what was reported by the OTP on 'imprisonment or severe deprivation of physical liberty'), most of them were very short deprivation of liberty, save for several exceptions.[169] Naturally, all those complaints were investigated and, where warranted, prosecuted and sentenced.

177. As indicated *ut supra*, the OTP subsequently specified a number of cases in the aforementioned 'Annex II' of its response on 13/01/2022. As part of its written submissions of 21/04/2022,[170] 14/06/2022,[171] 04/07/2022,[172] 26/07/2022,[173] 16/09/2022,[174] and 14/10/2022,[175] the GoV has since provided detailed updates of the cases specified in the annex mentioned above, which also assesses the criteria of gravity in accordance with the specific files.

178. All allegations of police abuse are being investigated, prosecuted, and punished where appropriate. In the most serious cases that meet the general threshold of abuse during efforts to bring the protests under control, needless to say investigations have been launched, and judicial proceedings have been brought. Nevertheless, as evidenced by an analysis of existing complaints filed in the SCC of the Public Prosecutor's Office, the security forces restored public order, and most cases have all been processed by internal judicial authorities.

179. According to a decision of 19/02/2020, the Appeals Chamber made clear that:

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[168] In this regard, it should be recalled that domestic codification is established in a special Venezuelan law, the 'Law to Prevent and Punish Torture and Other Cruel, Inhuman or Degrading Treatment' ('Ley para Prevenir y Sancionar la Tortura y Otros Tratos Crueles Inhumanos o Degradantes'), which transposes three main criminal crimes into domestic law: 1) the crime of torture, 2) the crime of cruel treatment, and 3) the crime of inhuman or degrading treatment, all of which are criminalised in accordance with international standards. In addition, these criminal offences provide for very high penalties, which shows that the domestic criminal legal system more than complies with international standards and obligations in this area.

[169] *Ibid.*, at 80-96. The report analysed deprivations of liberty under the following categories: **Very light deprivation**: police detention for a short period of time (from one to twelve hours) to carry out verification without formal detention and restore liberty. **Light deprivation**: complaints of arbitrary police detention until it is brought before a Court. **Serious deprivation**: complaints of arbitrary police detention without being brought before a Court, exceeding the legally established period of 48 hours. **Very serious deprivation**: complaints of deprivation of liberty through an arbitrary Court decision to send the person to provisional or pre-trial detention.

[170] VEN-OTP-0002-7069 (SPA); VEN-OTP-00001981 (ENG).

[171] VEN-OTP-0002-7119; VEN-OTP-00002001.

[172] VEN-OTP-0002-9653; VEN-OTP-00001984.

[173] VEN-OTP-00000081 to VEN-OTP-00000582.

[174] VEN-OTP-00000590 to VEN-OTP-00001966.

[175] VEN-OTP-00002066 to VEN-OTP-00002801.

> An interpretation of article 17(1)(d) of the Statute in light of the object and purpose of the Rome Statute further demonstrates that the purpose of the gravity requirement is to exclude those unusual cases in which the specific facts are only of marginal gravity.[176]

180. The same Chamber also noted that: 'the gravity requirement must be assessed on a case-by-case basis having regard to the specific facts of a given case' and that 'the purpose of this requirement is to exclude from the purview of the Court those rather unusual cases when conduct that technically fulfils all the elements of a crime under the Court's jurisdiction is nevertheless of marginal gravity only'.[177]

181. Based on this analysis, the PTC will therefore be able to assess the gravity of the acts and conclude that this case does not meet the criteria of gravity according to a specific analysis of the offences in question.

III.C. The interest of justice

182. The final criteria of admissibility is outlined in Article 53. The interest of justice is not analysed unless the other above-mentioned conditions–material jurisdiction (reasonable basis), the principle of complementarity and the gravity of the facts – are met. If one of the three criteria is not met, the ICC will not consider the interest of justice:

> In the absence of a definition or other guidance in the statutory texts, the meaning of the interests of justice as a factor potentially precluding the exercise of the prosecutorial discretion must be found in the overarching objectives underlying the Statute: the effective prosecution of the most serious international crimes, the fight against impunity and the prevention of mass atrocities. All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.[178]

183. In any event, the GoV believes that the Chamber should not consider the interest of justice given the arguments outlined above in relation to the inadmissibility of the situation before the Court. Punishable offences, in line with the principle of territoriality, are subject to the jurisdiction of national courts.

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[176] *Al Hassan*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', ICC-01/12-01/18-601-Red, 19 February 2020, § 56.

[177] *Al Hassan*, Judgment on the appeal of Mr Al Hassan against the decision of Pre-Trial Chamber I entitled 'Décision relative à l'exception d'irrecevabilité pour insuffisance de gravité de l'affaire soulevée par la défense', ICC-01/12-01/18-601-Red, 19 February 2020, § 53.

[178] 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, § 89.

184. The interest of justice requires the facts disputed herein to continue to fall within the jurisdiction of national courts and to be the subject of the procedure detailed herein by the GoV.

