

**Annex 3**  
**Public redacted**

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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Date: November 6, 2023

## APPEALS CHAMBER

**Before:** Judge Marc Perrin de Brichambaut, Presiding  
Judge Piotr Hofmański  
Judge Luz del Carmen Ibáñez Carranza  
Judge Solomy Balungi Bossa  
Judge Gocha Lordkipanidze

## SITUATION IN VENEZUELA I

### Public Document

**Legal Representatives' written representations on some of the issues identified in the Appeals Chamber's "Directions on the Conduct of the Hearing." with confidential *Ex Parte* Annexes (1-7).**

**Source: The present additional observations are submitted by Foro Penal and Robert F. Kennedy Human Rights in representation of victims of crimes against humanity committed in Venezuela.**

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

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Competent authorities of  
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**REGISTRY**

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**Section**

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## I. PROCEDURAL HISTORY

1. In June 2023, Pre-Trial Chamber I, authorized the Prosecutor to restart the investigation in Venezuela under Article 18(2) of the Statute. Venezuela appealed this decision on July 3, 2023.
2. On August 14, 2023, Venezuela filed its appeal brief, and on August 24, 2023, the Appeals Chamber directed the Victims Participation and Reparations Section (VPRS) to gather and submit representations from victims.
3. On October 3, 2023, the organizations Foro Penal and Robert F. Kennedy Human Rights, (“Legal Representatives”), presented observations to the VPRS on behalf of 226 victims. Among these, 209 of the victims had previously expressed their views and concerns during the Article 18(2) proceedings. Furthermore, this submission also encompassed the perspectives and concerns of additional 17 victims who had not participated in the Article 18(2) consultation process previously.
4. On October 12, 2023, the Appeals Chamber scheduled a hearing for November 7 and 8, 2023. On October 17, 2023, the VPRS submitted 172 forms and documents from victims along with a report that included information submitted by the Legal Representatives on behalf of the mentioned 226 victims. On the same day, the Appeals Chamber issued guidelines for the hearing, outlining specific issues for parties and participants to address.
5. On October 19, the Legal Representatives submitted a request for participation in the hearing.
6. On October 26, the Honorable Appeals Chamber issued its decision on *requests to appear at the hearing before the Appeals Chamber*, deciding that: “Legal Representatives [of three filed requests], may make further written representations on any of the issues identified in the Appeals Chamber’s

“Directions on the conduct of the hearing” of 17 October 2023 (ICC-02/18-68) and submit them to the [VPRS] no later than 12h00 on 6 November 2023.”

7. In light of this decision, the Legal Representatives now seek to offer their insights on behalf of the victims concerning the following matters:

*a) Whether the requirement that the domestic proceedings cover “the same types of conduct” as the Prosecutor’s investigation extends to contextual elements of crimes against humanity, including in particular: the organization policy and the widespread or systematic nature of the attack.*

*b) Whether the domestic investigations also need to cover the element of “discriminatory intent” in connection with the underlying acts of the crime of persecution, despite the absence of a domestic legislation that penalizes persecutions.*

## **II. LEGAL AND FACTUAL BASIS FOR CONFIDENTIAL EX PARTE FILING OF THE ANNEXES ACCOMPANYING THE PRESENT SUBMISSION**

8. In accordance with Regulation 23 *bis* of the Regulations of the Court, the Legal Representatives submit these observations publicly while maintaining confidential ex parte annexes available only to the Office of the Prosecutor, the Office of Public Counsel for Victims, The VPRS, and the Appeals Chamber. This request is grounded in Article 68 of the Rome Statute to protect sensitive information, including the identities and safety of represented individuals, legal representatives, and evidence. We respectfully request that the annexes remain restricted from State representatives to ensure the utmost safeguarding of this information and these individuals.

## **III. INTRODUCTION**

9. The 1969 Vienna Convention on the Law of Treaties affirms *pacta sunt servanda* to be a “universally recognized” rule in its preamble. Article 26 unambiguously

states that “every treaty in force” binds its parties, who have a duty to fulfill them in good faith. More specifically, article 27 establishes that parties cannot invoke its internal law as stopping them from fulfilling their treaty duties, fleshing out the form taken by treaty obligations.

10. The Rome Statute itself notes the complementary character of the international criminal jurisdiction to those undertaken by the States themselves. According to article 18, if a State informs the Court that is conducting adequate and effective investigations, the expected outcome is the deferral of the Court’s activities to those of the State. This, however, indicates the existence of an international obligation to prosecute the crimes under the scope of the Rome Statute.
11. This general duty to investigate has been directly linked to the Rome Statute by multiple authoritative sources. The OAS General Assembly has, through two resolutions (1770/2001 and 1900/2002), exhorted its members to judge domestically those crimes foreseen by the Statute, as a necessary step to curb impunity for such crimes. Further, the adoption of the Rome Statute was lauded as a goal for the Organization’s members, who were called on to adapt their national legislations and effectively join the treaty.
12. The Venezuelan Constitution seems to interpret international human rights treaties as binding instruments that shape the State’s relations to its citizens. Article 19 recognizes as “obligatory” the respect and conformity of the State with human rights treaties ratified by Venezuela. Article 23 further establishes that treaties and covenants entered by Venezuela regarding human rights have “constitutional hierarchy”, and must be applied to the exclusion of others, less protective norms in an “immediate” and “direct” manner. Further, article 25 declares as “null” any act by Venezuelan authorities which goes against the rights established by the Constitution.

