



# OAS

More rights  
for more people



**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**

Follow-up to the Report of the GSOAS and Panel of Independent  
International Experts on the Possible Commission of Crimes  
Against Humanity in Venezuela

*Washington, D.C., December 2, 2020*



Luis Almagro  
Secretary General  
Organization of American States

By Jared Genser  
Special Adviser on the Responsibility to Protect  
Organization of American States

Produced with the pro bono support of Perseus Strategies, with Brian Tronic,  
Juan Miramontes, Michael Russo, Skylar Gleason, and J. Ulysses Keegan-Lynch, and with the  
support of Christopher Hernández-Roy and Monika Le Roy of the General Secretariat

#### **OAS Cataloging-in-Publication Data**

Organization of American States. General Secretariat.

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 / [prepared by Jared Genser].

v. ; cm. (OAS. Official records ; OEA/Ser.D/XV.23)

ISBN 978-0-8270-7130-8

1. Crimes against humanity--Venezuela. 2. International crimes. 3. Human rights--Venezuela. I. International  
Criminal Court. II. Genser, Jared. III. Title. IV. Series.

OEA/Ser.D/XV.23



**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**

Follow-up to the Report of the GSOAS and Panel of Independent  
International Experts on the Possible Commission of Crimes  
Against Humanity in Venezuela

*Washington, D.C., December 2, 2020*









Inmates from the General Penitentiary of Venezuela, in San Juan de los Morros, are transferred to other prisons in the country after they escaped the hold that gangster Franklin Hernandez, alias "Massacre", had on the prison population, with the consent of the Ministry of Prisons. The inmates who were victims of this terrible violation of their human rights presented symptoms of severe malnutrition, gunshot wounds and the effects of tuberculosis. These photographs were taken towards the end of October 2016, during the transfer from a prison adjacent to this Penitentiary, where they escaped through a hole in the wall, and surrendered to the authorities

of that prison. Despite the prisoners having managed to escape with permission from the authorities and even though I was sent by the news paper for which I worked at the time, Latest News, the photographs were not published and were censored by the Chief of Information, because they were very offensive and they didn't want to show the situation created by the Government, which the newspaper supported. Given the censorship, I published them on my own in online news media.

**Carlos Hernandez**





# TABLE OF CONTENTS

<b>I. EXECUTIVE SUMMARY</b>	<b>17</b>
<b>II. POLITICAL CONTEXT OF THE CRISIS IN VENEZUELA</b>	<b>23</b>
<b>III. LEGAL ANALYSIS OF PROSECUTOR'S PRELIMINARY EXAMINATION</b>	<b>29</b>
A. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though There Are Ongoing, Widespread, and Worsening Crimes	30
1. Ongoing	30
2. Widespread	31
3. Worsening	32
B. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though Credible Information About the Crimes Is Publicly Available	33
C. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though There Are No Credible Domestic Proceedings to Hold Perpetrators Accountable	35
D. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though It Was an Unprecedented Regional Referral by Six States Parties	37
E. The Prosecutor Has Failed to Uphold Her Own Stated Policy Objectives for Preliminary Examinations	37
F. The Prosecutor Has Failed to Comply With the Principles of Impartiality and Objectivity by Understating the Scale and Severity of Some of the Alleged Crimes	41
G. The Prosecutor Has Failed to Follow Through on the Commitments Made in the Strategic Plan of the Office of the Prosecutor 2016–2018 and 2019–2021	44
<b>IV. BACKGROUND ON CONSIDERATION OF POSSIBLE CRIMES AGAINST HUMANITY IN VENEZUELA</b>	<b>47</b>
A. Key Actions Before the International Criminal Court	47
1. Opening of Preliminary Examination	47



2. Referral of the Situation by Six States Parties	47
3. Prosecutor’s 2018 Report on Preliminary Examination Activities	48
4. Prosecutor’s 2019 Report on Preliminary Examination Activities	49
B. General Approach to Preliminary Examinations	50
1. Phase 1: Initial Assessment	50
2. Phase 2: Jurisdiction	51
3. Phase 3: Admissibility	51
4. Phase 4: Interests of Justice	52
5. Timeframe for Review	52
C. Findings of Independent Expert Review	52

## **V. MULTILATERAL INVESTIGATIONS INTO THE SITUATION IN VENEZUELA 61**

A. 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, May 29, 2018	61
B. Human Rights Violations in the Bolivarian Republic of Venezuela: A Downward Spiral With No End in Sight, Office of the UN High Commissioner for Human Rights, June 22, 2018	63
C. Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Bolivarian Republic of Venezuela, July 5, 2019	68
D. Report of the UN High Commissioner for Human Rights on Outcomes of the Investigation Into Allegations of Possible Human Right Violations of the Human Rights to Life, Liberty and Physical and Moral Integrity in the Bolivarian Republic of Venezuela, July 2, 2020	69
E. Report and Detailed Findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, September 16, 2020	72

## **VI. UPDATED ANALYSIS OF ALLEGED CRIMES AGAINST HUMANITY IN VENEZUELA 77**

A. Crimes Against Humanity: Common Elements	77
1. Acts Must Be Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	77

a. There Must Be an Attack_____	77
b. Acts of the Accused Must Be “Part of” the Attack_____	78
c. Attack Must Be Widespread or Systematic_____	78
d. Attack Must Be Directed Against a Civilian Population_____	79
2. The Material Elements Were Committed With Knowledge and Intent_____	79
3. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Against a Civilian Population_____	80
B. Crime Against Humanity of Murder_____	83
1. The Perpetrator Killed One or More Persons_____	83
a. Findings of the 2018 Report of the Organization of American States_____	83
b. New Findings	84
2. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population_____	87
3. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Against a Civilian Population_____	87
C. Crime Against Humanity of Torture_____	88
1. The Perpetrator Inflicted Severe Physical or Mental Pain or Suffering Upon One or More Persons_____	88
a. Findings of the 2018 Report of the Organization of American States_____	88
b. New Findings_____	89
2. Such Person or Persons Were in the Custody or Under the Control of the Perpetrator_____	93
3. Such Pain or Suffering Did Not Arise Only From, and Was Not Inherent in or Incidental to, Lawful Sanctions_____	93
4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population_____	93
5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population_____	94



D. Crime Against Humanity of Imprisonment or Other Severe Deprivation of Physical Liberty	94
1. The Perpetrator Imprisoned One or More Persons or Otherwise Severely Deprived One or More Persons of Physical Liberty	94
a. Findings of the 2018 Report of the Organization of American States	95
b. New Findings	98
2. The Gravity of the Conduct Was Such That It Was in Violation of Fundamental Rules of International Law	100
3. The Perpetrator Was Aware of the Factual Circumstances That Established the Gravity of the Conduct	102
4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	103
5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population	103
E. Crime Against Humanity of Other Inhumane Acts	103
1. The Perpetrator Inflicted Great Suffering, or Serious Injury to Body or to Mental or Physical Health, by Means of an Inhumane Act	104
a. Inflicted	104
b. Great Suffering or Serious Injury	108
i. Findings of the 2018 Report of the Organization of American States	108
ii. New Findings	109
c. The Suffering or Injury Was Inflicted Intentionally	116
d. Inhumane Acts	118
2. Such Act Was of a Character Similar to Any Act Referred to in Article 7(1) of the Statute	120
3. The Perpetrator Was Aware of the Factual Circumstances That Established the Character of the Act	121
4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	121
5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population	121

F. Crime Against Humanity of Enforced Disappearance of Persons _____	122
1. The Perpetrator: (a) Arrested, Detained, or Abducted One or More Persons, or (b) Refused to Acknowledge the Arrest, Detention or Abduction, or to Give Information on the Fate or Whereabouts of Such Person or Persons _____	122
2. (a) Such Arrest, Detention or Abduction Was Followed or Accompanied by a Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons; Or (b) Such Refusal Was Preceded or Accompanied by That Deprivation of Freedom _____	122
a. Findings of the 2018 Report of the Organization of American States _____	122
b. New Findings _____	123
3. The Perpetrator Was Aware That: (a) Such Arrest, Detention or Abduction Would Be Followed in the Ordinary Course of Events by a Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons; Or (b) Such Refusal Was Preceded or Accompanied by That Deprivation of Freedom _____	125
4. Such Arrest, Detention or Abduction Was Carried Out by, or With the Authorization, Support or Acquiescence of, a State or a Political Organization _____	125
5. Such Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons Was Carried Out by, or With the Authorization or Support of, Such State or Political Organization _____	125
6. The Perpetrator Intended to Remove Such Person or Persons From the Protection of the Law for a Prolonged Period of Time _____	125
7. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population _____	126
8. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population _____	127
G. Crime Against Humanity of Rape / Sexual Violence _____	127
1.A Rape: The Perpetrator Invaded the Body of a Person by Conduct Resulting in Penetration, However Slight, of Any Part of the Body of the Victim or of the Perpetrator With a Sexual Organ, or of the Anal or Genital Opening of the Victim With Any Object or Any Other Part of the Body _____	127



1.B Sexual Violence: The Perpetrator Committed an Act of a Sexual Nature of Comparable Gravity to the Other Sexual Crimes Listed in Article 7(1)(G) Against One or More Persons, or Caused Such Person or Persons to Engage in Such an Act	127
a. Findings of the 2018 Report of the Organization of American States	128
b. New Findings	129
2. Sexual Violence: The Perpetrator Was Aware of the Factual Circumstances That Established the Gravity of the Conduct	129
3. The Invasion or Act Was Committed by Force, or by Threat of Force or Coercion, Such as That Caused by Fear of Violence, Duress, Detention, Psychological Oppression or Abuse of Power, Against Such Person or Another Person, or by Taking Advantage of a Coercive Environment, or the Invasion Was Committed Against a Person Incapable of Giving Genuine Consent	130
4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	130
5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population	130
H. Crime Against Humanity of Persecution	131
1. The Perpetrator Severely Deprived, Contrary to International Law, One or More Persons of Fundamental Rights	131
a. Findings of the 2018 Report of the Organization of American States	131
b. New Findings	133
2. The Perpetrator Targeted Such Person or Persons by Reason of the Identity of a Group or Collectivity or Targeted the Group or Collectivity as Such	135
3. Such Targeting Was Based on Political, Racial, National, Ethnic, Cultural, Religious, Gender as Defined in Article 7(3) of the Statute, or Other Grounds That Are Universally Recognized as Impermissible Under International Law	135
4. The Conduct Was Committed in Connection With Any Act Referred to in Article 7(1) of the Statute or Any Crime Within the Jurisdiction of the Court	135
5. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population	136

6. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population	136
---	-----

## **VII. RESPONSIBILITY OF MID-TO HIGH-LEVEL REGIME OFFICIALS** 139

A. Individual Criminal Responsibility	139
B. Command Responsibility	141

## **VIII. CONCLUSION** 145



▲ Like Animals. A group of protesters, mostly students, arrested by security forces and locked-up in the back of a truck to take them to a detention center following an anti-government protest in Caracas. While they were detained, tear gas got in the truck, and when the doors closed, it concentrated the gas.

*El Rosal, Caracas, Venezuela. June 29, 2017.*  
**Anthony Ascer Aparicio**





▲ The Arrest of Luis Theis. Luis Theis, a young artist is arrested on May 18, 2016 during a protest against the government of Nicolas Maduro. He was accused of assaulting a member of the Bolivarian National Police, who was part of the forces repressing demonstrations that day in Caracas. After his violent capture, the Venezuelan artistic community reacted and images of the moment he was attacked by security forces went viral on social media. After a week of intense struggle

against the legal and penal system by his family and legal team, on the morning of Thursday, May 26, Luis Theis was released under precautionary measures. Theis, like Bassil Da Costa and Robert Redman (both murdered) has become a visible and remarkable face of the Venezuelan youth during these times: rebel, victim of persecution, imprisoned, tortured and killed for thinking differently; for demanding and exercising their constitutional rights.

*El Bosque, Caracas, Venezuela. May 18, 2016.*  
**Anthony Ascer Aparicio**



# I. EXECUTIVE SUMMARY

On May 29, 2018, the Organization of American States (OAS) published the *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 (2018 OAS Report)*. After gathering and analyzing a voluminous amount of evidence, including testimony by former regime officials, the Report concluded that there were reasonable grounds to believe crimes against humanity had been committed in Venezuela. Based on recommendations by the Panel of Experts, Secretary General Luis Almagro submitted the Report and evidence collected to the Office of the Prosecutor at the International Criminal Court (ICC), invited states parties to the Rome Statute to refer the situation to the Office of the Prosecutor, and urged the Prosecutor to open an investigation into the crimes against humanity of murder, imprisonment or other severe deprivation of physical liberty, torture, rape, persecution, and enforced disappearance.

Unfortunately, since this Report was published, the alleged crimes against humanity have only broadened in scale and depth, targeting millions of Venezuelans, both directly and indirectly. The regime of Nicolás Maduro continues to repress dissent and attack perceived opponents through excessive force, arbitrary detention, torture, and extrajudicial killings. In addition, the humanitarian crisis created by the regime's intentional policies, which was already severe when the *2018 OAS Report* was published, has gotten even worse – countless thousands have died and widespread starvation is a growing threat. Meanwhile, the regime has not only protected perpetrators from any real accountability, but often promoted them for their loyalty to the regime, especially the high-level officials who are the most culpable.

Despite this horrific suffering, ICC Prosecutor Fatou Bensouda's preliminary examination into the situation in Venezuela,<sup>1</sup> which was originally opened *proprio motu* in February 2018 and was later supported in September 2018 by a referral from Argentina, Canada, Colombia, Chile, Paraguay, and Peru, appears far from reaching any final conclusion, despite nearly three years having elapsed. The Office's preliminary examination just finished the second of four phases – subject-matter jurisdiction – concluding there is a “reasonable basis” to believe that crimes against humanity have occurred. In the third phase, the Office will be focused on the potential admissibility of the situation. Specifically, it will review complementarity – that is, whether the alleged crimes have been examined by the authorities and, if not, if it was because of an unwillingness or inability to do so – and gravity – i.e., whether the alleged crimes are of sufficient gravity to justify further action by the ICC. If the situation is found admissible, the Office will still then need to complete the fourth phase of the preliminary examination, which focuses on whether it is in the interests of justice to open a full investigation.

---

<sup>1</sup> There are currently two separate preliminary examinations being conducted by the Office of the Prosecutor in relation to Venezuela. Except where specifically noted otherwise, whenever this report refers to the preliminary examination of the situation in Venezuela, it is referring to Venezuela I.



While it is understood and appreciated that the Prosecutor must take great care in reviewing evidence, the very slow pace of the review appears utterly unaffected by the widespread, severe, and devastating crimes being committed. As a result, the regime has been emboldened to commit more crimes, in the belief it can act with total impunity. This chart demonstrates the truly appalling scale and depth of the regime's ongoing alleged crimes:

BEST ESTIMATES OF ALLEGED CRIMES AGAINST HUMANITY IN VENEZUELA FROM 2014 – 2020 <sup>2</sup>	
MURDER	<b>18,093</b> murders committed by Venezuelan security forces and paramilitary groups, including extrajudicial killings and the killing of protesters.
TORTURE	<b>653</b> documented cases of torture. The actual number is far higher, as credible reporting alleges many of the thousands of individuals detained have been subjected to torture and ill treatment.
IMPRISONMENT OR OTHER SEVERE DEPRIVATION OF LIBERTY	<b>15,501</b> arbitrary detentions.
OTHER INHUMANE ACTS	Tens of millions subjected to great suffering or serious injury due to the ongoing humanitarian crisis created by the regime, based on statistics on malnutrition, starvation, illness, and lack of access to water and medical care. The crisis has also led to the premature deaths of at least tens of thousands.
ENFORCED DISAPPEARANCE	<b>724</b> enforced disappearances in 2018 and 2019.
RAPE / SEXUAL VIOLENCE	<b>192</b> cases of sexual assault and rape of detainees were reported in the <i>2018 OAS Report</i> , though the actual number is likely higher due to underreporting. Credible sources have reported a continuing pattern of sexual assault and rape against detainees beyond 2018. Sexual violence has also been used as a method of torture.
PERSECUTION	Hundreds of thousands, if not millions, have been persecuted by the regime's intentional and organized policies to deny food and health care to its real or imagined opponents. Moreover, as the <i>2018 OAS Report</i> noted, "the crime of persecution is present in all the crimes discussed".

<sup>2</sup> These are ranges of estimates of specific alleged crimes drawn from credible reports of multilateral organizations, NGOs, and the media. All effort has been taken where possible to avoid double counting between organizations and across time frames. The sources of these estimates can be found in section VI of this report. The breakdown of these estimates are as follows: 1) Murder: 8,292 extrajudicial killings and 131 protest-related deaths reported in the *2018 OAS Report*, three-fourths (5,642) of the 7,523 killings for "resistance to authority" documented in 2018 by *Observatorio Venezolano de Violencia (OVV)* (which were "most[ly]" extrajudicial killings), three-fourths (1,593) of the 2,124 killings for "resistance to authority" documented from January 1, 2019 to May 19, 2019 by OVV ("many" of which were extrajudicial executions), 57 new killings identified by the NGO *Monitor de Víctimas* in July 2019, 1,324 killings in the context of security operations between January 1 and May 31, 2020 according to a July 2020 OHCHR report (432 by the Special Action Forces (FAES), 366 deaths by the Bureau for Scientific, Criminal, and Forensic Investigations (CICPC), 136 deaths by the Bolivarian National Guard, and 124 deaths by the State police forces of Zulia), 343 new cases of presumed executions committed by members of the FAES in Caracas from August to December 2019 (*Monitor de Víctimas*), 711 killings in the context of security operations between June and August 2020 reported by the OHCHR; 2) Torture: 653 cases reported by Tamara Suju, CASLA Executive Director, August 2020; 3) Imprisonment or Other Severe Deprivation of Liberty: 15,501 arbitrary detentions according to *Crisis en Venezuela: Bulletin No. 140* by Foro Penal et al. in July 2020; 4) Enforced disappearance: data provided by *Foro Penal* and Robert F. Kennedy Human Rights in a report entitled *Enforced Disappearance as a Tool of Political Repression in Venezuela*, published June 2020; 5) Rape/ Sexual Violence: 192 cases of rape and sexual violence were identified in the *2018 OAS Report*; however, reporting by the Office of the UN High Commissioner for Human Rights (OHCHR) in 2018 and 2019 describes incidents of rape and sexual violence against detainees without a specific victim count, indicating a continued pattern of sexual violence that has likely resulted in a victim count significantly above 192; 6) Persecution: from the *2018 OAS Report*.

The Office of the Prosecutor has received numerous reports from multilateral organizations and NGOs, in addition to the *2018 OAS Report*, highlighting these statistics, concluding that crimes against humanity have been committed in Venezuela, and urging the Office of the Prosecutor to open an investigation into these crimes. Despite this, in December 2019, the Office of the Prosecutor said publicly in relation to concluding its preliminary examination:

*“We would like to proceed faster but do not want to jump to conclusions”.*

**Xabier Agirre**

Head of Investigative Analysis Section

Office of the Prosecutor, International Criminal Court<sup>3</sup>

Despite this characterization, it must be emphasized that ICC Prosecutor Bensouda is not being asked in any way to render conclusions about any specific allegations of crimes against humanity or to recommend any specific indictments against alleged perpetrators, but rather simply to decide, after nearly three years of effort, whether there is sufficient information “to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation”.<sup>4</sup> The Prosecutor alone has the authority to make this decision right now because of the multistate referral. In light of the enormous amount of information from credible sources that the Office of the Prosecutor has received relating to the commission of crimes against humanity in Venezuela, Mrs. Bensouda’s delay in simply opening a formal investigation into these crimes is inexplicable.

It bears emphasizing that, in addition to committing violations of international law that fall under the ICC’s jurisdiction, Venezuela is also violating a commitment it made at the 2005 UN World Summit. Under the Responsibility to Protect (R2P), which was adopted unanimously by the UN General Assembly in the World Summit Outcome Document, each state has an individual responsibility to protect its population from mass atrocity crimes, including genocide, war crimes, ethnic cleansing, and crimes against humanity.<sup>5</sup> The Maduro regime has consistently demonstrated that it is manifestly unwilling and/or unable to uphold this sovereign responsibility as it is the author of crimes against humanity. But R2P also mandates that “the international community should, as appropriate, encourage and help States to exercise this responsibility”.<sup>6</sup> As the OAS is comprised of states that have all agreed to uphold the Responsibility to Protect, it also has its own role to play in preventing and responding to mass atrocity crimes in the region.

---

<sup>3</sup> Xabier Agirre made this comment this during a panel discussion on potential crimes against humanity in Venezuela held at The Hague on December 6, 2019. See PILPG: *ASP18 Side Event: Paths to Justice and Accountability for Venezuela: Ongoing Initiatives by the International Community*, December 8, 2019, available at: <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2019/12/8/asp18-side-event-paths-to-justice-and-accountability-for-venezuela-ongoing-initiatives-by-the-international-community>.

<sup>4</sup> International Criminal Court Office of the Prosecutor: *Policy Paper on Preliminary Examinations*, November 2013, par. 2, available at: [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf).

<sup>5</sup> 2005 World Summit Outcome Document, G.A. Res. 60/1, U.N. Doc. A/RES/60/1, adopted September 16, 2005, pars. 138 to 140, available at [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_60\\_1.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf).

<sup>6</sup> *Ibidem*, par. 138.

This new report both carefully analyzes the Prosecutor’s delay in completing the preliminary examination and provides a detailed update to the *2018 OAS Report*.

First, it provides an overview of the deteriorating political, economic, and humanitarian crises in Venezuela.

Second, it compares the situation in Venezuela to other situations currently under preliminary examination and explains why the ICC Prosecutor should prioritize and expedite the preliminary examination regarding the situation in Venezuela. In fact, Mrs. Bensouda’s failure to conclude the preliminary examination and to open a formal investigation into the situation in Venezuela is as stunning as it is inexplicable because the lengthy delay has occurred despite the situation meeting all the relevant criteria that should have enabled a faster review. Specifically, there is an urgency because there are ongoing, widespread, and worsening crimes; credible information about the crimes is publicly available; there are no credible or proportional domestic proceedings to hold perpetrators accountable; the situation was an unprecedented regional referral by six states parties, thus eliminating the Prosecutor’s need for approval from the ICC Pre-Trial Chamber to begin a formal investigation; and the Prosecutor’s stated policy objectives would be promoted by proceeding to a formal investigation. This report also argues that the Prosecutor has failed to comply with two of her stated general principles for conducting preliminary examinations. And it explains that the failure to move expeditiously to a full investigation is contrary to the Prosecutor’s last two strategic plans for her Office.

Third, the report provides background information on the consideration of possible crimes against humanity in Venezuela, including the key actions that have already occurred before the ICC, the Prosecutor’s stated approach to preliminary examinations, and a brief summary of findings about the Office of the Prosecutor made by the Independent Expert Review, which was created by the Assembly of States Parties in December 2019.

Fourth, the report discusses other multilateral investigations that have been initiated since May 2018 by the OAS, the Office of the UN High Commissioner for Human Rights (OHCHR), the UN Human Rights Council, and the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, established by the Human Rights Council in September 2019.

Fifth, for each specific crime against humanity, the report summarizes the evidence presented in the *2018 OAS Report*, provides additional evidence that has been published since then, and expands upon the legal analysis in the original report.

And sixth, the report discusses two bases for criminal liability under the Rome Statute – chain-of-command and command responsibility – and how they may apply to regime officials.

The report concludes that ICC Prosecutor Bensouda should issue a statement about the deteriorating situation in Venezuela, complete her preliminary examination of the situation, and announce that she will proceed to undertake a formal investigation as expeditiously as possible. In light of the Maduro regime’s new self-referral to the ICC, claiming it is a victim of “unlawful coercive measures”, that it alleges have resulted in



the commission of mass atrocity crimes, she should request immediate, full, and open access to Venezuela to gather evidence in relation to all preliminary examinations underway. Further, this investigation should include, in addition to the crimes already being examined, the crime of other inhumane acts and all crimes against humanity committed since at least February 2014.



## II. POLITICAL CONTEXT OF THE CRISIS IN VENEZUELA

Once a highly prosperous and democratic state in Latin America, Venezuela today is among the poorest and most unstable countries in the region. Despite the lofty ambitions of former President Hugo Chávez (1999–2013) – who aimed to improve Venezuelans’ quality of life through ambitious, socialist projects<sup>7</sup> – his social and economic policies led to a deterioration of living standards and elimination of many civil and political rights. Towards the end of his presidency, inflation,<sup>8</sup> corruption,<sup>9</sup> shortages,<sup>10</sup> and violent crimes<sup>11</sup> were on the rise; intimidation of the media was rampant<sup>12</sup>; and judicial independence had been effectively eliminated.<sup>13</sup> Nicolás Maduro, who was narrowly elected President in 2013, has largely continued the repressive policies of his predecessor. Over the past seven years, the Maduro regime has established control over all aspects of Venezuelan society – it has dismantled Venezuela’s democratic institutions, consolidated government power in the Executive branch, and forcefully cracked down on dissent.<sup>14</sup> As the *2018 OAS Report* noted, the regime has attacked journalists; violently repressed protestors; and arbitrarily imprisoned, tortured, disappeared, or killed thousands of its opponents.<sup>15</sup>

The Maduro regime has intensified this pattern of repression during periods of widespread anti-government demonstrations. Between February and May 2014, for example, it cracked down on mass protests that began in response to the high levels of inflation and insecurity and scarcity of basic goods in the country.<sup>16</sup> Further, between April and July 2017, it unleashed a new wave of repression as popular protests broke out in response to regime’s attempts to nullify and replace the Opposition-led National

---

7 “Socialism After Chavez: Political Divisions Deepen Amid Unrest in Venezuela”, *PBS Newshour*, April 18, 2014, available at: <https://www.pbs.org/newshour/show/socialism-chavez-political-divisions-deepen-amid-unrest-venezuela>.

8 Matthew Walter: “Chávez Price Controls Mean Record Oil Fails to Prevent Shortage”, *Bloomberg*, May 23, 2008, available at: <https://agoracom.com/ir/Crystallex/forums/off-topic/topics/231497-bloomberg-chavez-price-controls-mean-record-oil-fails-to-prevent-shortage/messages/839941>.

9 Gustavo Coronel: “The Corruption of Democracy in Venezuela”, *CATO Institute*, March 4, 2008, available at: <http://www.cato.org/publications/commentary/corruption-democracy-venezuela>.

10 “Chávez Price Controls Mean Record Oil Fails to Prevent Shortage”, *supra* note 8.

11 Manuel Rueda: “How Did Venezuela Become So Violent?”, *Splinter News*, January 8, 2014, available at: <https://splinternews.com/how-did-venezuela-become-so-violent-1793840552>.

12 Human Rights Watch: *World Report 2012*, pages 279 to 80, available at: <http://www.hrw.org/sites/default/files/reports/wr2012.pdf>.

13 Human Rights Watch: *World Report 2009*, page 201, available at: [https://www.hrw.org/sites/default/files/world\\_report\\_download/wr2009\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/world_report_download/wr2009_web_1.pdf).

14 Organization of American States: *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*, May 29, 2018, page 9, available at: <http://www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf> [hereinafter, *2018 OAS Report*].

15 *Ibidem*, pages x, xiii, 8 and 9.

16 “What Lies Behind the Protests in Venezuela”, *BBC News*, March 27, 2014, available at: <https://www.bbc.com/news/world-latin-america-26335287>.



Assembly, including through Supreme Court rulings and the unconstitutional election of a constituent assembly loyal to the regime.<sup>17</sup>

In addition to this repression, the regime has inflicted suffering on the Venezuelan people by devastating Venezuela's economy. Through its corruption and disastrous economic policies, it has plunged the country into an unprecedented humanitarian crisis – among the worst disasters ever seen outside of an armed conflict.<sup>18</sup> For example, since 2014, corruption and mismanagement in the oil sector have led to oil production dropping to a 75-year low<sup>19</sup>; as a result, oil revenues – accounting for 95 percent of Venezuela's export earnings – have tanked.<sup>20</sup> Due to the lack of foreign exchange, imports have fallen, leading to widespread shortages of basic goods.<sup>21</sup> Further, instead of engaging in fiscal reform to resolve its economic woes, the cash-strapped regime has resorted to mass-printing money, resulting in catastrophic hyperinflation.<sup>22</sup> When the *2018 OAS Report* was published in May 2018, inflation had reached several thousand percent; there were acute shortages of essential medicines and food; and over three-fourths of Venezuelans were living in poverty, with millions only able to afford one meal a day.<sup>23</sup>

In the midst of this turmoil, the Maduro regime proceeded to hold presidential elections on May 20, 2018. However, as the *2018 OAS Report* noted, these elections were neither free nor fair. To ensure Maduro's victory, his regime committed egregious electoral violations – it imprisoned, forced into exile, or banned most popular opposition leaders from participating in the elections, and attempted to buy votes with government handouts.<sup>24</sup> Prior to the elections, the Inter-American Commission on Human Rights expressed “profound concern over the lack of the minimum necessary conditions to hold free, fair and trustworthy elections in Venezuela”.<sup>25</sup> Maduro was declared the winner on May 20, though the elections featured a very high voting abstention rate.<sup>26</sup>

---

17 Jason Hanna and Sarah Faidell: “UN: Venezuelan Protesters Endure Excessive Force, Other Rights Violations”, *CNN*, August 8, 2017, available at: <https://www.cnn.com/2017/08/08/americas/venezuela-unrest/index.html>.

18 Anatoly Kurmanav: “Venezuela's Collapse Is the Worst Outside of War in Decades, Economists Say”, *New York Times*, May 17, 2019, available at: <https://www.nytimes.com/2019/05/17/world/americas/venezuela-economy.html>.

19 Gideon Long and John Paul Rathbone: “Venezuela: Oil Producer's Slump Reflects Nation's Decline”, *Financial Times*, October 28, 2018, available at: <https://www.ft.com/content/d9be69d6-d7b0-11e8-ab8e-6be0dcf18713>.

20 Transparencia Venezuela: *Gran Corrupción y Derechos Humanos*, March 2019, page 20, available in Spanish at: <https://transparencia.org.ve/wp-content/uploads/2019/03/Informe-Gran-corrupcio%CC%81n-y-derechos-humanos-TV-28.03.2019-1.pdf>.

21 *2018 OAS Report*, *supra* note 14, page 6 (“Government price controls, combined with a lack of access to hard currency to import basic goods have caused massive shortages in both food and medical supplies that has had a devastating impact on the population”).

22 Sebastian Boyd: “Venezuelan Money Supply is Surging at the Fastest Pace on Record”, *Bloomberg*, February 5, 2019, available at: <https://www.bloomberg.com/news/articles/2019-02-05/venezuela-prints-money-at-fastest-pace-ever-in-sign-of-panic>.

23 *2018 OAS Report*, *supra* note 14, pages 5 to 7.

24 *2018 OAS Report*, page 12; see also: Nicholas Casey and William Neuman, “‘I Give and You Give’: Venezuela's Leader Dangles Food for Votes”, *New York Times*, May 18, 2018, available at: <https://www.nytimes.com/2018/05/18/world/americas/venezuela-election-president-maduro-food.html>.

25 Inter-American Commission on Human Rights: *IACHR Warns About Lack of Adequate Conditions to Hold Free and Fair Elections in Venezuela*, Press Release, May 18, 2018, available at: [https://www.oas.org/en/iachr/media\\_center/PReleases/2018/112.asp](https://www.oas.org/en/iachr/media_center/PReleases/2018/112.asp).

26 “Elecciones en Venezuela: Nicolás Maduro Gana las Presidenciales Según el Consejo Nacional Electoral y Henri Falcón Cuestiona el Resultado”, *BBC News*, May 21, 2018, available in Spanish at: <https://www.bbc.com/mundo/noticias-america-latina-44192065>.

The international community widely condemned Maduro's purported re-election, with the OAS, over 50 countries, and Venezuela's National Assembly – its last remaining democratically-elected institution – refusing to recognize the results and demanding Maduro hold new elections.<sup>27</sup> On January 10, 2019, shortly after Maduro proceeded to take the oath of office to begin a second term, the Permanent Council of the OAS adopted a resolution “[t]o not recognize the legitimacy of Nicolás Maduro's new term as of the 10<sup>th</sup> of January of 2019”.<sup>28</sup>

Meanwhile, Venezuela's National Assembly turned to the country's Constitution to resolve the political crisis. It adopted a resolution on January 15, 2019, officially declaring that Maduro – whom the National Assembly had previously found to have abandoned his constitutional duties and position as President – was usurping the Venezuelan presidency.<sup>29</sup> And it voted to invoke Article 233 of the Venezuelan Constitution, which instructs the President of the National Assembly to “take charge of the Presidency” when an elected President “abandon[s]” his position”. On this basis, Juan Guaidó, the President of the National Assembly, was sworn into office as interim President of Venezuela on January 23, 2019.<sup>30</sup>

To date, the OAS and nearly 60 countries have recognized Guaidó as the leader of the legitimate Government of Venezuela.<sup>31</sup> However, Maduro still holds effective control over much of the country's economy and governmental apparatus, including the military and the judiciary, and continues to oppress the Venezuelan people.<sup>32</sup> Though Guaidó has undertaken significant steps to mitigate the ongoing humanitarian crisis in the country and ease the suffering of his people, the Maduro regime has thwarted many of these efforts. On February 23, 2019, for example, the regime prevented truckloads of humanitarian aid at Venezuela's international borders from entering the country.<sup>33</sup>

The situation in Venezuela remains dire. Poverty, hyperinflation, and disease are rampant, and there are severe shortages. In recent years, the number of Venezuelan refugees and migrants fleeing the crisis has skyrocketed – as of October 2020, the number of Venezuelan refugees and migrants is estimated to be 5.5 million,<sup>34</sup> making Venezuelans “one of the single largest population groups displaced from their

---

<sup>27</sup> Center for Strategic and International Studies: *Venezuela's Presidential Crisis and the Transition to Democracy*, January 25, 2019, available at: <https://www.csis.org/analysis/venezuelas-presidential-crisis-and-transition-democracy>.

<sup>28</sup> Organization of American States: *OAS Permanent Council Agrees “to Not Recognize the Legitimacy of Nicolas Maduro's New Term”*, Press Release, January 10, 2019, available at: [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-001/19](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-001/19).

<sup>29</sup> Asamblea Nacional de la República Bolivariana de Venezuela: *Acuerdo Sobre la Declaratoria de Usurpación de la Presidencia de la República por Parte de Nicolás Maduro Moros y el Restablecimiento de la Vigencia de la Constitución*, January 15, 2019, available in Spanish at: <https://www.asambleanacionalvenezuela.org/actos/detalle/acuerdo-sobre-la-declaratoria-de-usurpacionde-la-presidencia-de-la-republica-por-parte-de-nicolas-maduro-moros-y-el-restablecimiento-de-la-vigenciade-la-constitucion-331>.

<sup>30</sup> Perseus Strategies: *Legal Analysis Explaining Why Juan Guaidó Holds a Unique and Legitimate Claim to the Presidency of Venezuela*, May 2019, available at: <https://www.perseus-strategies.com/wp-content/uploads/2019/05/Juan-Guaido-Legitimacy-Legal-Analysis.pdf>.

<sup>31</sup> “More Than 50 Countries Support Venezuela's Juan Guaidó”, *ShareAmerica*, November 15, 2019, available at: <https://share.america.gov/support-for-venezuelas-juan-guaido-grows-infographic/>.

<sup>32</sup> Anatoly Kurmanaev and Ana Vanessa Herrero: “Venezuela's Maduro Trains Sights on Opposition's Last Bastion: Congress”, *New York Times*, September 16, 2019, available at: <https://www.nytimes.com/2019/09/16/world/americas/venezuela-maduro-congress.html>.

<sup>33</sup> Nicholas Casey, Albinson Linares and Anatoly Kurmanaev: “Some Aid from Brazil Pierces Venezuela's Blockade, But Deadly Violence Erupts”, *New York Times*, February 23, 2019, available at: <https://www.nytimes.com/2019/02/23/world/americas/venezuela-aid-border-maduro.html>.

<sup>34</sup> R4V: *Venezuelan Refugees and Migrants' Figures Update*, October 2020, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/Explanatory%20Note\\_%20Population%20figures%20as%20of%20October%202020.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Explanatory%20Note_%20Population%20figures%20as%20of%20October%202020.pdf).

country”.<sup>35</sup> Meanwhile, security forces loyal to Maduro continue to commit gross human rights abuses with impunity, and the regime has cracked down on political opponents and dissenters with renewed force, particularly following an attempted uprising against Maduro in April 2019.<sup>36</sup>

The political situation also remains tumultuous. Desperate to hold onto power, Maduro now seeks to control the National Assembly – Venezuela’s only remaining political body with democratic legitimacy. On June 12, 2020, Venezuela’s Supreme Court named new leaders to the National Electoral Council, the board tasked with overseeing legislative elections.<sup>37</sup> The Supreme Court does not have authority to name officials to the Council, as the Constitution delegates that power to the legislature; at the time of the announcement, legislators protested, saying they were in the process of naming the leadership of the Council.<sup>38</sup> Days later, the Supreme Court suspended the leadership of two opposition political parties. The board of directors for the Justice First party and Democratic Action party were replaced as part of a “necessary restructuring process”, according to the Court’s rulings.<sup>39</sup> On July 7, the Supreme Court ordered the takeover of Popular Will, the party of Juan Guaidó, removing founder Leopoldo López as the party’s leader.<sup>40</sup>

On July 1, 2020, authorities in Venezuela announced that elections would be held on December 6th to fill 277 seats in the National Assembly – an increase of 110 seats from the body’s current capacity of 167 – which has been seen as an attempt to pack the legislature.<sup>41</sup> The upcoming December elections have been roundly and preemptively condemned as fraudulent and failing to meet international standards for free and fair elections. For example, following the European External Action Service’s visit to Venezuela in September 2020, the mission concluded that the European Union would not send an electoral observation mission to monitor the December elections:

The conditions are not currently there for a free, fair and democratic electoral process to take place. The possibility of postponing the legislative elections in order to open a space for dialogue and change those conditions was discussed. Without a postponement and an improvement in

---

<sup>35</sup> UN High Commissioner for Refugees: *Refugees and Migrants from Venezuela Top 4 Million: UNHCR and IOM*, June 7, 2019, available at: <https://www.unhcr.org/en-us/news/press/2019/6/5cfa2a4a4/refugees-migrants-venezuela-top-4-million-unhcr-iom.html>.

<sup>36</sup> CASLA Institute: *Tortura Sistemática en Venezuela 2019 y la Participación de Cubanos en los Patrones de Tortura*, December 12, 2019, page 12, available in Spanish at: <http://www.oas.org/fpdb/press/Informe-tortura-CASLA-2019.pdf>.

<sup>37</sup> “Venezuela Top Court Names New Electoral Council, Opposition Defiant”, *Reuters*, June 12, 2020, available at: <https://www.reuters.com/article/us-venezuela-politics/venezuela-top-court-names-new-electoral-council-opposition-defiant-idUSKBN23J39T>.

<sup>38</sup> *Ibidem*.

<sup>39</sup> “Venezuela Court Orders Takeover of 2 Major Opposition Political Parties”, *New York Times*, June 16, 2020, available at: <https://www.nytimes.com/2020/06/16/world/americas/venezuela-maduro-supreme-court.html>.

<sup>40</sup> Fabiola Sanchez and Christine Armario: “Venezuela High Court Orders Takeover of Guaidó’s Party”, *Associated Press*, July 7, 2020, available at: <https://apnews.com/article/69e0e1d9f1e987e6b26221e91991a26d>.

