Annex III

Public

Transmission of Documents Received from the Authorities of the Bolivarian Republic of Venezuela on 9 July 2021

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Public redacted version of 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 Regulation 46.2 of the Regulations of the Court[1]

The Government of the Bolivarian Republic of Venezuela, as a State Party to the Rome Statute of the International Criminal Court, hereby requests the Pre-Trial Chamber I, pursuant to Articles 15 and 21.3 of the Statute and Regulation[2] **46.2 of the Regulations of the Court, to realize a judicial control on the action of the OTP in the frame of the preliminary examination of the situation in Venezuela.**

[1] Corrigendum
[2] Corrigendum

THE ATTORNEY GENERAL OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, on behalf and in representation of the **BOLIVARIAN REPUBLIC OF VENEZUELA**, through its Permanent Mission to the International Criminal Court in The Hague, in the framework of the Preliminary Examination of **CASE VENEZUELA I**, in accordance with the provisions of art. 46. 2 of the Regulations of the Court, I am writing to the Pre-Trial Chamber requesting a ruling on the legal elements required by this State Party, in view of the possible infringement of provisions of the Rome Statute, such as art. 21.3 and 15.

Article 46.2 of the Regulations of the International Criminal Court (hereinafter referred to as " ICCR") provides that:

> The Presidency shall assign a situation to a Pre-Trial Chamber as soon as the Prosecutor has informed the Presidency in accordance with regulation 45. The Pre-Trial Chamber shall be responsible for any matter, request or information arising out of the situation assigned to it, save that, at the request of a Presiding Judge of a Pre-Trial Chamber, the President of the Pre-Trial Division may decide to assign a matter, request or information arising out of that situation to another Pre-Trial Chamber in the interests of the administration of justice.

The Bolivarian Republic of Venezuela (hereinafter "Venezuela") is subject to the Preliminary Examination phase in the case known as the Venezuela I case. Within the framework of this Preliminary Examination, legal controversies and questions have arisen between the State and the Office of the Prosecutor of the ICC, which require a ruling by Pre-Trial Chamber I, as they may affect Articles 21(3) and 15 of the Rome Statute.

It is for this reason that the following **REQUESTS FOR JUDICIAL REVIEW** on certain points of law are submitted under Article 46.2 of the ICCPR.

REQUEST FOR JUDICIAL REVIEW I - Should the ICC Office of the Prosecutor reply to the State and maintain a dialogue in the Preliminary Examination, being obliged to establish a constructive dialogue with the State within the framework of the principle of complementarity, in order to comply with Art. 15 of the Rome Statute, especially when this has been requested and offered by the State on a permanent basis and from the outset.

REQUEST FOR JUDICIAL REVIEW II - Should the State be granted access to evidentiary material in order to guarantee the right of defence, the principle of contradiction and the control of evidence, in the framework of art. 21.3 of the Rome Statute?

REQUEST FOR JUDICIAL REVIEW III - Can the ICC Office of the Prosecutor base its considerations on a Preliminary Examination of illegally obtained documentation and accept sources of information and allegations that are shown to be partial, in bad faith or without any evidentiary rigour?

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I. BACKGROUND

A. *Initiation of the case*

1. On September 26th, 2018, a group of States Parties, namely the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru, lodged a complaint with the Office of the Prosecutor of the ICC concerning alleged human rights violations allegedly committed in Venezuela. On various unspecified dates, the Office of the Prosecutor also received individual complaints in relation to the same facts.

2. On February 8th, 2018, the ICC Office of the Prosecutor had previously opened a Preliminary Examination and reported that it was considering whether crimes within the jurisdiction of the Court had been committed in Venezuela. Specifically, the ICC Prosecutor indicated the following:

> On 8 February 2018, following a careful, independent and impartial review of a number of communications and reports documenting alleged crimes potentially falling within the jurisdiction of the ICC, I decided to open a preliminary examination of the situation in Venezuela to analyze crimes allegedly committed in this State Party since at least April 2017, in the context of demonstrations and related political unrest. Since then, my Office has been assessing the information available in order to reach a fully-informed determination of whether there is a reasonable basis to proceed with an investigation. This preliminary examination will continue to follow its normal course, strictly guided by the requirements of the Rome Statute.
>
> **Attached as ANNEX 1**: STATEMENT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, FATOU BENSOUDA, ON THE REFERRAL BY A GROUP OF SIX STATES PARTIES REGARDING THE SITUATION IN VENEZUELA APPEARED IN ICC WEB PAGE.27.09. 2018.

3. On October 2nd, 2020, the ICC Office of the Prosecutor formally communicated to Venezuela, through its permanent mission in The Hague, which specific and concrete information on certain cases was required, on a temporary basis, in order to comply with the principle of complementarity established in the Rome Statute. The ICC Office of the Prosecutor communicated the following:

> For the purposes of assessing complementarity, as part of its preliminary examination of the situation in Venezuela, the Office of the Prosecutor (the "Office") hereby requests information at this stage on national investigations and judicial proceedings by the Venezuelan authorities in relation to the following alleged crimes which the Office has identified as falling within the jurisdiction of the ICC: multiple unlawful arrests and detentions, acts of torture, rape and/or other forms of sexual violence and persecution of individuals perceived to support or be affiliated with the opposition or otherwise considered to oppose to the Government of Venezuela since April 2017.
>
> **Attached as ANNEX 2**: [EXPURGATED]

4. In this communication, the ICC Office of the Prosecutor requested information on the following points:

> "(...)
>
> A. INFORMATION RELATING TO DOMESTIC INVESTIGATIVE AND PROSECUTORIAL AGENCIES
>
> a. Which state entities are responsible for conducting investigations and prosecutions of allegations of imprisonment or other severe deprivation of physical liberty; acts of torture in detention; rape and/or other forms of sexual violence in detention; and acts of persecution based on political grounds? To which branch of Government or authority do these entities report?
>
> b. In relation to Venezuelan criminal procedural law, please provide a description of the phases of criminal proceedings against State agents and relevant legal provisions relating to fair trial guarantees.

c. Please indicate whether there exists Venezuelan legislation that could *de jure* or *de facto* exempt State agents, including senior officials of the executive and military apparatus, from investigation or prosecution the crimes mentioned above.

B. INFORMATION RELATED TO DOMESTIC PROCEEDINGS RELATED TO THE ALLEGED CRIMES OR RELEVANCE TO PRELIMINARY EXAMINATION

1. In relation to allegations of imprisonment or other severe deprivation of physical liberty of individuals who opposed, or were perceived to oppose the Government of Venezuela, please provide answers to the following questions:

a. How many civilian authorities, members of the Venezuelan security forces and pro-government individuals are being or have been subjected to investigations and/or judicial prosecutions for allegations of unlawful arrests or detentions of individuals deemed to oppose or perceive to oppose to the Government of Venezuela since April 2017? How many have been convicted and acquitted to date? Please specify the names, ranks and units of the individuals concerned.

b. Please indicate the date of initiation of each investigation and prosecution and their case numbers.

c. Please indicate the material and temporal scope of each case under investigation or prosecution. Please, specify the date, location, number of victims and circumstances of the incidents that form the basis of the proceedings as well as information about the structure of the units and/or individuals reportedly involved in the incidents.

d. What conduct/role is alleged against the suspect or accused?

e. What is the status of the proceedings? What investigative steps have been taken and what results have been achieved? Please provide supporting material, to the extent available.

f. What is the expected timeline for the completion of the investigations and prosecutions?

2. In relation to allegations of torture of individuals who opposed, or were perceived to oppose, the Government of Venezuela, please provide answers to the following

questions:

a. How many civilian authorities, members of the Venezuelan security forces and pro-government individuals are being or have been subjected to investigations and/or prosecutions for allegations of torture since April 2017? How many have been convicted and acquitted to date? Please specify the names, ranks and units of the individuals involved.

b. Please indicate the date of initiation of each investigation and prosecution and their case numbers.

c. Please indicate the material and temporal scope of each case under investigation or prosecution. Please specify the date, location, number of victims and circumstances of the incidents that form the basis of each proceeding as well as information about the structure of the and/or individuals reportedly involved in the incidents.

d. What conduct/role is alleged against the suspect or accused?

e. What is the status of the proceedings? What investigative steps have been taken and what results have been achieved? Please provide supporting material, to the extent available.

f. What is the expected timeline for the completion of the investigations and prosecutions?

3. In relation to allegations of rape and/or other forms of sexual violence of comparable gravity of individuals who opposed, or were perceived to oppose the Government of Venezuela, please provide answers to the following questions:

a. How many civilian authorities, members of the Venezuelan security forces and pro-government individuals are being or have been subjected to investigations and/or judicial prosecutions for allegations of rape and/or other forms of sexual violence of comparable gravity of individuals in detention since April 2017? How many have been convicted and acquitted to date? Please specify the names, ranks and units of the individuals concerned.

b. Please indicate the date of initiation of each investigation and prosecution, and their case numbers.

c. Please indicate the material and temporal scope of each case under investigation or prosecution. Please, specify the date, location, number of victims and circumstances of the incidents that form the basis of each proceeding as well as

information about the structure of the units and/or individuals reportedly involved in the incidents.

d. What conduct/role is alleged against the suspect or accused?

e. What is the status of the proceedings? What investigative steps have been taken and what results have been achieved? Please provide supporting material, to the extent available.

f. What is the expected timeline for the completion of investigations and prosecutions?

4. In relation to allegations of persecution of individuals who opposed, or were perceived to oppose the Government of Venezuela, please provide answers to the following questions:

a. How many civilian authorities, members of the Venezuelan security forces and pro-government individuals are being or have been subjected to investigations and/or judicial prosecutions for allegations of persecution based on political grounds since April 2017? How many have been convicted and acquitted to date? Please specify the names, ranks and units of the individuals concerned.

b. Please indicate the date of initiation of each investigation and prosecution, and their case numbers.

c. Please indicate the material and temporal scope of each case under investigation or prosecution. Please specify the date, location, number of victims and circumstances of the incidents that form the basis of each proceeding as well as information about the structures of the units and/or individuals reportedly involved in the incidents.

d. What conduct/role is alleged against the suspect or accused?

e. What is the status of the proceedings? What investigative steps have been taken and what results have been achieved? Please provide supporting material, to the extent available.

f. What is the expected timeline for completion of investigations and prosecutions?

5. The information available to the Office indicates that, since April 2017, a number of civilians have been subjected to criminal proceedings before military courts for conduct committed in the context of anti-government demonstrations or for expressing dissent or disagreement with the Government actions or policies. In that

> regard, please indicate: What charges have been brought against these individuals? For how long and in what conditions have they been detained? Who are still in detention and since when?

5. Since then, Venezuela has provided absolute, unrestricted, and unconditional cooperation to the ICC Office of the Prosecutor.

B. Collaboration provided by the Bolivarian Republic of Venezuela

6. On November 4th, 2020, the Attorney General of the Republic visited the headquarters of the ICC Office of the Prosecutor in The Hague, showing the country's willingness to cooperate by providing all the information required in the framework of the open Preliminary Examination.[3]

7. Subsequently, on November 30th, 2020, the Bolivarian Republic of Venezuela submitted to the ICC Office of the Prosecutor "COMPLIANCE REPORT TO THE ICC PROSECUTOR'S QUESTIONNAIRE. VENEZUELA I". This report stated that the Bolivarian Republic of Venezuela had complied with the request for information, in due time and form, through the delivery of the aforementioned document, prepared by its competent authorities, which was transmitted through the corresponding diplomatic channel, the Permanent Mission of Venezuela to the ICC. Therefore, the 110-pages report provided detailed compliance with all the information required by the ICC Office of the Prosecutor. Furthermore, in this report, the State reported on the reforms planned at the institutional level, such as the legislative reforms necessary so that no civilian can be investigated, prosecuted or tried by the so-called military justice system, in favor of ordinary justice; to

[3] "DDHH | Fiscal General de Venezuela, Tareck William Saab, detalla su reunión con la Fiscal de la Corte Penal Internacional en La Haya", *Official Website of the Government of the Bolivarian Republic of Venezuela*, November 10*th*, 2020.

develop a system of Transitional Justice that proactively guarantees the rights of victims; or the relevant reforms to improve prison conditions and detention periods and compliance with international standards of respect for the human rights of the detainees.

Attached as ANNEX 3: [EXPURGATED]

8. Shortly thereafter, on January 31st, 2021, Venezuela voluntarily submitted a second report entitled "EXTENDING INFORMATION: ANSWER TO THE ICC QUESTIONNAIRE", in which it further expanded its cooperation with the ICC Office of the Prosecutor, updating cases and submitting relevant information that had not been requested. The report took the opportunity to raise a number of legal issues, relating to the State's right to defense in the framework of the Preliminary Examination, such as, for example, based on a comparative study of other cases and their consequences, the fact that there is no prescribed time limit for conducting preliminary examinations. Furthermore, the ICC Office of the Prosecutor was informed of progress in relation to institutional and normative reforms in the country linked to the protection of human rights, such as the creation of an Office for Attention to Victims for the Protection of Human Rights.

Attached as ANNEX 4: [EXPURGATED]

9. Continuing with the absolute collaboration and cooperation with the ICC Office of the Prosecutor, on April 30th, 2021, Venezuela submitted a third report entitled "II EXTENDING INFORMATION: ANSWER TO THE ICC QUESTIONNAIRE", in which it provided the ICC Office of the Prosecutor with a new update on the cases and various advances in the commitments undertaken by the State of the cases and various advances in the commitments made by the State. Likewise, it reported on normative and institutional advances in the country, such as the enactment of

various laws on human rights. Finally, in this third report, the Bolivarian Republic of Venezuela expressly requested the Office of the Prosecutor to (i) That it make a statement on all the information transmitted so far, thus putting an end to the absolute silence that was operating in the process; (ii) That the Office of the Prosecutor of the ICC allow access to the information, i.e. the complaints, that it had in the Preliminary Examination, since Venezuela was completely blind, responding without knowing the specific cases submitted for complementarity, and furthermore, doubting the veracity of the information transmitted by the complainants, and therefore violating the principle of contradiction.

Attached as ANNEX 5: [EXPURGATED]

10. In addition to the above, on May 5th, 2021, Venezuela submitted a new report, in this case concerning the malicious use of social networks to spread and give a multiplier effect to inconsistent allegations in the framework of this case.

Attached as ANNEX 6: [EXPURGATED]

11. On May 18th, 2021, a new supplementary and complementary report has been submitted with regard to the updating of cases, the incorporation of new data, emblematic cases and important normative modifications that endorse the willingness to cooperate and collaborate with the Office of the Prosecutor in this Preliminary Examination phase.

Attached as ANNEX 7: [EXPURGATED]

12. Thus, the requests for pronouncements submitted by this State to the ICC Office of the Prosecutor last April 28th, 2021, remain unanswered, and this lack of response

is evidence of the lack of interest on the part of the Office of the Prosecutor in the cooperation that has been offered in order to satisfactorily resolve the issues raised by the Office of the Prosecutor to Venezuela in October 2020. Therefore, no response has been given to the following requests:

a. Request for a pronouncement in relation to the four (4) reports, complying with what has been requested and providing more information than even requested, in order to put an end to the policy of silence deployed by the ICC Office of the Prosecutor.
b. Request for a pronouncement in relation to the guarantee of the right to defence, the principle of contradiction and equality, in relation to Venezuela's access to the information in the complaints filed in the case, in order to be able to respond in relation to this material within the framework of complementarity, as well as to be able to exercise control of evidence, considering that many of these complaints could contain false information.

13. However, to date, the ICC Office of the Prosecutor has not responded to the requests made by the State, forcing it to act "blindly", which is why the Bolivarian Republic of Venezuela, in the framework of Article 46.2 of the ICCPR, has submitted to the Pre-Trial Chamber a set of requests for judicial review.

II. REQUEST FOR JUDICIAL REVIEW I

Should the ICC Office of the Prosecutor reply to the State and maintain a dialogue in the Preliminary Examination, being obliged to establish a constructive dialogue with the State within the framework of the principle of complementarity, in order to comply with Art. 15 of the Rome Statute, especially when this has been requested and offered by the State on a permanent basis and from the outset?

A. *Indetermination of the Preliminary Examination Phase and necessity of judicial review*

14. Preliminary examination is unprecedented in international criminal tribunals. It is a procedural innovation established for the first time in the Rome Statute. Its regulation is markedly brief, and the jurisprudential pronouncements of the Pre-Trial Chamber on the elements, guarantees and principles that should inform the Preliminary Examination are practically non-existent. Therefore, this phase is being distorted through its conversion into a diplomatic tool, markedly political, in which the OTP, under the cover of not being in a judicial phase, plays a political role in which it publishes serious accusations against a state which cannot defend itself and which is subjected to the unilateralism of the ICC Office of the Prosecutor, and which is obliged to defend specific individuals who are named in the accusations and who have been implicated in the opaque actions of the Office of the Prosecutor, without even having been able to give their assent, thus deteriorating the institutional image of the state and of these individuals.

15. In the history of international criminal tribunals, there is no similar phase to that which has been established in the Rome Statute as the Preliminary Examination.

At the Nuremberg and Tokyo Military Tribunals, the procedural format was based on the principle of the supremacy of these tribunals, with the direct prosecution of the alleged perpetrators, and without any prior diplomatic or political dialogue between the Prosecutor's Office and states. Subsequently, the "ad hoc" tribunals for the former Yugoslavia and for Rwanda, created by UN Security Council resolution, also operated on the supremacy of this international criminal body, without diplomatic or political dialogue in the international arena against states.

16. It is striking that the Preliminary Examination phase did not figure in the initial drafts for the establishment of an International Criminal Court. The General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission (hereinafter "ILC") to address the question of the establishment of an international criminal court. Subsequently, in resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991, the General Assembly requested the ILC to continue its consideration of the question of the establishment of an international criminal jurisdiction; and in resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, it requested the ILC to prepare a draft statute for such a court.

17. The ILC complied with the request and discussed the question of the establishment of an international criminal court between its 42nd session in 1990 and 46th session in 1994, at which it finalized a draft statute for the international criminal court which was submitted to the General Assembly.

18. The preliminary examination stage of ICC proceedings may be described as a legal vacuum in the Rome Statute.[4] Despite being a core component of the OTP's work,

[4] S. WHARTON & R. GREY, "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law*, 2018, p. 6; K. DE MEESTER, *The Investigation Phase in International Criminal Procedure*, Intersentia, 2015, p. 878.

the term "preliminary examination" appears just once in the Statute, in Article 15(6) which refers to "the preliminary examination referred to in paragraphs 1 and 2".

19. Article 15 has been described by the ICC itself as "one of the most sensitive provisions of the Statute" (Kenya's decision to authorize an investigation, March 31st, 2010, § 17) and as "one of the most fervently negotiated provisions at the Rome Conference" (Kenya's decision to authorize an investigation, KAUL dissenting opinion, March 31st, 2010, § 12).[5]

20. The preliminary examination has been described by the OTP itself as "one of the most cost-effective ways for the Office to fulfil the Court's mission" (2015 OTP Report on Preliminary Examination Activities, § 16).[6]

21. Article 15(6) states in the current wording of the Statute:

> If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

22. This paragraph, and Article 15 altogether, did not appear in the initial, International Law Commission proposal in 1994. Its roots may be traced to early 1996, in the context of the work of the Preparatory Committee, where discussions emerged as to the possibility to allow for the OTP to investigate *proprio motu*. At that moment, many discussions arose on triggering mechanisms, and on whether the OTP itself should be one such mechanism (Article 25 of the Statute, at that time).

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[5] ICC, Pre-Trial Chamber II, *Situation in the Republic of Kenia*, « Décision relative à la demande d'autorisation d'ouvrir une enquête dans le cadre de la situation en République du Kenya rendue en application de l'article 15 du Statut de Rome », ICC-01/09-19, March 31st, 2010.

[6] ICC, Report on Preliminary Examination Activities (2015), Office of the Prosecutor, November 15th, 2015.

However, the concept of "preliminary examination" was, in itself, still absent from Article 25 proposals at that moment (A/AC.249/1).

23. On August 13th, 1997, Argentina circulated a new proposal for Article 25, where the concept of "preliminary examination", as such, is still not present (Non-Paper/WG.3/No.3 2).

24. A new version of Article 25*bis*, which becomes progressively closer to today's Article 15, was then circulated on 13 August 13th 1997 – though once again the concept of preliminary examination is as such absent from the proposal (A/AC.249/1997/WG.3/CRP.1).

25. Under Article 25*bis*, in the meantime renumbered as Article 46, and as it then appears in the February 4th, 1998, Report of the Preparatory Committee (A/AC.249/1998/L.13):

> The Prosecutor [may] [shall] initiate investigations [ex officio] [proprio motu] [or] on the basis of information [obtained] [he may seek] from any source, in particular from Governments, United Nations organs [and intergovernmental and non-governmental organizations]. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed. [The Prosecutor may, for the purpose of initiating an investigation, receive information on alleged crimes under article 5[20] (a) to (d) from Governments, intergovernmental and non-governmental organizations, victims and associations representing them, or other reliable sources.]

26. A footnote to the provision specifically reads: "The procedure to be followed by the Prosecutor in relation to this article may be discussed further".

27. This exact procedure, and the concept of "preliminary examination", were then introduced within the Working Group on Procedural Matters, under a proposal of

Argentina and Germany, on March 25th, 1998 (A/AC.249/1998/WG.4/DP.35), leading to a draft provision which would remain almost untouched to this day. Under the third paragraph of that proposal:

> If, after the preliminary examination referred to in (1), the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with (1) pertaining to the same situation in the light of new facts or evidence.

28. The proposal was left untouched under Article 10*quater* § 3 (renumbered) of the overall draft circulated by the Preparatory Committee on April 2nd, 1998 (A/AC.249/1998/CRP.8).

29. Again, the subsequent and final draft that was circulated by the Preparatory Committee prior to the Rome conference, on 14 April 14th, 1998 (A/CONF.183/2/Add.1), reads under Article 13(3):

> If, after the preliminary examination referred to in paragraph 1, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted in accordance with paragraph 1 pertaining to the same situation in the light of new facts or evidence.]

30. On July 10th, 1998, the Bureau circulated a new draft of the Statute, suggesting to possibility to adopt an alternative version of Article 15 (at that moment Article 12) which would add further guarantees before the OTP could act *proprio motu* (A/CONF.183/C.1/L.59).

31. On July 13th, 1998, strong debates emerged between the partisans of Article 15 (at the time, Article 12) as it stands today and partisans of the inclusion of further guarantees for the OTP to act *proprio motu* (A/CONF.183/C.1/SR.35). The principle

and existence of a preliminary examination, however, was no more discussed at that time.

32. On July 16th 1998, Article 15 as it is enshrined today in the Statute is submitted to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court as part of the final draft (A/CONF.183/C.1/L.76/Add.2), then adopted.

33. It is clear that this Preliminary Examination phase was established in the framework of a stage of political discussion of the Rome Statute. Its purpose was, indisputably, to establish a first filter for those cases in which the complaint did not come from the bodies with competence to determine the existence of a breach to international peace and security (UN Security Council). However, its generic positivisation in the Rome Statute, and the lack of tradition and clear precedents on the handling of this phase, have meant that it is absolutely indeterminate, without clear limits, rights and obligations, and therefore a pronouncement by the Pre-Trial Chamber is necessary to establish judicial control over various elements that affect this phase.

B. The evolution of the Preliminary Examination in the case Venezuela I

34. Article 53 of the ICC Statute sets out the conditions to be analyzed in the Preliminary Examination for the purpose of triggering an investigation: the existence of a "**reasonable basis to proceed**", based on the information received by the Office of the Prosecutor; whether the situation is or would be admissible under Article 17(1)(a) and (b) of the Statute ("**principle of complementarity**"); the "**gravity**" of the alleged facts (Article 17(1)(d)); and the "**interests of justice**".

35. Regarding the case Venezuela I, submitted to this Preliminary Examination, the following phases have been overcome: "existence of reasonable basis", and "gravity", without Venezuela even having been able to defend itself against the allegations presented. The Preliminary Review is currently evaluating the "principle of complementarity" and it would only be necessary to overcome the analysis of "interest for justice" to close the Preliminary Review. All this, in addition to subjecting to permanent public derision those who have decided, for obvious political reasons and interests, in the midst of exorbitant sanctions against the state itself that hinder the very survival of individuals, to proceed against the Venezuelan authorities, without taking into account the internal problems of the countries themselves, which, in some cases, are as serious or even more serious than those imputed to Venezuela.

1) Non-compliance with the adversarial principle at the first two stages of the preliminary examination

36. The first two assessments, the existence of reasonable basis and gravity, were carried out by the ICC Office of the Prosecutor, and concluded, without the participation of the State. The ICC Office of the Prosecutor received complaints, analyzed the material, and informed the Permanent Mission of Venezuela on October 2nd, 2020, that it considered the existence of reasonable basis and gravity to be established. The State was unable to exercise its right of contradiction, it was unable to exercise any right of defense, and it never had access to the specific allegations transferred to the ICC Office of the Prosecutor. Even so, the State, in its first communication dated on November 30th, 2020, contested the existence of a reasonable basis and gravity, referring us in this judicial control to those allegations (paragraphs 2.1 and 2.3 of the Report "COMPLIANCE REPORT TO THE ICC PROSECUTOR'S QUESTIONNAIRE. VENEZUELA I", [EXPURGATED]). Likewise, in that report and beforehand, the Attorney General offered to assist the

ICC Office of the Prosecutor for an unrestricted visit to the country.

37. Therefore, it is necessary for the Pre-Trial Chamber to decide, in the exercise of judicial review, whether the ICC Office of the Prosecutor can approach a State Party indicating that it has accredited two elements of the Preliminary Examination: the reasonable basis and gravity, without having counted on the contradiction, the right to defense and access to the allegations, by the State.

38. Following the ICC Office of the Prosecutor's communication to Venezuela that the Preliminary Examination had passed two of its analyses without its participation, the aforementioned communication dated on November 30th, 2020, sent a set of questions to the State for it to answer in the framework of the assessment of the principle of complementarity. Therefore, the complementarity assessment was the first time that Venezuela was able to participate in this phase, although, as we shall see, stripped of the minimum rights.

2) An unequal assessment of complementarity

39. The request for information under complementarity dated on October 2nd, 2020, was not accompanied by a proper assurance of access to the ICC Office of the Prosecutor's documentation arising from the allegations made. The communication simply stated that the country should provide "blind", without knowledge of the facts complained of, the information detailed in paragraph 4 of this document.

40. At this point, it is necessary for the Pre-Trial Chamber to decide, on the basis of judicial review, whether the Prosecution can approach a State requesting information, relating to the principle of complementarity, without giving any access to the allegations and ensuring knowledge of the incriminating material.

From our point of view, it is not possible to assume that this is the case because it contradicts the basic principles of public international law and the very meaning and raison d'être of the Rome Statute and generates a lawless space in which the practice of the Office of the Prosecutor leads the State to a situation in which it is institutionally and internationally damaged, without even being able to defend itself.

41. Nevertheless, and even though Venezuela was in absolute "procedural blindness", having simply received the request to transmit a large volume of information on its internal organizational structure, and on thousands of cases submitted to domestic jurisdiction, the State diligently proceeded to reply on November 30th, 2020, with a detailed report that gave unrestricted transmission of everything requested. In fact, Venezuela submitted a 110-page report, detailing all the cases in the material areas and the period indicated, which had been requested.

42. Subsequent to that submission dated on November 30th, 2020, in compliance with the request, three additional reports were submitted on January 30th, 2021, April 28th, 2021 and May 5th, 2021, completing the previous information, updating the evolution of the cases, and even reporting on the country's internal normative and institutional reforms in the field of human rights.

43. But during all this time, the dialogue has been unilateral, from the Bolivarian Republic of Venezuela to the ICC Office of the Prosecutor, without finding any response to the information sent. Therefore, an inquisitorial Preliminary Examination has been generated, in which the ICC Office of the Prosecutor prevents, in fact, the State from any possibility of access to the complaints, nor the transfer of information, and, despite this, the request for the aforementioned information has been met by the State to facilitate the work of the ICC Office of the Prosecutor, with transparency and in the spirit of maintaining cooperation in the

framework of complementarity provided for in the Statute.

C. *Necessity for responsiveness, constructive dialogue, and partnership in complementarity*

44. The principle of complementarity is intended to establish a productive dialogue between the ICC Office of the Prosecutor and the State, with the aim of respecting the sovereignty of national judicial bodies and assisting them to perform their *ius puniendi* effectively in accordance with international standards.

1) Scope of the notion of "complementarity"

45. The Pre-Trial Chamber recalled, in its consideration of the situation in the Afghanistan case, the meaning of complementarity under Article 17 of the Statute:

> Article 17(l)(a) and (b) provides that the Court shall determine **inadmissibility either if the case is being investigated or prosecuted by a State which has jurisdiction on it**, unless it is unwilling or unable genuinely to carry out the investigation or prosecution; or if the case has been investigated by a State which hasjurisdiction over it and the State has decided not to prosecute the person concerned, unless the decisionresulted from the unwillingness or inability of the State genuinely to prosecute. The Appeals Chamber has clarified that, for the purpose of assessing admissibility in respect of specific cases, **it must be verified whether there are ongoing investigations or prosecutions**, or whether, after investigating, the State having jurisdiction has decided not to prosecute the concerned person. **Only if the answers to these questions arein the affirmative does the issue of unwillingness and inability need to be examined**. It has also beenclarified that for a case to be inadmissible the national investigation must be tangible, concrete andprogressive and must cover the same individuals and substantially the same conducts as alleged in theproceedings before the Court.[7]

[7] ICC, Pre-Trial Chamber II, *Situation in the Islamic Republic of Afghanistan*, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of

[emphasis added]

46. Complementarity means, therefore, that international criminal justice should not replace the proper functioning of national criminal justice. Complementarity is the criminal side of the principle of **subsidiarity**. The procedural consequence of complementarity is that a situation is inadmissible, i.e., the opening of an investigation must be rejected by the ICC Office of the Prosecutor, or failing that, dismissed by the Pre-Trial Chamber dealing with the case, if it has not been clearly established that domestic investigation and prosecution procedures have not been or are not being mobilized. As the Pre-Trial Chamber indicated in the Côte d'Ivoire situation:

> Article 17 (l)(a) and (b) of the Statute provides that the Court shall determine that a case is inadmissible where: (a) the case is being investigated or prosecuted by a State which has jurisdiction over it; or (b) thecase has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned. However, the case is admissible if, regardless of the existence of proceedings under (a) and (b) above, the State is unwilling or unable genuinely to carry out theinvestigation or prosecution.[8]

47. It is necessary to highlight the pronouncement in the Germaine Katanga situation by the Appeals Chamber in the context of the Article 17 review:

> [I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the

Afghanistan", ICC-02/12-33, April 12th, 2019, § 72.

[8] ICC, Pre-Trial Chamber III, *Situation in the Republic of Cote d'Ivoire*, "Corrigendum to the "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, November 15th, 2011, §192.

> horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a State is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute. (…) [9]

48. The ICC's practice on complementarity shows that even cases of deficiencies in the domestic criminal justice system do not qualify for complementarity. The case law identifies that even excessively lengthy domestic proceedings or the lack of legal representation of the accused before domestic courts have not, in themselves, led to admissibility under Article 17. For example, in the Gaddafi case, the ICC stated that:

> (…) alleged violations of the accused's procedural rights are not per se grounds for a finding of unwillingness or inability under article 17 of the Statute. In order to have a bearing on the Chamber's determination, any such alleged violation must be linked to one of the scenarios provided for in article 17(2) or (3) of the Statute. In particular, as far as the State's alleged unwillingness is concerned, the Chamber is of the view that, depending on the specific circumstances, certain violations of the procedural rights of the accused may be relevant to the assessment of the independence and impartiality of the national proceedings that the Chamber is required to make, having regard to the principles of due process recognized under international law, under article 17(2)(c) of the Statute. However, this latter provision, identifying two cumulative requirements, provides for a finding of unwillingness only when the manner in which the proceedings are being conducted, together with indicating a lack of independence and impartiality, is to be considered, in the circumstances, inconsistent with the intent to bring the person to justice.[10]

49. On the basis of the above pronouncements, in the framework of Article 17 of the Statute, it is in cases of total absence of investigation or criminal proceedings that

[9] ICC, Appeals Chamber, *Situation in the Democratic Republic of the Congo - The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, September 25th, 2009, § 78.

[10] ICC, Pre-Trial Chamber I, *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al Senussi*, "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-01/11-01/11-466-Red, October 11th, 2013, §235.

the complementarity of the ICC can be assumed.[11] However, to prove this situation, which does not correspond to the Venezuelan judicial reality, there must be a productive dialogue between the ICC Office of the Prosecutor and the State. However, in order to prove this situation, which does not correspond to the Venezuelan judicial reality, there must be a productive dialogue between the ICC Office of the Prosecutor and the State, which is not taking place in the case Venezuela I. On the contrary, in the Preliminary Examination on Venezuela I, the State, completely blindly, sends information without knowing the specific allegations in the framework of complementarity, while the ICC Office of the Prosecutor does not respond to any encouragement to collaborate with the State.

50. In addition to the above, there has been discussion for years on the definition of indicators or factors that could be useful in determining the "unwillingness" or "inability" of a state to effectively carry out national proceedings.

2) Interpretation of the notions of "unwillingness" and "incapacity"

51. In 2003, the Expert Group suggested in its paper entitled "The principle of complementarity in practice" a list of indications of unwillingness or inability to actually carry out national procedures:

> The following are suggestions as to factors that may be relevant in determining the unwillingness or inability of a State to genuinely carry out proceedings. The OTP may wish to consider these indicia further and to organize them into a structured, systematized format. (…)[12]

[11] ICC, Appeals Chamber, *Situation in the Democratic Republic of the Congo - The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case", ICC-01/04-01/07-1497, September 25th, 2009, § 78.

[12] "Informal expert paper for the Office of the Prosecutor of the International Criminal Court: 'The principle of complementarity in practice'", January 2003, The Hague – Netherlands.

52. In the Policy Paper on Preliminary Examinations of November 2013[13], the ICC Office of the Prosecutor also listed "indicators" that can assist in the assessment of unwillingness or inability to investigate or prosecute:

> 50. For the purpose of assessing unwillingness to investigate or prosecute genuinely in the context of a particular case, pursuant to article 17(2), the Office shall consider whether (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. In so doing, the Office may consider a number of factors.
>
> (…)
>
> 56. For the purpose of assessing inability to investigate or prosecute genuinely in the context of a particular case, the Office will consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings.
>
> 57. In conducting its evaluation, the Office may consider, inter alia, the ability of the competent authorities to exercise their judicial powers in the territory concerned; the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems; the absence of the required legislative framework to prosecute the same conduct or forms of responsibility; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused.
>
> 58. When assessing unwillingness and inability, the Office considers whether any or a combination of the factors above impact on the proceedings to such an extent as to vitiate their genuineness. The complementarity assessment is made on the basis of the underlying facts as they exist at the time of the determination and is subject to revision based on change in circumstances.[14]

[13] ICC, "Policy Paper on Preliminary Examination", *The Office of the Prosecutor,* November 2013.
[14] *Ibid*., pp. 13-15.

53. The Chambers of Appeal[15] also pronounced on this issue:

> 25. (…) the two requirements set out in Article 17(2)(c) are cumulative, meaning that both requirements must be satisfied for a case to be admissible:36 a case is admissible under Article 17(2)(c) only if a national proceeding lacks independence or impartiality and is "being conducted in a manner which, in the circumstances, is inconsistent with the intent to bring the person concerned to justice."
>
> 26. The Rome Statute provides no definition of the three requirements. Authors have identified different criteria or indicators that may assist the Chambers in inferring whether these requirements are met. For example, the degree of independence of the judiciary, of prosecutors and of investigating agencies and their appointment and selection procedures may provide guidance to determine "independently". The rapport and common objectives between state authorities and suspect perpetrators, as well as linkages between judges and perpetrators, are relevant factors to determine "impartially". Politically motivated statements made by judges involved in the proceedings at hand may also be a relevant factor.
>
> (…)
>
> 28. The Appeals Chamber's jurisprudence may be of assistance to establish this second criterion. The Appeals Chamber held in the Kenya cases that the challenging State needed to show that "steps directed at ascertaining whether those suspects are responsible for that conduct" were taken. Although the Appeals Chamber addressed in that case whether there was a domestic investigation (first limb of the admissibility test), the Prosecution submits that those terms also entail some qualitative assessment of the measures adopted. Hence, the Chamber must determine whether the steps taken are consistent with those that diligent domestic authorities would ordinarily adopt in light of the circumstances of that case. For example, different types of evidence would need to be gathered (witness evidence, documentary material), corroboration would be, if possible, sought, and exculpatory material would be considered. However, this qualitative assessment should not become a judgment of the quality and efficiency of the domestic proceedings, and

[15] ICC, Appeals Chamber, *Situation in Libya - The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Corrigendum to Prosecution's 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'", ICC-01/11-01/11-483-Corr, November 27th, 2013.

should be limited to the confined purpose of the admissibility determination.[16]

3) The ICC's practice in relation to the complementarity test

54. Human Rights Watch's May 2018 report, "Pressure Point: The ICC's Impact on National Justice – Lessons from Colombia, Georgia, Guinea, and the United Kingdom"[17] provides a detailed examination of how the ICC Office of the Prosecutor can trigger national investigations and prosecutions of serious crimes. The report analyses the specific situations in Colombia, Georgia, Guinea and the UK and provides, among other analyses, a chronology of the ICC Office of the Prosecutor's engagements in these situations, giving detailed examples of different actions the ICC Office of the Prosecutor has taken in these situations in the context of complementarity.

55. The report examines a number of practical steps that the ICC Office of the Prosecutor can take in the context of its complementarity activities during the admissibility phase:

> (…) some positive complementarity effects may be triggered simply through the OTP's engagement with national authorities during the course of conducting its preliminary examinations. To go further, however, the OTP, like other complementarity actors, needs to have strategies to bridge the two pillars of "unwillingness" and "inability." These include:
>
> - Focusing public debate through media and within civil society on the need for accountability;
> - Serving as a source of sustained pressure on domestic authorities to show results in domestic proceedings;

[16] *Ibid*., pp. 12-14.
[17] "Pressure Point: The ICC's Impact on National Justice – Lessons from Colombia, Georgia, Guinea, and the United Kingdom", *Human Rights Watch*, May 2018.

- Highlighting to international partners the importance of including accountability in political dialogue with domestic authorities;
- Equipping human rights activists with information derived from the OTP's analysis, strengthening advocacy around justice; and
- Identifying weaknesses in domestic proceedings, to prompt increased efforts by government authorities and assistance, where relevant, by international partners.

Many of these are strategies shared with other complementarity actors, but among these actors, the OTP is unique. As indicated above, its leverage with national authorities stems from the fact that, unlike international donors or civil society actors, it has the authority to open an investigation if national authorities fail to act. Under the court's legal framework, however, the OTP's jurisdiction can be blocked even by the appearance of national activity, regardless of whether this ultimately matures into effective domestic proceedings.

This unique leverage, therefore, comes with a unique catch: the OTP needs to strike a balance between opening space to national authorities, while it proceeds and is being seen to proceed with a commitment to act if national authorities do not. Where delay in ICC action does not result in genuine national justice, but provides space to national authorities to obstruct ICC action, it undermines the OTP's influence with national authorities and the OTP risks legitimizing impunity in the view of key partners on complementarity.[18]

56. The report also indicates, among other elements, that:

OTP practice has changed significantly since a 2011 Human Rights Watch report, Course Correction. The report highlighted inconsistent approaches between situations, the rapid announcement of several new preliminary examinations, and a lack of substantive public reporting regarding progress in these examinations to back up initial publicity.[2]

Since that time, the OTP has made several important shifts in its approach to positive complementarity and preliminary examinations. These shifts are discussed in Appendix I. They include a more qualified posture on positive complementarity, seeking to engage national authorities only where relevant domestic proceedings are

[18] *Ibid*., pp. 2-3.

> already underway or where national authorities have explicitly stated their commitment to undertaking such proceedings.
>
> They also include its current practice of delaying specific positive complementarity initiatives until after the OTP is certain that potential cases fall within the ICC's jurisdiction, bolstering its ability to engage governments in a more concrete manner. The OTP has also been more cautious in the publicity it seeks for its preliminary examinations, while also putting more substantive information about each examination into the public domain through its annual reports. Lastly, it has boosted, albeit in a still-too-limited manner, the number of staff members assigned to carry out preliminary examinations.[19]

57. The final report of the Independent Experts of the ICC and the Rome Statute System, 30 September 2020[20], further states that:

> 721. Complementarity assessments involve the examination of the relevant national proceedings in relation to the potential cases being considered by the OTP. If there are such investigations or prosecutions, the OTP assesses their genuineness.
>
> 722. Complementarity will oust the jurisdiction of the Court if the domestic investigation or proceedings cover the same individual and substantially the same conduct as alleged in the proceedings before the Court (same conduct test). The OTP is required to determine with clarity the conduct it is investigating as well as the potential targets. Furthermore, it is of the utmost importance for the OTP to communicate, as clearly and as transparently as possible, what it expects of the State in terms of pursuing justice for the same criminal conduct.
>
> 723. The test is not a theoretical one. Rather, in order to show that a state is willing and able to investigate and prosecute, it needs to demonstrate that 'concrete, tangible, and progressive' steps were or are being taken in the national investigation. However, when the OTP conducts its admissibility assessment during the PE stage, it appears to do so also prospectively or on a continuing basis, in some instances waiting for years for national authorities to demonstrate their 'willingness and ability.'
>
> 724. There is a widespread concern among many external stakeholders that by

[19] *Ibid*., p. 4.

[20] "Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report", 30 September 2020.

applying the admissibility test prospectively, the OTP is exceeding its mandate. It is accused of conducting what amounts to 'human rights monitoring', or playing a 'watchdog role'. For instance it appears that in the cases of Afghanistan and Nigeria, where crimes continue to be committed after the opening of a PE, the OTP has undertaken continuing assessments of the domestic proceedings thereby extending the duration of the PE for a number of years. In others, e.g. Guinea or Colombia, the OTP has been monitoring the national proceedings for many years, without being able to come to a conclusion on their genuineness or sufficiency.