#### IV. THE VENEZUELA STATE MUST INVESTIGATE CONTEXTUAL ELEMENTS OF CRIMES AGAINST HUMANITY

13. In its appeal brief, the government of Venezuela (referred to as "GoV") argues that the Chamber made a mistake by insisting on an investigation into the contextual aspects of crimes against humanity.<sup>1</sup> GoV believes that the focus should be on the substantial overlap between the acts investigated and the alleged criminality described in the Article 18 notification.<sup>2</sup> GoV also asserts that its domestic investigations, "which cover multiple crimes across various locations within the same time frame or in a single location over an extended period, inherently encompass the investigation of contextual elements related to crimes against humanity."<sup>3</sup>
14. In its response, the Prosecution correctly highlights that the Chamber's emphasis on the actions under investigation rather than just legal terminology was well-founded.<sup>4</sup> Crimes against humanity involve specific elements that necessitate the consideration of concrete facts, factors, and information.<sup>5</sup> In this sense, referring to a previous Appeals Chamber precedent, the Prosecution accurately asserts that authorities must show they are addressing and prosecuting "patterns" that encompass the essential elements of crimes against humanity.<sup>6</sup>
15. The Legal Representatives, representing victims of crimes against humanity in Venezuela, concur with the assessment of Pre-Trial Chamber I, and the Prosecution. They further emphasize that the Venezuelan government has persistently denied the prevalence of widespread human rights violations in the nation, especially the systematic commission of crimes against humanity. This denial persists despite compelling evidence of a State policy aimed at

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<sup>1</sup> GoV [Appeals Brief](#), para. 122

<sup>2</sup> GoV [Appeals Brief](#), paras 123-124

<sup>3</sup> GoV [Appeals Brief](#), para. 125

<sup>4</sup> OTP's Response, para. 116

<sup>5</sup> OTP's Response, para. 117

<sup>6</sup> OTP's Response, para. 118; See said decision: [Philippines](#) Article 18(2) Judgment, paras. 106, 163.

suppressing critical voices or those perceived as such.<sup>7</sup> As highlighted by the Prosecution, the government of Venezuela has explicitly stated in its appeal brief that it is not actively investigating crimes against humanity,<sup>8</sup> primarily because it steadfastly denies their existence in the country. Moreover, the government has failed to conduct thorough and legitimate investigations into these allegations. Next, the Legal Representatives proceed to provide their specific observations on this matter.

### **1. Complementarity and the same conduct, same person test**

16. Complementarity necessitates an examination of the existence of national-level investigations and prosecutions. The same person, same conduct test is the initial step in determining the admissibility of a case based on the principle of complementarity. The second step involves the unwillingness or inability to investigate and prosecute the crime.

17. The same conduct test refers to the requirement that the alleged perpetrators have substantially carried out the same conduct under investigation by the Court.<sup>9</sup> It is important to note that, as correctly asserted by PTC I, in this analysis, the legal classification of the conduct does not need to be identical in national proceedings and within the scope of the International Criminal Court.<sup>10</sup> What is crucial is to compare the nature and gravity of the investigations to ensure that national proceedings closely resemble a potential trial before the Court.

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<sup>7</sup> [Fact-Finding Mission](#) on Venezuela Tells the Human Rights Council that Human Rights Violations Are Continuing in Venezuela, Reflecting a Policy of Repressing Dissent. See for example, Foro Penal and Robert F. Kennedy Human Rights, [Enforced Disappearance as a Tool of Political Repression in Venezuela](#), 2020. Foro Penal and Robert F. Kennedy Human Rights, [Criminal Justice as a Tool of Political Repression in Venezuela](#), 2022.

<sup>8</sup> OTP's Response, para. 119.

<sup>9</sup> Muthaura, Appeals Chamber, 30 August 2011, para. 76. Ruto, Appeals Chamber, 30 August 2011, para 1

<sup>10</sup> Al-Senussi, PTC, 31 May 2013, paras. 73-83



18. The Legal Representatives assert that, in Venezuela, there are not only no investigations that adequately mirror those conducted at the ICC, but the State is also demonstrably both unwilling and unable to do so. The reasons are as follows: there is a lack of effective incorporation of the crimes and modes of liability outlined in the Rome Statute, there is no judicial independence, and there is a presence of a State policy aimed at persecuting individuals considered critical voices or those perceived as such.

**2. The Lack of implementation of the Rome Statute makes the GoV unwilling and unable to carry out genuine investigations into crimes against humanity**

19. According to the GoV, the ICC case law recognizes that domestic investigations do not have to mirror the OTP's actions precisely; that they only need to cover similar conduct, since this allows States to use their domestic laws and offenses, known as 'ordinary crimes,' to investigate and prosecute such conduct.<sup>11</sup>

20. This statement is unequivocally inaccurate. Crimes against humanity entail specific elements that demand rigorous investigation,<sup>12</sup> not only to prevent impunity but also to effectively fulfill the international obligation undertaken by the State of Venezuela when it signed and ratified the Rome Statute.<sup>13</sup>

21. Indeed, the ICC is designed to function as a Court of last resort, aiming to complement rather than replace national jurisdictions.<sup>14</sup> The preference is unequivocally for the State to conduct genuine criminal proceedings, provided it is both willing and able.<sup>15</sup> Notably, the Preamble to the Rome Statute explicitly

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<sup>11</sup> GoV [Appeals Brief](#), para. 125

<sup>12</sup> ICC-01/04-02/06- 2359 ("[Ntaganda II](#)"), para. 1203

<sup>13</sup> Rome Statute, preamble.

<sup>14</sup> Rome Statute, preamble, para 6 ; article 17.

<sup>15</sup> Rome Statute article 17.

states that every State holds a responsibility to exercise its own criminal jurisdiction over international crimes.<sup>16</sup> It's essential to underscore the term "responsibility" in this context, signifying a clear and binding duty to investigate international crimes—a duty that should be willingly and competently fulfilled. In the current scenario, the Government of Venezuela (GoV) stands in flagrant violation of its responsibility to investigate international crimes.

