

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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PRE-TRIAL CHAMBER I

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

SITUATION IN THE BOLIVARIAN REPUBLIC OF VENEZUELA I

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only available to the Registrar and the Prosecution**

**Prosecution's observations following the Pre-Trial Chamber's 14 June 2021
Decision**

Source: Office of the Prosecutor

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

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SUBMISSIONS

1. On 14 June 2021, the Pre-Trial Chamber rejected (*in limine*) the Bolivarian Republic of Venezuela's request for it to exercise judicial control over the preliminary examination in the *Situation in the Bolivarian Republic of Venezuela I*.¹ In light of the Chamber's guidance on the Prosecutor's duty to engage in meaningful dialogue with Venezuela,² the Prosecution respectfully files these observations, to assure the Chamber that it has observed its statutory duties. In particular, while the Prosecution had anticipated giving further information on its level of engagement with Venezuela in its substantive response to Venezuela's Request, the Chamber's decision dismissing Venezuela's Request has rendered this redundant. However, the Prosecution considers it prudent, for the accuracy of the record, to provide a brief description of its engagement with Venezuela during the preliminary examination nonetheless, and does so accordingly.

i. Potential Next Steps

2. As the Prosecution noted in its earlier filing before the Chamber, the Prosecutor has concluded her preliminary examination of the Situation relating to Venezuela I.³ In particular, following a thorough and independent process, which has benefitted from the consistent cooperation of the Government of Venezuela, as well as other stakeholders, the Prosecutor has concluded that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Venezuela.⁴ This determination will be handed over to the incoming Prosecutor for his consideration and ultimate decision-making.

¹ ICC-02/18-9-Conf ("Decision"); ICC-02/18-6-Conf-AnxIV ("Request" or "Venezuela's Request"); ICC-02/18-7-Conf ("Prosecution's Omnibus Request"); ICC-02/18-08-Conf-AnxIII ("Venezuela's Response").

² Decision, paras. 16, 18-20, p. 12.

³ Prosecution's Omnibus Request, paras. 4 ("[...] the Prosecutor nonetheless considers it appropriate, in deference to the Pre-Trial Chamber's competence which has now been seized, to delay her announcement pending the Chamber's consideration of the Request."), 17.

⁴ ICC-OTP, [Report on Preliminary Examination Activities](#) (2020), 14 December 2020, paras. 202-206.

3. As set out in her 2020 Report on Preliminary Examination Activities, the Prosecutor has concluded that the information available provides a reasonable basis to believe that since at least April 2017, civilian authorities, members of the armed forces and pro-government individuals have committed the crimes against humanity of imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law pursuant to article 7(1)(e); torture pursuant to article 7(1)(f); rape and/or other forms of sexual violence of comparable gravity pursuant to article 7(1)(g); and persecution against any identifiable group or collectivity on political grounds pursuant to article 7(1)(h) of the Rome Statute.⁵

4. In this context, given the scope and range of the different alleged crimes within the context of the situation, the Prosecution has focused on a particular sub-set of allegations related to the treatment of persons in detention, for which sufficiently detailed and reliable information was available to enable a determination on whether there was a reasonable basis to believe that one or more crimes within the jurisdiction of the Court had been committed; without prejudice to other crimes that might be determined at a later stage and with respect to a wider time period.

5. In particular, the information available provides a reasonable basis to believe that the members of the security forces allegedly responsible for the physical commission of these alleged crimes include: the Bolivarian National Police (*Policía Nacional Bolivariana* or "PNB"), the Bolivarian National Intelligence Service (*Servicio Bolivariano de Inteligencia Nacional* or "SEBIN"), the Directorate General of Military Counterintelligence (*Dirección General de Contrainteligencia Militar* or "DGCIM"), the Special Action Forces (*Fuerza de Acciones Especiales* or "FAES"), the Scientific, Penal and Criminal Investigation Corps (*Cuerpo de Investigaciones Científicas, Penales y Criminalísticas* or "CICPC"), the Bolivarian National Guard (*Guardia Nacional Bolivariana* or "GNB"), the National Anti-Extortion and Kidnapping Command (*Comando Nacional Antiextorción y Secuestro* or "CONAS"), and certain other units of

⁵ [Report on Preliminary Examination Activities](#) (2020), para. 204.

the Bolivarian National Armed Forces (*Fuerza Armada Nacional Bolivariana* or "FANB").