<sup>41</sup> “Venezuela to Boost Number of Legislators in National Assembly in 2021”, *Reuters*, June 30, 2020, available at: <https://www.reuters.com/article/us-venezuela-politics/venezuela-to-boost-number-of-legislators-in-national-assembly-in-2021-idUSKBN2423X4>.



the democratic and electoral conditions, the EU cannot consider sending an electoral observation mission.<sup>42</sup>

At its fiftieth General Assembly on October 21, 2020, the OAS adopted a resolution condemning “in the most implacable terms” the actions the Maduro regime has taken to undermine the democratic system.<sup>43</sup> The resolution explicitly indicates that the regime’s actions “compromise[] the minimum conditions for guaranteeing the organization of democratic electoral processes in keeping with international standards”.<sup>44</sup>

As long as the Maduro regime manages to maintain its hold on power, the beleaguered Venezuelan population will continue suffering, and countless lives will be lost. This extraordinary situation confers upon the OAS, United Nations, ICC, and international community at large the responsibility to hold the Maduro regime accountable and to protect the rights of the Venezuelan people.

---

<sup>42</sup> European Union External Action: *Venezuela: Press Release on EU Dialogue with Stakeholders in Caracas*, Press Release, September 30, 2020, available at: <https://eeas.europa.eu/headquarters/headquarters-homepage/86152/venezuela-press-release-eu-dialogue-stakeholders-caracas-en>.

<sup>43</sup> Organization of American States: *The Lack of Minimum Democratic Conditions to Guarantee Free, Fair, and Transparent Elections in the Bolivarian Republic of Venezuela*, AG/doc.5712/20 rev. 1, adopted October 21, 2020, par. 1, available at: [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=S-018/20](https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-018/20).

<sup>44</sup> *Ibidem*.



### III. LEGAL ANALYSIS OF PROSECUTOR'S PRELIMINARY EXAMINATION

This report highlights five shortcomings in ICC Prosecutor Fatou Bensouda's preliminary examination of the situation in Venezuela.<sup>45</sup>

First, there has been an unwarranted delay. The preliminary examination was opened on February 8, 2018,<sup>46</sup> but in the nearly three years since, there has been no information as to when the Prosecutor might conclude the preliminary examination and proceed to begin a formal investigation.<sup>47</sup> The ICC Prosecutor's *Policy Paper on Preliminary Examinations* explains: "No provision in the [Rome] Statute or the [ICC's] Rules establishes a specific time period for the completion of a preliminary examination".<sup>48</sup> This allows preliminary examinations to be "adjusted to the specific features of each particular situation", including "the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes".<sup>49</sup> Yet all of these factors weigh in favor of the situation in Venezuela receiving prioritized and expedited review – the crimes are ongoing and worsening, there is widespread, credible information available, and there are no proportional or credible domestic proceedings against the perpetrators.

Second, an expedited review of the situation in Venezuela is further warranted because it is, in the Prosecutor's own words, the "first referral submitted by a group of States Parties concerning a situation on the territory of another State Party".<sup>50</sup>

---

<sup>45</sup> To be clear, the focus of this report is on the preliminary examination which began on February 8, 2018. On February 13, 2020, the Office of the Prosecutor received a referral from the Maduro regime relating to what it alleged were crimes against humanity committed "as a result of the application of unlawful coercive measures adopted by the Government of the United States against Venezuela, at least since the year 2014". International Criminal Court: *Preliminary Examination: Venezuela II*, available at: <https://www.icc-cpi.int/venezuelall>.

<sup>46</sup> International Criminal Court Office Of The Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and in Venezuela*, Press Release, February 8, 2018, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>.

<sup>47</sup> The Prosecutor's *Report on Preliminary Examination Activities 2019* did state that she expected to complete her assessment of subject-matter jurisdiction (Phase II) in early 2020. International Criminal Court Office of the Prosecutor: *Report on Preliminary Examination Activities 2019*, December 5, 2019, par. 83, available at: <https://www.icc-cpi.int/itemsDocuments/191205-rep-otp-PE.pdf> [hereinafter, *Report on Preliminary Examination Activities 2019*]. A November 2020 press release further indicated that, as of that date, the preliminary examination was in Phase III. International Criminal Court Office of the Prosecutor: *ICC Prosecutor, Mrs Fatou Bensouda, Receives High-Level Delegation From the Bolivarian Republic of Venezuela in the Context of Its Ongoing Preliminary Examinations*, Press Release, November 5, 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1544>. However, there is no indication of how long Phases III and IV are expected to take.

<sup>48</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 89.

<sup>49</sup> *Ibidem*.

<sup>50</sup> International Criminal Court Office Of The Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Referral by Group of Six States Parties Regarding the Situation in Venezuela*, Press Release, September 27, 2018, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180927-otp-stat-venezuela>.

Third, the preliminary examination has failed to comply with the Prosecutor’s own stated policy objectives for conducting a preliminary examination – ending impunity, prevention, and transparency.

Fourth, in conducting the preliminary examination of the situation in Venezuela, the Prosecutor has failed to comply with the overarching principles of impartiality and objectivity. Specifically, the Prosecutor’s *2019 Report on Preliminary Examination Activities* underreported the scale and severity of some of the alleged crimes, raising serious questions about the Office ignoring credible evidence and its intention to prosecute fully the crimes against humanity in Venezuela falling within the ICC’s jurisdiction.

And finally, the Prosecutor has failed to follow through on commitments made in her Office’s last two Strategic Plans, which emphasized that preliminary examinations can include preventive activities, such as public statements, and should be carried about in an expeditious manner.

## A. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though There Are Ongoing, Widespread, and Worsening Crimes

### 1. Ongoing

As detailed in Section VI of this report, Venezuelan security forces and armed civilian groups operating alongside them continue to commit crimes against humanity to this day.

For example, in March 2019, nine UN Special Procedures issued a joint statement noting that the “ongoing crackdown on [demonstrators] has reportedly resulted in a dramatic rise in arbitrary detentions, killings, raids and torture”.<sup>51</sup> In July 2019, the UN Working Group on Enforced or Involuntary Disappearances stated that “it continues to receive cases reflecting a pattern of short-term enforced disappearances of political opponents or persons perceived as such, and their relatives, and peaceful protesters in the Bolivarian Republic of Venezuela”.<sup>52</sup> On September 9, 2019, UN High Commissioner for Human Rights Michelle Bachelet said that extrajudicial killings appeared to be continuing in Venezuela and the Special Action Forces (FAES) presumed to be responsible had received support from the highest levels of the regime.<sup>53</sup> Data from *Foro Penal* confirms that arbitrary arrests and detention continue – as of October 31,

---

<sup>51</sup> Office of the UN High Commissioner for Human Rights: *Venezuela: UN Experts Condemn Widespread Rights Violations Reported During Protests*, March 21, 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24386&LangID=E>.

<sup>52</sup> UN Human Rights Council: *Report of the UN Working Group on Enforced or Involuntary Disappearances*, U.N. Doc. A/HRC/42/40, July 30, 2019, par. 90, available at: <https://undocs.org/A/HRC/42/40>.

<sup>53</sup> Michelle Bachelet, UN High Commissioner for Human Rights: *Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela*, September 9, 2019, available at: <https://www.derechos.org/ve/actualidad/oral-update-on-the-human-rights-situation-in-the-bolivarian-republic-of-venezuela> [hereinafter, *2019 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela*].



2018, the organization had documented a cumulative 12,871 arbitrary detentions, but by July 3, 2020, that number was 15,501.<sup>54</sup> In September 2020, the Independent International Fact-Finding Mission reported that “[i]n 2020, health workers and social media users critical of the Government’s response to the Covid-19 pandemic were also detained”.<sup>55</sup>

The ongoing nature of the alleged crimes being examined distinguishes the situation in Venezuela from most of the other situations currently under preliminary examination. For example, the alleged crimes under preliminary examination in Colombia,<sup>56</sup> Guinea,<sup>57</sup> Iraq/UK,<sup>58</sup> Bolivia,<sup>59</sup> and the Philippines<sup>60</sup> are either not ongoing or mostly not ongoing. Therefore, only the situations in Nigeria, Palestinian Territories, and Ukraine, are comparable to the situation in Venezuela in that alleged crimes central to the preliminary examination are ongoing and the Prosecutor has not yet requested the Pre-Trial Chamber to authorize a formal investigation.

## 2. Widespread

The scale of the alleged crimes in Venezuela is significantly larger than that in any of the other situations currently under preliminary examination. In particular, as discussed in more detail in Section VI, the regime has weaponized basic resources such as food and medicine and used them as tools of persecution. The results have been staggering – the World Food Programme has found that 9.3 million people (roughly one-third of Venezuela’s population) suffer from moderate or severe food insecurity.<sup>61</sup>

---

<sup>54</sup> Foro Penal: *Reporte Sobre La Represión en Venezuela: Septiembre y Octubre de 2018*, page 6, available in Spanish at: <https://foropenal.com/reportesobre-la-represion-en-venezuela-septiembre-octubre-2018/>; see also: Foro Penal et al.: *Crisis en Venezuela: Boletín No. 140 del 29 de Junio al 6 de Julio de 2020*, page 6, available in Spanish at: <https://crisisenvenezuela.com/wp-content/uploads/2020/07/Bolet%C3%ADn-140-Crisis-En-Venezuela-ES-B.pdf> [hereinafter, *Crisis en Venezuela: Boletín No. 140*]; see also Foro Penal et al.: *Crisis en Venezuela: Boletín No. 107 del 14 al 21 de Octubre de 2019*, page 2, available in Spanish at: <https://foropenal.com/crisis-en-venezuela-boletin-no-107-del-14-al-21-de-octubre/> [hereinafter, *Crisis en Venezuela: Boletín No. 107*].

<sup>55</sup> UN Human Rights Council: *Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela*, U.N. Doc. A/HRC/45/33, September 16, 2020, par. 23, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A\\_HRC\\_45\\_33\\_AUV.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_33_AUV.pdf) [hereinafter, *2020 Fact-Finding Mission Report*].

<sup>56</sup> The preliminary examination regarding Colombia is focused on “alleged crimes against humanity and war crimes committed in the context of the armed conflict between and among government forces, paramilitary armed groups and rebel armed groups”. International Criminal Court: *Preliminary Examination: Colombia*, accessed October 31, 2019, available at: <https://www.icc-cpi.int/colombia>. But the government reached a peace agreement with the FARC-EP in 2016, and initiated peace negotiations with the ELN in 2017. International Criminal Court Office of the Prosecutor: *Report on Preliminary Examination Activities 2018*, December 5, 2018, pars. 129 to 30, available at: <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> [hereinafter, *Report on Preliminary Examination Activities 2018*].

<sup>57</sup> The preliminary examination regarding Guinea is focused on events in 2009. *Report on Preliminary Examination Activities 2018*, *supra* note 56, par. 171.

<sup>58</sup> The preliminary examination regarding Iraq/UK is focused on events between 2003 and 2008. International Criminal Court: *Preliminary Examination: Iraq/UK*, accessed October 31, 2019, available at: <https://www.icc-cpi.int/iraq>.

<sup>59</sup> The preliminary examination regarding Bolivia is focused on events in August 2020. International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the Referral by Bolivia Regarding the Situation in Its Own Territory*, Press Release, September 9, 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=200909-otp-statement-bolivia-referral>.

<sup>60</sup> The preliminary examination regarding The Philippines is focused on crimes that occurred before March 17, 2019 because the country withdrew from the Rome Statute effective that date. *Report on Preliminary Examination Activities 2018*, *supra* note 56, par. 46.

<sup>61</sup> ReliefWeb: *WFP Venezuela Food Security Assessment Main Findings*, February 23, 2020, available at <https://reliefweb.int/report/venezuela-bolivarian-republic/wfp-venezuela-food-security-assessment-main-findings-data>.

Shortages of water, electricity, gas, telecommunication services, and fuel have been widely reported.<sup>62</sup> Moreover, more than five million Venezuelans have fled the country as a result of “political turmoil, socio-economic instability and the ongoing humanitarian crisis”.<sup>63</sup>

No other situation currently under preliminary examination has a comparable number of victims, which could be as many as tens of millions.

### 3. Worsening

The crimes and their impact on civilians in Venezuela are only increasing in severity. The humanitarian crisis, in particular, is taking a toll on many millions. Even before the onset of the pandemic, the humanitarian crisis was ravaging Venezuela. An April 2019 report by Human Rights Watch confirmed that the condition of Venezuela’s health system had “worsen[ed] drastically since 2017”.<sup>64</sup> A June 2019 report by an OAS Working Group stated that “Venezuela is experiencing the largest food and nutrition crisis reported in its history”<sup>65</sup> and estimated that the number of Venezuelan refugees could reach 5.75 million by the end of 2019, and 8.2 million by the end of 2020.<sup>66</sup> On September 9, 2019, UN High Commissioner for Human Rights Michelle Bachelet noted that the “economic and social situation continues to rapidly deteriorate” and that “the economy is experiencing what may be the most severe period of hyperinflation the region has seen, affecting the ability to purchase basic foods, medicine, and other essential goods”.<sup>67</sup> And in September 2020, the Independent International Fact-Finding Mission stated in its report that “Venezuela continues to suffer hyperinflation, severe shortages of food and medicine, and a dire humanitarian crisis, aggravated by Covid-19”.<sup>68</sup>

The regime’s repression is also intensifying. On September 25, 2020, the UN High Commissioner for Human Rights announced that, between June and August 2020, her office identified 711 cases of deaths as a result of security operations.<sup>69</sup> Since January 2020, the total number of deaths from security

---

<sup>62</sup> UN OCHA: *Venezuela – August 2020 Status Report*, October 12, 2020, available at: <https://reports.unocha.org/es/country/venezuela-bolivarian-republic-of>.

<sup>63</sup> International Organization for Migration: *Venezuelan Refugee and Migrant Crisis*, accessed November 9, 2020, available at: <https://www.iom.int/venezuela-refugee-and-migrant-crisis>.

<sup>64</sup> Human Rights Watch et al.: *Venezuela’s Humanitarian Emergency: Large-Scale UN Response Needed to Address Health and Food Crises*, April 2019, page 3, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/venezuela0419\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/venezuela0419_web.pdf) [hereinafter, *Venezuela’s Humanitarian Emergency*].

<sup>65</sup> Organization of American States: *Report of the OAS Working Group to Address the Regional Crisis Caused by Venezuela’s Migrant and Refugee Flows*, June 2019, page 25, available at: <http://www.oas.org/documents/eng/press/OAS-Report-to-Address-the-regional-crisis-caused-by-Venezuelas-migrant.pdf>.

<sup>66</sup> *Ibidem*, page 20.

<sup>67</sup> 2019 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela, *supra* note 53.

<sup>68</sup> 2020 Fact-Finding Mission Report, *supra* note 55, par. 13.

<sup>69</sup> Michelle Bachelet, UN High Commissioner for Human Rights: *Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela*, September 25, 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26295&LangID=E> [hereinafter, *2020 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela*].

operations has surpassed 2,000.<sup>70</sup> During July 2019 alone, the NGO *Monitor de Víctimas* (*Victims' Monitor*) identified 57 new cases of presumed executions committed by the FAES in Caracas.<sup>71</sup> Arbitrary detentions are also increasing. As of October 31, 2017, *Foro Penal* had documented a cumulative total of 11,993 arbitrary detentions.<sup>72</sup> By October 31, 2018, that number had reached 12,871,<sup>73</sup> and as of July 3, 2020, it had increased to 15,501.<sup>74</sup> In addition, the total number of political prisoners has reached 3,475, with 421 held as of July 3, 2020.<sup>75</sup>

## B. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though Credible Information About the Crimes Is Publicly Available

In a prior situation, the Prosecutor cited the lack of access to information as justifying a delay in completing the preliminary examination. Specifically, the Prosecutor highlighted “the very gradual manner in which important information which has had a material impact on the gravity assessment of the situation has been received” and “the deteriorating security situation . . . rendering access to information increasingly difficult”.<sup>76</sup> The Prosecutor also explained that the process of verifying the reliability and credibility of information received can be slow.<sup>77</sup>

Such concerns are reasonable when legitimate, but do not apply to the situation in Venezuela. There is simply an overwhelming amount of credible, publicly available evidence of crimes against humanity in Venezuela. The UN has published at least four major reports (in 2017, 2018, 2019, and 2020) on the

---

<sup>70</sup> *Ibidem*.

<sup>71</sup> Report of the OAS Working Group to Address the Regional Crisis Caused by Venezuela's Migrant and Refugee Flows, *supra* note 65, page 20.

<sup>72</sup> Foro Penal: Reporte Sobre la Represión en Venezuela: Octubre 2017, page 2, available at: <https://foropenal.com/reportederepresionoctubre-2017/>.

<sup>73</sup> Reporte Sobre la Represión en Venezuela: Septiembre y Octubre de 2018, *supra* note 54, page 6.

<sup>74</sup> Crisis en Venezuela: Boletín No. 140, *supra* note 54.

<sup>75</sup> *Ibidem*.

<sup>76</sup> Pre-Trial Chamber of the International Criminal Court: *Situation in the Central African Republic*, ICC-01/05, 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 15, 2006, par. 9, available at: <https://www.legal-tools.org/doc/1dd66a/pdf/>.

<sup>77</sup> *Ibidem*.

crisis based on a total of 1,117 interviews.<sup>78</sup> In May 2018, the OAS published its landmark report, nearly 500 pages, based on five public hearings conducted in 2017.<sup>79</sup> The OAS Secretary General Luis Almagro also issued several additional reports totaling hundreds of pages.<sup>80</sup> In December 2017, the Inter-American Commission on Human Rights issued a more than 250-page report documenting the human rights situation in the country.<sup>81</sup> The UN Working Group on Arbitrary Detention has issued 28 detailed opinions finding detentions to be arbitrary in Venezuela since 2013.<sup>82</sup> Civil society groups, including Amnesty International,<sup>83</sup> Human Rights Watch,<sup>84</sup> and the International Commission of Jurists,<sup>85</sup> have documented and written extensively about human rights violations in Venezuela. *Foro Penal*, *Provea*, and others have jointly published 155 bulletins (as of October 19, 2020) on the crisis that provide week-by-week updates, as well as additional reports.<sup>86</sup>

---

**78** 2020 Fact-Finding Mission Report, *supra* note 55; see also: UN Human Rights Council: *Detailed Findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela*, Doc. A/HRC/45/CRP.11, September 15, 2020, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A\\_HRC\\_45\\_CRP.11.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFMV/A_HRC_45_CRP.11.pdf) [hereinafter, 2020 Fact-Finding Mission Detailed Findings]; see also: Michelle Bachelet, UN Human Rights Council: *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Bolivarian Republic of Venezuela*, U.N. Doc. A/HRC/41/18, July 5, 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24788&LangID=E> [hereinafter, 2019 OHCHR Report]; see also: Office of the UN High Commissioner for Human Rights: *Human Rights Violations in the Bolivarian Republic of Venezuela: A Downward Spiral With No End in Sight*, June 2018, available at: [https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018_EN.pdf) [hereinafter, *Human Rights Violations in the Bolivarian Republic of Venezuela*]; see also: Office of the UN High Commissioner for Human Rights: *Human Rights Violations and Abuses in the Context of Protests in the Bolivarian Republic of Venezuela From 1 April to 31 July 2017*, August 2017, available at: [https://www.ohchr.org/Documents/Countries/VE/HCHReportVenezuela\\_1April-31July2017\\_EN.pdf](https://www.ohchr.org/Documents/Countries/VE/HCHReportVenezuela_1April-31July2017_EN.pdf).

**79** 2018 OAS Report, *supra* note 14.

**80** Luis Almagro: *Denunciation of a Dictatorial Regime's Consolidation in Venezuela*, September 25, 2017, available at: <http://scm.oas.org/pdfs/2017/CP38157REPORT.pdf>; see also: Luis Almagro: *Third Report on the Crisis in Venezuela*, July 19, 2017, available at: <http://www.oas.org/documents/eng/press/TERCER-INFORME-VENEZUELA-ENGLISH-Final-signed.pdf>; see also: Luis Almagro: *Second Report on the Crisis in Venezuela*, March 14, 2017, available at: <http://www.oas.org/documents/eng/press/Informe-VZ-II-English-Final-Signed.pdf>; see also: Luis Almagro, *Report on the Crisis in Venezuela*, May 30, 2016, available at: <http://www.oas.org/documents/eng/press/OSG-243.en.pdf>.

**81** Inter-American Commission on Human Rights: *Situation of Human Rights in Venezuela*, December 31, 2017, available at: <http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf> [hereinafter, *Situation of Human Rights in Venezuela*].

**82** The following Working Group opinions found detentions in Venezuela to be arbitrary and in violation of international law: 47/2013, 26/2014, 29/2014, 30/2014, 51/2014, 1/2015, 7/2015, 26/2015, 27/2015, 18/2017, 37/2017, 52/2017, 84/2017, 87/2017, 24/2018, 32/2018, 41/2018, 49/2018, 72/2018, 86/2018, 13/2019, 39/2019, 40/2019, 75/2019, 80/2019, 81/2019, 18/2020, 20/2020.

**83** Amnesty International: *Hunger for Justice: Crimes Against Humanity in Venezuela*, 2019, available at: <https://www.amnesty.org/download/Documents/AMR530222019ENGLISH.PDF> [hereinafter, *Hunger for Justice*]; see also: Amnesty International: *This Is No Way to Live: Public Security and Right to Life in Venezuela*, 2018, available at: <https://www.amnesty.org/download/Documents/AMR5389752018ENGLISH.PDF>; see also: Amnesty International: *Silenced by Force: Politically-Motivated Arbitrary Detentions in Venezuela*, 2017, available at: [https://www.amnestyusa.org/wp-content/uploads/2017/05/venezuela\\_silenced\\_by\\_force.compressed.pdf](https://www.amnestyusa.org/wp-content/uploads/2017/05/venezuela_silenced_by_force.compressed.pdf).

**84** *Venezuela's Humanitarian Emergency*, *supra* note 64; see also: Human Rights Watch: *The Venezuelan Exodus: The Need for International Protection and the Region's Response*, 2018, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/venezuela0918\\_web.pdf](https://www.hrw.org/sites/default/files/report_pdf/venezuela0918_web.pdf); see also: Human Rights Watch and Foro Penal: *Crackdown on Dissent: Brutality, Torture, and Political Persecution in Venezuela*, 2017, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/venezuela1117web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/venezuela1117web_0.pdf).

**85** International Commission of Jurists: *No Room for Debate: The National Constituent Assembly and the Crumbling of the Rule of Law in Venezuela*, July 2019, available at: <https://www.icj.org/wp-content/uploads/2019/07/Venezuela-No-room-for-debate-Publications-Reports-Fact-finding-mission-reports-2019-ENG.pdf>; see also: International Commission of Jurists, *El Juzgamiento de Civiles por Tribunales Militares en Venezuela*, 2018, available in Spanish at: <https://www.icj.org/wp-content/uploads/2018/04/Venezuela-Civiles-Tribunales-Militares-Publications-Reports-Thematic-Reports-2018-SPA.pdf>; see also: International Commission of Jurists: *The Supreme Court of Justice of Venezuela: An Instrument of the Executive Branch*, August 2017, available at: <https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>; see also: International Commission of Jurists: *Achieving Justice for Gross Human Rights Violations in Venezuela: A Baseline Study*, July 2017, available at: <https://www.icj.org/wp-content/uploads/2017/08/Venezuela-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>.

**86** Foro Penal et al.: *Crisis en Venezuela: Boletín No. 155 del 12 al 19 de Octubre de 2020*, available in Spanish at: <https://crisisenvenezuela.com/2020/10/19/boletin-no-155-del-12-al-19-de-octubre-de-2020/>.



In the *2018 Report on Preliminary Examination Activities*, the Prosecutor stated that she was reviewing precisely these sources – “Since the initiation of the preliminary examination, the Office has analysed Article 15 communications received in 2018 and in previous years and consulted a number of open sources, including reports from both Venezuelan and international civil society organisations, the UN OHCHR, the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights and the OAS General Secretariat, as well as multiple reports from think-tanks and media outlet[s]”.<sup>87</sup> She further stated that, rather than facing a dearth of information, her office “has gathered significant factual and contextual information of relevance to its legal analysis”.<sup>88</sup> Therefore, a lack of access to information does not justify the delay in completing the preliminary examination.

Moreover, in another recent case, the Prosecutor managed to complete a preliminary examination quickly even though her access to evidence was limited.<sup>89</sup> The preliminary examination of the situation in Bangladesh/Myanmar, which importantly was necessarily limited to the alleged forcible population displacement into Bangladesh (as Myanmar is not a state party to the Rome Statute), was opened in September 2018.<sup>90</sup> Yet the Prosecutor requested authorization from the Pre-Trial Chamber to investigate the situation only 10 months later, in July 2019 (and authorization was granted in November).<sup>91</sup> In this context, the delay in completing the preliminary examination of the situation in Venezuela, for which evidence is readily available, is inexplicable.

### C. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though There Are No Credible Domestic Proceedings to Hold Perpetrators Accountable

Official information regarding the prosecution of officials implicated in human rights violations has not been available since August 2017, when former Attorney General Luisa Ortega Díaz was forced out of office and subsequently persecuted.<sup>92</sup> However, on September 25, 2020, UN High Commissioner for Human Rights Michelle Bachelet stated that “[t]he Public Prosecutor’s Office reported that 70 FAES

---

<sup>87</sup> *Report on Preliminary Examination Activities 2018*, *supra* note 56, par. 118; see also: *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 81 (stating that the Prosecutor has reviewed “reports from Venezuelan and international civil society organisations and think-tanks, the UN Office of the High Commissioner for Human Rights (‘OHCHR’), the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights and the Organization of American States (‘OAS’)”).

<sup>88</sup> *Report on Preliminary Examination Activities 2018*, *supra* note 56, par. 120.

<sup>89</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 293 (noting that the Prosecutor collected evidence in Bangladesh).

<sup>90</sup> International Criminal Court Office of the Prosecutor: *Statement of ICC Prosecutor, Fatou Bensouda, on Opening a Preliminary Examination Concerning the Alleged Deportation of the Rohingya People From Myanmar to Bangladesh*, Press Release, September 19, 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>.

<sup>91</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, pars. 294 and 296.

<sup>92</sup> Human Rights Watch: *Venezuela: Events of 2018*, accessed November. 3, 2019, available at: <https://www.hrw.org/world-report/2019/country-chapters/venezuela#6bd0e8>.

officials have recently been charged in different states of the country”.<sup>93</sup> Previously, the regime informed the High Commissioner that 104 members of the security forces were convicted for human rights violations between August 2017 and May 2019.<sup>94</sup> The regime also indicated to the OHCHR that:

[A]s of June 2019, 44 persons are detained and 33 arrest warrants have been issued against persons for their alleged responsibility for killings during demonstrations in 2017 and 2019. Five members of FAES have been convicted of attempted murder, misuse of a weapon, and simulation of a punishable act, for events that occurred in 2018. Additionally, 388 FAES members are under investigation for murder, cruel treatment, and illegal house raids committed between 2017 and 2019.<sup>95</sup>

Even if these figures were accurate – which is far from clear, as the regime has repeatedly presented false and inaccurate information – they actually serve only as proof of a regime of near total impunity. The number of investigations and convictions is utterly insignificant compared to the number of abuses. To reiterate, former Attorney General Luisa Ortega Díaz has herself asserted that 8,292 people were murdered by the regime from 2015 to June 2017,<sup>96</sup> and *Foro Penal* has documented 15,501 arbitrary detentions since January 2014.<sup>97</sup> More recently, from January to May 2019, 2,091 people were detained for political motives<sup>98</sup> and security forces killed least 2,124 for “resistance to authority”, and the OHCHR reviewed information suggesting that “many of these killings may constitute extrajudicial executions”.<sup>99</sup>

The number of investigations that the regime is allegedly conducting proves nothing. As the OHCHR has noted, the “[i]nstitutions responsible for the protection of human rights . . . do not conduct prompt, effective, thorough, independent, impartial and transparent investigations into human rights violations and other crimes committed by State actors [or] bring perpetrators to justice”.<sup>100</sup> The Inter-American Commission on Human Rights has similarly noted “serious shortcomings in investigations, victims’ fears of subsequent reprisals, and judges’ temporary tenure, all of which are factors that make it difficult to throw light on abuses and identify and punish those responsible”.<sup>101</sup> Moreover, the criminal investigations that are pursued against state actors focus on low-level perpetrators in order to “deny the existence of a state policy and create the appearance of justice”.<sup>102</sup> Thus, rather than a sincere pursuit of justice, the

---

<sup>93</sup> 2020 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela, *supra* note 69.

<sup>94</sup> 2019 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela, *supra* note 53.

<sup>95</sup> 2019 OHCHR Report, *supra* note 78, par. 53.

<sup>96</sup> 2018 OAS Report, *supra* note 14, page 283.

<sup>97</sup> *Crisis en Venezuela: Boletín No. 140*, *supra* note 54, page 2.

<sup>98</sup> 2019 OHCHR Report, *supra* note 78, par. 41 (citing data provided by Foro Penal).

<sup>99</sup> *Ibidem*, par. 50.

<sup>100</sup> *Ibidem*, par. 33; see also: *ibidem*, pars. 43 (“The authorities have failed to conduct prompt, effective, thorough, independent, impartial and transparent investigations into credible allegations of torture and ill-treatment, including SGBV, to bring the alleged perpetrators to justice and to provide reparation to the victims”), 54 (“The majority of victims of human rights violations highlighted in this report have had no effective access to justice and remedies . . . . [A]uthorities do not investigate or do not conduct prompt, effective, thorough, independent, impartial and transparent investigations”).

<sup>101</sup> *Situation of Human Rights in Venezuela*, *supra* note 81, par. 400.

<sup>102</sup> 2018 OAS Report, *supra* note 14, page 422.

investigations are in fact an attempt to cover-up the complicity of higher-level regime officials, and delaying the preliminary examination based on these domestic proceedings serves only to maintain impunity and frustrate justice.

#### D. The Prosecutor Has Failed to Prioritize a Review of the Situation in Venezuela, Even Though It Was an Unprecedented Regional Referral by Six States Parties

The preliminary examination of the situation in Venezuela (Venezuela I) was originally opened by the Prosecutor in February 2018 and then in September 2018 also referred to the ICC by six states parties – Argentina, Canada, Colombia, Chile, Paraguay, and Peru – making it, in the Prosecutor’s own words, the “first referral submitted by a group of States Parties concerning a situation on the territory of another State Party”.<sup>103</sup> Of particular note, five of these countries are Venezuela’s regional neighbors. The other preliminary examinations currently being considered were begun *proprio motu*, at the Prosecutor’s initiation, with the exception of the situations in Bolivia, Palestinian Territories, and Ukraine, which were referred or authorized by parties themselves.

Although there is no formal requirement that referrals by states parties should be prioritized by the Prosecutor, this fact alone should at least be considered as a reason for greater urgency in conducting the preliminary examination. And unlike in situations that are *proprio motu*, in cases of state referrals the Prosecutor *does not* need the approval of the Pre-Trial Chamber to begin a formal investigation. She can do so at any time, the moment her Office concludes there is a “reasonable basis” to proceed with a formal investigation.

#### E. The Prosecutor Has Failed to Uphold Her Own Stated Policy Objectives for Preliminary Examinations

In the course of conducting a preliminary examination, the Prosecutor has stated her Office has three policy objectives – ending impunity through positive complementarity, prevention, and transparency.<sup>104</sup> The Prosecutor has failed to uphold these objectives in her preliminary examination of the situation in Venezuela.

---

<sup>103</sup> Statement of the Prosecutor of the International Criminal Court, *supra* note 45; see also: Statement of the Prosecutor of the International Criminal Court, *supra* note 50.

<sup>104</sup> Policy Paper on Preliminary Examinations, *supra* note 4, pars. 93 to 106.

First, the delay in completing the preliminary examination regarding the situation in Venezuela has not helped end impunity through positive complementarity. In fact, it has had the opposite effect. As discussed above, there is virtually no domestic accountability for crimes against humanity in Venezuela, especially for higher-level officials, nor any reasonable prospect that this will change in the near future.<sup>105</sup> Thus, the only way to end impunity is for the ICC to investigate and potentially prosecute the crimes in line with the principle of complementarity – that is, when the state is unwilling or unable to genuinely investigate and prosecute the crimes at issue.<sup>106</sup>

Second, regarding prevention, the Prosecutor is supposed to “perform an early warning function”.<sup>107</sup> The Prosecutor can “issue public, preventive statements in order to deter the escalation of violence and the further commission of crimes [and] put perpetrators on notice”.<sup>108</sup> Such statements have been issued during a variety of preliminary examinations.

For example, on October 22, 2020, the Prosecutor issued the following statement relating to the preliminary examination of the situation in Nigeria, which is focused on potential crimes against humanity and war crimes in the armed conflict between Boko Haram and Nigerian security forces:

My Office has been closely following the events around the current protests in Nigeria and the reaction of Nigeria’s law enforcement and security agencies. Any loss of life and injury is concerning. We have received information alleging crimes and are keeping a close eye on developments, in case the violence escalates and any indications arise that Rome Statute crimes may have been committed. I call for calm and restraint.<sup>109</sup>

This was, in fact, the sixth public statement by the Prosecutor about the situation in Nigeria outside of her annual reports on preliminary examinations.<sup>110</sup>

---

<sup>105</sup> See: *supra*, Section III(C).

<sup>106</sup> *Rome Statute of the International Criminal Court*, 2187 U.N.T.S. 3, entered into force July 1, 2002, Art. 17(1)(a).

<sup>107</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 104.

<sup>108</sup> *Ibidem*, par. 106.

<sup>109</sup> This statement was relayed in a tweet by the International Criminal Court, see: <https://twitter.com/intlcrimcourt/status/1319238242135429122?s=21>.

<sup>110</sup> International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of the Elections in Nigeria: “I Reiterate My Call to Refrain From Violence”*, Press Release, March 16, 2015, available at: [https://www.icc-cpi.int/Pages/item.aspx?name=otp\\_stat\\_150316](https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_150316); International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Ahead of the General and State Elections in Nigeria*, Press Release, February 2, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-02-02-2015> (“Any person who incites or engages in acts of violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes within ICC’s jurisdiction is liable to prosecution either by Nigerian Courts or by ICC. No one should doubt my resolve, whenever necessary, to prosecute individuals responsible for the commission of ICC crimes.”); International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Reports of Escalating Violence in Nigeria*, Press Release, January 19, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-20-01-2015>; International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Abduction of Schoolgirls in Nigeria*, Press Release, May 7, 2014, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-08-05-2014>; *Speech of the Prosecutor of the ICC, Fatou Bensouda, at the “International Seminar on the Imperatives of the Observance of Human Rights and International Humanitarian Law Norms in International Security Operations”*, Abuja, Nigeria, February 13, 2014, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-24-02-2014>.



For the situation in Colombia, Prosecutor's Office has conducted three country missions, issued an Interim Report, and published six other statements at various stages of engagement.<sup>111</sup>

In 2015, amidst reports of growing tensions and the "risk of possible violence" during the presidential election in Guinea, the Prosecutor stated:

I would like to reiterate my call for calm and restraint to all political actors, and their supporters. I wish to reiterate that anyone who commits, orders, incites, encourages or contributes in any other way to the commission of atrocity crimes falling within the jurisdiction of the ICC is liable to prosecution either in Guinea or at the Court in The Hague.<sup>112</sup>

She also conducted a country mission to Guinea, and has issued several additional statements about the situation, including a strong statement in October 2020.<sup>113</sup> In her July 2015 press conference in Guinea, she emphasized that her visit related to her Office's preventative mandate. She said specifically:

It is absolutely crucial to prevent further crimes from being committed, no matter the situation or circumstance. We know that violence can erupt during elections. I reiterate my 2010 call to all Guinean political actors, to ensure that elections remain calm and that their supporters refrain from violence. I am confident that this message will be heard by all Guineans. I will continue to closely monitor this situation.<sup>114</sup>

The Prosecutor has even threatened prosecution for crimes that were not, at the time, under preliminary examination. For example, before the preliminary examination in Mali had even been opened,<sup>115</sup> the Prosecutor issued a stern warning to fighters attacking Muslim shrines:

My Office is closely following events in Mali and will not hesitate to take appropriate action if information collected indicates the commission of crimes by anyone. Those who are destroying religious buildings in Timbuktu should do so in full knowledge that they will be held accountable and justice will prevail. My message to those involved in these criminal acts is clear: Stop the

---

<sup>111</sup> International Criminal Court Office of the Prosecutor: *News Items: Colombia*, available at: <https://www.icc-cpi.int/Pages/itemsrtso.aspx?relatedTo=Colombia>.

<sup>112</sup> International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Following Growing Tensions Reported in Guinea*, Press Release, October 14, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-14-10-2015>.

<sup>113</sup> International Criminal Court Office of the Prosecutor: *News Items: Guinea*, available at: <https://www.icc-cpi.int/Pages/itemsrtso.aspx?relatedTo=Guinea>; see also: International Criminal Court Office of the Prosecutor: *Statement of the ICC Prosecutor, Fatou Bensouda, on Pre-Election Violence and Growing Ethnic Tensions: "Guinea Can and Must Demonstrate its Will and Ability Both to Combat Impunity and to Prevent Renewed Cycles of Violence"*, Press Release, October 9, 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=201009-otp-statement-guinea>.

<sup>114</sup> International Criminal Court Office of the Prosecutor: *Statement to the Press by Fatou Bensouda, Prosecutor of the International Criminal Court*, July 4, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-150704>.

<sup>115</sup> The preliminary examination in Mali was opened on July 18, 2012. See: ABA-ICC Project: *Situations & Cases – Overview*, accessed January 8, 2019, available at: <https://www.aba-icc.org/about-the-icc/situations-cases-overview/>.

destruction of the religious buildings now: This is a War Crime which my Office has authority to fully investigate.<sup>116</sup>

The Prosecutor also made statements regarding violence in Burundi<sup>117</sup> before opening the preliminary examination in April 2016.<sup>118</sup>

In light of these clear precedents, the Prosecutor's failure to make any statement at all regarding the deteriorating situation in Venezuela is as inexplicable as it is inexcusable, especially now that even the Maduro regime itself has attempted to refer the situation to the ICC itself. The Prosecutor has warned against violence, potential crimes, and destruction of property in situations that were not even under preliminary examination; certainly, a statement on the alleged crimes in Venezuela – which are ongoing and under preliminary examination – is appropriate.

Finally, the third policy objective – transparency – requires the Prosecutor to provide information to the public “to promote a better understanding of the process and to increase predictability”.<sup>119</sup> However, the Prosecutor has not been transparent about a key aspect of the preliminary examination – the time period she is examining for potential crimes against humanity. In her announcement that she had opened the preliminary examination of the situation in Venezuela, the Prosecutor stated that she was analyzing alleged crimes “since at least April 2017”.<sup>120</sup> In her *2018 Report on Preliminary Examination Activities*, she expanded the time period being examined, noting that she “may also include . . . any alleged crime connected to the situation and falling within the Court's jurisdiction that may have been committed since 12 February 2014”.<sup>121</sup> However, the *2019 Report on Preliminary Examination Activities* appears to walk this back, stating only that her office has sought to place alleged crimes since April 2017 “in the context of previous waves of violence and political unrest, including with respect to conduct occurring from February 2014 onwards”<sup>122</sup> – there is no mention, as there was in the 2018 report, of potentially *prosecuting* crimes committed before April 2017. It is clear that numerous alleged crimes were committed in Venezuela before April 2017 (and really since February 2014). By failing to clearly specify the time period within which she will consider potential crimes against humanity and failing to clearly explain the reason for the apparently shifting time periods, the Prosecutor has not been transparent in her communications.