22. While the principle of complementarity does not compel the State of Venezuela to faithfully adopt the Statute's offenses into its domestic laws, the initial requirement for Venezuela, to fulfill its obligations and actively participate in the global effort to combat impunity involves having domestic legislation that, at the very least, encompasses the definition of fundamental crimes, general legal principles, and procedures for collaboration with the ICC.<sup>17</sup> Therefore, the State does have a vested interest in implementing the Rome Statute if it intends to enable the investigation of their own citizens within their national jurisdiction, rather than having the ICC handle such cases. Furthermore, for the ICC to fulfill its complementary role effectively, thorough and genuinely committed implementation is absolutely essential.<sup>18</sup>

23. Academics and commentators agree that several crucial factors are of significant importance for the Court when assessing the inability or unwillingness of a State.<sup>19</sup> Primarily, these pertain to the crimes delineated in the Statute, whose essence should be incorporated into national legislation as international crimes, to avoid findings of inability, as they belong to a distinct

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<sup>16</sup> Preamble, para 6.

<sup>17</sup> Amnesty International. International Criminal Court: The failure of states to enact effective implementing legislation. IOR 40/019/2004.

<sup>18</sup> J. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 94.

<sup>19</sup> J. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 94. See also, A. Zahar and G. Sluiter, *International Criminal Law*, Oxford Press, pp, 448-449.

category of offenses, as elaborated below. Merely prosecuting these acts as ordinary crimes is insufficient and should lead to a determination of inability. In this sense, it is imperative to note that even the principle of *ne bis in idem*, protecting against double jeopardy, does not extend to national convictions and acquittals for ordinary crimes,<sup>20</sup> showing that international crimes belong to a different category, and their efficient investigation demands a comprehensive revision and reform of deficient legislative schemes.

24. Furthermore, the best practices adopted by State Parties demonstrate that those nations genuinely committed to implementing the Rome Statute have initiated extensive legislative reforms to incorporate international criminal law.<sup>21</sup>
25. Despite the fact that the Rome Statute has been signed and ratified by Venezuela since the year 2000,<sup>22</sup> the Crimes falling under the jurisdiction of the Court (while respecting their specific characteristics and essential elements) have not been incorporated into domestic legislation. Therefore, there are no assigned penalties or established prosecution procedures for these crimes. In other words, it is not possible to prosecute anyone in Venezuela for the specific commission of Crimes against humanity.
26. The similar provisions contained in the Venezuelan legislation (i.e. torture, enforced disappearance, homicide) are not specifically considered, for the purposes of their legal prosecution in Venezuela, as "widespread or systematic attacks against a civilian population." They are evaluated as isolated crimes outside the context required by the Rome Statute.

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<sup>20</sup> A. Zahar and G. Sluiter, International Criminal Law, Oxford Press, Chapter 12, Section 12.4.

<sup>21</sup> This proactive approach is exemplified by countries such as Uruguay, Trinidad and Tobago, Argentina, Australia, Germany, The Netherlands, Canada, Italy, the UK, Austria, Benin, Cote d'Ivoire, Costa Rica, Democratic Republic of Congo, Dominican Republic, Guinea and Paraguay. <https://www.ibanet.org/document?id=ICC-Report-Rome-Statute-October-2021>

<sup>22</sup> Official Gazette [No. 5,507](#) of December 13, 2000

27. For example, the Venezuelan Penal Code,<sup>23</sup> and the Special Law for the Prevention and Punishment of Torture and Other Cruel, Inhuman, or Degrading Treatments,<sup>24</sup> are the two legislative bodies that contain criminal offenses similar to those described in the Rome Statute (Assassination, Torture, Enforced Disappearances, imprisonment, etc.). However, neither of them specifies the penalties applicable in cases where such crimes are determined to be committed as part of a widespread or systematic attack against the civilian population. Although the inclusion of the Crimes falling under the jurisdiction of the Court in Venezuela's national legislation (either in the Penal Code or in a special law) has been proposed, it has never been successful.
28. While the Organic Criminal Procedural Code<sup>25</sup> does mention Crimes against Humanity, War Crimes, and "serious violations of Human Rights," it does not establish a special procedure for these cases, does not link them to the Rome Statute, and also does not specify clear modes of liability, or the penalties that would potentially be applicable to these crimes.
29. In this context, the Legal Representatives wish to emphasize once more the preamble mentioned earlier, which highlights that every State bears a responsibility to exercise its own criminal jurisdiction over international crimes. While the Government asserts that "the reference to using domestic criminal jurisdictions suggests that as long as the person responsible for committing such crimes is held to account, the domestic criminal jurisdiction has satisfied its obligation,"<sup>26</sup> the truth remains that without an effective legislative incorporation of the fundamental principles of international crimes, accountability will remain an elusive goal. In sum, the GoV cannot use its own failure to update its legislation, as a shield to avoid conducting a legitimate and

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<sup>23</sup> Official Gazette No. 5,768 Ext. of April 13, 2005. [Penal code](#).

<sup>24</sup> Official Gazette [No. 40,212](#) of July 22, 2013

<sup>25</sup> Official Gazette [No. 6,644](#) of September 17, 2021

<sup>26</sup> GoV Appeals Brief, para. 124.

thorough investigation into crimes against humanity, including its contextual elements which are fundamental for any serious investigation.

30. This, coupled with a deteriorated justice system that has transformed into a political instrument of the Executive, primarily employed to target dissenting voices or those perceived as such,<sup>27</sup> contributes to a disturbing state of impunity that facilitates and encourages the commission of crimes against humanity within the nation. The Legal Representatives will elaborate on this specific point in Section 3.