6. Further, the information available indicates that pro-government individuals also participated in the repression of actual or perceived opponents of the Government of Venezuela, principally by acting together with members of the security forces or with their acquiescence.

7. With respect to complementarity, the Prosecutor has also concluded that the potential cases that would likely arise from an investigation of these alleged crimes would be admissible pursuant to article 17(1)(a)-(d) of the Statute.

8. Significantly, having reviewed the information submitted by the domestic authorities, the potential cases that would likely arise from an investigation into the situation would be admissible in terms of inaction. This is because of the limited number of relevant domestic proceedings relating to the potential cases identified by the Prosecution; their highly limited scope relative to its findings; and the lack of concrete, progressive steps in those cases to ascertain the criminal responsibility of suspected persons. Nonetheless, given that some of the underlying conduct and specific incidents examined by the Venezuelan authorities appear to at least partially correspond to some of the underlying conduct and incidents assessed by the Prosecution as part of its potential cases, it has also conducted a genuineness assessment into potentially relevant national proceedings. This has resulted in the conclusion that the authorities are unwilling genuinely to investigate and/or prosecute such cases. This is because, according to the information available, domestic proceedings have been undertaken or national decisions made for the purpose of shielding persons from criminal responsibility, under article 17(2)(a), and/or domestic proceedings have not been conducted independently or impartially, meaning that they have been conducted in a manner which is inconsistent with an intent to bring the person concerned to justice, under article 17(2)(c) of the Statute.

9. The Prosecution is mindful of the Chamber's guidance on approaches to complementarity and potential article 18 proceedings in this situation,⁶ and respectfully submits the information above accordingly. If the Prosecutor makes the determination to initiate an investigation, the Office of the Prosecutor ("Office") will also notify Venezuela accordingly.⁷

ii. The Office's engagement with Venezuela on complementarity during the preliminary examination

10. As previously stated, the Prosecutor deeply appreciates the fruitful cooperation she has enjoyed with the Government of Venezuela.⁸ To this end, the Prosecution is grateful that the Chamber considered that the Office was providing the requisite cooperation to Venezuela.⁹ However, since the Office did not have the opportunity to respond to Venezuela's submissions that its efforts to establish a productive dialogue with the Office were "met with silence",¹⁰ the Prosecution describes the steps it has undertaken to establish and to maintain a mutual dialogue with Venezuela during the preliminary examination.

11. The Prosecution firstly observes that it has not conducted a perfunctory admissibility assessment – instead it has engaged in meaningful process with the Venezuelan authorities to understand the nature and content of relevant domestic proceedings, as well as to assess their genuineness. This is despite the fact that already, as part of its subject-matter assessment which concluded in 2020, the Prosecution had made findings, in its internal reports, with respect to the lack of independence and impartiality of the judiciary as well as efforts to shield perpetrators from criminal justice, as relevant underlying factors to establish a State policy to attack the civilian population. Although the Prosecutor might have

⁶ Decision, paras. 16, 18-20.

⁷ Decision, para. 16 ("Should the Prosecution decide that there is a reasonable basis to commence an investigation it shall so notify Venezuela. [...]").

⁸ Decision, para. 19; Prosecution's Omnibus Request, para. 2.

¹⁰ Decision, para. 18.

¹⁰ Decision, para. 18.

concluded the complementarity assessment at that stage on the basis of the existing information showing a lack of genuineness, she nonetheless proceeded to engage in a meaningful process to request information from the Venezuelan authorities. This was done by the submission in October 2020 of a detailed request seeking information on multiple headings, which was submitted to the authorities against the standard set out in the extant case law of the Court on complementarity.

12. The submission of this detailed request was followed, on 4 November 2020, by an in-person meeting of the Attorney General, Mr Tarek William Saab, and the Venezuelan Ombudsperson, Mr Alfredo Ruiz, with the Prosecutor at the seat of the Court.¹¹ The meeting was organised at the request of the Venezuelan authorities and facilitated by the Prosecutor's Office with the Host State in the light of the EU sanctions restricting their entry into The Netherlands.¹² The meeting provided an opportunity to exchange with the delegation on a number of aspects relating to the preliminary examination process and sought information on relevant domestic proceedings and their conformity with Rome Statute requirements.