185. As such, since the GoV believes that there is no material jurisdiction (reasonable basis) and that the criteria of admissibility–namely, the principle of complementarity and the gravity of the facts–are not met, it takes the view that there is no point for the PTC to analyse the interest of justice.

IV. IRREGULARITIES AND BREACHES OF PROCEDURE IN 'VENEZUELA I'

186. The purpose of this section is to bring to the attention of the PTC a number of irregularities detected in respect of the procedure undertaken as part of the PE in the 'Venezuela I' situation, and of the current procedure undertaken pursuant to Article 18(2) RS, as a result of which the investigation ought to be formally suspended. The irregularities are considered to be relevant since they may have a bearing on the current status of the situation.

IV.A. On the uncertainty of the temporal criteria of the situation.

187. While the GoV petitions *ut supra* the PTC to rule on material jurisdiction (Art. 5 RS) and does not, in this phase (not subject to cases), call into question personal or territorial jurisdiction, it does, indeed, consider that the PTC shall rule on the criteria of jurisdiction *ratione temporis* (Art. 11(1)(a) RS). Although the facts of the 'Venezuela I' situation occur after the entry into force of the Rome Statute for the GoV (ratified on 07/06/2000), it is necessary to point out that the temporal criteria of the 'Venezuela I' situation has not been thoroughly respected by the OTP. The reason is that, within the framework of the precarious and brief PE undertaken by the OTP, the temporal criteria under analysis was at no point clearly determined or considered.

188. Quite the opposite is true. It was revised on a recurring basis by the OTP which initially distributed its analysis on crimes committed 'at least since April 2017', in its written submission of 02/10/2020;[179] before subsequently attaching the temporal criteria of 'since 12/02/2014' to the situation in its written submission of 16/12/2021 wherein it issued a formal notification that it was proceeding to the investigation phase.[180]

189. Therefore, in addition to the arguments about the need for the PTC to rule on material jurisdiction, the PTC shall also rule on the temporal criteria, given the arbitrary changes of dates

[179] OTP2020/019873, 2 October 2020.
[180] OTP/VEN1/SPs/Notif/ 161221/KK.

in the analysis of the 'Venezuela I' situation by the OTP, which made it impossible for the State to adequately demonstrate that it is willing and able to investigate and prosecute the alleged crimes.

IV.B. The preliminary examination was not completed

190. On 08/02/18, the OTP opened the PE into the 'Venezuela I' situation *proprio motu*. Yet, on 27/09/2018, the OTP reported having received a referral from six States. Thereafter, the OTP was aware that it could proceed to the investigation phase without having to seek judicial authorisation pursuant to Article 15, as indicated above. Thus, on 16/12/2021, the OTP formally notified its decision to proceed to the next phase and presented the conclusions of its PE in a meagre six-page report which evidently failed to analyse all the elements in accordance with PE requirements.

191. In this regard, it should be noted that the former Prosecutor, between February 2018 and June 2021, conducted a PE into the situation in due accordance with the usual requirements. However, the new Prosecutor decided without having concluded the PE to open an investigation on 03/11/2021, relying on the referral of States that the previous Prosecutor (Bensouda) had already decided to attach to the PE and not to proceed with the investigation phase. Given the existence of the OTP's conclusion, the aforementioned referral was declined for the purposes of the provisions of Article 14(1), making it inappropriate to open the investigation without the SCP's judicial authorisation.

IV.C. Irregularity in the notifications, deadlines for documentation in the process under Article 18(2)

192. As the OTP was required to notify the initiation of the investigation, it formally did so by way of three communications: the first was issued on 16/12/2021 and followed by a further two that would contain the *summum* of a notification on 13/01/2022 and 17/01/2022. However, the notification was incompletely and unduly issued. In light of the launch of the investigation, on 15/04/2022, the GoV chose to submit a request for a deferral of the investigation pursuant to Article 18(2) (for a period of six months).

193. While the OTP immediately announced that it would refer the matter to the PTC, it did not do so in the next six months. It did not act until 01/11/2022, at which point that option was no longer available from a purely legal perspective. In the context of that procedure, the OTP was required to demonstrate that the criteria had been met to request the resumption of the investigation (suspended under Art. 18(2))–a requirement that was not substantively fulfilled. In other words,

the PE undertaken by the OTP was by no means ideal. It did not examine the 'Venezuela I' situation in depth, which is why it merely sought authorisation from the PTC to resume the investigation to go 'fishing' or seek out cases that did not exist as part of an utterly prospective action that is at variance with the most fundamental principles of criminal procedural law.

194. The OTP's request contains a large number of footnotes referring to other documents: OAS reports, UN FFM reports, reports of the Office of the High Commissioner for Human Rights and even reports issued by the OTP itself in relation to the PE. This way, the OTP produces a presentation of hundreds and hundreds of pages. Some issues are barely addressed in the application and the documentation mentioned in the footnotes is used to provide explanations. This approach is, in and of itself, detrimental to due process and violates the rules and guidelines for the maximum number of pages for submission.