**2.1. Investigating the contextual elements of crimes against humanity is essential to achieving the core objective of the Rome Statute: putting an end to impunity.**

31. Crimes Against Humanity encompass the perpetration of specific inhumane acts, including murder, torture, rape, persecution, and other inhumane acts, within a defined context – one that necessitates their involvement in a *widespread* or *systematic attack* targeted at a civilian population.<sup>28</sup> This contextual dimension is what transforms crimes against humanity into matters of profound international significance. In other words, it is these contextual elements that elevate offenses that would otherwise come under solely national jurisdictions (as ordinary crimes), to crimes that concern the entire international community.<sup>29</sup> Therefore, it is crucial to acknowledge that any serious investigation into actions constituting crimes against humanity demands a comprehensive examination of their contextual elements.

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<sup>27</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela; September 16, 2020. Available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/238/94/PDF/G2023894.pdf?OpenElement>

<sup>28</sup> Article 7 of the Rome Statute.

<sup>29</sup> R. Cryer and others, *International Criminal Law and Procedure*, Cambridge University Press, p. 229.

32. The "widespread or systematic" criterion operates as a disjunctive test, implying that a prosecutor needs to satisfy either one of these thresholds.<sup>30</sup> However, it is crucial to underscore that there must always exist an "attack directed against a civilian population,"<sup>31</sup> which inherently entails a certain level of scale and organization, even if it's of modest proportions. In essence, while "widespread" and "systematic" represent distinct elements, the "attack" element necessitates some minimum characteristics of both.<sup>32</sup>
33. "Widespread" typically refers to the cumulative impact of numerous inhumane acts,<sup>33</sup> whereas "systematic" emphasizes the organized nature of violent actions and the unlikelihood of their random occurrence.<sup>34</sup> "Systematic" implies a high degree of organization, featuring aspects such as identifiable "patterns, continuous commission, use of resources, planning, and political objectives" as significant contributing factors.<sup>35</sup>
34. The Rome Statute defines attack in Article 7(2)(a) as: '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' [our emphasis]. In essence, this definition stipulates that a certain minimal scale (involving multiple acts) and a minimal level of collectivity (reflected in the 'policy' element) are prerequisites.<sup>36</sup> Furthermore, it necessitates either a high level of scale ('widespread') or a high degree of collective coordination and a pattern of conduct ('systematic').<sup>37</sup> The purpose of this definition is to exclude isolated

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<sup>30</sup> [Akayesu](#), ICTR Appeals Chamber, 1 June 2001, paras 461-469.

<sup>31</sup> Article 7(2)(a) of the Rome Statute

<sup>32</sup> See, [Haradinaj](#) et al., ICTY Trial Chamber I, 3 April 2008, para. 122.

<sup>33</sup> [Situation in Darfur](#) (Al Bashir warrant case), ICC PTC I, 4 March 2009, para 81.

<sup>34</sup> [Situation in Darfur](#) (Al Bashir warrant case), ICC PTC I, 4 March 2009, para 81.

<sup>35</sup> See for example, R. Cryer and others, *International Criminal Law and Procedure*, Cambridge University Press, p. 235

<sup>36</sup> See for example, R. Cryer and others, *International Criminal Law and Procedure*, Cambridge University Press, p. 236.

<sup>37</sup> *Ibid.*,

crimes (those not involving multiple acts) and unrelated, sporadic crimes (lacking any **policy** element).<sup>38</sup>

35. On this note, as emphasized by the Prosecutor in its response, the Appeals Chamber has also noted that in cases where the Prosecution seeks to investigate crimes against humanity, domestic authorities must establish that they are pursuing and prosecuting "patterns" in order to meet the requirements for a deferral request to be successful.<sup>39</sup>

36. The policy element of the attack or the pattern of conduct is essential for distinguishing individual acts from those driven by collective involvement, necessitating instigation or encouragement by entities other than individuals, such as a State or organization. Some scholars contend that the collective nature reflected by the policy element represents the core essence of crimes against humanity, portraying them as "politics gone wrong."<sup>40</sup> This also pertains specifically to a pattern of conduct or deliberate acts of violence, and does not encompass random, accidental, or isolated incidents of violence.

37. In this regard, we concur that in order for domestic proceedings to encompass the same categories of conduct as the Prosecutor's investigation, they must inevitably include the contextual components of crimes against humanity, which notably encompass the "policy" element of the attack.

### **3. Lack of judicial independence in Venezuela makes the GoV unwilling and unable to carry out genuine investigations into crimes against humanity**

38. Impunity is widespread in Venezuela, particularly in the context of government repression. Generalized impunity is largely a direct consequence of

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<sup>38</sup> [Elements of Crimes](#), Article 7 Crimes Against Humanity: Introduction, para. 3. See also, Prosecutor's response, para.118.

<sup>39</sup> Prosecutor's response, para. 118, citing : [Philippines Article 18\(2\) Judgment](#), paras. 106, 163.

<sup>40</sup> Ambos and Wirth, *The Current Law*, Kluwer Law International, 26-34; William Schabas, *State Policy as an Element of Crimes Against Humanity*, *Duke Journal of Comparative and International Law and Criminology*, p. 953.

governmental measures that have progressively eroded the independence of the judiciary and the public prosecutor's office, which are now co-opted by the executive branch.<sup>41</sup> The Venezuelan judicial system is not just a bystander to human rights violations; it actively fuels them. The Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela ("FFM") found that the judicial system was central to the development of the human rights crisis in the country.<sup>42</sup> The FFM concluded that "had prosecutorial and judicial officers properly performed their constitutional role, they could have prevented the crimes and violations from being committed, or placed stringent impediments on the ability of the intelligence and public security services to commit them."<sup>43</sup>

39. In the 2023 Rule of Law Index released by the World Justice Project,<sup>44</sup> which assesses the state of the rule of law globally and categorizes countries based on their adherence to this principle, Venezuela was ranked at the bottom of the list, signifying its position as the country with the weakest rule of law in the world. Remarkably, Venezuela has consistently held this last place ranking since the inaugural Rule of Law Index was introduced in 2015.