---

116 International Criminal Court Office of the Prosecutor: *OTP Briefing Issue #126: 20 June – 3 July, 2012*, available at: <https://www.legal-tools.org/doc/381aa6/pdf/>.

117 International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Worsening Security Situation in Burundi*, Press Release, November 6, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-06-11-2015>; see also: International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Recent Pre-election Violence in Burundi*, Press Release, May 8, 2015, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=OTP-STAT-150508>.

118 International Criminal Court Office of the Prosecutor: *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the Situation in Burundi*, Press Release, April 25, 2016, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016>.

119 *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 94.

120 *Statement of the Prosecutor of the International Criminal Court*, *supra* note 46.

121 *Report on Preliminary Examination Activities 2018*, *supra* note 56, par. 124.

122 *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 73.

## F. The Prosecutor Has Failed to Comply With the Principles of Impartiality and Objectivity by Understating the Scale and Severity of Some of the Alleged Crimes

As stated in the *Policy Paper on Preliminary Examinations*, a preliminary examination is supposed to be conducted “in the context of the overarching principles of independence, impartiality and objectivity”.<sup>123</sup> This means that the Office of the Prosecutor “will apply consistent methods and criteria, irrespective of the States or parties involved”, and will examine “incriminating and exonerating circumstances equally in order to establish the truth”.<sup>124</sup> When assessing information from external sources (as is primarily the case during a preliminary examination), the Office of the Prosecutor is supposed to “pay[] particular attention to the assessment of the reliability of the source and the credibility of the information”.<sup>125</sup> However, compared to the reports of highly reliable sources containing credible information, the Prosecutor has repeatedly understated the severity and scale of some of the alleged crimes, which raises serious questions about the Prosecutor’s impartiality and objectivity.

For example, the Prosecutor’s *2019 Report on Preliminary Examination Activities* indicates that it is examining merely a total of 100 to 117 killings by security forces and/or pro-Government armed civilians acting in coordination with them since 2017.<sup>126</sup> However, the *2018 OAS Report* found evidence of at least 131 murders of people who were taking part in demonstrations, *as well as at least 8,292 extrajudicial executions* since 2014 (information from former Venezuelan Attorney General Luisa Ortega Díaz herself, a strong admission against her interest).<sup>127</sup> Furthermore, the NGO *Observatorio Venezolano de Violencia* (OVV) reported numerous killings that authorities classified as resulting from “resistance to authority” – 7,523 in 2018<sup>128</sup> and 2,124 from January to May 2019.<sup>129</sup> Both the OHCHR and OVV reported that most of these deaths are likely extrajudicial killings.<sup>130</sup>

The *2019 Report on Preliminary Examination Activities* also underreports sexual violence, stating that “multiple examples of sexual violence . . . in the context of detention have been documented” but that

---

<sup>123</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 25.

<sup>124</sup> *Ibidem*, pars. 28 and 30.

<sup>125</sup> *Ibidem*, par. 31.

<sup>126</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 76.

<sup>127</sup> *2018 OAS Report*, *supra* note 14, page 449.

<sup>128</sup> *2019 OHCHR Report*, *supra* note 78, par. 50.

<sup>129</sup> *Ibidem*.

<sup>130</sup> *Ibidem* (“Information analysed by OHCHR suggests many of these killings may constitute extrajudicial executions.”); see also: Observatorio Venezolano de Violencia: *Informe Anual de Violencia 2018*, December 30, 2018, available at: <https://observatoriodeviolencia.org.ve/ovv-lacso-informe-anual-de-violencia-2018/> (noting that these deaths “can . . . for the most part . . . be classified as extrajudicial killings . . . with certainty”) (translated from Spanish).

there is an “absence of overall estimates of the scale of this alleged conduct”.<sup>131</sup> However, the *2018 OAS Report* reported “192 cases of rape of persons under State control” as of September 2017.<sup>132</sup>

The *2019 Report on Preliminary Examination Activities* does not estimate the number of victims of persecution, but simply notes that the regime has allegedly “targeted victims by reason of their actual or perceived political opposition to the Government”.<sup>133</sup> The *2018 OAS Report*, however, explained that the number of persons that have been persecuted “reaches hundreds of thousands, if not millions, resulting from the weaponization of food and healthcare”.<sup>134</sup>

The chart<sup>135</sup> below highlights discrepancies between the numbers of victims reported by the Office of the Prosecutor in its December 2019 report and the numbers reported by other credible sources (that were then available).

ALLEGED CRIMES	PROSECUTOR’S 2019 REPORT	CREDIBLE REPORTS	ANALYSIS
MURDER	<ul style="list-style-type: none"> <li>• <b>70</b> killed by security forces and/or pro-government armed civilians between April and July 2017</li> <li>• <b>30 to 47</b> killed by security forces and/or pro-government armed civilians from January 21 to 25, 2019</li> </ul>	<ul style="list-style-type: none"> <li>• <b>8,292</b> extrajudicial executions between 2015 and June 2017, according to former Venezuela Attorney General Luisa Ortega Díaz</li> <li>• At least <b>105</b> murdered by security forces and/or pro-government armed civilians between April and July 2017 (OAS)</li> <li>• <b>7,523</b> killed for “resistance to authority” in 2018 and 2,124 from January to May 2019; most constitute extrajudicial killings (OVV)</li> <li>• <b>47</b> killed during anti-government protests in January 2019 (Amnesty Int’l)</li> <li>• <b>57</b> killings identified by the NGO <i>Monitor de Víctimas</i> in July 2019</li> </ul>	The Office of the Prosecutor, without explanation, omits thousands of reported killings from credible sources

<sup>131</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 79.

<sup>132</sup> *2018 OAS Report*, *supra* note 14, page 450; see also: *ibidem*, pages 166 to 167 (this figure was of September 2017).

<sup>133</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, par. 80.

<sup>134</sup> *2018 OAS Report*, *supra* note 14, page 450.

<sup>135</sup> The numbers highlighted in this chart are drawn from credible reports of multilateral organizations, NGOs, and media. The sources of these estimates can be found in the Sections V and VI.



<b>OTHER INHUMANE ACTS</b>	Does not discuss other inhumane acts	Tens of millions subjected to great suffering or serious injury due to the ongoing humanitarian crisis created intentionally by the regime, based on statistics on malnutrition, starvation, illness, and lack of access to medical care	The Office of the Prosecutor, without explanation, makes no mention of other inhumane acts
<b>ENFORCED DISAPPEARANCE OF PERSONS</b>	Notes only that it has reviewed information related to alleged cases of enforced disappearances	<ul style="list-style-type: none"> <li>• <b>199</b> cases of enforced disappearances from 2000 to 2018 (<i>Provea</i>)</li> <li>• There is a “pattern of short-term enforced disappearances of political opponents or persons perceived as such, and their relatives, and peaceful protesters” (UN Working Group on Enforced or Involuntary Disappearances)</li> </ul>	The Office of the Prosecutor fails to acknowledge that enforced disappearances are not isolated cases, but rather part of a larger pattern
<b>RAPE/ SEXUAL VIOLENCE</b>	Acknowledges “multiple” reports of sexual violence in detention, but claims there is an absence of overall estimates	<b>192</b> cases of rape of detainees under State control as of September 2017 (Tamara Suju / CASLA Institute)	The Office of the Prosecutor, without explanation, omits specific numbers of victims of rape/sexual violence
<b>PERSECUTION</b>	Notes that the regime has allegedly targeted victims for their actual/perceived opposition to the regime; does not provide an estimated number of victims	“Thousands of persons have been persecuted, a number that reaches hundreds of thousands, if not millions, resulting from the weaponization of food and healthcare” (OAS)	The Office of the Prosecutor, without explanation, omits specific numbers of victims of persecution

## G. The Prosecutor Has Failed to Follow Through on the Commitments Made in the Strategic Plan of the Office of the Prosecutor 2016–2018 and 2019–2021

On July 17, 2019, the Office of the Prosecutor published its *Strategic Plan 2019–2021*. The Plan asserted “eight goals out of the nine mentioned in the plan 2016–2018 have sufficiently progressed”, which included the goal relating to further improving the quality and efficiency of preliminary examinations.<sup>136</sup> Regarding that goal, the *Strategic Plan 2016–2018* stated as follows:

Preliminary examinations can also help deter actual or would-be perpetrators of atrocity crimes through the threat of international prosecutions . . . . The Office will also react promptly to upsurges or serious risks of violence by reinforcing its early interaction with States, international, regional organisations and NGOs in order to fine-tune its assessment and coordinate next steps. Such steps may include field visits, targeted public statements and media interviews. The Office will further develop criteria for guiding such preventive activities.<sup>137</sup>

Yet, as noted previously, not only did the Office of the Prosecutor downplay and omit credible reports of alleged crimes in its *2018 Report on Preliminary Examination Activities*, which was covered by the timeframe of the *Strategic Plan 2016–2018*, but it also failed to conduct field visits or make public statements or provide media interviews.

In *Strategic Plan 2019–2021*, Strategic Goal 2 is “to increase the speed, efficiency and effectiveness of preliminary examinations, investigations and prosecutions”.<sup>138</sup> The explanatory notes indicate that such “proceedings must be expeditious in order to respect and serve the rights and interests of victims and their communities, suspects and accused persons, and be responsive to the expectations of the broader stakeholders of the Rome Statute system”.<sup>139</sup> Given that nearly three years has passed since the preliminary examination of the situation in Venezuela was opened, no reasonable person could conclude that this investigation has been “done with speed and efficiency”, which is the plain meaning of “expeditious”.<sup>140</sup>

*Strategic Plan 2019–2021* also provides: “no preliminary examination takes longer than is required to complete a thorough independent assessment of the statutory criteria. The Office will continue its efforts to expedite the conduct of preliminary examinations, and remains open to engaging with stakeholders on

---

<sup>136</sup> International Criminal Court Office of the Prosecutor: *Strategic Plan, 2019-2021*, July 17, 2019, par. 5(e), available at: <https://www.icc-cpi.int/itemsDocuments/20190726-strategic-plan-eng.pdf>.

<sup>137</sup> International Criminal Court Office of the Prosecutor: *Strategic Plan, 2016-2018*, Nov. 16, 2015, par. 55(4), available at: [https://www.icc-cpi.int/iccdocs/otp/en-otp\\_strategic\\_plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/en-otp_strategic_plan_2016-2018.pdf).

<sup>138</sup> *Strategic Plan, 2019-2021*, *supra* note 136.

<sup>139</sup> *Ibidem*, par. 18 (emphasis added).

<sup>140</sup> Lexico: *Expeditious*, accessed November 9, 2020, available at: <https://www.lexico.com/en/definition/expeditious>.

the various factors related to this issue”.<sup>141</sup> Clearly this conclusory statement has been rendered devoid of meaning in relation to the situation in Venezuela – not only is the preliminary examination still ongoing after nearly three years, but as discussed below, it is only in the third of the four phases of review.

---

<sup>141</sup> *Strategic Plan, 2019-2021*, *supra* note 136, par. 21.





## IV. BACKGROUND ON CONSIDERATION OF POSSIBLE CRIMES AGAINST HUMANITY IN VENEZUELA

### A. Key Actions Before the International Criminal Court

#### 1. Opening of Preliminary Examination

On February 8, 2018, the ICC Prosecutor announced that she was opening a preliminary examination into the situation in Venezuela.<sup>142</sup> The examination, she explained, would focus on alleged crimes since at least April 2017 “in the context of demonstrations and related political unrest”, and in particular, on the alleged excessive use of force by security forces against demonstrators, detention of thousands of perceived regime opponents, and mistreatment of detainees.<sup>143</sup>

#### 2. Referral of the Situation by Six States Parties

On September 27, 2018, Argentina, Canada, Colombia, Chile, Paraguay, and Peru referred the situation in Venezuela to the Office of the Prosecutor under Article 14(1) of the Rome Statute.<sup>144</sup> The referral requested that the Prosecutor investigate possible crimes against humanity committed in Venezuela since February 12, 2014.<sup>145</sup> The referral was based substantially on the facts alleged in the *2018 OAS Report*, but also highlighted a December 2017 report by the Inter-American Commission on Human Rights and a June 2018 report by the OHCHR.<sup>146</sup> This was the “first referral submitted by a group of States Parties concerning a situation on the territory of another State Party”.<sup>147</sup> Notably, five out of the six referring parties are

---

<sup>142</sup> *Statement of the Prosecutor of the International Criminal Court*, *supra* note 46.

<sup>143</sup> *Ibidem*.

<sup>144</sup> Letter from Mauricio Macri, President of the Republic of Argentina, Justin Trudeau, Prime Minister of Canada, Iván Duque Márquez, President of the Republic of Colombia, Sebastián Piñera Echenique, President of the Republic of Chile, Mario Abdo Benítez, President of the Republic of Paraguay, and Martín Vizcarra Cornejo, President of the Republic of Peru, to Prosecutor of the International Criminal Court, Sept. 26, 2018, available at [https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf) [hereinafter, *Referral of the Situation in Venezuela*].

<sup>145</sup> *Ibidem*, page 1.

<sup>146</sup> *Ibidem*, pages 2 to 3 (citing: Inter-American Commission on Human Rights: *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, December 31, 2017; *2018 OAS Report*, *supra* note 14; and *Human Rights Violations in the Bolivarian Republic of Venezuela*, *supra* note 78).

<sup>147</sup> *Statement of the Prosecutor of the International Criminal Court*, *supra* note 50.

hemispheric neighbors of Venezuela. France, Germany, and Costa Rica later expressed support for the referral.<sup>148</sup>

### 3. Prosecutor's 2018 Report on Preliminary Examination Activities

On December 5, 2018, the Office of the Prosecutor released its annual *Report on Preliminary Examination Activities*.<sup>149</sup> The report indicates that the preliminary examination regarding the situation in Venezuela focuses on crimes allegedly committed since at least April 2017, but as noted above, that the Office may include in its analysis any alleged crime connected to the situation committed as far back as February 12, 2014.<sup>150</sup> The report provides a brief overview of events in Venezuela since April 2017 and alleged crimes,<sup>151</sup> and then recounts the activities undertaken in 2018.

Since the preliminary examination was opened, the Office of the Prosecutor “initiated a thorough and independent examination of all the information available”.<sup>152</sup> This includes a review of the 110 Article 15 communications that had been received at that time and numerous open sources, such as reports by civil society organizations, think tanks, media outlets, the OHCHR, the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights, and the OAS General Secretariat.<sup>153</sup> These sources provided “significant factual and contextual information of relevance” to the Prosecutor’s legal analysis.<sup>154</sup> The Office of the Prosecutor also “held numerous meetings with relevant stakeholders and information providers”.<sup>155</sup>

Looking forward, the report stated that the Office of the Prosecutor expects to determine “within a reasonable time frame” whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.<sup>156</sup> The report further states that the fact that the situation was referred to the Office of the Prosecutor by states parties will not expedite the process, except “to the extent that judicial review of the Prosecutor’s decision would not be required”.<sup>157</sup> The Office of the Prosecutor will also continue to engage with a variety of reliable sources and relevant stakeholders, continue to record

---

<sup>148</sup> Luis Almagro: “The International Criminal Court Must Investigate Maduro’s Crimes in Venezuela”, *Washington Post*, November 16, 2018, available at: <https://www.washingtonpost.com/news/global-opinions/wp/2018/11/16/the-international-criminal-court-must-investigate-maduros-crimes-in-venezuela/>.

<sup>149</sup> *Report on Preliminary Examination Activities 2018*, *supra* note 56.

<sup>150</sup> *Ibidem*, pars. 113 and 124.

<sup>151</sup> *Ibidem*, pars. 104 to 16.

<sup>152</sup> *Ibidem*, par. 117.

<sup>153</sup> *Ibidem*, pars. 99 and 118.

<sup>154</sup> *Ibidem*, par. 120.

<sup>155</sup> *Ibidem*, par. 121.

<sup>156</sup> *Ibidem*, par. 122.

<sup>157</sup> *Ibidem*.

allegations of crimes committed, and “[i]n accordance with its Policy Paper on Preliminary Examinations . . . may further gather available information on relevant national proceedings”.<sup>158</sup>

#### 4. Prosecutor’s 2019 Report on Preliminary Examination Activities

On December 5, 2019, the Office of the Prosecutor released its annual *Report on Preliminary Examination Activities*.<sup>159</sup> The report provides a brief overview of the events in Venezuela in the context of demonstrations between February 2014 and 2017, the escalation of violence between April and July 2017, and the political crisis following the May 2018 presidential election.<sup>160</sup> It then provides a cursory discussion of subject-matter jurisdiction<sup>161</sup> and recounts the activities taken in 2019.<sup>162</sup>

Similar to the prior year’s report, the 2019 report indicates that the preliminary examination regarding the situation in Venezuela has focused primarily on crimes allegedly committed since at least April 2017; however, it no longer states that the Office of the Prosecutor may include in its analysis alleged crimes committed since February 2014.<sup>163</sup> It does state that that the Office of the Prosecutor has considered conduct occurring from February 2014 to April 2017 as *contextual information*, but there is no indication that the Office of the Prosecutor has also considered the conduct occurring prior to April 2017 as possible *criminal conduct* under Article 7.<sup>164</sup> For example, the brief discussion of subject-matter jurisdiction in the 2019 report reviews only alleged criminal conduct occurring since April 2017.<sup>165</sup> This is problematic, given the wealth of information provided to the Office of the Prosecutor by numerous bodies, including the OAS, pointing to the likely commission of crimes against humanity since at least February 2014.

Further, as previously noted, the report understates the scope and severity of some of the alleged crimes. Credible reports by reputable international bodies, including the OAS, give a clearer picture of the number of victims, but the 2019 report inexplicably avoids highlighting the true breadth of the alleged crimes.

Finally, the report notes that during the reporting period, the Office of the Prosecutor has analyzed multiple Article 15 communications and reports by civil society organizations, think tanks, media outlets, the OHCHR, the UN Working Group on Arbitrary Detention, and the Inter-American Commission on Human Rights, and that the Office of the Prosecutor expected to conclude its assessment of subject-matter

---

<sup>158</sup> *Ibidem*, pars. 123 to 24.

<sup>159</sup> International Criminal Court Office of the Prosecutor: *The Prosecutor of the International Criminal Court, Fatou Bensouda, Issues Report on Preliminary Examination Activities (2019)*, Press Release, December 5, 2019, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=PR1504>.

<sup>160</sup> *Report on Preliminary Examination Activities 2019*, *supra* note 47, pars. 62 to 72.

<sup>161</sup> *Ibidem*, pars. 73 to 80.

<sup>162</sup> *Ibidem*, pars. 81 to 82.

<sup>163</sup> *Ibidem*, par. 73.

<sup>164</sup> *Ibidem*.

<sup>165</sup> *Ibidem*, pars. 76 to 80.

jurisdiction (the second phase of review) in early 2020<sup>166</sup> (as discussed below, the Prosecutor has since completed this assessment and moved on to the third phase).

## B. General Approach to Preliminary Examinations

Article 53(1) of the Rome Statute sets forth the procedure for the Prosecutor’s preliminary examination of information relating to potential crimes falling under the Court’s jurisdiction. Specifically, when deciding whether to initiate an investigation, the Prosecutor must consider whether (a) there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed”, (b) the case is or would be admissible under Article 17, and (c) an investigation would not serve the interests of justice.<sup>167</sup> The Office of the Prosecutor conducts this analysis through four successive phases,<sup>168</sup> each of which will be described below.

### 1. Phase 1: Initial Assessment

Under Phase 1, the Office of the Prosecutor reviews all information provided to it under Article 15 to filter out matters that are manifestly outside the Court’s jurisdiction, already under preliminary examination, already under investigation, or already form the basis of a prosecution.<sup>169</sup> If none of these apply, the matter is then analyzed to determine whether the alleged crimes appear to fall within the jurisdiction of the Court – this is done using both open source information and other reliable sources for corroboration purposes.<sup>170</sup> If the alleged crimes do appear to fall within the jurisdiction of the Court, the matter proceeds to the next phase.<sup>171</sup> However, when a situation is referred by states parties to the Office of the Prosecutor, Phase 1 is skipped and the Prosecutor begins right with Phase 2.<sup>172</sup>

---

<sup>166</sup> *Ibidem*, pars. 81 to 83.

<sup>167</sup> *Rome Statute*, *supra* note 106, Art. 53 1).

<sup>168</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, pars. 77 to 84.

<sup>169</sup> *Ibidem*, par. 78.

<sup>170</sup> *Ibidem*, pars. 78 to 79.

<sup>171</sup> *Ibidem*, par. 79.

<sup>172</sup> *Ibidem*, par. 76 (“Upon receipt of a referral or a declaration pursuant to article 12(3), the Office will open a preliminary examination of the situation at hand”).



## 2. Phase 2: Jurisdiction

Phase 2 represents the formal commencement of a preliminary examination.<sup>173</sup> It focuses on whether the preconditions to the exercise of jurisdiction under Article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.<sup>174</sup> A “reasonable basis” means “a sensible or reasonable justification”.<sup>175</sup> In Phase 2, the Office of the Prosecutor conducts a thorough factual and legal assessment of the situation to identify potential cases within the Court’s jurisdiction, paying particular attention to crimes committed on a large scale as part of a plan or pursuant to a policy.<sup>176</sup> An “Article 5 report” is produced for the Prosecutor, which analyzes whether the Court has subject-matter jurisdiction under Article 5.<sup>177</sup> The Prosecutor’s 2018 and 2019 annual reports indicated that the situation in Venezuela was being assessed under Phase 2; on November 5, 2020, the Prosecutor announced her Office has “concluded its subject-matter assessment and determined that there was a reasonable basis to believe that crimes within the jurisdiction of the Court have occurred in Venezuela.”<sup>178</sup>

## 3. Phase 3: Admissibility

The Venezuela I preliminary examination is now focused on Phase 3, which examines admissibility as defined in Article 17.<sup>179</sup> Specifically, complementarity (whether the alleged crimes have been / are being investigated by national authorities) and gravity (whether the alleged crimes are of sufficient gravity to justify further action by the Court) are considered.<sup>180</sup> An “Article 17 report” is submitted to the Prosecutor regarding admissibility.<sup>181</sup>

---

<sup>173</sup> *Ibidem*, par. 80.

<sup>174</sup> *Ibidem*.

<sup>175</sup> *Ibidem*, par. 34 (quoting: Situation in the Republic of Kenya, ICC-01/09, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation*, March 31, 2010, par. 35, available at: <https://www.refworld.org/cases,ICC,4bc2fe372.html>).

<sup>176</sup> *Ibidem*, par. 81.

<sup>177</sup> Article 5 of the *Rome Statute*, entitled “Crimes within the jurisdiction of the Court”, states that “The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression”.

<sup>178</sup> *Report on Preliminary Examination Activities 2018*, *supra* note 56, page 3; see also: *Report on Preliminary Examination Activities 2019*, *supra* note 47, pars. 81 to 83; see also: International Criminal Court Office of the Prosecutor: *ICC Prosecutor, Mrs Fatou Bensouda, Receives High-Level Delegation From the Bolivarian Republic of Venezuela in the Context of Its Ongoing Preliminary Examinations*, Press Release, November 5, 2020, available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>.

<sup>179</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 82.

<sup>180</sup> *Rome Statute*, *supra* note 106, Art. 17.

<sup>181</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 82.

## 4. Phase 4: Interests of Justice

In Phase 4, the Office of the Prosecutor considers the interests of justice under Article 53 1) c)<sup>182</sup> – that is, whether, “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.<sup>183</sup> An “Article 53 1) report” is produced, which contains an initial legal characterization of the alleged crimes within the jurisdiction of the Court and a statement of facts indicating the location, time period, and a description of the perpetrators (to the extent identified) of the alleged crimes.<sup>184</sup>

## 5. Timeframe for Review

Nothing in the Rome Statute or the ICC’s Rules of Procedure and Evidence sets forth a specific timeframe for completing a preliminary examination.<sup>185</sup> Each preliminary examination will consider the particular issues and circumstances presented, including the availability of information; the nature, scale and frequency of the crimes; and the existence of national responses.<sup>186</sup> In a prior preliminary examination, the Prosecutor justified a delay in making a decision by pointing to ongoing national proceedings that had to be properly assessed; the “very gradual manner” in which important information was received; a deteriorating security situation, which impeded access to information; and a steady stream of new information, that had to be assessed for reliability and credibility.<sup>187</sup> It is worth noting that none of these factors justifying a delay, except for the receipt of ongoing information, is present in the situation of Venezuela. The Prosecutor has, however, committed to reaching decisions under Article 53(1) “as expeditiously as possible”.<sup>188</sup>

## C. Findings of Independent Expert Review

In December 2019, the Assembly of States Parties to the Rome Statute created the Independent Expert Review to “identify ways to strengthen the International Criminal Court and the Rome Statute system in order to promote universal recognition of their central role in the global fight against impunity and

---

<sup>182</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 83.

<sup>183</sup> *Rome Statute*, *supra* note 106, Art. 53 1) c).

<sup>184</sup> *Policy Paper on Preliminary Examinations*, *supra* note 4, par. 84.

<sup>185</sup> *Ibidem*, par. 89.

<sup>186</sup> *Ibidem*.

<sup>187</sup> International Criminal Court: *Situation in the Central African Republic, ICC-01/05, Prosecution’s Report Pursuant to Pre-Trial Chamber III’s 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination*, December 15, 2006, par. 9, available at: [https://www.icc-cpi.int/CourtRecords/CR2007\\_03777.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_03777.PDF).

<sup>188</sup> *Ibidem*, par. 10.

enhance their overall functioning”.<sup>189</sup> To that end, the Experts were asked to make “concrete, achievable, actionable recommendations aimed at enhancing the performance, efficiency and effectiveness of the Court and the Rome Statute system as a whole”.<sup>190</sup>

The Experts issued their final report on September 30, 2020, which included a lengthy section of critiques and recommendations relating to the Office of the Prosecutor, several of which help explain but do not justify why the preliminary examination of the situation in Venezuela is still ongoing after nearly three years.

As noted earlier, one of the major problems with the Office of the Prosecutor’s handling of the situation in Venezuela has been its failure to comply with the requirements of the *Policy Paper on Preliminary Examinations*. This reflects a more general problem that was noted in the Independent Expert Review – “The Experts were informed by many members of [the Office of the Prosecutor’s] staff that the current regulatory framework is unclear to them”.<sup>191</sup> Some of the guiding documents – the Regulations of the Office of the Prosecutor and the Operations Manual – had, in practice, “been abandoned,” and were determined to be inconsistent with other documents, such as Policy Papers, Standard Operating Procedures, and Internal Guidelines.<sup>192</sup> As for the Policy Papers, they were found to be “neither comprehensive nor clear as to how their provisions are to be implemented” and it was also “unclear whether these Policy Papers are binding or only intended for guidance”.<sup>193</sup> The Independent Expert Review concluded that “there is no uniform regulatory framework [for the Office of the Prosecutor] and as a result there is an absence of standard practices”. In fact, staff informed the Experts that “the absence of standard working procedures leaves it to the teams to ‘invent’ their own ways of working”.<sup>194</sup>

---

<sup>189</sup> *Review of the ICC and Rome Statute System*, ICC-ASP/18/Res.7 (2019), at Annex I(A), par. 1, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf).

<sup>190</sup> *Ibidem*.

<sup>191</sup> Independent Expert Review of the International Criminal Court and the Rome Statute System: *Final Report*, September 30, 2020, par. 129, available at: [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf).

<sup>192</sup> *Ibidem*.

<sup>193</sup> *Ibidem*, par. 131.

<sup>194</sup> *Ibidem*, par. 132.



▲ Body of David Contreras (27) being carried by officers of the Scientific, Penal, and Criminal Investigation Service Corps (CICPC) after he was murdered for his smartphone on Av. Francisco de Miranda.

*Caracas, Venezuela. October 11, 2018. Román Camacho*





▲ Officers of the Special Actions Force (FAES) of the Bolivarian National Police carry out operations in El Guarataro, a dangerous neighborhood in Caracas.

*Caracas, Venezuela. May 26, 2019. Román Camacho*





^ A view of Caracas, Venezuela, from Cerro El Ávila. The capital is the most dangerous city in the world, with an average of 130.5 homicides for every 100,000 residents.

*Caracas, Venezuela.* March 1, 2019. **Andrea Hernández**





▲ On the way home from elementary school, children walk among the ruins of 17 houses that accidentally burned down during a blackout in Petare, Caracas

*Caracas, Venezuela. April 8, 2019.*  
**Adriana Loureiro Fernández**





^ The Ineffectiveness of the CLAP. Inhabitant of Barrio 24 de Julio in Petare rummaging through the garbage dump remains

*Barrio 24 de julio, Petare, Caracas. June 6, 2019.*  
**Andrés Rodríguez**





▲ The Last Resort. A retiree from Exxon Mobil on a hunger strike awaiting back-pay and benefits payments from the Venezuelan State.

*Plaza de la Moneda, near Miraflores Palace, Caracas, Venezuela. June 5, 2019. Andrés Rodríguez*





## V. MULTILATERAL INVESTIGATIONS INTO THE SITUATION IN VENEZUELA

This report updates the May 2018 report by the Organization for American States on the possible commission of crimes against humanity in Venezuela.<sup>195</sup> Since then, there have been three major multilateral efforts to investigate and document the crisis and alleged human rights violations in the country. In June 2018, then UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein published a report.<sup>196</sup> His successor, Michelle Bachelet, has published two reports: one in July 2019<sup>197</sup> and one in July 2020.<sup>198</sup> Finally, an Independent Fact-Finding Mission on Venezuela was established by the UN Human Rights Council in September 2019.<sup>199</sup> This section will analyze the scope and methodology of these efforts and reports, as well as their overarching conclusions. Later sections will draw on and analyze more specific findings and data from these reports.

### A. 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, May 29, 2018

On July 25, 2017, the Secretary General of the OAS, Luis Almagro, designated former ICC Prosecutor Luis Moreno Ocampo as Special Adviser on Crimes against Humanity to help the OAS consider whether Venezuelan authorities committed crimes against humanity.<sup>200</sup> In September 2017, Almagro appointed a Panel of Independent International Experts – comprised of Manuel Ventura Robles, Santiago Canton,

---

<sup>195</sup> 2018 OAS Report, *supra* note 14.

<sup>196</sup> Human Rights Violations in the Bolivarian Republic of Venezuela, *supra* note 78.

<sup>197</sup> 2019 OHCHR Report, *supra* note 78.

<sup>198</sup> Michelle Bachelet, UN Human Rights Council: *Outcomes of the Investigation Into Allegations of Possible Human Right Violations of the Human Rights to Life, Liberty and Physical and Moral Integrity in the Bolivarian Republic of Venezuela*, U.N. Doc. A/HRC/44/20, July 2, 2020, available at: [https://www.ohchr.org/Documents/Countries/VE/A\\_HRC\\_44\\_20\\_AdvanceUneditedVersion.pdf](https://www.ohchr.org/Documents/Countries/VE/A_HRC_44_20_AdvanceUneditedVersion.pdf) [hereinafter, July 2, 2020 High Commissioner's Report].

<sup>199</sup> Office of the High Commissioner for Human Rights: *Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela*, accessed November 18, 2019, available at: <https://www.ohchr.org/EN/HRBodies/HRC/FFMV/Pages/Index.aspx>.

<sup>200</sup> OAS: *OAS Secretary General Designates Luis Moreno Ocampo as Special Adviser on Crimes against Humanity*, OAS, Press Release, July 25, 2017, available at: [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-057/17](https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-057/17).

and Irwin Cotler – to analyze the evidence gathered by the OAS General Secretariat and produce a final report.<sup>201</sup>

The General Secretariat held five public hearings on Venezuela in September, October, and November, 2017.<sup>202</sup> Twenty-six witnesses – which included victims, members of civil society, and former government officials – gave testimony.<sup>203</sup> The Panel also reviewed information from other sources, including international and domestic civil society.<sup>204</sup> Media reports were used as a secondary source, but were cross-checked against all other materials.<sup>205</sup> Applying the Rome Statute’s definition of crimes against humanity, the Panel focused their legal and factual evaluation on alleged human rights violations that were “part of a widespread or systematic attack directed against any civilian population and where the perpetrators had knowledge of the attack”.<sup>206</sup>

This process culminated in a nearly 500-page report, published in May 2018. The report sets forth detailed evidence on each alleged crime against humanity – murder, torture, rape/sexual violence, imprisonment or severe deprivation of liberty, persecution, and enforced disappearance<sup>207</sup> – and then analyzes whether the Rome Statute’s requirements for opening an investigation were met. Specifically, after considering jurisdiction, the report reviews whether there was a reasonable basis to believe that each alleged crime against humanity has occurred in Venezuela.<sup>208</sup> The report also discusses admissibility – that is, complementarity and the interests of justice.<sup>209</sup> The key findings of the report include the following<sup>210</sup>:

- There are reasonable grounds to believe that the crimes against humanity of murder, imprisonment, torture, rape and other forms of sexual violence, persecution, and enforced disappearance have occurred in Venezuela since at least February 12, 2014.<sup>211</sup> Specifically, the Panel found evidence of at least 8,423 murders, 12,000 arbitrary detentions, 289 cases of torture, 192 cases of rape, “a number” of enforced disappearances, and hundreds of thousands, if not millions, of cases of persecution.<sup>212</sup>

---

**201** 2018 OAS Report, *supra* note 14, pages ix and 305.

**202** *Ibidem*, page x.

**203** *Ibidem*, pages x and 17.

**204** *Ibidem*, page 307.

**205** *Ibidem*.

**206** *Ibidem*, page 308.

**207** *Ibidem*, pages 55 to 261.

**208** *Ibidem*, pages 311 to 417.

**209** *Ibidem*, pages 417 to 44.

**210** *Ibidem*, pages 449 to 51.

**211** *Ibidem*, page 449.

**212** *Ibidem*, pages 449 to 50.

- These criminal acts were committed as part of a widespread and systematic attack directed against the segment of the civilian population made up of political opponents or those identified as such by individuals who had knowledge of the attack.<sup>213</sup>
- The complementarity requirement is met because there is a “massive assault on the rule of law and the justice system” in Venezuela; judges and prosecutors are complicit in the crimes; senior members of the regime, State security forces, and *colectivos* enjoy “utter impunity”; and the judiciary suffers from an “utter absence of independence and impartiality”.<sup>214</sup> Therefore, the ICC is “the international body of last resort for pursuing justice [and] ending the impunity in Venezuela”.<sup>215</sup>

The report concluded with two recommendations – the Secretary General of the OAS should (1) submit the report and evidence collected to the Office of the Prosecutor at the ICC “for the purposes of opening an investigation into the crimes against humanity”, and (2) invite states parties to the Rome Statute to refer the situation of Venezuela to the Office of the Prosecutor and call for an investigation to be opened.<sup>216</sup>

## B. Human Rights Violations in the Bolivarian Republic of Venezuela:

### A Downward Spiral With No End in Sight, Office of the UN High Commissioner for Human Rights, June 22, 2018

The Office of then UN High Commissioner Zeid Ra’ad Al Hussein produced this report as an update to a prior report that documented human rights violations in Venezuela connected to the protests in April to July 2017.<sup>217</sup> The updated report had an expanded scope – it examined a wider range of human rights violations (e.g., not just those related to protests) over a longer period of time – from 2014 to 2018.<sup>218</sup> Information for the report was gathered through 150 interviews of victims, witnesses, and other sources, including civil society representatives, journalists, lawyers, medical doctors, and academics.<sup>219</sup> Further information was gathered by examining documents and other materials from monitored incidents of human rights abuses, including medical and forensic reports, official information, legal documents, photographs,

---

<sup>213</sup> *Ibidem*.

<sup>214</sup> *Ibidem*.

<sup>215</sup> *Ibidem*, page 451.

<sup>216</sup> *Ibidem*, pages ix and 449.

<sup>217</sup> *Human Rights Violations in the Bolivarian Republic of Venezuela*, *supra* note 78, page ii (citing *Human Rights Violations and Abuses in the Context of Protests*, *supra* note 78).

<sup>218</sup> *Ibidem*.

<sup>219</sup> *Ibidem*.

videos, media reports, social media material, and NGO statistics.<sup>220</sup> According to the report, these sources provided a substantial body of information which lend credibility to the report's findings, despite the OHCHR lacking access to the country and information from the authorities.<sup>221</sup>

This report, published in June 2018, had several important findings:

- The use of excessive force by the security forces in security operations “has been ongoing since at least 2012”.<sup>222</sup> In particular, since 2015, there has been “a pattern of disproportionate and unnecessary use of force” during the so-called “Operations for the Liberation of the People”, which has resulted in a large number of killings that could constitute extrajudicial executions.<sup>223</sup>
- Security forces, and in particular the intelligence services, continue to use arbitrary detention to intimidate and repress the political opposition or anyone perceived as a threat to the regime.<sup>224</sup> At least 570 persons, including 35 children, were arbitrarily detained from August 2017 to April 2018.<sup>225</sup>
- There is a “clear pattern” of security forces employing torture and ill-treatment to intimidate and punish detainees, as well as to extract confessions and information.<sup>226</sup>
- There are “recurrent violations of due process”, which include *incommunicado* detention, enforced disappearance, restrictions on the right to prepare a defense, unjustified judicial delays, and the trial of civilians before military courts.<sup>227</sup>
- Regime officials have “failed to act with due diligence to promptly and effectively investigate the excessive use of force and the killings of protestors by security forces, punish the alleged perpetrators, and establish chain of command responsibilities of senior authorities”.<sup>228</sup> This has included blocking efforts to identify perpetrators, releasing alleged perpetrators, and delaying judicial proceedings.<sup>229</sup>

---

<sup>220</sup> *Ibidem*, page 2.

<sup>221</sup> *Ibidem*.

<sup>222</sup> *Ibidem*, page ii.

<sup>223</sup> *Ibidem*.

<sup>224</sup> *Ibidem*, page iii.

<sup>225</sup> *Ibidem*.

<sup>226</sup> *Ibidem*, pages iii to iv.

<sup>227</sup> *Ibidem*, page iii.

<sup>228</sup> *Ibidem*, page ii.

<sup>229</sup> *Ibidem*.

In some cases, security forces have tampered with evidence.<sup>230</sup> Security forces enjoy “high levels of impunity”.<sup>231</sup>

- The regime continues to intimidate and repress the political opposition and anyone expressing discontent.<sup>232</sup> Attacks have been documented against leaders and members of opposition parties, social activists, students, academics, and human rights defenders.<sup>233</sup> Some have been accused of terrorism, treason, and other serious crimes.<sup>234</sup> Civil society organizations have also been targeted.<sup>235</sup>
- There is a “dramatic health crisis” resulting from the “collapse of the Venezuelan health care system”.<sup>236</sup> Regime officials have not taken effective measures to address the crisis, and in fact, have refused to release information on it.<sup>237</sup> Furthermore, the economic and social policies implemented by the regime – including state control over food prices and foreign currency exchange – has led to “critical levels of food unavailability and a situation where large segments of the population cannot afford to buy food at market price”.<sup>238</sup> Moreover, the regime has refused to acknowledge or address the scale of the health and food crises.<sup>239</sup>

Based on these findings, the report recommended that the UN Human Rights Council establish an international commission of inquiry to investigate human rights violations in Venezuela.<sup>240</sup> It also urged the Maduro regime to provide the OHCHR, UN Special Procedures, and regional mechanisms full access to the country for further assessment.<sup>241</sup> Finally, it provided extensive recommendations to regime officials and bodies to address the human rights violations detailed in the report.<sup>242</sup>

---

<sup>230</sup> *Ibidem*, page iii.