725. Another area of concern is the lack of time limits for states to produce evidence of concrete, tangible, and progressive steps being taken by them during the PE stage. There are no benchmarks or criteria for the states to satisfy in order to convince the OTP to close a PE.

726. To an extent, the absence of time limits imposed by the OTP is understandable. Some members of the OTP staff informed the Experts that certain states, even if acting in good faith, face significant financial and personnel constraints, making compliance with OTP requests for information a lengthy process.

727. However, the complete lack of timelines or benchmarks for states makes it difficult for the OTP to predict, let alone determine, the duration of admissibility assessments. It has been reported to the Experts that this lack of clarity enables some states intentionally to delay assisting the OTP with regard to its assessment of complementarity. This may be manifested by the provision of minimal cooperation, and inconsistent, insufficient, irrelevant, or delayed information. This leaves the OTP unable to progress in situations where the domestic proceedings might be sufficient to persuade a Pre-Trial Chamber to deny the authorisation of an investigation, but too little to justify the closure of the PE.

728. The Experts consider that a change in approach towards the complementarity test, in combination with meaningful benchmarks, and a tailor-made strategy for each situation, might remedy what has become an untenable situation for the OTP.

(…)

732. Based on the OTP Policy Paper on PEs, during Phase 3, the OTP 'may engage with the domestic authorities in order to promote domestic proceedings. In this case the complementarity assessment takes place in parallel to other types of engagements with domestic stakeholders' (…). Such activities include, amongst others, in-country missions, consultations with domestic authorities and civil society, as well as

> monitoring activities.
>
> 733. The institutional approach to it, as well as the practice in situations such as Guinea, Colombia, and Nigeria, demonstrate that positive complementarity efforts are not incidental. For instance, in the situations of Colombia and Guinea, the OTP engages closely with the authorities of the state concerned, visiting each 15-17 times during the PE process. While certain positive developments in terms of accountability efforts have occurred during this period in situations under examination, these PEs are also among the lengthiest ones (…).
>
> 734. The OTP appears to consider that positive complementarity is exclusive to the PE stage (based on the Strategic Plan and Policy). However, nothing precludes the OTP from engaging states in the same manner during the investigation stage. Once an investigation is opened, the OTP conducts a case selection and prioritization exercise in relation to the situation. At this time, closer dialogue with situation and/or neighboring states would be beneficial in developing a strategy with clear prosecutorial goals. The setting of prosecutorial priorities would benefit from collaboration with the relevant states and other competent authorities.[21]

58. It can be concluded that there is a practice of dialogue between the ICC Office of the Prosecutor and States during its assessment of national actions. It can also be concluded that the ICC Office of the Prosecutor has on several occasions in the past held consultations with different State delegations in the context of developing indicators and benchmarks to assess national efforts to account for Rome Statute crimes. A detailed examination of the ICC Office's actions and commitments in previous situations shows that the ICC Office of the Prosecutor seeks to engage with national authorities where relevant national proceedings are already underway, or where national authorities have explicitly stated their commitment to undertake such proceedings.

[21] "Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report", September 30th, 2020, pp. 233-236.

59. In fact, if we analyze the practice of complementarity maintained by the ICC Office of the Prosecutor in previous cases, we can observe that the logic has always been one of collaboration and dialogue with the State, for years, which in the Preliminary Examination of Venezuela I is not operating. We will now analyze how the Preliminary Examination has been guided in previous cases, in order to reach the conclusion that in all cases a productive dialogue has been established, which in the Venezuela I case is not taking place.

a) Overview of ongoing preliminary examinations

60. The following are details of the **ongoing preliminary examinations**.

i. Colombia

The situation in Colombia has been under *proprio motu* preliminary examination since **June 2004**. While the Office of the Prosecutor has not clarified precisely when it concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed in this situation (i.e. end of phase 2), its reports show that this decision was made **no later than 2010**, at which point the Office of the Prosecutor was already focusing on admissibility (i.e. phase 3).[22]

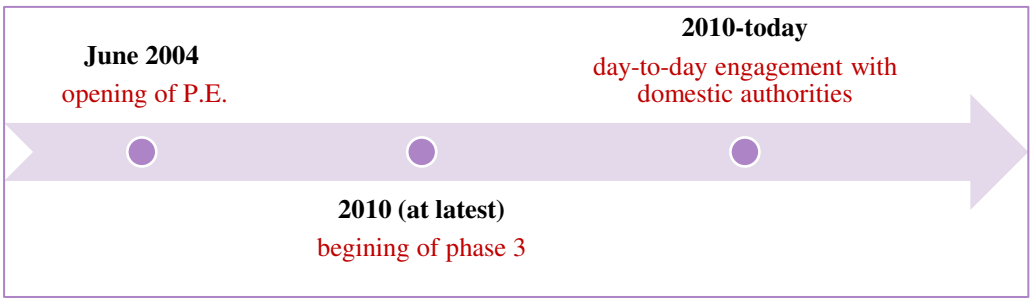

Table 1: chronology Colombia

[22] ICC, "Report of the International Criminal Court to the Sixty-fifth Session of the UN General Assembly", UNGAOR, Doc A/65/313, August 19th, 2010, § 70.

The Office of the Prosecutor's methodology to proceed with Colombia's preliminary examination has been very strong and refined. Although it would be impractical to describe all of its aspects, here are a few elements worth recalling:

- The Office of the Prosecutor has conducted several **on-site missions** to Colombia (e.g. three in 2018 only; or most recently, one from 19 to 23 January 2020);
- The Office of the Prosecutor and Colombian authorities have exchanged countless **requests for information and responses** on all aspects of the Office of the Prosecutor's preliminary examination. For more than 16 years, the Office of the Prosecutor has thus continued constructively engaging with the Colombian authorities to seek additional details and share its views on domestic investigations and prosecutions – for only the period from 2004 to 2012, this reportedly led Colombia to send a total of **114 communications** to the Office of the Prosecutor;[23]
- The Office of the Prosecutor published at least **7 detailed interim reports** on the preliminary examination of Colombia, stressing areas of progress and clarifying its position on further necessary improvements (in comparison, only one short report of 6 pages has so far been published by the Office in relation to Venezuela).[24]
- In order to facilitate communication and the complementarity assessment, the Office of the Prosecutor has clearly divided its whole preliminary examination in Colombia into a distinct **set of issues** (e.g. proceedings relating to the activities of paramilitary groups; proceedings related to forced displacement, proceedings related to sexual offences; *etc.*);
- Within several of these distinct areas, the Office of the Prosecutor has further identified **clearly defined "potential cases"**, which it delineated through personal, temporal and geographic circumstances (e.g., "false positives killings allegedly committed by members of the Fourth Division (7th, 16th and 28th Brigades) between 2002 and 2008 in the departments of Meta, Casanare and Vichada", *etc.*);
- To enhance predictability, the Office of the Prosecutor is currently developing a

[23] M. AKSENOVA, "The ICC Involvement in Colombia: Walking the Fine Line between Peace and Justice", in M. Bergso & C. Stahn, *Quality Control in Preliminary Examination: Volume 1*, Brussels, TOAEP, 2018, p. 270.
[24] ICC, OTP, Informe sobre las actividades de examen preliminar 2020 – Venezuela, December 14th, 2020.

> **detailed benchmarking framework**. The purpose of this framework, a first draft of which should be ready to share with Colombian authorities in the first half of 2021, is "to enable the Office to identify the indicators that could in principle enable it, at the appropriate time, to conclude whether it should either proceed to open an investigation or defer to national accountability processes as a consequence of relevant and genuine domestic proceedings".[25]

In sum, Colombia is a very telling example of the **positive effects** and reforms that may be stimulated by reason of an Office of a Prosecutor's preliminary examination. Surely, not *all* specific aspects of the Office of the Prosecutor's preliminary examination have led to immediate results at the Colombian level. For instance, while the Office of the Prosecutor has emphasized that it wanted to see those most responsible for extra-judicial executions carried out by the military brought to justice, commentators report that so far almost no cases have been brought in Colombia targeting this group.[26] Yet the Office of the Prosecutor has continued and is still continuing working hand-in-hand with Colombian authorities to further enhance and favor still more effective actions at the domestic level.

ii. Guinea

The situation in Guinea has been under *proprio motu* preliminary examination since **October 14th, 2009**. Although the exact date is unknown, statements from the Office of the Prosecutor make it clear that complementarity had already become the center of the examination **early 2010**.[27]

[25] ICC, OTP, Report on Preliminary Examinations Activities 2020, §. 154.
[26] P. SEILS, "Putting Complementarity in its Place," in C. Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford, Oxford University Press, 2015, p. 326.
[27] *See* e.g. "Statement by Mrs Fatou Bensouda, Deputy Prosecutor of the International Criminal Court", *ICC – The Office of the Prosecutor*, February 19th, 2010.

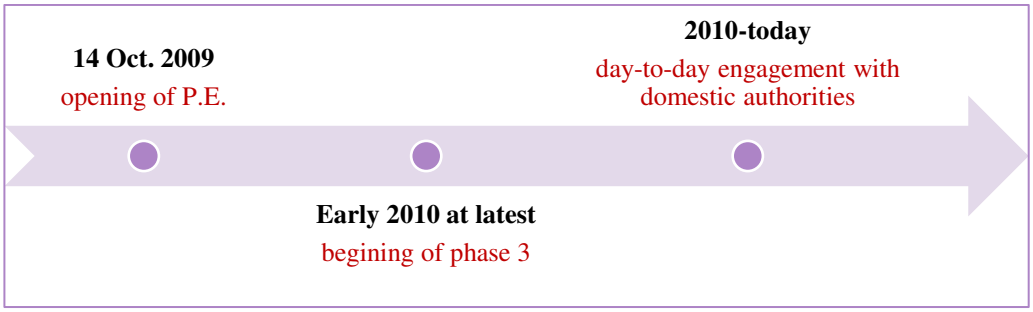

Table 2: chronology Guinea

Since then, in accordance with its positive complementarity approach, the Office has continued to encourage national proceedings. The Office of the Prosecutor has thus been in **close and regular contact** with representatives of Guinea to assess complementarity. The Office has **visited the country** on many occasions, most recently in October 2019. The Office devised a **specific roadmap** laying down a set of required actions to be implemented by the Guinean authorities within a specific time frame.[28] This includes very specific actions such as the designation of a suitable courtroom for an expected trial, the appointment and training of magistrates of the competent jurisdiction, *etc*.

In a very comparable vein to the situation in Colombia, the Office has announced that, in addition to the above roadmap, it will now "engage with the Guinean authorities and relevant stakeholders in the development of a **benchmarking framework**. The purpose of the framework is to enable the Office to identify the indicators that could in principle enable it, at the appropriate time, to conclude whether it should either proceed to open an investigation or defer to national accountability processes as a consequence of relevant and genuine domestic proceedings. The Office hopes to share the benchmarking framework in draft form with the Guinean authorities and other stakeholders for comments during the first

[28] ICC, OTP, Report on Preliminary Examinations Activities 2020, §. 170.

half of 2021".[29]

iii. Palestine

The situation in Palestine has been under preliminary examination since **January 16th, 2015**. On May 22nd, 2018, the Office received a referral from the Government of the State of Palestine.

On **December 20th, 2019**, the Prosecutor announced that it had concluded its preliminary examination and that in its view the statutory criteria under the Rome Statute for the opening of an investigation were met. As there had been a referral from the State of Palestine, the Office was not required to seek the Pre-Trial Chamber's authorization before proceeding to open an investigation; however, it decided to still seek prior judicial approval in this specific case, due to "highly contested legal and factual issues attaching to this situation, namely, the territory within which the investigation may be conducted". The Pre-Trial Chamber's decision is yet to be rendered.

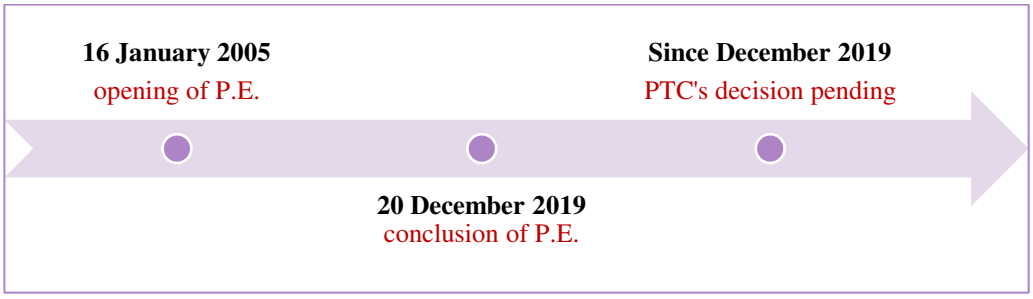

Table 3: chronology Palestine

iv. The Philippines

The situation in the Philippines has been under preliminary examination since **February 8th, 2018**. On March 17th, 2018, the Government of the Philippines deposited a written notification of withdrawal from the ICC Statute. Since then,

[29] ICC, OTP, Report on Preliminary Examinations Activities 2020, § 175 (our emphasis).

cooperation of the Philippines with the Court is absent. At some point in **2020**, the Office completed phase 3 and proceeded to phase 4. The Office anticipates reaching a final decision on whether to seek authorization to open an investigation into the situation in the Philippines in the **first half of 2021**.[30]

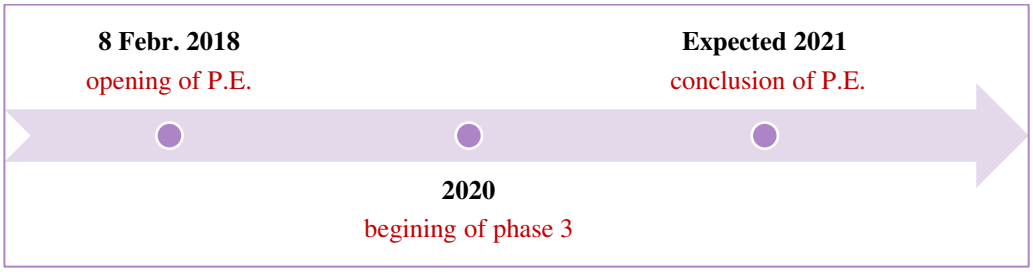

Table 4: chronology the Philippines

b) Practice observed in relation to Preliminary Reviews concluded with a decision not to investigate

61. In relation to Preliminary examinations concluded with a decision not to investigate (having reached stage 3), the following practice is observed. As of 1 January 2021, seven preliminary examinations had been terminated (at least temporarily, some of them being reopened at a later stage), under a decision not to proceed to an investigation. The reasons for this outcome vary. One was closed in phase 1 because the Office concluded that the preconditions to jurisdiction were not satisfied (Palestine I). Four were closed in phase 2 because the Office concluded that there were not reasonable grounds to believe that crimes within the ICC's jurisdiction had been committed (Venezuela I before being reopened, South Korea, Honduras, and Gabon). One was very recently closed in phase 3 because the Office considered itself unable to demonstrate the unwillingness of domestic authorities to prosecute, after it had first considered, in an earlier determination, that the situation was admissible for lack of sufficient gravity (Iraq / United Kingdom). In

[30] ICC, OTP, Report on Preliminary Examinations Activities 2020, §§. 176 *et seq*.

the remainder of this section, the analysis will only focus on situations which, as Venezuela, have at some point reached phase 3 – before being eventually closed, either in light of complementarity (Iraq / United Kingdom), or for lack of sufficient gravity (the registered vessels of Comoros, Greece and Cambodia).

i. Iraq / United Kingdom

The starting year of the initial, *proprio motu* preliminary examination into the Iraq/UK situation is unknown. On February 9th, 2006, the Office of the Prosecutor announced that it was closing this preliminary examination, as it concluded that it did not meet the required gravity threshold and, thus, was not admissible.

The situation was however reopened on **May 13th, 2014**, on the basis of new information relating to the allegations. At some point in **2017**, the Office of the Prosecutor announced that there was a reasonable basis to believe that members of the British armed forces committed war crimes (end of phase 2).[31] The Office then proceeded to the complementarity assessment until December 9th, 2020.

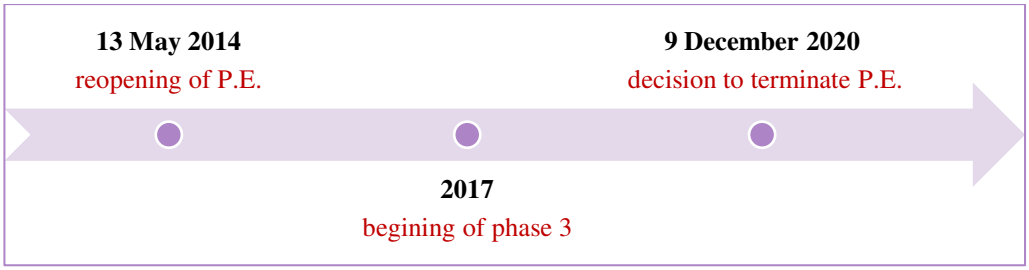

Table 5: chronology Irak / UK

In **December 9th, 2020**, in a final report on this situation, the Office of the Prosecutor strongly criticized the British judicial lack of response to the crimes investigated. The Office noted in particular that "[t]he outcome of the more than ten year long domestic process, involving the examination of thousands of allegations, has

[31] ICC, OTP, Situation in Irak / UK. Final Report, December 9th, 2020, §. 1.

resulted in **not one single case** being submitted for prosecution: a result that has deprived the victims of justice".[32] This is the result of a complex domestic "investigative and prosecutorial process leading to cases being filtered out or discontinued" systematically.[33] The Office raised numerous concerns in this regard, and concluded that British authorities "might have proceeded differently".[34]

Nonetheless, the Office eventually decided to terminate the preliminary examination as it still concluded that it "could not substantiate allegations that the UK investigative and prosecutorial bodies had engaged in shielding" persons from criminal liability. While acknowledging and criticizing the existence of "intentional disregarding, falsification, and/or destruction of evidence during the course of domestic investigations, as well as the impeding or prevention of certain investigative inquiries and the premature termination of cases", the Office of the Prosecutor concluded that the ICC was "not a human rights body called upon to decide whether in domestic proceedings, the requirements of human rights law or domestic law have been violated".[35]

While doing so, the Office of the Prosecutor has now clearly identified the wide margin of appreciation that must be left to domestic judicial authorities and the **strict admissibility standard** that the Office applies, when domestic efforts for justice are being show, before turning to phase 4 of a preliminary examination:

> The Office considers that the relevant test is not whether the Prosecutor or a Chamber of this Court would have come to a different conclusion to that of [domestic authorities] on the evidence and proceeded differently, but whether the facts, on their face, demonstrate an intent to shield persons from criminal

[32] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 6 (our emphasis).
[33] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 8.
[34] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 8.
[35] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 9.

> responsibility. **To do otherwise would be to substitute the Prosecutor's own assessment** of what might constitute a realistic prospect of obtaining sufficient evidence to satisfy the evidence sufficiency test, or a realistic prospect of conviction to support a prosecution before [domestic courts], **in place of the assessment of the competent national prosecuting service**--and to interpret that difference as a lack of genuine intent to bring the person concerned to justice.[36]

ii. The registered vessels of Comoros, Greece and Cambodia

On **May 14th, 2013,** a law firm acting on behalf of the Government of the Union of the Comoros transmitted to the Office of the Prosecutor a referral of the Union of the Comoros with respect to the May 31st, 2010, Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip. On the same day the Prosecutor announced the opening of a preliminary examination on the referred situation, as is done as a matter of policy in instances of referrals from States parties.

On **November 6th, 2014,** the Prosecutor announced her decision that the gravity requirement for opening an investigation into the situation had not been met, and thus the conclusion of the preliminary examination. The specificity of the Office's methodology in this case is that complementarity was not at all addressed as the Office directly focused, for the purpose of phase 3, on (the lack of) sufficient gravity.[37]

On July 16th, 2015, following a request for review presented by the Government of the Union of the Comoros, Pre-Trial Chamber I requested the Prosecutor to reconsider her decision. On **November 29th, 2017**, the Prosecutor notified her final decision, which remained of the view that the information available did not provide a reasonable basis to proceed with an investigation, based on insufficient

[36] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 10.
[37] ICC, OTP, Situation in Iraq / UK. Final Report, December 9th, 2020, §. 10.

gravity. On September 16th, 2020, Pre-Trial Chamber I rejected Comoros' request for judicial review of the Prosecutor's new and final decision. On September 22nd, 2020, the Government of Comoros sought for leave to appeal the Pre-Trial Chamber decision of September 16th, 2020, which was denied by the Appeals Chamber on December 21st, 2020.

The Comoros preliminary examination was thus the second (after Iraq / UK in its initial stage) to be closed due to a conclusion of insufficient gravity, and the only preliminary examination to remain closed on that basis.

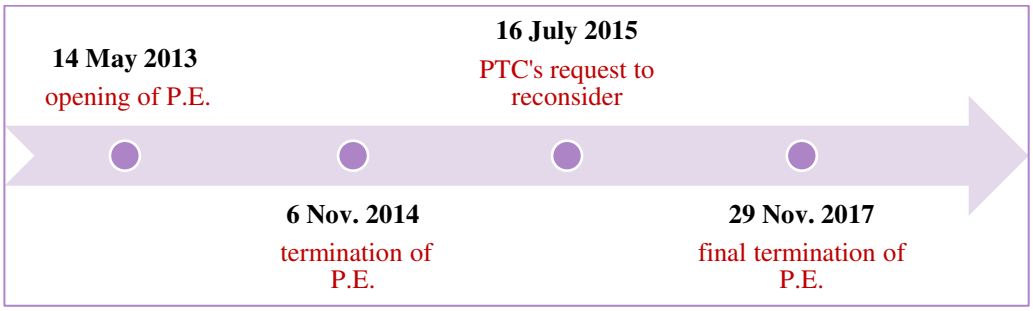

Table 6: chronology registered vessels

c) Preliminary examinations completed with a decision to investigate

i. Democratic Republic of the Congo

62. The first example of a preliminary examination leading to a formal decision to investigate was in **June 2004**, when then Prosecutor Moreno-Ocampo opened an investigation in the DRC after receiving a self-referral from that State in **April 2004**.

Since the Office of the Prosecutor did not announce the opening of preliminary examinations at this early stage in its practice, there is some uncertainty as to whether the prosecutor was already conducting a preliminary examination into the Congolese situation prior to the State Party's referral.

For the DRC situation, there is **limited information** about the steps taken by the Office of the Prosecutor during this early preliminary examination – only later did

the Office of the Prosecutor's practice on preliminary examinations and investigations became increasingly transparent.

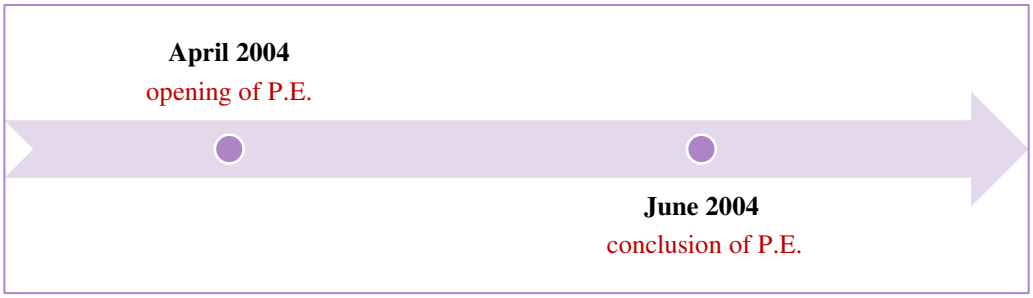

Table 7: chronology DRC

ii. Uganda

The Office of the Prosecutor announced its decision to open an investigation on **July 29th, 2004**, subsequent to a **January 29th, 2004,** self-referral by Uganda.

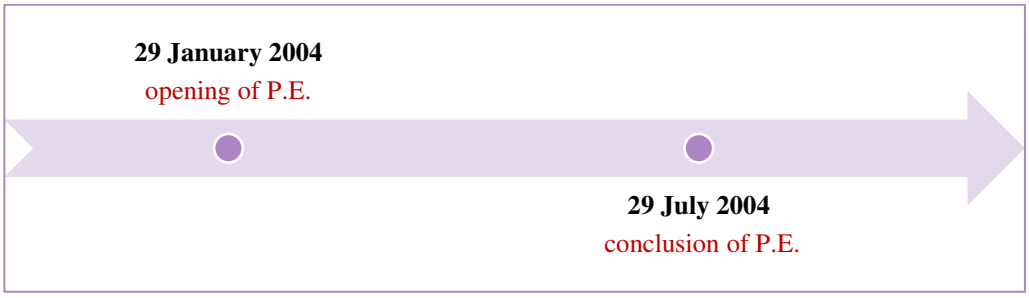

Table 8: chronology Uganda

Since the Office of the Prosecutor did not announce the opening of preliminary examinations at this early stage in its practice, there is some uncertainty as to whether or not the prosecutor was already conducting a preliminary examination into the Ugandan situation prior to the State Party's referral.

For the Uganda situation, there is **limited information** about the steps taken by the Office of the Prosecutor during this early preliminary examination – only later did the Office of the Prosecutor's practice on preliminary examinations and investigations became increasingly transparent.

iii. Darfur, Sudan

On **March 31st, 2005,** the UN Security Council referred the situation in Darfur, Sudan, to the ICC. Two months later, on **June 6th, 2005**, Prosecutor Moreno-Ocampo announced his decision to open an investigation into that situation.

There is **no public information** as to the working methodology used by the Office of the Prosecutor over those two months.

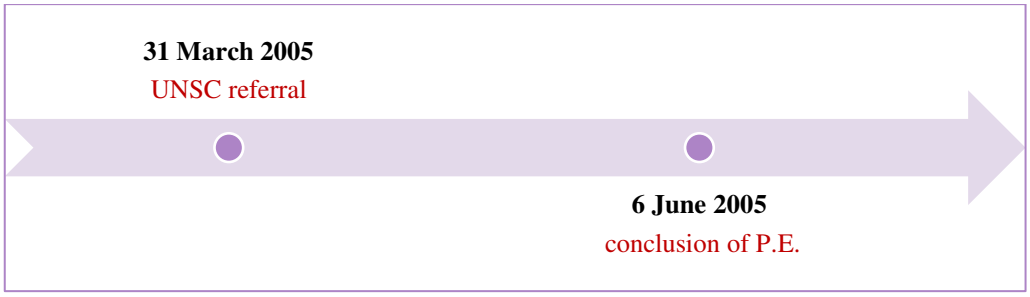

Table 9: chronology Darfur, Sudan

iv. Central African Republic

On **May 22nd, 2007**, the Office of the Prosecutor announced the start of a preliminary investigation into crimes allegedly committed in CAR. This investigation followed a preliminary examination that began when the Office of the Prosecutor received a self-referral from that State on **December 21st, 2004**.

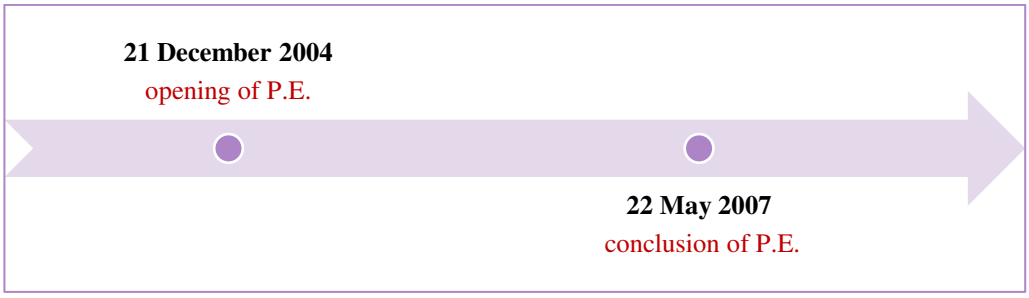

Table 10: chronology CAR

v. Kenya

In this situation, in line with the former prosecutor's practice of seeking referrals from states, the Office of the Prosecutor initially held several discussions with Kenyan authorities about a possible state, self-referral, after beginning a preliminary examination on **December 27th, 2007**. However, no such referral materialized.

From 2007 onwards, the Office of the Prosecutor regularly met with Kenyan authorities and participated into several meetings, including roundtables in The Hague and Geneva.[38]

On **November 26th, 2009**, the prosecutor requested judicial authorization to open an investigation, considering that "no national investigations or proceedings are pending against those bearing the greatest responsibility for the crimes against humanity allegedly committed" and that "the available information does not indicate the existence of national proceedings in relation to the post-election violence in other States with jurisdiction".[39]

The Office received the authorization to investigate on **March 31st, 2010**.

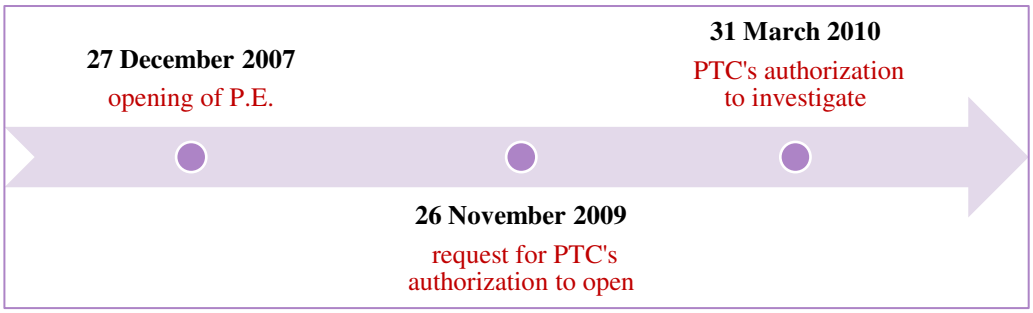

Table 11: chronology Kenya

[38] ICC, OTP, Article 53(1) Report on the Situation on Registered Vessels of Comoros, Greece and Cambodia, November 6th, 2004.
[39] ICC, OTP, Situation in Kenya, Request for authorisation of an investigation pursuant to Article 15, November 26th, 2009, §. 55.

vi. Libya

The situation in Libya was referred to the Office of the Prosecutor by the UNSC on **February 26th, 2011**. Only five days later, on **March 3rd, 2011**, the Prosecutor initiated an investigation, considering that the statutory criteria were met, making Libya the swiftest preliminary examination in ICC's history.

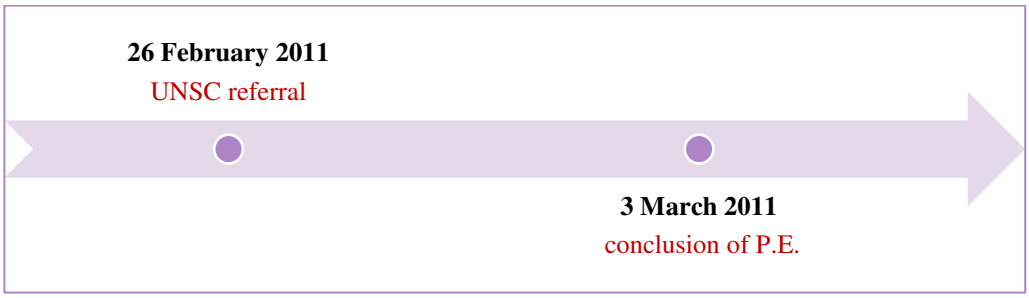

Table 12: chronology Libya

vii. Côte d'Ivoire

The *proprio motu* preliminary examination in Côte d'Ivoire was opened on **October 1st, 2003**. On **June 23th, 2011**, the prosecutor requested authorization to open an investigation. Côte d'Ivoire was at that time not a state party to the Rome Statute. However, it had accepted the jurisdiction of the ICC through an article 12(3) declaration in 2003. The pre-trial judges authorized the investigation on **October 3rd, 2011**, and, in February 2013, Côte d'Ivoire ratified the Rome Statute.

Limited information is available as to the Office's methodology in conducting its complementarity assessment in relation to this situation. In its request for authorization to open an investigation, the Office notes that the projected establishment of a domestic commission of inquiry for human rights violations has no criminal powers, and that therefore, "**no national investigations or proceedings** are pending in Côte d'Ivoire against those bearing the greatest responsibility for the most serious crimes falling within the jurisdiction of the

Court".[40]

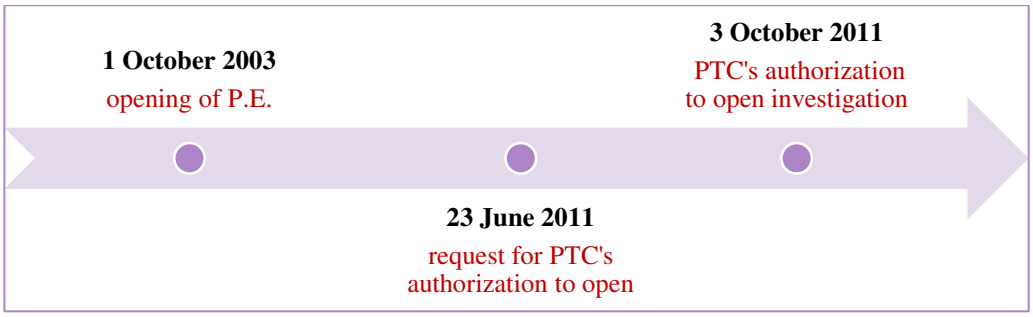

Table 13: chronology Ivory Coast

viii. Mali

On **July 18th, 2012**, the Malian Government referred the situation in Mali to the ICC. In August and October 2012, the Office of the Prosecutor sent two missions to Mali for the purpose of verifying information in its possession.[41] By **November 2012**, the Office of the Prosecutor had determined that there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed (end of phase 2), and the investigation was opened shortly thereafter, on **January 16th, 2013**, after the Office of the Prosecutor considered that "there [were] **no national proceedings** in Mali or in any other State against individuals who appear to bear the greatest responsibility for crimes that the Office of the Prosecutor would investigate", and that this, in itself, was "sufficient to render a case admissible" from the perspective of complementarity.[42]

[40] ICC, OTP, Situation in Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, June 23rd, 2011, §. 48.
[41] ICC, OTP, Situation in Mali, Article 53(1) Report, January 16th, 2013, §. 10.
[42] ICC, OTP, Situation in Mali, Article 53(1) Report, January 16th, 2013, §§ 10 and 174.

Table 14: chronology Mali

ix. Central African Republic II

The Office of the Prosecutor opened an investigation in relation to a subsequent conflict in CAR on **September 24th, 2014** (CAR II). While the prosecutor opened the CAR II preliminary examination *proprio motu* in **February 2014**, CAR subsequently referred the situation to the court on **May 30th, 2014**, removing the need to seek judicial authorization before the investigation could proceed.

Table 15: chronology CAR II

x. Georgia

This investigation was the first one opened in relation to a country outside of Africa, and the first investigation opened by Prosecutor Bensouda *proprio motu*. The preliminary examination was also notable because, unlike prior examples, it was initiated with the support of a major non-state party, Russia. In fact, the vast majority of "article 15 communications" that triggered the preliminary examination (a total of 3,817) were sent by the prosecutor general of Moscow.

The Office of the Prosecutor commenced the preliminary examination on **August 14th, 2008,** and, by **2011**, concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the court were committed (end of phase 2). On March 17th, 2015, the government of Georgia informed the Office that **national proceedings had been indefinitely suspended**, which prompted the Prosecutor to conclude that "the potential cases identified in the Request would be admissible, due to State inaction."[43] The OTP requested authorization to open an investigation into the situation in Georgia on **October 13th, 2015**, which was granted by Pre-Trial Chamber I on **January 27th, 2016**.

During its preliminary examination, the Office of the Prosecutor made a total of ten formal requests for information: six to the Government of Georgia and four to the Government of the Russian Federation.[44] It has conducted at least nine missions regarding the situation: six to Georgia and three to Russia.[45]

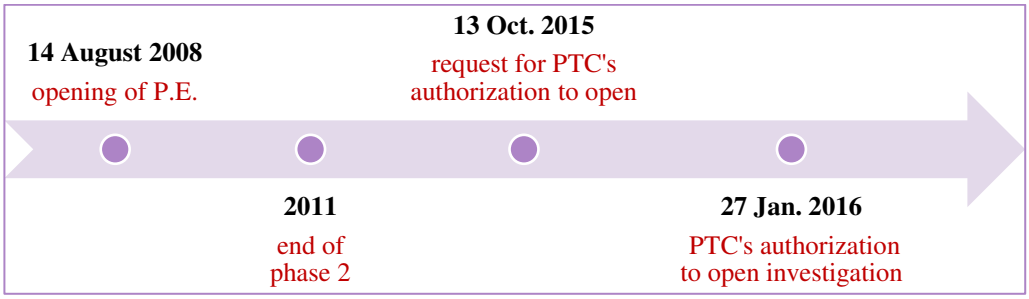

Table 16: chronology Georgia

xi. Burundi

On **April 25th, 2016**, Prosecutor Bensouda announced that her Office was opening a preliminary examination into crimes that had been reportedly committed in Burundi since April 2015. In response to that announcement, Burundi submitted

[43] ICC, OTP, Report on Preliminary Examinations Activities 2015, §. 227.
[44] ICC, OTP, Situation in Georgia, ICC-01/15-4-Corr2, Corrected Version of Request for Authorisation of an Investigation pursuant to Article 15, November 17th, 2015, § 39.
[45] S. WHARTON & R. GREY, "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law*, 2018, p. 18.

notification of its intent to withdraw from the Rome Statute to the UN secretary-general. Pursuant to article 127 of the Rome Statute, Burundi's withdrawal became effective one year later, making it the first State to officially withdraw from the ICC.

In the context of that impending deadline, the preliminary examination proceeded more quickly than most. Despite not having reached a conclusion with respect to either questions of jurisdiction or admissibility as of its 2016 preliminary examination report, the Prosecutor had concluded her preliminary examination by **August 17th, 2017** and notified the ICC president of her intent to submit a request for authorization, which was indeed submitted on September 6th, 2017. The Pre-Trial Chamber also moved quickly, granting authorization to open an investigation on **October 25th, 2017**. The prosecutor opened her investigation that same day, a mere two days before Burundi's withdrawal came into effect on October 25th, 2017.

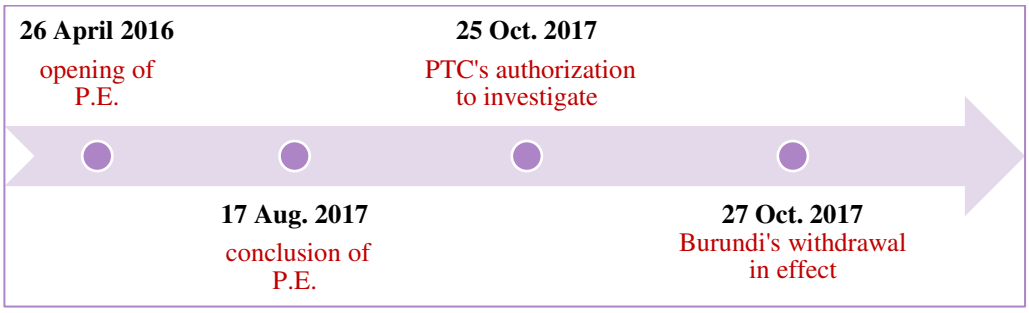

Table 17: chronology Burundi

xii. Bangladesh/Myanmar

On **September 18th, 2018**, the Office of the Prosecutor opened a preliminary examination *proprio motu* in relation to the alleged deportation of the Rohingya people from Myanmar to Bangladesh, as well as possible other crimes.

Acknowledging the "**absence of relevant national investigations or prosecutions** in Myanmar or in relevant third States", the Office filed a request to open an investigation on **July 4th, 2019**.

On **November 14th, 2019**, Pre-Trial Chamber III authorized the Prosecutor to proceed with an investigation of this situation.

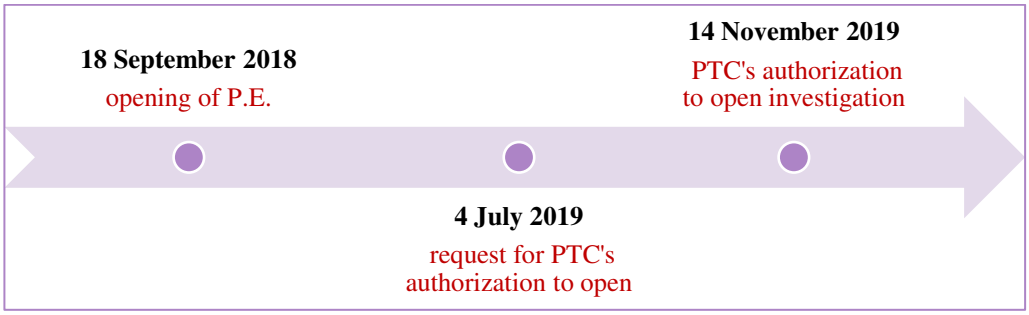

Table 18: chronology Bangladesh/Myanmar

xiii. Afghanistan

The Afghanistan *proprio motu* preliminary examination is one of the longest known preliminary examinations to date, second only to Colombia. This preliminary examination was opened in **2006** (specific date is unknown). By **2013**, the OTP had concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the court had been committed (end of phase 2).

On October 30th, 2017, the prosecutor notified the ICC president of her intent to submit a request for authorization of an investigation, which was submitted on **November 20th, 2017**. In her request, the Prosecutor noted that "**no national investigations or prosecutions** have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed". On 12 April 2019, Pre-Trial Chamber II denied such request. On **March 5th, 2020**, however, the Appeals Chamber decided to set aside the Pre-Trial Chamber's decision and to authorize the Prosecutor to commence an investigation.