40. Given that State policy enables crimes against humanity, including extrajudicial killings, torture, and arbitrary detention, the Legal Representatives are of the view that the GoV has no interest in properly investigating or prosecuting those responsible. Victims seeking justice will never find it, on the contrary, they will be targeted and most likely criminalized.

41. Recent reports by the OHCHR, and the findings of the FFM<sup>45</sup> concur in their assessment that the judiciary in Venezuela lacks independence. Instead, it is

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<sup>41</sup> See, for example, OHCHR human rights [report](#).

<sup>42</sup> Fact-Finding Mission 2020 [Report](#)

<sup>43</sup> Ibid.,

<sup>44</sup> [Rule of Law Index](#)

<sup>45</sup> Venezuelan [justice system](#) plays a significant role in the State's repression of government opponents (2021). [Venezuela](#): UN Fact-finding Mission says attacks on civic and democratic space have intensified, urges new security force – DAET - be monitored to protect rights (2023).



employed as an instrument to facilitate the repression of both real and perceived political adversaries. These reports also substantiate the prevalence of widespread human rights abuses, including torture, cruel and degrading treatment, enforced disappearances, incommunicado detention, and extrajudicial executions within this context.

42. For example, the Legal Representative can attest to the existence of a distinct pattern that emerges in cases of torture, suggesting a likely sequence of events: initially, arbitrary detention is followed by prolonged and unjustified confinement, which includes incommunicado detention or disappearance. This may occur in either an official or clandestine detention facility or through the unnecessary extension of the transfer time, with the latter being more common in cases related to protests or demonstrations. Throughout this period, the arbitrarily detained individual is highly susceptible to torture or ill-treatment, often aimed at coercing them into making confessions or providing testimony against themselves or third parties.

43. All of these serious human rights violations, such as arbitrary detentions, torture, and enforced disappearances, are formally denounced.<sup>46</sup> However, in every case, State authorities have neglected their duty to initiate and conduct investigations into these incidents. For example, in each case of arbitrary detention that Foro Penal receives and confirms, the proper formal complaint is made, yet no investigations have been initiated for this reason, even in situations where the UN Working Group on Arbitrary Detention has officially declared these detentions as arbitrary.<sup>47</sup>

44. In cases of torture, a similar situation occurs. For example, between 2020 and 2023, Foro Penal submitted 78 formal torture complaints without receiving any

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<sup>46</sup> Formal complaints with receipt stamps that are never answered. See ANNEXES 1 and 2.

<sup>47</sup> From 2014 to 2019, Foro Penal registered 15,248 individuals arbitrarily detained for political reasons. The United Nations Working Group on Arbitrary Detention, has already issued opinions with respect to over 400 political detainees in Venezuela, considering them as subjects of arbitrary detention. [Alfredo Romero, [The Repression Clock](#)].

response from the authorities.<sup>48</sup> And from 2014 to 2019, Foro Penal submitted 115 formal complaints.<sup>49</sup> The latter were presented to both the Prosecutor's Office and the Ombudsman's Office ("*Defensoría del Pueblo*"), as well as the courts handling the cases. In none of the cases was an investigation ordered against the security force officials involved in acts of torture.<sup>50</sup> In some cases, even though the law<sup>51</sup> obliges the authorities to receive and process complaints of torture, the courts simply refuse to receive or record the complaints received. Even when torture was alleged as a ground for nullifying the legal proceedings at the time of presenting detained victims to the Public Prosecutor's Office and the Courts, or when urgent medical attention was required due to such acts of torture, these complaints and requests for nullification were systematically ignored. In the cases Foro Penal has denounced and monitored, not a single police or military official, nor any member of the security forces, has ever been investigated for the use of torture against individuals that have been arbitrarily detained for political purposes.

45. In cases where there has been an enforced disappearance, whether short or long term, the lawyers of Foro Penal have filed a complaint with the respective Court at the time of the arraignment. This complaint is regularly ignored by judges and prosecutors and so far, there has been no investigation for denounced cases of enforced disappearance.<sup>52</sup> Foro Penal makes public complaints, including to the Office of the Prosecutor for Fundamental Rights and the Ombudsman's Office, to no avail.<sup>53</sup>

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<sup>48</sup> ANNEX 1

<sup>49</sup> ANNEX 2

<sup>50</sup> Since April 2017, the law enforcement agency with the highest number of torture complaints against dissidents is the DGCIM. See, for example: Foro Penal and RFKHR [2022 Joint report](#), pp. 23-29.

<sup>51</sup> Article 15 of the venezuelan Special Law for the Prevention and Punishment of Torture and Other Cruel, Inhuman, or Degrading Treatments. Extraordinary Official Gazette of the Bolivarian Republic of Venezuela number 40.212 of July 22, 2013.

<sup>52</sup> See for example: Foro Penal and Robert F. Kennedy Human Rights, [Enforced Disappearance as a Tool of Political Repression in Venezuela](#), 2020.

<sup>53</sup> See ANNEX 1 and ANNEX 2.

#### 4. The Government of Venezuela's Deliberate Policy of Persecution against Dissenting Voices or Perceived Opponents

46. The Legal Representatives possess credible information, documented in various reports, derived from ongoing monitoring of the situation,<sup>54</sup> and the documentation of severe human rights violations within the context of detention<sup>55</sup> and the cases directly represented by lawyers of Foro Penal in Venezuela.<sup>56</sup> This information underscores a distinct State policy characterized by the systematic practice of imprisonment (including arbitrary detention, prolonged use of pre-trial detention, and the unjustified application of burdensome precautionary measures,<sup>57</sup> including house arrest); enforced disappearance,<sup>58</sup> torture,<sup>59</sup> and other human rights abuses, orchestrated by State agents with the aim of criminalizing, suppressing, and intimidating anyone perceived as a critical voice or political dissident.