195. Therefore, if the GoV engaged in the same practices as the OTP, it would simply be unable to do so correctly without reading and analysing the various reports attached by the OTP (i.e. open reports). Indeed, according to Regulation 36(2)(b), 'Any appendix containing references, authorities, copies from the record, exhibits and other relevant, non-argumentative material. An appendix shall not contain submissions.' Strictly speaking, while the reports in the footnotes are not 'appendices', they are certainly comparable in practice, given the presence of the links. They are part of the submission. According to Regulation 36(3), 'No substantial submissions may be placed in the footnotes of a document'.

196. Another example of the strategy used to abuse the goodwill of the GoV during this entire process is portrayed in paragraph 102 of the OTP's request of 01/11/2022, where it refers to members or pro-government groups known as *colectivos*. Footnote 208 subsequently states 'See' and provides links to Report OTP PE 2019, para. 74; Report OTP PE 2020, para. 206, and Detailed Report FFM 2020, paras. 216-224. In order to provide an appropriate response to the request, the GoV would need to respond not only to the allegations of paragraph 102, but also to those of the other three documents. The above is just one of many examples.

197. The GoV believes that a breach of the Regulations of the Court is not merely technical but an affront to the fairness of procedures. As such, steps should be taken to determine whether the request of the OTP of 01/11/2022 should be dismissed on account of the breach of Regulation 36 or, in the alternative, whether the OTP should be required to resubmit the request once all those references have been removed. In any event, the reference to a large amount of information from

open sources, frequently misrepresented or even manipulated, is a cause for serious concern given that it underpins the allegations of the OTP in the 'Venezuela I' situation.

IV.D. Reference to the burden of proof

198. It is difficult to reconcile the OTP's stance on the burden of proof with the text of the relevant provision. According to Article 18(2), the OTP is required to defer to the State's investigation. This decision may only be reversed if the PTC intervenes 'on the application of the Prosecutor'. Moreover, the application submitted by the Prosecutor under Rule 54 'shall be in writing and shall contain the basis for the application'. Surely this is not the kind of language that the drafters of the Statute and the Rules would have used if the intention was to impose the burden of proof on the State. Logically, they would have quite naturally envisaged the State submitting a request to the PTC, as is the case when Article 19(2) is invoked.

199. It is easy to see why the OTP considers the wording of Article 18(2) and Rule 54 to be inconvenient. Yet, the Preparatory Works clearly show that the mechanism outlined in Article 18 was part of a delicate set of requirements related to the recognition by the Statute of the extraordinary powers at the disposal of the OTP and the concerns of States about interference in their sovereign affairs. It would be injudicious for the Court to alter this requirement based on an interpretation of legislative texts meant to lessen the burden of the Prosecutor and to the detriment of the rights of the State.

200. The Statute is based on the principle of complementarity. The Preamble establishes the duty of States Parties to investigate and bring proceedings. This is the logical basis of any examination of admissibility to the extent that it creates a presumption that the State Party is assuming its responsibilities. Exceptionally, the Prosecutor may intervene only after establishing that a State Party is unwilling or unable to proceed. This burden is undoubtedly imposed on the Prosecutor and not the States Parties.

201. The GoV acknowledges that requirements to assist in the process are established in both the Statute and the Rules, in particular Rule 52. This is demonstrated by the GoV's history of cooperation with the OTP and its willingness to provide information about the relevant domestic proceedings. Moreover, the request of the OTP makes no suggestion that the GoV has in any way failed to fulfil its obligations. At no point does the OTP indicate that any information or documentation is required for the determination of the Trial Chamber; or that the GoV has denied access to such elements.

202. No reference is made to the burden of proof either in the Statute or the Rules. The concept of 'burden of proof' corresponds to a court and does not apply to the relations between the OTP and the State Party. That the State Party is required 'to provide information about its investigation' ('*fournir des renseignements*') is not the same as a 'burden of proof'. Should the Prosecutor not specify the cases in which its office is interested and not the other way around? However, the OTP refused to do so based on the implausible assertion that 'it has not identified any targets or suspects'.[181]

Given the above, the GoV respectfully **REQUESTS** the Chamber to:

I. Rule that the ICC does not have material jurisdiction given the absence of a reasonable basis to consider that crimes against humanity (Article 7) were committed in the Bolivarian Republic of Venezuela.

II. In the alternative, declare that the 'Venezuela I' situation is inadmissible in accordance with the criteria outlined in Articles 17 and 53.

III. In the further alternative, declare that the OTP may not undertake any investigation and defer to the investigation of the domestic, primary, and principal jurisdiction of the GoV, pursuant to Article 18(2), while dismissing the application submitted by the OTP on 01/11/2022.

IV. Concurrently with the aforementioned rulings, the PTC is requested to rule on the violations of due process that may have been committed against the GoV in the context of the PE and the investigation phase, in light of the claims set out above.

Yván Gil Pinto

Minister of Foreign Affairs of the Bolivarian Republic of Venezuela

Date this 27 March 2023
At Caracas, Venezuela

[181] Letter to Félix Plasencia, GoV's Foreign Affairs Minister, 13 January 2022.