In the context of its Afghanistan preliminary examination, the Office of the

Prosecutor submitted no less than twenty-nine formal **requests for information** to relevant stakeholders.[46]

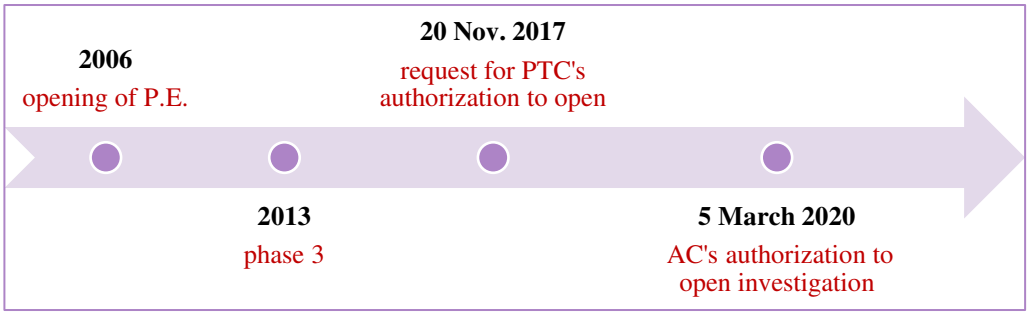

Table 19: chronology Afghanistan

xiv. Ukraine

The situation in Ukraine has been under preliminary examination since **April 25th, 2014**, after, on April 17th, 2014, the Government of Ukraine lodged a declaration under article 12(3) of the Rome Statute accepting the ICC's jurisdiction over alleged crimes committed on its territory. The preliminary examination entered phase 3 "**early 2019**".[47]

Throughout the process, the Office made **detailed requests** to national authorities to provide information on proceedings of relevance to its assessment. It received responses from Ukraine regarding national proceedings, but no response was received to requests sent to the Russian Federation. The Office also conducted a mission to Ukraine in February 2020.

On **December 11th, 2020**, the Office determined that all criteria for the opening of an investigation were met and that it would seek approval of the competent Pre-Trial Chamber for the opening of an investigation. Regarding complementarity, the

[46] S. WHARTON & R. GREY, "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law*, 2018, p. 18.
[47] ICC, OTP, Report on Preliminary Examinations Activities 2018, §. 267.

Office determined that:

> (…) despite the existence of information on domestic proceedings, my Office has concluded that the potential cases that would likely arise from an investigation into the situation in Ukraine would be admissible. This is because the competent authorities in Ukraine and/or the Russian Federation are **either inactive** in relation to the categories of persons and conduct that the Office has identified, **or because the national judicial system is 'unavailable'** in territory under the control of the opposing party, rendering the competent authorities unable genuinely to obtain the accused or the necessary evidence and testimony or otherwise to carry out their proceedings.[48]

In practice, however, **no request for judicial authorization** has yet been made or seems to be on the immediate agenda:

> in the light of the operational capacity of the Office to roll out new investigations, the fact that several preliminary examinations have reached or are approaching the same stage, as well as operational challenges brought on by the COVID-19 pandemic, the Prosecutor intends to consult with the incoming new Prosecutor, once elected, on the strategic and operational issues related to the **prioritization of the Office's workload** and the filing of necessary applications before the Pre-Trial Chamber.[49]

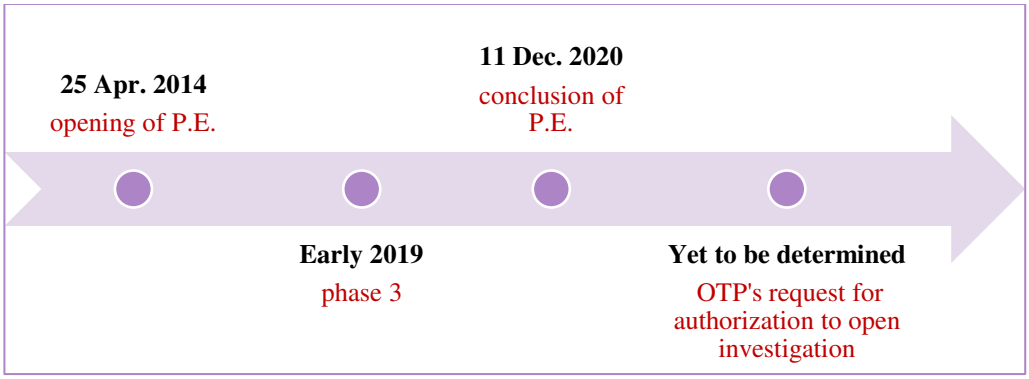

Table 20: chronology Ukraine

[48] ICC, OTP, Statement on the conclusion of the preliminary examination of the situation in Ukraine, December 11th, 2020.
[49] ICC, OTP, Report on Preliminary Examinations Activities 2020, §. 289.

xv. Nigeria

The *priori motu* preliminary examination of the situation in Nigeria was announced on **November 18th, 2010**. The preliminary examination reached phase 3 at latest on **August 5th, 2013**.[50] Since then, the Office of the Prosecutor clearly identified 9 potential cases involving possible international crimes.

Throughout 2020 the Office did not receive any additional information from the Nigerian authorities on relevant national proceedings.[51]

On **December 11th, 2020**, the Office determined that all criteria for the opening of an investigation were met and that it would seek approval of the competent Pre-Trial Chamber for the opening of an investigation.

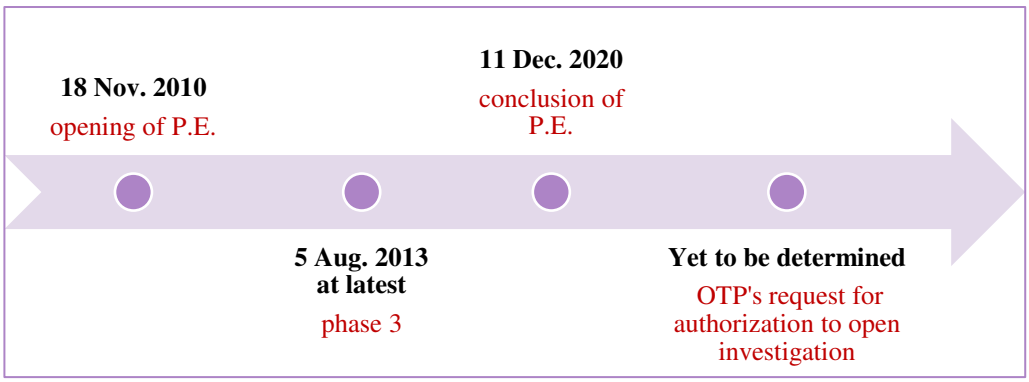

Table 21: chronology Nigeria

Regarding complementarity, the Office determined that:

> The duration of the preliminary examination, open since 2010, was due to the priority given by my Office in supporting the Nigerian authorities in investigating and **prosecuting these crimes domestically**.
>
> It has always been my conviction that the goals of the Rome Statute are best served by States executing their own primary responsibility to **ensure accountability at the**

[50] ICC OTP, Situation in Nigeria: Article 5 Report, August 5th, 2013.
[51] ICC, OTP, Report on Preliminary Examinations Activities 2020, §. 261.

> **national level**. I have repeatedly stressed my aspiration for the ability of the Nigerian judicial system to address these alleged crimes. We have **engaged in multiple missions to Nigeria to support national efforts**, shared our own assessments, and invited the authorities to act. (…)
>
> I have given ample time for these proceedings to progress, bearing in mind the **overarching requirements of partnership and vigilance that must guide our approach to complementarity**. However, our assessment is that none of these proceedings relate, even indirectly, to the forms of conduct or categories of persons that would likely form the focus of my investigations. And while this does not foreclose the possibility for the authorities to conduct relevant and genuine proceedings, it does mean that, as things stand, the requirements under the Statute are met for my Office to proceed.[52]

In practice, however, **no request for judicial authorization** has yet been made at this stage, nor does it seem to be on the immediate agenda:

> in the light of the operational capacity of the Office to roll out new investigations, the fact that several preliminary examinations have reached or are approaching the same stage, as well as operational challenges brought on by the COVID-19 pandemic, the Prosecutor intends to consult with the incoming new Prosecutor, once elected, on the strategic and operational issues related to the **prioritization of the Office's workload** and the filing of necessary applications before the Pre-Trial Chamber.[53]

4) Conclusions

63. From the casuistry analyzed, various conclusions can be drawn that demonstrate that the Preliminary Examination guided in Venezuela I, with regard to complementarity, is substantially deviating from the practice of the ICC Office of the Prosecutor in previous cases, without any productive dialogue with the State,

[52] ICC, OTP, Statement on the conclusion of the preliminary examination of the situation in Nigeria, December 11th, 2020.
[53] ICC, OTP, Report on Preliminary Examinations Activities 2020, §. 265.

which has even expressly requested it in its report of April 28th and has not even replied.

a) Chronology

64. There is no prescribed time limit for conducting preliminary examinations. Several pre-trial chambers have stated their view that preliminary examinations should at least be concluded "within a reasonable time" and invited the Office of the Prosecutor to provide an estimate timing or expected date for the final decision,[54] but the Office of the Prosecutor has insisted that "[n]o provision in the Statute or the Rules establishes a specific time period for the completion of a preliminary examination"[55] and that "there is no obligation under the Rome Statute or the rules to provide such an estimate or to give such a date".[56]

65. The Office of the Prosecutor has further highlighted that in its view, the duration of preliminary examinations **depends on a range of concrete factors**, including "the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes".[57]

66. In the context of this wide temporal discretion afforded to the Office, earlier preliminary examinations' length has varied greatly from case to case – a situation that has attracted some critical scholarly comments. According to PUES, for instance: "[d]uring the leadership of the first two Prosecutors, Luis Moreno

[54] ICC, Situation in the Central African Republic, Pre-Trial Chamber III, ICC-01/05-6, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, November 30th, 2006.
[55] ICC, Situation in the Central African Republic, OTP, ICC-01/05-7, Prosecution's Report Pursuant to Pre-Trial Chamber III's, November 30th, 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, December 15th, 2006.
[56] ICC, OTP, Policy Paper on Preliminary Examinations, §. 89. *See* also Ch. DE VOS, *Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo*, Cambridge, Cambridge University Press, 2020, p. 110.
[57] ICC, Situation in the Central African Republic, OTP, ICC-01/05-7, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, December 15th, 2006, §§. 9-10.

Ocampo and Fatou Bensouda, preliminary examinations were conducted within time frames that differed by 12 or more years. (…) A set timetable might not be workable for the Prosecutor, because information flows that feed into the analysis will differ greatly from country to country. This alone, however, cannot explain the vast differences in the different preliminary investigations".[58]

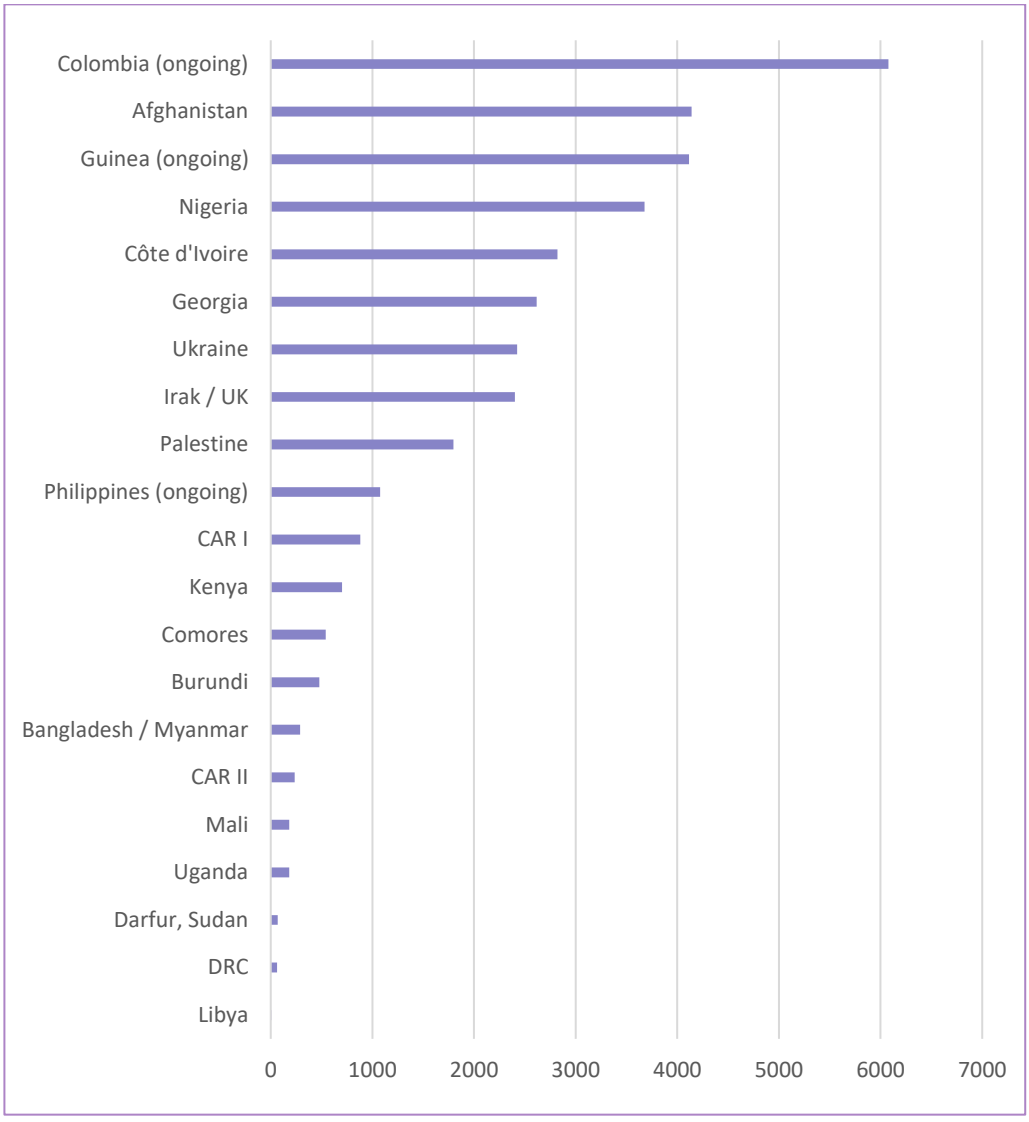

Table 22: total duration of preliminary examinations in days
(As of 20 January 2021, re. ongoing preliminary examinations)[59]

[58] E. PUES, *Prosecutorial Discretion at the International Criminal Court*, Oxford, Hart, 2020, pp. 34-35. *See* also, e.g., B. BOTECHA, "The International Criminal Court's Selectivity and Procedural Justice", *Journal of International Criminal Justice*, Vol. 18, 2020, pp. 118-119.

[59] When the exact day in a given month was unknown, the 1st day of the month has been used as default data. When the exact moment in a given year was unknown (and no other indication was available), the 1st of July has been used as default data.

67. Important distinctions must however be carefully drawn among all the precedents above.

68. One first key distinction is between situations originating from **self-referrals** and situations with other origins. With respect to the first category (self-referred situations), phase III assessments have usually been rather expedient. This logically stems from the specificity of those situations: they are entirely built on the circumstance that, in the view of the normally competent State (the referring State Party), effective domestic proceedings are not possible. As has been written: "[i]n case of situations referred by the affected states, these self-referring states express their inability or unwillingness to investigate and prosecute obviating the need for a lengthy analysis of national proceedings for this group of preliminary examinations".[60] By contrast, "in non-referred situations it will be necessary to pay close attention to the existence and nature of any domestic proceedings".[61] This explains why, quite naturally, non-self-referred preliminary examinations have been much lengthier.

69. In practice, amongst non-self-referred situations (i.e., situations either investigated *proprio motu*, or referred by the UN Security Council, or yet referred by a third State Party), the Office of the Prosecutor seems to also apply a distinctive regime to **UN Security Council referred situations**. Indeed, while other situations have commonly lasted for several years, the two UN Security Council referred situations (to date) have remained in examination status for very limited time: 5 days in the case of Libya, and just above 2 months in the case of Darfur, Sudan.

70. Some commentators have been critical towards this second, distinctive feature of the Office of the Prosecutor's approach to preliminary examinations. As a

[60] E. PUES, Prosecutorial Discretion at the International Criminal Court, Oxford, Hart, 2020, pp. 35-36.
[61] E. PUES, Prosecutorial Discretion at the International Criminal Court, Oxford, Hart, 2020, p. 36.

commentator observes: "[i]t is interesting because Colombia can be qualified as a conflict-ridden country for over 50 years, whereas the crisis in Libya was newborn, which could warrant more pre-investigative initiatives by the Prosecutor".[62]

71. Be that as it may, it is thus clear that in practice, self-referrals and UN Security Council referrals have developed into a distinct methodological framework than *proprio motu* investigations and situations referred by a State Party other than the territorial State (this is despite the fact that, in theory, the Office of the Prosecutor's approach to all situations is supposedly identical, whatever the mode of referral).[63]

72. It is thus acknowledged that for situations referred either by the territorial State Party itself or by the UN Security Council, "the prosecutor conducts a review tilted sharply toward opening a full investigation", while for other situations "the presumption appears to be reversed".[64]

73. In this decisive context, for the remainder of this conclusive section, we will mainly draw from our analysis of above situations that are generally comparable to Venezuela, that is, situations investigated *proprio motu* or referred to the Court by other States Parties (at the exclusion of the territorial State). Our conclusive comments below will therefore be based in particular on the situations in Colombia, Guinea, Philippines, Iraq / United Kingdom, Comoros, Kenya, Côte d'Ivoire, Georgia, Burundi, Bangladesh / Myanmar, Afghanistan, Ukraine, and Nigeria.

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[62] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, p. 115.
[63] See Ch. DE VOS, Complementarity, Catalysts, Compliance: The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo, Cambridge, Cambridge University Press, 2020, p. 111.
[64] D. BOSCO, "Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations", *American Journal of International Law*, Vol. 111, 2017, pp. 395-396.

74. Turning to these situations only, the **differences in duration of preliminary examination**, though they become less severe, remain significant – e.g. a bit more than one year for the situation on the registered vessels of Comoros, approximately 11 years in the situation in Afghanistan, and more than 16 years (and still ongoing) in the situation in Colombia.

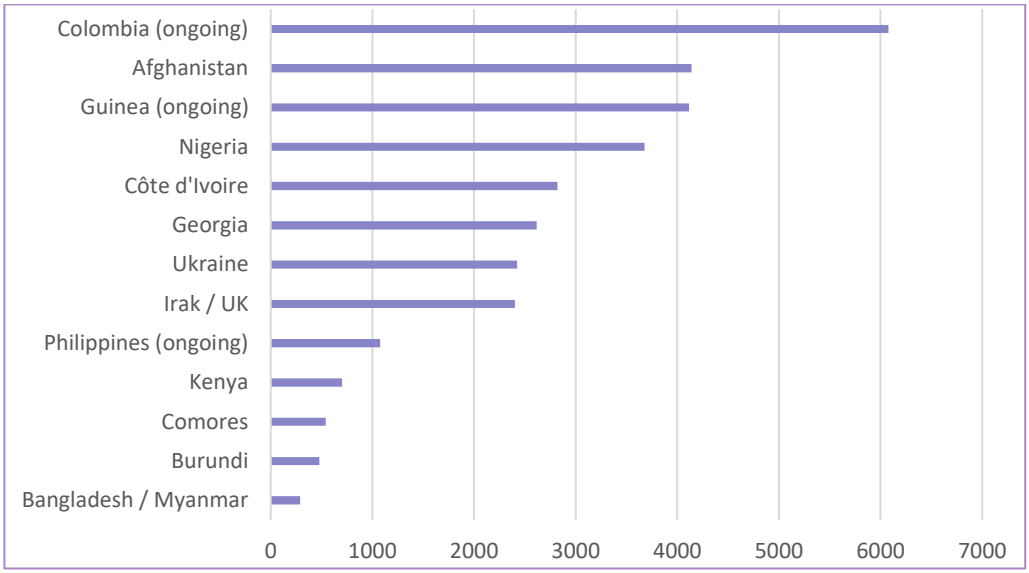

Table 23: total duration of preliminary examinations in days, at the exclusion of self-referred and UNSC referred situations (as of 20 January 2021, re. ongoing preliminary examinations)[65]

75. A final but **key distinction** must yet be drawn to further refine the assessment of preliminary examinations durations. As is widely acknowledged by expert observers,[66] in comparison to situations where domestic responses are simply lacking, preliminary examinations are naturally much longer when, due to the *existence of domestic proceedings*, complex complementarity assessments related to the willingness and ability of the competent domestic authorities to genuinely

[65] When the exact day in a given month was unknown, the 1st day of the month has been used as default data. When the exact moment in a given year was unknown (and no other indication was available), the 1st of July has been used as default data.

[66] *See* e.g. GROTIUS CENTRE FOR INTERNATIONAL LEGAL STUDIES, *Preliminary Examinations and Legacy/Sustainable Exit: Reviewing Policies and Practices*, 2015, para. 18; C. STAHN, "Damned If You Do, Damned If You Don't, Challenges and Critiques of Preliminary Examinations at the ICC", *Journal of International Criminal Justice*, Vol. 15, 2017, p. 428, September 29th, 2015.

proceed are necessary. In this sense, the situation in **Venezuela is only genuinely comparable to four other situations: Iraq / United Kingdom, Colombia, Nigeria, and Guinea**.

76. Focusing on those fully comparable situations only, tables 24 and 25 below illustrate, on the one hand, the global duration of those preliminary examinations, and, on the other hand, the approximate duration of phase 3 only.

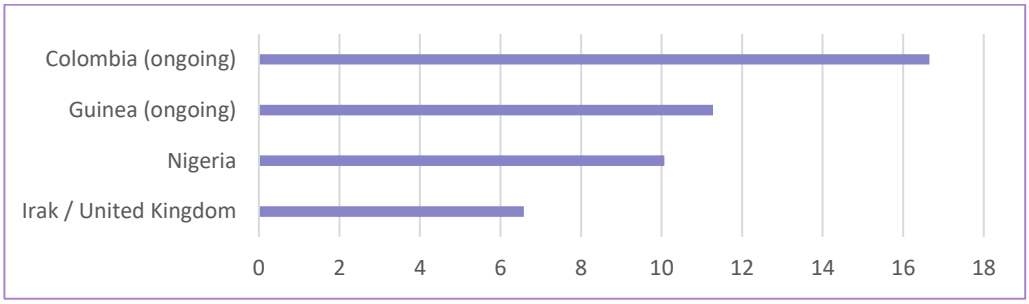

Table 24: total duration of comparable preliminary examinations in years (as of 20 January 2021, re. ongoing preliminary examinations)[67]

77. As table 26 shows, the situations in Iraq / United Kingdom and Nigeria remained in phase 3 for **almost 3,5 years** and for **7 years** respectively, while the ongoing situations in Guinea and Colombia have both been in phase 3 for **11 years** (as of 20 January 2021).

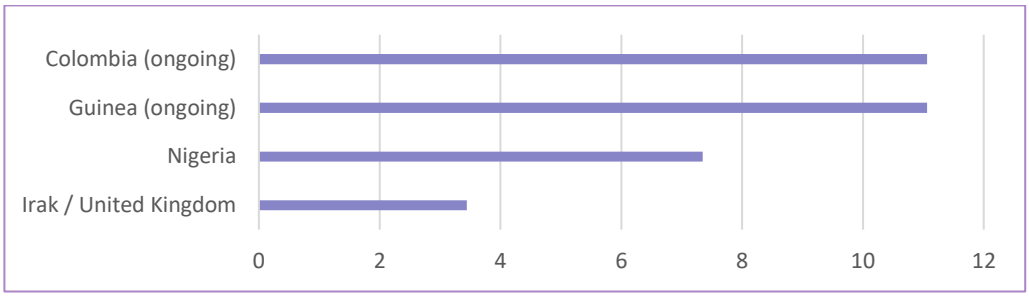

Table 25: phase 3 duration of comparable preliminary examinations in years (as of 20 January 2021, re. ongoing preliminary examinations)[68]

[67] When the exact day in a given month was unknown, the 1st day of the month has been used as default data. When the exact moment in a given year was unknown (and no other indication was available), the 1st of July has been used as default data.

[68] When the exact day in a given month was unknown, the 1st day of the month has been used as default data. When the exact moment in a given year was unknown (and no other indication was available), the 1st of July has been used as default data.

78. While some commentators have been critical towards the duration of some preliminary investigations, it all depends of the circumstances of each specific case. In some situations, commentators have conversely been **critical towards preliminary examinations that were conducted too quickly**, as this may stand in opposition to the need for constructive dialogue and the realization of the general objectives of positive complementarity (*see* below):

> The Court shall encourage the national jurisdictions, and it is a time-consuming effort. The Court shall be positive to the national jurisdictions, and facilitating their intervention may take some time.[69]

79. In other words, complementarity can be of little value if the State is not given the possibility of adopting the necessary measures to remedy any dysfunctions or omissions that may have previously occurred. If during the preliminary examination, as in this case, the State's willingness to cooperate and to investigate and punish the alleged perpetrators is evident, it would be contradictory not to allow it to even begin this period. Therefore, a reasonable period of time should be allowed and not cut off any possibility of reaction, which would lead to an unjustified change of phase and consequences that would be more negative than positive.

80. Finally, beyond the overall duration of preliminary examinations and the duration of the complementarity assessment as such, it must also be observed that very different timings have applied for the Office of the Prosecutor to reach phase 3 in the first place. For instance, the Office of the Prosecutor commenced phase 3 in Afghanistan only in 2013 – six years after the preliminary investigation had been initially opened (compared to 18 months to reach phase 3 in the situation of Venezuela).

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[69] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, p. 116.

b) General standards

81. The Office of the Prosecutor's methodology in relation to phase III has slightly differed from situation to situation, although the general spirit, principles and concrete steps governing the Office's action remain similar.

82. Firstly, the general spirit at the core of the entire Office of the Prosecutor's preliminary examination practice at phase 3 is **positive complementarity**. As is summarized in the Office of the Prosecutor's Policy Paper:

> 100. In light of the global nature of the Court and the complementarity principle, a significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international crimes. The complementary nature of the Court requires national judicial authorities and the ICC to function together. (…) Accordingly, States bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain an exception to the norm. (…)
> 101. Where potential cases falling within the jurisdiction of the Court have been identified, the Office will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes.[70]

83. Secondly, beyond the transversal notion of positive complementarity, the Office of the Prosecutor's action in phase 3 (and more generally in the entire preliminary examination process) seems to be dictated by **several cross-cutting principles**, the most important of which are detailed below.

i. For the purpose of maintaining a consistent, effective and constructive process, the Office of the Prosecutor has so far adopted a general strategy to serve and promote **transparency**, **clarity** and **predictability** in preliminary

[70] ICC, OTP, Policy Paper on Preliminary Examinations.

examination activities.[71]

ii. It is formally acknowledged that the preliminary examination process should be led with due consideration for the "the overarching principles of **independence**, **impartiality** and **objectivity**".[72] According to the Office of the Prosecutor, one important implication of independence is that "decisions shall not be influenced or altered by the presumed or known wishes of any party".[73] Furthermore, impartiality means that "the Office will apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned".[74]

iii. **Fairness** and equality of arms are other important aspects of the Office of the Prosecutor's methodology: "[t]he Office also seeks to ensure that, in the interests of fairness, objectivity and thoroughness, all relevant parties are given the **opportunity to provide information** to the Office".[75]

iv. It is central that "**no automaticity is assumed**"[76] in the Office of the Prosecutor's final decision whether to open an investigation. The Office of the Prosecutor's determination should be both thoroughly "**informed**" and "**well-reasoned**".[77] Judge Hans-Peter Kaul similarly insisted that for the purpose of deciding whether to proceed with an investigation, the Statute "requires a full, genuine and substantive determination" that is not "of a

[71] ICC, OTP, Policy Paper on Preliminary Examinations, §§. 21 and 95 in particular.
[72] ICC, OTP, Policy Paper on Preliminary Examinations, §. 25.
[73] ICC, OTP, Policy Paper on Preliminary Examinations, §. 26.
[74] ICC, OTP, Policy Paper on Preliminary Examinations, §. 28.
[75] ICC, OTP, Policy Paper on Preliminary Examinations, §. 33.
[76] ICC, OTP, Policy Paper on Preliminary Examinations, §. 28.
[77] ICC, Situation in the Central African Republic, OTP, ICC-01/05-7, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, December 15th, 2006, §. 7.

mere administrative or procedural nature." [78]

v. Therefore, the Office of the Prosecutor always needs to "**maximize the available information**" before taking a decision.[79]

vi. On the one hand, the information should be **comprehensive as to the nature and details of the crimes** allegedly committed:"[b]y the time the process of preliminary examination reaches its conclusion, there should almost always be substantial clarity on the type of alleged criminal conduct, the number of incidents and victims of that conduct and related matters concerning aggravation or impact"[80].

vii. The information should also be **comprehensive as to any insufficiency of the domestic response** to those crimes: "Preliminary examination of available information in respect of a situation must be performed in a comprehensive and thorough manner. (…) This may also entail assessing specific relevant national proceedings, where they exist, over a long period of time in order to assess their genuineness and their focus throughout the entirety of the proceedings, including any appeals".[81]

viii. This all leads the Office of the Prosecutor to engage with all lot of **proactivity** in preliminary examinations. Under article 15(2) of the Statute, during the preliminary investigation the prosecutor "may seek additional information

[78] ICC, Situation in Kenya, Pre-Trial Chamber II, ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31st, 2010, §§. 14 and 19.
[79] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, p. 119.
[80] P. SEILS, "Making Complementarity Work: Maximising the Limited Role of the Prosecutor," in C. Stahn & M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, New York, Cambridge University Press, 2011, p. 993.
[81] ICC, OTP, Policy Paper on Preliminary Examinations, §. 90.

from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate" and may also "receive written or oral testimony at the seat of the Court." As will be further detailed below, in practice the Office has usually made full use of these powers. Far from adopting a passive role at the preliminary examination stage, it undertakes "numerous information-seeking activities, including conducting missions to relevant states and hosting and participating in meetings at the seat of the court and in other locations during which it engages with relevant stakeholders, such as state officials, victims and victim representative organizations, and international and local NGOs."[82]

ix. In its recent decision on the situation in Iraq / United Kingdom, the Office of the Prosecutor has identified the wide margin of appreciation that must be left to domestic judicial authorities and the **strict admissibility standard** that the Office applies, whenever domestic efforts for justice are indeed being show, before deciding to open an investigation:

> The Office considers that the relevant test is not whether the Prosecutor or a Chamber of this Court would have come to a different conclusion to that of [domestic authorities] on the evidence and proceeded differently, but whether the facts, on their face, demonstrate an intent to shield persons from criminal responsibility. **To do otherwise would be to substitute the Prosecutor's own assessment** of what might constitute a realistic prospect of obtaining sufficient evidence to satisfy the evidence sufficiency test, or a realistic prospect of conviction to support a prosecution before [domestic courts], **in place of the assessment of the competent national prosecuting service**--and to interpret that difference as a lack of genuine intent to bring the person concerned to justice.[83]

[82] S. WHARTON & R. GREY, "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law*, 2018, p. 17.
[83] ICC, OTP, Situation in Irak / UK. Final Report, December 9th, 2020, §. 10.

c) Actions and methods

84. In practice, as the above situation-by-situation analysis shows, the Office of the Prosecutor's proactivity in relation to preliminary examinations generally takes the form a range of very concrete actions, steps and methods.

85. The most recurring ones are briefly summarized below.

i. In general, the Office of the Prosecutor always seeks to develop "**strong interaction** with the stakeholders".[84]

ii. The Office of the Prosecutor especially ensures a **clear and detailed communication** with the domestic authorities. With respect to the situation in Colombia, for instance, the Office of the Prosecutor has already published at least 7 detailed interim reports, stressing areas of progress and clarifying its position regarding further necessary improvements (in comparison, only one short report of 6 pages has so far been published by the Office in relation to Venezuela).[85] In the same vein, in order to further facilitate communication and the complementarity assessment in Colombia, the Office of the Prosecutor has identified clearly defined "potential cases", which it delineated through personal, temporal and geographic circumstances (e.g., "false positives killings allegedly committed by members of the Fourth Division (7th, 16th and 28th Brigades) between 2002 and 2008 in the departments of Meta, Casanare and Vichada", *etc.*).

[84] ICC, Situation in the Central African Republic, OTP, ICC-01/05-7, Prosecution's Report Pursuant to Pre-Trial Chamber III's, November 30th, 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, December 15th, 2006, §. 8.
[85] ICC, OTP, Informe sobre las actividades de examen preliminar 2020 – Venezuela, December 14th, 2020.

iii. The Office of the Prosecutor also seeks to ensure **foreseeability**. With respect to Colombia and Guinea, in particular, the Office of the Prosecutor has recently announced that it was currently developing **detailed benchmarking frameworks**, a draft of which are expected to be shared with the respective domestic authorities in the first half of 2021. The purpose of these frameworks is to clearly establish, in advance, the standards that will eventually be applied by the Office to make its final determination on the satisfaction (or not) of complementarity in those two situations. In the Office's more precise words, these two benchmarking frameworks will "enable the Office to identify the indicators that could in principle enable it, at the appropriate time, to conclude whether it should either proceed to open an investigation or defer to national accountability processes as a consequence of relevant and genuine domestic proceedings".[86]

iv. Similarly, the Office of the Prosecutor normally **requests relevant information on a continuous basis**. For example, in the context of its preliminary examination in Georgia, the Office of the Prosecutor has made a total of ten formal requests for information: six to the Government of Georgia and four to the Government of the Russian Federation. In the context of its Afghanistan preliminary examination, the Office of the Prosecutor submitted no less than twenty-nine formal requests for information. With regard to Colombia, for more than 16 years, the Office of the Prosecutor and domestic authorities have exchanged countless requests for information and responses on all aspects of the Office of the Prosecutor's preliminary examination – for only the period from 2004 to 2012 this gave Colombia the opportunity to send a total of 114 communications to the Office of the Prosecutor.[87]

[86] ICC, OTP, Report on Preliminary Examinations Activities 2020, §§. 154 et 175 respectively.
[87] M. AKSENOVA, "The ICC Involvement in Colombia: Walking the Fine Line between Peace and Justice", in

v. Interaction with domestic authorities may also include the **setting of deadlines** or concrete **roadmaps**. With respect to Guinea, for instance, the Office devised a roadmap laying down a set of required actions to be implemented by the Guinean authorities within a specific time frame.[88] The latter includes very specific actions such as the designation of a suitable courtroom for a specific trial, the appointment and training of magistrates of the competent jurisdiction, *etc*.

vi. The Office of the Prosecutor normally proceeds to several on-site **country visits**. For example, since the opening the Guinea preliminary examination in September 2009, the Office of the Prosecutor has conducted more than fifteen missions to that country. Since announcing the Georgia preliminary examination in August 2008, it has conducted at least nine missions regarding that situation: six to Georgia and three to Russia. In relation to the situation in Colombia, the Office of the Prosecutor conducted three missions to that country in 2018 alone; or most recently, from 19 to 23 January 2020.[89]

d) Assessment

86. In relation to the evaluation of the practice of the OTP related to preliminary investigations, we can identify following patterns.

87. In practice, the positive complementarity methodology implemented by the Office of the Prosecutor has led to very **effective and promising results** that have been

M. Bergso & C. Stahn, *Quality Control in Preliminary Examination: Volume 1*, Brussels, TOAEP, 2018, p. 270.

[88] ICC, OTP, Report on Preliminary Examinations Activities 2020, § 170.

[89] *See* S. WHARTON & R. GREY, "The Full Picture: Preliminary Examinations at the International Criminal Court", *Canadian Yearbook of International Law*, 2018, pp. 17-18.

applauded by the international community.

88. In Guinea, for example, the Office of the Prosecutor's preliminary investigation triggered domestic investigations that led to effective prosecutions. The preliminary examination in Georgia has similarly worked as a catalyst for domestic proceedings in Georgia and Russia. In the same vein, the Court's examination of Côte d'Ivoire reportedly played an important role in deterring a further escalation of violence in the wake of a failed attempt to overthrow then President Laurent Gbagbo.

89. Colombia is yet another striking example of the positive effects and reforms that may be stimulated by reason of a constructive preliminary examination process in phase 3, having led, among others, to the adoption of a Justice and Peace Act and to the conclusion of the final 2015 agreement negotiated between the government and the Revolutionary Armed Forces of Colombia. Surely, not *all* specific aspects of the Office of the Prosecutor's preliminary examination have led to immediate results at the Colombian level (*see* above at para. 13). Yet the Office of the Prosecutor has continued and is still continuing working hand-in-hand with Colombian authorities to further enhance and favor still more effective actions at the domestic level.

90. As a general assessment, the preliminary examination stage has thus been described as **extremely fruitful** for the international criminal justice system as a whole:

> Entering this stage and conducting it have many benefits that should not be underestimated. (…). Indeed, the Court mainly functions as a trigger mechanism. In the ICC-era, the Court has a central role in triggering and activating States and other organizations to take their responsibilities in combating international crimes. Under the principle of complementarity, the Court's success should not be assessed by taking into account the number of prosecutions before the Court. On the contrary, the effectiveness of the Court should be mainly assessed in light of its efficiency in

> managing the international criminal justice system and in activating other actors within this system.[90]

91. This positive approach and strategy has been clearly endorsed by the Office of the Prosecutor, which expressly noted that the preliminary examination phase "offers a first opportunity for the Office to act as a catalyst for national proceedings" and that the Office can "better identify the steps required to meet national obligations to investigate and prosecute serious crimes."[91]

e) Outcome

92. While the outcome of a preliminary investigation depends on the circumstances of each situation, three options are ultimately available to the Office of the Prosecutor.

i. Firstly, the Office may decline to investigate (*see* situations **e** to **f** above);
ii. Secondly, the Office may decide to open an investigation based on article 53(1) of the ICC Statute (see above situations).
iii. Thirdly and equally importantly, the Office may decide to **keep a situation under preliminary examination** in order to collect further information with a view to making a final determination at a later stage.

93. Scholarly literature has argued in favor of such a more 'open-ended' approach to preliminary examinations.[92] Such a positive and long-term approach seems

[90] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, pp. 409 and 405.
[91] ICC, OTP, Prosecutorial Strategy 2009-2012, 2010, § 38.
[92] *See* eg P. SEILS, "Making Complementarity Work: Maximising the Limited Role of the Prosecutor," in C. Stahn & M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, New York, Cambridge University Press, 2011, p. 326.

particularly relevant where a preliminary examination has reached phase 3 (complementarity) and investigations and prosecutions *are* in fact being held at the domestic level. This is echoed, among many examples, by the position the Office has expressly adopted for many years with respect to Guinea. Already in 2012, the Office declared:

> In accordance with its positive approach to complementarity, the Office will continue to actively follow-up on the proceedings and to mobilize relevant stakeholders, including State Parties and international organizations, to support the efforts of the Guinean authorities to ensure that justice is rendered. Should such efforts fail, the Office may revise its current finding of inadmissibility. The situation will therefore remain under preliminary examination.[93]

94. The decision, at a given moment in time, to proceed with an investigation or to carry on with a preliminary examination, should first and foremost be dictated by the **completeness and preciseness of the information** collected by the Office of the Prosecutor in relation to both the alleged crimes and domestic response thereto. In other words, before opening an investigation, there must be **advanced legal and factual clarity** on the alleged crimes and any insufficiency of domestic efforts for justice. It must be recalled that "no automaticity is assumed"[94] in the final decision to open an investigation and that fairness and equality of arms are important aspects of the Office of the Prosecutor's methodology.

95. This is all necessary for and consistent with the general spirit of complementarity. **Domestic authorities must have an effective opportunity to deal with and remedy the crimes** on their own motion. Therefore, it is also of utmost importance, for the purpose of an effective complementary regime, that domestic authorities are given sufficiently precise information and directions as to the alleged crimes,

[93] ICC, OTP, Report on Preliminary Examinations Activities 2012, §. 163.
[94] ICC, OTP, Policy Paper on Preliminary Examinations, § 28.

as well as a **reasonable period of time** – of course, under continued scrutiny by the Office of the Prosecutor – to investigate these offences, to prosecute those responsible, and if necessary, to implement the necessary institutional and legislative reforms to avoid repetition.

96. In fact, **only once** – and very recently – in the ICC's history has the Office of the Prosecutor **proceeded to phase 4** and eventually determined that the conditions for opening an investigation were fulfilled **while domestic proceedings were ongoing**. This is the situation in Nigeria, in which, after more than 10 years of preliminary examination including 7 years in phase 3 only, the Office of the Prosecutor eventually announced on 11 December 2020 that the examination was over and that it would seek approval of the competent Pre-Trial Chamber for the opening of an investigation in due course (though it is worth recalling that, in effect, **no request for judicial authorization** has been made or seems to be on the immediate agenda – *see* above at para 74). On the very contrary, in the situation or Iraq / UK, the Office of the Prosecutor proceeded to terminate the preliminary examination while heavily criticizing the (lack of) domestic response to the relevant crimes.

f) Overall conclusion and prospects in the situation of Venezuela

97. It is said that the process of conducting a thorough preliminary investigation phase – especially in phase 3 – has "many benefits that should not be underestimated".[95] The Bolivarian Republic of Venezuela certainly relates to such statement that positive complementarity is a valuable and necessary methodology in connection with phase 3 – and indeed the only methodology that is in line with the principle of subsidiarity at the basis of the ICC's establishment.

[95] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, p. 409.

98. For the past few years, Venezuelan authorities have been facing and struggling to deal with an extremely sensitive and difficult situation at the domestic level, involving social uprisings, riots, violence and extreme economic conditions due to illegal commercial and economic sanctions from third States. The Bolivarian Republic of Venezuela has been working hard and is still struggling to implement the necessary institutional, legislative and judicial reforms in other to address this exceptional situation in an effective manner. The Office of the Prosecutor's opening of a preliminary investigation in the situation of Venezuela and the constructive dialogue that has followed is certainly working as a powerful, **external catalyst to carry on with and intensify this important process**. The results are there for all to see and will continue to be produced if the dialogue is maintained.

99. The constructive dialogue that is required between the Office of the Prosecutor and the Bolivarian Republic of Venezuela will contribute to refining and improving several key aspects of ongoing criminal investigations and institutional reforms. The Venezuelan authorities are willing to continue on this constructive path and wish take this renewed opportunity to once again recall their intention to cooperate with the Office for the purpose of the ongoing preliminary examination of the situation. But in order to do so, the ICC Office of the Prosecutor must ensure such a productive dialogue, as it has done in previous cases, by changing the approach to the Venezuela I case.

100. Therefore, taking into account that the Bolivarian Republic of Venezuela has so far submitted up to four (4) detailed reports, dated 30 November 2020, 30 January 2021, 28 April 2021, 5 May 2021, and has not received any response from the Office of the Prosecutor of the ICC, this Pre-Trial Chamber is requested to instruct the Office of the Prosecutor to proceed with the productive dialogue and **to refrain at this time from requesting the opening of an investigation**, based on Article 53(1) of the ICC Statute. Instead, the Bolivarian Republic of Venezuela respectfully

requests your Office to continue accompanying its competent domestic authorities in both (a) conducting investigations and prosecutions for any international crimes that would have been committed, and (b) implementing more global, ongoing institutional and judicial reforms.