47. What has been identified, in conjunction with other organizations and international mechanisms, is a pattern where individuals (perceived as vocal critics or those whose interests run counter to the government's agenda), are routinely subjected to arbitrary detention, with security agencies failing to disclose their whereabouts, even when lawyers and family members are present at the detention sites, seeking to verify the detainees' location and well-being,

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<sup>54</sup> See for example, Foro Penal and Robert F. Kennedy Human Rights, [Enforced Disappearance as a Tool of Political Repression in Venezuela](#), 2020. Foro Penal and Robert F. Kennedy Human Rights, [Criminal Justice as a Tool of Political Repression in Venezuela](#), 2022.

<sup>55</sup> Foro Penal, [publications](#)

<sup>56</sup> Foro Penal, [Political Prisoners in Venezuela](#)

<sup>57</sup> From 2014 to the present date, Foro Penal has documented that 9,000 people remain arbitrarily subjected to restrictive measures of their freedom.

<sup>58</sup> In 2020, the organizations Robert F. Kennedy Human Rights and Foro Penal published a report demonstrating how Venezuela's Bolivarian regime uses enforced disappearances as a tactic to silence its political opponents and critical voices. 2020 [Joint Report on Enforced Disappearances](#), Foro Penal and RFKHR, pp. 22 -23.

<sup>59</sup> See, for example: Foro Penal and RFKHR [2022 Joint report](#), pp. 23-33.

both physically and psychologically.<sup>60</sup> It is highly probable that the State will appoint a public defender, even when the detainee has requested the exercise of their right to choose their own attorney.<sup>61</sup> Furthermore, in cases of political nature, there is a significant likelihood of resorting to special jurisdictions, such as those dealing with terrorism or military matters, which often involve expedited and confidential proceedings.<sup>62</sup> According to Foro Penal, since 2017, without solid legal basis, at least 131 political prisoners in Venezuela have been charged, accused or convicted for “terrorism” or crimes related to “terrorism”,<sup>63</sup> even when their cases don’t meet the international standards<sup>64</sup> to be considered as such.

48. Arbitrary detentions, and enforced disappearances lead to additional grave human rights violations, including violations of the right to life, security, and personal liberty, as well as due process violations (including the right to an effective defense and a fair trial), along with the widespread use of torture and cruel, inhuman, or degrading treatment.<sup>65</sup>
49. Despite the seriousness of these practices and the recurring patterns that indicate a policy, as they are not isolated incidents, it is evident that State authorities responsible for investigating and prosecuting these serious crimes, including the Judiciary, Public Prosecutor's Office, and Ombudsman's Office,

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<sup>60</sup> See, for example, Foro Penal and Robert F. Kennedy Human Rights, *Criminal Justice as a Tool of Political Repression in Venezuela*, 2022. Part IV: Criminal justice in practice based on the experience of Foro Penal.

<sup>61</sup> Foro Penal and Robert F. Kennedy Human Rights, [Criminal Justice as a Tool of Political Repression in Venezuela](#), 2022, pp. 20, 48-51.

<sup>62</sup> Foro Penal and Robert F. Kennedy Human Rights, [Criminal Justice as a Tool of Political Repression in Venezuela](#), 2022, pp. 28

<sup>63</sup> ANNEX 7.

<sup>64</sup> Article 2 (1.b) of the UN International Convention for the Suppression of the Financing of Terrorism (Adopted by the United Nations General Assembly in its resolution A/RES/54/109 of 9 December 1999 and opened for signature on 10 January 2000).

<sup>65</sup> See below the cases of Javier Tarazona and Emirlendrys Benitez

have failed in their duties<sup>66</sup> to the extent that they appear to shield those responsible and perpetuate a culture of impunity.<sup>67</sup>

50. Moreover, as the Legal Representatives informed this Honorable Chamber, in their observations of October 3, 2023, in this context, the systematic attacks on human rights defenders persist: In 2022, there were 396 recorded incidents, involving harassment, intimidation, stigmatization, and threats.<sup>68</sup> Members of Foro Penal and legal representatives of victims have reported that they and their families have been threatened and harassed by the Venezuelan government for cooperating with the ICC.

51. The constant attacks against Foro Penal are evident on social media and State-controlled media. They have also been documented in the organization's numerous denunciations to international bodies, including the Inter-American Commission on Human Rights, the United Nations High Commissioner for Human Rights, and the Office of the Prosecutor and Victims' Participation of the International Criminal Court.<sup>69</sup>

52. In its observations to the Appeals Chamber, the Venezuelan government stated that it cannot oppose what is drawn from "social media and organizations that are positioned against the state itself, politically," <sup>70</sup>(our emphasis) when referring to the principle of complementarity and its allegedly "sufficient

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<sup>66</sup> See, Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela; September 16, 2020. Available here: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/238/94/PDF/G2023894.pdf?OpenElement>

<sup>67</sup> See, for example, Foro Penal and RFKHR 2022 Repor : At the end of 2021, Foro Penal analyzed 148 cases in which the complaints made for torture, whether before the courts, the Prosecutor's Office or the Ombudsman's Office, were physically on file. In all cases, the courts, in addition to ignoring the complaint, even when in some cases the judges were shown the marks from the blows or injuries suffered by the victims who were present at the hearings, failed to comply with the Law, which establishes the obligation for any public official who knows of the existence of a possible case of torture to send the information to the Ombudsman's Office for investigation. In none of the cases in which complaints were filed directly with the Ombudsman's Office was any investigation carried out. In the cases reported directly to the Public Prosecutor's Office, specifically to the Fundamental Rights Prosecutor's Office, no investigation was initiated and conducted nor was guilt established.