<sup>231</sup> *Ibidem*, page ii.

<sup>232</sup> *Ibidem*, page iv.

<sup>233</sup> *Ibidem*.

<sup>234</sup> *Ibidem*.

<sup>235</sup> *Ibidem*.

<sup>236</sup> *Ibidem*.

<sup>237</sup> *Ibidem*.

<sup>238</sup> *Ibidem*, page v.

<sup>239</sup> *Ibidem*.

<sup>240</sup> *Ibidem*, page 52.

<sup>241</sup> *Ibidem*.

<sup>242</sup> *Ibidem*, page 52 to 54.





▲ Alex and Nia take a bus from Caracas to San Cristóbal on their immigration journey to Lima, Perú.

Venezuela. August 23, 2017. **Gabriel Méndez**



▲ A boy sleeps on a pile of suitcases while he and his family wait in the massive line to get their passports stamped before entering Colombia and permanently emigrating from Venezuela. Every day, motivated by the profound social, economic, and political crisis under Nicolás Maduro's regime, at least 30 thousand people cross the Simón Bolívar International Bridge (many with limited or non-existent resources) to seek a better life outside of their country.

February 10, 2018. **Rafael Hernández**



▲ A boy carries a bag of clothes on a path that crosses the border between Colombia and Venezuela from Táchira State to Norte de Santander.

Colombia- Venezuela Border. February 18, 2019. **Rayner Peña**





▲ ▲ “Chinatown” is split in half. This neighborhood is dark, so there’s no natural light. This is the home of 58 women. “The situation doesn’t help anybody. When we leave, if we leave, we will be worse off than before,” says Ayari, a 33-year-old detainee.

*El Valle, Caracas, Venezuela. March 2018. Ana María Arévalo G*



<<

Passers-by walk around Miraflores Palace during the blackout that affected most of the country.

*Caracas, Venezuela. March 7, 2019. Rayner Peña*

## C. Report of the UN High Commissioner for Human Rights on the Situation of Human Rights in the Bolivarian Republic of Venezuela, July 5, 2019

UN High Commissioner for Human Rights Michelle Bachelet produced this report in response to Human Rights Council Resolution 39/1, which requested the High Commissioner produce an additional report on the human rights situation in Venezuela.<sup>243</sup> The report reviews violations of Venezuelans' economic and social rights, civil and political rights, and right to access justice. Unlike the OHCHR's 2018 report, the 2019 report includes information obtained during in-country missions to Venezuela. Specifically, the OHCHR traveled to Venezuela in March and June of 2019 to meet with various stakeholders across the country, including Maduro and other high-level officials.<sup>244</sup> The OHCHR made additional visits to Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Peru, and Spain to interview Venezuelan migrants and refugees.<sup>245</sup> In total, the OHCHR conducted 558 interviews with victims and witnesses of human rights violations and other sources and held 159 meetings with various other stakeholders.<sup>246</sup>

The report documents numerous human rights violations:

- The economic and social crisis in Venezuela has “deteriorated further”, and “there are reasonable grounds to believe that grave violations of economic and social rights, including the rights to food and health, have been committed”.<sup>247</sup> The regime’s response to the food crisis has been inadequate – it has not demonstrated that it has used all available resources, nor that it unsuccessfully sought international assistance to address the gaps.<sup>248</sup> The health situation in Venezuela is “dire”, with shortages of essential medicines, reemergence of preventable diseases, and critical lack of supplies.<sup>249</sup> Social programs have been implemented “in a discriminatory manner, based on political grounds, and as an instrument of social control”.<sup>250</sup>
- The regime’s efforts to “neutraliz[e], repress[] and criminaliz[e] political opponents . . . has accelerated since 2016”.<sup>251</sup>

---

<sup>243</sup> 2019 OHCHR Report, *supra* note 78, par. 1.

<sup>244</sup> *Ibidem*, pars. 3 to 4.

<sup>245</sup> *Ibidem*, par. 3.

<sup>246</sup> *Ibidem*, par. 6.

<sup>247</sup> *Ibidem*, pars. 10 and 75.

<sup>248</sup> *Ibidem*, par. 13.

<sup>249</sup> *Ibidem*, pars. 16 to 19.

<sup>250</sup> *Ibidem*, par. 75.

<sup>251</sup> *Ibidem*, par. 30.

- During protests, security officials have used “excessive force deliberately, to instil fear and discourage further demonstrations”.<sup>252</sup>
- The regime “has used arbitrary detentions as one of the principal means to intimidate and repress the political opposition and any real or perceived expression of dissent since at least 2014”.<sup>253</sup> In many cases, detainees are subjected to torture or ill treatment.<sup>254</sup>
- Thousands of Venezuelans, mainly men, have been killed in alleged confrontations with Venezuelan security forces in a manner that may qualify as extrajudicial killing.<sup>255</sup>
- The Maduro regime has “systematically denied victims of human rights violations their rights to truth, justice, and reparation”.<sup>256</sup> This impunity has “enabled the recurrence of human rights violations, emboldened perpetrators, and side-lined victims”.<sup>257</sup>

The report concludes by calling for the Maduro regime to, *inter alia*, cease all abuses, take steps to improve the social and economic state of the country, and increase accountability through better documentation and investigation.<sup>258</sup>

#### D. Report of the UN High Commissioner for Human Rights on Outcomes of the Investigation Into Allegations of Possible Human Right Violations of the Human Rights to Life, Liberty and Physical and Moral Integrity in the Bolivarian Republic of Venezuela, July 2, 2020

On September 26, 2019, the Human Rights Council adopted Resolution 42/4, requesting UN High Commissioner for Human Rights Michelle Bachelet to prepare a comprehensive report regarding the human rights situation in Venezuela, “including the outcomes of the investigation on the ground into allegations of possible human rights violations of the human rights to life, liberty and physical and moral integrity in the country, to ensure the accountability of perpetrators and redress for victims”.<sup>259</sup> The High Commissioner’s

---

<sup>252</sup> *Ibidem*, par. 39.

<sup>253</sup> *Ibidem*, par. 41.

<sup>254</sup> *Ibidem*, par. 43.

<sup>255</sup> *Ibidem*, par. 78.

<sup>256</sup> *Ibidem*, par. 80.

<sup>257</sup> *Ibidem*.

<sup>258</sup> *Ibidem*, pars. 81 to 82.

<sup>259</sup> July 2, 2020 High Commissioner’s Report, *supra* note 198, par. 1.

report, dated July 2, 2020, discussed Venezuelans' economic and social rights, the shrinking democratic and civic space, and violations of the rights to life and liberty and integrity of the person, with a focus on the period from June 2019 to May 2020.<sup>260</sup> It was based on interviews with multiple sources, meetings with a broad range of stakeholders, data provided by the government, and information and documents provided by victims, civil society, and other sources.<sup>261</sup>

The report documents numerous human rights violations:

- *Colectivos* continued to wage attacks against political opponents, demonstrators, and journalists. State security forces made no effort to prevent or intervene during these attacks.<sup>262</sup>
- Following the March 13, 2020, "state of alarm" decree regarding the COVID-19 pandemic, the OHCHR observed "discretionary implementation of the 'state of alarm' by the military, law enforcement and local authorities", as well as "the involvement of armed colectivos in the enforcement of confinement measures in poor neighbourhoods, and documented undue restrictions on access to information and freedom of expression, which resulted in detention of demonstrators, journalists, human rights defenders, and political leaders by security forces".<sup>263</sup>
- "OHCHR documented restrictions to the right to liberty of demonstrators, and media and health workers".<sup>264</sup> For example, three health professionals were arrested for "denouncing the lack of basic equipment, providing information about COVID-19 or criticizing the Government's response to the pandemic".<sup>265</sup>
- There were numerous due process violations. For example, lawyers had limited access to those detained in SEBIN or DGCIM facilities. Even when lawyers were permitted to visit their imprisoned clients, they were not given sufficient time or confidentiality. In some cases, defense lawyers were not given access to their client's case files, and in others, they were given access only immediately before the hearing. The case files themselves were often severely deficient, lacking fundamental legal documents, such as the indictment. In addition, "[c]ourts repeatedly rejected legal filings of defence lawyers at key hearings challenging jurisdiction, witnesses or other evidence without clear reasoning or without any response".<sup>266</sup> An analysis of 110 cases indicated that many people were arrested without a warrant,

---

<sup>260</sup> *Ibidem*.

<sup>261</sup> *Ibidem*, par. 4.

<sup>262</sup> *Ibidem*, par. 25.

<sup>263</sup> *Ibidem*, par. 31.

<sup>264</sup> *Ibidem*, par. 40.

<sup>265</sup> *Ibidem*, par. 43.

<sup>266</sup> *Ibidem*, par. 47; see also: *ibidem*, par. 40 (OHCHR "documented violations of due process in cases of persons charged for crimes such as treason, rebellion, public incitement, conspiracy, attempted assassination, terrorism or funding of terrorism").



arrest warrants were issued retroactively, and houses were searched without judicial authorization.<sup>267</sup> Some detainees were held *incommunicado* for up to 40 days.<sup>268</sup>

- The OHCHR received allegations of torture or ill treatment aimed at intimidating and punishing detainees, extracting confessions, or incriminating others through videos or written statements.<sup>269</sup> Conditions of detention may have also violated international law – in one detention center, “most individuals were held in overcrowded rooms lacking adequate sanitary facilities”; “[l]ights were reportedly left on 24 hours a day and air conditioning was used excessively to create uncomfortable conditions”; and “detainees could not leave their cells during the day, and the possibility to spend time in open spaces was seriously restricted”.<sup>270</sup> At that same facility, “some detainees were held for extended periods of time in complete isolation in small cells without any ventilation, in the dark and handcuffed most of the time.”<sup>271</sup>
- “Almost all individuals detained by DGCIM from the cases documented by OHCHR were subjected to enforced disappearances for short periods following their arrest,” some up to 40 days.<sup>272</sup>

On October 6, 2020, the Human Rights Council adopted Resolution 45/2, which requests the High Commissioner to provide an oral update on the human rights situation in Venezuela at the Council’s forty-sixth session, and a comprehensive written report at the Council’s forty-eighth session.<sup>273</sup>

Additionally, pursuant to Human Rights Council Resolution 42/25, UN High Commissioner for Human Rights Michelle Bachelet published a report on July 15, 2020, entitled *Independence of the Justice System and Access to Justice in the Bolivarian Republic of Venezuela, Including for Violations of Economic and Social Rights, and the Situation of Human Rights in the Arco Minero del Orinoco Region*.<sup>274</sup> The report confirms that victims of human rights violations in Venezuela continue to face “legal, political and socioeconomic barriers in accessing effective justice, with women experiencing gender-specific challenges”.<sup>275</sup> The report

---

<sup>267</sup> *Ibidem*, par. 45.

<sup>268</sup> *Ibidem*, par. 49.

<sup>269</sup> *Ibidem*, par. 52.

<sup>270</sup> *Ibidem*, par. 65.

<sup>271</sup> *Ibidem*, par. 66.

<sup>272</sup> *Ibidem*, par. 46.

<sup>273</sup> UN Human Rights Council: *Strengthening Cooperation and Technical Assistance in the Field of Human Rights in the Bolivarian Republic of Venezuela*, HRC Res. 45/2, U.N. Doc A/HRC/RES/45/2, adopted October 6, 2020, available at: <https://undocs.org/en/A/HRC/RES/45/2>.

<sup>274</sup> Michelle Bachelet, UN Human Rights Council: *Independence of the Justice System and Access to Justice in the Bolivarian Republic of Venezuela, Including for Violations of Economic and Social Rights, and the Situation of Human Rights in the Arco Minero del Orinoco Region*, U.N. Doc. A/HRC/44/54, July 15, 2020, available at: [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A\\_HRC\\_44\\_54.pdf](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session44/Documents/A_HRC_44_54.pdf) [hereinafter, July 15, 2020 High Commissioner’s Report].

<sup>275</sup> *Ibidem*, par. 17.

documents cases of enforced disappearance,<sup>276</sup> torture,<sup>277</sup> and gender-based violence,<sup>278</sup> and pays special attention to the human rights landscape in the Arco Minero del Orinoco region, where “levels of labour, exploitation, trafficking and violence are high, due to the existence of a corruption and bribery scheme by groups controlling the mines whereby they pay off military commanders to maintain their presence and illegal activities”.<sup>279</sup>

## E. Report and Detailed Findings of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, September 16, 2020

On September 27, 2019, the UN Human Rights Council adopted Resolution 42/25, which established the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela.<sup>280</sup> The Fact-Finding Mission was given a year-long mandate to “investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims”.<sup>281</sup>

On December 2, 2019, the President of the Human Rights Council, Ambassador Coly Seck (Senegal), announced the appointment of Marta Valiñas (Portugal), Francisco Cox Vial (Chile), and Paul Seils (United Kingdom) as the three members of the Independent International Fact-Finding Mission, with Ms. Valiñas serving as Chair.<sup>282</sup>

On September 15, 2020, the Fact-Finding Mission published two reports which offer a scathing indictment of the human rights landscape in Venezuela.<sup>283</sup> The first provides an “overview of its findings with respect to extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment, committed in the country since 2014”, as well its assessment of who is responsible for the violations found.<sup>284</sup> The second, at 411 pages, offers a more thorough description

---

<sup>276</sup> *Ibidem*, par. 25.

<sup>277</sup> *Ibidem*, par. 27.

<sup>278</sup> *Ibidem*, par. 33.

<sup>279</sup> *Ibidem*, par. 41.

<sup>280</sup> UN Human Rights Council: *Situation of Human Rights in the Bolivarian Republic of Venezuela*, HRC Res. 42/25, U.N. Doc. A/HRC/RES/42/25, adopted September 27, 2019, par. 24, available at: <https://undocs.org/A/HRC/RES/42/25>.

<sup>281</sup> *Ibidem*.

<sup>282</sup> Human Rights Council: *President of Human Rights Council Appoints Members of Fact-Finding Mission on Venezuela*, Press Release, December 2, 2019, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25376&LangID=E>; see also: *Situation of Human Rights in the Bolivarian Republic of Venezuela*, *supra* note 280, par. 24.

<sup>283</sup> 2020 Fact-Finding Mission Report, *supra* note 55; see also: 2020 Fact-Finding Mission Detailed Findings, *supra* note 78.

<sup>284</sup> 2020 Fact-Finding Mission Report, *supra* note 55, Summary.

of the cases documented, a more detailed analysis of state and individual responsibility, and a list of specific recommendations.<sup>285</sup>

While the Fact-Finding Mission was not able to conduct in-country visits due to travel restrictions in Venezuela and the COVID-19 pandemic, it identified “patterns and documented specific incidents establishing reasonable grounds to believe that violations of international human rights law have been committed, along with crimes under national and international criminal law”.<sup>286</sup> Cumulatively, the Fact-Finding Mission investigated 223 individual cases, reviewed an additional 2,891 reported human rights violations to corroborate patterns, and conducted 274 interviews.<sup>287</sup>

These reports document numerous human rights violations:

- Venezuela continues to be wracked by “hyperinflation, severe shortages of food and medicine, and a dire humanitarian crisis”, which has been exacerbated by the COVID-19 pandemic.<sup>288</sup> The crisis has caused 5 million Venezuelans – approximately one sixth of the population – to flee the country.<sup>289</sup>
- The regime employs arbitrary detention to “target individuals based on their political affiliation, participation, views, opinions or expression”, and in the cases investigated by the Fact-Finding Mission, “a number of detainees were also victims of short term enforced disappearances and acts of torture and cruel, inhuman or degrading treatment, including sexual and gender based violence, at the hands of intelligence agencies SEBIN and DGCIM.”<sup>290</sup>
- There are reasonable grounds to believe that security forces committed extrajudicial executions during Operations for People’s Liberation and Operations for People’s Humane Liberation,<sup>291</sup> and that police committed extrajudicial executions during other security operations.<sup>292</sup> Both security forces and police have a pattern of attempting to cover up such killings by planting evidence to simulate a violent confrontation.<sup>293</sup>
- Human rights violations have been committed by state security forces at protests. Specifically, “recurring arbitrary detentions of demonstrators occurred in violation of their right to liberty and security”, “security forces including the GNB, PNB and SEBIN subjected demonstrators to torture and

---

<sup>285</sup> 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, par. 3.

<sup>286</sup> 2020 Fact-Finding Mission Report, *supra* note 55, par. 5.

<sup>287</sup> *Ibidem*, par. 8; 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, par. 9.

<sup>288</sup> 2020 Fact-Finding Mission Report, *supra* note 55, par. 13.

<sup>289</sup> *Ibidem*.

<sup>290</sup> *Ibidem*, par. 34.

<sup>291</sup> *Ibidem*, par. 91.

<sup>292</sup> *Ibidem*, par. 102.

<sup>293</sup> *Ibidem*, pars. 93, 95, 115 to 16.

cruel, inhuman or degrading treatment”, and “[s]ecurity forces used lethal force against the victim when it was not strictly unavoidable to protect lives”.<sup>294</sup>

- The Fact-Finding Mission explicitly affirmed that it had reasonable grounds to believe that “crimes against humanity were committed in Venezuela in the period under review”, including “murder, imprisonment and other severe deprivations of physical liberty, torture, rape and other forms of sexual violence, enforced disappearance of persons . . . and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health”.<sup>295</sup> The Fact-Finding Mission further noted that “[s]ome of the same conduct may also constitute the crime against humanity of persecution”.<sup>296</sup>
- The Fact-Finding Mission also concluded that high-level regime officials – including President Nicolás Maduro and several of his ministers – “ordered or contributed to the commission of the crimes documented in this report, and having the effective ability to do so, failed to take preventive and repressive measures”.<sup>297</sup>

The longer report concludes with 65 recommendations to address the crimes committed, including “ensur[ing] that the Office of the Prosecutor of the International Criminal Court takes into consideration the needs of the victims of the crimes investigated by the Mission and those under its consideration to have justice served in a timely fashion”.<sup>298</sup>

On October 6, 2020, the Human Rights Council adopted Resolution 45/20, which extended the mandate of the Independent International Fact-Finding Mission for two years so that it can “continue to investigate gross violations of human rights . . . committed since 2014, with a view of combating impunity and ensuring full accountability for perpetrators and justice for victims”.<sup>299</sup> The resolution further requests the Fact-Finding Mission to present an oral update at the forty-sixth and forty-ninth sessions of the Council, and to prepare written reports on its findings to present to the Council at its forty-eighth and Fiftieth Session.<sup>300</sup>

---

<sup>294</sup> *Ibidem*, pars. 129, 139, 145.

<sup>295</sup> *Ibidem*, par. 161; see also: *2020 Fact-Finding Mission Detailed Findings*, *supra* note 78, par. 2086 (“[T]he Mission has reasonable grounds to believe that most of the violations and crimes documented in this report were committed as part of a widespread and systematic attack directed against a civilian population, with knowledge of the attack, pursuant to or in furtherance of a State policy. In relation to these crimes, the Mission has reasonable grounds to believe that crimes against humanity were committed in Venezuela in the period under review”).

<sup>296</sup> *2020 Fact-Finding Mission Report*, *supra* note 55, par. 161.

<sup>297</sup> *2020 Fact-Finding Mission Report*, *supra* note 55, par. 164.

<sup>298</sup> *2020 Fact-Finding Mission Detailed Findings*, *supra* note 78, ch. VIII, par. 65.

<sup>299</sup> UN Human Rights Council: *Situation of Human Rights in the Bolivarian Republic of Venezuela*, HRC Res. 45/20, U.N. Doc A/HRC/RES/45/20, adopted October 6, 2020, available at: <https://undocs.org/en/A/HRC/RES/45/20>.

<sup>300</sup> *Ibidem*.







## VI. UPDATED ANALYSIS OF ALLEGED CRIMES AGAINST HUMANITY IN VENEZUELA

The intent of this section is twofold. First, it will compile new information about the crisis in Venezuela that has been published by reputable sources since the OAS's May 2018 report. This will provide an updated account of potentially criminal actions by regime officials and the harms inflicted on the Venezuelan people. And second, based on the facts documented in the *2018 OAS Report* and these more recent reports, it will expand on the legal analysis provided in the *2018 OAS Report* and will demonstrate there is a reasonable basis to conclude that Venezuelan officials have committed crimes against humanity.

### A. Crimes Against Humanity: Common Elements

The Rome Statute defines “crime against humanity” as any one of a listed set of acts (e.g., murder, torture, etc.) that is “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.<sup>301</sup> Before discussing specific crimes against humanity, the elements common to all of them will be analyzed in the context of Venezuela.

#### 1. Acts Must Be Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

##### a. There Must Be an Attack

In the Rome Statute, an “attack” refers to “a campaign, an operation or a series of actions” – that is, “a course of conduct and not a single isolated act”.<sup>302</sup> An attack must involve the commission of multiple acts listed in Article 7(1).<sup>303</sup> As the *2018 OAS Report* explains, since at least February 12, 2014, there has been “an attack by the different agencies of the Venezuelan State as well as by members of ‘colectivos’

---

<sup>301</sup> *Rome Statute*, *supra* note 106, Art. 7 1).

<sup>302</sup> International Criminal Court: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga*, Judgment Pursuant to Article 74 of the Statute, March 7, 2014, par. 1101, available at: [https://www.icc-cpi.int/CourtRecords/CR2015\\_04025.PDF](https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF).

<sup>303</sup> International Criminal Court: *Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74 of the Statute, March 21, 2016, pars. 150 to 51, available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF).

acting in coordination with the State” against perceived regime opponents.<sup>304</sup> As discussed below, this has involved countless thousands of individual acts prohibited by Article 7 1), including murder, torture, imprisonment, persecution, enforced disappearance, rape and sexual violence, and other inhumane acts.

### **b. Acts of the Accused Must Be “Part of” the Attack**

To fall within the ICC’s jurisdiction, an individual criminal act must be “part of” the larger attack against the civilian population. In considering this, the ICC “makes an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act”.<sup>305</sup> For all of the criminal acts detailed below, the requisite nexus between the acts and the attack is clear – the victims of all the acts were precisely those being targeted by the attack (actual or perceived government opponents) and the acts were committed by government forces (or armed civilians operating alongside them) working under an unequivocal government policy.<sup>306</sup>

### **c. Attack Must Be Widespread or Systematic**

The ICC has explained that “widespread” refers to “the large-scale nature of the attack and to the number of targeted persons”.<sup>307</sup> The term “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence” or “the existence of ‘patterns of crimes’ reflected in the non-accidental repetition of similar criminal conduct on a regular basis”.<sup>308</sup>

The Venezuelan regime’s attack against its own people is both widespread and systematic. The number of targeted persons – anyone perceived as a regime opponent<sup>309</sup> – is truly vast. Further, it is clear that the acts of violence are not random, but rather form an organized pattern.<sup>310</sup> The OHCHR’s July 2019 report found “targeted repression of opposition members and social leaders”.<sup>311</sup>

---

**304** 2018 OAS Report, *supra* note 14, page 316.

**305** *Prosecutor v. Bemba*, *supra* note 303, par. 165.

**306** See, e.g.: 2018 OAS Report, *supra* note 14, page 347 (finding that “the connection with the contextual element is proven, since the murders were of persons who make up the identified group that was targeted by the attack and they were committed by agents who undoubtedly had knowledge of the existence of the policy”).

**307** *Prosecutor v. Katanga*, *supra* note 302, par. 1123.

**308** *Ibidem*.

**309** 2018 OAS Report, *supra* note 14, page xii (noting “a widespread or systematic state policy particularly targeting opponents of the regime or those believed to be opponents of the regime”); see also: *ibidem*, page x (“The testimony revealed a pattern of widespread and systematic attacks against the opposition, which was identified as any individual who expresses views that do not support the ideology of the Bolivarian Government in Venezuela”).

**310** *Ibidem*, page x (noting “a pattern of widespread and systematic attacks against the opposition”); see also: *ibidem*, page 337 (“[T]his Panel is convinced that the attack was directed against the civilian population. In addition, this panel understands that it has been shown that the attack was both widespread and systematic”).

**311** 2019 OHCHR Report, *supra* note 78, par. 36.

#### d. Attack Must Be Directed Against a Civilian Population

Under the Rome Statute, an attack is “directed against any civilian population” if it is “pursuant to or in furtherance of a State . . . policy to commit such attack”.<sup>312</sup> The state must have “actively promote[d] or encourage[d]” the attack.<sup>313</sup> However, the “policy” does not need to be a formal policy; it may be inferred from factors such as: the attack was planned, directed, or organized; a recurrent pattern of violence; the use of public resources to further the policy; the involvement of the state in the commission of crimes; statements, instructions, or documentation attributable to the state condoning or encouraging the commission of crimes; and an underlying motivation.<sup>314</sup>

The *2018 OAS Report* concluded that the Venezuelan regime had such a policy: “The information received by this Panel is sufficient to verify that the crimes of murder, severe deprivation of liberty, torture, rape and other forms of sexual violence, persecution, and enforced disappearance are part of a state policy of attack directed against an identifiable segment of the civilian population: political opponents or those who were perceived as such”.<sup>315</sup> The report noted that numerous different regime security forces (GNB, PNB, SEBIN, CICPC, DGCIM, etc.) have committed crimes against civilians; crimes have been committed consistently since February 2014 (and thus were not isolated cases); regime bodies and officials have enacted various laws, decrees, orders, resolutions, and plans to facilitate the attack; and high-level officials, including Maduro himself, have publicly demonized the opposition and incited violence.<sup>316</sup>

The September 2020 report by the Independent International Fact-Finding Mission similarly found that “most of the violations and crimes documented in this report were committed as part of a widespread and systematic attack directed against a civilian population, with knowledge of the attack, pursuant to or in furtherance of two distinct State policies” – a policy to suppress opposition to the Maduro regime, and a policy to fight crime, “including by eliminating individuals perceived as ‘criminals’ through extrajudicial execution”.<sup>317</sup>

## 2. The Material Elements Were Committed With Knowledge and Intent

Under Article 30 of the Rome Statute, except where otherwise provided, the *mens rea* for crimes against humanity is knowledge and intent.<sup>318</sup> The “knowledge” requirement is satisfied where the perpetrator was aware that a circumstance existed or a consequence would occur in the ordinary course of

---

<sup>312</sup> *Rome Statute*, *supra* note 106, Art. 7 2) a).

<sup>313</sup> International Criminal Court: *Elements of Crimes*, 2011, page 5, available at: <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> (interpreting “policy to commit such attack”).

<sup>314</sup> *Prosecutor v. Bemba*, *supra* note 303, par. 160.

<sup>315</sup> *2018 OAS Report*, *supra* note 14, page 319.

<sup>316</sup> *Ibidem*, pages 318 to 33.

<sup>317</sup> *2020 Fact-Finding Mission Report*, *supra* note 55, par. 160.

<sup>318</sup> *Rome Statute*, *supra* note 106, Art. 30 1).

events, and the “intent” requirement is satisfied where the perpetrator meant to engage in the conduct or cause the consequence at issue.<sup>319</sup>

For most of the crimes against humanity discussed in this report, it is obvious that the perpetrators acted with the requisite *mens rea*. For example, the acts of murder, torture, imprisonment, enforced disappearance, rape, and persecution described below were clearly committed intentionally and with knowledge of their consequences. The *mens rea* for other inhumane acts, which in the context of Venezuela is slightly more complicated, and the additional discriminatory intent required for persecution, will be discussed in the context of those specific crimes.

### 3. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Against a Civilian Population

The ICC has explained that this element does not require “proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization”.<sup>320</sup> For emerging attacks against a civilian population, it suffices that “the perpetrator intended to further such an attack”.<sup>321</sup>

The *2018 OAS Report* found that, in Venezuela, “it has been demonstrated that the perpetrators had knowledge that their conduct was or was intended to be part of a widespread or systematic attack directed against the segment of the civilian population composed of political opponents or those identified as such”.<sup>322</sup> The report highlighted the mobilization of civilian and regime forces; laws, resolutions, and regime plans relating to this; public statements of high-level officials; similar patterns of action by different security forces throughout Venezuela; and the constant use of stigmatizing insults with degrading political epithets.<sup>323</sup>

---

<sup>319</sup> *Ibidem*, Art. 30 2) to 3).

<sup>320</sup> *Elements of Crimes*, *supra* note 313, page 5.

<sup>321</sup> *Ibidem*.

<sup>322</sup> *2018 OAS Report*, *supra* note 14, page 336.

<sup>323</sup> *Ibidem*, pages 336 to 37.





^ Venezuelan digital media journalist Gregory Jaimes was hit by pellets during an antigovernment disturbance in Caracas while recording an arbitrary arrest by the Bolivarian National Police. The Venezuelan Red Cross helped Jaimes stop the bleeding in his neck caused by the shooting.

*Caracas, Venezuela. May 1, 2019. Rafael Hernández*



^ A young man covers his mouth with a T-shirt against tear gas during a protest in Caracas.

This was one of the first of a series of protests in response to the call of several opposition leaders and the cancellation of the negotiations between the opposition and President Nicolás Maduro.

*Caracas, Venezuela. April 16, 2019. Andrea Hernández*



^ A demonstrator was beaten and robbed by officers of the Bolivarian National Police on Avenida Francisco de Miranda during a protest against Nicolás Maduro's Regime.

*Caracas, Venezuela. January 23, 2018. Rayner Peña*



^ Members of the National Guard shoot pellets and tear gas grenades at a group of protestors. Some of them shoot directly into the crowd, which puts anyone they hit in mortal danger. Some demonstrators have died or been seriously injured from being directly hit by tear gas grenades.

*Caracas, Venezuela. May 1, 2017. Horacio Siciliano*





^ A man rests his head against a military tank during a protest in Caracas, Venezuela. He shows the wounds he received from the rubber bullets fired from a short distance. This was one of the first of a series of protests caused by the arrest of several opposition leaders and the cancellation of the negotiations between the opposition and President Nicolás Maduro.

*Caracas, Venezuela. April 6, 2017. **Andrea Hernández***



^ Luis Eduardo González, age 19, does physical rehabilitation to treat his phantom limb. A local police officer shot him in the leg during a protest in La Guaira.

*Vargas, Venezuela. November 1, 2017. **Adriana Loureiro Fernández***



^ During the protests against Nicolás Maduro's regime, an elderly woman prevents one of the armored vehicles of the Bolivarian National Guard of Venezuela from moving forward to suppress the demonstration, standing in front of it and resisting the effects of the tear gas.

*Caracas, Venezuela. April 19, 2017. **Horacio Siciliano***

## B. Crime Against Humanity of Murder

The crime against humanity of murder has three elements: (1) the perpetrator killed one or more persons, (2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.<sup>324</sup>

### 1. The Perpetrator Killed One or More Persons

The evidence is simply overwhelming – regime security forces, or armed civilian groups operating alongside them, have directly murdered thousands of people. Under ICC precedent, for the crime against humanity of murder, “it is not necessary for the Prosecution to prove the specific identity of the victim or the perpetrator”.<sup>325</sup>

#### a. Findings of the 2018 Report of the Organization of American States

The *2018 OAS Report* documented numerous instances of murder by regime forces and paramilitary groups operating under the aegis of (and, in some cases, with explicit permission from) the regime.<sup>326</sup> The report noted that it considered evidence of at least 131 murders of people who were taking part in demonstrations and at least 8,292 cases of extrajudicial executions.<sup>327</sup> For example, in 2014, there were at least 25 murders of demonstrators or bystanders in the vicinity of anti-regime demonstrations<sup>328</sup> and from April to July 2017, there were 105 murders during protests, with nearly 15,000 injured.<sup>329</sup> More generally, according to figures provided by former Attorney General Luisa Ortega Díaz, 8,292 people were murdered by the regime from 2015 to June 2017.<sup>330</sup> The human rights NGO COFAVIC has similarly asserted that between January 2012 and March 2017, there were 6,385 extrajudicial executions in which the regime is presumed to be either directly or indirectly responsible.<sup>331</sup> The OAS described these murders as “a veritable massacre of the civilian population by agents of the State”.<sup>332</sup>

---

<sup>324</sup> *Elements of Crimes*, *supra* note 313, page 5.

<sup>325</sup> *Prosecutor v. Bemba*, *supra* note 303, par. 88.

<sup>326</sup> *2018 OAS Report*, *supra* note 14, pages 88 to 89 (“The individuals responsible for committing the murders described in this Report are all part of this organizational structure, whether they are a member of the Armed Forces, regional police forces, or the paramilitary groups, known as the colectivos. Members of the colectivo armed civilian groups have openly admitted been hired directly by the regional governments”).

<sup>327</sup> *2018 OAS Report*, *supra* note 14, page 449.

<sup>328</sup> *Ibidem*, page 63.

<sup>329</sup> *Ibidem*, pages 10 and 52.

<sup>330</sup> *Ibidem*, page 283.

<sup>331</sup> *Ibidem*, page 59.

<sup>332</sup> *Ibidem*.

## b. New Findings

2018: The NGO OVV reported that 7,523 individuals died as a result of actions by police and military forces in 2018, an average of 626 per month.<sup>333</sup> These deaths, which authorities classified as resulting from “resistance to authority”, “can . . . for the most part . . . be classified as extrajudicial killings . . . with certainty”.<sup>334</sup>

2018: According to information from the NGO *Provea*, the Special Action Forces murdered at least 205 people in 2018.<sup>335</sup> This includes 46 killings in September, 20 in October, and 51 in November.<sup>336</sup>

2018 – 2019: Human Rights Watch documented killings by FAES or Special Actions Force officers in June 2018, September 24, 2018, January 2019, and the first half of 2019.<sup>337</sup>

June 2018 – April 2019: The OHCHR documented the killing of 20 young men by the FAES during this period.<sup>338</sup> All occurred in similar circumstances – FAES officials arrived in black pickup trucks without license plates, blocked access points, broke into residences, committed gender-based violence, and separated young men from other family members before shooting them.<sup>339</sup> In all these cases, the FAES manipulated the crime scene and evidence, including by firing their weapons against the walls or in the air to suggest a confrontation.<sup>340</sup>

2019: The OHCHR documented that, in 2019, six young men were “executed by FAES in reprisal of their role in anti-government protests”.<sup>341</sup>

January – May 2019: From January 1 to May 19, 2019, the regime reported 1,569 killings for “resistance to authority”.<sup>342</sup> OVV reported at least 2,124 killings for “resistance to authority” between January and May, 2019.<sup>343</sup> According to the OHCHR, it has reviewed information which “suggests many of these killings may constitute extrajudicial executions”.<sup>344</sup>

---

<sup>333</sup> *Informe Anual de Violencia 2018*, *supra* note 130.

<sup>334</sup> *Ibidem* (translated from Spanish).

<sup>335</sup> *Provea: Informe Especial | FAES Asesinó a 205 Venezolanos Entre Enero y Diciembre de 2018*, January 30, 2019, available in Spanish at: <https://www.derechos.org/ve/investigacion/informe-especial-faes-asesino-a-205-venezolanos-entre-enero-y-diciembre-de-2018>.

<sup>336</sup> *Ibidem*.

<sup>337</sup> Human Rights Watch: *Venezuela: Extrajudicial Killings in Poor Areas*, September 18, 2019, available at: <https://www.hrw.org/news/2019/09/18/venezuela-extrajudicial-killings-poor-areas>.

<sup>338</sup> *2019 OHCHR Report*, *supra* note 78, par. 48.

<sup>339</sup> *Ibidem*.

<sup>340</sup> *Ibidem*, par. 49.

<sup>341</sup> *Ibidem*, par. 52.

<sup>342</sup> *2019 OHCHR Report*, *supra* note 78, par. 50.

<sup>343</sup> *Ibidem*.

<sup>344</sup> *Ibidem*.



First quarter of 2019: The NGO *Provea* reported 275 killings by the FAES in the first quarter of 2019.<sup>345</sup>

January 21–25, 2019: At least 47 people died during anti-regime protests, all from gunshot wounds.<sup>346</sup> It has been reported that 39 were killed by state forces, or by third parties acting with their acquiescence.<sup>347</sup> Eleven of them were extrajudicially executed.<sup>348</sup> Some 228 were wounded.<sup>349</sup> Amnesty International specifically confirmed six extrajudicial executions by the Bolivarian National Police (mainly the FAES) during this time.<sup>350</sup> In all six cases, the victims had some link with the protests and criticisms by several of the victims had gone viral on social media – in the words of Amnesty International, these were “targeted executions based on the profile of the victims”.<sup>351</sup> In each of these cases, both the crime scene and the victim’s body were tampered with in order to cover up evidence.<sup>352</sup>

February 22–23, 2019: At least 14 people were killed and scores injured when Venezuelan security forces opened fire on a group of civilians who tried to prevent them from blocking the border with Brazil.<sup>353</sup> The General Secretariat of the OAS, jointly with the CASLA Institute, sent a mission to the Brazil–Venezuela border in the weeks following the killings and they were able to determine that, in addition to the 14 confirmed deaths, at least 51 other people were injured by gunshots fired by state security forces or their paramilitary allies.<sup>354</sup> Most of the victims were members of the Pemon indigenous nation who are facing severe persecution, violence, and forced displacement at the hands of the regime in order to control the *Gran Sabana* municipality, which is rich in gold and other precious minerals.<sup>355</sup> The OAS/CASLA team also documented at least 1,200 Pemon who were forcibly displaced as a result of the violence on February 22–23, 2019.<sup>356</sup>

---

<sup>345</sup> 2019 OHCHR Report, *supra* note 78, par. 47 note 38.

<sup>346</sup> *Hunger for Justice*, *supra* note 83, page 10.

<sup>347</sup> *Ibidem*, pages 10 to 11.

<sup>348</sup> *Ibidem*, page 11.

<sup>349</sup> Shane Croucher: “Venezuela Riots Casualties Latest Updates: 16 Dead and Hundreds Wounded as Russia Backs Maduro, U.S. ‘Stands Ready to Support’ Guaidó”, *Newsweek*, January 24, 2019, available at: <https://www.newsweek.com/venezuela-riots-guaido-maduro-trump-regime-change-1302882>.

<sup>350</sup> *Hunger for Justice*, *supra* note 83, pages 4 to 5.

<sup>351</sup> *Ibidem*, page 5.

<sup>352</sup> *Ibidem*.

<sup>353</sup> “Venezuela Crisis: Border Clashes as Aid Row Intensifies”, *BBC News*, February 22, 2019, available at: <https://www.bbc.com/news/world-latin-america-47329806>; see also: “Más de 285 Heridos y 14 Asesinatos por Represión del Régimen de Maduro este #23Feb, Estima Informe de la OEA”, *La Patilla*, February 23, 2019, available in Spanish at: <https://www.lapatilla.com/2019/02/23/mas-de-285-heridos-y-14-asesinatos-por-represion-del-regimen-de-maduro-este-23feb-estima-informe-de-la-oea/>.

<sup>354</sup> General Secretariat of the OAS & CASLA Institute: *Represión Sistemática y Crímenes de Lesa Humanidad Contra el Pueblo Pemon de Venezuela: Resumen Ejecutivo*, July 8, 2019, page 3, available in Spanish at: <http://www.oas.org/documents/spa/press/Resumen-Ejecutivo-REPRESION-SISTEMATICA-Y-CRIMENES-CONTRA-EL-PUEBLO-PEMON-VENEZUELA.pdf>.