101. In this perspective, the Bolivarian Republic of Venezuela strongly believes that the establishment and communication, by the Office, of a specific **benchmarking framework** – comparable to the ones being designed in the context of the situations in Colombia and Guinea – would be of invaluable assistance for Venezuelan authorities with a view to gaining full understanding of the expectations and demands of the Office in relation to ongoing domestic investigations and prosecutions. This requires the end of the current silence approach and the opening of such a productive dialogue, in line with previous precedents.

102. Similarly, the Bolivarian Republic of Venezuela would be particularly interested in receiving the **Office of the Prosecutor's views and/or directions** on the following aspects:

i. Communicate to the Bolivarian Republic of Venezuela a detailed interim report on its position with respect to the information submitted, the necessary improvements to be implemented and the identification of "potential cases" so that they can be analyzed in relation to their situation in the domestic jurisdiction.
ii. Identify detailed frameworks for assessing relevant internal procedures.
iii. Send a new letter and report to the Bolivarian Republic of Venezuela (after the last communication of November 4th, 2020), analyzing the various reports submitted by the Bolivarian Republic of Venezuela with formal requests for complementary information if they consider it relevant.
iv. Establish, in dialogue, and in an interactive manner, concrete deadlines and roadmaps.

103. Finally, the Bolivarian Republic of Venezuela would like to take this opportunity to once again reiterate its **invitation** to the Office of the Prosecutor to visit the country. In the opinion of the authorities of the Bolivarian Republic of Venezuela, such an on-site visit, which is consistent with the Office's practice on preliminary examinations, would be a valuable opportunity to further reinforce constructive dialogue and cooperation with respect to the ongoing domestic efforts to address any international crimes committed in Venezuela.

104. Therefore, taking into account the practice of the principle of complementarity in the Preliminary Examination, it can be concluded that, in the case of Venezuela I, the Office of the Prosecutor is not complying with these prior standards of conduct. On the contrary, it is deploying a silent, non-collaborative analysis, without any dialogue, of the imperative of complementarity.

105. This is why this Pre-Trial Chamber is asked to determine, on the basis of its competence for judicial review, whether the ICC Office of the Prosecutor is obliged to respond to the States regarding the information submitted, establish a constructive dialogue and thus develop cooperation with the State Party within the framework of the principle of complementarity, in accordance with Art. 15 of the Rome Statute.

III. REQUEST FOR JUDICIAL REVIEW II

Should the State be granted access to evidentiary material in order to guarantee the right of defence, the principle of contradiction and the control of evidence, in the framework of art. 21.3 of the Rome Statute?

106. In addition to the above, it is important to highlight that the examination of the principle of complementarity is taking place in the Venezuela I case without the State enjoying the most elementary general principles of law. The Bolivarian Republic of Venezuela does not have access to the allegations made, is unaware of the facts with which it is charged, cannot exercise control over the evidence, and is therefore deprived of fundamental principles of law such as the right to defense, to contradiction and to equality between the parties.

A. Introduction and general context

107. Although States are (or should be) critical actors in the context of preliminary examinations at the International Criminal Court (hereinafter "ICC"), there is only scarce reference in the Court's founding instruments on their specific position and procedural rights, especially regarding access to information and evidence (B). This situation is hardly consistent with international fairness standards (C). It is also at odds with general principles and practice pertaining to the settlement of international disputes (D). Therefore, our conclusion is that both the spirit of complementary and internationally recognized standards call for the Bolivarian Republic of Venezuela to already be entitled to information disclosure at this stage of the ongoing preliminary examination (E).

B. *Accessing prosecution information and evidence: general notions*

1) Accessing prosecution information and evidence: general notions

108. It is undisputed that in criminal matters, the right to receive the evidence on which the prosecution intends to rely is fundamental to procedural fairness and equality of arms. The ICC regime of evidence disclosure is governed by Articles 54(3)(e), 61(3) and (6), 67(2), 68(5) and 72 of the Statute, as well as Rules 76 to 84 and 121 of the Rules of Procedure and Evidence (hereinafter "RPE"). The **disclosure and openness obligations of the Prosecutor differ at the pre-trial and trial stages** (as they are more extensive in preparation for the trial itself than in preparation for the confirmation of charges hearing).

109. According to Article 61(3) of the ICC Statute, within a reasonable time **before the confirmation of charges** hearing (and in any event no later than 30 days before the hearing), the suspect must be provided with the charging documents and informed of the evidence on which the prosecutor intends to rely during the confirmation hearing. The Pre-Trial Chamber (hereinafter "PTC") may issue additional orders on the disclosure of information for the hearing. In the *Bemba* case, for example, the PTC ordered the parties to provide (1) a list of evidence, (2) a list of identified recipients for each item reflecting also the access and the level of confidentiality for each item *vis-à-vis* any party, and (3) an analysis of each piece of evidence.[96]

[96] ICC, *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, July 31st, 2008, p. 22. ICC, *Prosecutor v. Bemba*, Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, ICC-01/05-01/08-55, July 31st, 2008, p. 22.

110. **Pre-trial disclosure**, on the other hand, is governed by Article 67(2) (disclosure of exculpatory evidence), Rule 76-77 (the Prosecutor's disclosure obligations) and Rules 78-80 (defense's disclosure obligations). In the *Lubanga* case, the Single Judge drew a distinction between two modalities: disclosure *stricto sensu* (Article 67(2), Rules 76 and 79), which requires the relevant party to provide directly to the other party copies of the evidence and materials subject to disclosure; and inspection (Rules 77-78), which imposes on the relevant party the obligation (i) to allow the other party to inspect the relevant books, photographs, maps, and tangible objects, and (ii) to provide those copies requested during inspection.[97] The Single Judge **rejected the defense's request for full access to the entire investigation file** of the prosecutor in that case, considering this request to be "fundamentally contrary to the system of disclosure set out in the Statute and the Rules, and in particular in Articles 61(3), 67(1)(a) and (b) and 67(2) of the Statute and Rules 76 and 77 of the Rules."[98]

111. This is very much illustrative of the fact that, even in immediate preparation for trial, there is **no right to full disclosure at the ICC**; there is no right to receive a full copy of prosecution material. This has been **criticized** by some. Perhaps the most reasonable solution, especially in the light of the duty incumbent on the ICC Prosecutor to investigate exonerating circumstances equally, would be to allow open access to all evidentiary materials, including the prosecution's CaseMap file, in the form of a dossier.

112. This would also relieve some of the criticisms that are often laid against prosecution teams in relation to the practice of 'flooding' the defense, whereby thousands of pages of documents are disclosed to the defense just in advance of

[97] ICC, *Prosecutor v. Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, May 15th, 2006, p. 4.
[98] ICC, *Prosecutor v. Lubanga Dyilo*, Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, May 15th, 2006, p. 5.

trial, without indicating precisely which parts are exculpatory, which means that defense teams have to analyze vast quantities of evidence within a short time-frame. Furthermore, this would solve the problem whereby the defense regards a piece of evidence as exculpatory, the prosecution believes it to be inculpatory, and the Chamber has a third view insofar as it sees the evidence as potentially exculpatory but not for the reasons proposed by the defense, as was the case in *Karadžić*.[99]

2) Whether States have a possibility to access information and evidence at the preliminary examination stage

113. Disclosure obligations – beyond the fact that they are limited in nature (*see* above) – **only arise at the case stage** (and not the situation stage). The accusatorial material at the preliminary investigation stage is usually referred to as "**information**" rather than "evidence". Any preliminary examination commences with handling such information presented to the OTP. In practice, the OTP maintains an "evidence database". This database assists the Office of the Prosecutor (hereinafter "OTP") with proper registration and storage of all information and evidence collected from different sources. Each item or page of the materials is registered with a unique Evidence Registration Number. However, there is **no right to access such documents**.

114. **Secrecy** is thus a principle governing preliminary examinations, in contrast to the pre-trial and trial proceedings that are governed by the principle of publicity. According to expert literature, "[t]his principle is justified by the need to avoid potential suspects absconding, and to protect the life of victims and witnesses and

[99] Y. MCDERMOTT, Fairness in International Criminal Trials, OUP, 2016, p. 86.

the preservation of evidence and information".[100] The OTP insists on its duty to protect the **confidentiality** of the available information.[101]

115. Therefore, it seems that as the law stands the Prosecutor has **no disclosure obligations whatsoever under the Statute before the pre-trial stage**. This is once again confirmed, as a matter of practice, in the OTP Policy Paper on Preliminary Examinations: "When seeking additional information pursuant to Article 15, the Office confers with potential information providers regarding the scope and possible use of the information sought and the disclosure obligations that might ultimately arise should an investigation be opened and prosecution ensue"[102].

116. It may still be of interest to mention that – although in relation to (the very early steps of) the case stage – the Court has judicially developed some form of limited right to disclosure for the defense in relation to arrest warrants. Under the Statute, no specific obligation of disclosure of evidence literally arises in relation to **interim detention/release**. Yet, in *Mbarushimana*, prior to the client's surrender to the ICC, the defense petitioned the prosecution for the disclosure of material related to the client's arrest for three purposes: (i) to challenge the validity of the arrest warrant pursuant to Rule 117(3) of the RPE; (ii) to apply for interim release; and (iii) to challenge the admissibility of the case. The prosecution countered that neither the ICC Statute nor the RPE provided for disclosure in relation to the issuance of an arrest warrant. In support of its petition, the prosecution argued that "such advanced disclosure as sought by the defense created a risk of disseminating highly sensitive information to a person who is not subject to the Court's control."[103] Partially granting the defense request, the Pre-Trial Chamber affirmed the defense

[100] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, p. 118.
[101] ICC, OTP, Policy Paper on Preliminary Examinations, § 87.
[102] CPI, Fiscalía, Documento de política general sobre exámenes preliminares, párrafo 88.
[103] ICC, *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-31, Prosecution Response to the 'Defence Request for Disclosure', January 5th, 2011, PTC I, pp. 2, 12.

right to have **access to documents which are essential for the purposes of applying for interim release and challenging the validity of the arrest warrant**, but limited the scope of disclosure having regard to the sensitive nature of such disclosure.[104]

117. Be that as it may, it is noteworthy that, in any case, disclosure obligations seem to be only due, under Article 67(2) of the Statute and under the wording of all relevant provisions of the RPE, **to the defense**, and **not to other participants such as States**. Disclosure to States is, therefore, ungoverned by the Statute or RPE.

118. However, it is interesting that the same question arose in relation to **victims** – who are not recognized disclosure rights under the Statute, literally, but yet, whose rights have been progressively recognized on a judicial basis, yet to some extent with some uncertainty. In the *Lubanga* case, the trial chamber held that as a starting point, victims are, as a matter of general principle, entitled to **any materials in the possession of the prosecution that are relevant to the personal interests of victims**, which the victims have identified with precision in writing, and provided that in the view of the chamber it will assist in the determination of the truth.[105] This was upheld by the Appeals Chamber,[106] though scholarship had been very critical towards the severity of the standard developed by the trial chamber.[107]

119. From this all, it must be concluded that the Court is inclined to recognize **extra-statutory rights to disclosure** when so requested for an effective participation to specific procedures provided for in the Statute. This may well be extended to possible Article 18 or Article 19 challenges, in relation to documents and

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[104] ICC, *Prosecutor v. Callixte Mbarushimana*, Prosecution Response to the 'Defence Request for Disclosure', ICC-01/04-01/10-31, January 5th, 2011, PTC I, p. 17.
[105] ICC, *Prosecutor v. Lubanga*, Decision on victim participation, January 18th, 2008, §§ 108 and 111.
[106] ICC, ICC, *Prosecutor v. Lubanga*, Judgment on appeal, July 11th, 2008, § 100.
[107] See eg "Disclosure of Evidence" in K. KHAN et al. (eds.), *Principles of evidence in international criminal justice*, OUP, 2010, p 357.

information that are essential for Venezuela to make an effective defense of its own interests in the course of such procedures. Therefore, arguably, Article 18 or Article 19 admissibility challenges require some form of prosecution disclosure. All the more so if one takes into account the level of dissemination that is being given by some of the complainants, who point to specific persons as the target of the action before the ICC and the absence of mechanisms so that these persons, exposed in the preliminary examination, cannot, even though the State, make the relevant allegations with a minimum of solvency in a context in which the State is carrying out, through the competent judicial institutions, the exhaustive investigation of the facts.

3) Challenging the reliability or admissibility of prosecution information and evidence: general notions

120. In relation to the reliability or admissibility of the information and evidence the general notions are following. Under **Article 69(4)** of the Statute: "[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence."

121. Under **Article 69(7)** of the Statute: "Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

122. Under **Article 69(8)** of the Statute: "When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law."

123. On the basis of these legal foundations, the Chamber may rule on the relevance and/or admissibility of each submitted piece of evidence and determine the weight later; but it may also defer the decision to assess the relevance and/or admissibility, probative value and potential prejudice of each piece of evidence until the end of the proceedings when it has to evaluate the guilt or innocence of the accused.[108]

124. This **very flexible regime of evidence admissibility** is widely said to be at odds with the general adversarial nature of ICC proceedings. Expert literature has thus been very critical of the evidentiary regime at the ICC, insofar as it combined features of civil and common legal systems in a manner that is, all taken together, irreconcilable with fair trial rights.[109] In particular, in line with the accusatorial model, it is primarily up to the parties (prosecution and defense) to collect and present evidence at the ICC.[110] In this context, as the Office of the Prosecutor is part of the Court and can rely on a large staff, it benefits from a clear structural advantage in terms of investigative resources,[111] which would normally require a strict admissibility regime and, among others, a strict ban on unchallenged statements collected before trial (*i.e.* hearsay evidence) in order to maintain equality of arms.[112] As has been seen above, it stems from the Statute, however, that the

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[108] ICC, *Prosecutor v. Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1386, A. Ch., May 3rd, 2011, §§ 36-37.

[109] *See*, *e.g.*, A. ZAHAR and G. SLUITER, *International Criminal Law*, OUP, 2008, p. 394.

[110] M. CAIANIELLO, 'Disclosure before the ICC: The Emergence of a New Form of Policies Implementation System in International Criminal Justice?', 10 *International Criminal Law Review* (2010) pp. 38-39.

[111] On this issue, *see* S. NEGRI, 'Equality of Arms – Guiding Light or Empty Shell?', in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007) pp. 50-55.

[112] In inquisitorial systems, no such ban is needed for the equality of arms is already ensured by the proactive role of the judge, among others in evidentiary matters.

admissibility of evidence is rather flexible, and will only be barred under very restrictive circumstances. Caianiello deplores this **inconsistency** in the following terms:

> Perhaps, the worst hypothesis for the fairness of the system occurs when, despite the accusatorial structure, hearsay evidence is broadly admitted. In such cases, the process combines the worst aspects of the two models. On one side, it is polarized in the accusatorial way, and therefore both the collection and presentation of evidence rely primarily on the parties. On the other, it is structurally unequal because the prosecutor is systematically in a better position than the defense.[113]

125. In a recent webinar on evidence at the ICC (March 1st, 2021), senior OTP lawyer **Alex Whiting** declared:

> No evidence is perfect in itself. There is always some form of bias somewhere. The question is not each single piece of evidence but whether everything is globally corroborated by the rest of the evidence. In relation to illegal evidence, there is no argument that the Statute of the ICC should be respected. Another question is if the evidence does not violate the Statute per se but was obtained illegally in the State of origin, that is, in breach of the State's own rules on evidence (eg. hacking of confidential information; theft; etc.). In this respect, the ICC should be allowed to use that as long as it does not undermine the integrity of the proceedings. This is the rule under the Rome Statute. The ICC cannot be bound by all the rules on procedure of all the domestic jurisdictions. It is only bound by its own rules and by the principle of integrity.

4) Whether evidentiary challenges are available to States at the preliminary examination stage

126. Beyond the very flexible regime of evidence assessment and admissibility, the question arises whether the above provisions also apply at the preliminary examination stage – and in particular, to admissibility challenge procedures that

[113] M. CAIANIELLO, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models', 36 *North Carolina Journal of International Law and Commercial Regulation* (2011) p. 298.

would be filed by States at that stage.

127. According to the broad terms of rule 63(1) of the RPP, "The rules of evidence set forth in this chapter, together with Article 69, shall apply in **proceedings before all Chambers**." According to Carsten STAHN, "[b]ien qu'elles aient été insérées dans le chapitre consacré au « Procès », ces règles s'appliquent à **toutes les phases de la procédure** de la CPI".[114]

128. Admittedly, exclusionary rules should therefore apply already at the preliminary examination stage. It seems, however, that preliminary examinations are – altogether – not considered as an actual phase of the procedure – judicial proceedings starting only at the moment when an arrest warrant is delivered (departure from the situation stage and beginning of the **case stage**).

129. In practice, **the OTP thus has almost full discretion and flexibility** during preliminary examinations as to the information it gathers:

> The only obstacle in the way of using an information source is its lack of reliability. The evaluation of information is carried out based on a specific methodology. Such a methodology, as such described by the Prosecutor, is based on criteria, including relevance (usefulness of the information to determine the elements of a possible future case), reliability (refers to the trustworthiness of the provider of the information as such), credibility (refers to the quality of the information in itself, to be evaluated by the criteria of immediacy, internal consistency, and external verification), and completeness (the extent of the source's knowledge or coverage vis-à-vis the whole scope of relevant facts).[115]

130. Furthermore, under rule 61(3) of the RPP, "a Chamber shall rule on an

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[114] C. STAHN, "Article 69", in J. Fernandez et al (eds.), Statut de Rome de la Cour pénale internationale. Commentaire Article par Article, 2nd ed., *Pedone*, 2020, p. 1903.

[115] M. HADI ZAKERHOSSEIN, Situation Selection Regime at the International Criminal Court: Law, Policy, Practice, Antwerp, Intersentia, 2017, pp. 119-120.

application of a **party** or on its own motion, made under Article 64, subparagraph 9 (a), concerning admissibility when it is based on the grounds set out in Article 69, paragraph 7." States are not parties but mere participants before the ICC. Therefore, it seems that States are not in a procedural position to file exclusionary challenges before the ICC (though they may always invite the Court to deal with such a question *proprio motu*).

131. However, the truth is that, at this stage, a series of procedural actions are taking place behind the backs of those possibly affected, which will be decisive for the beginning of the investigation phase and the issuing of the relevant arrest warrants against them. In other words, in the present case, we find ourselves, on the one hand, with a state that is providing all possible cooperation without knowing exactly what the content of the alleged facts is, and on the other, with a series of investigations that, in fact, will decisively affect its own institutions and their representatives, as can be seen from the known documentation, if the proceedings continue, without being able to defend themselves in the slightest. In this respect, the concept of being a party to the proceedings goes beyond the concept of a party to the proceedings itself and becomes broader. The State, when requested to cooperate, has the right to know at least a minimum of the content on which it is pronouncing.

C. *International fairness requirements in the determination of any "criminal charge"*

132. International fairness requirements – including access to information, possibility to challenge evidence and other aspects pertaining to the principle of equality of arms – are enshrined in numerous international treaties and have acquired the status of customary international law (*see* further below). It is

submitted that, at this crucial moment in the OTP's ongoing preliminary examination into the situation in Venezuela, the Bolivarian Republic of Venezuela should be entitled to the full enjoyment of those internationally recognized rights. This is because the ICC, as an institution, is bound by international standards of fairness, including vis-à-vis States. Furthermore, at this stage of the preliminary examination, it must be considered that the Bolivarian Republic of Venezuela sits in a situation where it is, in fact, as a State, subjected to the equivalent of a "criminal charge" and involved in a dispute pertaining to "civil rights and obligations" in the meaning of said international standards.

133. Upholding those essential fairness standards is not only an international procedural right of the Bolivarian Republic of Venezuela – as will be demonstrated. In practice, it will also **favor greatly the ongoing constructive cooperation between Venezuela and the OTP** and increase the capability of Venezuelan authorities to effectively pursue their efforts in implementing the necessary institutional, legislative and judicial reforms with a view to addressing the current, exceptional crisis faced by Venezuela.

134. One cannot pretend that this is considered a minor issue, when the cooperation and collaboration in good faith on the part of the State and its institutions has been accredited, and the highest authorities of the State are being implicated in this case, without the minimum basis that would be provided by the facts established impartially and without any political interest in between. Neither the attacks at various levels nor the intention on the part of some bodies to use the criminal route represented by the ICC to spuriously attack - as will be demonstrated - the Venezuelan state and its institutions, especially its judicial institutions, turning the international criminal judicial arena into a field of political action, are accidental.

1) Whether the ICC is bound by international fairness requirements

135. Clearly, the ICC does not find itself outside the general international law. Therefore, the question must be asked: is the ICC obliged to comply with international fairness requirements? It goes undisputed today that the ICC is, as an international institution, bound to abide by generally recognized human rights standards.[116] Although the Court is not as such a party to the international and regional instruments on human rights protection, this obligation rests on **a series of legal foundations**.

136. First, as unwritten sources of international law, **custom and general principles** are binding on the ICC because they are binding on all international organizations in general. According to the International Court of Justice ("ICJ"): "[i]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them *under general rules of international law*, under their constitutions or under international agreements to which they are parties".[117] This finding of the world Court goes undisputed in legal literature.[118]

137. It is further echoed by the work of the International Law Commission, and in particular by the 2011 *Draft Articles on the responsibility of international organizations*.[119] The international organization is therein defined as "an

[116] Eg Ch. SAFFERLING, *Towards an International Criminal Procedure* OUP, 2001, p. 40; S. ZAPPALÀ, *Human Rights in International Criminal Proceedings*, OUP, 2003, pp. 5-7; L. GRADONI, "The Human Rights Dimension of International Criminal Procedure", in G. SLUITER *et al*. (eds), *International Criminal Procedure: Principles and Rules*, OUP, 2013, pp. 80-83; G. SLUITER, "International Criminal Proceedings and the Protection of Human Rights", *New Eng. L. Rev.*, 2003, p. 935.

[117] ICJ, *Interpretation of the Agreement*, Advisory Opinion, May 21st, 1980, Reports 1980, § 37 (emphasis added).

[118] *See* eg J. WOUTERS *et al*., "Accountability for Human Rights Violations by International Organisations: Introductory Remarks", *in* J. WOUTERS *et al*. (eds.), *Accountability for Human Rights Violations by International Organisations*, Antwerp, Intersentia, 2010, pp. 6-7.

[119] Draft Articles adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/66/10, § 87).

organization established by a treaty or other instrument *governed by international law* and possessing its own international legal personality" (Article 2).[120] Article 3 further provides that "[e]very internationally wrongful act of an international organization entails the international responsibility of that organization", which obviously implies that international organizations are capable of having obligations in the first place. In short, it is unchallenged that international organizations are bound by general international law. As an international organization with international legal personality, [121] the ICC is no exception to the rule. It is bound by international fairness requirements *qua* customary international law and general principles of law. This conclusion has also been supported by the ECtHR.[122]

138. In practice, it is agreed upon that **core fairness requirements** have, as other cornerstone civil and political rights recognized as early as in the Universal Declaration of Human Rights, have acquired **customary status**.[123] They have also acquired the status of **general principles of law**. In 1993, Bassiouni thus writes that fair trials has acquired the status of general principle of law (alongside only ten other fundamental freedoms).[124] In his founding study on general principles, Bin Cheng already wrote in 1953 that juridical equality of the parties was "one of the two cardinal characteristics of a judicial process".[125]

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[120] Emphasis added.

[121] ICC Statute, Article 4.

[122] ECtHR, *Djokaba Lambi Longa v. The Netherlands*, 33917/12, Judgment, October 9th, 2012, § 64 ("as an international organisation with legal personality, the [ICC] cannot disregard the customary rule of non-refoulement").

[123] *See* eg L. B. SOHN, "The New International Law: Protection of the Rights of Individuals Rather than States", *Am. U. L. Rev.*, 1982, pp. 15-16; Ch. TOMUSCHAT, *Human Rights: Between Idealism and Realism*, CUP, 2nd ed., 2008, p. 4.

[124] M. Ch. BASSIOUNI, « Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions », 3 *Duke J. Comp. & Int'l L.* (1993), pp. 235-297.

[125] B. CHENG, General principles law applied international courts and tribunals, Stevens & Sons, 1953, p. 290.

139. The second manner in which international human rights (and especially fairness) standards penetrate the ICC framework pertains to **general principles of the law of international organizations**. By adopting the Rome Statute, States have agreed to delegate (part of) their judicial authority – which is traditionally associated with sovereignty and statehood under international law – upon the ICC.[126] In turn, this supposes that the international obligations incumbent on delegating States inevitably extend to the ICC. This is the logical result of the conjunction of two well-established principles of the law of international organizations. On the one hand, under the maxim *nemo plus juris ad alium transferre potest quam ipse habet*, all States are precluded from transferring more powers or rights than they themselves have.[127] The necessary result of this principle is that States Parties to the Rome Statute cannot have vested the ICC with a right that they did not possess, namely that of departing from generally recognized fairness requirements. On the other hand, the principle of specialty (or doctrine of attributed powers)[128] implies that the ICC cannot escape the relevant human rights obligations on its own initiative; such conduct would exceed the limits of the delegation consented by States, and would thus be performed *ultra vires*.

140. Finally, and most importantly, the ICC's obligation to respect generally recognized rights can be firmly grounded on the Rome Statute itself. In particular, Article 21(3) of the Statute provides that "[t]he application and interpretation of law pursuant to this Article must be consistent with **internationally recognized human rights**".[129] This cross-reference to human rights law represents the

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[126] *See* eg Sh. WALLERSTEIN, "Delegation of Powers and Authority in International Criminal Law", *Crim. L. & Phi.*, 2013, 18 p.

[127] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment, October 10th, 2002, ICJ Reports 2002, §§ 194-209; Permanent Court of Arbitration, *Island of Palmas case (Netherlands v. USA)*, Award (Max Huber), April 4th, 1928, Reports of International Arbitral Awards, Vol. 2, p. 842.

[128] See ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, July 8th 1996, ICJ Reports 1996, § 25.

[129] Our emphasis.

cornerstone of fairness and other basic right before the Court. In one of its earliest decisions, the Appeals Chamber has acknowledged the significance of Article 21(3) by concluding, in regard to the provision, that "[h]uman rights underpin the Statute; every aspect of it".[130]

141. In its early practice, the Court has recognized the full potential of this provision, at least in three distinct ways. The Court has first seen in paragraph 3 a **general principle of interpretation** under which, among several possible readings of a statutory provision, the one reading that is in line with human rights law must be favored.[131] Going one step further, the Court has also concluded that Article 21(3) empowers it to **set aside any provision of its Statute** that would conflict with internationally recognized rights.[132] Even more importantly, ICC judges have gone as far as to **assume powers which are not conferred upon them by the Statute** but which, in their view, appear necessary to ensure adequate protection to relevant basic rights. This understanding of paragraph 3 has most clearly been resorted to by the Court in one of the key moments of the *Lubanga* case: while recognizing that neither the Statute nor the Rules of Procedure and Evidence empowered judges to stay the proceedings as a result of the Prosecutor's refusal to disclose exculpatory evidence, on the basis of Article 21(3) the Appeal Chambers nonetheless supported the Trial Chamber's decision to do so.[133]

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[130] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-772, Appeals Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19 (2) (a) of the Statute of October 3rd, 2006, December 14th, 2006, § 37.

[131] See, *e.g.*, ICC, *The prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07-474, Pre-trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, May 13th, 2008, § 78.

[132] See, *e.g.*, ICC, *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3003, Trial Chamber II, Decision on an *Amicus Curiae* application and on the « Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d'asile » (Articles 68 and 93(7) of the Statute), June 9th, 2011, § 73.

[133] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on June 10th,

142. Whether it takes the form of interpretation, of Chambers ignoring the Rome Statute or even assuming extra-statutory powers, Article 21(3) entails that the ICC is fully bound to respect "internationally recognized human rights standards".

143. This raises the question what this concept means. Although it appears twice in the Statute – in Article 21(3) but also in Article 69(7) –, it is not further defined by the instrument, nor by the Rules of Procedure and Evidence. Judge Pikis, however, proceeded to define the notion in a separate opinion in the *Lubanga* case: "[i]nternationally recognized may be regarded **those human rights acknowledged by customary international law and international treaties and conventions**".[134] According to SHEPPARD, internationally recognized human rights at least comprise those guarantees – including fair trial – that are provided for in UN universal instruments of protection.[135] GRADONI adds that the principal regional conventions should also be included.[136] In any case, this therefore includes fair trial standards.

2) Whether as a State, the Bolivarian Republic of Venezuela is entitled human rights protection

144. Therefore, considering the international obligations regarding equity, which also affect the ICC, the question arises: is the Bolivarian Republic of Venezuela, as a State, entitled to the protection of human rights? In this sense, the classical position that international human rights standards are only for private individuals – at the exclusion of States and other public entities – is long gone. It is accepted

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2008", October 21st, 2008, § 77.

[134] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-424, Appeals Chamber, Decision on the Prosecutor's "Application for Leave to Reply to « Conclusions de la défense en réponse au mémoire d'appel du Procureur »", September 12th, 2006, Separate opinion of Judge Georghios M. Pikis, § 3.

[135] D. SHEPPARD, "The International Criminal Court and 'Internationally Recognized Human Rights': Understanding Article 21(3) of the Rome Statute", *Int'l Crim. L. Rev.*, 2010, p. 63.

[136] L. GRADONI, "The Human Rights Dimension of International Criminal Procedure", in G. SLUITER *et al.* (dir.), *International Criminal Procedure: Principles and Rules*, OUP, 2013, p. 86.

today that, **to the extent such public entities are involved in judicial processes or other disputes, they should enjoy the same standards as private parties**. This modern view of the beneficiaries of human rights law has been particularly well recognized – both by expert literature and international as well as domestic case law – as far as **fairness requirements** are concerned.

145. According to R. ERGEC for instance: "It would be (…) shocking if the State, or one of its emanations, being a party to a dispute before a domestic court, would be deprived of the right to invoke, on its own behalf, the guarantees of the right to a fair trial (ECHR, art. 6)."[137]

146. Several domestic courts have adopted a similar position in the sense that international human rights – and especially fair trial rights – should extend to States.[138]

147. This is also the clear and well-reasoned position of the Court of Justice of the European Union:

> 53. According to the case-law, neither in the Charter of Fundamental Rights of the European Union nor in European Union primary law are there any provisions which state that legal persons which are emanations of States are not entitled to the protection of fundamental rights. On the contrary, the provisions of the Charter which are relevant to the pleas raised by the applicant, and in particular Articles 17, 41 and 47, guarantee the rights of '[e]veryone' or '[e]very person', a form of wording which includes legal persons such as the applicant (judgment of 6 September 2013

[137] R. ERGEC, *Convention européenne des droits de l'homme*, 2nd ed., Bruylant, 2014, p. 88 (our translation of "Il serait (...) choquant que l'État, ou l'un de ses démembrements, partie à une instance devant une juridiction nationale, soit privé du droit d'invoquer, à son profit, les garanties du droit à un procès équitable (Convention EDH, art. 6)."). See for a similar view S. VAN DROOGHENBROEK, "Les droits de l'homme de l'État : au-delà des évidences", *Journal des Tribunaux*, 2021, p. 115.

[138] *See* eg, in the Netherland, Hoge Raad Nederland, July 8th, 2005, ECLI:NL:HR:2005:AO9273, and in Belgium, Cour de cassation de Belgique, May 16th, 2002, C.99.0515.N; February 10th, 2017, F.15.0145.N; and again November 2nd, 2012, C.11.0018.N.

in *Bank Melli Iran* v *Council*, T-35/10 and T-7/11, ECR, EU:T:2013:397, paragraph 65).

53. None the less, the Council relies, in this context, on Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), the effect of which is that applications submitted by governmental organizations to the European Court of Human Rights are not admissible.

55. First, Article 34 of the ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union. Secondly, according to the case-law of the European Court of Human Rights, the aim of that provision is to ensure that a State which is a party to the ECHR is not both applicant and defendant before that court (see, to that effect, judgment of the European Court of Human Rights of 13 December 2007 in *Islamic Republic of Iran Shipping Lines v. Turkey*, no. 40998/98, § 81, ECHR 2007-V). That reasoning is not applicable to the present case (judgment in *Bank Melli Iran* v *Council*, cited in paragraph 53 above, EU:T:2013:397, paragraph 67).

56. The Council also argues that the justification for the rule on which it relies is that a State is the guarantor of respect for fundamental rights in its territory but cannot qualify for such rights.

57. However, even if that justification were applicable in relation to an internal situation, the fact that a State is the guarantor of respect for fundamental rights in its own territory is of no relevance as regards the extent of the rights to which legal persons which are emanations of that same State may be entitled in the territory of third countries (judgment in *Bank Melli Iran* v *Council*, cited in paragraph 53 above, EU:T:2013:397, paragraph 69).

58. In the light of the foregoing, it must be held that EU law contains no rule preventing legal persons which are emanations of non-Member States from taking advantage of fundamental rights protection and guarantees. Consequently, even if the applicant, as a public entity, is an emanation of the Iranian State, it may rely on those rights before the Courts of the European Union in so far as they are compatible with its status as a legal person (see, to that effect, *Bank Melli Iran* v *Council*, cited in paragraph 53 above, EU:T:2013:397, paragraph 70).[139]

[139] ECJ, *Bank of Industry and Mine c. Council of the EU*, T-10/13, Judgment of April 29th, 2015.

148. This approach has been repeated, both by the General Court and by the Court of Justice of the European Union, in several similar cases (*see*, among others, *Sina Bank v. Council*, Case T-67/12, judgment of the General Court of June 4th, 2014, §§ 56-62; *Bank of Industry and Mine v. Council*, Case T-10/13, judgment of the General Court of 29 April 2015, §§ 57-58; *Council v. Bank Saderat Iran*, Case C 200/13 P, judgment of the Court of Justice of 21 April 2016, § 50).

149. For what is more, this approach is not restricted to the catalogue of fair trial rights, it also concerns other internationally recognized human rights. The right to an effective jurisdictional remedy is but one example. In its recent, **20 January 2021 Opinion in the context of proceedings initiated by the Bolivarian Republic of Venezuela before the European Court of Justice**, the Advocate General concludes as follows:

> (…) respect for the rule of law and the principle of effective judicial protection also argues in favor [of] a ruling that the [Bolivarian Republic of Venezuela] is a legal person for the purposes of the fourth paragraph of Article 263 TFEU. As is apparent inter alia from Article 2 TEU, the rule of law is one of the founding values of the EU. Moreover, while Article 47 of the Charter cannot confer jurisdiction on the Court, that provision, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that *any person* whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that Article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law.[140]

3) Whether there is a "criminal charge"

150. In any event, where there may be a "criminal charge", under internationally recognized human rights standards, including Article 14 § 1 of the International

[140] ECJ, *Bolivarian Republic of Venezuela v Council of the EU*, C-872/19 P, Opinion AG Hogan, January 20th, 2021.

Covenant on Civil and Political Rights (hereinafter "ICCPR") and Article 6 § 1 of the European Convention on Human Rights (hereinafter "ECHR"), fairness standards apply “in the determination of any criminal charge”, provided that "the determination of any criminal charge" is operative.

151. This scope of application of fair trial rights in criminal matters is subject to an autonomous interpretation, the important criterion being that a charge supposes “the **official notification** given to an individual by the competent authority of an allegation that he has committed a criminal offence”, or in a slightly different approach, that the situation of the concerned person “has been substantially affected” (ECtHR, *Deweer v. Belgium*, §§ 42 and 46; *Eckle v. Germany*, § 73, and also *Ibrahim and Others v. the United Kingdom* [GC], § 249; *Simeonovi v. Bulgaria* [GC], § 110).

152. According to the European Court of Human Rights (hereinafter “ECtHR”), has for instance been “charged” in the meaning of the Convention, the person who has been questioned in respect of his or her suspected involvement in an offence (ECtHR, *Stirmanov v. Russia*, § 39).

153. Furthermore, the starting point for the assessment of the applicability of the criminal aspect of Article 6 of the Convention is based on the **threefold criteria** outlined in *Engel and Others v. the Netherlands* (§§ 82-83): 1. Classification in domestic law; 2. Nature of the offence; 3. Severity of the penalty that the person concerned risks incurring.

154. It is important to note that the second and third criteria laid down in *Engel and Others v. the Netherlands* are alternative and **not necessarily cumulative**; for Article 6 to be held to be applicable, it suffices that the offence in question should by its nature be regarded as “criminal” from the point of view of the Convention, or that the offence rendered the person liable to a sanction which, by its nature and degree

of severity, belongs in general to the "criminal" sphere (ECtHR, *Lutz v. Germany*, § 55; ECtHR, *Öztürk v. Germany*, § 54). The fact that an offence is not punishable by imprisonment is not in itself decisive, since the relative lack of seriousness of the penalty at stake cannot divest an offence of its inherently criminal character (ECtHR, *Nicoleta Gheorghe v. Romania*, § 26).

155. It is important to observe that fair trial rights have repeatedly been said to **apply also to preliminary proceedings**, before the actual criminal trial starts. This includes preliminary ruling procedures before constitutional courts. Such preliminary procedures are but the anticipation, or the anticipatory step to, a substantive procedure to determine a criminal charge (or, in civil matters, civil rights or obligations). Therefore, Article 6 of the Convention is already applicable to such procedures (ECtHR, *Ruis Mateos v. Spain*, June 23rd, 1993).

156. Finally, and in the same vein, it is now well established that fair trial standards are **applicable throughout the entirety of proceedings** for the determination of any "criminal charge", including any **pre-trial stage** (ECtHR, *Dvorski v. Croatia*, § 76). According to the ECtHR, this is because the pre-trial stage (inquiry, investigation) has a direct influence on the conduct and fairness of the subsequent proceedings, including the actual trial (see eg ECtHR, *Vera Fernández-Huidobro v. Spain*, §§ 108-114). In the ECtHR's words, "[c]ertainly the primary purpose of Article 6 (art. 6) as far as criminal matters are concerned is to ensure a fair trial by a 'tribunal' competent to determine 'any criminal charge', but it does not follow that the Article (art. 6) has no application to pre-trial proceedings" (ECtHR, *Imbrioscia v. Switzerland*, § 36).

157. It clearly appears that, at this advanced stage of the preliminary examination, the Bolivarian Republic of Venezuela is subjected to the equivalent of a criminal charge.

158. It should be recalled that on February 8th, 2018, the OTP (re)opened a preliminary examination of the situation in Venezuela since at least April 2017. On September 27th, 2018, the Office received a referral from a group of States Parties to the Statute, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru. On October 2nd, 2020, after a meeting with the diplomatic representative of Venezuela in The Hague, the Office of the Prosecutor formally notified entry into phase 3 of the preliminary examination and requested detailed information on ongoing domestic investigations and proceedings. In her letter, the Prosecutor writes:

> (…) following a thorough assessment and analysis of the information available, my Office has concluded that there is a reasonable basis to believe that **crimes within the jurisdiction of the Court have been committed in Venezuela**.
>
> Given the **scope and range of the different alleged crimes** within the context of the situation, my Office has focused, for the purpose of the preliminary examination, on a particular sub-set of allegations related to the treatment of persons in detention. Specifically, and without prejudice to other crimes that my Office might determine at a later stage in the preliminary examination, my Office has concluded that the information available at this stage 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 ("Statute").
>
> (…)
>
> The information available to my Office 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 the Bolivarian National Armed Forces (*Fuerza Armada Nacional Bolivariana* or "FANB"). Further, the information available indicates that **pro-government individuals** also participated in the repression of actual opponents of the Government of Venezuela or people perceived as such, principally by **acting together with members of the security forces** or with their acquiescence.

159. On **December 14th, 2020**, through her 2020 Report on Preliminary Examination Activities, the Prosecutor added and reiterated:

> (…) the Office concluded that there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed in Venezuela since at least April 2017. (…)
>
> Specifically, and without prejudice to other crimes that the Office might determine at a later stage, the Office has concluded that the information available at this stage 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.
>
> The information available to the Office 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 the Bolivarian National Armed Forces (*Fuerza Armada Nacional Bolivariana or "FANB"*).
>
> Further, the information available indicates that pro-government individuals also participated in the repression of actual opponents of the Government of Venezuela or people perceived as such, principally by acting together with members of the security forces or with their acquiescence. With regard to the alleged role of the aforementioned actors, the Office's potential case(s) would not be limited to these persons or groups of persons and would seek to examine the alleged responsibility of those who appear most responsible for such crimes.

160. Such strong statements clearly amount to an **official and serious notification qualifying as a "criminal charge"** in the meaning of the relevant international standards.

4) Whether "civil rights and obligations" are involved

161. Moreover, these international minimum standards of fairness operate even when civil rights and obligations are involved. Under internationally recognized human rights law, including Article 14 § 1 of the ICCPR and 6 § 1 of the ECHR, fairness standards also apply "in the determination of civil rights and obligations".

162. It is important to note that **the two aspects, civil and criminal, of fair trial rights are not necessarily mutually exclusive**, so if they are applicable under their civil head, they may also be applicable under their criminal head in relation to the same

matter (ECtHR, *Ramos Nunes de Carvalho e Sá v. Portugal* [GC], § 121).

163. The scope of application of fair trial rights in civil matters is also subject to an autonomous interpretation. Article 6 § 1 of the Convention applies **irrespective of the parties' status, the nature of the legislation governing the "dispute"** (civil, commercial, administrative law etc.), **and the nature of the authority with jurisdiction in the matter** (ordinary court, administrative authority etc.) (*Georgiadis v. Greece*, § 34; *Bochan v. Ukraine (no. 2)* [GC], § 43; *Naït-Liman v. Switzerland* [GC], § 106).