<sup>68</sup> See, [Amnesty](#).

<sup>69</sup> Please refer to Observations of Legal Representatives, dated October 3, 2023, paras 17-19

<sup>70</sup> GoV [Appeals Brief](#), para. 10

jurisdictional activity." This statement reconfirms the government's view of human rights and other civil society organizations as "opponents" and enemies of the State simply for doing their work, which is essential in a healthy democracy.

#### **4.1. Political Prisoners in Venezuela are a Fundamental Component of State-Sanctioned Persecution**

53. The use of political imprisonment in Venezuela serves as a stark example of the State's deliberate policy to stifle dissent and opposition voices. It is a tactic employed to quash any form of political criticism or dissenting opinions within the country. By imprisoning individuals on political grounds, the government seeks to create an atmosphere of fear and intimidation, making it increasingly perilous for citizens to voice their concerns or advocate for political change.<sup>71</sup>

54. As of October 30th, of this year, Venezuela's staggering count of 271 political prisoners,<sup>72</sup> with 101 of them enduring over 3 years of pretrial detention,<sup>73</sup> paints a disturbing picture. According to the Venezuelan Criminal Procedural Code, the maximum of pretrial detention (or coercive measures before a sentence) is 3 years. This implies that, according to the Venezuelan legal system, these individuals are considered to be formally arbitrarily detained. Furthermore, despite numerous complaints and petitions submitted by lawyers from Foro Penal to the courts and the national Prosecutor's Office, they have been consistently denied without providing substantial justifications.<sup>74</sup>

55. This grim reality suggests a discernible pattern of State persecution, characterized by a clear and delimited discriminatory intent—namely, the targeted persecution of individuals based on their political affiliations, all with

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<sup>71</sup> For a thorough analysis of political detention as State policy used for regime's stability see [The Repression Clock](#).

<sup>72</sup> See ANNEX 3.

<sup>73</sup> See ANNEX 4.

<sup>74</sup> See ANNEX 4

the aim of suppressing dissenting voices and opposition. The Legal Representatives will now elaborate on the Government of Venezuela's obligation to investigate and prosecute the element of "discriminatory intent" within this concerning context, highlighting the critical need for accountability and respect for human rights.

## V. DOMESTIC INVESTIGATIONS MUST COVER THE ELEMENT OF "DISCRIMINATORY INTENT" WITH REGARDS TO THE UNDERLYING ACTS OF THE CRIME OF PERSECUTION

56. While the argument of the GoV regarding the necessity to consider the substance of conduct rather than mere legal labels is valid for the effective application of the complementarity principle,<sup>75</sup> it is essential to underline that the present situation before the Chamber differs significantly from the situation in Libya.

57. The GoV aims to assert that, like Libya, the absence of a distinct domestic legal provision for the crime of persecution should not hinder the Appeals Chamber from acknowledging that the GoV intends to prosecute the same underlying conduct as the Prosecutor. This assertion is based on the premise that the Chamber should also recognize that the "discriminatory intent" element is treated as an aggravating factor under Venezuelan criminal law.<sup>76</sup>

58. Nevertheless, despite potential formal similarities, where the 2017 Law Against Hate, for Peaceful Coexistence and Tolerance<sup>77</sup> could hypothetically fulfill a similar role as the Libyan legislation did in those cases, it is crucial to emphasize

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<sup>75</sup> GoV [Appeals Brief](#), para. 132.

<sup>76</sup> GoV [Appeals Brief](#), paras. 132-133.

<sup>77</sup> [Ley Contra el Odio, por la Convivencia Pacífica y la Tolerancia](#). It is extremely important to highlight that this law has been instrumentalized to serve as a means of criminalizing those perceived as opposed to the government's interests, And it is not a "law" in the strict sense, since it is a legislative decree (issued by a body other than the National Assembly) that does not meet the requirements of Article 202 of the venezuelan Constitution and, consequently, violates Article 49(6) of the same Constitution.

that the actions of the GoV throughout the proceedings have significantly diverged from those of Libya in this context.

59. In the *Gaddafi* case, it was the State of Libya that explicitly affirmed that, although Libyan criminal law did not contain a precise provision identical to the crime of persecution as defined in the Rome Statute, the “discriminatory intent” of the perpetrator committing the underlying act was considered an aggravating factor that could be considered during sentencing.<sup>78</sup> It was upon receiving this clarification from Libya that the Pre-Trial Chamber reached the conclusion that, while the offenses listed in Libyan legislation on their own did not precisely match the offenses the Prosecutor intended to pursue under the Rome Statute, when evaluated in conjunction with “discriminatory intent” as an aggravating factor, the structure of charges sufficiently encompassed the fundamental conduct, thus favoring domestic jurisdiction.<sup>79</sup>

60. Furthermore, in the *Senussi* admissibility appeal, it was the State of Libya that provided a detailed explanation of how a domestic judge could consider discrimination on political grounds as an aggravating feature at the sentencing stage.<sup>80</sup>

61. The attempt of the GoV to draw a parallel between its actions and those of Libya without conducting a thorough examination of their elements is misleading. The GoV seeks to convince the Chamber that it has followed a similar path to Libya. This, however, is not the case. Unlike Libya, which presented a comprehensive intended charging structure and provided specific insight into how discriminatory intent could be integrated into its investigation during

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<sup>78</sup> Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11. [“Libyan Government’s further submissions on issues related to the admissibility of the case against Saif Al-Islam Gaddafi”](#), para. 87.

<sup>79</sup> Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, [“Decision on the admissibility of the case against Saif Al-Islam Gaddafi”](#), para. 113.