13. In response to the Prosecutor's October 2020 request, the Venezuelan authorities submitted a significant volume of information from 30 November 2020 onwards. This included detailed reports on legal and factual issues arising from the preliminary examination, whereby the Government of Venezuela challenged the subject-matter findings entered by the Office, as well as information on specific cases it reported as having been initiated at the national level—some relevant to the Prosecutor's request, others concerning other different categories of alleged conduct.

14. The Office also routinely interacted with the Venezuelan authorities through their Embassy in The Hague. This included at least seven in-person meetings

¹¹ ICC Press release, [ICC Prosecutor, Mrs Fatou Bensouda, receives high-level delegation from the Bolivarian Republic of Venezuela in the context of its ongoing preliminary examinations](#), 5 November 2020.

¹² [European Union Consolidated Financial Sanctions List](#), updated on 15/06/2021, available at: <https://webgate.ec.europa.eu/fsd/fsf/public/files/pdfFullSanctionsList/content?token=dG9rZW4tMjAxNw>.

between the Ambassador Permanent Representative Permanent Mission of the Bolivarian Republic of Venezuela to OPCW-ICC with the Prosecutor, to undertake exchanges on the situation and to provide relevant updates on the progress of the Office's assessment.

15. In this respect, it should be noted that the Attorney General, Mr Tarek William Saab, frequently conveyed through the Embassy a request for substantive 'feedback' on the information submitted. The Prosecutor, as per her practice, while repeatedly conveying the Office's appreciation for the information provided in response to its request for information, was not, however, in a position to provide substantive indications on her conclusions on the materials provided—in advance of her final determination. The 'silence' to which the Government of Venezuela refers, thus, appears to relate less to the nature and frequency of the Office's interactions with the Venezuelan authorities, which remain frequent throughout this period, but rather the apparent expectation, on the side of the Venezuelan Attorney General, for the Prosecutor to share her substantive determination on the relevance and genuineness of domestic proceedings on a rolling basis in response to the sequential submission of information by the Venezuelan authorities.

16. The Venezuelan authorities have continued, during 2021, and without prompting by the Office, to provide routine periodic updates on domestic proceedings—constituting seven submissions to date. While not all of these submissions have related to national proceedings, and much of the information submitted on domestic cases fell beyond the specific scope of the Prosecutor's request for additional information of October 2020, the Office has continued to welcome and study the information provided by the authorities with the appropriate and necessary due diligence.

17. The Office continues to extend its deep appreciation to the Venezuelan authorities for their provision of information in response to its October 2020 request.

This information has ultimately assisted the Office in reaching its admissibility assessment on the basis of the best information available. In line with the Chamber's guidance,¹³ the Prosecution is mindful of the current stage of the preliminary examination and the potential availability of the article 18 option at a later stage (if relevant), at which point the statutory rights of the Government of Venezuela would be engaged to litigate on the question of admissibility, as the case may be.

18. Consistent with the Chamber's guidance that the requirement to "maintain a meaningful dialogue with Venezuela, in line with the complementary principle" is relevant both "during the preliminary examination and beyond as the case may be", the Prosecution also wishes to assure the Chamber that it will continue to count on the support and cooperation of the Government of Venezuela. Bearing in mind the overarching requirements of partnership and vigilance that have guided the Prosecution's approach to complementarity, it will also continue to consider how justice may best be served within a framework of complementary domestic and international action.

19. The Prosecution respectfully submits these observations for consideration, and seeks no other relief.

CONFIDENTIALITY

20. This filing is classified as "*ex parte*" pursuant to regulation 23*bis*(1) of the Regulations of the Court as it refers to information concerning the Prosecution's determination that is neither public nor available to Venezuela at this stage, and is being provided to the Chamber on a discretionary and *ex parte* basis. The Prosecution will file a confidential redacted version of these observations, available to Venezuela. Following the Chamber's Decision,¹⁴ once a public redacted version of Venezuela's Request is available, the Prosecution will also file a public redacted

¹³ Decision, para. 16.

¹⁴ Decision, paras. 7-8.

version of these observations (or seek reclassification thereof), along with its earlier filing.



Fatou Bensouda, Prosecutor

Dated this 15th day of June 2021
At The Hague, The Netherlands