164. The applicability of Article 6 § 1 in civil matters firstly depends on the **existence of a "dispute"** (in French, "*contestation*"). According to the ECtHR, this means that the right to a fair trial does not apply to a non-contentious and unilateral procedure which does not involve opposing parties (ECtHR, *Alaverdyan v. Armenia* (dec.), § 35). Article 6 of the Convention likewise does not apply to reports on an investigation aimed at ascertaining and recording facts which might subsequently be used as a basis for action by other competent authorities – prosecuting, regulatory, disciplinary or even legislative (even if the reports may have damaged the reputation of the persons concerned) (*Fayed v. the United Kingdom*, § 61). However, Article 6 of the Convention applies as soon as a formal, procedural dispute arises. **This would, for instance, be the case, should the Bolivarian Republic of Venezuela decide to trigger admissibility challenges** under Article 18 or Article 19 of the ICC Statute.

165. Secondly, the dispute must relate to **a "right"** which can be said to exist, at least on arguable grounds. Whether or not a right, or an obligation, is to be regarded as civil in the light of the Convention must be determined by reference to its substantive content and effects. The right to a fair trial, in its civil limb, has for instance been said to cover the **right to a good reputation** (ECtHR, *Helmers v.*

Sweden); the right of **access to administrative documents** (ECtHR, *Loiseau v. France* (dec.)) or to **evidence in the file on an investigation** (ECtHR, *Savitskyy v. Ukraine*, §§ 143-145).

166. There is no doubt that, should admissibility proceedings be held before the ICC, with a view to determining whether the Bolivarian Republic of Venezuela is "willing and able" to deal with criminality on its own territory, the outcome of this procedure would greatly affect the reputation of the Republic and would, as such, involve civil rights and obligations.

5) Core implications of the general, international fairness requirement

167. On the basis of the foregoing, fairness presupposes respect for several, important and specific guarantees. This includes: the right to effective participation in the proceedings, the right to equality of arms and to an adversarial process, including disclosure of evidence, and the right to specific information on the nature of the accusation. To date, nothing has been communicated by the ICC Prosecutor's Office to the State, which is extremely grave for the reasons given above, which entails the burden of information obligations that are not being compensated for with the necessary attention given the actions that the State is developing through the relevant criminal proceedings and which provide a sufficient internal response without the need to internationalize the process.

168. According to the ECtHR, Article 6, read as a whole, guarantees the **right to participate effectively in the criminal process** (*Murtazaliyeva v. Russia* [GC], § 91). Such right is implicit in the very notion of an adversarial procedure and can also be derived from the guarantees contained in sub-paragraphs (c), (d) and (e) of paragraph 3 of Article 6 of the ECHR (*Stanford v. the United Kingdom*, § 26). This

may also be connected to the right to an effective remedy in general.

169. **Equality of arms** is an inherent feature of a fair trial. It requires that each party be given a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent (*Öcalan v. Turkey* [GC], § 140; *Foucher v. France*, § 34; *Bulut v. Austria*; *Faig Mammadov v. Azerbaijan*, § 19). Equality of arms requires that a fair balance be struck between the parties. It applies not only to criminal cases, but also to civil matters. The right to an adversarial hearing means in principle the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed with a view to influencing the court's decision (*Brandstetter v. Austria*, § 67).

170. The principle of procedural equality is **an integral element of the rule of law**. As it was put in the UN Secretary-General's Report, *The Rule of Law at the National and International Levels*:

> The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, *equality before the law*, accountability to the law, fairness in the application of the law, separation of powers, participation in decision making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[141]

171. Moreover, according to the Human Rights Committee, "[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights

[141] UN Secretary-General, 'Delivering justice: programme of action to strengthen the rule of law at the national and international levels' UN Doc A/66/749, March 16th, 2012.

protection *and serves as a procedural means to safeguard the rule of law"*.[142]

172. The right to specific **information** presupposes the Prosecution's obligation to provide access to the material that forms the basis of the accusation. In *Jespers v. Belgium*, the European Commission stated that the meaning of "facilities" within Article 6(3) (b) of the Convention "include the opportunity to acquaint himself, for the purposes of preparing his defense, with the results of investigations carried out throughout the proceedings". The person thus has the right "to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction of his sentence, all relevant elements that have been or could be collected by the competent authorities." (§ 56). According to FEDOROVA, **the right to information "present[s] a particular challenge with regard to international criminal practice, in fact, one of the biggest challenges in light of the equality of arms principle**."[143]

D. General standard in international dispute settlement practice

173. In addition to the above, it is also necessary to take into account the standards established by international law for the resolution of international disputes, which also recognize the rights of States that are not being taken into account in the framework of the Preliminary Examination of Venezuela I.

1) Whether there is an "international dispute"

174. First, we have to distinguish when we are dealing with an "international dispute".

175. According to Stahn: "**Admissibility challenges have a particular status in ICC**

[142] UN Human Rights Committee, 'General Comment No 32 Article 14: Right to equality before courts and tribunals and to a fair trial' UN Doc CCPR/C/GC/32, August 23rd, 2007.
[143] M. FEDOROVA, The Principle of Equality of Arms in International Criminal Proceedings, Intersentia, p. 58.

procedure. They are proceedings '*sui generis*'. They are formally part of the criminal process (…), but involve aspects of inter-state litigation".[144]

176. With this sentence, the author captures perfectly the nature of the current situation. The Bolivarian Republic of Venezuela and the Court are, at this moment, in a constructive and cooperative process towards accountability for any crimes committed in Venezuela. The question remains whether such accountability process should be national or international in nature. The position of Venezuela is that important efforts and reforms are being undertaken at the domestic level, with a view to favoring domestic accountability. Although it is true that justice at the domestic level seems impossible with respect to the specific matter of foreign interferences leading to crimes against humanity, the domestic courts of Venezuela are, on the other hand, well equipped and actually in the process of prosecuting a vast series of crimes committed by Venezuelan nationals, including public officials, in the context of the ongoing crisis.

177. Should the Office of the Prosecutor determine that there is reasonable basis to proceed with the opening of an international investigation of those crimes, the Bolivarian Republic of Venezuela would respectfully disagree and dispute such conclusion. This would qualify as a "dispute" under general international law.

178. The definition of a "dispute" has been provided in several cases by the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ). In the *Mavrommatis Palestine Concessions* case, the Permanent Court gave the following broad definition: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[145] In another

[144] C. STAHN, "Admissibility challenges before the ICC: From Quasi-Primacy to Qualified Deference", in C. STAHN (ed.), *The Law and Practice of the International Criminal Court*, OUP, 2015, p. 231.
[145] Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of August 30th, 1924, 1924 PCIJ (Ser. A) No. 2, at 11.

case, the ICJ referred to "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."[146]

179. ICSID tribunals have adopted similar descriptions of "disputes", often relying on the PCIJ's and ICJ's definitions.[147] The broad PCIJ/ICJ approach has been reiterated several times.

180. In the *East Timor* case, the ICJ noted that "Portugal has rightly or wrongly, formulated complaints of fact and law against Australia, which the latter has denied. By virtue of this denial, there is a legal dispute".

181. The acceptance of a relatively low threshold was again underlined in the *Application of the Genocide Convention* case, where the ICJ stated that "by reason of the rejection by Yugoslavia of the complaints formulated against it by Bosnia-Herzegovina, 'there is a legal dispute' between them". Such denial of the allegations made against Yugoslavia has occurred "whether at the stage of proceedings relating to the requests for the indication of provisional measures, or at the stage of the present proceedings relating to those objections".

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[146] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of March 30th, 1950 (first phase), 1950 ICJ Rep. 65, at 74.

[147] *Maffezini v. Spain*, Decision on Jurisdiction of January 25th, 2000, 40 *ILM* 1129, at §§ 93, 94 (2001); *Tokios Tokelės v. Ukraine*, Decision on Jurisdiction of April 29th ,2004, at §§ 106, 107; Lucchetti *v*. Peru, Award of February 7th,2005, at § 48; *Impregilo v. Pakistan*, Decision on Jurisdiction of April 22nd, 2005, at §§ 302, 303; *AES v. Argentina,* Decision on Jurisdiction of April 26st, 2005, at § 43; *El Paso Energy Intl. Co. v. Argentina*, Decision on Jurisdiction of April 27th ,2006, at § 61; Suez, *Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentina*, Decision on Jurisdiction of May 16th ,2006, at § 29; *M.C.I. v. Ecuador*, Award of July 31st, 2007, at § 63.

2) Relevant rules of practices in international dispute settlement

182. This, in turn, raises the question what standards apply to such a (latent) dispute. This relates to general principles of the law of international dispute settlement. The increasing number of international judicial institutions, producing an ever-growing stream of decisions, has indeed been one of the dominant features of the international legal order of the past two decades, leading to the emergence of a global law of dispute settlement.

183. One recurring theme in this area of international law is fairness. FORLATI identifies fairness as of the "general principles of procedure in international law". The author writes that such principles are a "set of uniform principles – regulating the management of proceedings from their institution to their conclusion but also the structure and organization of the institution which decides a case, its relationship to the parties, the remedies it grants, and the role it can have in the post adjudication phase, notably as regards review and implementation". Regarding fairness, she writes: "the constitutive instruments of international courts and tribunals – in the case of the ICJ the Statute (ICJ Statute), the Rules of Court (ICJ Rules) and the other texts regulating procedure – are deemed to reflect **procedural fairness**".[148]

184. The ICJ has always played a prominent role in the crystallization of such a general procedural principle of fairness. For instance, in the *Military and Paramilitary Activities in and against Nicaragua* case (*Nicaragua v. United States of America*), the Court held: "The **provisions of the Statute and the Rules of Court concerning the presentation of pleadings and evidence are designed to secure a**

[148] S. FORLATI, "The Role of the International Court of Justice in the Identification of General Principles of Procedure", Gaetano Morelli Lectures Series (Vol. 3 – 2020), p. 3.

proper administration of justice and a fair and equitable opportunity for each party to comment on its opponent's contention" (judgment of June 27th, 1986, § 31).

185. More generally, it is apparent from ICJ practice that the world Court deems that the principles of **equality between the parties** and of the **equality of arms** are part of the general principles of international procedure, where they are corollaries of the principle of sovereign equality among subjects of international law. The ICJ sees equality of arms as "one of the fundamental principles underlying its jurisdiction".[149] The procedural components of party equality and of the equality of arms include the possibility to respond to claims, the treatment of evidence, and financial aid.[150]

186. The Court has thus repeatedly affirmed that "the equality of the parties to the dispute must remain the basic principle for the Court."[151] In the case of its contentious jurisdiction, it is "derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1 of the Charter of the United Nations. More specifically, **equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3 of the Charter, in the process of settling an international dispute** by peaceful means."[152]

187. Furthermore, the IFAD advisory opinion confirms that the principles of procedure that the ICJ applies at inter-State level (and, more specifically, the

[149] *See* Continental Shelf beyond 200 Nautical Miles, cit., para. 53 and, supra, Section VI.1. Cf. Institut de droit international, Resolution on Equality of the Parties before International Investment Tribunals, The Hague Session, August 31st, 2019, Preamble.
[150] Maritime Delimitation and Territorial Questions between Qatar and Bahrain, § 15 et seq.
[151] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) (Judgment-Merits) [1986] ICJ Rep 14, [31].
[152] Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures) [2014] ICJ Rep 147, [27].

principle of party equality) play a role **also as regards situations where non-State actors are involved**. [153] In that Advisory Opinion the ICJ expressly relied on the Human Rights Committee's General Comment No. 32 in order to assess whether fair trial standards, and more specifically the principle of the equality of arms, had been respected in the very peculiar framework it was dealing with – that of advisory proceedings concerning the review of a judgment of the ILO Administrative Tribunal on a complaint brought by an employee. The ICJ stressed that "the principle of equality of parties follows from the requirements of good administration of justice" and "must now be understood as including access on an equal basis to available appellate or similar remedies unless an exception can be justified ed on objective and reasonable grounds".[154]

188. Thus, in this opinion the ICJ has indicated that the principle of party equality applies not only in inter-State proceedings, as a corollary of the principle of sovereign equality, but also in situations where individuals or other non-State actors are involved.

189. Fairness requirements are not only central in classical, judicial frameworks, but also in international arbitration. As BANTEKAS writes:

> Two principles are universally accepted as being applicable in arbitral proceedings, namely: due process and fair hearing, and the independence and impartiality of the tribunal. Due process is a broad principle encompassing many different aspects of the proceedings. Its most salient manifestation is party equality, guaranteed by Article 6 ECHR, according to which even if the agreement between the parties indicates otherwise, the tribunal must treat all litigants in the same manner without

[153] For international criminal law see S. NEGRI, Equality of Arms: Guiding Lights or Empty Shell?, in M. BOHLANDER (ed.), *International Criminal Justice: A Critical Appraisal of Institutions and Procedures*, London: Cameron May, 2007, p. 13 et seq., p. 43.

[154] International Court of Justice, Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development, advisory opinion of February 1st, 2012, § 44. See also International Court of Justice, Judgments of the Administrative Tribunal of the International Labour Organisation upon Complaints Made against the United Nations Educational, Scientific and Cultural Organization, advisory opinion of October 23rd, 1956, p. 86.

> any distinction or discrimination. Essentially, what is allowed for one party should equally be allowed to the other.[155]

190. Also of interest is, in the author's analysis, the very foundation for the applicability of fairness requirements to arbitral bodies:

> Major commercial arbitration instruments give a prominent place to fair trial rights, as is the case with Article 18 of the UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. (…) Given that arbitration constitutes a permissible exception to the authority of the civil and commercial courts, which are naturally subject to fair trial guarantees, it is imperative that arbitral tribunals are equally bound to adhere to such guarantees.[156]

191. Party equality is also at the center of investment disputes: "it is contrary to the principle of the equality of arms that one party has access to and can rely on documents to which the other party has no access."[157]

192. Party equality is thus one key principle of general international dispute settlement. As FORLATI writes, this principle is strongly "embedded in traditional inter-State adjudication, as a reflection of the principle of sovereign equality"[158]. Also, "international courts perceive the paramount importance of procedural fairness", "as part of the more general effort to promote the rule of law in the international society".[159]

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[155] S. BANTEKAS, "Equal Treatment of Parties in International Commercial Arbitration", *International and Comparative Law Quarterly*, Vol. 69, 2020, p. 1000.
[156] S. BANTEKAS, "Equal Treatment of Parties in International Commercial Arbitration", *International and Comparative Law Quarterly*, Vol. 69, 2020, p. 992.
[157] *Standard Chartered Bank (Hong Kong) Ltd v Tanzania Electric Supply Company Ltd* (Procedural Order No 6) ICSID ARB/10/20 (2012, McRae P, Douglas & Stern), [13].
[158] S. FORLATI, "Fair Trial in International Non-Criminal Tribunals", in A. SARVARIAN, F. FONTANELLI, R. BAKER, V. TZEVELEKOS (eds), *Procedural Fairness in International Courts and Tribunals*, British Institute of International and Comparative Law (BIICL), 2015, p. 108.
[159] S. FORLATI, "Fair Trial in International Non-Criminal Tribunals", in A. SARVARIAN, F. FONTANELLI, R. BAKER, V. TZEVELEKOS (eds), *Procedural Fairness in International Courts and Tribunals*, British Institute of International and Comparative Law (BIICL), 2015, p. 117.

193. Several scholars insist that the maintenance of such global principles of international dispute settlement are **particularly crucial in the area of international *criminal* law**, given the specific mission of international criminal tribunals: "the consideration that the exercise of criminal jurisdiction over international crimes is primarily a prerogative and responsibility of State authorities […] requires that the complementary exercise of such jurisdiction by international or hybrid courts must conform with the same fair trial conditions that are required and expected from States".[160]

194. Scholarship also insists that **fairness is particularly essential in relation to the administration of evidence**. The applicable framework at the ICJ may be taken as an example. As Judge Sir HERSCH LAUTERPACHT has written, "A substantial part of the task of judicial tribunals consists in the examination and the weighing of the relevant facts for the purpose of determining liability and assessing damages." He concluded that "the [ICJ] is in the position to perform that task with exacting care."[161] Nothing a court does affects the public perception of its fairness so clearly.

195. To understand the importance of this task, it is also useful to recall the differences between international courts – such as the ICC and ICJ – and more familiar domestic tribunals. The ICC and ICJ are unusual in that they also hear parties which are **States** and, in FRANCK's words, "these **must be given considerably more deference in matters such as evidence** or time limits than persons appearing in national courts".[162]

196. For all of the above reasons, the Pre-Trial Chamber, in its judicial control

[160] L. CARTER, F. POCAR (eds), International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems, Cheltenham: Elgar, p. 8.
[161] Sir HERSCH LAUTERPACHT, The Development of International Law by the International Court, 48 (1958).
[162] T. FRANK, Fairness in International Law and Institutions, 1998, *OUP*, p. 338.

functions, is required to determine whether the general principles of law and the rules of customary law inherent to all judicial proceedings, in which States or individuals are involved, such as the right of access to evidence, the right of defense, the right to contradict, or the equality of the parties, operate within the framework of the Preliminary Examination, in accordance with Article 21.3 of the Rome Statute.

IV. REQUEST FOR JUDICIAL REVIEW III

Can the ICC Office of the Prosecutor base its considerations on a Preliminary Examination of illegally obtained documentation and accept sources of information and allegations that are shown to be partial, in bad faith or without any evidentiary rigour?

197. In addition to the above, the Pre-Trial Chamber will also be required to exercise judicial control, in relation to the Preliminary Examination, of the admission of contaminated material and illicit evidence. The Bolivarian Republic of Venezuela has submitted detailed reports to the Office of the Prosecutor of the ICC which prove that part of the material transferred was stolen in Venezuelan territory, while another part of the information received responds to reports of bad faith, which respond to political and absolutely biased criteria.

198. The information set out below was transmitted to the Office of the Prosecutor of the ICC through four reports, thus it is aware of the illegality of some evidence, and the bad faith and partiality of other evidence. However, the Bolivarian Republic of Venezuela has not received a response from the Office of the Prosecutor after transmitting to them the information that is now shared with the Pre-Trial Chamber in its entirety.

A. Source Analysis

199. Although, as stated above, Venezuela is deprived of the right of access to incriminating information, mainly the complaints filed, and therefore in violation of its right to defense, this report will analyze the sources that the Office of the Prosecutor of the ICC is allegedly following.

200. An analysis has been made of the sources that could be identified, as they were alluded to by the Office of the Prosecutor of the ICC in its reports on preliminary activities in 2018[163], 2019[164] and 2020[165] regarding Venezuela. However, an analysis has only been made of the sources that mentioned cases as early as April 2017 in Venezuela.

201. These sources are:

a. Two of the Opinions adopted by the Working Group on Arbitrary Detention:

- Opinion No. 84/2017 concerning [EXPURGATED].[166]
- Opinion No. 41/2018 concerning [EXPURGATED].[167]

b. The 2017 report "Democratic Institutionality, Rule of Law and Human Rights in Venezuela" by the Inter-American Commission on Human Rights.[168]

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[163] ICC, "Report on Preliminary Activities 2018", *Office of the Prosecutor*, December 5th, 2018.
[164] ICC, "Report on Preliminary Activities 2019", *Office of the Prosecutor*, December 5th, 2019.
[165] ICC, "Report on Preliminary Activities 2020", *Office of the Prosecutor*, December 14th, 2020.
[166] UN, Opinion No. 84/2017 [EXPURGATED], UN Doc A/HRC/WGAD/2017/84, *HRC – WGAD*, January 23rd, 2018.
[167] UN, Opinion No. 41/2018 [EXPURGATED], UN Doc A/HRC/WGAD/2018/41, *HRC – WGAD*, October 12th, 2018.
[168] IACHR, "Democratic Institutionality, Rule of Law and Human Rights in Venezuela", December 31st, 2017) ; cited in the referral made to the ICC Office of the Prosecutor by the Governments of the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru regarding the situation in Venezuela (September 25th, 2018) available at

c. The 2018 report of the Secretary-General of OAS and the panel of independent international experts on the possible commission of crimes against humanity in Venezuela.[169]

d. The 2018 OHCHR report: "Human Rights Violations in the Bolivarian Republic of Venezuela: a downward spiral with no end in sight".[170]

e. The report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela of September 2020.[171]

f. The 2020 report "Fostering impunity: the impact of the failure of the Prosecutor of the International Criminal Court to open an investigation into the possible commission of crimes against humanity in Venezuela" by the OAS.[172]

202. After having identified the above-mentioned sources, we have proceeded to a detailed analysis of the cases alleged to have occurred as of April 2017 according to these sources. For each report we have used the same methodology which consists of filling in a table with the following columns/information identified and/or criticized with regard to the cases: "Date of occurrence"; "Location of occurrence"; "Sponsor (institution)"; "Name of operation"; "Name of victim"; "Name of perpetrator"; "Sources"; "Pages and paragraphs"; "Infringement"; "Occurrence

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<https://www.icc-cpi.int/itemsDocuments/180925 otp-referral-venezuela_SPA.pdf > p 2 § 2.2, which in turn was cited in the ICC, "Report on Preliminary Activities 2018", *Office of the Prosecutor*, December 5th, 2018.

[169] OAS General Secretariat and panel of independent international experts, "Report on the possible commission of crimes against humanity in Venezuela", May 29th, 2018; Cited in the 2018 referral, p 2 § 2.3 ; Also cited by the ICC Office of the Prosecutor in the 2018 report p 2 § 101.

[170] UN, "Human Rights Violations in the Bolivarian Republic of Venezuela: a downward spiral that seems to have no end", *OHCHR*, June 22nd, 2018; cited in the 2018 referral, p 5 § 2.4.

[171] UN HRC, "Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela", September 15th, 2020) A/HRC/45/33 Cited by the ICC, "Report on Preliminary Activities 2020", *Office of the Prosecutor*, December 14th, 2020.

[172] OAS, "Fostering impunity: the impact of the ICC Prosecutor's failure to open an investigation into the possible commission of crimes against humanity in Venezuela", December 2nd, 2020. Cited by the ICC Office of the Prosecutor in the 2020 report p 5 § 211.

BRV I"; "Occurrence BRV II" and; "Comments".

a. In "sponsor (institution)" we have identified the alleged Venezuelan state body involved in the case.

b. Under "pages and paragraphs" we have specified where in the report the references to the case in question were to be found.

c. Under "Infringement" we have specified the type of infringement the case concerned according to the report under consideration.

d. In "BRV I Occurrence" and " II Occurrence", where appropriate, we have reflected where in the "Report on Compliance with the ICC OTP Questionnaire"[173] and/or the "Expansion of Information: Response to the ICC Questionnaire" Report[174] that Venezuela submitted to the ICC OTP, we also discussed the case in question, the procedural stage and identified whether the information was different, more precise, etc.[175]

e. In "Comments" we have emphasised the differences identified in the previous point and/or reflected any data that seemed relevant.

203. With respect to the sources identified and cited in the previous point, the tables analyzing these sources are, respectively, as follows:

Attached as ANNEX NO. 8: [EXPURGATED]

Attached as ANNEX NO. 9: [EXPURGATED]

Attached as ANNEX NO. 10: [EXPURGATED]

[173] Bolivarian Republic of Venezuela, "Report on Compliance with the Questionnaire of the Office of the Prosecutor of the ICC - Venezuela I", November 30th, 2020.
[174] Bolivarian Republic of Venezuela, "Expanded Information: Response to the ICC Questionnaire", January 2021.
[175] For more information on the databases from which Venezuela has drawn this information, see section II - 2.

Attached as ANNEX NO. 11: [EXPURGATED]

Attached as ANNEX NO. 12: [EXPURGATED]

1) Objective

204. In relation to the analysis of these sources, it is necessary to begin with the following. The source study has always taken into account the objective of identifying concrete cases in order to check whether the country has complied with the complementarity requirement, comparing with the database sent to the ICC Office of the Prosecutor by the Bolivarian Republic of Venezuela.

2) Comparison with the database sent to the Office of the Prosecutor of the International Criminal Court by the Bolivarian Republic of Venezuela

205. In both the Report on Compliance with the Questionnaire of the Office of the Prosecutor of the ICC[176] and the Report "Expansion of Information: Response to the ICC Questionnaire"[177] that Venezuela submitted to the Office of the Prosecutor of the ICC, with respect to crimes that had taken place in the framework of the demonstrations since April 2017, the data found in the following databases were shared:

a. The Intranet of the State Office of the Prosecutor, called "*Sistema de Seguimiento de Casos*" (SSC).

[176] Bolivarian Republic of Venezuela, "Report on Compliance with the Questionnaire of the Office of the Prosecutor of the ICC - Venezuela I", November 30th, 2020.
[177] Bolivarian Republic of Venezuela, "Expanded Information: Response to the ICC Questionnaire", January 2021.

- The information collected in that database with respect to cases that have been brought before the ordinary jurisdiction, which was forwarded to the ICC, can be found in Annex 1 of the Report on Compliance with the ICC Questionnaire.

- In the report "Extending Information: Answer to ICC Questionnaire", [EXPURGATED].

b. Supreme Court of Justice database.

- The list of cases provided by the Supreme Court of Justice of Venezuela [EXPURGATED] of the Report on Compliance with the ICC Questionnaire.

c. Military Justice/Military Courts Database

- The information collected with regard to civilians who have been subject to military jurisdiction [EXPURGATED] of the Report on Compliance with the ICC Questionnaire.

3) Lack of information

206. The analysis of the cases extracted from the sources consulted by the Office of the Prosecutor of the ICC shows, among other shortcomings, that these sources mention 313 cases, but that only 79 of these cases are to be found in the databases referred to in the *Report on Compliance with the ICC Questionnaire* and its *Extension*. Similarly, there are 83 cases where the place of the events is unknown, 89 cases where the date of the events is unknown, 90 cases where the victims are unknown and 237 cases where the perpetrator is unknown.

207. Consequently, the country finds itself in a very complex situation, and in a very

serious situation of defenselessness, since there is not enough clear, detailed and verified information to understand what the Office of the Prosecutor of the ICC is basing this Preliminary Examination on. This means that the Bolivarian Republic of Venezuela, despite this extremely important deficiency, is complying with the requirement of complementarity, and is doing so in the worst possible circumstances, since without knowing the specific cases handled by the Office of the Prosecutor, it is not possible to verify whether they are the subject of domestic criminal proceedings.

B. *Information misappropriated by the former Attorney General of the Republic*

1) Information communicated on social media

208. Through a letter[178] published on the Twitter account of [EXPURGATED]and dated December 15th, 2017, it is noted that the Office of the Prosecutor of the ICC received 'documents' from the former Attorney-General of the Bolivarian Republic of Venezuela.[179] Regardless of the question of the irregularity of the dissemination of this apparently misappropriated information, what is relevant is that the Bolivarian Republic of Venezuela can conclude that the Office of the Prosecutor of the ICC has information from this source.

209. The former Venezuelan Prosecutor, dismissed in August 2017, [EXPURGATED], appears to have sent a complaint against Venezuela, prior to the referral to the Office of the Prosecutor by six States - the Republic of Argentina, Canada, the Republic of Chile, the Republic of Colombia, the Republic of Paraguay

[178] Referral to the Office of the Prosecutor by Six States, September 25th, 2018, p 2 § 2.1.

[179] [EXPURGATED], "Desde que presenté las pruebas en 2017, hemos tenido la certeza jurídica y científica de que el caso venezolano avanzaría procesalmente. Este es un importante paso para vencer el oprobio, el horror y el totalitarismo que representan Maduro y su grupo criminal. Habrá justicia!", *Twitter*, December 14th, 2020, at 8

and the Republic of Peru - on September 25th, 2018.[180] Furthermore, it should be noted that, in the States' referral, the information contained in the Letter from the former Prosecutor is mentioned, without the Venezuelan government having had access to it. In fact, the referral expressly states:

> 2.1 On February 8, 2018, Office of the Prosecutor of the ICC ordered that a "preliminary examination" be opened to analyze whether, since at least April 2017, crimes within the jurisdiction of the Court have been committed in Venezuela in the context of demonstrations and of the related political instability. To this end, the Office of the Prosecutor considered the information that was provided to it a few months prior by the deposed Attorney General of Venezuela, [EXPURGATED].[181]

210. Furthermore, in a video uploaded to Twitter[182] by [EXPURGATED]on January 11th, 2021, she herself states that:

> Nuestra labor ante @IntlCrimCourt inició en 2017 y continuará hasta que se haga justicia por los crímenes de lesa humanidad perpetrados por el madurismo contra los venezolanos. Acá les muestro una cronología de ese trabajo que ya arroja sus primeros resultados.

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[180] Referral cited by the OTP in 2018 report, p 2 § 101.

[181] Referral to the Office of the Prosecutor by Six States, September 25th, 2018, p 2 § 2.1.

[182] [EXPURGATED], "Our work before the @IntlCrimCourt began in 2017 and will continue until justice is done for the crimes against humanity perpetrated by Madurismo against Venezuelans. Here I show you a chronology of this work that is already yielding its first results" [free translation], *Twitter*, January 11th, 2021 at 2:33pm.

211. In this video, [EXPURGATED] gives a **chronology of the complaints** filed before the ICC. She herself explained (literally) the following**:**

> I filed a formal complaint with the ICC about crimes against humanity perpetrated by the tyrannical regime of Nicolás Maduro, which was supported by more than 1,690 pieces of evidence.
>
> Referral of complaint: Referral of a copy of the complaint filed with the ICC to the OAS.
>
> **Lima Group**: The evidence accompanying the complaint lodged with the Criminal Court was made available to the Foreign Ministers of the Lima Group so that they could request the opening of a formal investigation into crimes against humanity in Venezuela.
>
> [EXPURGATED]: Expansion of the complaint before the ICC for the massacre that took place on January 15, 2018 in the parish of El Junquito in Caracas, where seven citizens were killed, among them [EXPURGATED], at the hands of state security agencies. A year later, photographs and new evidence of the [EXPURGATED] case were sent to the ICC.
>
> New testimonies: Referral of several testimonies to the ICC in support of the complaint filed with the ICC for crimes against humanity.
>
> Request from 6 presidents: Copy of the complaint sent to the presidents of Argentina, Chile, Paraguay, Peru and Canada, who then called for the initiation of a formal investigation against Nicolas Maduro, crediting the evidence and legal arguments gathered in the Venezuelan Public Office of the Prosecutor.
>
> [EXPURGATED]: Lodging of a complaint to the ICC on the human rights violations perpetrated against [EXPURGATED], MP
>
> [EXPURGATED]: Addition of charges to the ICC for the murder of councilor [EXPURGATED], which occurred on October 8th, 2018 at the SEBIN facilities. Also included was the testimony of former judge [EXPURGATED] on the non-existence of the rule of law, as well as that of the Chacao police officers, who recounted the violations inflicted in their illegal detentions.
>
> Michelle Bachelet Report: The High Commissioner's report was submitted as evidence to the ICC.
>
> Michelle Bachelet to be added to the file of the complaint filed in November 2017 (free translation from Spanish).

212. This first video refers to several stages in the aforementioned denunciation of the alleged crimes against humanity committed in Venezuela. However, it should be noted that, of these proceedings, there are several of which the Venezuelan Public Office of the Prosecutor has no knowledge.

213. By virtue of the right to defense, the Bolivarian Republic of Venezuela urges the Office of the Prosecutor of the ICC to transmit this information within a reasonable period of time so that it can exercise its right to defense, thereby complying with due complementarity. **This express request was not replied to.**

214. However, it would be unacceptable if the reply from the Office of the Prosecutor were to reserve this knowledge for an eventual change of phase (investigation) when maximum cooperation is being offered at this time. The prejudices for the Bolivarian Republic of Venezuela that such a potential advance would entail, without the possibility of counteracting it with effective investigations and answers on certain and contrasted bases, are evident and would point to discriminatory and partial treatment on the part of the Office of the Prosecutor, which is why we are addressing this Pre-Trial Chamber.

215. Other videos relating to the different steps listed in [EXPURGATED] chronology also deserve attention.

216. First, on October 14th, 2017, four months before the formal complaint of the seven countries to the ICC, the former Prosecutor [EXPURGATED] made a statement in Geneva[183]. It states that she has prepared a dossier to denounce the Venezuelan government for "human rights violations". In addition, she reports that prosecutors and directors in Colombia "are with her", even holding preliminary

[183] "[EXPURGATED] denunciará a régimen de Maduro ante la Corte Penal Internacional", *RED MÁS Noticias on Youtube*, October 13th, 2017.

meetings with US authorities in order to "exchange information". She says that they have a "body of evidence that compromises high-ranking government officials". [free translation]

217. The former Prosecutor also had a meeting with the UN High Commissioner for Human Rights, Zeid Ra'ad AL HUSSEIN. However, no information is provided on what was said at this meeting or what information may have been exchanged.

218. In two more videos, from November 16th, 2017, this time in The Hague, in front of the ICC, the former Prosecutor makes a public statement to journalists moments after filing the complaint.[184]

219. In front of journalists, [EXPURGATED]explains that the dossier denounces: Nicolás Maduro Moros (President of Venezuela); Vladimir Padrino López (Venezuelan Minister of Defense); Néstor Reverol (Venezuelan Minister of Interior and Justice); Gustavo González López (Director of SEBIN) and Antonio Benavidez Torres (Head of the Government of the capital district) for being " involved in crimes against humanity" [free translation].

220. The former Prosecutor claims that she has handed over **evidence**, i.e., "all the elements available to the Public Office of the Prosecutor: more than 1000 pieces of evidence, including: expert opinions, legal medical examinations, psychiatric examinations, technical inspections and interviews" [free translation]. However, this evidence allegedly transmitted to the Office of the Prosecutor of the ICC has not been communicated to the Bolivarian Republic of Venezuela. Nevertheless, the principles of equality of arms and the right to defense imply access to information in order to be able to prepare its defense, at the risk of finding itself in a position of

[184] "[EXPURGATED] on Twitter #ENVIVO denuncia ante CPI", *Uy Press on Youtube*, November 16th, 2017; *See* also "La exfiscal de Venezuela denuncia a Maduro ante la Corte Penal Internacional", *Agencia EFE on Youtube*, November 16th, 2017.

defenselessness, as has already been explained in this report. In relation to this point, it is insisted once again that the Office of the Prosecutor is obliged to facilitate the response mechanisms and especially those of collaboration that it has offered openly and in good faith.

221. Furthermore, the former Prosecutor stated that "in Venezuela there is no justice, it is not possible to punish those responsible" [free translation], which is why she affirmed that it was necessary to turn to this international body. [EXPURGATED] also claimed that the people killed since 2015 (**2015**: 1777; **2016**: 4667; **2017** (until June): 1846 people killed by police and military officials) were killed "under the orders of the executive" as part of a "social cleansing plan" [free translation]. Again, no further information is provided on the origin of these numbers or their detailed content.

222. She adds that the complaint includes the "OLP" which allegedly killed 505 people, as well as the alleged **17,000** arbitrary detentions. The former prosecutor also stated that "we are requesting that an international arrest warrant be issued for Nicolás Maduro and other persons". [free translation] Finally, in an interview in the Netherlands, the former prosecutor also stated that "Nicolás Maduro and his government [...] must pay for the hunger, the misery, the hardship to which the people of Venezuela are subjected". In another video by Agencia EFE[185], published on February 28th, 2018, the former Venezuelan Prosecutor is shown participating in a teleconference of a domestic policy session of the Dutch parliament, informing that she was going to request the Dutch legislature to expel the Venezuelan ambassador to the ICC, Haifa EL AISSAMI, for allegedly "obstructing investigations into human rights violations" [free translation]. She adds that "finds it insufficient that the body has only opened a preliminary examination of the

[185] "Exfiscal [EXPURGATED] pedirá a Holanda expel a embajadora venezolana de la CPI", *Agencia EFE en YouTube*, February 28th, 2018.

Venezuelan state" [free translation].

223. On March 16th, 2018, [EXPURGATED] filed an extension of the complaint for the events related to the alleged murder of [EXPURGATED], a former dissident police officer. In her statement[186], she stated that given the systematic and continuous nature of the crimes committed by the Venezuelan government since last year's denunciation, it was necessary "to make an extension of that denunciation" [free translation]. The former Prosecutor stated that:

> Specifically, there is an event that marks the continuity that is the violation of human rights that occurred on January 15th, where seven Venezuelans, including [EXPURGATED], were assassinated and massacred. This was a military operation planned and directed by Nicolás Maduro, who is the President of the Republic. He is the one who can order an operation of this nature to the Strategic Operational Command (CEO) who directed the operation through the President of the Republic and his commander [EXPURGATED] [free translation].

224. The former prosecutor also requested that [EXPURGATED] and the Director of the National Police, [EXPURGATED], be "prosecuted for crimes against humanity [free translation]. She affirms that they have a wealth of evidence that certifies [their] assertions [free translation].

225. He also adds that he has **evidence** that the people who were killed had surrendered, because "the surrender had already been negotiated" [free translation]. She states that "the order came at the last minute from Nicolás Maduro to proceed to liquidate them, to assassinate them" [free translation].

[186] "Venezuela -[EXPURGATED] llevó a la Corte Penal Internacional el caso[EXPURGATED]", *VPItv en Youtube*, March 16th, 2018.

226. This alleged murder of [EXPURGATED]was "recalled" three years later by the former prosecutor on her Instagram account on January 15th, 2021, where she again shared the complaint to the ICC about this event, even stating that a year after the complaint was filed, photographs and new evidence of the case were sent.[187]

227. Along with the above, on VIVO Play's YouTube platform, a video was published on January 17th, 2019 entitled "[EXPURGATED] *denunció muerte de* [EXPURGATED] *ante CPI*"[188]. In the video there is a new manipulation of the complaint before the ICC, this time in relation to the case of the death of [EXPURGATED]. According to the former Prosecutor, she had a meeting at the ICC where the complaint about the murder was filed. In [EXPURGATED]interview after that meeting at the ICC, she stated that:

> We also consigned the testimony of [EXPURGATED] and that testimony makes it clear that in Venezuela there is no rule of law, it is not possible to obtain justice [free translation].

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[187] [EXPURGATED], "Hace 3 años el régimen mostró lo peor de su saña criminal con el asesinato [EXPURGATED]y 6 de sus compañeros, quienes fueron masacrados por su deseo de un mejor país. Todas las pruebas de ese caso las enviamos ante la Corte Penal Internacional y estoy segura que habrá justicia! #15Ene", *Instagram*, January 15th, 2021.

[188] "[EXPURGATED]z denounced [EXPURGATED] death before the ICC" [free translation], *VIVO Play on YouTube*, January 17th, 2019.

228. According to the journalist[EXPURGATED]gave details of the documents handed over to the ICC. Specifically, the journalist reported that the former Prosecutor "explained that the death in state custody was a murder" [free translation]. However, again, no information was provided.

229. The former Prosecutor did not hesitate to affirm that they are working for the ICC to act against Nicolás Maduro and his "clique". She stated that "the international community understands that Nicolás Maduro is no longer President of Venezuela, so he can be investigated, tried and captured without any impediment" [free translation].

230. Several months earlier, on October 9th, 2018, the digital newspaper *El Carabobeño*[189] had already echoed what had appeared on [EXPURGATED] own personal twitter account, who claimed to have information "that [EXPURGATED] had drowned because they were torturing him with a bag" [free translation] a statement she also made in an interview with *NTN24* the following[190] day, going so far as to say that "they even have information from inside" [free translation]. It was later in January 2019 when he reportedly denounced this fact to the Office of the Prosecutor of the ICC itself.

231. The information about the filing of this complaint was also published by the Infobae portal the day before on January 16th, 2019, which published information about this complaint and echoed the unfounded accusations of the former prosecutor that "the orders to carry out the persecution against political dissidents, to carry out the murder of young Venezuelans such as the case of [EXPURGATED], are being given not only by Nicolás Maduro, but also by the assassin

[189] "[EXPURGATED] says she has information that Councilman [EXPURGATED] died by drowning" *El Carabobeño*, October 9th, 2018.
[190] " [EXPURGATED] on Councillor [EXPURGATED]: He died of drowning because they tortured him with a bag" *NTN24 on YouTube.* October 10th, 2018.

[EXPURGATED]" [free translation].[191]

232. Two years after the complaint, on January 15th, 2021, the former prosecutor once again recalled the filing of the complaint on her Instagram account.[192]

2) Proceedings in Venezuela against former prosecutor [EXPURGATED]

233. It is also necessary to remind this Pre-Trial Chamber that criminal proceedings are ongoing in Venezuela against former Prosecutor [EXPURGATED]. On February 22nd, 2018, the Public Office of the Prosecutor initiated an investigation under number [EXPURGATED], in which the alleged punishable acts related to the participation of [EXPURGATED], former Attorney-General of the Bolivarian Republic of Venezuela, are being investigated. These facts could be verified basically through what appeared in the press and digital audio-visual media.

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191 "Former Venezuelan Prosecutor [EXPURGATED] denounced the death of councillor [EXPURGATED] before the International Criminal Court", *Infobae*, January 16th, 2019.

192 [EXPURGATED], "#DenunciaCPI #TBT El 8 de octubre de 2018 el concejal [EXPURGATED]fue asesinado en las instalaciones del Sebin. [EXPURGATED]fue detenido ilegalmente y luego apareció muerto en extrañas circunstancias. Este caso también fue interpuesto ante la Corte Penal Internacional y esperamos que pronto se haga justicia #Venezuela #Justicia #CPI #DerechosHumanos #21Ene", *Instagram*, January 15th, 2021.