<sup>80</sup> Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, [Response](#) to the “Document in Support of Appeal on behalf of Abdullah Al-Senussi against Pre-Trial Chamber I’s ‘Decision on the admissibility of the case against Abdullah Al-Senussi’”, para. 146.



sentencing, the GoV has not provided a comparable level of specificity and detail into its intended investigation, if any at all.

62. The approach of the State of Libya was not casually acknowledged by the Chamber; it was accepted through substantial proof that the charging structure, when comprehensively evaluated, adequately covered the underlying conduct the Prosecutor aimed to charge. Contrary to this, Venezuela merely asserted that “no cases of persecution have been recorded since there is no express criminal type in national legislation as persecution can be deployed through multiple criminal conducts”.<sup>81</sup>
63. Moreover, it was the Prosecution, not the State, that referred to the existence of the alleged legislation designed to address this charging deficiency. While the GoV attempts to frame this as the Prosecution conceding that the hypothetical domestic case would align with its own, the Legal Representatives contend that, when this aspect is considered in conjunction with the fact that the GoV has not brought charges against the most responsible for the appropriate offenses with the necessary vigor, a single conclusion becomes evident: The GoV has not sufficiently demonstrated that the domestic investigation at this stage would incorporate a "discriminatory intent" element.
64. The Appeals Chamber should not deduce that the mere incidental mention of legislation, a point not even raised by the GoV, but introduced by the Prosecution at this juncture, implies that the domestic investigation intends to encompass this element in its interpretation of the situation. To reach a different conclusion would permit the GoV to effectively disregard the "discriminatory intent" element from the investigation, distorting the contextual understanding of crimes in the situation. Such an oversimplified narrative fails to align with the true circumstances and, if endorsed by the Chamber, would contradict the

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<sup>81</sup> Situation in The Bolivarian Republic of Venezuela I, ICC-02/18, “Prosecution [request to resume the investigation](#) into the situation in the Bolivarian Republic of Venezuela I pursuant to article 18(2)”, para. 110; VEN-OTP-0001-1250 at 1330, para. 163.

principle of positive complementarity and the overarching goal of ending impunity as outlined in the Preamble and the core principles of the Rome Statute.

**5. Two examples that exemplify the points raised by the Legal Representatives: lack of implementation, lack of judicial independence, the existence of a State policy of persecution with a discriminatory intent: based on political beliefs**

65. The willful neglect of the GoV in investigating cases related to torture, sexual violence, and other grave atrocities persists today, exemplified by the tragic stories of Emirlendris Carolina Benítez Rosales and José Javier Tarazona Sánchez, which are only a sample of the widespread impunity that runs rampant in Venezuela.

66. Emirlendris Carolina Benitez Rosales, was arbitrarily detained and abducted by DGCIM personnel while traveling on a highway on August 5, 2018. Despite being one month pregnant at the time, she was taken to the Boleíta DGCIM headquarters, where she suffered brutal torture, including asphyxiation with plastic bags and having her face submerged in a bucket of water. She was also subjected to physical beatings and kicked across her stomach, despite pleading for mercy due to her pregnancy. The torture she endured resulted in a tragic miscarriage. Following this horrific ordeal, she was brought before a judge who ordered her to remain in pre-trial detention. Despite being granted medical treatment, the detention facility in which she was located failed to provide her with the necessary care she urgently required. These facts have been repeatedly brought to the attention of the domestic authorities for their investigation and prosecution, both through domestic and international actors such as the Inter-American Commission on Human Rights and the Working Group on Arbitrary Detentions.<sup>82</sup> Foro Penal and/or Ms. Benitez Rosales' relatives have lodged complaints with the national Prosecutor's Office or submitted formal

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<sup>82</sup> See ANNEX 5.

declarations to the Venezuelan courts, yet no investigations have been initiated.

<sup>83</sup> Overall, there has been a lack of concrete actions to ensure accountability for Emirlendris, underscoring a significant miscarriage of justice and a recurring pattern of deliberate disregard for similar cases throughout the country.

67. Human rights defender Javier Tarazona, is an activist and member of the NGO FundaRedes, who was arbitrarily detained at the Prosecutor's office when he attempted to report being followed by SEBIN agents. His abduction occurred without any legal warrant or explanation regarding his apprehension and destination. For several days, he was held incommunicado, unable to contact his family or his legal defence team, who remained uncertain of his location for three days. Javier Tarazona also suffers from multiple cardiac illnesses that require specific medical treatment and a specialized diet. Tragically, the GoV has failed to provide him with the necessary medical care, resulting in a continuous deterioration of his health, despite this situation being repeatedly brought to the attention of the authorities.<sup>84</sup> In this case, as well as Ms. Benitez Rosales, Foro Penal and/or Mr. Tarazona's relatives have filed complaints before the national Prosecutor's Office or submitted formal declarations to the Venezuelan courts, and no investigations have been initiated.<sup>85</sup>

68. In essence, both stories serve as compelling examples of the unwillingness and deliberate failure of the GoV to initiate any meaningful investigations that would even remotely resemble the structure of crimes defined in the Rome Statute or, for that matter, any criminal investigations at all.

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<sup>83</sup> See ANNEX 5.

<sup>84</sup> See ANNEX 6.

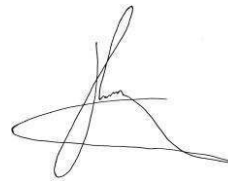
<sup>85</sup> See ANNEX 6

**VI. CONCLUSION**

69. For the reasons outlined above, the Legal Representatives respectfully request the Honorable Appeals Chamber to reject the Government of Venezuela's appeal and uphold the Pre-Trial Chamber's decision.



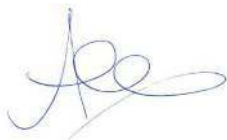
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Dated this November 5, 2023

At Caracas, Venezuela and Washington D.C. United States































































































































































































































































































































































































































