<sup>355</sup> *Ibidem*, pages 1 to 2.

<sup>356</sup> *Ibidem*, page 2.

July 2019: The NGO *Monitor de Víctimas* identified 57 new cases of presumed executions committed by members of the FAES in Caracas.<sup>357</sup>

September 9, 2019: UN High Commissioner for Human Rights Michelle Bachelet expressed concern about apparent killings by the National Guard of a pregnant Warao woman, a six-year-old girl, and a Curripaco indigenous leader.<sup>358</sup> She also decried that the FAES, which is implicated in numerous extrajudicial killings, has “received support from the highest level of Government”.<sup>359</sup>

December 2019: *Monitor de Víctimas* identified 343 new cases of presumed executions committed by members of security forces in Caracas from August to December 2019.<sup>360</sup>

July 2, 2020: The OHCHR published a report which found that 1,324 people were killed in the context of security operations from January 1 to May 3, 2020. According to the report, “Special Action Forces (FAES) were allegedly responsible for 432 deaths, the Bureau for Scientific, Criminal, and Forensic Investigations (CICPC) for 366 deaths, the Bolivarian National Guard for 136 deaths and the State police forces of Zulia for 124 deaths”.<sup>361</sup>

July 26, 2020: *Provea* reported that Carlos Chaparro, 47, “died of a shot allegedly fired by a member of the National Guard as a crowd decried the shortage of fuel at a service station in the town of Aragua de Barcelona, in eastern Anzoategui state”. A similar incident occurred on July 16, in which another protestor (19-year-old Jose Luis Albornoz) was shot and killed by security forces in Zulia state.<sup>362</sup>

September 2020: The Independent International Fact-Finding Mission presented data from four sources regarding deaths attributable to security forces between 2014 and 2019, with government data indicating at least 24,431 deaths.<sup>363</sup> The Fact-Finding Mission noted that “[e]ven the lowest estimates here suggest that killings by State agents in Venezuela are among the highest rates in Latin America”.<sup>364</sup> The Fact-Finding Mission also analyzed specific killings and found numerous of them to constitute unlawful extrajudicial killings.<sup>365</sup> It further noted that “[t]here is information about an agreed practice to kill

---

<sup>357</sup> Oral Update on the Situation of Human Rights in the Bolivarian Republic of Venezuela, *supra* note 53.

<sup>358</sup> *Ibidem*.

<sup>359</sup> *Ibidem*.

<sup>360</sup> Monitor de Víctimas: *Deaths from August to December 2019*, accessed July 10, 2020, available at: <https://monitordevictimas.com/>. To perform the comprehensive search, scroll down to picture of calendar on left side, and enter the date range August 2019 to December 2019, then click “Aceptar”.

<sup>361</sup> July 2, 2020 High Commissioner’s Report, *supra* note 198, par. 35.

<sup>362</sup> “Man Fatally Shot in Venezuela Gasoline Protest; Second Such Incident This Month”, *Reuters*, July 26, 2020, available at: <https://www.reuters.com/article/us-venezuela-protests-gasoline/man-fatally-shot-in-venezuela-gasoline-protest-second-such-incident-this-month-idUSKCN24R0RP>.

<sup>363</sup> 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, page 200 tbl. 5.

<sup>364</sup> *Ibidem*, par. 1010.

<sup>365</sup> *Ibidem*, pars. 1096, 1163, 1218, 1264, 1279, 1310, 1339, 1356, 1374, 1385, 1419, 1439, 1454, 1469, 1486, 1502, 1598, 1827.

individuals with criminal records even if they offered no resistance during detention, including in order to demonstrate ‘results’ in the fight against criminality”.<sup>366</sup>

September 25, 2020: At the 45th session of the Human Rights Council, UN High Commissioner for Human Rights Michelle Bachelet expressed serious concern regarding deaths as a result of security operations in disadvantaged areas. The OHCHR identified 711 deaths that took place in the context of security operations between June and August 2020. The total number of deaths identified as a result of security operations since January 2020 now exceeds 2,000.<sup>367</sup>

## **2. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

This element was discussed above. Moreover, the *2018 OAS Report* specifically found that “all of the extrajudicial executions ordered by the government of Nicolás Maduro . . . constitute a widespread practice designed to instill terror and control the population, as part of a policy of repression to combat the internal enemy”.<sup>368</sup> The report also noted that the extrajudicial executions took place “under the direct orders of a government that chose to end to the lives of thousands of people”.<sup>369</sup>

## **3. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Against a Civilian Population**

This element was discussed above. As the *2018 OAS Report* explained, the extrajudicial executions took place “under the direct orders of [the] government”,<sup>370</sup> so the individual perpetrators must have known that their actions were part of the overall attack against civilians.

---

<sup>366</sup> *Ibidem*, par. 2039.

<sup>367</sup> *2020 Oral Update on the Human Rights Situation in the Bolivarian Republic of Venezuela*, *supra* note 69.

<sup>368</sup> *2018 OAS Report*, *supra* note 14, page 62.

<sup>369</sup> *Ibidem* (quoting former Attorney General Luisa Ortega Díaz).

<sup>370</sup> *Ibidem*.

## C. Crime Against Humanity of Torture

The crime against humanity of torture has five elements: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, (2) such person or persons were in the custody or under the control of the perpetrator, (3) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions, (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>371</sup>

### 1. The Perpetrator Inflicted Severe Physical or Mental Pain or Suffering Upon One or More Persons

There is no specific definition of the threshold of “severe” pain or suffering.<sup>372</sup> However, the ICC has explained that “an important degree of pain and suffering has to be reached”.<sup>373</sup> Jurisprudence by regional human rights courts makes clear that the analysis depends on the specific circumstances of each case, including, e.g., the method or manner used to inflict harm, the duration of the treatment, its physical or mental effects, and the personal circumstances (e.g., sex, age, state of health) of the victim.<sup>374</sup>

#### a. Findings of the 2018 Report of the Organization of American States

The *2018 OAS Report* found that “there is a reasonable basis for believing that aberrant acts of torture have been committed in the territory of Venezuela that can be characterized as crimes against humanity”.<sup>375</sup> These acts, the report explained, “inflicted severe physical and mental suffering on a considerable number of persons”.<sup>376</sup> The report noted that the Panel of Experts received information regarding “at least 289 cases of torture”.<sup>377</sup> As evidence, the report cited numerous incidents of stunning brutality that were documented by civil society and UN bodies.<sup>378</sup> For example, a 2017 report by Human

---

<sup>371</sup> *Elements of Crimes*, *supra* note 313, page 7.

<sup>372</sup> International Criminal Court: *Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, June 15, 2009, par. 193, available at: [https://www.icc-cpi.int/CourtRecords/CR2009\\_04528.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF).

<sup>373</sup> *Ibidem*.

<sup>374</sup> See, e.g.: European Court of Human Rights: *Selmouni v. France*, Application No. 25803/94, July 28, 1999, par. 100, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-58287%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58287%22]}) and Inter-American Court of Human Rights: *Bueno-Alves v. Argentina*, Judgment of May 11, 2007, Merits, Reparations, and Costs, par. 83, available at: [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_164\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_164_ing.pdf).

<sup>375</sup> *2018 OAS Report*, *supra* note 14, page 376.

<sup>376</sup> *Ibidem*.

<sup>377</sup> *Ibidem*, page 450.

<sup>378</sup> *Ibidem*, pages 95 to 161 and 365 to 68.



Rights Watch and *Foro Penal* documented 53 cases in which at least 232 detainees were subjected to physical and psychological abuse in order to punish them or force them to incriminate themselves or others.<sup>379</sup> The 2018 OAS Report also set forth 72 case studies of torture in extended detail.<sup>380</sup>

## b. New Findings

2014 – 2019: The OHCHR collected information on 135 individuals who were arbitrarily detained between 2014 and 2019 and, “[i]n most [of the] cases, women and men were subjected to one or more forms of torture or cruel, inhuman or degrading treatment or punishment, including electric shocks, suffocation with plastic bags, water boarding, beatings, sexual violence, water and food deprivation, stress positions and exposure to extreme temperatures”.<sup>381</sup>

Fernando Albán: Albán, a councilman for the *Primero Justicia* opposition party, died on October 8, 2018 while in the custody of the Bolivarian National Intelligence Service (SEBIN). The Maduro regime claimed that Albán committed suicide by jumping from the 10th floor of the SEBIN headquarters, but the Venezuelan opposition and the OAS insist that he was tortured and murdered.<sup>382</sup> OHCHR officials expressed concern about his death and said they would investigate his death as part of the wider investigation of human rights abuses in Venezuela.<sup>383</sup>

Luis Hernando Lugo Calderón: DGCIM agents arrested him without a warrant on October 14, 2018.<sup>384</sup> He was held in a cold cell in DGCIM headquarters, where he was denied food and water for days, forced to drink water from the toilet, and allowed to go to the bathroom only twice per day.<sup>385</sup>

January – May 2019: The OHCHR documented that “[m]any demonstrators were arbitrarily detained and ill-treated or tortured”<sup>386</sup> between January and May 2019.

January 2019: Amnesty International documented that several individuals were tortured in connection with the January 2019 protests.<sup>387</sup>

---

<sup>379</sup> *Ibidem*, page 367 (citing *Crackdown on Dissent*, *supra* note 84).

<sup>380</sup> *Ibidem*, pages 95 to 161.

<sup>381</sup> 2019 OHCHR Report, *supra* note 78, pars. 42 to 43.

<sup>382</sup> “Venezuela Opposition Lawmaker Dies in Prison”, *Deutsche Welle*, October 9, 2018, available at: <https://www.dw.com/en/venezuela-opposition-lawmaker-dies-in-prison/a-45806913>.

<sup>383</sup> “Fernando Albán: UN to Investigate Death in Custody of Venezuelan Politician”, *The Guardian*, October 9, 2018, available at: <https://www.theguardian.com/world/2018/oct/09/fernando-alban-death-venezuela-opposition-politician-custody>.

<sup>384</sup> Human Rights Watch: *Venezuela: Suspected Plotters Tortured*, January 9, 2019, available at: <https://www.hrw.org/news/2019/01/09/venezuela-suspected-plotters-tortured>.

<sup>385</sup> *Ibidem*.

<sup>386</sup> 2019 OHCHR Report, *supra* note 78, par. 40.

<sup>387</sup> *Hunger for Justice*, *supra* note 83, page 39.

**March 2019:** On March 20, 2019, CASLA Institute Executive Director Tamara Suju presented a report to the OAS documenting 40 new cases of torture in the prior two months involving minors, civilians, and members of the military.<sup>388</sup> The report claimed dozens of individuals were being detained by Venezuelan military intelligence units in secret dungeons and subjected to inhumane treatment.<sup>389</sup> Suju also presented the live testimony of Ronald Dugarte, a former employee of the DGCIM, who had secretly filmed the inhumane living conditions in these dungeons between August 2018 and February 2019.<sup>390</sup> Dugarte claimed he had heard “cries of pain” emanating from rooms where inmates were purportedly being tortured.<sup>391</sup>

**March 2019:** On March 21, 2019, nine of the UN Special Procedures issued a joint statement noting that the “ongoing crackdown on [demonstrators] has reportedly resulted in a dramatic rise in arbitrary detentions, killings, raids and torture”.<sup>392</sup>

**June 2019:** Captain Acosta Arévalo was detained and tortured, and later died from his injuries. UN High Commissioner for Human Rights Michelle Bachelet stated: “I am shocked by the alleged torture of Captain Acosta Arévalo, and that his treatment in custody may have been the cause of his death”.<sup>393</sup>

**July 2019:** In July 2019, the Raoul Wallenberg Centre for Human Rights filed an urgent appeal to the UN Special Rapporteur on Torture regarding Ígbert José Marín Chaparro.<sup>394</sup> The urgent appeal details Chaparro’s long-standing and ongoing mistreatment in DGCIM custody, which has included, at times, mechanical asphyxia, electric shocks, and blows to the head.<sup>395</sup>

**July 2019:** The OHCHR’s 2019 report stated that the “[i]ntelligence services (SEBIN and DGCIM) have been responsible for arbitrary detentions, ill-treatment and torture of political opponents and their relatives”.<sup>396</sup> The report also highlighted that “[s]ecurity forces and intelligence services, particularly SEBIN and DGCIM, routinely resort to [torture and cruel, inhuman or degrading treatment or punishment] to extract information and confessions, intimidate, and punish the detainees”.<sup>397</sup> It further stated that the

---

**388** “Abogados Disidentes Denuncian el Aumento ‘Cruel’ de la Tortura en Venezuela”, *La Vanguardia*, March 21, 2019, available in Spanish at: <https://www.lavanguardia.com/internacional/20190321/461152618301/tortura-venezuela.html>.

**389** Elizabeth Plaza: “OEA Recibe Informe y Videos Que Denuncia Tortura a Civiles y Militares en Cárceles Venezolanas”, *CNN*, March 20, 2019, available in Spanish at: <https://cnnespanol.cnn.com/2019/03/20/oea-recibe-informe-y-videos-que-denuncia-tortura-a-civiles-y-militares-en-carceles-venezolanas/>.

**390** *Ibidem*.

**391** *Ibidem*.

**392** *Venezuela: UN Experts Condemn Widespread Rights Violations Reported During Protests*, *supra* note 51.

**393** “Venezuela: ‘Shocked’ by Alleged Torture, Death of Navy Captain, UN Human Rights Chief Urges ‘In-Depth’ Investigation”, *UN News*, July 2, 2019, available at: <https://news.un.org/en/story/2019/07/1041762>.

**394** UN Working Group on Arbitrary Detention: *Urgent Submission, Ígbert José Marín Chaparro v. Venezuela*, July 16, 2019, available at: <https://static1.squarespace.com/static/5ab13c5c620b859944157bc7/t/5d56c555def293000193bfcb/1565967704334/Mar%C3%ADn+Chaparro+Urgent+Submission.pdf>.

**395** *Ibidem*.

**396** 2019 OHCHR Report, *supra* note 78, par. 32.

**397** *Ibidem*, par. 43.

OHCHR has documented cases of sexual and gender-based violence against female detainees, “particularly by SEBIN and DGCIM elements and officers of [the] GNB”.<sup>398</sup>

September 2019: On September 9, 2019, UN High Commissioner for Human Rights Michelle Bachelet stated that her office had documented “cases of torture of soldiers and others arbitrarily held”.<sup>399</sup>

September 2019: On September 30, 2019, Venezuelan journalist Alexandra Belandia uploaded a video to Twitter showing police forces torturing inmates housed in the Police Coordination Center of Anaco.<sup>400</sup> The 45-second clip depicts dozens of inmates lying naked, face-down, with their hands behind their heads, in a filthy room with roosters trampling on top of them.<sup>401</sup> Police officials are heard laughing in the background, and at one point one of the officials beats an inmate with a wooden stick.<sup>402</sup> It was reported that at least 82 inmates were beaten in the span of two hours and were denied food and water for 24 hours due to the inmates’ decision to declare a hunger strike to protest the lack of food, clean water, and medicine.<sup>403</sup>

December 2019: CASLA Institute’s *2019 Report on Systematic Torture in Venezuela* documents “how systematic repression and the commission of crimes against humanity has continued [this year]”.<sup>404</sup> CASLA received testimonies regarding various incidents of torture involving at least 83 victims – one incident took place in 2016, two in 2017, six in 2018, and eleven in 2019.<sup>405</sup> The report documented beatings, asphyxiations, electric shocks, hangings, and psychological torture, among other abuses.<sup>406</sup> The victims were reportedly tortured on the orders or with the involvement of “[v]ice-presidents, ministers, high-ranking military chiefs, governors, civil and military prosecutors, judges, the Ombudsman, prison directors, heads of . . . intelligence bodies . . . regional police . . . [and] the [Venezuelan National Police], among others”.<sup>407</sup> Further, CASLA noted that all the victims were tortured in detention centers or military zones, including in secret detention centers where the victims’ cries could be masked.<sup>408</sup>

---

<sup>398</sup> *Ibidem*, par. 44.

<sup>399</sup> Stephanie Nebehay: “Killings, Torture Still Going on in Venezuela: UN Rights Chief”, *Reuters*, September 9, 2019, available at: <https://www.reuters.com/article/us-venezuela-security-un/killings-torture-still-going-on-in-venezuela-u-n-rights-chief-idUSKCN1VU1IB>.

<sup>400</sup> “El Impactante Video Que Muestra Cómo Torturan a los Presos en una Comisaría Venezolana”, *Infobae*, October 4, 2019, available in Spanish at: <https://www.infobae.com/america/venezuela/2019/10/04/el-impactante-video-que-muestra-como-torturan-a-los-presos-en-una-comisaria-venezolana/>.

<sup>401</sup> *Ibidem*.

<sup>402</sup> *Ibidem*.

<sup>403</sup> *Ibidem*.

<sup>404</sup> Instituto CASLA: *Tortura Sistemática en Venezuela 2019 y la Participación de Cubanos en los Patrones de Tortura*, December 12, 2019, page 4, available in Spanish at: <http://www.oas.org/fpdb/press/Informe-tortura-CASLA-2019.pdf> (translated from Spanish).

<sup>405</sup> *Ibidem*, page 12.

<sup>406</sup> See generally: *ibidem*.

<sup>407</sup> *Ibidem*, page 5 (translated from Spanish).

<sup>408</sup> *Ibidem*, page 12.

June 2020: A report published by Robert F. Kennedy Human Rights entitled *Enforced Disappearance as a Tool of Political Repression in Venezuela* indicated a significant increase in torture cases from 2018 to 2019. When military personnel are forcibly disappeared, they frequently report being tortured in the process. In 2018, torture was reported in 83.6 percent of the cases of military officials forcibly disappeared, but in 2019, members of the military faced a nearly 95 percent chance of being tortured once forcibly disappeared.<sup>409</sup> The report also highlighted data from *Foro Penal* showing that, between January and September 2019, 73 persons were tortured; 53 were military personnel, and 20 were civilians.<sup>410</sup>

July 2020: A report by UN High Commissioner for Human Rights Michelle Bachelet – *Independence of the Justice System and Access to Justice in the Bolivarian Republic of Venezuela, Including for Violations of Economic and Social Rights, and the Situation of Human Rights in the Arco Minero del Orinoco Region* – indicated that her office had received credible accounts that persons deprived of their liberty in Venezuela were “subjected to sessions of one or more forms of cruel, inhuman or degrading treatment which could amount to torture”, including “beatings with boards, suffocation with plastic bags and chemicals, submerging the head of the victim under water, electric shocks to the eyelids, and sexual violence in the form of electric shocks to genitalia. Detainees were also exposed to cold temperatures and/or constant electric light, handcuffed and/or blindfolded for long periods of time, and subjected to death threats against themselves and their relatives”.<sup>411</sup>

September 2020: The Independent International Fact-Finding Mission reaffirmed that Venezuela’s security forces have engaged in torture and ill-treatment of detainees. The Fact-Finding Mission found that DGCIM officials have subjected detainees to “heavy beatings; asphyxiation with toxic substances and water; stress positions; prolonged solitary confinement in harsh conditions; sexual and gender-based violence including forced nudity, and rape; cuts and mutilations; electric shocks; use of drugs to induce confession; and psychological torture”.<sup>412</sup> SEBIN has used similarly brutal tactics.<sup>413</sup> The Fact-Finding Mission found evidence that the GNB and PNB torture and mistreat detainees as well.<sup>414</sup>

---

<sup>409</sup> Robert F. Kennedy Human Rights and Foro Penal: *Enforced Disappearance as a Tool of Political Repression in Venezuela*, June 19, 2020, page 24, available at: <https://rfkhumanrights.org/work/protecting-human-rights/latin-america/venezuela/enforced-disappearance-tool-political-repression-venezuela>.

<sup>410</sup> *Ibidem*, page 55.

<sup>411</sup> July 15, 2020 OHCHR Report, *supra* note 274, par. 27.

<sup>412</sup> 2020 Fact-Finding Mission Report, *supra* note 55, par. 65.

<sup>413</sup> *Ibidem*, par. 49.

<sup>414</sup> *Ibidem*, par. 139.

## 2. Such Person or Persons Were in the Custody or Under the Control of the Perpetrator

All of the incidents cited above occurred while the victims were in state custody.<sup>415</sup>

## 3. Such Pain or Suffering Did Not Arise Only From, and Was Not Inherent in or Incidental to, Lawful Sanctions

The acts described in the *2018 OAS Report* and subsequent reports – including electric shocks, beatings, sleep deprivation, sexual violence, stress positions, and death threats – clearly did not arise only from, and were not inherent in or incidental to, lawful sanctions. Moreover, even if such treatment had been permitted under domestic law, they would not constitute “lawful sanctions”, as that phrase refers only to those sanctions “that constitute practices widely accepted as legitimate by the international community”.<sup>416</sup>

## 4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was discussed above. The *2018 OAS Report* found that the acts of torture “did not happen spontaneously or in isolation, but rather answer to a policy established by the government of Venezuela through acts directed by the highest-level state authorities, setting clear systematic patterns of action”.<sup>417</sup> The report also quoted a report by Human Rights Watch and *Foro Penal*, which found that:

[T]he abuses were not isolated cases or the result of excesses by rogue security force members. On the contrary, the fact that widespread abuses by members of security forces were carried out repeatedly, by multiple security forces, in multiple locations across 13 states and the capital – including in controlled environments such as military installations and other state institutions . . . supports the conclusion that the abuses have been part of a systematic practice by the Venezuelan security forces.<sup>418</sup>

---

<sup>415</sup> See, e.g.: *2018 OAS Report*, *supra* note 14, pages 376 to 77 (“[T]hese are acts of torture that have inflicted severe physical and mental suffering on a considerable number of persons who were under the control or custody of the State, particularly of the officers who committed the acts of torture . . .”).

<sup>416</sup> Nigel S. Rodley: *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1997/7, January 10, 1997, par. 8, available at: <https://undocs.org/E/CN.4/1997/7>; see also: P. Kooijmans: *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1988/17, January 12, 1988, par. 42, available at: <https://undocs.org/en/E/CN.4/1988/17> (“[T]he fact that these sanctions are accepted under domestic law does not necessarily make them ‘lawful sanctions’ in the sense of article 1 of the Convention against Torture . . . . It is international law and not domestic law which ultimately determines whether a certain practice may be regarded as ‘lawful’”).

<sup>417</sup> *2018 OAS Report*, *supra* note 14, page 377.

<sup>418</sup> *Ibidem*, page 367 (quoting *Crackdown on Dissent*, *supra* note 84, page 2).



## 5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was addressed above. Both the similarity in torture methods used and the identity of the victims demonstrate that the perpetrators knew their acts were part of, and intended their acts to be part of, the overall attack. The *2018 OAS Report* explained that the “security agencies have acted in a coordinated and systematic manner, using the same tactics and methods, as if they are following a single user’s manual for the physical mistreatment of people considered to be the enemies of the government”.<sup>419</sup>

## D. Crime Against Humanity of Imprisonment or Other Severe Deprivation of

### Physical Liberty

The crime against humanity of imprisonment or other severe deprivation of physical liberty has five elements: (1) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty, (2) the gravity of the conduct was such that it was in violation of fundamental rules of international law, (3) the perpetrator was aware of the factual circumstances that established the gravity of the conduct, (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>420</sup>

## 1. The Perpetrator Imprisoned One or More Persons or Otherwise Severely Deprived One or More Persons of Physical Liberty

The ICC has explained that “imprisonment” means “unlawful captivity of a person in an enclosed environment, such as a prison or psychiatric institution” and “other severe deprivation of physical liberty” refers to “the unlawful restriction of the person’s movements to a specific area, such as a ghetto, camp or a house”.<sup>421</sup>

---

<sup>419</sup> *Ibidem*, page 94.

<sup>420</sup> *Elements of Crimes*, *supra* note 313, page 7.

<sup>421</sup> International Criminal Court: *Situation in the Republic of Burundi*, ICC-01/17-X, Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, ICC-01/17-X, November 9, 2017, par. 68, available at: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06720.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06720.PDF).

## a. Findings of the 2018 Report of the Organization of American States

The *2018 OAS Report* found that there were “reasonable grounds to believe that acts of imprisonment or other severe deprivation of physical liberty have been committed within the territory of Venezuela that may be characterized as crimes against humanity”, and that “thousands of such imprisonments have taken place”.<sup>422</sup> Specific types of detention highlighted in the report are set forth below.

*Detention for criticizing the regime:* Since Maduro assumed office in April 2013, more than 12,000 people have been arrested as part of the regime’s “plan to use arbitrary detentions and imprisonment as a weapon against anyone who challenges or criticizes” the regime.<sup>423</sup> This includes many who are detained during demonstrations “despite not having committed any crime”.<sup>424</sup> From February to June 2014, for example, 3,306 persons were detained as the result of demonstrations and a “large number of these detentions were arbitrary”.<sup>425</sup> The OHCHR similarly noted the “unprecedented number of protest-related detentions” during the first half of 2017.<sup>426</sup> *Foro Penal* noted that, as of December 2017, 5,475 individuals had been detained since the start of protests in April 2017.<sup>427</sup> The UN Special Procedures have condemned the systematic arrests of demonstrators.<sup>428</sup> Academics who have published criticism of regime policies have also been detained<sup>429</sup>; for example, Dr. Santiago Guevara García was arrested and charged with high treason after publishing an article critical of the regime’s public policies.<sup>430</sup> Journalists that cover protests and demonstrations have also been targeted,<sup>431</sup> and human rights activists are “key targets of the regime”.<sup>432</sup>

*Detention for belonging to the opposition:* In November 2017, the UN Working Group on Arbitrary Detention found that the “arbitrary arrest[] of persons because of their political opposition to the Government [of Venezuela] . . . is a systematic attack or practice by the Government intended to deprive political opponents of their physical freedom”.<sup>433</sup> The use of arbitrary detention against elected officials

---

<sup>422</sup> 2018 OAS Report, *supra* note 14, page 361.

<sup>423</sup> *Ibidem*, page 175.

<sup>424</sup> *Ibidem*.

<sup>425</sup> *Ibidem*, page 351 (citing: UN Committee Against Torture, *Concluding Observations on the Combined Third and Fourth Periodic Reports of the Bolivarian Republic of Venezuela*, U.N. Doc. CAT/C/VEN/CO/3-4, December 12, 2014, par. 9, available at: <https://undocs.org/ru/CAT/C/VEN/CO/3-4>).

<sup>426</sup> *Ibidem*, page 354 (quoting *Human Rights Violations and Abuses in the Context of Protests*, *supra* note 78, page 20).

<sup>427</sup> *Ibidem*, page 10.

<sup>428</sup> *Ibidem*, page 352.

<sup>429</sup> *Ibidem*, pages 176 to 77.

<sup>430</sup> *Ibidem*, page 177.

<sup>431</sup> *Ibidem*, page 178; see also: *ibidem*, page 179 (discussing journalists Braulio Jatar and Héctor Pedroza Carrizo).

<sup>432</sup> *Ibidem*, page 179.

<sup>433</sup> UN Working Group on Arbitrary Detention: *Opinion No. 87/2017 concerning Marcelo Eduardo Crovato Sarabia*, U.N. Doc. A/HRC/WGAD/2017/87, adopted November 23, 2017, par. 48, available at: <https://undocs.org/en/A/HRC/WGAD/2017/87>, cited in 2018 OAS Report, *supra* note 14, page 186.

associated with the opposition is growing.<sup>434</sup> The *2018 OAS Report* also highlighted “documented cases of persons who were arrested . . . simply for being considered supporters of the opposition”.<sup>435</sup>

*Pretrial detention:* In cases involving politically-motivated criminal charges, pretrial detention is used to “ensur[e] that the proceedings themselves become a punishment”.<sup>436</sup> The *2018 OAS Report* gave numerous specific examples of extended pretrial detention, including Skarlyn Duarte, who was arrested in August 2014 but not released on bond until December 31, 2016,<sup>437</sup> and Efraín Ortega, Vasco Da Costa and José Luis Santa María, who were imprisoned for more than three years without trial.<sup>438</sup>

*Detention despite a release order:* Some people are detained even after a Venezuelan court has ordered their release.<sup>439</sup> As one example, Víctor Ugas had a release order as of June 2017 but was still detained as of May 2018.<sup>440</sup>

*Detention with due process violations:* Many detainees are subjected to serious due process violations, including arrest without a warrant, refusal to inform them of the reason for their arrest, detention without being promptly brought before a court, denial of access to counsel, *incommunicado* detention, denial of the opportunity to call witnesses in one’s defense, denial of the presumption of innocence, and planted evidence.<sup>441</sup>

*Civilians detained and tried by a military court:* In August 2017, five of the UN Special Procedures condemned the growing use of military courts to try civilians.<sup>442</sup> From April 2017 to March 2018, at least 554 civilians were detained by military courts.<sup>443</sup>

---

<sup>434</sup> *2018 OAS Report*, *supra* note 14, page 353 (citing *Silenced by Force*, *supra* note 83, page 7); see also: *ibidem*, pages 30 to 34 (discussing persecution, including detention, of opposition mayors and legislators).

<sup>435</sup> *Ibidem*, page 352.

<sup>436</sup> *Ibidem*, page 184.

<sup>437</sup> *Ibidem*.

<sup>438</sup> *Ibidem*, page 185.

<sup>439</sup> *Ibidem*, pages 186 to 87.

<sup>440</sup> *Ibidem*, page 186.

<sup>441</sup> *Ibidem*, pages 179 (Juan Pedro Lares has been detained since July 2017 but, as of May 2018, had not been brought before a court), 181 (Ruperto Chiquinquirá Sánchez Casares was not allowed to introduce any witnesses in his defense), 351 (noting “a large number of the detainees were not informed of the reasons for their detention, did not have confidential access to a lawyer until minutes before the court hearing, and were transferred to various detention centers without their whereabouts being communicated to their family” and that the OHCHR documented “lack of arrest warrants, incommunicado detention, the lack of access to a lawyer, and the failure to observe the principle of the presumption of innocence”), 352 (“The OHCHR has documented that the security forces often arrested persons without a court order and that they later said they had been caught in flagrante delicto”), 352 (“The OHCHR found the existence of a pattern consisting of the security forces planting material evidence against the persons arrested, such as gas masks, helmets, and Molotov cocktails”).

<sup>442</sup> *Ibidem*, page 352 (citing: Office of the IN High Commissioner for Human Rights: *Venezuela Must End Systematic Detentions and Military Trials for Protesters – UN Experts*, August 4, 2017, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21939&LangID=E>).

<sup>443</sup> *Ibidem*, page 355.



^ Male prisoners who committed minor crimes suffer from malnutrition, scabies, and tuberculosis. They are not given food or water in the detention center. They rely on their families to bring them basic supplies.

*Poli- Valencia, Carabobo, Venezuela. March 2018.*  
**Ana María Arévalo G**



^ Seven detained men await trial in a cell. According to one of the officers, one man committed suicide in the cell by hanging himself a few weeks prior.

*Police Detention Center Naguanagua, Carabobo, Venezuela.*  
*March 2018. Ana María Arévalo G*



^ SEBIN officials surround the residence of Mayor Antonio Ledezma. It was revealed that Ledezma had escaped during the night and fled to Colombia. He had been on house arrest for 2 years for protests in 2014.

*Caracas, Venezuela. November 17, 2017. Román Camacho*



^ General Ángel Vivas, a political prisoner under Nicolás Maduro's regime, emerges from El Helicoide, the headquarters of SEBIN, with his family.

39 detainees were released with precautionary measures issued by criminal courts at the request of the Government of Venezuela after negotiations with political opposition leaders.

*Caracas, Venezuela. June 01, 2018. Román Camacho*



## b. New Findings

May 1 – July 31, 2018: *Foro Penal* reported that, during this period, 102 people were arbitrarily arrested.<sup>444</sup> As of the end of July, there were 248 political prisoners in custody and the cumulative number of civilians tried in military courts was 801.<sup>445</sup>

September 1 – October 31, 2018: *Foro Penal* reported that 42 people were arbitrarily detained during this time period, and that 492 had been arbitrarily detained from January 1 to October 31, 2018.<sup>446</sup>

January – May 2019: Citing *Foro Penal*, the UN High Commissioner for Human Rights reported that from January to May 2019, 2,091 people were detained “for political motives”, primarily in the context of demonstrations.<sup>447</sup>

January 2019: According to Amnesty International, from January 21–31, 2019, authorities arbitrarily detained 988 people, including 137 children.<sup>448</sup> 770 of these detentions occurred on a single day – January 23.<sup>449</sup> On January 29 and 30, 11 journalists were arbitrarily detained, according to several of the UN Special Procedures.<sup>450</sup>

February 2019: *Foro Penal* reported that, during demonstrations against the blocking of humanitarian aid in February 2019, at least 107 people were arbitrarily detained.<sup>451</sup> According to several of the UN Special Procedures, during February and the first week of March, at least 20 journalists were arbitrarily arrested.<sup>452</sup>

July 2019: In July 2019, the OHCHR reported that it had “documented an increasing number of arbitrary detention of relatives, particularly women, of alleged political opponents”.<sup>453</sup> It also reported that, after reviewing numerous cases of arbitrary detention in Venezuela dating back to 2014, there were “serious and repeated violations of the right to a fair trial”.<sup>454</sup>

---

<sup>444</sup> *Foro Penal: Report on Repression in Venezuela: May, June, July 2018*, page 1, available at: <https://foropenal.com/en/report-on-repression-in-venezuela/>.

<sup>445</sup> *Ibidem*, page 2.

<sup>446</sup> *Reporte Sobre La Represión en Venezuela Septiembre y Octubre de 2018*, *supra* note 54, page 3.

<sup>447</sup> 2019 OHCHR Report, *supra* note 78, par. 41 (citing data provided by *Foro Penal*).

<sup>448</sup> *Hunger for Justice*, *supra* note 83, page 33.

<sup>449</sup> *Ibidem*.

<sup>450</sup> *Venezuela: UN Experts Condemn Widespread Rights Violations Reported During Protests*, *supra* note 51.

<sup>451</sup> *Foro Penal: Report on Repression in Venezuela: Feb. 2019*, page 10, available at: <https://foropenal.com/en/report-on-repression-in-venezuela-february-2019/>.

<sup>452</sup> *Venezuela: UN Experts Condemn Widespread Rights Violations Reported During Protests*, *supra* note 51.

<sup>453</sup> 2019 OHCHR Report, *supra* note 78, par. 38.

<sup>454</sup> 2019 OHCHR Report, *supra* note 78, par. 42.



October 2019: *Foro Penal* reported that, since January 2014, it had documented a cumulative 15,177 arbitrary detentions, 848 civilians detained or tried by a military court, and 3,233 political prisoners in Venezuela.<sup>455</sup> There were 429 political prisoners still detained as of October 21, 2019.<sup>456</sup>

UN Working Group on Arbitrary Detention: Since May 2018, the UN Working Group on Arbitrary Detention has adopted 12 opinions finding detentions in Venezuela to be arbitrary and unlawful because, e.g., there were egregious due process violations, the detention was based on the exercise of the right to freedom of expression, or the victims were targeted due to their political activity.<sup>457</sup> In these opinions, the Working Group has reiterated that, “[i]n recent years, the Working Group has repeatedly ruled on the multiple commission of arbitrary detentions of people who are part of the Government opposition, or who have exercised the rights to freedom of opinion, expression, association, meeting or political participation”.<sup>458</sup> The Working Group has further noted that this constitutes “an attack or systematic practice by the Government to deprive political opponents of physical freedom, particularly those who are perceived as opponents of the regime” and that “under certain circumstances, imprisonment and other forms of serious deprivation of liberty . . . may constitute crimes against humanity”.<sup>459</sup>

July 2020: *Foro Penal* reported that, since January 2014, it had documented a cumulative 15,501 arbitrary detentions, 865 civilians detained or tried by a military court, and 3,475 political prisoners in Venezuela. There were 421 political prisoners in Venezuela as of July 3, 2020.<sup>460</sup> Among the political prisoners are five members of Venezuela’s National Assembly, who have not been charged with crimes but remain in “legal limbo”.<sup>461</sup>

July 2, 2020: A report by UN High Commissioner for Human Rights Michelle Bachelet indicated that her office “observed a pattern of unlawful arrests, arbitrary detentions and violations to due process

---

<sup>455</sup> Foro Penal et al.: *Crisis en Venezuela: Bulletin No. 108 from October 21 to 28, 2019*, page 4, available at: <https://www.derechos.org/web/wp-content/uploads/Bolet%C3%ADn-108-Crisis-En-Venezuela-EN-B.pdf>.

<sup>456</sup> *Ibidem*.

<sup>457</sup> UN Working Group on Arbitrary Detention: *Opinion No. 20/2020 concerning Héctor Armando Hernández Da Costa*, U.N. Doc. A/HRC/WGAD/2020/20, adopted May 1, 2020; UN Working Group on Arbitrary Detention: *Opinion No. 18/2020 concerning Rubén Darío González Rojas*, U.N. Doc. A/HRC/WGAD/2020/18, adopted May 1, 2020; UN Working Group on Arbitrary Detention: *Opinion No. 81/2019 concerning Carlos Miguel Aristimuño*, U.N. Doc. A/HRC/WGAD/2019/81, adopted November 22, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 80/2019 concerning Carlos Marrón Colmenares*, U.N. Doc. A/HRC/WGAD/2019/80, adopted November 22, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 75/2019 concerning Roberto Eugenio Marrero Borjas*, U.N. Doc. A/HRC/WGAD/2019/75, adopted November 21, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 40/2019 concerning Juan Carlos Requesens Martínez*, U.N. Doc. A/HRC/WGAD/2019/40, adopted August 14, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 39/2019 concerning Pedro Jaimes Criollo*, U.N. Doc. A/HRC/WGAD/2019/39, adopted August 13, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 13/2019 concerning 11 Employees of the Banesco Bank*, U.N. Doc. A/HRC/WGAD/2019/13, adopted April 26, 2019; UN Working Group on Arbitrary Detention: *Opinion No. 86/2018 concerning Aristides Manuel Moreno Méndez*, U.N. Doc. A/HRC/WGAD/2018/86, adopted November 23, 2018; UN Working Group on Arbitrary Detention: *Opinion No. 49/2018 concerning José Vicente García Ramírez Rangel*, U.N. Doc. A/HRC/WGAD/2018/49, adopted August 22, 2018; UN Working Group on Arbitrary Detention: *Opinion No. 72/2018 concerning 59 Colombian Citizens*, U.N. Doc. A/HRC/WGAD/2018/72, adopted November 20, 2018; UN Working Group on Arbitrary Detention: *Opinion No. 41/2018 concerning Juan Pedro Lares Rangel*, U.N. Doc. A/HRC/WGAD/2018/41, adopted August 20, 2018.

<sup>458</sup> *Opinion No. 40/2019 concerning Juan Carlos Requesens Martínez*, *supra* note 457, par. 134 (translated from Spanish).

<sup>459</sup> *Ibidem*.

<sup>460</sup> *Crisis en Venezuela: Bulletin No. 140*, *supra* note 54.