Among the events in which [EXPURGATED]is allegedly implicated is the request for an international arrest warrant in 2018, before the so-called Supreme Court of Justice - in exile - against President Nicolás Maduro Moros, in a hearing held in the city of Bogotá, Colombia, for his alleged involvement in bribery by the Brazilian company ODEBRECHT.[193]

234. As a result of these events, once the criminal investigation had been initiated by [EXPURGATED], various investigative measures were carried out, in which the alleged commission of the following punishable offences was determined: **TREASON TO THE COUNTRY**, foreseen and punished in article 128 of the Penal Code[194], **USURPATION OF PUBLIC FUNCTIONS** foreseen and punished in article 213 ejusdem[195], **USE OF FALSE DOCUMENT** foreseen and punished in article 322 ejusdem[196], **CONCEALMENT AND WITHHOLDING OF PUBLIC**

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[193] See the hearing for the reading of the judgment at https://www.youtube.com/watch?v=zYROuDJ84l8&ab_channel=VPItv

[194] ***Artículo 128. Traición a la Patria:*** *Cualquiera que, de acuerdo con País o república extranjera, enemigos exteriores, grupos o asociaciones terroristas, paramilitares, insurgentes o subversivos, conspire contra la integridad del territorio de la patria o contra sus instituciones republicanas, o la hostilice por cualquier medio para alguno de estos fines, será castigado con la pena de presidio de veinte a treinta años.*

Article 128. Treason: Anyone who, in agreement with a foreign country or republic, external enemies, terrorist, paramilitary, insurgent or subversive groups or associations, conspires against the integrity of the territory of the homeland or against its republican institutions, or harasses it by any means for any of these purposes, shall be punished by imprisonment for a term of twenty to thirty years. [free translation]

[195] ***Artículo 213. Usurpación de Funciones Públicas****: cualquiera que indebidamente asuma o ejerza funciones públicas civiles o militares, será castigado con prisión de dos a seis meses, y en la misma pena incurrirá todo funcionario público que siga ejerciéndolas después de haber sido legalmente remplazado o de haberse eliminado el cargo. Podrá disponerse que, a costa del condenado, se publique la sentencia en extracto, en algún periódico del lugar que indicara el Juez.*

Article 213. Usurpation of Public Functions: anyone who unduly assumes or exercises civil or military public functions shall be punished with two to six months' imprisonment, and any public official who continues to exercise them after having been legally replaced or after having been removed from office shall incur the same penalty. It may be ordered that, at the expense of the convicted person, an extract of the sentence be published in a newspaper in a place indicated by the judge. [free translation]

[196] ***Artículo 322. Uso de Documento Falso****: Todo el que hubiere hecho uso o de alguna manera se hubiere aprovechado de algún acto falso, aunque no haya tenido parte en la falsificación, será castigado con las penas respectivas establecidas en los artículos 319, si se trata de un acto público, y 321 si se trata de un acto privado.*

Article 322. Use of False Document: Anyone who has made use of or in any way taken advantage of a false act, even if he has had no part in the forgery, shall be punished with the respective penalties

DOCUMENT provided for and sanctioned in article 80 of the Law Against Corruption[197], **FALSE DENUNCIATION OR FALSE ACCUSATION** provided for and sanctioned in article 84 ejusdem[198] , **USE OF FALSE SEAL** provided for and sanctioned in article 313 of the Penal Code and [199]**ASSOCIATION TO COMMIT AN OFFENSE** provided for in Article 35 in conjunction with Article 37 of the Law against Organized Crime and Terrorist Financing.[200]

235. In view of the foregoing, [EXPURGATED], the competent Office of the Prosecutor requested by means of official letter identified as [EXPURGATED] before the jurisdictional body, in this case the Forty-Third Court of First Instance in functions of Control of the Judicial District of the Metropolitan Area of Caracas,

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established in Articles 319, in the case of a public act, and 321 in the case of a private act. [free translation]

[197] ***Artículo 80. Ocultación y Retención****: Cualquiera que ilegalmente ocultare, inutilizare, alterare, retuviere o destruyera, total o parcialmente, un libro o cualquier otro documento que curse ante un órgano o ente público, será penado con prisión de tres (03 a siete (07) años. Podrá disminuirse hasta la mitad la pena prevista en este artículo si el daño o perjuicio causado fuese leve y hasta la tercera parte (1/3) si fuese levísimo.*

Article 80. Concealment and Retention: Anyone who illegally conceals, renders useless, alters, withholds or destroys, totally or partially, a book or any other document filed with a public body or entity, shall be sentenced to three (3) to seven (07) years imprisonment. The penalty provided for in this Article may be reduced by up to one half if the damage or harm caused is minor and by up to one third (1/3) if it is very minor. [free translation]

[198] ***Artículo 84. Falsa Denuncia o Falsa Acusación****: Cualquiera que falsamente denunciare o acusare a otra persona de la comisión de alguno o algunos de los hechos punibles previstos en este Decreto con Rango, Valor y Fuerza de Ley, será castigada con prisión de uno (01) a tres (03) años.*

Article 84. False Complaint or False Accusation: Anyone who falsely denounces or accuses another person of committing any or some of the punishable acts provided for in this Decree with the Range, Value and Force of Law, shall be punished with imprisonment of one (01) to three (03) years. [free translation]

[199] ***Artículo 313. Uso de Sello Falso:*** *El que habiéndose procurado los verdaderos sellos, timbres, punzones o marcas que se han indicado en el presente Capítulo, haga uso de ellos en perjuicio de otro o en provecho propio o ajeno, incurrirá en las penas establecidas en los artículos precedentes, pero con reducción de un tercio a la mitad.*

Article 313. Use of Counterfeit Stamp: Whoever, having procured the real stamps, seals, punches or marks indicated in this Chapter, makes use of them to the detriment of another or for his own or another's benefit, shall incur the penalties established in the preceding Articles, but with a reduction of one third to one half. [free translation]

[200] ***Artículo 37. Asociación****: Quien forme parte de un grupo de delincuencia organizada, será penado o penada por el solo hecho de la asociación con prisión de seis a diez años.*

Article 37. Association: Whoever forms part of an organised criminal group shall be punished for the mere fact of association with imprisonment of six to ten years. [free translation]

an arrest warrant against the citizen [EXPURGATED].

236. Subsequently, the aforementioned court issued an order on the aforementioned date in which an arrest warrant was issued, as well as precautionary measures prohibiting the alienation and encumbrance and the seizure and blocking of her bank accounts.

237. It is also important to point out that, from the results of the investigation, the Public Office of the Prosecutor was able to infer the active participation also of those identified as [EXPURGATED] and [EXPURGATED] in the commission of the aforementioned punishable acts. Consequently, [EXPURGATED], an arrest warrant was also requested against these citizens, all the requests being registered in the aforementioned Forty-third Court in control functions, under file number [EXPURGATED].

238. The following day, [EXPURGATED], the Public Office of the Prosecutor itself submitted to the aforementioned judicial body official letter no. [EXPURGATED] requesting extradition proceedings. Likewise, on the same date and by means of official letter no. [EXPURGATED], the Head of the International Police Division of the Scientific, Criminal and Criminalistics Investigations Corps (CICPC) was addressed to request the inclusion of [EXPURGATED] in the system of arrest warrants at the international level and subsequent issuance of "Red Notice" to INTERPOL.

239. Therefore, it is left to the judicial control of this Pre-Trial Chamber to determine that the "evidence" provided by [EXPURGATED] is contaminated because the supports containing it have been stolen and made public without any kind of protection or respect for the chain of custody, even going so far as to affirm that she has collaborated for its presentation with countries that are not even part of the

ICC.

C. *The Use of Partial and Flawed Sources I: The International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela*

240. As stated above, the Bolivarian Republic of Venezuela transferred to the Office of the Prosecutor of the ICC the use of sources that were markedly flawed, in bad faith, partial and responding to political criteria. Specifically, the information that is now being submitted to the Pre-Trial Chamber regarding the Fact-Finding Mission was transferred.

1) General Mission Features

a) *Origin of the independent international fact-finding mission on the Bolivarian Republic of Venezuela*

241. In May 2017, the non-governmental human rights organization "UN Watch"[201] circulated a draft resolution at the United Nations Human Rights Council (UNHRC) to "establish an independent and impartial Commission of Inquiry into gross and systematic human rights violations in Venezuela to ensure that there is full accountability for those responsible for violations".

242. In September 2017, the UN Watch draft resolution is published by the United Nations as an official document at the UNHRC. This resolution decides: "to establish an independent and impartial Commission of Inquiry into gross and systematic human rights violations in Venezuela to ensure that there is full

[201] This NGO has a specific pro-American conservative political character, *see* for example C., Zund, "La campagne de trop de UN Watch", *Le Temps*, September 27th, 2013.

accountability for those responsible for violations"

243. On September 27th, 2019, the United Nations Human Rights Council established the "Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela", through resolution 42/25, for a period of one year, to assess alleged human rights violations committed since 2014. The mandate of the Fact-Finding Mission was extended by the Council on October 6th, 2020, for a further two years, until September 2022, through its resolution 45/20.

b) Composition of the International Independent Fact-Finding Mission to determine the facts about the Bolivarian Republic of Venezuela

244. If we examine the way in which these commissions are composed, we can conclude the following.

245. Most commissions/missions are composed of three to five members. In composing the commissions/missions established by the Human Rights Council, the President of the Council usually seeks the views of States, non-governmental organizations (NGOs) and members of the UN Human Rights Council on potential candidates[202]. In addition, the UN Human Rights Council maintains a list of qualified high-level individuals who may be considered for the bodies of inquiry. These individuals are expected to have the necessary experience, skills, integrity and other qualifications.

246. The UN Human Rights Council considers potential candidates based on the requirements of each commission/mission. The final decision is made by the

[202] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015, p. 19.

mandating authority.[203] Appointees must respond in writing to confirm their acceptance of their functions and sign an undertaking to act independently and impartially throughout their mandate, to respect confidentiality and not to disclose any information, even after their appointment is terminated.[204]

247. However, fact-finding missions are recurrently criticized because of their political nature. As Michelle FARRELL and Ben MURPHY point out:

> The commission-establishing activity of the Human Rights Council is greeted in the (admittedly minimal) literature with great suspicion. Commentators tend to view the proliferation of commissions established by the Human Rights Council as a highly politicized activity. These commissions are often criticized on the grounds of being 'selective' and holding a 'biased mandate'. These accusations allege that the commissions depart from the impartiality requirement central to the Hague Convention and to other more recent pronouncements on such commissions, such as the General Assembly Declaration on Fact-finding. The 2009 United Nations Fact-Finding Mission on the Gaza Conflict, or Goldstone Commission", for example, came under fire in these respects, as did the 2014 Gaza commission. Other commissions have also been criticized along the same lines, particularly the International Commission of Inquiry on Libya and the International Commission of Inquiry on the Syrian Arab Republic. To a great extent, these criticisms echo those made more generally of the Human Rights Council and of its predecessor, the Commission on Human Rights".[205][206]

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[203] *Ibid*., p. 19.

[204] *Ibid*., p. 20.

[205] *"La actividad de creación de comisiones del Consejo de Derechos Humanos es recibida en la literatura (ciertamente mínima) con gran recelo. Los comentaristas tienden a considerar la proliferación de comisiones establecidas por el Consejo de Derechos Humanos como una actividad muy politizada. A menudo se critica a estas comisiones por ser "selectivas" y tener un "mandato sesgado". Estas acusaciones alegan que las comisiones se apartan del requisito de imparcialidad central de la Convención de La Haya y de otros pronunciamientos más recientes sobre dichas comisiones, como la Declaración de la Asamblea General sobre la Determinación de los Hechos. La Misión de Investigación de las Naciones Unidas sobre el Conflicto de Gaza de 2009, o Comisión Goldstone, por ejemplo, fue objeto de críticas en estos aspectos, al igual que la comisión de Gaza de 2014. Otras comisiones también han sido criticadas en el mismo sentido, especialmente la Comisión Internacional de Investigación sobre Libia y la Comisión Internacional de Investigación sobre la República Árabe Siria. En gran medida, estas críticas se hacen eco de las formuladas de forma más general al Consejo de Derechos Humanos y a su predecesora, la Comisión de Derechos Humanos"* (our Spanish free translation).

[206] M. FARRELL and B. MURPHY, Hegemony and Counter-Hegemony: The Politics of Establishing United Nations Commissions of Inquiry, Oxford: Hart Publishing, 2017, p. 2.

248. For the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, on December 2nd, 2019, the President of the Human Rights Council appointed Marta VALIÑAS of Portugal, Paul SEILS of the United Kingdom of Great Britain and Northern Ireland and Francisco COX of Chile as members of the fact-finding mission. Ms. VALIÑAS was selected as chairperson.[207]

249. Their biographies on the OHCHR website mention:

> Ms. Valiñas is a human rights and legal professional, who has been specializing Valiñas is a human rights and legal professional, who has been specializing on international criminal justice and, more specifically, on sexual and gender-based crimes. Most recently, she worked in one of the investigation teams at the Office of the Prosecutor of the International Criminal Court (2014-2019). Prior to that, she worked as a legal adviser, both in non-governmental organizations, such as REDRESS (2009) and the Women's Initiatives for Gender Justice (2013/2014), and in the OSCE Mission to Bosnia and Herzegovina (2009-2013). She has consulted for various organizations, including UNICEF-IRC, UN Women, ICTJ, the OSCE Gender Section, and various times for Justice Rapid Response. In this capacity, she has recently trained and mentored legal professionals in domestic jurisdictions such as Guatemala and Colombia (2017 and 2019). Ms. Valiñas holds a graduate degree in Law from the University of Porto and a Master's Degree in Human Rights and Democratization. (E.MA). She has also been an academic researcher at the University of Leuven on transitional justice (2004-2008)[208].
>
> Mr. Cox Vial is a prominent criminal lawyer. He led the Interdisciplinary Group of Independent Experts (GIEI) appointed by the Inter-American Commission on Human Rights and the Government of President Enrique Peña Nieto to investigate the case of the 43 missing students in Ayotzinapa (Mexico). Mr. Cox litigated before the International Criminal Court, including in the case against Dominic Ongwen, in which Cox represents 2605 victims of the armed conflict in northern Uganda.

[207] For more information, their biographies are available at: https://www.ohchr.org/EN/HRBodies/HRC/FFMV/Pages/Members.aspx#Cox
[208] Original in English.

> Recently GRULAC nominated him to integrate the panel of five world experts that advises the Executive Committee of the Assembly of States Parties of the International Criminal Court to elect the next Prosecutor of the International Criminal Court. He studied law at Diego Portales University and then obtained a Master's Degree (LL.M) from Columbia University.[209]
>
> Mr. Seils is currently the Director of Peace Practice and Innovation at the European Institute of Peace. He began his professional career as a criminal defense lawyer in his native Scotland where he also served as Legal Director of the Scottish Refugee Council. He has held various senior international posts including Head of Situation Analysis in the Office of the Prosecutor of the International Criminal Court from 2004-2008, the Analysis Chief in the International Commission Against Impunity in Guatemala; Head of the Rule of Law and Democracy Unit (a.i.) in the Office of the High Commissioner for Human Rights; and Vice President of the International Centre for Transitional Justice from 2011-2017. He lived and worked for five years in Guatemala City, designing and directing investigations into the crimes and human rights violations committed during the civil war there. He has written widely on human rights, criminal justice and transitional justice. He taught for several years on the Advanced LL.M at Leiden University, Netherlands, and is currently a Visiting Professor at St. Andrew's University, Scotland.[210]

250. The Fact-Finding Mission was supported by a secretariat of 13 professionals based in Panama City, composed of "a coordinator, human rights investigators, legal and gender advisers, digital forensic and military experts, and security, administrative and reporting officers". **211**[212]

2) Rules applicable to International Independent Fact-Finding Missions

[209] Original in English.
[210] Original in English.
[211] Original in English.
[212] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p.2.

251. No specific information has been disclosed on the procedure on the mission for Venezuela. However, we can refer to the general principles laid down in this respect.

252. The missions apply the Principles and Rules of the United Nations and international law. In addition, the United Nations has progressively developed specific practices for Commissions of Inquiry (working methods and rules of procedure). These principles are: security, independence, impartiality, transparency, objectivity, confidentiality, credibility, visibility, integrity, professionalism and consistency.[213]

253. In principle, they should follow a methodological and systematic approach to verify whether or not there have been allegations of violations of international human rights law.[214]

254. In addition, commissions must ensure the safety of victims, witnesses, sources and others working with them.

1. Methodology:

- Step 1: The Commission shall first interpret the mandate given to it in order to determine its competences (territorial, temporal, material and personal).

- Step 2: Commission gathers initial information to understand the context (history of the country, structures, political parties, judicial system, ethnic groups, etc.).

[213] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015, pp. 37-39.
[214] *Ibid*, pp. 40-44.

- Step 3: The Commission examines the information (public and internal UN reports).

- Step 4: The Commission shall, in case incidents have not been previously identified in the mandate, prioritise the incidents to be investigated. It then sets the criteria for prioritisation (these criteria can be geographical, the seriousness of the violations, the type of violations, etc.).

- Step 5: The Commission sets an investigation plan by determining the member responsible for a particular task and the method to be used to carry it out.

2. At the end of its work, the Commission issues a report setting out its conclusions.

255. It is necessary to consider the **configuration of fact-finding missions in human rights and international humanitarian law**. Mainly because all of them must be respectful of the principle of sovereignty and equality of arms.

a) Respect for the principle of sovereignty and equality of arms

i. The necessary consent of states or respect for the principle of sovereignty

256. In principle, the application of humanitarian law is not the responsibility of the United Nations, as the UN has the primary task of ensuring compliance with the prohibition of the use of force in international relations.[215]

[215] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015, p.4

257. Article 90 of the 1977 First Additional Protocol to the 1949 Geneva Conventions provides for the establishment of an International Commission of Inquiry if 20 States Parties have agreed to accept the competence of the Commission. The Commission was established in 1991 following the acceptance of its competence by 20 States Parties as required by Article 90(1)(b). States have to accept, as a precondition, its competence before they can use it to investigate alleged violations of IHL. This consent may be expressed either through an *a priori* declaration permanently recognizing the Commission's competence, or through an *ad hoc* agreement on the Commission's competence for the purpose of a specific investigation.[216]

258. However, in recent years, the United Nations, including the Human Rights Council, has regularly mandated commissions of enquiry and fact-finding missions to respond to situations of serious violations of international humanitarian law and international human rights law.[217]

259. Some authors consider that the UN has jurisdiction to conduct investigations under Article 34 of the UN Charter. According to this provision: "The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security". Article 34 of the Charter is to be interpreted restrictively and does not establish a general mandate for the UN to conduct investigations. This competence is said to derive from the Declaration of January 17th, 1992 on Fact-Finding in the Maintenance of International Peace and

[216] Art.90.2, al. a of the First Additional Protocol of 1977 to the Geneva Conventions of 1949.
[217] S. VITÉ, *Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire*, Brussels, Bruylant, 1998, p. 55.

Security.[218][219] In fact, Article 34 would only determine whether the situation is a threat to security and the maintenance of peace.[220] Moreover, according to Sylvain VITE, the creation of such procedures is inherent to the action of international organizations and therefore derives from "implicit powers".[221] Indeed, before they can offer their services in the event of armed conflict, they need to have a prior vision of the situation.[222]

260. As the Human Rights Council lacks binding powers, states are not obliged to comply with a commission of enquiry. For example, in August, a UN fact-finding mission to Syria was opened in 2011. However, it has not yet been able to visit Syria to establish the facts and the violations of humanitarian law and other international instruments, as it has not yet received the authorisation.[223]

ii. Equality of arms

261. Article 90 §4 of the 1977 First Additional Protocol expressly allows the parties to have access to evidence, but also to comment on it and, if necessary, to challenge it. The rules of evidence set out in these paragraphs tend to give the Chamber's activity a quasi-judicial character.[224]

> 4. (a) The Chamber set up under paragraph 3 to undertake an enquiry shall invite

[218] Original in English.
[219] United Nations, "Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security", *General Assembly*, AG 46/59, December 9th, 1991.
[220] S. VITÉ, "Les procédures internationales d'établissement des faits dans la mise en œuvre du droit international humanitaire", Brussels, *Bruylant*, 1998, p. 109.
[221] *Ibidem*, p. 106.
[222] *Ibidem*, p. 106.
[223] *See* eg, United Nations General Assembly, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic", *Human Rights Council*, A/HRC/22/59, February 5th, 2013, which states in paragraph 5 that: '*Lack of physical access to the country undermined the commission's ability to fulfil its mandate. Its access to Government officials and to members of the armed and security forces was limited. Victims and witnesses inside the country, especially those allegedly abused by anti-Government armed groups, could not be interviewed in person*'.
[224] "Commentary of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 – Article 90 : International Fact-Finding Commission", ICRC, 1987.

> the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation 'in loco'.
> (b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission.
> (c) Each Party shall have the right to challenge such evidence. [225]

Article 90, §4 of the 1977 First Additional Protocol is supplemented by the Rules of Procedure of the International Humanitarian Commission. For example, according to Article 27:

> (...) The Chamber shall invite the parties to the conflict to assist it and to present evidence within a fixed time period. It may also seek any other evidence it considers relevant and may carry out an enquiry in loco.
> (…)
> The Chamber shall determine the admissibility and the weight of the evidence presented by the parties to the conflict, and the conditions under which witnesses shall be heard.
> (…)
> (...) All the evidence shall be fully disclosed to the parties concerned who shall be informed of their right to comment on it to the Commission.[226]

262. Unlike the International Humanitarian Commission, fact-finding missions established by the UN would not be obliged to follow a specific procedure. However, the UN High Commissioner for Human Rights has drafted an internal manual for fact-finding missions.[227] Nevertheless, it is a matter of concern that the procedure does not fully guarantee the rights of defense of the state under investigation.

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[226] Original in English.
[227] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015.

b) The principle of impartiality

263. The functioning of commissions of enquiry and fact-finding missions in human rights and international humanitarian law was clearly defined in a February 2015 document produced by the Office of the United Nations High Commissioner for Human Rights (OHCHR). United Nations High Commissioner for Human Rights (OHCHR).[228]

264. This instrument formally establishes that there is an obligation of impartiality, on the one hand, on the members of the commission/mission and, on the other hand, on the mission as such in the context of its work.

265. *Firstly*, on the appointment process of the members of the commissions/missions and the selection criteria, this process varies according to the authority that set up the commission. In principle, it is up to the authority that decided to set up the commission/mission.

266. There are a number of important elements that must be taken into account in the selection of members to ensure the effective fulfilment of the mandate. In addition to the requirements of numbers, qualifications, gender and geographical origin, there are fundamental requirements inherent to the role of an expert: the requirements of independence and impartiality:

> Independencia e imparcialidad. En todos los casos, los miembros deben tener demostrada independencia e imparcialidad. También es importante asegurarse de que los antecedentes de los candidatos y las candidatas, sus declaraciones públicas precedentes o su afiliación política o de otra índole no afecten su independencia e imparcialidad, ni den impresión de parcialidad.[229]

[228] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015.
[229] *Ibid*, p.21.

267. First of all, in the selection process, candidates are requested to disclose any information that might raise questions about their independence, impartiality and integrity, including, for example, any publications on the subject of the investigation, political affiliations, economic interests in the country in question or membership in any organization that might be involved in or have an interest in the matters under investigation. Secondly, candidates are asked to disclose any information that might raise questions about their independence, impartiality and integrity.[230]

268. The OHCHR stresses that it is important that members of the commission/mission, during their mandate, do not incur other obligations or responsibilities that could affect their image of independence, integrity and impartiality. Therefore, not only independence, but also the appearance of independence is of crucial importance.

269. *Secondly*, at the time of appointment, the mandating authority asks the members to sign the following declaration:

> I solemnly declare and promise to exercise my functions independently, impartially, loyally and conscientiously, and to discharge these functions and regulate my conduct in accordance with the terms of my mandate, the Charter of the United Nations and the principles and values of the United Nations, and with the sole objective of contributing to the promotion and protection of human rights, without seeking or accepting instructions from any Government or any other source. I also undertake to respect, during the tenure of my mandate and subsequently, the confidentiality of all information made available to me in my capacity as a member of the commission of inquiry/fact-finding mission. Additionally, I agree to comply with the United Nations ethical, personal conduct, administrative and security rules

[230] *Ibid,* p. 23.

and policies.[231]

270. *Thirdly*, as far as methodological aspects are concerned, commissions of enquiry and fact-finding missions mandated by the United Nations to investigate violations of international human rights law and international humanitarian law have an obligation to ensure that their methods of work comply with the principles and precepts of the United Nations Charter and international law.

271. The United Nations has also developed a set of principles and standards for investigations conducted under its authority, which, over the years, constitute practice and doctrine. UN-mandated commissions/missions should ensure adherence to these principles and standards, reflect them in their mandates, working methods and rules of procedure, and describe them in the final report.

> Principles of human rights and international humanitarian law fact-finding and investigations
>
> Do no harm (...)
>
> Independence
>
> Members and staff of the commission/mission are required to act independently. They should ensure that they do not seek or accept instructions from any person, Government or other source, and are not unduly influenced in the exercise of their functions by any person, Government, NGO or other entity.
>
> Impartiality
>
> All tasks of the commission/mission should be based on its mandate and applicable international norms, and alleged violations by all parties should be investigated with equal thoroughness and vigor. The commission/mission should avoid any perceptions that it could be siding with one party over another.
>
> Transparency (...)
>
> Objectivity
>
> The commission/mission is required to collect all relevant facts from all relevant sources, objectively consider all the facts and information gathered and base its

[231] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015, p.120.

> conclusions on the facts gathered. It should take into consideration only information that is gathered in an unbiased and impartial manner.
> Confidentiality (...)
> Credibility (...)
> Visibility (...)
> Integrity (...)
> Professionalism (...)
> Consistency (...).

272. The integrity of the work of the commission/mission is absolutely conditional on the respect of these requirements of independence and impartiality, without which the processes of information collection and analysis cannot be endorsed.

273. As early as 1997, the United Nations Commission on Human Rights made recommendations for the respect of the principles of independence and impartiality.[232] In its recommendations, it underlines the importance of respecting the principle of neutrality:

> "71. Guided by the principles of neutrality, non-selectivity and objectivity, the meeting reaffirmed the following general principles and criteria:
> The special rapporteurs are independent experts. Their independence is reflected in both the form and the substance of their communications, their inquiries and their reports. It is a feature of the special rapporteurs' relations with all the parties concerned;
> The annexed terms of reference (appendix V) are the minimum necessary to ensure the independence, impartiality and safety of visits by the special rapporteurs to the field. These terms of reference do not exclude additional safeguards, depending on the mandates or circumstances;
> The special rapporteurs and working groups perform their tasks with strict impartiality and objectivity, the only guidelines or yardsticks for analyzing the situations covered by their mandates being the Universal Declaration of Human

[232] United Nations, "Report on the meeting of special rapporteurs", *Economic and Social Council - 54th session*, E/CN.4/1998/45, November 20th, 1997.

> Rights, the international human rights instruments to which the States concerned are party, and other extra conventional instruments adopted within the United Nations system. Their task is to weigh the facts that come to their attention and analyze them in the light of those international instruments, and to make recommendations with a view to enabling all inhabitants of the countries under investigation to enjoy all the rights laid down in those instruments; (…)"
> The requirement of independence and impartiality is inseparable from international expertise work. Expertise work must be carried out under specific conditions, since "*expert missions... are of interest to states only if they respect broad impartiality*".[233]

c) The Right to the Presumption of Innocence

274. The right to the presumption of innocence is recognized in international human rights law for all accused persons. It is found among others in the Universal Declaration of Human Rights which states in Article 11 §1:

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.[234]

275. Other international conventions enshrine the notion of presumption of innocence, such as the International Covenant on Civil and Political Rights in Article 14(2).[235] This right is also recognized at regional level. The Inter-American Convention on Human Rights states in Article 8(2) on judicial guarantees:

> 2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. (…)[236]

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[233] Free translation of "*Les mission d'experts [...] n'ont d'intérêt pour les Etats que dans le respect d'une large impartialité* "in D. DUBOUIS L., "La condition juridique des agents internationaux", *in* société française pour le droit international, *Les agents internationaux. Colloque d'Aix-en-Provence, Paris, Pedone, 1985,* p.29.
[234] Universal Declaration of Human Rights, United Nations *General Assembly*, Resolution 217 A, December 10th, 1948.
[235] International Covenant on Civil and Political Rights, United Nations *General Assembly*, Resolution 2200 A (XX), December 16th, 1966.
[236] American Convention on Human Rights (Pact of San José), November 22nd, 1969.

276. This principle is also recognized at European level. Furthermore, in its Green Paper on the presumption of innocence[237] , the European Commission states that:

> A court or public official may not state that the accused is guilty of an offence if he has not been tried and convicted of it. The presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and without his having had the opportunity of exercising his rights of defense, a judicial decision concerning him reflects an opinion that he is guilty.[238]

277. It means that the accused benefits from the right to have his guilt established legally and judicially, after a fair trial.

278. Proof of guilt rests with the prosecution and doubt should always benefit the accused, irrespective of the burden.[239] The accused person is presumed innocent until the prosecution can establish guilt beyond reasonable doubt and must be acquitted if guilt is not proved.[240]

279. Respect for this principle also applies *vis-à-vis* the ICC as provided for in Article 66 of the Rome Statute:

> 1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
>
> 2. The onus is on the Prosecutor to prove the guilt of the accused.
>
> 3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.[241]

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[237] "Green Paper on the presumption of innocence", *Commission of the European Communities*, April 26th, 2006.
[238] *Ibid.* p. 8
[239] Human Rights Committee, "The Right to Equality".
[240] *See* in this regard, IACHR, *Ricardo Canese v. Paraguay*, August 31st, 2004, Series C no. 111, §153.
[241] Rome Statute of the International Criminal Court, *United Nations Secretary General*, A/CONF.183/9, July 17th, 1998, p. 38.
[158] "Green Paper on the Presumption of Innocence", *Commission of the European Communities*, COM(2006) 174 final, April 26th, 2006.

280. However, this principle can be qualified, as the European Commission specifies when it states that:

> (…) authorities may publicly report investigations and express suspicions of guilt, provided that the suspicion is not a declaration of guilt of the accused, and is expressed with discretion and caution.[242]

281. With regard to fact-finding missions in particular, the report of the Security Council at its 8225th meeting provides a key to understanding when it speaks of establishing a mechanism to investigate incidents involving the use of chemical weapons. In fact, the Council specifies:

> In such murky circumstances, of course, we have to determine what happened. But we have to do it honestly, objectively and impartially, without sacrificing the principle of the presumption of innocence and certainly not by prejudging the process of an investigation.[243]

282. It certainly seems appropriate to apply the principles enumerated by the Security Council to fact-finding missions.

283. As developed above[244], fact-finding missions must respect the principle of impartiality in making their reports and recommendations. Violation of the presumption of innocence, when systematic, can become a violation of the principle of impartiality.

284. That way, a panel of experts that would have already decided even before the trial that a certain state or political leader is guilty, disregards the principle of impartiality and their duties as experts.

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[242] "Threats to International Peace and Security - The Situation in the Middle East", *United Nations Security Council*, 8225th Session, S/PV.8225, April 9th, 2018, pp. 6-7.
[243] "Threats to International Peace and Security - The Situation in the Middle East", *United Nations Security Council*, 8225th Session, S/PV.8225, April 9th, 2018, pp. 6-7.
[244] See Principle of impartiality, above.

3) The evident partiality of the Fact-Finding Mission assigned to the Venezuela I situation

a) The lack of independence and impartiality of the expert COX VIAL

285. In this context it is necessary to analyze the concrete violations of the principles set above by the fact-finding mission.

286. To begin with, we have to consider the violation of the principle of impartiality and of the principle of the presumption of innocence from the expert Francisco COX VIAL.

287. As we have seen, the framework of the fact-finding missions ask the independence and impartiality of their members[245]. The international reports, with a mandate from the UN Human Rights Council, are considered as part of the justice process, and this is why they have to be objective and impartial.

288. The independence and impartiality of an expert can be measured, not only on its legal position – protection against external pressure-, but also in function of his/her behavior in a concrete case.

289. With regard to structural independence, it is appropriate to consider the terms and conditions of appointment of experts, the choice and composition of mission members.

290. The appearance of independence, that is, the confidence that the parties may have in these experts a *priori*, is also of great importance.

[245] Ibidem.

291. As for impartiality, it is the actual conduct of the international expert that must be exemplary and his or her attitude must not give rise to any doubt as to his or her impartiality. Thus, the utmost discretion is required of international experts when they are asked to investigate, in order to ensure their image as impartial actors.

292. *With regard to independence*, the expert Francisco Cox Vial was appointed by the president of the Human Rights Council. He is a Chilean criminal lawyer who was appointed by the Inter-American Commission on Human Rights and the government of President Enrique PEÑA NIETO to investigate the case of the 43 missing students in Ayotzinapa ("*Ayotzinapa Case*"). He also litigated before the ICC as lawyer for 2605 victims of the armed conflict in northern Uganda. He does not appear to be subject to outside pressure, but his impartiality could be questionable.

293. *With regard to impartiality*, as seen in the guidance and practice of fact-finding missions in human rights and international humanitarian law[246], it is important "to ensure that the background of candidates, prior public statements or political or other affiliations do not affect their independence or impartiality or create perceptions of bias".

294. Several things can affect the appearance of impartiality and particularly, with regard to Mr. COX VIAL, certain statements, his background and his political affiliation questioned the appearance of his impartiality.

[246] United Nations, "Commissions of Inquiry and fact-Finding Missions on international Human Rights and Humanitarian Law - Guidance and practice", *OHCR*, 2015, p.120.

i. Statements

- On 24 September 2020, during its 45th session, the Human Rights Council concluded its dialogue with the Independent International Fact-Finding Mission on Venezuela. In his conclusion, Francisco COX VIAL, far from complying with the duty of reserve to which he is bound, stated that:

> The implementation of these recommendations may lead to an improvement of the human rights situation in the country. The judiciary and the prosecution must carry out prompt, thorough and impartial investigations into the violations committed; **perpetrators must be held accountable, and justice must be done for the victims**. These investigations must be carried out with a genuine separation of powers. Detainees must be able to communicate with their families and lawyers so that their relatives can know their whereabouts. **If the Venezuelan judiciary is unable to carry out investigations impartially, call on states, where they have the capacity, to apply their universal jurisdiction.**[247]

- Interviewed by the Miami television channel EVTV, Francisco COX VIAL said that "Officials active in Maduro's repressive and intelligence bodies pointed to the narco-terrorist and his ministers REVEROL and PADRINO LÓPEZ of giving direct orders and contributing to committing at least four crimes against humanity in Venezuela from 2014 to the present".[248] Furthermore, referring to the "command structure", Mr. COX VIAL stated that "Nicolás Maduro and the ministers had information that these crimes were being committed, and did not take repressive and punitive measures to stop them, this also generates responsibility according to the Rome Statute". In stating this, the lawyer claims that state actors, and precisely President Maduro, failed to act, having

[247] United Nations, "Human Rights Council holds dialogue with the Expert Mechanism on the rights of indigenous peoples and begins dialogue with the Special Rapporteur on the rights of indigenous peoples", *Human Rights Council Press Release*, September 24th, 2020.

[248] "EXCLUSIVA| Cox: Desde el régimen delataron a Nicolás Maduro", *EVTV Online*, January 23th, 2021. Free translation of: "*Funcionarios activos en cuerpos represivos y de inteligencia de Maduro señalaron al narcoterrorista y a sus ministros Reverol y Padrino López de dar órdenes directas y contribuir a cometer por lo menos cuatro delitos de lesa humanidad en Venezuela desde el 2014 hasta el presente*".

knowledge of the alleged crimes. However, it is worth emphasising the fact that, before any trial, the crimes in question and above all those responsible for them are *alleged*. Thus, by testifying that President MADURO did not act - which may lead to his criminal liability - Mr. COX does not respect the principle of the presumption of innocence which, as we have already pointed out, also implies maintaining a semblance of impartiality.

- This bias is also highlighted in an interview with the newspaper *La Tercera*.[249] When responding to the journalist's second question, Mr. COX starts by telling that they believe the FAES should be "disbanded, they should be disbanded, because they **have been one of the agents that have committed crimes**.[Free translation from Spanish]". However, in the next sentence, he states that there were extrajudicial executions and that there were simulated clashes. In fact, the Mission concluded in its report that such acts happened, but as was repeated several times, the experts are not judges, and have no competence to state that such acts occurred. By speaking in this way, Mr. COX violates the principle of impartiality by giving the journalist, and then all readers of the article, the impression that these conclusions are an established truth. Furthermore, in answering the last question regarding responsibilities, Mr. COX says:

> We conclude that President Maduro and the Minister of the Interior bear criminal responsibility because they contributed to the commission of the crimes. Also, because, knowing of the commission of the crimes, they did not take preventive and repressive measures.

- If on the face of it, this statement only shares the findings of the Mission's investigations, the fact is that it asserts that President MADURO and the Minister of the Interior had knowledge of the crimes and yet failed to act. However, it should be remembered that the Mission did not have access to the

[249] Fernando FUENTES, " Francisco Cox Vial, miembro de la misión de la ONU en Venezuela: "Maduro y el ministro del Interior tienen responsabilidad penal", *La Tercera*, September 16th, 2020.

Venezuelan state and that its findings are based on "testimonies" from sources, mostly anonymous or based on openly "anti-Maduro" NGOs. So, by declaring to the general public that the President and the minister can be held criminally responsible, this goes beyond the experts' attributions and, by extension, violates the principle of presumption of innocence.

- In a Project Syndicate article[250] directly co-authored by the three experts of the Mission, the Chilean lawyer, in the second paragraph of the transcript, states very clearly the difference in treatment between the President and the highest Venezuelan officials, in relation to the "list of persons who should be investigated further, due to their possible involvement" [Free translation]. Indeed, Mr. COX states clearly and as if it were "beyond reasonable doubt" that the "Venezuelan state actors have committed large-scale human rights violations" [Free translation] without meriting qualification of his allegations. It should be stressed that the Mission's work does not amount to a criminal investigation and that all allegations of alleged crimes and related responsibilities must therefore be substantiated by a criminal investigation. By insinuating that the responsibility of the Chilean expert does not respect (again) the principle of the presumption of innocence.

- In another interview with the media *24 horas*[251] , Francisco COX VIAL, in response to a question regarding how the Mission's report will be used, states: "there is also a recommendation that the Venezuelan justice system is not capable or does not want to make progress in this investigation [...]"[Free translation]. By affirming that the Bolivarian Republic of Venezuela is not able or willing to investigate the alleged crimes in order to provide justice to the

[250] Marta VALINAS, Francisco COX VIAL, Paul SEILS, "Taking Venezuela's human rights crisis seriously", *Project Syndicate*, October 12th, 2020.
[251] Video YouTube, "Vía Pública - Wednesday 16 September", *24horas.cl*, September 17th, 2020.

victims, the expert replaces the Office of the Prosecutor of the ICC and pretends to carry out the complementarity examination himself. Once again, Mr. COX goes beyond his powers and acts in a biased manner.

295. These public statements are accusatory and in no way respect either the mandate given to the mission: to establish facts and analyze them (not responsibilities), or the duty of reserve and impartiality. In fact, Mr. Francisco Cox Vial's statements are unappealable, they do not speak of "alleged perpetrators" but of perpetrators of violations, while he urged states to prosecute these persons within the framework of universal jurisdiction, implying that these are de facto crimes against humanity.

ii. The background

296. What is also criticized about Mr. COX VIAL is his background, i.e., his positions taken through his criminal defense work:

a Francisco COX VIAL's professional record includes the defence [EXPURGATED].[252]

b Francisco COX VIAL was also a defender of the former Minister of Education in the PIÑERA government, [EXPURGATED], Minister of Foreign Affairs under the government of Sebastián PIÑERA. [EXPURGATED] faced a constitutional accusation for breach of legal duties in the exercise of her functions.[253] [EXPURGATED] is known for her support, at the time, for the dictator Augusto PINOCHET and her nostalgia for that era.

[252] "La angelica apuesta comunicacional de [eEXPURGATED]", *El Mostrador*, April 9th, 2015.
[253] "Diputados/as rechazan acusación constitucional contra la ministra [EXPURGATED]", *Cámara de diputadas y diputados - Noticia Detalle*, October 10th, 2019.

297. These people are known to be right-wing (in ideological terms) or even extreme right-wing in Chile. For these reasons they have a political plan to confront and destroy the Venezuelan political project.

298. On 25 October 2019, while Chile was in the midst of a State of Emergency Exception, the Curfew, and multiple, serious and systematic violations of Human Rights, Francisco COX VIAL appeared in an interview in the newspaper *La Tercera* where, among other statements, he made a fierce defense of the PIÑERA Government, denying the possibility that systematic violations of Human Rights had been committed, and affirming that the institutions, and "the State have worked" [Free translation].

299. In the most controversial passages, Mr. COX VIAL points out that: "Chile has an institutional framework that has been functioning", that "it demonstrates a rule of law that is functioning", and that "I do not believe that this generates international responsibility for the State of Chile"; "in my opinion, they are not crimes against humanity as they do not meet the element of context or threshold, there is no attack on a civilian population, it must be a State policy". " You are not complying with the requirement that it be a state or organizational policy (...) Here the state has functioned".[254] He was referring to the events that took place as a result of the social outbreak, in which repression has been systematic and brutal and in which judicial action is being seriously questioned. This is striking when compared to the purpose of the mission in which he participated in Venezuela.

300. This public statement by Mr. Francisco COX in 2019, invested as a human rights

[254] "Acá (Chile) el Estado ha funcionado»: Francisco Cox Vial, uno de los abogados del Informe de la ONU sobre Derechos Humanos en Venezuela", *Revista de Frente*, September 17th, 2020. Free translation of: "*No estás cumpliendo con el requisito de que sea una política de Estado o de la organización […] Acá el Estado ha funcionado*"

lawyer, transgresses objectivity. By denying the existence of serious human rights violations, he plays the role of political defender of the current government and of Sebastián PINERA in particular.

301. The government of Sebastián PIÑERA does not recognize the constitutional Venezuelan President, Nicolás MADURO, so on January 23rd, 2019, Sebastián PIÑERA recognized Juan GUAIDO as President of Venezuela.[255]

302. Appointing a lawyer who supports this government and who has defended politically controversial individuals with alleged human rights violations does not meet the requirement of a semblance of independence and does not engender the legitimate confidence that states under investigation are entitled to expect from the experts who analyze them.

303. Mr. COX VIAL's reputation is also questioned by human rights defenders in Chile, who have sent a letter to Mrs. Michelle BACHELET, the United Nations High Commissioner for Human Rights.[256] In the letter, the human rights specialists considered it necessary to "review the characteristics of Mr. COX, who does not seem to have the minimum competences to carry out a job that confers minimum guarantees of objectivity".