<sup>461</sup> Ibis Leon, *Efecto Cocuyo: Cinco Diputados que Siguen Presos sin Debido Proceso*, July 16, 2020, available in Spanish at: <https://efectococuyo.com/politica/cinco-diputados-que-siguen-presos-sin-debido-proceso/>.

guarantees against individuals on the grounds of their alleged involvement in actions to destabilize the Government”.<sup>462</sup> Additionally, the OHCHR recorded cases of individuals benefiting from precautionary measures who were arrested again without the precautionary measures having been revoked by a tribunal, as well as individuals detained despite having served their full sentence.<sup>463</sup>

September 2020: The Independent International Fact-Finding Mission identified numerous cases where individuals were detained based on their political affiliation or ideology.<sup>464</sup> Furthermore, the Fact-Finding Mission concluded that these arbitrary detentions “did not constitute isolated or random acts”, but were instead “carried out in a systematic manner” as demonstrated by the “reiteration of the conduct, the similarities in the modus operandi and the involvement of different state institutions at different levels”.<sup>465</sup>

## 2. The Gravity of the Conduct Was Such That It Was in Violation of Fundamental Rules of International Law

The ICC has indicated that the “fundamental rules of international law” include the rights enshrined in Articles 9–11, 14, and 15 of the ICCPR.<sup>466</sup> The ICC has further explained that the “brevity of detention alone cannot be brought forward as an argument to deny the severity of the deprivation of physical liberty”.<sup>467</sup>

The detentions discussed above violate the rights enshrined in the ICCPR. In particular, in addition to violating the specific rights discussed below, they all constitute arbitrary detention in violation of ICCPR Article 9(1).

*Detention for criticizing the regime:* The right to freedom of expression (ICCPR Article 19 2)) includes the right to criticize the regime and regime officials.<sup>468</sup> Therefore, detention or imprisonment for doing so

---

<sup>462</sup> July 2, 2020 High Commissioner’s Report, *supra* note 198, par. 83.

<sup>463</sup> *Ibidem*, par. 50.

<sup>464</sup> 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, par. 262.

<sup>465</sup> *Ibidem*.

<sup>466</sup> *Situation in the Republic of Burundi*, *supra* note 421, par. 68 note 169.

<sup>467</sup> *Ibidem*, par. 68.

<sup>468</sup> UN Human Rights Committee: *General Comment No. 34: Freedoms of Opinion and Expression*, U.N. Doc. CCPR/C/GC/34, September 12, 2011, par. 38 (“[A]ll public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition . . .”), par. 42 (“The penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression”), par. 43 (“It is also inconsistent with [ICCPR Article 19(3)] to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government”); see also: UN Human Rights Council: *Methods of Work of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/36/38, July 13, 2017, par. 8 b) (detention is arbitrary “When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed . . . by articles 12, 18–19, 21–22 and 25–27 of the International Covenant on Civil and Political Rights . . .”).

is arbitrary.<sup>469</sup> Detention for participating in a peaceful protest against the regime further violates the right to peaceful assembly (ICCPR Article 21) and is thus arbitrary in violation of ICCPR 9(1).<sup>470</sup>

*Detention for belonging to the opposition:* Where someone is detained “only for his political views and opinions”, this violates the rights to freedom of thought/conscience (ICCPR Article 18(1)) and opinion (ICCPR Article 19(1)) and is thus arbitrary.<sup>471</sup> Detention simply for belonging to a particular political party violates the right to freedom of expression, opinion, and association (ICCPR Article 22(1)) and is also arbitrary.<sup>472</sup> Detention under this category also constitutes unlawful discrimination.<sup>473</sup>

*Pretrial detention:* The ICCPR contains a presumption against pretrial detention. Article 9 3) states that, “It shall not be the general rule that persons awaiting trial shall be detained in custody”.<sup>474</sup> The Human Rights Committee, interpreting this provision, has explained that pretrial detention “must be based on an individualized determination that it is reasonable and necessary . . . for such purposes as to prevent flight, interference with evidence or the recurrence of crime”.<sup>475</sup> The UN Working Group on Arbitrary Detention has similarly emphasized that “pretrial detention must be an exceptional measure and as such should be justified in each individual case”.<sup>476</sup> However, in Venezuela, it appears that perceived opponents are routinely subjected to pretrial detention without an individualized determination that it is reasonable and necessary for the limited permissible purposes.

*Detention despite a release order:* Continued detention after a court has ordered a person be released is arbitrary.<sup>477</sup>

---

<sup>469</sup> UN Working Group on Arbitrary Detention: *Opinion No. 25/2000 concerning James Mawdsley*, U.N. Doc. E/CN.4/2001/14/Add.1 at 124, adopted September 14, 2000, par. 12 (“Peaceful expression of opposition to any regime cannot give rise to arbitrary arrest”).

<sup>470</sup> UN Working Group on Arbitrary Detention: *Opinion No. 13/2014 concerning Mohammad Muthana AlAmmari*, U.N. Doc. A/HRC/WGAD/2014/13, adopted April 30, 2014, par. 27 (finding detention for participating in peaceful anti-government demonstration to be arbitrary and in violation of ICCPR Articles 9, 14, 19, and 21).

<sup>471</sup> UN Working Group on Arbitrary Detention: *Opinion No. 35/1993 concerning Mujalli Nasrawin*, U.N. Doc. E/CN.4/1994/27 at 114, adopted September 29, 1993, par. 6 (where a person was “detained only for his political views and opinions”, the detention violated, *inter alia*, ICCPR Articles 9, 18, and 19).

<sup>472</sup> UN Working Group on Arbitrary Detention: *Opinion No. 11/1993 concerning Muhammad Munir Missouti*, U.N. Doc. E/CN.4/1994/27 at 57, adopted April 30, 1993, par. 5 c).

<sup>473</sup> UN Working Group on Arbitrary Detention: *Opinion No. 39/2014 concerning Salem Lani*, U.N. Doc. A/HRC/WGAD/2014/39, adopted November 18, 2014, par. 33 (“There is every indication that their membership of the Ennahdha party is at the very root of the proceedings against them . . . . The Working Group therefore concludes that the detention is also arbitrary under category V”); see also: *Opinion No. 2/2015 concerning Andargachew Tsige v. Ethiopia*, U.N. Doc. A/HRC/WGAD/2015/2, adopted April 20, 2015, par. 25 (finding a Category V violation where an individual was held “on the basis of his political convictions”).

<sup>474</sup> International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, entered into force March 23, 1976, Article 9(3) [hereinafter, ICCPR].

<sup>475</sup> UN Human Rights Committee: *General Comment No. 35 on Article 9: Liberty and Security of Person*, U.N. Doc. CCPR/C/GC/35, December 16, 2014, par. 38.

<sup>476</sup> UN Working Group on Arbitrary Detention: *Opinion No. 62/2017 concerning Teymur Akhmedov*, U.N. Doc. A/HRC/WGAD/2017/62, adopted August 25, 2017, par. 41; see also: *Opinion No. 24/2015 concerning Gloria Macapagal-Arroyo*, U.N. Doc. A/HRC/WGAD/2015/24, adopted September 2, 2015, par. 36 (“[P]retrial detention should be an exception rather than the rule and as short as possible”).

<sup>477</sup> UN Working Group on Arbitrary Detention: *Opinion No. 8/1993 concerning Teudo Mordán Gerónimo*, U.N. Doc. E/CN.4/1994/27, adopted April 29, 1993, par. 5(f).

*Detention after completing sentence:* Continued detention after a person has completed their criminal sentence is arbitrary.<sup>478</sup>

*Detention with due process violations:* Detention is arbitrary when it is based on serious due process violations.<sup>479</sup> All of the due process violations listed above have been held by the UN Working Group on Arbitrary Detention to render detention arbitrary.<sup>480</sup>

*Civilians detained by a military court:* Article 14(1) of the ICCPR requires that trials are adjudicated by an “independent and impartial tribunal established by law”. The Human Rights Committee has emphasized that “the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned”.<sup>481</sup> Therefore, the Committee has explained, “[t]rials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.<sup>482</sup> The UN Working Group on Arbitrary Detention has gone further and insisted that military tribunals should never try civilians in any circumstances.<sup>483</sup> Regardless, even if the trial of civilians by military courts is considered permissible in certain cases, the Venezuelan regime has used them far beyond just the “exceptional” cases where “resorting to such trials is necessary and justified by objective and serious reasons”.

### 3. The Perpetrator Was Aware of the Factual Circumstances That Established the Gravity of the Conduct

The security forces and judicial authorities responsible for the arbitrary detentions listed above clearly knew their actions were improper and grave, as they violate Venezuela’s own laws. The Constitution, for example, prohibits discrimination and protects the rights to freedom of association, assembly,

---

<sup>478</sup> Jared Genser: *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice*, 2019, pages 115 to 16 (discussing cases where the UN Working Group on Arbitrary Detention found detention beyond the expiration of a detainee’s sentence to be arbitrary).

<sup>479</sup> *Methods of Work of the Working Group on Arbitrary Detention*, *supra* note 468, par. 8 c) (detention is arbitrary “[w]hen the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character”).

<sup>480</sup> *The UN Working Group on Arbitrary Detention: Commentary and Guide to Practice*, *supra* note 478, pages 229 to 374 (discussing cases where the UN Working Group on Arbitrary Detention found detention to be arbitrary due to violation of due process rights).

<sup>481</sup> UN Human Rights Committee: *General Comment No. 22 on Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial*, U.N. Doc. CCPR/C/GC/32, August 24, 2007, par. 22.

<sup>482</sup> *Ibidem*.

<sup>483</sup> UN Human Rights Council: *Report of the Working Group on Arbitrary Detention*, U.N. Doc. A/HRC/27/48, June 30, 2014, par. 69 (“(a) Military tribunals should only be competent to try military personnel for military offences; (b) If civilians have also been indicted in a case, military tribunals should not try military personnel . . . .”); see also: UN Working Group on Arbitrary Detention: *Opinion No. 11/2012 concerning Sayed Mohammed Abdullah Nimr*, U.N. Doc. A/HRC/WGAD/2012/11, adopted May 3, 2012, par. 18 (“[W]hatever the charges faced, civilians should not be tried by military courts, as such courts cannot be considered independent and impartial tribunals for civilians.”); see also: UN Human Rights Council, *United Nations Basic Principles and Guidelines on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court*, U.N. Doc. A/HRC/30/37, July 6, 2015, par. 55 (“Military tribunals are not competent to review the arbitrariness and lawfulness of the detention of civilians. Military judges and military prosecutors do not meet the fundamental requirements of independence and impartiality”).

expression, and conscience.<sup>484</sup> The Constitution further contains a presumption against pretrial detention, prohibits detention despite a release order, protects the right to due process and the right to be tried by an “independent and impartial court”, and requires “common crimes” to be tried by civilian (rather than military) courts.<sup>485</sup> Moreover, Venezuela’s Penal Code specifically makes it a crime for a public official to unlawfully detain someone, fail to follow the formalities prescribed by law for detention, or refuse to obey a written release order.<sup>486</sup>

#### 4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was discussed above. The *2018 OAS Report* concluded that the arbitrary detentions “did not take place spontaneously or in isolation, but instead reflect policy put in place by the Government of Venezuela through acts directed by the highest State authorities that establishes clear and systematic patterns of action”.<sup>487</sup>

#### 5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was discussed above. The fact that political opponents and others who criticized the regime were targeted for arbitrary detention demonstrates that the perpetrators knew that their conduct was part of the overall attack against civilians.

### E. Crime Against Humanity of Other Inhumane Acts

Though the *2018 OAS Report* considered the actions of the Maduro regime that have led to the humanitarian crisis, it did not analyze these specifically as the crime against humanity of “other inhumane acts”. This section will conduct this analysis, incorporating information from the *2018 OAS Report* and, where relevant, additional information not contained therein.

---

<sup>484</sup> *Constitución de la República Bolivariana de Venezuela*, December 30, 1999, Art. 21 1) (prohibition on discrimination), Art. 52 (freedom of association), Art. 53 (freedom of assembly), Art. 57 (freedom of expression), Art. 61 (freedom of conscience), Art. 67 (right to political association).

<sup>485</sup> *Ibidem*, Art. 44 1) (presumption against pretrial detention), Art. 44 5) (prohibition on detention despite a release order), Art. 49 (right to due process), Art. 49 3) (competent, independent, and impartial court), Art. 261 (“[C]ommission of common crimes . . . shall be judged by the courts of the ordinary jurisdiction”).

<sup>486</sup> *Criminal Code of Venezuela*, October 20, 2000, Arts. 175, 177, and 180, available in Spanish at: [https://www.oas.org/juridico/spanish/mesicic3\\_ven\\_anexo6.pdf](https://www.oas.org/juridico/spanish/mesicic3_ven_anexo6.pdf).

<sup>487</sup> *2018 OAS Report*, *supra* note 14, page 361.



The crime against humanity of other inhumane acts has five elements: (1) the perpetrator intentionally inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act, (2) such act was of a character similar to any act referred to in Article 7(1) of the Rome Statute, (3) the perpetrator was aware of the factual circumstances that established the character of the act, (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>488</sup>

## **1. The Perpetrator Inflicted Great Suffering, or Serious Injury to Body or to Mental or Physical Health, by Means of an Inhumane Act**

The ongoing humanitarian crisis in Venezuela is the direct result of actions taken and policies adopted by the Maduro regime, and it has caused great suffering and serious injury – including starvation, malnutrition, and lack of medical care – to millions of people. The crisis has also led to the premature deaths of at least tens of thousands.

### **a. Inflicted**

The Maduro regime has “inflicted” great suffering and serious injury because, through its corruption, policies, and actions, it has caused “one of the worst humanitarian crises the region has experienced”.<sup>489</sup>

First, an intricate system of currency controls – established in 2003 and kept largely in place under Maduro – has restricted the amount of foreign currency Venezuelans can purchase from the government. Restricting access to foreign currency is problematic because most consumer products are imported, and therefore “a steady supply of foreign currency is essential for commercial activity”.<sup>490</sup> This includes the most basic necessities – domestic industries produce only 30 percent of Venezuela’s food needs, so the rest must be imported,<sup>491</sup> and the “vast majority” of the country’s medical supplies and equipment are also imported.<sup>492</sup> The restricted access to foreign currency therefore limits the availability of basic goods,

---

<sup>488</sup> *Elements of Crimes*, *supra* note 313, page 12. The word “intentionally” in Element 1 does not appear in the ICC’s Elements of Crimes, but is required under Article 7 1) k) of the Rome Statute (and would otherwise be required by Article 30 1)).

<sup>489</sup> 2018 OAS Report, *supra* note 14, page 235.

<sup>490</sup> *Ibidem*, page 238.

<sup>491</sup> *Ibidem*.

<sup>492</sup> Paul Dobson: “Venezuela Calls on UN to Break US Blockade and Supply Medical Equipment”, *Mint Press News*, November 15, 2018, available at: <https://www.mintpressnews.com/venezuela-calls-on-un-to-break-us-sanctions-supply-medical-equipment/251934/>.

including food and medical supplies.<sup>493</sup> The *2018 OAS Report* explicitly blamed the critical shortage of medicines on the lack of foreign exchange, noting that the shortage “is a direct result of state policy”, as “pharmaceutical companies in Venezuela have not ha[d] access to dollars since October 2016”.<sup>494</sup>

Second, those same currency controls have created “a parallel and illegal currency market”<sup>495</sup> that allows elites to make easy profits but takes foreign currency that the government should be using to purchase food and other goods out of the government’s supply. More specifically, the regime has artificially set the official exchange rate at about 10 Bolivars per US dollar, while the black market exchange rate was (as of February 2018) 228,000 Bolivars per US dollar,<sup>496</sup> and then given preferential access to its limited supply of dollars at the subsidized rate to its cronies.<sup>497</sup> These individuals are able to enrich themselves by purchasing dollars at the subsidized rate and then selling them on the black market for a significant profit,<sup>498</sup> which simultaneously reduces the supply of foreign currency available to the government for importation of humanitarian goods.

Third, using the parallel currency system described above, government officials and other elites have stolen over a staggering amount of money from the *Petróleos de Venezuela (PDVSA)*, the state-owned oil company. In one case, these individuals loaned the company \$42 million worth of bolivars but were repaid by the company in dollars at the government’s subsidized exchange rate, increasing their initial sum to \$600 million.<sup>499</sup> And this may be just the tip of the iceberg – according to opposition politicians, up to \$30 billion has gone missing from the *PDVSA* in recent years.<sup>500</sup> This corruption, together with other factors, has crippled the *PDVSA* to the point where it is all but failing<sup>501</sup> – despite Venezuela having the largest proven oil

---

<sup>493</sup> *2018 OAS Report*, *supra* note 14, page 251 (“[F]oreign-exchange shortages have limited imports of food and basic goods”). (quoting: FAO et al.: *The State of Food Security and Nutrition in the World*, 2017, page 54); see also: Mercy Benzaquen, “How Food in Venezuela Went From Subsidized to Scarce”, *New York Times*, July 16, 2017, available at: <https://www.nytimes.com/interactive/2017/07/16/world/americas/venezuela-shortages.html> (by restricting private importers’ access to foreign currency, the regime “forc[ed them] to the black market” to buy the dollars they need to pay for imports, but since they were “unable to afford prices on the black market, many cut imports, leading to even more products vanishing from the shelves”).

<sup>494</sup> *2018 OAS Report*, *supra* note 14, page 242.

<sup>495</sup> *Ibidem*, page 5.

<sup>496</sup> *Ibidem*, pages 5 to 6. According to *DolarToday*, the exchange rate, as of November 1, 2020, is 1 USD = 535,692.1 bolivar. *DolarToday* Spreadsheet, available at: <https://dxj1e0bbefdsyig.woldrssl.net/custom/dolartoday.xlsx>. However, this exchange rate is for the Bolívar soberano, which replaced the Bolívar fuerte in August 2018 at a rate of 100,000 to 1. See: Steve Hanke, “Venezuela’s Great Bolivar Scam, Nothing But A Face Lift”, *Forbes*, August 18, 2018, available at: <https://www.forbes.com/sites/stevehanke/2018/08/18/venezuelas-great-bolivar-scam-nothing-but-a-face-lift/#1ef42e2e4c23>. Thus, for a point of comparison to the February 2018 rate, the current exchange rate in Bolívar fuerte would be: 1 USD = 53,569,210,000 bolivar.

<sup>497</sup> *2018 OAS Report*, *supra* note 14, page 239 (the differential exchange rates create a “corruption mechanism that is profitable for the elite of the Regime and the military”).

<sup>498</sup> *Ibidem*.

<sup>499</sup> Jay Weaver and Antonio Maria Delgado: “Venezuela’s Hyperinflation Fuels Misery for Poor but Enriches Elite Through Currency Exchanges”, *Miami Herald*, September 11, 2018, available at: <https://www.miamiherald.com/news/local/article217868465.html>; see also: Giulia Saudelli, “How Millions of ‘Dirty Dollars’ Were Laundered Out of Venezuela”, *Deutsche Welle*, March 13, 2019, available at: <https://www.dw.com/en/how-millions-of-dirty-dollars-were-laundered-out-of-venezuela/a-47867313>.

<sup>500</sup> Richard Pérez-Peña and Boryana Dzhambazova, “Millions Flowed From Venezuelan Oil Firm to Small Bulgarian Bank”, *New York Times*, February 13, 2019, available at: <https://www.nytimes.com/2019/02/13/world/europe/venezuela-bulgaria-money-transfer.html>.

<sup>501</sup> *2018 OAS Report*, *supra* note 14, page 5 (“[I]n 2017 alone, corrupt practices and bad management have resulted in the drop of oil production by 629,000 barrels . . .”).

reserves in the world, Venezuela's oil output was recently at its lowest level in 75 years,<sup>502</sup> and in the span of one year, the PDVSA's profits dropped almost 90 percent.<sup>503</sup> Because 95 percent of Venezuela's supply of foreign currency comes from the oil sector,<sup>504</sup> this represents a disastrous decrease in the regime's ability to purchase food, medical supplies, and other desperately needed goods.

Fourth, again abusing using the parallel currency system, importers – reportedly including high-level government and military officials<sup>505</sup> – have engaged in import fraud to reap massive profits. When requesting access to foreign currency in order to import goods, importers often majorly inflate the value of the goods in order to gain access to more foreign currency than they require for the shipments.<sup>506</sup> They then pocket the surplus cash or sell it on the black market for huge profits.<sup>507</sup> At times, importers have used shell companies to “fake the shipments altogether and import nothing at all”.<sup>508</sup> It is estimated that “tens of billions of dollars have disappeared from the country in recent years in payments for over-invoiced or phantom imports”.<sup>509</sup> Not only does this practice generally decrease the foreign exchange available to import needed goods, such as food, but this practice has been reported among food importers specifically, contributing directly to food shortages.<sup>510</sup>

Fifth, when deciding how to allocate its scarce funds, the Venezuelan regime has chosen to appease its foreign allies rather than feed its population. As noted in a CNN report, “[f]or several years, Maduro has had a stark choice: Pay down debts to China, Russia and foreign investors – or buy food and medicine from abroad. He has chosen to pay the bills”.<sup>511</sup> This has required slashing spending on the latter – between 2014 and 2016, for example, food imports fell by 70 percent.<sup>512</sup>

---

502 Gideon Long and John Paul Rathbone, “Venezuela: Oil Producer’s Slump Reflects Nation’s Decline”, *Financial Times*, October 28, 2018, available at: <https://www.ft.com/content/d9be69d6-d7b0-11e8-ab8e-6be0dcf18713>.

503 “Venezuela’s PDVSA Oil Revenue Tumbles Amid Lower Prices, Production”, *Reuters*, August 12, 2017, available at: <https://www.reuters.com/article/us-venezuela-pdvsa/venezuelas-pdvsa-oil-revenue-tumbles-amid-lower-prices-production-idUSKBN1AS04U>.

504 *Gran Corrupción y Derechos Humanos*, *supra* note 20, page 20.

505 Hannah Dreier and Joshua Goodman, “Venezuela Military Trafficking Food as Country Goes Hungry”, *Associated Press*, December 28, 2016, available at: <https://www.ap.org/explore/venezuela-undone/venezuela-military-trafficking-food-as-country-goes-hungry.html> (“The U.S. government has taken notice. Prosecutors have opened investigations against senior Venezuelan officials, including members of the military, for laundering riches from food contracts through the U.S. financial system . . . .”); see also: “\$350 Billion Lost to Corruption in Venezuela: Expert”, *Insight Crime*, March 22, 2016, available at: <https://www.insightcrime.org/news/brief/350-billion-lost-to-corruption-venezuela-official>.

506 William Neuman and Patricia Torres, “Venezuela’s Economy Suffers as Import Schemes Siphon Billions”, *New York Times*, May 5, 2015, available at: <https://www.nytimes.com/2015/05/06/world/americas/venezuelas-economy-suffers-as-import-schemes-siphon-billions.html>.

507 *Ibidem*.

508 *Ibidem*.

509 *Ibidem*.

510 “Venezuela Military Trafficking Food as Country Goes Hungry”, *supra* note 505.

511 Patrick Gillespie et al.: “Venezuela: How a Rich Country Collapsed”, *CNN Business*, July 30, 2017, available at: <https://money.cnn.com/2017/07/26/news/economy/venezuela-economic-crisis/index.html>.

512 Douglas Barrios and Miguel Angel Santos: *Venezuela: Anatomía de un Colapso*, page 13, available in Spanish at: <https://politikaukab.files.wordpress.com/2018/04/venezuela-anatomia-de-un-colapso.pdf>; see also:

Mercy Benzaquen, “How Food in Venezuela Went From Subsidized to Scarce”, *New York Times*, July 16, 2017, available at: <https://www.nytimes.com/interactive/2017/07/16/world/americas/venezuela-shortages.html> (“By late 2014, oil money stopped flowing in. Venezuela had saved little from the oil price boom of the 2000s. Under Mr. Chávez’s successor, President Nicolás Maduro, the country slashed imports and used thinning reserves to pay its foreign debt and avoid default. As a result, food and medicine became scarce”).

Sixth, instead of using the country's natural resources to feed its populace, the Maduro regime has used the oil industry to "buy the backing of other key players in the region".<sup>513</sup> Specifically, as the Maduro regime exported oil to regional neighbors in exchange for food,<sup>514</sup> it deliberately lost money by overpaying for the food in extreme amounts. Some countries were essentially given oil for free – they "negotiated" their oil debt to Venezuela down, paying back less than half of what they owed.<sup>515</sup> The purpose of this corruption was to buy loyalty – the countries that benefitted, or simply owed Venezuela large debts, were expected to (and did) support the regime in the international arena.<sup>516</sup> Through these actions, "hundreds of millions of dollars"<sup>517</sup> were wasted.

Seventh, facing shortages of cash, the regime has tended to print money instead of engaging in needed fiscal reform. When oil prices dropped in 2014, reducing the regime's cash in hand, the regime starting printing money "at breakneck speed", causing the bolivar to "plunge[] in value".<sup>518</sup> When the prices of goods rose as a result, the government responded by printing even more money – precisely the cycle that "causes hyperinflation".<sup>519</sup> In 2017, opposition politicians said that the regime's "refusal to . . . stop excessive money printing will only create more misery in 2018".<sup>520</sup> As a result of the regime's policies, inflation in Venezuela reached unprecedented levels,<sup>521</sup> making basic necessities, including food, unaffordable for the vast majority of the population. In 2015, for example, food prices increased by over 100 percent.<sup>522</sup> By the time the *2018 OAS Report* was published, a Venezuelan family needed to earn 63 times the minimum wage to afford basic food necessities.<sup>523</sup> More generally, to afford the basic market basket of goods (which includes additional necessities, such as healthcare, education, items for personal hygiene, housing, and clothing), a family of five would need an income 141.5 times the minimum salary.<sup>524</sup> In 2017, in one month alone, the price for a family to purchase this basic market basket of goods increased

---

513 Ben Wolfgang: "Nicolas Maduro Used Venezuela Oil to Buy Political Loyalty as Citizens Left to Starve", *Washington Times*, March 19, 2019, available at: <https://www.washingtontimes.com/news/2019/mar/19/nicolas-maduro-used-venezuela-oil-buy-political-lo/>.

514 Connectas: *#Petrofraude*, "Introduction", January 2019, available at: <https://www.connectas.org/especiales/petrofraude/introduction.html>.

515 "Nicolas Maduro Used Venezuela Oil to Buy Political Loyalty as Citizens Left to Starve", *supra* note 513.

516 "Introduction", *supra* note 514 and Connectas: *#Petrofraude*, "Oil for Votes", January 2019, available at: <https://www.connectas.org/especiales/petrofraude/en.html#capitulo5>.

517 "Introduction", *supra* note 514.

518 "Venezuela: How A Rich Country Collapsed", *supra* note 511.

519 Michelle Carmody: "What Caused Hyperinflation in Venezuela: A Rare Blend of Public Ineptitude and Private Enterprise", *The Conversation*, February 5, 2019, available at: <https://theconversation.com/what-caused-hyperinflation-in-venezuela-a-rare-blend-of-public-ineptitude-and-private-enterprise-102483> ("[P]rinting more money simply made the problem worse. It added to the supply of currency, pushing the value down even further. As prices rose, the government printed more money to pay its bills. This cycle is what causes hyperinflation").

520 Alexandra Ulmer and Corina Pons: "Venezuela Raises Minimum Wage 40 Percent, Stoking World's Fastest Inflation", *Reuters*, December 31, 2017, available at: <https://www.reuters.com/article/us-venezuela-economy/venezuela-raises-minimum-wage-40-percent-stoking-worlds-fastest-inflation-idUSKBN1EP0K3>.

521 *2018 OAS Report*, *supra* note 14, page 5.

522 *Ibidem*, page 251.

523 *Ibidem*, page 6.

524 *Ibidem*, page 238.

by 81 percent.<sup>525</sup> The *2018 OAS Report* concluded: “Malnutrition in Venezuela today is not a result of war or a natural catastrophe; it is caused by scarcity and inflation provoked by the Regime”.<sup>526</sup>

Finally, despite overwhelming evidence, the Maduro regime has “repeatedly denied” the existence of the humanitarian crisis to the international community and refused offers of assistance,<sup>527</sup> which has exacerbated the situation.<sup>528</sup>

## **b. Great Suffering or Serious Injury**

It is indisputable that hundreds of thousands, if not millions, of people in Venezuela have experienced great suffering and serious injury as a result of the humanitarian crisis. In particular, rampant shortages of food and medicine and hyperinflation (making the necessities of life prohibitively expensive) have resulted in widespread malnutrition, starvation, disease, lack of access to medical care, as well as the premature deaths of at least tens of thousands.

## **i. Findings of the 2018 Report of the Organization of American States**

The *2018 OAS Report* described the horrific severity of this “man-made”<sup>529</sup> humanitarian crisis:

- Thousands of children suffer from severe malnutrition and “[e]very week, between five and six children die from malnutrition”<sup>530</sup>
- Nearly 80 percent of the population consumes only two meals per day, and another 4.5 million people consume only one per day<sup>531</sup>
- 82 percent of the population is living in poverty, and 52 percent in extreme poverty<sup>532</sup>

---

<sup>525</sup> *Ibidem*.

<sup>526</sup> *Ibidem*, page 250.

<sup>527</sup> *Ibidem*, page 235.

<sup>528</sup> *Ibidem*, page 26.

<sup>529</sup> *Ibidem*, page 235.

<sup>530</sup> *Ibidem*, pages 7 and 236.

<sup>531</sup> *Ibidem*, page 6.

<sup>532</sup> *Ibidem*, page 237.



- 300,000 people with chronic health conditions and 77,000 people living with HIV are at risk of dying due to the collapse of the health system and lack of access to treatment and medication<sup>533</sup>
- In one year, child mortality increased 30 percent and maternal mortality increased 65 percent<sup>534</sup>
- Out of 150 medicines determined to be essential, Venezuela is suffering an estimated 70 percent shortfall<sup>535</sup>
- Food insecurity affects 9 of every 10 households<sup>536</sup>
- More than 70 percent of the population has lost weight – an average of 8.7 kilograms (over 19 pounds)<sup>537</sup>

## ii. New Findings

**June 2018:** In June 2018, the OHCHR published a report on the “downward spiral” of human rights violations in Venezuela.<sup>538</sup> The report noted that because “the Government refused to acknowledge the scale of the health and food crisis, it has not adopted the urgent measures and policy reforms needed to address the crisis and its root causes, thereby failing to comply with its international obligation to make every possible effort to fulfil the rights to health and food, including through international cooperation and assistance”.<sup>539</sup>

**July 2018:** Reuters reported that, based on data from the opposition-run legislature, “Consumer prices have risen 46,305 percent this year”.<sup>540</sup>

**September 2018:** The NGO Coalition *CodeVida* (*Coalition of Organizations for the Right to Health and Life*) released a report in September 2018 documenting the deteriorating health crisis in Venezuela.<sup>541</sup> The report highlighted that, in 2017, the regime stopped public funding of numerous key medications,

---

<sup>533</sup> *Ibidem*, page 241; see also: *ibidem*, page 236 (“Patients with chronic diseases are dying from the high prices of and/or outright shortages of medicines . . .”).

<sup>534</sup> *Ibidem*, page 249.

<sup>535</sup> *Ibidem*, page 242.

<sup>536</sup> *Ibidem*, page 401.

<sup>537</sup> *Ibidem*.

<sup>538</sup> *Human Rights Violations in the Bolivarian Republic of Venezuela*, *supra* note 78.

<sup>539</sup> *Human Rights Violations in the Bolivarian Republic of Venezuela*, *supra* note 78, page v.

<sup>540</sup> Brian Ellsworth: “IMF Projects Venezuela Inflation Will Hit 1,000,000 Percent in 2018”, *Reuters*, July 23, 2018, available at: <https://www.reuters.com/article/us-venezuela-economy/imf-projects-venezuela-inflation-will-hit-1000000-percent-in-2018-idUSKBN1KD2L9>.

<sup>541</sup> CodeVida and PROVEA: *Informe Sobre la Situación del Derecho a la Salud de la Población Venezolana en el Marco de una Emergencia Humanitaria Compleja*, September 13, 2018, available in Spanish at: <https://www.codevida.org/codevida/wp-content/uploads/Informe-Derecho-a-la-Salud-en-la-EHC-Venezuela-Codevida-Provea-septiembre-2018.pdf>.

including those for cancer, HIV, transplants, hemophilia, and multiple sclerosis.<sup>542</sup> Furthermore, due to low vaccination coverage, there have been outbreaks of preventable diseases, including 1,992 cases of Diphtheria, with 168 deaths (mostly children); 4,272 cases of measles, with 62 deaths; and at least 400,000 cases of malaria, the highest in Latin America.<sup>543</sup> As of June 2018, 820 people had died due to the lack of anti-malaria medication.<sup>544</sup>

October 2018: The International Monetary Fund (IMF) predicted consumer prices would rise 1.37 million percent in Venezuela in 2018, up from an earlier projection of one million percent, and predicted hyperinflation in the country would reach 10 million percent in 2019.<sup>545</sup>

January 2019: A report published in January 2019<sup>546</sup> by a group of journalists documented how the Maduro regime has corruptly used the oil industry to “line the pockets of power brokers inside Venezuela and to buy the backing of other key players in the region”.<sup>547</sup> Specifically, as the Maduro regime exported oil to regional neighbors in exchange for food,<sup>548</sup> it deliberately lost money by overpaying for the food in extreme amounts. For example, under this exchange program, Maduro authorized green coffee and beef to be purchased at prices that were higher than the highest selling averages for those goods in the prior 20 years.<sup>549</sup> Sugar was purchased at 65 percent higher than the benchmark price.<sup>550</sup> Some countries were essentially given oil for free – they “negotiated” their oil debt to Venezuela down, paying back less than half of what they owed.<sup>551</sup> The purpose of this corruption was to buy loyalty – the countries that benefitted, or simply owed Venezuela large debts, were expected to (and did) support the regime in the international arena.<sup>552</sup> Of course, by wasting “hundreds of millions of dollars”,<sup>553</sup> the regime deprived Venezuelans of critically needed food.

---

<sup>542</sup> *Ibidem*, page 2.

<sup>543</sup> *Ibidem*.

<sup>544</sup> *Ibidem*.

<sup>545</sup> Luc Cohen, “IMF Sees Venezuela Inflation at 10 Million Percent in 2019”, *Reuters*, October 9, 2018, available at: <https://in.reuters.com/article/venezuela-economy/imf-sees-venezuela-inflation-at-10-million-percent-in-2019-idINKCN1MJ1YX>.

<sup>546</sup> “Introduction”, *supra* note 514.

<sup>547</sup> “Nicolas Maduro Used Venezuela Oil to Buy Political Loyalty as Citizens Left to Starve”, *supra* note 513 (discussing the report).

<sup>548</sup> “Introduction”, *supra* note 514.

<sup>549</sup> Connectas: #Petrofraude, “The Business that Emptied the Pockets of Venezuelans”, January 2019, available at: <https://www.connectas.org/especiales/petrofraude/the-business-that-emptied-the-venezuelans-table.html>.

<sup>550</sup> *Ibidem*.

<sup>551</sup> “Nicolas Maduro Used Venezuela Oil to Buy Political Loyalty as Citizens Left to Starve”, *supra* note 513.

<sup>552</sup> “Introduction”, *supra* note 514; see also: “Oil for Votes”, *supra* note 516.

<sup>553</sup> “Introduction”, *supra* note 514.

**February 2019:** In February 2019, the *2018 Survey on Life Conditions (ENCOVI)* was published, showing that life standards decreased significantly in Venezuela in 2018.<sup>554</sup>

**April 2019:** In April 2019, Human Rights Watch published a report further documenting the humanitarian crisis. The report found “a health system in utter collapse” and widespread hunger, malnutrition, and severe shortages of food.<sup>555</sup> The report further noted that “[d]espite overwhelming evidence that Venezuela is facing a humanitarian crisis, the Maduro government continues to publicly minimize it and to suppress information about it, and has done far too little to alleviate it”.<sup>556</sup>

**May 2019:** On May 28, 2019, the Central Bank of Venezuela (BCV) published key economic statistics on the Venezuelan economy for the first time since 2015.<sup>557</sup> The Maduro regime stopped publishing statistics as the economic crisis spiraled out of control, but resumed after the IMF issued a declaration of censure against Venezuela and warned of potential sanctions if it continued to withhold this data.<sup>558</sup> The BCV reported an inflation rate of 862.6 percent in 2017 and 130,060 percent in 2018 – though these figures are lower than others published by international financial institutions and the National Assembly, and have been criticized as being “underestimated”.<sup>559</sup> The BCV also reported that Venezuela’s GDP fell 22.5 percent between the third quarter of 2017 and 2018, 15.7 percent in 2017, and 17 percent in 2016.<sup>560</sup> Imports purportedly decreased 77.5 percent from 2012 to 2018.<sup>561</sup> Meanwhile, the Venezuelan National Institute of Statistics, which is controlled by the Maduro regime, also resumed publishing statistics after years of silence. Incredibly, its data indicates that, despite all evidence to the contrary, both poverty and extreme poverty decreased between 2014 and 2018 – by three percent and one percent, respectively.<sup>562</sup>

---

<sup>554</sup> Universidad Católica Andrés Bello and Instituto de Investigaciones Económicas y Sociales: *Encovi*, February 2019, available in Spanish at: <http://elucubista.com/wp-content/uploads/2019/02/Presentacion-Encovi-2018-y-Plan-Pa%C3%ADs-Def.pdf>; see also: Ignacio Marín: “Venezuela’s Revolution of Hunger: A Photo Essay”, *The Guardian*, March 22, 2019, available at: <https://www.theguardian.com/world/2019/mar/22/venezuelas-revolution-of-hunger-a-photo-essay> (“The last Encovi survey reported 89.4% of respondents said their household income was not enough to buy food and 61% reported sleeping hungry at night”).

<sup>555</sup> *Venezuela’s Humanitarian Emergency*, *supra* note 64, pages 2 and 4.

<sup>556</sup> *Venezuela’s Humanitarian Emergency*, *supra* note 64, page 7.

<sup>557</sup> Alex Vasquez: “Venezuela Reports Grim Details of Hyperinflation, GDP Plunge”, *Bloomberg*, May 28, 2019, available at: <https://www.bloomberg.com/news/articles/2019-05-29/venezuela-central-bank-reports-2019-hyperinflation-gdp-plunge>.

<sup>558</sup> *Ibidem*; see also: Lesley Wroughton and Brian Ellsworth: “IMF Censures Crisis-stricken Venezuela Over Lack of Data”, *Reuters*, May 2, 2018, available at: <https://www.reuters.com/article/us-imf-venezuela/imf-censures-crisis-stricken-venezuela-over-lack-of-data-idUSKBN1I32I4>.

<sup>559</sup> “Venezuela Reports Grim Details of Hyperinflation, GDP Plunge”, *supra* note 557; see also: Jorge Luis Pérez Valery: “Por Primera Vez en 3 Años, el Banco Central de Venezuela Publica Nuevos Datos sobre la Economía y Son Demoledores”, *CNN Español*, May 30, 2019, available in Spanish at: <https://cnnespanol.cnn.com/2019/05/30/por-primera-vez-en-3-anos-el-banco-central-de-venezuela-publica-nuevos-datos-sobre-la-economia-y-son-demoledores/>.

<sup>560</sup> “Venezuela Reports Grim Details of Hyperinflation”, *supra* note 557.

<sup>561</sup> Cedrom: “BCV Admite Hiperinflación de 53.798.500% desde 2016”, *Venezuela al Día*, May 28, 2019, available in Spanish at: <https://venezuelaaldia.com/2019/05/28/banco-central-venezuela-hiperinflacion-2016/>.

<sup>562</sup> Alex Vasquez: “Venezuela GDP Sinks Amid Rampant Inflation: Central Bank Report”, *Bloomberg*, October 18, 2019, available at: <https://www.bloomberg.com/news/articles/2019-10-19/venezuela-gdp-sinks-amid-rampant-inflation-central-bank-report>.

June 2019: In June 2019, the relief agency Caritas sent UN High Commissioner for Human Rights Michelle Bachelet a letter during her visit to Venezuela highlighting the extent of the humanitarian crisis.<sup>563</sup> It stated that 52 out of every 100 children that Caritas receives has some sort of nutritional deficit and that 10 percent of them, around 130,000 small children, need immediate humanitarian help.<sup>564</sup> It further explained that 24 percent of the pregnant women they receive are malnourished and that more than a third of the children that Caritas has received have an irreparable delay in physical growth.<sup>565</sup> Additionally, six out of 10 families that Caritas works with are surviving by begging and looking for food in trashcans.<sup>566</sup>

July 2019: The OHCHR's July 2019 report noted that "the economic and social crisis deteriorated further" in 2018 and 2019.<sup>567</sup> The OHCHR verified "violations of the right to food, including the State's obligation to ensure the population is free from hunger".<sup>568</sup> Although the regime had requested and accepted some aid, it was not sufficient to meet the population's needs, and the regime "has not demonstrated that it has used all resources at its disposal to ensure the progressive realization of the right to food, nor that it has unsuccessfully sought international assistance to address gaps".<sup>569</sup> As of April 2019, the minimum wage of \$7 USD per month "only covered 4.7 percent of the basic food basket".<sup>570</sup> Regarding health and medical care, the "situation . . . is dire".<sup>571</sup> In major cities, shortages of essential drugs range from 60 to 100 percent.<sup>572</sup> Between November 2018 and February 2019, 1,557 people died due to lack of supplies in hospitals, and 40 patients died due to power outages in March 2019.<sup>573</sup> Moreover, the regime's failure to publish comprehensive data on public health, which is essential for an adequate response to the ongoing crisis, "is a violation of the right to health".<sup>574</sup>

---

<sup>563</sup> Letter from Caritas Venezuela and the Venezuelan Catholic Church to Michelle Bachelet, UN High Commissioner for Human Rights, June 2019, available in Spanish at: <http://caritasvenezuela.org/comunicacion-de-caritas-de-venezuela-de-la-iglesia-catolica-venezolana-en-el-marco-de-la-visita-a-venezuela-de-la-dra-michelle-bachelet-alta-comisionada-de-los-derechos-humanos-de-la-onu-caracas/>.

<sup>564</sup> *Ibidem*.

<sup>565</sup> *Ibidem*.

<sup>566</sup> *Ibidem*.

<sup>567</sup> 2019 OHCHR Report, *supra* note 78, par. 10.

<sup>568</sup> *Ibidem*, par. 13.

<sup>569</sup> *Ibidem*.

<sup>570</sup> *Ibidem*, par. 11.

<sup>571</sup> *Ibidem*, par. 16.

<sup>572</sup> *Ibidem*.

<sup>573</sup> *Ibidem*, par. 19.

<sup>574</sup> *Ibidem*, par. 20.

July 2019: A news report in July 2019 detailed the cost of various foods in Venezuela. Bananas cost 10 percent of a monthly minimum wage, while milk powder costs more than a person on minimum wage is paid per month.<sup>575</sup> Food is prohibitively expensive even for those earning more – one liter of milk cost 11 percent of a computer engineering professor’s monthly salary, while one kilogram of milk powder cost over half of his salary.<sup>576</sup>

November 2019: A news article published on November 3, 2019 highlighted how Venezuela’s elite, including many with direct ties to the regime, have used the national oil company to embezzle and launder billions of dollars.<sup>577</sup> According to the article, Maduro’s three step-sons are implicated, and Maduro himself is under investigation by US authorities for related corruption.<sup>578</sup>

July 2020: On July 15, 2020, the UN Office for the Coordination of Humanitarian Affairs released its response plan to address the worsening humanitarian crisis in Venezuela. The plan identifies 7 million people in need and outlines a plan to support 4.5 million people. The report offers a humanitarian needs overview, which indicates that malnutrition, lack of access to clean water, and lack of access to medical care are endemic problems. It further notes that water supply failures hinder critical health and education services. In 2019, 106,326 children under age 5 (4 percent of this population group) were affected by severe acute malnutrition. Vaccination rates for communicable diseases have fallen continuously since 2015, and COVID-19 threatens to devastate Venezuela’s already fatigued public health infrastructure.<sup>579</sup>

September 2020: The grim humanitarian landscape in Venezuela has continued to deteriorate. Faced with a debilitated public health infrastructure, the bottoming-out of oil prices, rampant inflation, and widespread shortages of food and water, Venezuela was in dire straits even before the COVID-19 pandemic.<sup>580</sup> The pandemic has exacerbated all of Venezuela’s existing challenges and has created new ones. Minister of the Interior, Néstor Reverol, announced in July 2020 that Venezuelan refugees returning from abroad “would be charged under the Organic Law against Organised Crime and Financing of Terrorism, allegedly for bringing Covid-19 into the country”.<sup>581</sup>

---

<sup>575</sup> Seana Davis et al.: “Venezuela: 1 Litre of Milk Could Cost a Third of Your Wage”, *Euronews*, July 26, 2019, available at: <https://www.euronews.com/2019/02/15/venezuela-all-my-life-s-savings-were-destroyed-by-hyperinflation-the-cube>.

<sup>576</sup> *Ibidem*.

<sup>577</sup> Jay Weaver and Antonio Maria Delgado: “Venezuela’s Business Elite Face Scrutiny in \$1.2 Billion Money Laundering Case”, *Miami Herald*, November 3, 2019, available at: <https://www.miamiherald.com/news/local/article236793383.html>.

<sup>578</sup> *Ibidem*.

<sup>579</sup> United Nations Office for the Coordination of Humanitarian Affairs: *Humanitarian Response Plan: Venezuela*, July 2020, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/venezuela\\_hrp\\_2020\\_en\\_vf.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/venezuela_hrp_2020_en_vf.pdf).

<sup>580</sup> 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, par. 114.

<sup>581</sup> *Ibidem*, par. 244.





▲ ▲ A woman looks at empty refrigerators at the Quinta Crespo market, located in downtown Caracas, while picking up the day's leftovers off the floor and putting them in a bag to take home.

*Caracas, Venezuela. May 26, 2016. Horacio Siciliano*



▲ ▲ Two men eat out of the trash outside a restaurant in the popular area of Chacaíto, located in Caracas.

*Caracas, Venezuela. August 04, 2016. Horacio Siciliano*



▲ ▲ After a nation-wide blackout that lasted 5 days, people from the community of San Agustín del Sur in Caracas, desperate due to the lack of water service, go down together to the banks of the Guaire River (main drainage from the Venezuelan capital) to collect water to clean their houses, cook, and bathe.

*Caracas, Venezuela. March 11, 2019. Rafael Hernández*



▲ ▲ Residents of 23 de Enero, Avenida Sucre, and Catia protest over the water shortage on Avenida Sucre in Caracas. Citizens came out to demonstrate after the water supply was cut off due to the extensive blackout in Venezuela.

*Caracas, Venezuela. March 31, 2019. Rayner Peña*





▲ Saida Bravo (44) suffers from Parkinson's disease and severe malnutrition. The regime's lack of health and medical care has confined her to a dark room in the Altos de Milagro neighborhood in Maracaibo, Venezuela, where she lives off of yuca and rice due to the extreme poverty in which she lives.

*Maracaibo, Venezuela. May 25, 2019. Rafael Hernández*



▲ Segundo Galué (93) is bedridden in the Maracaibo neighborhood of Altos de Milagro Norte, waiting for a slow and painful death from severe malnutrition. Galué and his family can only eat once a day, living off of tubers such as yuca or sweet potato. They don't remember the last time they ate animal protein.

*Zulia, Venezuela. May 25, 2019. Rafael Hernández*



▲ One of the rooms on the seventh floor of Dr. José Gregorio Hernández General Hospital, also known as Magallanes de Catia Hospital.

*Caracas, Venezuela. August 17, 2016. Gabriel Méndez*



▲ Dr. Ángel Larralde University Hospital – Patients await medical care in the emergency room of Dr. Ángel Larralde University Hospital, also known as Carabobo Hospital, in Valencia, Carabobo. The hospital appears neglected, its facilities were abandoned due to contamination, and it only handles emergencies, with multiple shortcomings.

*Carabobo, Venezuela. April 25, 2019. Rayner Peña*

### c. The Suffering or Injury Was Inflicted Intentionally

Under Article 7(1)(k) of the Rome Statute, the inhumane acts must have *intentionally* caused great suffering or serious injury.<sup>582</sup> However, this does not require that the perpetrator specifically aimed or wanted to bring about the harmful consequences of their acts; rather, it suffices that they were aware that these consequences would “occur in the ordinary course of events” and yet acted anyway.<sup>583</sup> The ICC has interpreted this to mean that the consequences must be a “virtual certainty” or “practical certainty”<sup>584</sup>; it is not enough that the consequences were merely likely or possible.<sup>585</sup>

Officials in the Maduro regime were undoubtedly aware that their corruption, policies, and actions would lead, in the ordinary course of events, to widespread shortages of food and medicine, malnutrition, starvation, disease, lack of access to medical care, and resulting deaths. Over the last five years, the humanitarian crisis has been thoroughly documented and highlighted by the OAS, UN, civil society, and numerous foreign governments, and the Maduro regime has been repeatedly warned that its corruption, policies, and actions were to blame.

For example, a May 2016 report by OAS Secretary General Luis Almagro discussed numerous aspects of the crisis.<sup>586</sup> In his presentation of that report to the OAS Permanent Council, Almagro stated that the “crisis is reaching a breaking point” and pointed to the “unprecedented food and medical shortages across the country”.<sup>587</sup> Almagro further laid the blame for the crisis squarely on the Maduro regime – “These challenges cannot be blamed on external forces. The situation facing Venezuela today is the result of the actions of those currently in power”.<sup>588</sup> He specifically explained that “[t]he systematic failure of the controlled exchange rate system has caused the currency to lose 99% of its value since 2013”.<sup>589</sup>

Former UN High Commissioner for Human Rights Zeid Ra’ad al Hussein, speaking to the UN Security Council in November 2017, stated:

Millions of Venezuelans live in hardship, as the government refuses to recognize or address the existence of a humanitarian crisis. A 2017 Food and Agriculture Organization report found that undernourishment had increased by 1.3 million people over the last three years. Inflation is so high that today a family needs 16 times the minimum wage to access the basic food basket . . . . The health situation has continued to deteriorate, given the continuing shortage of medicine and

---

<sup>582</sup> *Rome Statute*, *supra* note 106, Art. 7 1) k); see also: Art. 30 1).

<sup>583</sup> *Rome Statute*, *supra* note 106, Art. 30 2) b).

<sup>584</sup> *Prosecutor v. Bemba*, *supra* note 372, par. 362.

<sup>585</sup> *Ibidem*, par. 363.

<sup>586</sup> *Report on the Crisis in Venezuela*, *supra* note 80.

<sup>587</sup> Luis Almagro: “Presentation of the Secretary General of the OAS to the Permanent Council on the Application of the Democratic Charter”, June 23, 2016, available at: [https://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=S-011/16](https://www.oas.org/en/media_center/press_release.asp?sCodigo=S-011/16).

<sup>588</sup> *Ibidem*.

<sup>589</sup> *Ibidem*.

lack of access to medical care. Mosquito borne diseases as well as infant and maternal mortality rates are on the rise.<sup>590</sup>

Michelle Bachelet, the current UN High Commissioner for Human Rights, wrote in a July 2019 report that “the economic and social crisis deteriorated further as the economy continued to contract, inflation skyrocketed, and public revenues dropped”.<sup>591</sup> She noted that the minimum wage “can no longer be considered a living wage” – as of April 2019, it covered only 4.7 percent of the basic food basket.<sup>592</sup> In fact, “people interviewed by OHCHR consistently stressed that their monthly family income . . . cover[ed] approximately four days of food per month”.<sup>593</sup> Bachelet further highlighted the “dire” situation of the health system, which had “severe shortages in basic medical equipment, supplies and medicines”.<sup>594</sup> Between November 2018 and February 2019, 1,557 people had died due to lack of supplies in hospitals.<sup>595</sup> Bachelet further tied the current crisis to the regime’s policies, noting that “economic and social policies adopted over the past decade have undermined food production and distribution systems”; “[m]isallocation of resources, corruption, lack of maintenance of public infrastructure, and severe underinvestment has resulted in violations to the right to an adequate standard of living”; and the “Government has not demonstrated that it has used all resources at its disposal to ensure the progressive realization of the right to food, nor that it has unsuccessfully sought international assistance to address gaps”.<sup>596</sup>

UNICEF has repeatedly highlighted the humanitarian crisis. For example, in July 2016, it noted the “crippling economic crisis” and that “[b]asic goods, food and medicines have been missing from store shelves throughout Venezuela”.<sup>597</sup>

Civil society has also documented the crisis. Human Rights Watch published a report in April 2016 entitled *Venezuela’s Humanitarian Crisis: Severe Medical and Food Shortages, Inadequate and Repressive Government Response*.<sup>598</sup>

The 2018 OAS Report explicitly tied the humanitarian crisis to institutionalized corruption and the regime’s destructive economic policies (including restricted and preferential access to foreign currency).<sup>599</sup> It

---

<sup>590</sup> Statement by UN High Commissioner for Human Rights Zeid Ra’ad al Hussein to the UN Security Council, November 13, 2017, available at: <http://webtv.un.org/meetings-/watch/zeid-ra%E2%80%99ad-al-hussein-ohchr-on-the-situation-in-venezuela-security-council-arria-formula-meeting/5643399460001/?term=?term&lan=english> (timestamp 7:57 to 9:02).

<sup>591</sup> 2019 OHCHR Report, *supra* note 78, par. 10.

<sup>592</sup> *Ibidem*, par. 11.

<sup>593</sup> *Ibidem*.

<sup>594</sup> *Ibidem*, par. 16.

<sup>595</sup> *Ibidem*, par. 19.

<sup>596</sup> *Ibidem*, pars. 12 to 13 and 15.

<sup>597</sup> Andrew V. Pestano: “UNICEF Calls for Venezuelan Children, Teens to be Focus of Crisis Solution”, *UPI*, July 29, 2016, available at: [https://www.upi.com/Top\\_News/World-News/2016/07/29/UNICEF-calls-for-Venezuelan-children-teens-to-be-focus-of-crisis-solution/5561469800286/](https://www.upi.com/Top_News/World-News/2016/07/29/UNICEF-calls-for-Venezuelan-children-teens-to-be-focus-of-crisis-solution/5561469800286/).

<sup>598</sup> Human Rights Watch: *Venezuela’s Humanitarian Crisis: Severe Medical and Food Shortages, Inadequate and Repressive Government Response*, 2016, available at: [https://www.hrw.org/sites/default/files/report\\_pdf/venezuela1016\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/venezuela1016_web_1.pdf).

<sup>599</sup> 2018 OAS Report, *supra* note 14, pages 6, 236, and 239.



noted that the Maduro regime was “intentionally sustaining a humanitarian crisis characterized by extreme hunger and illness”,<sup>600</sup> and that, “[i]nstead of choosing policies that could help improve the circumstances of the country, the Regime has repeatedly chosen to profit off the suffering of its people”.<sup>601</sup> The regime’s knowledge is further demonstrated by the fact that it has “actively censor[ed] information about the health crisis”, refused to disclose health or epidemiological data and statistics, and punished those who bring such data to light.<sup>602</sup> In fact, former Minister of Health Antonieta Caporale was removed from office the day after a damning report on rapidly deteriorating statistics on maternal, newborn, and child health, including premature deaths, was published online.<sup>603</sup>

#### d. Inhumane Acts

Neither the Rome Statute nor the ICC’s *Elements of Crimes* defines the term “inhumane” or provide clarity on exactly which acts will constitute “inhumane” acts.<sup>604</sup> As discussed below, case law from the international tribunals and academic scholarship suggest differing methods of interpretation. However, regardless of what ultimately proves to be the correct interpretation, the Maduro regime’s acts and policies, which officials knew would lead to great suffering and serious injury, would qualify as inhumane.<sup>605</sup>

One interpretation is that the term “inhumane” is redundant because any act that causes great suffering or serious injury would qualify as inhumane.<sup>606</sup> While this might seem like a result to be avoided, violating the legal maxim *verba cum effectu accipienda sunt*,<sup>607</sup> there is nothing in the drafting history of the Rome Statute suggesting this interpretation to be incorrect<sup>608</sup> and case law from the ICTY supports this interpretation.<sup>609</sup> If this is correct, the acts and policies described above would qualify as inhumane because they have caused great suffering and serious injury.

---

<sup>600</sup> *Ibidem*, page 241.

<sup>601</sup> *Ibidem*, page 239.

<sup>602</sup> *Ibidem*, page 241; see also: *Venezuela’s Humanitarian Emergency*, *supra* note 64, page 7 (“Venezuelan authorities under Maduro have concealed the crisis by ending the once-regular publication of official health information. They have harassed and retaliated against those who collect data or speak out about food and medicine shortages. These actions, together with the government’s failure to acknowledge the full scope of the problem, have rendered a comprehensive diagnosis of the crisis impossible. Such a diagnosis is critical to creating an effective humanitarian response”).

<sup>603</sup> 2018 OAS Report, *supra* note 14, page 241.

<sup>604</sup> Iris Haenen: *Classifying Acts as Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 14 German American L. J. 796, 817 (2013).

<sup>605</sup> See: Sonja Starr: *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 Nw. U. L. Rev. 1257, 1300 (2007) (“[I]t is hard to imagine that a corrupt act knowingly inflicting great suffering or serious injury, such as extreme poverty and severe preventable health harms, on a civilian population could fail to be characterized as ‘inhumane’”).

<sup>606</sup> *Ibidem*, pages 1299 to 1300 (citing *Prosecutor v. Stakić*, IT-97-24-A, Appeal Judgement, Int’l Crim. Trib. for the Former Yugoslavia, March 22, 2006, par. 362); see also: Ben Bloom: *Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption*, 29 Am. U. Int’l L. Rev. 627, 652 (2014) (“Grand Corruption Is Inherently Inhumane as It Causes Great Suffering and Serious Injury”).

<sup>607</sup> Meaning “words must be taken so as to have effect”. Black’s Law Dictionary 1698 (7th ed. 1999).

<sup>608</sup> *Extraordinary Crimes at Ordinary Times*, *supra* note 605, pages 1299 to 1300.

<sup>609</sup> International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Blaškić*, IT-95-14, Judgment, March 3, 2000, par. 239, available at: <https://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> (causing “serious physical and mental injury . . . is without doubt an ‘inhumane act’”).



Another interpretation is that “inhumane” serves as “as an initial limiting principle by excluding many or all omissions – as opposed to affirmative acts – from criminal liability”.<sup>610</sup> This would appear to be in line with the high standard for omissions to qualify as crimes against humanity.<sup>611</sup> If this position is correct, the acts and policies described above would not be excluded as potential crimes against humanity, as they were and are affirmative acts, rather than omissions.

A different scholar’s interpretation is that “the ICC can use human rights law as a source for determining the scope of the clause ‘other inhumane acts’”.<sup>612</sup> This approach has been used by both the ICC and the international tribunals.<sup>613</sup> The Maduro regime’s corruption, policies, and actions have caused widespread malnutrition, starvation, and lack of access to essential medical care; many people have died as a result. These are egregious violations of, among other rights, the right to life,<sup>614</sup> health,<sup>615</sup> and food,<sup>616</sup> making these decisions inhumane.

More generally, there is a long-standing recognition that the widespread denial of food can constitute an “inhumane act”. As far back as 1949, the UN Secretary General, analyzing “other inhumane acts” in the context of the Nuremberg Tribunal, posited “whether deprivation of means of sustenance might not be considered as an ‘inhumane act.’”<sup>617</sup> In fact, during the drafting of Rome Statute, mass starvation was proposed for specific inclusion in Article 7 1), but was ultimately not listed because, among other reasons, it was understood that it already likely fell under the listed crimes of murder, extermination, and/or other inhumane acts.<sup>618</sup> Furthermore, in 2014, the UN Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (North Korea) concluded that “causing or aggravating prolonged and severe starvation to large numbers of people, with the knowledge that this will result in starvation and related severe suffering in the ordinary course of events, can constitute an inhumane act of a nature amounting to a crime against humanity”.<sup>619</sup>

---

<sup>610</sup> *Extraordinary Crimes at Ordinary Times*, *supra* note 605, page 1300.

<sup>611</sup> *Elements of Crimes*, *supra* note 313, page 5 note 6 (“The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action”).

<sup>612</sup> *Classifying Acts as Crimes Against Humanity*, *supra* note 604, page 818.

<sup>613</sup> See: International Criminal Court, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, *Decision on the Confirmation of Charges Against Dominic Ongwen*, March 23, 2016, par. 94, available at: [https://www.icc-cpi.int/CourtRecords/CR2016\\_02331.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF); see also: Terhi Jyrkkö: ‘Other Inhumane Acts’ as Crimes Against Humanity, 1 Helsinki L. Rev. 183, 191 (2011) (“The position of human rights law as guidelines for the minimum standards of treatment – the breach of which could be seen as inhumane – has been repeatedly recognized by the international tribunals”).

<sup>614</sup> ICCPR, *supra* note 474, Art. 6 1) (right to life); see also: United Nations Human Rights Commission: *General Comment No. 36: Right to Life*, U.N. Doc. CCPR/C/GC/36, September 3, 2019, par. 26, available at: <https://undocs.org/CCPR/C/GC/36>.

<sup>615</sup> International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, entered into force January 3, 1976, Art. 12 1) [hereinafter, ICESCR]; see also: UN Committee on Economic, Social and Cultural Rights: *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4, August 11, 2000, pars. 43 to 44, available at: <https://undocs.org/en/E/C.12/2000/4>.

<sup>616</sup> ICESCR, *supra* note 615, Art. 11 1); see also: UN Committee on Economic, Social and Cultural Rights: *General Comment No. 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5, May 12, 1999, par. 6, available at: <https://undocs.org/en/E/C.12/1999/5>.

<sup>617</sup> International Law Commission: *The Charter and Judgment of the Nurnberg Tribunal: History and Analysis*, U.N. Doc. A/CN.4/5, page 67, available at: [https://legal.un.org/docs/?path=../ilc/documentation/english/a\\_cn4\\_5.pdf&lang=E](https://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_5.pdf&lang=E).

<sup>618</sup> Herman von Hebel and Darryl Robinson: “Crimes Within the Jurisdiction of the Court”, in *The International Criminal Court: The Making of the Rome Statute* 102 to 103 (Roy S. Lee, ed. 1999).

<sup>619</sup> UN Human Rights Council: *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, U.N. Doc. A/HRC/25/CRP.1, February 7, 2014, par. 1131, available at: <https://undocs.org/A/HRC/25/CRP.1> [hereinafter, *UN North Korea Report*].

## 2. Such Act Was of a Character Similar to Any Act Referred to in Article 7(1) of the Statute

The “character” of an act refers to its “nature and gravity”.<sup>620</sup> The ICTY has explained that the similarity requirement should “be evaluated in light of all factual circumstances, such as the nature of the act or omission, the context within which it occurred, the individual circumstances of the victim(s) as well as the physical, mental and moral effects on the victim(s)”.<sup>621</sup>

The Maduro regime’s policies and actions have a similar nature to other crimes listed in Article 7 of the Rome Statute. In particular, the crime of extermination includes the infliction of conditions of life, such as the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.<sup>622</sup> The UN Commission of Inquiry on North Korea explained that, under this standard, “[t]he death of large numbers of people does not have to be the goal pursued by the perpetrators” but rather “it is sufficient that the perpetrators impose living conditions in calculated awareness that such conditions will cause mass deaths in the ordinary course of events”.<sup>623</sup> As explained above, the acts and policies of the Maduro regime have led to widespread and severe deprivation of access to food and medicine, and the officials engaged in these acts and implemented these policies knowing that these conditions would follow in the ordinary course of events. More generally, like the other listed crimes, these policies and actions involve “gross violations of fundamental human rights”.<sup>624</sup>

The regime’s policies and actions also have a similar gravity to the other crimes listed in Article 7. At the individual level, suffering from starvation – severe, prolonged physical pain and severe mental trauma – is “clearly comparable to that of other enumerated crimes against humanity”.<sup>625</sup> At the societal level, widespread suffering and death have resulted from the regime’s policies and actions, just as they can result from the other listed crimes.

---

<sup>620</sup> *Elements of Crimes*, *supra* note 313, page 12 note 30.

<sup>621</sup> International Criminal Tribunal for the Former Yugoslavia: *Prosecutor v. Blagojević*, IT-02-60- T, Judgment, January 17, 2005, par. 627, available at: [https://www.icty.org/x/cases/blagojevic\\_jokic/tjug/en/bla-050117e.pdf](https://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf).

<sup>622</sup> *Elements of Crimes*, *supra* note 313, page 6 note 9.

<sup>623</sup> *UN North Korea Report*, *supra* note 619, par. 1042.

<sup>624</sup> *Extraordinary Crimes at Ordinary Times*, *supra* note 605, page 1301; see also: *Classifying Acts as Crimes Against Humanity*, *supra* note 604, page 820 (arguing that human rights violations involving the right to life, physical integrity, or liberty will be similar in character to the other listed crimes in Rome Statute Article 7 1)).

<sup>625</sup> Randle C. DeFalco: *Conceptualizing Famine as a Subject of International Criminal Justice: Towards a Modality-Based Approach*, 38 U. Pa. J. Int’l L. 1113, 1175 (2017).

### 3. The Perpetrator Was Aware of the Factual Circumstances That Established the Character of the Act

This element has been interpreted by one scholar as requiring that the perpetrator was aware of the “circumstances that render the consequences the ordinarily expected result of the act”.<sup>626</sup> In Venezuela, the key circumstance in this regard is the vulnerability of the population, as this makes malnutrition, starvation, disease, and death the ordinarily expected result of large-scale corruption and the regime’s disastrous actions and policy decisions, including the corruption-breeding parallel currency system, the mass printing of money, denying the existence of the humanitarian crisis, paying its foreign allies instead of purchasing urgently needed food, and wasting hundreds of millions of dollars in its oil-for-food program to buy favor from regional neighbors.

### 4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

The *2018 OAS Report* found that “[t]he 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”.<sup>627</sup> Statements by high-level regime officials demonstrate that the regime has “weaponize[d] the humanitarian crisis”<sup>628</sup> against the opposition – Freddy Bernal, the Minister of Urban Agriculture, stated that the Local Supply and Production Committee, responsible for distributing government aid, “has come not only to distribute food; it came to exercise political control, social control, [and] popular control in the territory”.<sup>629</sup> The *2018 OAS Report* concluded that the regime has a “deliberate policy of using hunger and illness as tools of political-social control”.<sup>630</sup>

### 5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was discussed above. Regime officials must have known that their individual acts and policies were part of a larger series of corrupt acts and disastrous policies that were causing great suffering and serious injury to the Venezuelan population.

---

<sup>626</sup> *Extraordinary Crimes at Ordinary Times*, *supra* note 605, page 1303.

<sup>627</sup> *2018 OAS Report*, *supra* note 14, page 235; see also: page 258 (“[T]he current serious situation is not the result of negligence, but of a strategy guided by ideological-partisan interests to seriously deteriorate the living conditions of Venezuelans, and is now being used to penalized those who do not support the Bolivarian revolution, in some cases going as far as to purge the opposition, helping to secure the Regime’s hold on power indefinitely”).

<sup>628</sup> *Ibidem*, page xiv.

<sup>629</sup> *Ibidem*, page 256.

<sup>630</sup> *Ibidem*, page 236.

## F. Crime Against Humanity of Enforced Disappearance of Persons

The elements of the crime against humanity of enforced disappearance of persons<sup>631</sup> are set forth below.

1. The Perpetrator: (a) Arrested, Detained, or Abducted One or More Persons, or (b) Refused to Acknowledge the Arrest, Detention or Abduction, or to Give Information on the Fate or Whereabouts of Such Person or Persons
2. (a) Such Arrest, Detention or Abduction Was Followed or Accompanied by a Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons; Or (b) Such Refusal Was Preceded or Accompanied by That Deprivation of Freedom

The ICC has clarified that “arrest, detention or abduction” covers “any form of deprivation of liberty of a person against his or her will”.<sup>632</sup> In Venezuela, regime officials have refused to acknowledge numerous detentions and refused to give information about numerous detainees.

### a. Findings of the 2018 Report of the Organization of American States

The 2018 OAS Report found that, in Venezuela, “[d]etainees are held incommunicado throughout the country”.<sup>633</sup> Moreover, “[i]n certain facilities, in particular those of the SEBIN no one is allowed to communicate with those in detention under any circumstances, not even representatives of public institutions”.<sup>634</sup> The report also detailed specific cases of enforced disappearances, including: José Gustavo Arocha, who was held in a SEBIN jail (*La Tumba*) for six months, without his family members being notified and without any record; Wilmer Azuaje, an opposition legislator who was detained by intelligence agents without a warrant and held at a SEBIN base for more than four months; Juan Pedro Lares, son of an opposition mayor, who was arrested without a warrant and detained for at least 81 days but did not appear on the list of detainees at the prison facility; and Juan Carlos Caguaripano, who was taken to an unknown location and held *incommunicado* for more than a month, with no contact from his lawyers or family.<sup>635</sup> In

---

<sup>631</sup> *Elements of Crimes*, *supra* note 313, page 11.

<sup>632</sup> International Criminal Court: *Situation in the Republic of Burundi*, ICC-01/17-X, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation, October 25, 2017, par. 118, available at: [https://www.icc-cpi.int/CourtRecords/CR2017\\_06720.PDF](https://www.icc-cpi.int/CourtRecords/CR2017_06720.PDF).

<sup>633</sup> 2018 OAS Report, *supra* note 14, page 184.

<sup>634</sup> *Ibidem*.

<sup>635</sup> *Ibidem*, pages 412 to 14.

another case, the detaining security forces “repeatedly denied” that a detainee was actually detained.<sup>636</sup> The 2018 OAS Report concluded that “there is a reasonable basis to believe that enforced disappearances have been committed in the territory of Venezuela”.<sup>637</sup>

## b. New Findings

**2018 – 2019:** The NGO *Provea* has documented 199 cases of enforced disappearance in Venezuela from 2000 to 2018, almost all of which have gone unpunished.<sup>638</sup> It highlighted the cases of Venezuelan activist Alceldo Mora and Colombian citizens Jesús Esneider Vergel Prado and Eliezer Antonio Vergel Medina, who have been disappeared for over four years (as of August 2019).<sup>639</sup>

**2018 – 2019:** Alfredo Romero, Executive Director of *Foro Penal*, had reported that his organization has documented 200 enforced disappearances in 2018, and 498 in 2019.

**October 2018:** An October 2018 report by *Centro de Derechos Humanos UCAB, Espacio Público*, and the University of Texas Human Rights Clinic noted an “increase in practice of forced and involuntary disappearances of short duration in Venezuela”.<sup>640</sup> The report documented several enforced disappearances, including two that occurred in October 2018 (Fernando Albán and Maryori Medina Parra).<sup>641</sup>

**Gilber Caro:** On April 26, 2019, opposition member of parliament Gilber Caro was seized by intelligence officers.<sup>642</sup> His fate and location were unknown for several weeks.<sup>643</sup>

**Ígbert José Marín Chaparro:** Already in detention, he was disappeared from April 28 to at least July 16, 2019, denied all access to, communication with, or visits from family.<sup>644</sup> His family was not given any new information regarding his fate or whereabouts.<sup>645</sup>

---

<sup>636</sup> *Ibidem*, page 414 (discussing Rafael Ángel Cardozo Maldonado).

<sup>637</sup> *Ibidem*.

<sup>638</sup> “Día Internacional de Las Víctimas de Desapariciones Forzadas | Entre El Año 2000 y el 2018 Provea Registró 199 Casos de Desaparición Forzada en Venezuela”, *Provea*, August 30, 2019, available in Spanish at: <https://www.derechos.org/ve/actualidad/dia-internacional-de-las-victimas-de-desapariciones-forzadas-entre-el-ano-2000-y-el-2018-provea-registro-199-casos-de-desaparicion-forzada-en-venezuela>.

<sup>639</sup> *Ibidem*.

<sup>640</sup> Centro de Derechos Humanos UCAB et al.: *La Negación Del Paradero de Personas Detenidas Como Práctica de Desaparición Forzada en Venezuela*, October 2018, page i, available in Spanish at: <https://law.utexas.edu/wp-content/uploads/sites/11/2018/10/2018-10-HRC-InformeDFVenezuela.pdf>.

<sup>641</sup> *Ibidem*, page 5.

<sup>642</sup> Amnesty International UK: *Urgent Action: Parliamentarian Disappeared in Venezuela*, May 13, 2019, available at: <https://www.amnesty.org.uk/resources/urgent-action-parliamentarian-disappeared-venezuela>.

<sup>643</sup> Manuel Llorens: “Where’s Gilber Caro?”, *Caracas Chronicles*, May 28, 2019, available at: <https://www.caracaschronicles.com/2019/05/28/wheres-gilber-caro/> (“Gilber was taken . . . on the night of April 26th, by SEBIN agents and nothing has been known about him since”).

<sup>644</sup> *Urgent Submission*, *supra* note 394.

<sup>645</sup> *Ibidem*.



Rafael Acosta Arévalo: On June 21, 2019, unidentified armed men detained him, after which his location was unknown for seven days.<sup>646</sup> His family and lawyers made repeated inquiries but were given no information.<sup>647</sup> Captain Arévalo was eventually brought before a judge, showing clear signs of having been tortured, and he died soon thereafter.<sup>648</sup> The UN noted that the case “may . . . constitute enforced disappearance”.<sup>649</sup>

July 2019: The UN Working Group on Enforced or Involuntary Disappearances stated that “it continues to receive cases reflecting a pattern of short-term enforced disappearances of political opponents or persons perceived as such, and their relatives, and peaceful protesters in the Bolivarian Republic of Venezuela”.<sup>650</sup>

June 19, 2020: Robert F. Kennedy Human Rights and *Foro Penal* identified 724 cases of enforced disappearances in Venezuela between January 1, 2018 and December 31, 2019: 200 in 2018, and 524 in 2019. The report indicates that forced disappearance have become an increasingly common political tool in Venezuela: “In many cases, Venezuelan security forces have disappeared their victims in order to subject them to illegal interrogation processes accompanied by torture or cruel and inhuman treatment. Some of those disappeared have even been forced to record audio or videos incriminating other individuals. On several occasions, and particularly since 2017, security forces have targeted family and friends of military personnel or persons considered by authorities to be involved in acts of rebellion”.<sup>651</sup>

July 2, 2020: A report by UN High Commissioner for Human Rights Michelle Bachelet indicated that her office documented cases in which individuals were subjected to enforced disappearances: “Almost all individuals detained by DGCIM from the cases documented by OHCHR were subjected to enforced disappearances for short periods following their arrest, and before being presented to a judge. Authorities did not confirm the whereabouts of the individuals to the relatives or lawyers for periods usually ranging from seven to 40 days, which raised concerns about increased risks of torture and ill-treatment”.<sup>652</sup>

September 2020: The Independent International Fact-Finding Mission concluded there is a reasonable basis to believe that political opponents and military and other dissidents have been subjected to short term enforced disappearance.<sup>653</sup>

---

<sup>646</sup> “Venezuela: ‘Shocked’ by Alleged Torture, Death of Navy Captain”, *supra* note 393.

<sup>647</sup> *Ibidem*.

<sup>648</sup> *Ibidem*.

<sup>649</sup> *Ibidem*.

<sup>650</sup> *Report of the UN Working Group on Enforced or Involuntary Disappearances*, *supra* note 52, par. 90.

<sup>651</sup> *Enforced Disappearance as a Tool of Political Repression in Venezuela*, *supra* note 409, page 4.

<sup>652</sup> *July 2, 2020, High Commissioner’s Report*, *supra* note 198, par. 46.

<sup>653</sup> *2020 Fact-Finding Mission Detailed Findings*, *supra* note 78, par. 278 (“The Mission has reasonable grounds to believe that some political opponents or dissidents and persons associated with them have been subject to short term enforced disappearance during the period under review.”); see also: *ibidem*, par. 313 (“The Mission has reasonable grounds to believe that some military dissidents and persons associated with them were subjected to short term enforced disappearances during the period under review.”); see also: *ibidem*, par. 262 (“Targeted dissidents were also victims of short term enforced disappearances . . . at the hands of intelligence agencies”).

**3. The Perpetrator Was Aware That: (a) Such Arrest, Detention or Abduction Would Be Followed in the Ordinary Course of Events by a Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons; Or (b) Such Refusal Was Preceded or Accompanied by That Deprivation of Freedom**

Maduro regime officials frequently refuse to acknowledge the detention of or give information about a detainee despite being aware of the detention. Their knowledge of the detention can be inferred from the fact that the detainees are held by regime forces and it is those same forces that either refuse to acknowledge the detention or give information about the detainee. Officials also arrest or detain persons, knowing the abduction would be followed by a refusal to acknowledge the detention or give information about the detainee. As mentioned, “[i]n certain facilities, in particular those of the SEBIN no one is allowed to communicate with those in detention under any circumstances, not even representatives of public institutions”.<sup>654</sup> Therefore, anyone who arrested an individual and brought them to a SEBIN facility would know that the person is likely to be disappeared.

**4. Such Arrest, Detention or Abduction Was Carried Out by, or With the Authorization, Support or Acquiescence of, a State or a Political Organization**

**5. Such Refusal to Acknowledge That Deprivation of Freedom or to Give Information on the Fate or Whereabouts of Such Person or Persons Was Carried Out by, or With the Authorization or Support of, Such State or Political Organization**

In all the cases discussed, the detention and the refusal to acknowledge or provide information were carried out by Venezuelan security forces.

**6. The Perpetrator Intended to Remove Such Person or Persons From the Protection of the Law for a Prolonged Period of Time**

The ICC has explained “oftentimes the manner in which the person is deprived of his or her liberty allows the Chamber to infer the intention to remove the victim from the protection of the law”.<sup>655</sup> For example, a lack of a judicial detention order, abduction in cars with tinted windows and no license plates, detention in secret/unofficial prisons, failure to register the name of a detainee in official records, and

---

<sup>654</sup> 2018 OAS Report, *supra* note 14, page 184.

<sup>655</sup> Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”, *supra* note 421, par. 120.

capture in desolate areas indicate an intention to remove a person from the protection of the law.<sup>656</sup> The UN Working Group on Arbitrary Detention has also noted that holding detainees *incommunicado* makes it impossible for them to challenge their detention and therefore places them outside the protection of the law.<sup>657</sup>

As set forth above, detainees in Venezuela are often held without a judicial detention order, without being registered in the detention facility's official records, and *incommunicado*. This indicates an intention to remove them from the protection of the law.

Regarding the intent to remove the detainee from the protection of the law for a *prolonged period of time*, the ICC has indicated “[a] period of several months or years certainly fulfils that requirement”.<sup>658</sup> The International Commission of Jurists has argued that the phrase “prolonged period of time” must be interpreted in light of the requirement under international law that a detainee be brought “promptly” before a judge,<sup>659</sup> implying that an intent to disappear a person for a relatively short period of time would also suffice. The *2018 OAS Report* similarly argued that “prolonged period of time” should be “interpreted as a parameter for reliably determining the intent to keep a person removed from the protection of the law and not as an objective time standard that renders the article inapplicable”.<sup>660</sup> Regardless of the exact requirement, in Venezuela, at least some enforced disappearances lasted for several months – for example, José Gustavo Arocha (six months), Wilmer Azuaje (more than four months), Juan Pedro Lares (81 days), and Ígbert José Marín Chaparro (more than 2.5 months).<sup>661</sup> Therefore, the intent to remove persons from the protection of the law for a prolonged period of time can be inferred.