304. The appearance of impartiality incumbent on members of an international fact-finding mission in the exercise of their functions is clearly violated in the present case because, as the adage goes, "not only must Justice be done, it must also be seen to be done". On the contrary, it is a blatant appearance of partiality that can be seen

[255] "Pinera says Chile and Lima Group recognize Juan Guaido as "President-in-charge" of Venezuela", *La Tercera*, January 23rd, 2019.
[256] "CARTA Abogados en DD.HH emplazan a Bachelet por rol de COX", *El desconcierto*, February 2nd, 2020.

in Mr. COX VIAL's conduct on the occasion of these statements.

b) The lack of impartiality of the experts VALIÑAS and SEILS in their public statements

i. Marta VALIÑAS

305. The lack of impartiality of the experts VALINAS and SEILS can also be shown in their public statements.

306. With regard to the lawyer Marta VALIÑAS, president of the Mission, although in most of her public statements she stated that the standard of proof used by the Mission is below that required in a criminal trial, she did not, however, sometimes qualify her words. Indeed, according to the newspaper *El Nacional*[257], Ms. VALIÑAS stated that the crimes under investigation constitute "crimes against humanity". However, by stating this, the President of the Mission acts contrary to the required impartiality, given that she legally qualifies the facts as crimes in front of the general public and without issuing *reservations.*

307. In another interview with the newspaper *Efecto Cocuyo*[258], the lawyer said: "(…) we are talking about **acts that were committed by members of state security forces**, or above all in these cases, of sexual violence, of torture by members of the intelligence services", without qualifying her words. Later in the interview, she states that sexual violence against male detainees "is used to humiliate and degrade them, because it puts them in a more vulnerable and defenseless position". Again, she did not qualify his words by specifying that they are conclusions of the Mission that have no legal value. However, the most important thing to remember is that

[257] "Misión de la ONU presentó informe sobre Venezuela ante el Consejo de DD HH", *El Nacional*, September 23rd, 2020.
[258] Youtube video, "¿Qué dice el informe presentado en la ONU?", *Efecto Cocuyo*, September 26th, 2020.

she is addressing a newspaper for the general public and that, in this context, even greater caution is required to respect the principle of the presumption of innocence.

308. In a virtual meeting of the Organization of American States[259], Ms. VALIÑAS did not respect the principle of presumption of innocence. Indeed, in the transcript of the interview, she asserted that "the security forces committed extrajudicial executions during security operations". If the facts cannot be disputed, the lawyer would at least have had to qualify aspects of the legality of the executions. For a death by state agents to be an extrajudicial execution, it should be recalled that it means that it does not meet the requirements of domestic and international law, particularly the principle of proportionality. However, only a criminal investigation can determine whether these criteria were met.

ii. Paul SEILS

309. In relation to the expert Paul SEILS, two Amnesty International *tweets* show its biased attitude in conveying the expert's words. Thus, Mr. Seils said that "higher authorities are responsible for torture"[260], using the term "crime against humanity".[261]

310. In an interview with the Spanish newspaper *El Diario.es*[262] , Mr. SEILS began the interview by recalling that the Mission met a standard of proof below what is necessary before a Court. However, he did not bother to qualify his words

[259] Youtube video, "2020 Sep 29. "Virtual Meeting of the Permanent Council", *OAS OEA Videos*, October 1st, 2020.
[260] Twitter, Amnesty (@amnistia), "La misión constata que entre los responsables de actos de tortura se encuentran miembros de la policía, la guardia y el SEBIN. Las autoridades superiores, incluidos el Presidente y los ministros, lo sabían y son responsables de ellas" dijo Paul Seils", September 18th, 2020. Free translation of: "*las autoridades superiores son responsables de las torturas".*
[261] *Ibid*.
[262] Javier BIOSCA AZCOITI, "Paul Seils, UN rapporteur: "Nadie en su sano juicio va a dudar de que hay abusos y torturas en Venezuela", *El Diario*, September 17th, 2020.

throughout the interview. Indeed, for example, in response to the journalist's question about the possible responsibility of the Venezuelan government, the SEILS expert spoke of "social cleaning", a term that is often used to refer to genocide or crimes against humanity. He goes on to add that: "Firstly, the political authorities knew, supported, directed and planned. Secondly, they never did anything to prevent it. That is the responsibility of the president and the ministers indicated". All this shows that the expert SEILS goes far beyond what was attributed to him by his mandate.

c) Content of the findings of the International Fact-Finding Mission

311. Looking at the findings of the Fact-Finding Mission[263], there are a number of methodological shortcomings in the investigation: both in terms of the sources used, the number of cases investigated, and the way in which the facts were presented.

i. Mission sources and number of cases investigated

312. In the introduction to the findings[264], the Mission explains that it "had several constraints to the investigation, including lack of access to Venezuela and witness protection concerns".[265] These constraints have reportedly worsened since March 2020 due to travel restrictions due to the Covid-19 outbreak. However, in the following paragraph, the Mission considers that it "was nevertheless able to gather the information necessary to establish facts and draw conclusions in accordance

[263] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p.2.
[264] *Ibid*., p. 2 §7.
[265] *Ibidem*., p. 2§7.

with its mandate".[266] This statement is hardly credible given that in order to have an idea of the context in Venezuela and to be able to verify the veracity of the facts referred to in the conclusions on the basis of testimonies and/or dubious sources, field work would have been necessary, a possibility that the State has proposed to the Office of the Prosecutor of the ICC.

313. The data collected by the mission reflects a lack of completeness, transparency and objectivity.

314. The lack of completeness of the information collected and of the research in general is reflected in the number of case studies conducted. According to the findings, 223 cases of alleged human rights violations in Venezuela that took place from 2014 to 2020 were studied[267], which would amount to an average of 38 cases per year. However, only 48 cases were reportedly studied in detail[268], resulting in an average of 8 cases per year. It is therefore difficult to conclude that there is a state policy on crimes against humanity.[269] Surprisingly, the Mission also notes that a further 2891 incidents were investigated[270], which are not reflected anywhere in the report.

315. The lack of transparency is evident throughout the document, as there is no record of the Mission having had access to the judicial and administrative files of the 48 cases studied, nor to the victims and their families. Furthermore, most of the sources are hidden or subject to the greatest opacity, making it impossible to verify the veracity of the Mission's investigative activities and conclusions.

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[266] *Ibidem*., p. 3 §8.
[267] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p 2 §1; p 4 §12.
[268] *Ibid*., p 4 §12.
[269] *See* for example: p 434 §2086 and p 4 §12.
[270] CDH ONU, 'Conclusiones' A/HRC/45/CRP.11, p 4 §12.

316. It is also strange for the Mission to make pronouncements on tax investigations, prosecutions and police proceedings without having direct access to administrative and judicial files or evidence. To make a pronouncement without prior analysis of all the facts is reckless on the part of these professionals.

317. The sources used include information in the public domain, found in social networks, blogs, and opinion articles, among others.[271] However, the Mission did not highlight that most of these belong to sectors adverse to President MADURO, to human rights organizations that are funded by foreign governments opposed to the Venezuelan government, and to individuals who were directly involved in the coup d'état of April 2019. In any case, this aspect will be extensively addressed in the following expanded report, which will expose the biased and, in many cases, manipulated nature of these "sources" that have apparently served as the basis for the "accusations" of the Office of the Prosecutor of the ICC.

318. Indeed, the lack of objectivity of certain sources is evident. For example, the Mission has used the testimony of [EXPURGATED] to make assertions about the situation in Venezuela, without consulting objective sources to verify the veracity of his statements.[272] The same mission said it is "aware of his admitted role in the April 2019 coup attempt and his expressed intention to implicate President Maduro in the perpetration of serious crimes."[273] However, despite recognizing at the outset

[271] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p 3 §10.
[272] Moreover, the Mission's analysis report does not explain how controversial this source is, it says that the thesis that the SEBIN and GGCIM agencies, blamed for crimes against dissidents, had links to the government is proven and that "their information has been considered 'prima facie consistent and plausible'". *See* Analysis Report, November 25th, 2020, A/HRC/45/CRP.11 p 8 §§ 32 and 41.
[273] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p. 4 §15.

that it "it has not received any information from the Government, despite requests, and therefore does not have countervailing information contradicting the points alleged by [EXPURGATED]"[274], many serious allegations in the conclusions are based exclusively on his testimony[275], without confirming it with credible sources and without remembering that this is a character who has a personal interest in incriminating the government of the Bolivarian Republic of Venezuela. This, clearly, is a serious lack of both objectivity and transparency, both of which must be involved in the information collected for any serious and rigorous investigation. On the contrary, this is a good example of the techniques used by the mission to whitewash opponents of the government and participants in the *coup d'état*.

319. [EXPURGATED] told the Mission that when he was appointed Director General of SEBIN in late 2018, he took steps to change practices within the intelligence agency. He told the Mission that he investigated specific allegations of torture, dismissed an official he believed to be involved in violations, and secured the release of certain detainees, among other measures. The Mission is not aware of any allegations of torture during his time as Director.

320. The NGO "Foro Penal" is a source that is used a large number of times in the conclusions. However, its Executive Director, [EXPURGATED], and its vice-president, [EXPURGATED], have been empowered to litigate before the ICC and both are fervent opponents of President Maduro's government. [EXPURGATED] even went so far as to declare that "the Maduro regime is threatening President Juan Guaidó and the other opposition deputies"[276].

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[274] *Ibid*., p. 4 §15.

[275] For example, *see* UN HRC, 'Conclusions' A/HRC/45/CRP.11, p 64 - 65 §214; p 85 § 272; p 87 §§ 281 and 283.

[276] M. GONZALES, "Si Europa retira su apoyo a Guaidó será un golpe muy duro", *El País,* December 28th, 2020.
Free translation of: "*el régimen de Maduro amenaza al presidente Juan Guaidó y a los demás diputados de la oposición"*.

321. The Venezuelan Education-Action Programme (Provea) is also used on several occasions as a source by the Mission, but its General Coordinator, [EXPURGATED], is also known to be a fervent opponent of the MADURO government, so once again a source on which the Mission bases its allegations lacks objectivity.[277]

322. The lack of credible sources that could support the allegations made in the findings is also evident when the Mission states that "individual cases or incidents are based on at least one credible source of direct information, which was corroborated by at least one other credible source of information".[278] Given the weight accorded to [EXPURGATED] testimony, it is unclear what kind of examination the Mission is making to determine the degree of credibility of its sources.[279]

ii. Examples of biased facts

323. In establishing the legal framework used to carry out the investigations, we can already consider that the conclusions are biased.

324. The Mission already reveals certain initial methodological shortcomings. In paragraphs 42 and 43, the Mission constructs the categories under which it intends to falsely link President MADURO and other high-ranking officials to alleged crimes against humanity, establishing that the deprivation of liberty of certain

[277] For example, *see* the following interview: "[EXPURGATED] i: Gobierno de Nicolás Maduro quiere silenciar a los medios de comunicaciones", *Todos Ahora*, January 15th, 2021. *See* also, United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, p. 4 §15.
[278] *Ibid*., p.3 §13.
[279] See previous paragraph and accompanying footnote.

persons has been based on a scheme of persecution of political opponents.[280] This way of presenting information, which is recurrent throughout the document, effectively serves to whitewash the participation of these people in acts of public commotion, violation of human rights, attacks on institutions and public order that required a response by the security forces of the Republic.

325. Subsequently, the report states that SEBIN and DGCIM have committed acts of torture and human rights violations against detainees. These accusations are based on anonymous interviews that are impossible to evaluate and mainly refer to statements made by [EXPURGATED]. In other words, the conclusions give high credibility to the opinions of this person, knowing his political bias and his participation in the coup attempt, which weakens the accusations made against SEBIN and the DGCIM. Moreover, because the Venezuelan executive does not recognize the legitimacy of the Mission, the latter avoids dialogue with the officials responsible for both institutions, since the report has been carried out outside the country.

326. In the case of the Operations for Peoples' Liberation (OLP) and the Operations for People's Humane Liberation (OLHP), the conclusions are overwhelming, with testimonies based on eyewitness accounts, statements by victims' families and accounts that are clearly aimed at whitewashing certain confrontations. The Mission stresses that President Nicolás MADURO activated some corrective measures in response to various complaints of police excesses in the context of these security operations. Likewise, the Attorney-General's Office of the Republic executed a series of indictments and opened several investigations to prosecute

[280] United Nations, "Detailed findings of the independent international fact-finding mission on the Bolivarian Republic of Venezuela", *Human Rights Council - Forty-fifth session*, A/HRC/45/CRP. 11, September 15th, 2015, pp 9-10 § 42-43. *See* also statement at p 73 § 262.

police officers involved in crimes. However, the Mission highlights these elements as circumstantial intentions and does not give them objective weight. Rather, it focuses on accounts and testimonies that project the image of a government and judicial institutions unconcerned with the allegations that allegedly collaborated, directed and coordinated the human rights violations suggested in the conclusions. For example, the conclusions state that "the OLPs may also have had express motives of 'social cleansing'".[281] However, the footnote accompanying the text explains that this was a slip of the tongue. The president immediately corrected it to what he really meant: "liberation". This way of presenting information is misleading.

327. The Mission also says that the failure to investigate and prosecute the perpetrators of the violations presented in the findings may, in itself, give rise to a separate violation of the State's international obligations.[282] Contrary to the usual practice of the OHCHR, Michelle BACHELET, for example, the mission displays a lack of objectivity, accuracy and precision by omitting that progress has been shown in the investigations by the Venezuelan State.

328. Paragraph 470 et seq. is designed to undermine the Venezuelan government's security plans by using the testimony of unidentified individuals allegedly involved in ill-treatment and human rights violations.[283] This account is one of the most vociferous in the entire report and raises suspicions that the methodology of the statements is used on condition of anonymity. Many of the testimonies allude to the fact that detainees at the time of interrogation were *forced* to declare connections or facts that supposedly did not exist. For example, according to family

[281] UN HRC, 'Conclusions' A/HRC/45/CRP.11, p 201 § 1020.
[282] *Ibid*., p 398 § 2082.
[283] UN HRC, 'Conclusions' A/HRC/45/CRP.11, p 113 § 470 *sq*. See footnote 993.

members and lawyers, in the case of [EXPURGATED], the government *induced* his confession through drugs to link him to the assassination attempt in 2018.[284]

329. The conclusions also do not review with sufficient forcefulness the case of [EXPURGATED]. In December 2017, [EXPURGATED]staged an assault on the command of the Bolivarian National Guard (GNB) and after gagging several soldiers and stealing weapons and ammunition, [EXPURGATED]published the scene on social media to increase the impact of the assault. This armed action was part of the formation of a paramilitary cell led by himself with the aim of initiating a low-intensity protracted conflict against Venezuelan institutions and security forces. It is clear from paragraph 96 that information is deliberately omitted in order to whitewash the clashes between violent dissidents and the forces of state authority.[285]

330. Consequently, it is clear that the Mission's presentation of the facts is biased and methodologically flawed.

iii. Political posturing outside the mission area

331. With regard to the partiality of the report of the International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, it is worth noting the political statements in the report.

332. As its name indicates and as previously stated, the Mission should be independent and impartial. However, for a number of reasons already set out above, it turned out that this was not the case.

[284] UN HRC, 'Conclusions' A/HRC/45/CRP.11, p 134 § 599 *sq.* In fact, these allegations have been supported by [EXPURGATED], p 78 § 283.
[285] UN HRC, 'Conclusions' A/HRC/45/CRP.11, p 25 § 96.

333. It seems necessary first of all to recall the Mission's mandate[286]:

> Urgently send a mission to the Bolivarian Republic of Venezuela to investigate extrajudicial killings, enforced disappearances, arbitrary detentions, torture and other cruel, inhuman or degrading treatment committed since 2014. Ensure full accountability for perpetrators and justice for victims. To report its findings to the Council during an interactive dialogue at its 45th session.

334. As a matter of scope, it can be stated that the Mission did not act as a panel of independent and impartial experts, but rather, through its detailed report and conclusions, expressed its political position in relation to the Bolivarian Republic of Venezuela.

335. First, a quick comparison can be made with other international fact-finding mission reports. For example, in the case of the Independent International Fact-Finding Mission on Myanmar[287] recommends that the State "take appropriate legislative measures"[288] or "conduct effective investigations into the underlying acts of genocide documented in the Mission's 2018 report and, where appropriate, prosecute and punish those guilty".[289] As we can see, the Mission does not express itself in such indicative terms. On the contrary, the Mission seems to order the State, declaring with certainty that crimes against humanity have taken place. Similarly, the International Independent Mission on the Gaza Conflict[290] is much more cautious in its conclusions and recommendations than has been done in relation to Venezuela. Indeed, the Mission that examined the situation in Gaza speaks in its

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[286] *See* the official website of the International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela: https://www.ohchr.org/SP/HRBodies/HRC/FFMV/Pages/Index.aspx.

[287] "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", *Human Rights Council - 42nd session*, A/HRC/42/CRP.5, September 16th, 2019.

[288] *Ibid*. § 693, p. 179: "Enact the domestic legislation necessary."

[289] *Ibidem* §692, p. 179 §§ 692 and 693.

[290] "Human Rights in Palestine and other Occupied Arab Territories – Report of the United Nations Fact-Finding Mission on the Gaza Conflict", *Human Rights Council - 12th session*, A/HRC/12/48, 25 September 25th, 2009.

recommendations of "possible war crimes and crimes against humanity"[291], contrary to what the experts in charge of the situation in Venezuela did, seeming to be convinced of their legal qualification beforehand. In the same vein, fact-finding missions often recommend that states conduct independent investigations[292] and that the international community launch further investigations[293].

336. For its part, as explained below, the Mission did the opposite. It did not confine itself to establishing facts or events and trying to establish responsibility, but took a political position, demonstrating that it had already decided who was to blame.

337. Firstly, it is necessary to highlight the gap between the terms used to designate members of the government or security forces and the use of the term "victims" to designate civilians.

338. Referring to the persons designated as "victims", the report and its detailed conclusions always refer to political opponents (sometimes including their relatives, neighborhood, etc.). In good faith, the Mission does not forget to underline, especially in relation to the demonstrations, that some demonstrators threw stones or Molotov cocktails. However, they remain the victims of the regime.

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[291] *Ibid*. p. 423 § 1968-b).

[292] *Ibid*, § 1972-g):"The Mission recommends that the Government of Israel should cease actions aimed at limiting the expression of criticism by civil society and members of the public concerning Israel's policies and conduct during the military operations in the Gaza Strip. The Mission also recommends that Israel should set up an independent inquiry to assess whether the treatment by Israeli judicial authorities of Palestinian and Jewish Israelis expressing dissent in connection with the offensive was discriminatory, in terms of both charges and detention pending trial."
§ 1975 -a): "The Mission recommends that the States parties to the Geneva Conventions of 1949 should start criminal investigations in national courts, using universal jurisdiction, where there is sufficient evidence of the commission of grave breaches of the Geneva Conventions of 1949."

[293] " La Mission recommande que les États parties aux Conventions de Genève de 1949 ouvrent des enquêtes judiciaires devant les tribunaux nationaux, en exerçant la compétence universelle, lorsqu'il existe suffisamment d'éléments prouvant que de graves violations des Conventions de Genève de 1949 ont été commises." (*Ibidem* § 1975 – a).

However, the reality is different. By deliberately omitting the involvement of some opponents in human rights violations, violent (and sometimes organized) attacks against institutions and even heads of government, the Mission is biased. Note that no reference is ever made to the assassination attempts on President MADURO.

339. For example, in its detailed conclusions, the Mission focuses on the case of [EXPURGATED].[294] Indeed, it underlines that:

> [EXPURGATED], along with nine other people, was killed in January 2018 in a raid by mixed security forces.

340. However, the account of this episode omits to specify that [EXPURGATED]flew the helicopter used and that, flying over public institutions located in the center of Caracas, he fired machine gun fire and hit with fragmentation grenades, endangering the lives of civilians. The report does not qualify this incident as an attack with terrorist characteristics but limits itself to a brief and not very detailed mention. Consequently, the Mission was inclined to detail the facts only to damage the Venezuelan government, without analyzing the situation as a whole.

341. Similarly, another assassination attempt against President MADURO was not qualified as such by the Mission.[295] Referring to the incident of August 4th, 2018, the report states:

> (...) State television showed images of two drones exploding near the stage where President Maduro and other high-level officials were watching a military parade, injuring at least seven members of the military.[296]

342. Furthermore, it is necessary to underline again, as already indicated, that the Mission decided to base a large part of its observations and conclusions on the

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[294] UN HRC, 'Conclusions' A/HRC/45/CRP.11, p. 21 § 87.
[295] "Failed attack on Nicolas Maduro in Caracas confirmed", *RT*, August 4th, 2018 ; *see* also "Seven injured in drone attack on President Nicolas Maduro in Caracas", *Europa Press*, 5 August 5th, 2018.
[296] UN HRC, 'Conclusions' A/HRC/45/CRP.11. p. 24 § 99.

testimony of [EXPURGATED], considering it as reliable even while it is publicly known that the General participated in the April 2019 coup attempt.[297] As previously detailed (see *above*), although the Mission is aware of the role he has played and his willingness to incriminate the government, it decided nevertheless to consider his testimony "coherent and plausible". This again indicates the Mission's political stance.

343. Finally, in relation to the difference in terms used when talking about the protagonists of Venezuelan events, it is important to insist on the fact that coup attempts, attacks on institutions or other violence against the government are always *alleged*, while extrajudicial executions, inhuman, cruel or degrading treatment or other forms of human rights violations by the armed forces or other persons affiliated with the regime are almost always considered *true.* As an illustration, reference can be made to Table 4 entitled "Alleged operations and persons detained".[298] The report always refers to "alleged coup d'état", "alleged conspiracy", "alleged destabilization activities and an attack against the President", etc. Never, in the report or in its conclusions, does the Mission consider attacks against the government and attacks against opponents in the same way. Of course, the objective was never to diminish or cast doubt on the testimonies of the victims, but as an independent and impartial actor, the Mission should have considered both sides in the same way. On the contrary, the mission wrote its report as if the government had already been judged guilty of crimes against humanity.

344. On the other hand, the Mission, in making "prognoses" about the alleged failures or willfulness of the government, also shows its political position. In fact, describing the *Barlovento case*, it says:

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[297] *Ibid*. p. 4 § 15.
[298] *Ibidem.,* Table 4 - Alleged operations and persons detained, pp. 78-81.
[216] *Ibidem.,* p. 393 §2030.

> The gravity of the crimes increased, from illegal detention to enforced disappearance, torture and murder. There are reasonable grounds to believe that early intervention by the command authorities could have prevented them from occurring.[299]

345. Here, the Mission indulges in prognostications about what might have happened if the authorities had intervened earlier. In this sense, the Mission judges, to some extent, what the authorities did, although it admitted that it did not have sufficient information on the measures taken by the government. While it is part of the Mission's mandate to establish the facts and try to attribute responsibility, it is also clear that it is not part of its mandate to make a diagnosis of what might have happened in another situation. In this way, the Mission shows its disagreement with state policy and its political position.

346. The *Barlovento case* is not the only case in which the Mission gives its opinion on the policy of the Bolivarian Republic of Venezuela. Indeed, neither is it impartial when speaking about the state's security policies in general. On the basis of speculation and value judgements, the Mission manages to convey its vision of a violent and power-hungry state when it details the alleged state policy that constitutes one of the material elements of the crime against humanity. In this sense, the Mission explains:

> The Mission's research suggests that there are several motives behind hardline security tactics. These include the following:
>
> Demonstrate that the government responds to the social problem of insecurity by being tough on crime. […]
>
> Generating fear and reinforcing power for social control purposes to reduce the possibility of political uprisings, especially in poorer urban neighborhoods [...].

[299] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 423 §2030.

> Maintain or assume dominance over local economies and criminal markets. […] [300]

347. In this example, once again, the Mission starts from its incomplete research to deduce a policy model with the aim of toppling President MADURO and his ministers. It again intrudes into areas of power reserved for the sovereign state, namely, in this case, the fight against crime. Finally, the Mission dares to go further here, accusing, without any basis other than its own assertion, the state security policy of maintaining its "dominance over local criminal economies and markets". That in itself amounts to accusing the government of being a criminal smuggler.

348. Likewise, the Mission, recklessly, issues conclusions and dares to give its opinion on the alleged "tactics" of the government, which it does not do when talking about the actions of the opposition. In the part of the detailed conclusions reserved for the Liberation Operations (OLP) and the Humanist People's Liberation Operations (OLHP), the Mission argues as follows:

> [The OLPs and OLHPs] Officially announced five months before the December 2015 National Assembly elections, the OLPs were, according to what has been suggested by several analysts, an **effort to gain electoral popularity by showing results in the fight against crime.**

349. In this paragraph, the Mission clearly goes beyond its remit by taking sides with state policy on OLPs and OLHPs, describing them as an opportunity to gain popularity. It is necessary to underline again that the Mission's mandate does not give it the competence to give an opinion on what it considers right or wrong. The Mission must base its conclusions on established facts.

350. As for the recommendations made to the Bolivarian Republic of Venezuela, the

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[300] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 202 §1018.

Mission also goes beyond its remit to take a political position on the situation. We will focus here on the most striking.

351. First, in its second recommendation[301] to the Bolivarian Republic of Venezuela, the Mission suggests:

> Ensure that investigations include **those at higher levels of responsibility**, with respect to all violations and crimes documented in this report.

352. Obviously, the state can be held responsible for the unlawful conduct of non-state persons or groups when they act in total dependence on the state and under its direction or effective control, or with the acquiescence of the state.[302] Again, however, the terms used by the Mission demonstrate its political position. By focusing on "persons at the highest level of responsibility", the report implicitly refers to members of the government. It is worth noting that fact-finding mission reports do not usually address government members in particular. In fact, the reports often use more general terms. For example, the Independent Fact-Finding Mission to Myanmar speaks of "[c]onducting effective investigations into the underlying acts of genocide documented in the Mission's 2018 report and, **where appropriate, prosecuting and punishing the perpetrators**: (...)."[303] The Mission never makes explicit reference to the senior perpetrators, even if relevant. In this way, the Mission once again demonstrated its willingness to overthrow the government of the Bolivarian Republic of Venezuela in particular.

353. In its recommendation forty-one (41), the Mission *recommends* that the State:

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[301] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, Recommendation 2, p. 407.

[302] "Draft Articles on Responsibility of States for Internationally Wrongful Acts", *International Law Commission - 53rd Session*, 12 December 2001. This draft constitutes *soft law* but always applies.

[303] "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", *Council of Human Rights Council* - 42nd session, A/HRC/42/CRP.5, September 16th, 2019, p. 179 §692.

> Ensures that the security forces are regulated by laws that clearly prescribe their powers, establish oversight mechanisms and conform to international human rights standards. **These laws should be passed by the National Assembly, not by decrees of the executive or the National Constituent Assembly**. It must be ensured that such laws are strictly enforced.[304]

354. Here, the Mission clearly opposes the principle of non-interference in the internal affairs of states and the principle of sovereignty. First of all, instead of *recommending* - as is usually done in the recommendations of fact-finding Missions - it *asks* the government to have security regulations approved by the National Assembly. As already documented several times, on August 4th, 2017, the National Constituent Assembly was created by Decree of the President of the Bolivarian Republic on May 1st, 2017.[305] Its recognition at the global level was divided, being recognized by countries such as Syria, Bolivia, Russia, Iran and Nicaragua[306] while the European Union and the Lima group did not recognize the constitution of the Assembly.[307]

355. Asking the government that the regulations regarding the powers and oversight mechanisms of the security forces be adopted by the National Assembly, and not by the Constituent Assembly, is thus clearly an indication that the Mission defends those who did not recognize that Assembly. If since December 18th, 2020, the National Constituent Assembly is dissolved, it is necessary to underline that

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[304] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, Recommendation 41, p. 441.
Free translation of: "Velar por que las fuerzas de seguridad estén reguladas por leyes que prescriban claramente sus facultades, establezcan mecanismos de supervisión y se ajusten a las normas internacionales de derechos humanos. Estas leyes deben ser aprobadas por la Asamblea Nacional, y no por decretos del Ejecutivo o de la Asamblea Nacional Constituyente. Hay que asegurar que dichas leyes se apliquen estrictamente."
[305] Nicolás MADURO MOROS - President of the Republic, Decree no. 2. 830, *Official Gazette of the Bolivarian Republic of Venezuela*, May 1st, 2017.
[306] "Bolivia, Russia Defend Venezuela's Constituent Assembly" *Telesur*, July 31st, 2017.
[307] "Los 28 países de la UE no reconocen la Constituyente", *Hoy.com*, August 3rd, 2017.

this "recommendation" of the Mission is clearly seen as taking a political position.

356. Further in its recommendations, the Mission "recommends":

> Ensure that policing activities, and especially any specialized bodies such as FAES, are required to continuously record the activities of agents with the **use of body worn cameras**.[308]

357. Again, the Mission demonstrates a political attitude by commenting on the use of body-worn cameras. In fact, the use of body-worn cameras is quite recent worldwide. The use of body-worn cameras is neither a necessary requirement for the rule of law nor has it demonstrated intangible evidence of its effectiveness. In any case, the implementation of such regulation is a matter for the state.

358. In its recommendation 51, the Mission calls on the State:

> Cease collaboration with, disarm and disband *colectivos* and any other armed groups operating outside state security structures that engage in illegal activities and are not subject to control and accountability.[309]

359. This recommendation echoes the part of the conclusions reserved for *colectivos* in which the Mission used abusive language, describing *colectivos* as "armed groups."[310] *Colectivos* are a type of organization in Venezuela, heir to the Bolivarian revolution, which is usually made up of citizens who support the regime by engaging in cultural or political activities. By associating these groups, the basis of Chavismo, with armed groups, the Mission violates state policy and once again demonstrates its bias.

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[308] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, Recommendation 49, p. 410.

[309] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, Recommendation 51, p. 410.

[310] *Ibíd*. p. 59 §217.

360. Furthermore, in its recommendation 53, the Mission advises the Venezuelan government to harmonize its legislation regulating demonstrations and, in particular, the progressive use of force and the principles of legality, necessity and proportionality.[311] However, throughout the report and its detailed conclusions, it is already developed that Venezuelan legislation incorporates as a principle the progressive use of force. For example, the Mission recalls that:

> The 2008 Organic Law of the police and the 2017 police bylaw outline the standards on **progressive use of force** by the PNB, state and municipal police. The laws describe the **progressive and differential nature of the force based on the principles of legality, necessity and proportionality. The use of lethal force is only allowed when the law enforcement official has to defend his own life or the life of a third person**.[312]

361. Finally, the Mission's recommendation 59 is undoubtedly one of the most flagrant for its lack of political impartiality. It recommends that the Bolivarian Republic of Venezuela:

> [Cooperate] with bodies of the Organization of American States. Comply with the precautionary measures issued by the Inter-American Commission and the provisional measures issued by the Inter-American Court. Implement Inter-American Court judgments related to Venezuela.[313]

362. This recommendation is clearly biased. It is common knowledge that the Organization of American States is accused of "Americanism". Moreover, under former US President Donald TRUMP, Luis ALMAGRO, Secretary General of the organization, recommended an armed intervention inside Venezuela.[314]

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[311] *Ibidem*., Recommendation 53, p. 442.
[312] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 311 § 1528.
[313] *Ibid*., Recommendation 59, p. 442.
[314] Andrea AMAYA, "No se puede descartar una intervención militar contra Maduro": Luis Almagro", *France 24*, September 15th, 2018.

Recommending the government to cooperate with that organization is clearly a political posturing on the part of the Mission.

363. In addition to the above, the Fact-Finding Mission is in clear violation of the principle of presumption of innocence.

iv. Violation of the principle of the presumption of innocence

364. As underlined, fact-finding missions are bound to respect the principle of the presumption of innocence when drafting, reporting and, above all, establishing responsibility.

365. The principle of the presumption of innocence means that the guilt of a person, whether a natural or legal person, should not be established before it has been proven after a fair trial.

366. The Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (FFMV) disregarded this principle on several occasions.

367. The Mission was established by the UN Human Rights Council. The purpose of the Mission was therefore to report its findings to the Council during the interactive dialogue at its 45th session. It is important to recall the role of the Mission, which never could or had to determine with certainty who the perpetrators were.

368. Firstly, in terms of its mandate, the Human Rights Council Resolution gave it the task of establishing accountability.[315] Obviously, as it is not an independent or impartial tribunal, the Mission cannot establish responsibilities in the same way as

[315] *See* the official website of the International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela: https://www.ohchr.org/EN/HRBodies/HRC/FFMV/Pages/Index.aspx.

a Court can. Therefore, in its report, the Mission specifies the standard of proof it applies when determining who is responsible for the alleged crimes. Indeed, the report states:

> (…) the mission used reasonable grounds to believe as the standard of proof. This standard is met when factual information has been collected that would satisfy an objective and ordinarily prudent observer that the incident has occurred as described with a reasonable degree of certainty. The standard of proof required does not give rise to a finding of criminal responsibility. It is for the appropriate criminal authorities to investigate the acts and conduct documented in the report and establish criminal responsibility.[316]

369. Accordingly, the Mission cannot determine the authors or perpetrators categorically, without qualifying its conclusions on the basis of the information available to it. It is important to remember that the Mission was never in the territory of Venezuela. Therefore, both the acts described, and the resulting conclusions and recommendations must be analyzed with caution[317].

370. More specifically, the Mission, in its detailed findings, often refers to "perpetrators" although it does not have the legitimacy to find someone guilty of a crime[318].

371. For example, when discussing the Special Action Forces (FAES), the Mission states:

> The FAES has been described by several sources as “unprofessional” and lacking training. As one former military officer said, the “FAES is a group of uniformed criminals at the disposal of the Government, not a professional police force”. **The FAES quickly became the most lethal police institution in Venezuela, responsible for 64.5 per cent of the deaths the Mission reviewed in 2019** (see Chapter IV). The

[316] “Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela”, *Human Rights Council - 45th session*, A/HRC/45/33, September 16th, 2020, p. 3 §9.
[317] See Section B – 2).
[318] See Part II – 4) Principle of presumption of innocence.

> Mission has not been able to locate official documents or other publicly available information in relation to FAES, including operation manuals, since its creation.[319]

372. In this paragraph, the Mission presumes the responsibility of the FAES, and directly designates it as the most lethal force. Again, it is necessary to recall that the investigations carried out by the Mission are not judicial investigations but are based on testimonies and documents whose reliability may be questionable.

373. In the same sense, it designates the collectives as "responsible for the killing of demonstrators"[320] or the "[PNB/FAES] two security forces were responsible for 59% of killings in the years under review".[321] This pattern of *holding* state security forces *responsible* is found throughout the report and the Mission's conclusions.

374. Regarding the use of the term "liable", it is necessary to specify that it refers to a person who must answer for a damage caused, which is different from a person *allegedly* liable, accused of having committed such an offence, without his liability having been established by a judge.

375. Moreover, apart from omitting the term "responsible", the Mission also refers to "killings". In fact, the FFMV, in the part of the conclusions devoted to "OLP/OLHPs Tactics", the Mission's experts state that:

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[319] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p 56 § 204.

[320] *Ibid.* p. 61 § 224: "During political protests, the colectivos were in some cases involved in crowd control or violations in coordination with the State armed forces and/or upon the instruction of State political leaders. In several cases investigated by the Mission, the colectivos were identified as those responsible for the killing of demonstrators."

[321] *Ibid.* p. 251 § 1269: "Between 2014 and 2018, the CICPC was the security force most commonly involved in cases (45.4%). Subsequently, in 2019, the PNB/FAES was identified as the perpetrator in the majority of cases (64.5% of cases). These two security forces were responsible for 59% of killings in the years under review."

> the OLP/OLHPs differed from other cases of **killings** by police forces. [322]

376. Without awaiting trial, the Mission already establishes that the deaths caused in the operations of these security forces were extrajudicial or at least not legitimate. Of course, this assertion violates the principle of the presumption of innocence.

377. In establishing responsibilities, the Mission also violated the principle of presumption of innocence. Despite its reminder at the beginning of this part of the conclusions of what standard of proof it was going to use, the formulation of responsibilities shows, on the contrary, that there is no doubt about the perpetrators of such crimes. Again, in contrast to the usual practice of fact-finding missions, the Mission refrained from using neutral language by omitting the use of terms such as "alleged", "supposed", etc.

378. To illustrate the necessary and customary nuancing of accusations of responsibility, reference can be made to the report by the Fact-Finding Mission to Myanmar. For example:

> The Mission documented cases where the proximity of EAO fighters, [...], were **likely** responsible for serious harm to civilians. [323]

379. Or:

> In light of the Mission's findings on the continued persecution of the Rohingya

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[322] "Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 206 § 1032.

[323] "Detailed findings of the Independent International Fact-Finding Mission on Myanmar", *Council of Human Rights Council* - 42nd session, A/HRC/42/CRP.5, September 16th, 2019, p. 148 § 546 "The Mission documented cases in which the proximity of EAO fighters, wearing uniforms and carrying weapons, to civilians, coupled with the opposing force's known disregard for the principles of precaution and distinction, was likely responsible for severe harm to civilians."

> population (...) the Mission deems it **likely** that (...).[324]

380. It is therefore clear that it is the Mission's decision not to mitigate its words and assertions. It is therefore appropriate here to make some revealing enumerations of what has just been said.

381. First, in defining responsibilities in the "context of security and social control", the Mission completely speculated as to the role of the FAES. In fact, it states that:

> **FAES officers committed killings under** the authority and orders of their Heads of Brigade. The same is true of CICPC, in which officers also report to Heads of Brigades. **The killings were not isolated acts, committed by individuals acting alone**.[325]

382. In addition to suggesting crimes for which there is no evidence, the Mission believes that the crimes were organized, most likely to discredit the forces.

383. The same was true when trying to establish the planned nature of the alleged crimes:

> The Mission considers that there were cases of arbitrary detentions committed in the context of protests. The Mission does **not have sufficient information at this point to find that there was a high-level plan or policy** to arbitrarily detain in the context of protests. Further investigation would be **required to establish such a plan or policy**, as well as knowledge of a criminal pattern of conduct in relation to acts of

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[324] *Ibid*. p. 176 § 669 "In light of the Mission's findings on the continued persecution of the Rohingya population in Rakhine State and the impossibility of the return of Rohingya refugees from Bangladesh under the current circumstances, the Mission deems it likely that any business or development actor operational in Rakhine is highly likely to support, directly, indirectly or inadvertently, or even consolidate the Tatmadaw's persecutory and genocidal objectives with respect to the Rohingya population."

[325] Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 394 § 2036.

> arrest and detention.[326]

384. The Mission is cautious in acknowledging that it does not have sufficient information to say **whether** there was a plan or a policy. However, it then states that an investigation would be necessary to establish **what** the plan was. In short, if at first sight, the Mission respects the principle of the presumption of innocence, then, in seeking to establish what the stated policy was, the Mission indicates that the condition of a state policy is present in the case. Again, the Mission clearly goes beyond its powers and violates the presumption of innocence.

385. Continuing with the examples of disregard for the presumption of innocence, the Mission states categorically that the constituent elements of crimes against humanity were found in the case of the following alleged crimes: killings (referred to as arbitrary and extrajudicial executions throughout the report), imprisonment and other severe deprivations of physical liberty in violation of fundamental norms of international law, enforced disappearances, acts of torture and other inhumane acts of a similar character committed against members of the civilian population in the context of security operations or social control[327]. Indeed, the Mission states:

> These crimes were committed as part of an attack directed against a civilian population. Indeed, first, the acts constituted a "course **of conduct**" in the sense that there was a **multiple commission of acts**, which formed part of an overall flow of events3643 as opposed to crimes committed by isolated and uncoordinated individuals acting randomly on their own.3644 Second, **the attack was directed against the civilian population as the primary, as opposed to incidental, target of the attack**. As noted below, acts committed against members of the military that

[326] Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 399 § 2065.

[327] The Mission was more reserved in qualifying the same acts as constituting crimes against humanity in the context of the demonstrations, recognising that it did not have sufficient information. In this regard *see*: Detailed findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, p. 405 § 2093.

> have been placed hors de combat may properly fall under this definition. Third, the crimes listed above were, respectively, committed **in furtherance of the following two distinct State policies**
>
> a. **A policy to silence, discourage and quash opposition to the Government of President Maduro**, including by targeting individuals who, through various means, demonstrated their disagreement with the Government, or were perceived as being against the Government, and their relatives and friends who were targeted for being associated with them.
> b. A policy to combat crime, including by eliminating individuals perceived as "criminals" through extrajudicial execution.[328]

386. The lack of precautions taken by the Mission could not seem to be any clearer. Not only does it limit itself to making a legal analysis on the basis of incomplete information, but it also makes dubious and biased estimates of the government's alleged intentions. However, it does not have any evidence, nor sufficient elements to establish this assertion, even with the low standard of proof applied in the report.

387. In concluding the (non-exhaustive) overview of violations of the right to the presumption of innocence, the Mission stated that:

> Members of these security forces and agencies [PNB (including PNB/FAES), CICPC, municipal and state police forces, SEBIN, FANB and DGCIM] **were the perpetrators** of the violations and crimes documented in this report.[329]

388. Again, the Mission did not hesitate to assert that the security forces are undoubtedly responsible for the alleged crimes.

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[328] Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 403 § 2088.

[329] Conclusiones detalladas de la Misión internacional independiente de determinación de los hechos sobre la República Bolivariana de Venezuela", *Human Rights Council*, A/HRC/45/CRP.11, September 15th, 2020, p. 4015§ 2096.

389. This also occurred in recommendation 48 addressed to the Bolivarian Republic of Venezuela in which the experts *suggest*:

> Dismantle the FAES given the high number of extrajudicial executions carried out by this police force since its creation.[330]

[330] *Ibid*., Recommendation 48, p. 410.

D. CRITICAL ANALYSIS OF THE 2018 OAS REPORT

390. Since April 2011, the International Criminal Court and the Secretary General of the OAS have established a Framework Cooperation Agreement "focused on the promotion and dissemination of shared principles and values, as well as the exchange of information and documents on matters of common interest".[331]

1) General features

a) Origin of the expert panel

391. In relation to the situation in the Bolivarian Republic of Venezuela, Luis Almagro submitted two detailed reports: a first report in May 2016[332] and a second on March 14th, 2017.[333] In the latter, Almagro declared that "Venezuela violates all articles of the Inter-American Democratic Charter".[334] In that report, one can already see the vehemence with which Mr. ALMAGRO describes the Venezuelan government, asserting that it is a "totalitarian regime that denies the most elementary rights".[335]

392. On April 3rd, 2017, the Permanent Council of the Organization stated in a

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[331] "Memorandum of understanding on cooperation between the General Secretariat of the Organization of American States through the Executive Secretariat of Inter-American Commission on Human Rights and the Office of the Prosecutor of the International Criminal", April 25th, 2012.

[332] Luis ALMAGRO, "Detailed report on the situation in Venezuela", *Organization of American States*, OSG/243-16, May 30th, 2016.

[333] Luis ALMAGRO, Informe detallado sobre la situación en Venezuela, *Organización of American States*, OSG/128-17, 14 March 2017, online: http://www.oas.org/documents/eng/press/Informe-VZ-II-English-Final-Signed.pdf.

[334] Press release, 'CP/RES. 1078 (2108/17) - Resolution on the recent events in Venezuela', *Permanent Council of the Organisation of American States*, April 3rd, 2017.

[335] Luis ALMAGRO, Detailed Report on the Situation in Venezuela, *Organization of American States*, OSG/285-17, 19 July 2017, online: http://www.oas.org/documents/spa/press/TERCER_INFORME-VENEZUELA-SPANISH-Final-signed.pdf.

Resolution that there was a "violation of the constitutional order"[336] in Venezuela. In July 2017, a third report was presented by the OAS Secretary General on the situation in the Bolivarian Republic of Venezuela.[337] At that time, the Secretary General goes so far as to describe Maduro's government as a "dictatorship", stating that:

> These are the deliberate actions of a **dictatorship** desperate to stay in power. The regime has created a "new normality" in which the state uses systematic institutional violence in a dirty war against the people.[338]

393. Following the publication of this third report,

> [...] the General Secretariat of the OAS was tasked with monitoring developments in Venezuela and compiling information for the Panel of Experts whose recommendations would eventually assist the Prosecutor of the International Criminal Court to determine whether to initiate an investigation of the situation in Venezuela.[339]

394. On July 25th, 2017, Luis Almagro "implemented a procedure to evaluate the allegations that crimes against humanity have been committed in Venezuelan territory, and to determine whether, in keeping with the agreement signed with the International Criminal Court (...) the information collected should be forwarded to the Office of the Prosecutor of the International Criminal Court (...)".[340]

395. Finally, the panel of experts was appointed on September 14th, 2017 by the OAS

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[336] Comunicado de prensa, "CP/RES. 1078 (2108/17) - Resolución sobre los sucesos recientes en Venezuela", *Consejo Permanente de la Organización de los Estados Americanos*, 3 de abril de 2017, en línea: https://www.oas.org/es/centro_noticias/comunicado_prensa.asp?sCodigo=C-022/17.

[337] Luis ALMAGRO, Detailed Report on the Situation in Venezuela, *Organization of American States*, OSG/285-17, July 19th, 2017.

[338] Luis ALMAGRO, Detailed report on the situation in Venezuela, *Organisation of American States*, OSG/285-17, 19 July 201. *See* for example p. 16 §3.

[339] "Fact Sheet: Process to Analyze the Possible Commission of Crimes against Humanity in Venezuela", *Organisation of American States*, Press Release D-021/18, May 24th, 2018.

[340] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 253 §1.

Secretary General.[341] The first objective of the panel was:

> to analyze whether there is a reasonable basis for believing that crimes against humanity may have been committed in Venezuela, and to assess whether the situation should be submitted to the Prosecutor of the International Criminal Court (ICC) for consideration.[342]

396. The information and evidence analyzed was to be compiled in a report submitted to the OAS Secretary General together with recommendations.

397. It is worth noting, however, that the Resolution by which the experts were appointed, as well as the legal basis justifying the creation of such a panel, do not appear to be available on the official OAS website. In fact, only press releases are accessible. This lack of official content calls into question the transparency of the procedure regarding the selection of the experts, as well as the independence of the Secretary General.

b) Composition of the panel of independent experts

398. In the 2018 OAS report, it is mentioned that on 14 September 2017 the Secretary General appointed three International Independent Experts: Santiago Cantón, Secretary for Human Rights of the Province of Buenos Aires and previously Executive Secretary of the Inter-American Commission on Human Rights, Manuel Ventura Robles, former Judge of the Inter-American Court of Human Rights and Professor Irwin Cotler, President of the Raul Wallenberg Human Rights Centre and former Minister of Justice and Attorney-General of Canada, to analyze the evidence compiled by the Secretary General and other sources, draw up a final report and

[341] *See* "Fact Sheet: Process to Analyze the Possible Commission of Crimes against Humanity in Venezuela", *Organisation of American States*, Press Release D-021/18, May 24th, 2018.
[342] *Ibid*.

submit their recommendations to the Secretary General.[343]

399. The governments of Argentina, Canada and Costa Rica consented to the appointment of these individuals as experts. The Panel took office on 28 September 2017.[344]

400. The following information on Santiago Canton can be found on the OAS website:

> Santiago Canton was the Executive Secretary of the IACHR from August 1, 2001 to June 30, 2012. An Argentine citizen, he studied law at the University of Buenos Aires and earned a Master of International Law degree at American University in Washington, D.C. From 1998 to 2001 he was the IACHR Special Rapporteur for Freedom of Expression. From 1994 to 1998, he was Director for Latin America and the Caribbean at the National Democratic Institute for International Affairs (NDI), a democratic development organization based in Washington, D.C. He also worked as Political Adviser to President Jimmy Carter on democratic development programs.[345]

401. Regarding Irwin Cotler, there is no detailed biography as for Santiago Canton on the OAS website. However, on the McGill University website we find the following information:

> Irwin Cotler is the Chair of the Raoul Wallenberg Centre for Human Rights, an Emeritus Professor of Law at McGill University, former Minister of Justice and Attorney-General of Canada and long-time Member of Parliament, and an international human rights lawyer.
>
> A constitutional and comparative law scholar, Professor Cotler is the author of numerous publications and seminal legal articles and has written upon and intervened in landmark Charter of Rights cases in the areas of free speech, freedom

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[343] The General Secretariat of the OAS and the panel of independent international experts, 'Report on the possible commission of crimes against humanity in Venezuela", May 29th, 2018; more information on the working procedure of this panel in the following item.

[344] OAS General Secretariat and panel of experts, 'Report 2018' p. 18.

[345] OAS, "Latest IACHR Executive Secretary".

> of religion, minority rights, peace law and war crimes justice. (…)
>
> An international human rights lawyer, Professor Cotler (...) recently became international legal counsel to (...) Venezuelan political prisoner Leopoldo López (emphasis added) (...).

402. This raises questions about Mr. COTLER's alleged status as an "independent international expert", given that his client's case appears extensively in the 2018 report he helped draft for the OAS.[346] Furthermore, we note that Canada is one of the States that submitted a referral against Venezuela to the ICC for the alleged commission of crimes against humanity within the ICC's jurisdiction.[347]

403. Manuel VENTURA ROBLE's curriculum vitae can be found in full on the OAS website and reads as follows:

> Judge Ventura Robles has held various positions in the private sector and in public administration, precisely in the Costa Rican Foreign Service in the Embassy of Costa Rica in Washington, D.C. and in the Permanent Mission of Costa Rica to the Organization of American States (OAS). He held the position of Secretary of Inter-American Court of Human Rights from January of 1990 until December of 2003. Previously, he held the position of Deputy Secretary, from December of 1979 until March of 1989. [...]. As a part of his responsibilities, he has attended the Fourteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth, Thirtieth, Thirty-first, Thirty-second and Thirty-third Ordinary Sessions of the General Assembly of the OAS.
>
> Member of the Hispano-Luso-American Institute of International Law – Member of the Editorial Board of the Revista do Instituto Brasileiro de Direitos Humanos – […] Member of the International Law Association, 1984 – Member of the American Society of International Law, 1989 (…).[348]

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[346] As an example, OAS General Secretariat and panel of experts, 'Report 2018' p. 45.

[347] Referral made to the ICC Office of the Prosecutor by the Governments of the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru regarding the situation in Venezuela, September 25th,2018.

[348] "Curriculum Vitae of Manuel E. Ventura Robles", *OAS Official Website*, April 16th, 2021.

c) Work of the panel of independent experts

404. The OAS Secretary General says he has appointed a Panel of Independent International Experts to examine whether there is a reasonable basis to know whether crimes against humanity have been committed in Venezuela and to assess whether the situation should be referred to the Prosecutor of the International Criminal Court (ICC) for consideration[349]. The Secretary General asked the Panel to analyze the evidence gathered by the General Secretariat and other sources, produce a final report and formulate their recommendations to the Secretary General.[350]

405. The Panel says that it has resorted to a modality of information analysis consistent with that used by the Office of the Prosecutor of the ICC, in order to assess the information received. Thus, "has compiled the available information produced by the General Secretariat of the OAS, international and regional human rights organizations, international and Venezuelan NGOs, as well as the information received in the public hearings conducted by the OAS General Secretariat for this purpose, and the supplemental information presented directly to this Panel by NGOs, the persons who testified in the public hearings, and others. Information reported by the media has also been used as a secondary source, which due to the seriousness of the information and the existing context, was compared with all of the other available information, considering it to be essential to include it due to the intrinsic value this may have for the investigation in this preliminary stage. In all circumstances, and in accordance with the modality of work carried out by the Office of the Prosecutor of the ICC, the available information has been independently evaluated and the seriousness of the information received was

[349] OAS, 'FACT SHEET: Process to Analyze the Possible Commission of Crimes Against Humanity in Venezuela', Press Release D-021/18, May 24th, 2018.
[350] OAS General Secretariat and panel of experts, 'Report 2018' p. 305.

analyzed".[351]

406. On the basis of this information, the Panel "has prepared this Report for the purpose of providing a legal characterization of the criminal acts that have been committed in the Bolivarian Republic of Venezuela within a given time period, with an exhaustive description of the facts, the places where they occurred, and a description of the groups of persons involved. This description of the facts corresponds to the preliminary examination stage, it is not binding for the Office of the Prosecutor of the International Criminal Court, and is presented for the Office of the Prosecutor to consider whether the requirements set out in Article 53 for the opening an investigation into the Bolivarian Republic of Venezuela over possible commission of crimes against humanity, in accordance with Article 7 of the Rome Statute, have been met".[352]

407. Finally, the Panel has presented "facts that are outside the timeframe that is intended to be studied, but which, while outside the temporal jurisdiction of the ICC, are necessary to explain the context in which the other facts presented within the temporal jurisdiction of the Court occurred."[353]

408. Neither the OAS website nor the 2018 report contains information on the principles that should govern the work of the panel of experts. This makes us question the professionalism and thoroughness of the work of the panel. We refer to the principles and rules of the United Nations and international law that fact-finding missions must apply and respect and that by analogy should guide the work of the OAS panel of experts[354].

[351] OAS General Secretariat and panel of experts, 'Report 2018' p. 307-308.
[352] OAS General Secretariat and panel of experts, 'Report 2018' p. 308-309.
[353] OAS General Secretariat and panel of experts, 'Report 2018' p. 309.
[354] See above on the work of the UN fact finding mission.

409. Nevertheless, the Bolivarian Republic of Venezuela wishes to raise to this Pre-Trial Chamber the lack of independence of these experts.

2) Criticism of the panel of experts

a) Lack of independence of experts

410. In total, twenty-six eye-witness testimonies were developed in this report. As detailed previously, these testimonies were collected during five public hearings organized in September, October and November 2017 at the headquarters of the Organization of American States in Washington DC.

411. Although the duty of impartiality must be applied in reports by allegedly independent experts, from the first pages of the May 2018 report, impartiality and lack of respect for the presumption of innocence can be questioned.

412. In fact, for example, on page 9 of the report, in the part dedicated to the background and intensification of the crisis in Venezuela, the experts stated without qualification:

> Recognizing that he had lost the confidence of the Venezuelan public, instead of trying to win back the trust and confidence of the people, President Maduro worked diligently and consistently to dismantle the country's democratic institutions, consolidating any and all government authority in the hands of the Executive. He chose authoritarianism as his means to hold onto power.[355]

413. Further on, the experts go so far as to state that "The Government itself became

[355] Report of the General Secretariat of the Organization of American States and the panel of independent international experts on the possible commission of crimes against humanity in Venezuela, *Washington D.C,* 29 May 2018 [hereinafter: OAS Report 2018], p. 9 §3.

the entity that threatens the lives of its citizens".[356] They even qualify the regime as a **dictatorship**[357] after making comparisons with the dictatorships of *Plan Cóndor*. Indeed, the experts made this accusation in the part of the report devoted to "The government's plans against the "internal enemy." They stated that:

> It is not the first time in Latin America that an authoritarian Government has conceived of a state of internal war against its civilian population
>
> (…)
>
> The notion of internal war with an internal civilian enemy is a central component in the design of a totalitarian political order. As with the dictatorships of the Southern Cone, as with Plan Condor, the Venezuelan government has employed widespread and systematic repression and persecution as a political strategy to stay in power. **Plans Sucre and Zamora are Maduro's Plan Condor of today**. The governments of Hugo Chávez and Nicolás Maduro turned the exercise of politics into a class struggle, through the daily use of warlike words in their speeches, and by encouraging the use of epithets against those who do not think the same way as the Bolivarian current.[358]

414. In this part of the report, the experts clearly go beyond their remit. Instead of analyzing precise facts at a certain time, they allow themselves to give their political opinions on the regimes of Presidents MADURO and CHÁVEZ, comparing them to campaigns of assassinations and anti-guerrilla warfare conducted by liberal dictatorships. This comparison again demonstrates the lack of impartiality of these experts and, consequently, their lack of professionalism throughout the report.

415. On another occasion the regime is described as a dictatorship:

> Under direct orders from President Maduro himself, the Cabinet and the military commanders implemented a systematic practice of repression and the excessive use of force, including the murder of peaceful protesters. This was not a collection of

[356] OAS Report 2018, *Washington D.C*, 29 May 2018, p. 11 §2.
[357] *See* p. 70 §4: "These were the deliberate actions of a dictatorship desperate to stay in power. The regime created a "new normality" in which the state uses systematic institutional violence in a dirty war against the people".
[358] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 53 §§2-4.

> coincidences. These were calculated actions taken by a dictatorship desperate to hold onto power. The Regime created a "new normal", where the State uses systematic institutional violence in a "dirty war" against its people.[359]

416. Such references to a totalitarian regime, using very serious accusatory terms, are found throughout the report. On one occasion, the experts theorize about the government's alleged aim in controlling the demonstrations. In fact, in the part concerning "the government's plans against the "internal enemy"", it is stated that:

> The military plan was put into operation against the perceived internal enemy, as defined above, and the national territory was transformed into a military theater of operations in order to defeat, dominate, terrorize, and force the disappearance of Venezuelans who dissent from the Government. The **objective was not to bring the demonstrations under control, but to violently crush them**.[360]

417. It should be added that these allegations are based on very little information, or at least on information that is not available. Thus, the panel states that:

> It is evident that the current rates of violence in Venezuela are, at least in a significant measure, a consequence of a State policy to terrorize and subdue the population to prevent the people from claiming their rights or expressing opposition to or criticism of the Government.[361]

418. On another occasion, experts have drawn general conclusions based on the testimony of a single person reported in a newspaper. This was the case when talking about alleged members of collectives paid by the government.[362]

419. Moreover, the experts also concluded in a general way by speaking of the

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[359] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 66 §4.
[360] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 53 §2.
[361] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 57 §1.
[362] *See* in this regard: OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 93 §4 : "*Some members of the colectivos have claimed to be hired by state governments*" to be combined with the appropriate footnote (n°171) : "Ex colectivo asegura que gobierno de Aragua le pagaba para crear caos", *El Nacional*, January 25th, 2018.

knowledge, on the part of "the perpetrators" that "committed murder as part of a widespread and systematic attack against the civilian population and with full knowledge that these actions were taken as part of that widespread and systematic attack on the civilian population".[363] Again, there is no nuance in the words, but rather it is stated as an absolute truth to be determined by a Court. This general and unsourced assumption is also found later in the report.[364]

420. Apart from making generalizations, the report also states figures without indicating in any way where they come from, the methodology used, the size of the sample analyzed, the indicators evaluated, showing once again its lack of seriousness. Thus, it states that:

> At least 30% of the total number of cases presented here are individuals specifically targeted because of their opposition to the Government, because they publicly denounced or have expressed displeasure with the Regime, or because they demanded their rights and respect for the rule of law and the Constitution. They were also tortured to extract a confession from them or coerce them into accusing other individuals, in most cases, political opposition leaders. The remaining 70% of cases, were individuals tortured for simply protesting or participating in mass public demonstrations, in order to punish, intimidate, coerce false accusations against other individuals or partisan groups, and even leave them marked for life as "opposition", and to terrorize their families, friends, and the population in general.[365]

421. Further in the report, we find again an accusatory vocabulary. In the part devoted to "The humanitarian crisis as a tool of persecution" - which is already an accusation in itself - it is stated that:

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[363] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 89.

[364] *See* in this regard: OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 200 §2 : "*In all cases, the instigators, mediate and immediate perpetrators, accomplices and accessories to the mass arrests were fully aware that their conduct constituted a serious violation of the fundamental rights of individuals because they were carried out as part of a widespread or systematic attack directed against an individualised civilian population on political grounds, identified as the opposition or dissident internal enemy of the Government of Nicolás Maduro."*

[365] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 94 §3.

> The Regime in Venezuela is responsible for what has become one of the worst humanitarian crises the region has experienced. This crisis is man-made and a direct result of inhuman actions by leaders who do not care about the suffering of their people, allowing their citizens to die of hunger and preventable diseases. The severity of the humanitarian crisis is not simply the consequence of negligence, but it has become part of the broader strategy of repression in the country that is guided by ideological and political interests.[366]

422. Different opinions debate the causes of the humanitarian crisis in Venezuela. However, as *independent* experts, Santiago CANTON, Irwin COTLER and Manuel VENTURA ROBLES have gone beyond the scope of their role and mandate, again impacting their impartiality.

423. Finally, the report goes so far as to act as a judge by stating - without any qualification whatsoever - what it states:

> The President of the Bolivarian Republic of Venezuela, Nicolás Maduro Moros and the senior leadership with which he has surrounded himself, who hold the real power in Venezuela, are the intellectual authors behind the repression and the war on the internal enemy. **These individuals are those <u>responsible</u> for the systematic and widespread repression and persecution** taking place across the country, including the arbitrary and mass detentions, enforced disappearances, murder, torture, rape and other forms of sexual violence, and persecution committed by their subordinates down the civilian and military chains of command. [367]

424. Thus, according to the experts, President MADURO and his entourage are responsible. However, it should be recalled that the experts are not judges and that their role is only to analyze a situation and precise facts to determine whether "there is a **reasonable basis** to proceed with an investigation" and in no way has the competence to determine the criminal responsibility of individuals.

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[366] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 235 §3.
[367] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 289 §3.

425. In fact, when analyzing the report, successive inconsistencies in the analysis of the cases are detected.

3) The successive inconsistencies in the analysis of the cases

426. As noted above, the report analyzed 26 testimonies and documented 131 cases involving alleged victims of killings, as well as 289 alleged cases of torture. Below, we analyze the inconsistencies in the report with respect to these cases and the lack of independence of the experts in their analysis. First, it should be recalled that the panel stated as follows in the part devoted to the "assessment received by the panel":

> In all circumstances, and in accordance with the modality of work carried out by the Office of the Prosecutor of the ICC, the available information has been **independently** evaluated and the **seriousness** of the information received was analyzed.[368]

427. However, it will be easily demonstrated that these requirements were not met.

428. In relation to the case of [EXPURGATED][369], son of the ousted mayor [EXPURGATED], alleged victim of arbitrary detention, torture and inhuman treatment, as well as short-term enforced disappearance, the report is rather incoherent. Indeed, in explaining the arrest of [EXPURGATED], the experts start by saying that it was members of armed *colectivos* who entered the house, but two lines later, it is explained that it was security forces who arrested [EXPURGATED].[370] In this way, the experts show a lack of precision in confusing

[368] OAS Report 2018, *Washington D.C*, 29 May 2018, p 30.
[369] *See* pages 32 (§§3-4); 190 (§2); 183 (§5) and 416 (§3) of the 2018 AEO Report, *Washington D.C.*, 29 May 2018.
[370] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 32 §4.

the security forces with the *colectivos*. This contradiction shows that the experts did not bother to seriously investigate the allegations, but rather, as throughout the report, have demonstrated their anti-regime stance.

429. In the case of [EXPURGATED], it is the date of his execution that differs between two paragraphs of the report. In fact, when developing this case in the part dedicated to the "Systematic and Widespread Patterns of Political Persecution", it is indicated that he was shot by the security forces on 19 June 2017[371], but later, when using this case as an example of extrajudicial execution as an element of the crime against humanity, it is stated that [EXPURGATED] was killed on 17 June.[372] This shows that the veracity of the testimonies collected by the Secretary General of the OAS, which apparently have not been verified, can be questioned.

430. Another date inconsistency is demonstrated by the cases of [EXPURGATED] (CICPC officer); [EXPURGATED] (former military counter-intelligence agent); [EXPURGATED] (former police officer of Araguaya State); [EXPURGATED] (brothers and former members of the GNB); [EXPURGATED] (wife [EXPURGATED]); and journalism student [EXPURGATED]. Indeed, with regard to [EXPURGATED]:

> On **January 16, 2016,** Interior Minister Néstor Reverol confirmed the death of [EXPURGATED] during an operation to detain him in the Caracas neighborhood of El Junquito. "*Ante una agresión que pone en riesgo la vida de los funcionarios, se procedió al protocolo para neutralizar al grupo agresor, lamentablemente con el saldo de siete*

[371] OAS Report 2018, *Washington D.C.,* 29 May 2018**, p. 39 §2**: "[EXPURGATED]father described the death of his 17-year-old son [...]. He testified that on **19 June** [EXPURGATED] travelled to Caracas to participate in a peaceful demonstration. ...] Five young people were wounded, including [EXPURGATED] who died shortly after from a gunshot wound to the chest ".

[372] OAS Report 2018, *Washington D.C,* 29 May 2018**, p. 354**: " at 3:30 pm, on **June 17, 2017**, [...], several members of the National Guard unholstered their firearms, aimed them, and fired at the people who were demonstrating. As a result, was that five people were killed, among them [EXPURGATED], who died minutes after [...]".

> *terroristas fallecidos*" said the Minister of Internal Relations, Justice, and Peace. [EXPURGATED] had become famous when **on June 27, 2017,** he took a helicopter, flew to the headquarters of the Ministry of Internal Relations, Justice, and Peace, and fired 15 shots over a party with about 80 guests. He then went to the Supreme Court of Justice, where in addition to firing shots while the Constitutional Chamber was in session, threw at least four grenades. The BBC estimates that the shots and the grenades could have been blanks, since there were no injuries or deaths and material damages was limited[373]. [Emphasis added]

431. This inconsistency reveals, once again, a clear lack of seriousness and professionalism in the drafting of this report.

432. Five consecutive times, the report does not indicate whether the shots that allegedly caused the death of individuals ([EXPURGATED][374], [EXPURGATED][375], [EXPURGATED][376], [EXPURGATED][377] and [EXPURGATED][378]) came from groups of armed civilians or from the police. This information is, however, essential for the search for the truth and the establishment of responsibilities.

[373] OAS Report 2018, *Washington D.C*, 29 May 2018, p. 357 §§2-3.
[374] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 76 §62.
[375] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 76 §66.
[376] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 76 §67.
[377] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 77 §68.
[378] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 77 §70.

433. Likewise, the reliability of the information can also be questioned in the case of [EXPURGATED]. Indeed, the course of events leading to her death varies throughout the report. In the first "version"[379] it is stated that "was exercising her right to peaceful protest" while in the second version[380], the opposite is stated: "*No se encontraba participando de las manifestaciones sino que estaba de pie frente a su vivienda*". Once again, this difference in version shows that the experts have done a superficial job without verifying the facts and their sources.

434. Generally speaking, in many cases, they merely state them, but do not contain any information. Sometimes, only the case of "*4 víctimas masculinas*"[381] is presented, but without any additional information. At the very least, this strategy indicates the lack of seriousness of this report, but one can also question the neutrality of the experts who seem to have added cases without any information in order to increase the number of cases.

435. In several cases, there is no indication of who was responsible for the events or even the institution allegedly responsible. Moreover, in relation to extrajudicial executions and killings, the report often does not indicate whether the shots that have allegedly caused the death of individuals[382] were fired by armed civilian groups or by the police. Such information is, however, essential for the search for the truth and the establishment of responsibilities. On other occasions in relation to cases of torture, the experts have not yet bothered to indicate how long the alleged victims suffered torture and/or inhuman, cruel and degrading treatment.[383]

436. This demonstrates that the conclusions of the experts are biased by an evident

[379] OAS Report 2018, *Washington D.C,* 29 May 2018, p. 83 §100.
[380] OAS Report 2018, *Washington D.C*, 29 May 2018, p. 344 §3.
[381] "4 male victims" [free translation] OAS Report 2018, *Washington D.C.,* 29 May 2018, p. 144 incidence 149.
[382] See for example the cases of [EXPURGATED] (p. 79 §62), [EXPURGATED] (p. 80 §66), [EXPURGATED] (p. 80 §67), [EXPURGATED] (p. 80 §68) and [EXPURGATED] (p. 80 §70).
[383] *See* for example the cases of [EXPURGATED]and [EXPURGATED] (pp. 146-147 incidence 43) ; [EXPURGATED] (pp. 148-149 incidence 46)

partiality.

4) Content of the conclusions of the independent expert panel

437. The panel of independent experts made conclusions by categories of alleged crimes, but also general conclusions.[384]

438. In its "thematic" conclusions, the panel of experts specifies that the conclusions are those of the panel *in light of the* information and witnesses analyzed. Indeed, it often uses the formulation "*Basado en el análisis de los elementos contextuales y los hechos de los crímenes de lesa humanidad, este Panel encuentra que existe* ***fundamento razonable*** *para creer que […]*"[385]; "*A la luz de estas consideraciones, y teniendo en cuenta la escala y el contexto en que tuvieron lugar los asesinatos, este Panel considera que se encuentran presentes los requisitos necesarios para que la Fiscalía investigue […]*"[386]. The expert panel arbitrarily assumes the role of the Office of the Prosecutor of the ICC and uses its own legal terms that apply to the preliminary phase, although they should be limited to fact-finding and examination.

439. However, just as the panel of experts did specify that some are "**alleged**"[387] crimes, the parts relating to other alleged crimes contain no such qualification.[388]

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[384] *See* Part II of the Report "Analysis and Conclusions of the Panel of Independent International Experts to assess whether the situation in Venezuela merits referral to the International Criminal Court", pp. 303-449.

[385] OAS Report 2018, *Washington D.C*, 29 Mayo 2018, p. 348 §3. "Based on the analysis of the contextual elements and the facts of the crimes against humanity, the Panel finds that there are **reasonable grounds** to believe that [...]" [free translation]

[386] OAS Report 2018, *Washington D.C.*, 29 May 2018, p. 348 §2. "In light of these considerations, and mindful of the scale and context in which the murders took place, the Panel considers that the necessary requirements are present for the Office of the Prosecutor to investigate [...]" [free translation]

[387] OAS Report 2018, *Washington D.C*, 29 May 2018, p. 338: "Alleged Crimes against Humanity".

[388] *See* in this regard the headings of the parts relating to the crimes of imprisonment or other severe deprivation of physical liberty (p.348), torture (p.374), rape (p.363), persecution (p.385) or enforced

5) The experts' public statements and track records reflecting their lack of independence

440. Identically as for the UN fact finding mission, in this case, the OAS Report has shown that the experts that are not independent.

441. The Panel of Experts, supposedly impartial and independent, was in reality composed of individuals who already had a predetermined opinion before they began their investigations into the commission of alleged crimes against humanity for the OAS in 2018 and who reflect neither the impartial position they should have, nor respect for the presumption of innocence.

a) Santiago Cantón

442. With regard to Santiago Cantón, he has made many media appearances over the last six years, some of which clearly reflect his position on the Bolivarian Republic of Venezuela, even long before he was selected as a member of the Panel of Independent Experts to draft the 2018 OAS report.

443. For example, in 2015 Mr Cantón had already issued serious accusations against President Maduro and his government, saying:

> In Venezuela (...) there is a permanent persecution of journalists who do not support those in power, and social protests are violently repressed, which have already cost the lives of dozens of people. Since they have not been able to stop the protests, they have imprisoned politicians who express the disenchantment of millions. President Nicolás Maduro, perceiving that the blows to the postman did not prevent reality

disappearance of persons (p.408) which present the facts as if they were judicially established under the relevant articles of the Rome Statute.

> from crossing the border, exported the blows, expelled the international news network NTN24 and threatened prestigious international journalists.[389]

444. He also stated:

> Faced with allegations of human rights violations, both Maduro and Chávez hid behind the shield of sovereignty to reject the accusations. They used the same argument as the dictatorships and authoritarianisms of past decades.[390]

445. These are serious accusations, containing no nuance whatsoever, against the government of a country with respect to which he was later to be appointed as an "independent expert" to analyze whether crimes against humanity had been committed, which makes us question the methodology and seriousness of the selection of such a panel[391], as well as the level of impartiality and independence that should characterize the latter.

446. Moreover, Mr. CANTÓN is completely unaware of the presumption of innocence, when in 2018 he stated the following:

> We knew about the human rights violations (in Venezuela), now we are demonstrating that *they are* crimes against humanity (...). I know that the only thing Maduro and his gang are afraid of is the International Criminal Court in The Hague (...). They are afraid that they will ask for his international arrest. A conviction for

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[389] S. A. CANTÓN, "Pinceladas de censura", *El País - Tribuna*, April 17th, 2015.
Free translation: "En Venezuela […] hay una persecución permanente a los periodistas que no acompañan al poder y se reprimen violentamente las protestas sociales, que ya le han costado la vida a decenas de personas. Como no han podido detener los reclamos, encarcelaron a los políticos que expresan el desencanto de millones. El presidente Nicolás Maduro, percibiendo que los golpes al cartero no impedían que la realidad traspasara la frontera, exportó los golpes, expulsó a la cadena internacional de noticias NTN24 y amenazó a prestigiosos periodistas internacionales".

[390] S. A. CANTÓN, "Venezuela, brujas y demonios", *El País - Tribuna*, April 30th, 2015.
Free translation of: "*Frente a las denuncias de violaciones a los derechos humanos, tanto Maduro como Chávez se escondieron detrás del escudo de la soberanía para rechazar las acusaciones. Usaron el mismo argumento que las dictaduras y autoritarismos de décadas pasadas*".

[391] We recall that there is no transparency regarding the way the Panel members are chosen, *see* section "Origin of the Expert Panel" above.

> crimes against humanity is serious.[392]

447. This is also confirmed when, in 2018, he stated the following:

> [The case is about] a gang of criminals who are robbing and who are killing their people, who are torturing. [393]

448. It is thus clear that Mr. CANTÓN is not fulfilling the functions that an independent expert should have, which respond to the principles of professionalism, independence and that they should not go beyond their mandate and exercise a judging function by affirming the guilt of the Venezuelan rulers from the outset.

b) Manuel VENTURA ROBLES

449. The jurist Manuel Ventura Robles was appointed Costa Rican Minister of Foreign Affairs and Worship from 7 January 2019 to 31 January 2020, during the government of Carlos Alvarado Quesada[394]. As Minister of Foreign Affairs, he was responsable for "*dirigir las relaciones exteriores de la República; celebrar tratados, promulgarlos y ejecutarlos una vez aprobados por la Asamblea Legislativa, y recibir a los Jefes de Estado y los representantes diplomáticos de otras naciones y admitir a sus*

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[392] F. KOBELINSKI, "Santiago Cantón: 'A lo único que le temen Nicolás Maduro y su banda es a la Corte Penal de la Haya'", *Infobae*, February 17th, 2018.
Free translation of: "Sabíamos de las violaciones a los derechos humanos (en Venezuela), ahora estamos demostrando que son delitos de lesa humanidad (…). Yo sé que a lo único que le temen Maduro y su banda es a la Corte Penal Internacional de La Haya (…). Temen que pidan su captura internacional. Es que una condena por delitos de lesa humanidad es grave".

[393] P. LUGONES, "Interview with Santiago Cantón: 'Hay que resolver la crisis en Venezuela sin intervención militar'", *Clarín.com*, 26 February 2019.
Free translation of: "[El caso se trata de] una banda de criminales que está robando y que está matando a su pueblo, que está torturando."

[394] See in this regard: "*Jurista Manuel Ventura Robles es designado Ministro de Relaciones Exteriores de Costa Rica*", *Ministerio de Relaciones Exteriores y Culto - República de Costa Rica*, Asunto administrativo, 8 January 2019, online: https://www.rree.go.cr/?sec=servicios&cat=prensa&cont=593&id=4405.

cónsules"[395]. In this sense, it represents Costa Rica's interests at the international level. It should be recalled that, in November 2018, Costa Rica joined the twelve countries that did not recognize the Maduro government as of 10 January 2019[396]. In this sense, even if the report of the Organization of American States was published a year before this decision of the Costa Rican executive, it shows that Mr. Ventura Robles, by assuming a political position in a country that has such a position towards Maduro, is not neutral.

450. Furthermore, as a judge in the case of *Granier et al. (Radio Caracas Televisión) v. Venezuela,* he issued a dissenting opinion in relation to points 11, 12 and 13 of the majority judgment of 22 June 2015, i.e. in relation to Venezuela's non-violation of the right to a simple and prompt remedy; the guarantees of independence and impartiality in the administrative proceedings for annulment and in the processing of the claim for diffuse and collective interests.

451. In this case, the Inter-American Court of Human Rights (IACHR) declared the Bolivarian Republic of Venezuela responsible for violation of the right to freedom of expression and discrimination. In fact, the Venezuelan state did not renew (by a decision of 28 May 2007) the concession of the channel Radio Caracas Televisión (RCTV). According to the Court, "*Como consecuencia de la decisión, RCTV habría*

[395] "Ministerio de Relaciones Exteriores y Culto de la República de Costa Rica", *Official website - About the Ministry*, [accessed 21 April 2021], online: https://www.rree.go.cr/?sec=ministerio&cat=acerca#. "directing the foreign relations of the Republic; concluding treaties, promulgating and executing them once approved by the Legislative Assembly, and receiving Heads of State and diplomatic representatives of other nations and admitting their consuls" [free translation]

[396] See in this sense: José MELÉNDEZ, "Costa Rica designará canciller a co-autor de co-autor de severo informe de
OAS on Venezuela." *El Universal*, 7 January 2019, online: https://www.eluniversal.com.mx/mundo/costa-rica-designara-canciller-co-autor-de-severo-informe-de-oea on-venezuela; see also: "Costa Rica desconoce la Asamblea ilegítima del régimen y reitera su lucha por la democracia venezolana", *Asamblea Nacional de la República Bolivariana de Venezuela- Centro de comunicación nacional*, 5 January 2021, online: https://presidenciave.com/internacional/costa-rica-desconoce-la asamblea-ilegitima-del-regimen-y-reitera-su-lucha-por-la-democracia-venezolana/

dejado de transmitir como estación de televisión abierta, con un presunto impacto en la libertad de expresión de sus accionistas, directivos y periodistas"[397].

452. In his opinion, he stated that:

> §3. Un punto clave para entender la presente sentencia es la falta de independencia e imparcialidad del
> *Poder Judicial de Venezuela*
>
> *[…]*
>
> *§8. La actuación del Tribunal Supremo contribuyó con la desviación de poder, haciendo uso de una facultad permitida con el objetivo ilegitimo de cooperar con las decisiones tomadas por órganos del Poder Ejecutivo.*
>
> *[…]*[398].

453. As an IACHR judge, Mr. Ventura Robles not only assumed his role of applying legal norms by ensuring that fundamental guarantees are respected but also, in his dissenting opinion, gave his political view on the Venezuelan situation.

454. The observations he made in his dissenting opinion do not appear to show a lack of impartiality on the part of a judge, but only the expression of conclusions. However, taking into account these observations, which were made in 2015, i.e., before the drafting of the OAS report of May 2018, these comments become a factor of bias. Indeed, it should be recalled that, within the role of an independent

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[397] "Factsheet: Granier et al. (Radio Caracas Televisión) v. Venezuela," *Inter-American Court of Human Rights*, [accessed 21 April 2021], online: https://www.corteidh.or.cr/cf/jurisprudencia2/ficha_tecnica.cfm?nId_Ficha=429&lang=es. "As a consequence of the decision, RCTV ceased broadcasting as an open television station, with an alleged impact on the freedom of expression of its shareholders, directors and journalists" [free translation]

[398] IACHR, *Granier et al. (radio Caracas Televisión) v. Venezuela (Preliminary Objections, Merits, Reparations and Costs)*, 22 June 2015, Dissenting opinion of Judge Manuel Ventura Robles, online: https://www.corteidh.or.cr/docs/casos/articulos/seriec_293_esp.pdf, §§3 and 8. "§3. A key point to understand in the present judgment is the lack of independence and impartiality of the Judiciary of Venezuela […] §8. The Supreme Court's actions contributed to the misuse of power, making use of a permitted power with the illegitimate aim of cooperating with decisions taken by organs of the executive branch. […]" [free translation]

international expert, there is also the need to respect the presumption of innocence. Thus, when writing the report in 2018, the Costa Rican jurist already had a determined opinion on the Venezuelan situation.

c) Irwin CORTLER

455. What is most relevant in relation to the Canadian lawyer Irwin CORTLER is his lack of independence, given that he positioned himself as an unconditional defender of the opponent of the MADURO regime, [EXPURGATED], and against the Venezuelan state.[399] Comparing the case of Nelson MANDELA with that of [EXPURGATED].[400]

456. More than a defender, he is part of the defense of [EXPURGATED][401]. It should also be noted that the Canadian Minister of Justice participated in a virtual seminar on International Criminal Justice, organized by the Venezuelan Embassy in Canada[402] appointed by Juan GUAIDÓ. In that panel, the participants "reaffirmed their commitment to the defense of human rights in Venezuela and against impunity". During the seminar,

> Irwin Cotler's proposal was highlighted, suggesting **ten immediate steps to advance global justice**, including taking the regime to the International Court of Justice for

[399] *See* in this regard: Irwin CORTLER, "Political Prisoners - Prisonniers politiques", *Youtube video*, December 4th, 2014.
[400] *Ibid*.
[401] "La maratón más dura de [EXPURGATED]lleva ya 16 meses", *El Universo*, 21 June 2015, online: https://www.eluniverso.com/noticias/2015/06/21/nota/4973365/maraton-mas-dura-tintori-lleva-ya-16 meses/; "Ex presidente uruguayo Lacalle ofrece sumarse a defensa opositores venezolanos", *El Nuevo Herald*, 1ero de abril de 2015, online: https://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela en/article17100074.html
[402] "Ambassador Viera-Blanco: "Venezuela logrará la paz y la libertad duradera de la mano de la justicia internacional"", *Asamblea Nacional de la República Bolivariana de Venezuela- Centro de comunicación nacional*, 23 July 2020, online: https://presidenciave.com/embajadas/embajador-viera-blanco-venezuela-lograra-la paz-y-la-libertad-duradera-de-la-la-mano-de-la-justicia-internacional/

violation of the Anti-Torture and Degrading Treatment treaty.[403]

457. In addition, Mr. CORTLER is also president of the Raoul Wallenberg Centre for Human Rights.[404] As coordinator and founder, he supports, together with Canada, the Centre's initiative, which is concretized in funds for the travel of relatives of Venezuelan political prisoners to lobby the authorities of American and Western Europe. In May 2021, lawyer CORTLER coordinated the trip of [EXPURGATED] and [EXPURGATED] mother to Canada, where they held meetings with Prime Minister Justin Trudeau and congressional lawmakers.

458. This same center recently shared an article from *Foreign Policy* entitled "Recognizing Juan GUAIDÓ as Venezuela's Leader Isn't a Coup. It's an Embrace of Democracy" This shows once again the position of the Raoul Wallenberg Center and, by extension, that of its president and founder.

459. Finally, the jurist received, in May 2016, a Special Award from the National Assembly of Venezuela (GUAIDÓ) for his work defending the freedom of political prisoners in the country.[405]

460. It follows from the above that Irwin CORTLER clearly has a political position that is opposed to the MADURO government. Therefore, he was naturally unable to exercise his mandate as an expert with independence and impartiality.

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[403] "Ambassador Viera-Blanco: "Venezuela logrará la paz y la libertad duradera de la mano de la justicia internacional"", *Asamblea Nacional de la República Bolivariana de Venezuela- Centro de comunicación nacional*, July 23th, 2020.
Free translation of: "*Se destacó la propuesta de Irwin Cotler, quien sugiere* ***diez medidas inmediatas para impulsar la justicia global****, entre ellos, denunciar al régimen ante la Corte Internacional de Justicia por violación del tratado Contra las torturas y tratos denigrantes*."

[404] Raoul Wallenberg Center for Human Rights, Official website, online: https://www.raoulwallenbergcentre.org/irwin-cotler-fr.

[405] Jeremy SHARON, "Venezuelan parliament recognizes Cotler for political-prisoner advocacy", *The Jerusalem Post*, May 21st, 2016.

Attached as ANNEX 13: [EXPURGATED]

461. All of the above evidence was transferred to the ICC Office of the Prosecutor. However, even having established the existence in this Pre-Trial Examination of illegally obtained evidence, and other clearly partial evidence, the ICC Office of the Prosecutor has not ruled on the matter, thus requiring the Pre-Trial Chamber's control over this body of evidence.

462. In view of the above, it is required that the Pre-Trial Chamber, in its judicial review function, determine whether the ICC Office of the Prosecutor may base its considerations on a Pre-Trial Examination of illegally obtained documentation, as well as accept sources of information and allegations that are proven to be partial, and that such judicial review be made within the framework of Art. 15 of the Rome Statute.

FOR THESE REASONS, the Government of the Bolivarian Republic of Venezuela hereby requests the Pre-trial Chamber I of the International Criminal Court to realize a judicial control and:

a) Consider whether the OTP is obliged to respond and develop a constructive dialogue with the State party, in the frame of the complementary check of the preliminary examination and evaluation of the described situation;

b) Consider whether the OTP has to transmit a copy of all statements, documents, testimonies or other pieces of evidentiary material used by the OTP to assess the different phases of the preliminary examination;

c) Consider whether the OTP can base its assessment in the preliminary examination on obviously illegally obtained documents and manifestly partial sources;

Tarek William Saab

Attorney General of the Bolivarian Republic of Venezuela

Date 25 May 2021, expurgated version on July 6, 2021