## 7. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population

This element was discussed above. The *2018 OAS Report* found that, in Venezuela, “enforced disappearances of political opponents, or persons who are presumed to be such, have been committed and continue to be committed as part of the attack on this group of the civilian population”.<sup>662</sup> The UN Working Group on Enforced or Involuntary Disappearances also noted that the disappearances were not random or isolated cases, but rather “reflect[] a pattern of short-term enforced disappearances of political opponents

---

<sup>656</sup> *Ibidem*.

<sup>657</sup> UN Working Group on Arbitrary Detention: *Hatem Al Darawsheh v. Jordan*, Opinion No. 46/2017, U.N. Doc. A/HRC/WGAD/2017/46, adopted August 22, 2017, par. 23, available at: [https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session79/A\\_HRC\\_WGAD\\_2017\\_46.pdf](https://www.ohchr.org/Documents/Issues/Detention/Opinions/Session79/A_HRC_WGAD_2017_46.pdf).

<sup>658</sup> *Public Redacted Version of “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi”*, *supra* note 421, par. 120.

<sup>659</sup> International Commission of Jurists: *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, 2015, page 18, available at: <https://www.icj.org/wp-content/uploads/2015/12/Universal-Enforced-Disappearance-and-Extrajudicial-Execution-PGNo9-Publications-Practitioners-guide-series-2015-ENG.pdf>.

<sup>660</sup> *2018 OAS Report*, *supra* note 14, page 416.

<sup>661</sup> *Ibidem*, pages 412 to 14; see also: *Urgent Submission*, *supra* note 394.

<sup>662</sup> *Ibidem*, page 411.

or persons perceived as such, and their relatives, and peaceful protesters in the Bolivarian Republic of Venezuela”.<sup>663</sup>

#### **8. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

This element was discussed above. The fact that enforced disappearances have been used to target “political opponents or persons believed to be political opponents”<sup>664</sup> indicates that the perpetrators knew their actions were part of the overall attack.

### **G. Crime Against Humanity of Rape / Sexual Violence**

The crime against humanity of rape and the crime against humanity of sexual violence cover separate acts committed under similar circumstances. Therefore, they will be discussed together, with their elements as set forth by the ICC<sup>665</sup> slightly renumbered and reorganized for ease of analysis.

#### **1A.Rape: The Perpetrator Invaded the Body of a Person by Conduct Resulting in Penetration, However Slight, of Any Part of the Body of the Victim or of the Perpetrator With a Sexual Organ, or of the Anal or Genital Opening of the Victim With Any Object or Any Other Part of the Body**

#### **1B.Sexual Violence: The Perpetrator Committed an Act of a Sexual Nature of Comparable Gravity to the Other Sexual Crimes Listed in Article 7(1)(G) Against One or More Persons, or Caused Such Person or Persons to Engage in Such an Act**

There is no exhaustive list of which acts constitute “sexual violence of comparable gravity” to the other sexual crimes listed in the Rome Statute. International tribunals have generally held that, among

---

<sup>663</sup> *Report of the UN Working Group on Enforced or Involuntary Disappearances*, *supra* note 52, par. 90.

<sup>664</sup> *2018 OAS Report*, *supra* note 14, page xiii.

<sup>665</sup> *Elements of Crimes*, *supra* note 313, pages 8 and 10.

other acts, forced nudity, forced masturbation, and forced touching of the body meet this threshold.<sup>666</sup> However, in the *Bemba* case, the ICC found that the act of troops forcing women to undress in public in order to humiliate them did not constitute sexual violence of comparable gravity.<sup>667</sup> Given that it is nonetheless possible for the ICC to recognize forced nudity in some circumstances as a violation of Article 7(1)(g) – for example, when exacerbated by an enforced disappearance – cases of forced nudity in Venezuela will be presented in this section. If, however, *Bemba* is interpreted to foreclose such an argument, forced nudity would still constitute the crime against humanity of other inhumane acts<sup>668</sup> and perhaps also the crime against humanity of torture.<sup>669</sup>

#### a. Findings of the 2018 Report of the Organization of American States

In Venezuela, “detainees – both men and women – are commonly subjected to various forms of sexual torture, including rape”.<sup>670</sup> *Foro Penal* has documented “numerous cases of sexual violence against both men and women, and that threats of rape, improper touching, and lascivious acts were commonly directed at detainees”.<sup>671</sup> Similarly, Tamara Suju (CASLA Institute) has documented 192 cases of detainees who had been subjected to an act of sexual violence, including 77 cases of forced undressing, a number of others who were partially undressed, five cases of rape, and seven cases of attempted rape with a pipe or other foreign object.<sup>672</sup>

Sexual violence, including rape, is used as a form of punishment against detained demonstrators.<sup>673</sup> For example, COFAVIC documented “26 cases of sexual torture” between February and May of 2014 and “[t]he IACHR has received numerous complaints of sexual violence perpetrated against individuals who participated in . . . the 2017 protests”.<sup>674</sup> The NGO AVESA has documented 25 cases relating to the 2017 demonstrations, which include sexual violence, groping, and rape perpetrated by the PNB, the Aragua Police, and the GNB.<sup>675</sup>

---

<sup>666</sup> *Commentary on the Law of the International Criminal Court*, page 54 note 57 (Mark Klamberg ed., 2017), available at: <https://www.legal-tools.org/doc/aa0e2b/pdf/>.

<sup>667</sup> International Criminal Court: *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, *Decision on the Prosecutor’s Application for a Warrant of Arrest*, June 10, 2008, pars. 39–40, available at: [https://www.icc-cpi.int/CourtRecords/CR2008\\_04180.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_04180.PDF).

<sup>668</sup> International Criminal Tribunal for Rwanda: *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, *Judgement*, September 2, 1998, par. 697, available at: <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict96-4/trial-judgements/en/980902.pdf> (finding the defendant responsible for “other inhumane acts” for the forced undressing of several victims).

<sup>669</sup> Juan E. Méndez: *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/HRC/28/68/Add.3, December 29, 2014, par. 28, available at: <https://undocs.org/en/A/HRC/28/68/Add.3> (“Sexual torture includes forced nudity . . .”)

<sup>670</sup> 2018 OAS Report, *supra* note 14, page 166.

<sup>671</sup> *Ibidem*, pages 166 to 67.

<sup>672</sup> *Ibidem*, page 167.

<sup>673</sup> *Ibidem*, pages 168 to 69.

<sup>674</sup> *Ibidem*.

<sup>675</sup> *Ibidem*, page 170.



## b. New Findings

In its June 2018 report, the OHCHR stated that it had documented over 90 cases of arbitrary detention prior to, during, and after the protests in 2017, where the detainees were subjected to ill-treatment and torture, including “rape and other forms of sexual violence”.<sup>676</sup> Among others, it highlighted the case of “[a] lawyer who had been defending protestors . . . [who] told OHCHR that he was detained by GNB officers on his way home from a court hearing . . . blindfolded and brought to a place where he was first beaten with a pipe . . . then stripped naked and raped by the officers”.<sup>677</sup>

In July 2019, the OHCHR stated that it had “documented cases of SGBV against women and girls in detention, particularly by SEBIN and DGCIM elements and officers of GNB. Women interviewed referred to physical assaults, such as being dragged by the hair and inappropriate touching, threats of rape, forced nudity and gendered and sexist insults, aiming at humiliating and punishing them, as well as extracting confessions”.<sup>678</sup> In addition, “[g]uards and other prisoners pressured women [detained in the SEBIN headquarters ‘*Helicoide*’] to exchange sex for ‘privileges’ and/or protection”.<sup>679</sup>

In July 2020, the OHCHR indicated that, between June 2019 and May 2020, sexual violence in the form of shocks to the genitalia was used as a method of torture.<sup>680</sup>

In September 2020, the Independent International Fact-Finding Mission found that both DGCIM and SEBIN officials have committed acts of sexual violence against detainees, including forced nudity, threats of rape, rape, and electric shocks to the genitalia.<sup>681</sup>

## 2. Sexual Violence: The Perpetrator Was Aware of the Factual Circumstances That Established the Gravity of the Conduct

This element is clearly met in cases where regime security forces sexually abuse a detainee in custody.

---

<sup>676</sup> *Human Rights Violations in the Bolivarian Republic of Venezuela*, *supra* note 78, pages iii and 28.

<sup>677</sup> *Ibidem*, page 29.

<sup>678</sup> 2019 OHCHR Report, *supra* note 78, par. 44.

<sup>679</sup> *Ibidem*, par. 46.

<sup>680</sup> July 15, 2020 High Commissioner’s Report, *supra* note 274, par. 27.

<sup>681</sup> 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, pars. 285 and 319.

**3. The Invasion or Act Was Committed by Force, or by Threat of Force or Coercion, Such as That Caused by Fear of Violence, Duress, Detention, Psychological Oppression or Abuse of Power, Against Such Person or Another Person, or by Taking Advantage of a Coercive Environment, or the Invasion Was Committed Against a Person Incapable of Giving Genuine Consent**

The *2018 OAS Report* found there was a reasonable basis for believing that security forces in Venezuela committed rape and acts of sexual violence against detainees by force, by taking advantage of a coercive environment, by threat of force or coercion, and against a person incapable of giving genuine consent.<sup>682</sup> Indeed, any sexual contact between a detainee and a guard or captor is inherently coercive and genuine consent is not possible.<sup>683</sup>

**4. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

This element was addressed above. In May 2019, the *Coalición Equivalencias en Acción*, made up of five NGOs, released the report *Mujeres al Límite (Women at Their Limit)*, which discussed the use of sexual and gender-based violence against women in the context of the ongoing humanitarian crisis.<sup>684</sup> In particular, it noted the use of sexual and gender-based violence as an “exercise of control over the population [and] to intimidate and demoralize victims, especially protestors and/or detained individuals, which constitutes ‘sexual violence for political reasons.’”<sup>685</sup>

**5. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

This element was addressed above. The *2018 OAS Report* found that the perpetrators of rape and sexual violence “no doubt knew that the conduct was part of a widespread and systematic attack directed against the group identified as political opponents”.<sup>686</sup>

---

<sup>682</sup> 2018 OAS Report, *supra* note 14, page 382.

<sup>683</sup> Amnesty International: *Rape and Sexual Violence: Human Rights Law and Standards in the International Criminal Court*, 2011, page 20, available at: <https://www.amnesty.org/download/Documents/32000/ior530012011en.pdf> (“Sexual conduct between inmates or detainees and persons in authority enforcing detention are presumed to be criminal acts of rape or sexual violence, due to the inherently coercive nature of detention”).

<sup>684</sup> AVESA et al.: *Mujeres al Límite*, May 2019, available in Spanish at: [https://avesawordpress.files.wordpress.com/2019/05/mujeres\\_limite\\_a4web.pdf](https://avesawordpress.files.wordpress.com/2019/05/mujeres_limite_a4web.pdf).

<sup>685</sup> *Ibidem*, page 87.

<sup>686</sup> 2018 OAS Report, *supra* note 14, page 382.

## H. Crime Against Humanity of Persecution

The crime against humanity of persecution has six elements: (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights, (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such, (3) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law, (4) the conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court, (5) the conduct was committed as part of a widespread or systematic attack directed against a civilian population, and (6) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>687</sup>

### 1. The Perpetrator Severely Deprived, Contrary to International Law, One or More Persons of Fundamental Rights

#### a. Findings of the 2018 Report of the Organization of American States

The *2018 OAS Report* found that the crime of persecution was “present in all the crimes discussed” in the report – murder, imprisonment/severe deprivation of liberty, torture, rape/sexual violence, and enforced disappearance – because they violated the rights to life, personal liberty, humane treatment, and freedom from forced disappearance.<sup>688</sup> The report further found that there were additional rights violations that constituted persecution – namely, injuries, intimidation, and the political use of the humanitarian crisis.<sup>689</sup>

Regarding injuries, the report highlighted that thousands of people were injured from the use of force against protestors and demonstrators in the first half of 2017.<sup>690</sup> As for intimidation, the report noted that opposition political figures and human rights defenders have been tracked and surveilled, illegally interrogated, threatened with torture and death, and had their families repeatedly visited by security forces.<sup>691</sup> Thirty-nine out of seventy-seven pro-opposition mayors (as of August 2017) had suffered acts of political persecution, including dismissal, issuance of arrest warrants, withdrawal of powers, detention, and

---

<sup>687</sup> *Elements of Crimes*, *supra* note 313, page 10.

<sup>688</sup> *2018 OAS Report*, *supra* note 14, page 387.

<sup>689</sup> *Ibidem*.

<sup>690</sup> *Ibidem*, pages 387 to 88.

<sup>691</sup> *Ibidem*, pages 389 to 97.

travels bans.<sup>692</sup> There have also been “clear, direct and violent threats” against the opposition by high-level regime officials, including Maduro himself.<sup>693</sup>

Finally, the report noted that, amidst the ongoing humanitarian crisis, the regime has “weaponized” basic resources such as food and medicine and used them “as tools of persecution to intimidate and discriminate against” regime opponents (or perceived opponents).<sup>694</sup> Specifically, to access public assistance – including food packages distributed by Local Supply and Production Committees (CLAPs) – an individual must have a special national ID card (the *Carnet de la Patria*).<sup>695</sup> However, applications for the card are verified through *Movimiento Somos Venezuela*, a self-described “political organization” led by Maduro’s Vice-President, Delcy Rodríguez, and issuance requires the approval of the governing party.<sup>696</sup> Additional indications that the ID cards and public assistance are being used in a politically-discriminatory manner include explicit statements by high-level regime officials; each committee of the CLAP is composed of four entities that have strong ties with the ruling party; and testimonies by individuals who were threatened that they would not receive CLAP food packages if they did not vote for the ruling party.<sup>697</sup> Furthermore, before 2015, parishes were selected for food distribution based on poverty indicators.<sup>698</sup> However, in 2015, this was changed to political indicators – specifically, voting population and level of sympathy for the government.<sup>699</sup> Parishes that were not selected using this new criteria “had their inventories of subsidized food depleted”.<sup>700</sup> Major General García Plaza, former Minister of Food, testified to the OAS that he discussed this plan with Maduro himself, and Maduro indicated that he approved.<sup>701</sup>

The political use of the humanitarian crisis is being used to destroy the opposition – they are forced to either emigrate or remain in Venezuela and “fall in line with the Revolution, because that is the only way to ensure access to the little food and healthcare that is available”.<sup>702</sup> The General Secretariat of the OAS concluded that the humanitarian crisis “is not the result of negligence, but of a strategy guided by ideological partisan interests to seriously deteriorate the living conditions of Venezuelans, and is now being used to penalize[] those who do not support the Bolivarian revolution, in some cases going as far as to purge the opposition, helping to secure the Regime’s hold on power indefinitely”.<sup>703</sup>

---

<sup>692</sup> *Ibidem*, page 389.

<sup>693</sup> *Ibidem*, page 391.

<sup>694</sup> *Ibidem*, page 237; see also: *ibidem*, page 238 (“[T]he Regime has demonstrated its determination to capitalize on the [humanitarian] crisis, using it to persecute and even eliminate any opposition”).

<sup>695</sup> *Ibidem*, page 254.

<sup>696</sup> *Ibidem*.

<sup>697</sup> *Ibidem*, pages 254 to 57.

<sup>698</sup> *Ibidem*, page 42.

<sup>699</sup> *Ibidem*, pages 42 to 43.

<sup>700</sup> *Ibidem*, page 43.

<sup>701</sup> *Ibidem* (recounting the testimony of Herbert García Plaza).

<sup>702</sup> *Ibidem*, page 236.

<sup>703</sup> *Ibidem*, page 407.

## b. New Findings

**2018 – 2019:** During this period, the OHCHR documented “an increasing number of arbitrary detention of relatives . . . of alleged political opponents”.<sup>704</sup> Relatives are also subjected to death threats, surveillance, intimidation, and harassment.<sup>705</sup>

**2018 – 2019:** A wide of variety of individuals were persecuted for criticizing the regime: trade union leaders and workers were fired or detained after protesting for decent salaries and working conditions; dozens of health professionals were dismissed, threatened by superiors, or arbitrarily detained after denouncing the state of healthcare; university staff were threatened with non-payment of salaries, prevented from accessing their workplace and travelling abroad, and arbitrarily detained for criticizing the regime; and human rights defenders were subjected to defamation campaigns, surveillance, intimidation, harassment, threats, and arbitrary detention.<sup>706</sup>

**2018 – 2019:** The Supreme Court of Justice has stripped a number of deputies of the National Assembly of their parliamentary immunity.<sup>707</sup> Many have been criminally charged, e.g., with treason, conspiracy, incitement to insurrection, and civil rebellion in connection with a reported assassination attempt against Maduro in August 2018 and an April 2019 statement by Guaidó calling for the armed forces to defect.<sup>708</sup> On May 8, 2019, the pro-government Supreme Court stripped Edgar Zambrano, the Vice President of the National Assembly, of his parliamentary immunity in order to prosecute him for his role in the April 2019 uprising.<sup>709</sup> Zambrano was imprisoned for four months.<sup>710</sup>

**Juan Requesens:** On August 7, 2018, opposition leader and National Assembly Deputy Juan Requesens and his sister Rafaela were arrested by intelligence (SEBIN) officials during a crackdown in response to the alleged attempted assassination of Maduro.<sup>711</sup> Earlier that day, Mr. Requesens gave an impassioned speech in the National Assembly, condemning “Maduro’s regime and his oppression”.<sup>712</sup> He was eventually charged nearly a year later for alleged involvement in assassination attempt.<sup>713</sup>

---

<sup>704</sup> 2019 OHCHR Report, *supra* note 78, par. 38.

<sup>705</sup> *Ibidem*.

<sup>706</sup> *Ibidem*, par. 36.

<sup>707</sup> *Ibidem*, par. 37.

<sup>708</sup> *Ibidem*.

<sup>709</sup> Anatoly Kurmanaev: “Ally of Venezuelan Opposition Leader Is Detained After Failed Uprising”, *New York Times*, May 8, 2019, available at: <https://www.nytimes.com/2019/05/08/world/americas/venezuela-opposition-zambrano-detained.html>.

<sup>710</sup> “Freed Venezuela Lawmaker Edgar Zambrano: The Regime Kidnapped Me”, *BBC News*, September 18, 2019, available at: <https://www.bbc.com/news/world-latin-america-49736985>.

<sup>711</sup> Alexandra Ulmer and Andreina Aponte: “Venezuela Lawmaker, Student Leader Arrested: Opposition”, *Reuters*, August 7, 2018, available at: <https://www.reuters.com/article/us-venezuela-politics/venezuela-lawmaker-student-leader-arrested-opposition-idUSKBN1KT06B>.

<sup>712</sup> Diego Scharifker: “Venezuela’s Detention of an Opposition Lawmaker is Chilling. The World Must Act”, *Washington Post*, August 17, 2018, available at: <https://www.washingtonpost.com/news/global-opinions/wp/2018/08/17/venezuelas-arrest-of-an-opposition-lawmaker-is-chilling-the-world-must-act/>; see also: Amnesty International, “Urgent Action: Representative’s Right to Fair Trial at Risk”, November 20, 2019, available at: <https://www.amnesty.org/download/Documents/AMR5314392019ENGLISH.pdf> (noting his speech occurred on the same day as his detention).

<sup>713</sup> “Venezuela Lawmaker Juan Requesens Charged Over Drone Attack”, *BBC News*, July 2, 2019, available at: <https://www.bbc.com/news/world-latin-america-48838628>.



October 2018: Opposition leader Maria Corina Machado was physically attacked by pro-regime civilian groups during a political event.<sup>714</sup> Machado claimed the attack had been ordered by the Maduro regime.<sup>715</sup>

Juan Guaidó: Since Juan Guaidó assumed the interim presidency in January 2019, he has been subjected to wide-ranging harassment and intimidation: he was prohibited from leaving the country; his house has been searched without his authorization and his family members harassed; his bank accounts were blocked and assets frozen; an audit was opened into his finances; an investigation was started for his supposed responsibility in the electricity crisis; his parliamentary immunity was revoked; he was prohibited from holding political office; and his Head of Office and one of his relatives were arrested.<sup>716</sup>

January 2019: In response to the January 2019 protests, security forces used extrajudicial killings, excessive force, mass arrests, torture and ill-treatment, and harassment of the protestors' relatives to "send a message of terror to the population in order to discourage protest".<sup>717</sup> High-level regime officials, including Maduro, made public statements "stigmatizing the protesters as violent, criminals or agents controlled by foreign powers".<sup>718</sup>

February 2019: In response to the February 2019 protests, security forces committed arbitrary detention, used excessive force, killed several people, and broke violently into homes in an attempt to quash protests and intimidate the opposition.<sup>719</sup>

June 2019: A June 2019 report by the OAS Working Group to Address the Regional Crisis Caused by Venezuela's Migrant and Refugee Flows recounted an interview given by Cuban doctor Yansnier Arias, who was sent to work in Venezuela.<sup>720</sup> Dr. Arias explained that he was told by his superiors in Venezuela that "oxygen . . . should be used as a political weapon: not for the medical emergencies of the day, but to be shared when the election . . . was closer, as part of a national strategy to force patients to vote for the government".<sup>721</sup> He also explained that doctors would "deny treatment to opposition supporters who have deadly diseases" and that doctors "were ordered to go door-to-door in poor neighborhoods to . . . warn residents that they would not have access to medical services if they did not vote for Maduro or his candidates".<sup>722</sup>

---

<sup>714</sup> Daniel Lozano: "Repudio Ante la Agresión Chavista Contra María Corina Machado", *El Mundo*, October 25, 2018, available in Spanish at: <https://www.elmundo.es/internacional/2018/10/25/5bd1f960e2704e52538b466d.html>.

<sup>715</sup> *Ibidem*.

<sup>716</sup> Foro Penal et al.: *Crisis en Venezuela: Bulletin No. 80 from April 1st to 8, 2019*, available at: <https://foropenal.com/en/crisis-en-venezuela-bulletin-80-01-to-08-april-2019/>.

<sup>717</sup> *Hunger for Justice*, *supra* note 83, pages 5 and 46.

<sup>718</sup> *Ibidem*, page 40.

<sup>719</sup> *Report on Repression in Venezuela: Feb. 2019*, *supra* note 451.

<sup>720</sup> *Report of the OAS Working Group*, *supra* note 65, page 24.

<sup>721</sup> *Ibidem*.

<sup>722</sup> *Ibidem*.

September 2020: The Independent International Fact-Finding Mission determined that many of the crimes it identified may also constitute the additional crime against humanity of persecution because the victims were targeted on political grounds – that is, “due to their identity as perceived political opponents to the regime”.<sup>723</sup>

**2. The Perpetrator Targeted Such Person or Persons by Reason of the Identity of a Group or Collectivity or Targeted the Group or Collectivity as Such**

**3. Such Targeting Was Based on Political, Racial, National, Ethnic, Cultural, Religious, Gender as Defined in Article 7(3) of the Statute, or Other Grounds That Are Universally Recognized as Impermissible Under International Law**

As the *2018 OAS Report* explained, regime officials and security forces targeted individuals that belonged to group that was defined politically – the political opposition and those who had expressed disagreement with regime decisions.<sup>724</sup>

**4. The Conduct Was Committed in Connection With Any Act Referred to in Article 7(1) of the Statute or Any Crime Within the Jurisdiction of the Court**

As discussed, many of the acts of persecution also constitute crimes against humanity – e.g., murder, imprisonment/severe deprivation of liberty, torture, rape/sexual violence, enforced disappearance, and other inhumane acts.<sup>725</sup> The acts of persecution that are not standalone crimes against humanity were committed in connection with those other crimes against humanity.<sup>726</sup>

---

**723** 2020 Fact-Finding Mission Detailed Findings, *supra* note 78, par. 2085.

**724** 2018 OAS Report, *supra* note 14, page 386 (“[I]n the Bolivarian Republic of Venezuela persons were deprived of their fundamental rights for the mere fact of belonging to opposition political groups, or for expressing their disagreement with the decisions made by the Government”.); see also: *ibidem*, page 408 (“[I]t has been shown that the criminal conduct is directed against a group of persons identifiable as the political group of the opposition or the group of persons who express disagreement with the decisions of the Government; and that it is politically motivated”).

**725** 2018 OAS Report, *supra* note 14, page 385 (noting that the “persecution against a civilian population includes other acts prohibited in Articles 7 1) a), 7 1) e), 7 1) f), 7 1) g), and 7 1) i)”).

**726** *Ibidem*, page 408 (“[T]he deprivation of the fundamental rights that the victims of political persecution suffered in Venezuela is part of the widespread and systematic attack and is connected to the crimes established in Article 7 of the Rome Statute, namely: murder, imprisonment, torture, sexual violence or rape, and enforced disappearance”).

## **5. The Conduct Was Committed as Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

This element was discussed above. As the *2018 OAS Report* explained, “the crime of persecution is present in all the [other] crimes” – murder, imprisonment, rape, etc. – that make up the attack against the civilian population.<sup>727</sup> Indeed, the crime of persecution explains the underlying reason for those other crimes.

## **6. The Perpetrator Knew That the Conduct Was Part of or Intended the Conduct to Be Part of a Widespread or Systematic Attack Directed Against a Civilian Population**

It has already been argued above that the perpetrators of murder, torture, imprisonment, and rape knew that their acts were part of the overall attack against the civilian population. Regarding the political use of the humanitarian crisis, it is clear that regime officials intended this to be part of the attack – their own statements indicate as much. For example, Freddy Bernal, Minister of Urban Agriculture and national coordinator for the CLAPs, explicitly stated that “the CLAP has come not only to distribute food; it came to exercise political control”.<sup>728</sup>

---

<sup>727</sup> *Ibidem*, page 387.

<sup>728</sup> *Ibidem*, page 256.







## VII. RESPONSIBILITY OF MID-TO HIGH-LEVEL REGIME OFFICIALS

Responsibility for the crimes detailed above extends beyond the immediate and direct perpetrators. Regime officials in Venezuela bear both individual criminal responsibility and command responsibility for those crimes.

### A. Individual Criminal Responsibility

Article 25(3)(b) of the Rome Statute provides that anyone who “[o]rders, solicits or induces the commission” of a crime under the ICC’s jurisdiction bears individual criminal responsibility for that crime.<sup>729</sup> Circumstantial evidence can be used to prove that someone ordered a crime.<sup>730</sup> An order “need not be in written or any particular form, nor must it be transmitted directly to the physical perpetrator”, but it must have had “a direct and substantial effect on the commission of the illegal act”.<sup>731</sup> It must be demonstrated that the person accused of issuing the order intended to order a crime or was aware of a “substantial likelihood that a crime would be committed”.<sup>732</sup>

The evidence demonstrates crimes against humanity in Venezuela were ordered by high-level regime officials who intended that the crimes be committed (or, at least, were aware of a substantial likelihood that they would be). As the *2018 OAS Report* explains, the crimes against humanity occurred as part of a state policy of repression formulated by Maduro and his senior leadership. The evidence of the existence of this state policy was discussed above in Section VI(A)(1)(d) – numerous different regime security forces committed crimes against civilians; crimes have been committed consistently since February 2014 (and thus were not isolated cases); regime officials and bodies have enacted various laws, decrees, orders, resolutions, and plans to facilitate the attack against perceived regime opponents; and high-level officials, including Maduro himself, have publicly demonized the opposition and incited violence. The

---

<sup>729</sup> *Rome Statute*, *supra* note 106, Art. 25 3) b) (“In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted . . .”).

<sup>730</sup> International Criminal Tribunal for Rwanda: *Prosecutor v. Ntawukuliyayo*, ICTR-05-82-T, Judgment and Sentence, August 3, 2010, par. 455 note 644, available at: [http://www.worldcourts.com/icttr/eng/decisions/2010.08.03\\_Prosecutor\\_v\\_Ntawukuliyayo.pdf](http://www.worldcourts.com/icttr/eng/decisions/2010.08.03_Prosecutor_v_Ntawukuliyayo.pdf).

<sup>731</sup> Int’l Crim. Trib. for the Former Yugoslavia: *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Public Redacted Version of Judgement, March 24, 2016, par. 573, available at: <https://www.legal-tools.org/doc/173e23/pdf/>.

<sup>732</sup> *Ibidem*.

*2018 OAS Report* concluded that Maduro and his senior leadership “are the intellectual authors behind the repression and the war on the internal enemy” in Venezuela.<sup>733</sup>

The September 2020 report of the Independent International Fact-Finding Mission found “reasonable grounds to believe that both the President and the Ministers of People’s Power for Interior Relations, Justice and Peace and for Defence, ordered or contributed to the commission of the crimes documented in this report, and having the effective ability to do so, failed to take preventive and repressive measures”.<sup>734</sup> The Fact-Finding Mission called for further investigations to determine “the exact contours” of each individual’s criminal responsibility, either in national or international jurisdictions.<sup>735</sup>

The *2018 OAS Report* identified eleven specific high-level officials<sup>736</sup> who should be investigated for crimes against humanity under Article 25(3)(b). The following list includes updated information on the individuals currently holding each position. It should be noted that since January 10, 2019, the Maduro regime has been usurping power in Venezuela, though it continues to hold *de facto* control over the country. The listing of titles below does not imply any official recognition of the individuals’ claim to the office:

- 1) Nicolás Maduro Moros, President of the Bolivarian Republic of Venezuela (current)
- 2) Tareck El Aissami, Vice President until June 14, 2018, who oversaw the SEBIN and the DGCIM and Chairman of the Anti-Coup Command
  - Delcy Eloína Rodríguez Gómez has served as Vice-President of Venezuela since June 14, 2018
- 3) Jorge Arreaza Montserrat, Vice President 2013–2016, Minister of Foreign Affairs (current)
- 4) Elias Jaua Milano, Vice President for Social Development and Mission Revolution until September 4, 2018
  - Aristóbolo Istúriz Almeida has served as Vice President for Social Development and Mission Revolution (renamed the Sectoral Vice President for Territorial and Social Socialism) since September 4, 2018
- 5) Jorge Rodríguez Gómez, Minister of Popular Power for Communication and Information until September 4, 2020

---

<sup>733</sup> *2018 OAS Report*, *supra* note 14, page 289.

<sup>734</sup> *2020 Fact-Finding Mission Report*, *supra* note 55, par. 164.

<sup>735</sup> *Ibidem*.

<sup>736</sup> The titles listed reflect those in the *2018 OAS Report* but some of them may no longer be accurate.

- Freddy Nájuez has served as Minister of Popular Power for Communication and Information since September 4, 2020
- 6) Delcy Eloina Rodríguez Gómez, Minister of Foreign Relations of Venezuela 2014–2017, President of the National Constituent Assembly until June 14, 2018
    - Diosdado Cabello has served as President of the National Constituent Assembly since June 14, 2018
  - 7) Vladimir Padrino López, Operational Strategic Commander of the FAN 2014–2017, Minister of Defense (current)
  - 8) Néstor Luis Reverol Torres, Major General, Minister of Internal Relations, Justice and Peace (current)
  - 9) Gustavo Enrique Gonzalez López, Major General, Minister of Internal Relations, Justice and Peace 2015–2016, Director of the SEBIN 2015–2018 and again since April 30, 2019 (current), member of the Anti-Coup Command
  - 10) Antonio Benavides Torres, Major General, Commander General of the Bolivarian National Guard (current)
  - 11) Carlos Alfredo Pérez Ampueda, Brigadier General, Director of the Bolivarian National Police (current)

## B. Command Responsibility

Under Article 28 of the Rome Statute, a military commander (or person acting as one) is responsible where (1) forces under the commander's effective command and control commit crimes under the Rome Statute, (2) the commander knew, or should have known, that the forces were committing or about to commit such crimes, and (3) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>737</sup> Command responsibility also applies to non-military superiors that exercise effective authority and control over subordinates, except that the knowledge requirement

---

<sup>737</sup> *Rome Statute*, *supra* note 106, Art. 28 a).

is stricter (i.e., less likely to impute responsibility)<sup>738</sup> and the crimes must concern activities within the effective responsibility and control of the superior.<sup>739</sup> For command responsibility to apply to a failure to prevent crimes, it must be shown that the failure increased the risk that the crimes would be committed.<sup>740</sup>

The *2018 OAS Report* did not invoke command responsibility as a basis for liability. However, it is likely applicable in the context of Venezuela, particularly to mid-level security force officials who did not themselves commit crimes against humanity, but either ordered forces under them to do so and/or failed to take action to hold perpetrators accountable.

---

**738** Military commanders are responsible when they knew or should have known that crimes were being or were about to be committed. *Rome Statute*, *supra* note 106, Art. 28 a) i). Non-military superiors are responsible when they knew or consciously disregarded information which clearly indicated that crimes were being or were about to be committed. *Rome Statute*, *supra* note 106, Art. 28 b) i). The ICC has explained that this different reflects “the intent of the drafters [of the Rome Statute] to take a more stringent approach towards commanders and military-like commanders compared to other superiors”. *Prosecutor v. Bemba*, *supra* note 372, par. 433.

**739** *Rome Statute*, *supra* note 106, Art. 28 b) ii).

**740** *Prosecutor v. Bemba*, *supra* note 372, par. 425 (interpreting “as a result of” in the chapeau of Article 28 a), which also appears in the chapeau of Article 28 b)).







## VIII. CONCLUSION

This report, in addition to providing an update to the *2018 OAS Report*, reiterates the call by Secretary General Almagro for ICC Prosecutor Bensouda to complete the preliminary examination of the situation of Venezuela and to proceed to a formal investigation as expeditiously as possible. In light of the overwhelming evidence presented to the Prosecutor from numerous credible sources, the ongoing delay is not only inexplicable but contrary to her stated principles and objectives for conducting preliminary examinations. To fully comply with the standards set forth in the *Policy Paper on Preliminary Examinations*, Mrs. Bensouda should request immediate, full, and open access to Venezuela, commit to prosecuting crimes in Venezuela dating back to February 2014, issue a detailed public statement about the deteriorating situation in Venezuela, and highlight the true scope and severity of the situation in Venezuela in her forthcoming *2020 Report on Preliminary Examination Activities*, relying on the reports of the United Nations, OAS, and credible civil society organizations.



^ Venezuelans hand over their identity documents to Colombian immigration officers before crossing the Simón Bolívar International Bridge on September 17, 2018. On any given day, an average of 30,000 people cross the structure to buy food and medicine, or to migrate. As malnutrition becomes more prevalent, the medicine shortage has turned minor health problems into major complications, and many Venezuelans have emigrated in search of better living conditions.

*Táchira, Venezuela. September 17, 2018.*  
**Andrea Hernández**





▲ A boy rests on a pile of suitcases while waiting for a bus headed to Ecuador in Cúcuta, the Colombian city on the border with Venezuela.

*Cúcuta, Colombia. May 29, 2018.*  
**Adriana Loureiro Fernández**





⚠ Shortages and No Food. Reina Espinoza says she is 57 years old, but her wrinkles, gray hair and flabby skin betray a few more years. She lives in the “Parnaso” community in Turgua, El Hatilla (Caracas-Venezuela). “Today I have nothing to eat for lunch”; her fridge is empty. Like Reina, many of the inhabitants of her community rarely eat three meals a day.

Her house only has one light bulb and she has no candles so she remains in the dark every day. She lives alone but her children live in the same community and help her however they can. She goes to bed at 8:00pm and gets up at 4:00am every day to walk approximately 3 miles to Hoyo de la Puerta, where she works cleaning a family home.

*Parnaso, Caracas, Venezuela. March 19, 2018.*  
**Claudia Paprelli**





⚡ During one of Javier Bertucci's presidential campaign rallies in Petare, Caracas, hundreds of people line up to ask for free soup, a basic component of his presidential campaign

*Caracas, Venezuela. May 12, 2018.*  
**Adriana Loureiro Fernández**



⚠️ **Accustomed to Hunger.** The children of a family in Petare show signs of severe malnutrition due to poor diet due to food shortages and lack of resources.

*Petare, Caracas, Venezuela.* February 3, 2018.  
**Vanessa Taratino**





▲ Acquired Responsibilities. Children adopt household chores while their parents are on the street trying to get food.

*La Vega, Caracas, Venezuela. May 20, 2018.*  
**Vanessa Taratino**

## PHOTO EXHIBIT

### Victims of Venezuela's Dictatorship: The Reality of a Country Fighting for Survival

For more than a decade, Venezuela has been submerged in a spiral of chaos and death. Crimes against humanity have become a constant scene of Venezuelan life, in a context where the twin political and economic crises, intermixed with a society that is slowly falling apart, is so complicated that it has become almost impossible to comprehend.

In 2014, which marked the beginning of Nicolás Maduro's government, a group of photographers started to record this reality up-close, for all to see. Even in places where there were no politicians, where the international cameras were not recording, the photographers remained on the ground, focusing their lens on the victims of the dictatorship, the people who have been lost among the hundreds of daily news headlines.

The images shown here are part of a larger photo exhibit, "Victims of the Dictatorship", produced by Un Mundo Sin Mordaza in partnership with the Victims of Communism Memorial Foundation and curated by Horacio Ciciliano. The exhibit was first presented at the 49th Regular Session of the OAS General Assembly in Medellín, Colombia, from June 26-28, 2019. It reflects the reality, the abandonment, the crisis and the pain suffered by people in Venezuela that has been intensifying in recent years. Using the audiovisual artistic medium these images inform and raise awareness around the world about the institutional crisis and human rights violations that occur in Venezuela which are causing an immense deterioration of basic needs, dramatically affecting the quality of life and opportunities of Venezuelans.

Every photo expresses the reality of a country where people struggle to survive in every street protest and sometimes die as a result of the apathy of a dictatorship that governs them. The images were taken by courageous photographers who refused to remain silent in the face of injustice. Every single one of these photos tells a story that is kept alive only when these images are seen. These stories can be changed through actions. The time to act is now.

*As a group of dynamic young activists, **Un Mundo Sin Mordaza (UMSM)** was founded in 2009 as a Non-Governmental Organization directed by Rodrigo Diamanti to denounce the deterioration and attacks against freedom of expression in Venezuela. Over its 10 years of operation, the organization has grown with volunteers all over the country and the world and coordinates campaigns using music, art, cultural events, new technologies and online activism to promote human rights and democratic values in Venezuela. The organization directs a large part of its efforts towards the training of human rights activists and defenders throughout the world and articulates, through its legal department, different initiatives to document and register violations of fundamental rights in Venezuela and denounce them before international audiences and institutions.*

**The Victims of Communism Memorial Foundation (VOC)** is an educational, research, and human rights bipartisan nonprofit organization, authorized in 1993 by a unanimous Act of the Congress of the United States of America, devoted to commemorating the more than 100 million victims of communism around the world and to pursuing the freedom of those still living under totalitarian regimes. To further this vision, the Victims of Communism Memorial Foundation's mission is to educate future generations about the ideology, history, and legacy of communism and to advocate for the freedom of those still held captive by communist regimes.



OAS

More rights  
for more people



VICTIMS OF COMMUNISM  
MEMORIAL FOUNDATION







⚠️ Opposition demonstrators protest in front of Generalissimo Francisco de Miranda Air Base, also known as La Carlota.

*Caracas, Venezuela. June 24, 2018.*  
**Rayner Peña**



OAS

More rights  
for more people