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# COMBATING DISINFORMATION: VENEZUELA'S CASE BEFORE THE INTERNATIONAL CRIMINAL COURT

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Venezuela is the only country in Latin America with an open investigation before the International Criminal Court (ICC). The case has been the object of disinformation on behalf of Venezuelan authorities and the language surrounding the ICC can at times be confusing for those who are unfamiliar with international law. The Washington Office on Latin America (WOLA) believes that it is important to bring this process closer to the international community, to decision-makers in Washington D.C., to Venezuelans, and to those who follow what is happening in Venezuela. That is why, through a series of questions and answers written in plain English, we are bringing you an easy-to-understand publication on the ICC investigation on Venezuela.

The following sections describe what the International Criminal Court (ICC) is and answers each of the following questions:

## **1. What is the International Criminal Court?**

The ICC is a judicial institution created in 2002 that seeks accountability for those most responsible for some of the world's worst crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The founding treaty of the ICC, the Rome Statute, was adopted by the UN General Assembly at a conference held in Rome in July 1998 and, after being ratified by more than sixty countries (including Venezuela in 2000), entered into force on July 1, 2002. The Office of the Prosecutor is an independent branch of the Court and is responsible for receiving information, conducting investigations, and prosecuting cases before the Court. In 2021, the Office of the Prosecutor was headed by British lawyer Karim Khan.

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The ICC is a permanent court with a universal vocation, governed by the principle of complementarity. The ICC complements national jurisdictions, which means that States have priority when it comes to carrying out investigations and providing justice to victims, but the Court can come into operation when it is demonstrated that the State is unable or unwilling to fulfill its obligations to investigate and punish those responsible for these crimes.

Two additional aspects are fundamental to understanding how the ICC works. First, the ICC tries individuals, not states. Second, the Court's jurisdiction is limited to the most serious crimes against humanity described in the Rome Statute, the Court's founding treaty. These crimes, all equally serious, are: genocide, crimes against humanity, war crimes, and aggression. In order for the Court to find that any of these crimes have been committed, conditions called the "elements of crimes" must be met, including specific conduct, elements of intent, and contextual circumstances. For example, in the case of crimes against humanity, as contextual elements, it must be demonstrated that a widespread or systematic attack has been committed against a civilian population, with knowledge of the attack.

## 2. Why did the ICC initiate an investigation into Venezuela and what is the current status of the process?

After receiving information from various sources about crimes allegedly being committed in Venezuela, in February 2018 the then ICC Prosecutor Fatou Bensouda, announced that her office would open a preliminary examination on Venezuela, which is a stage before the opening of an investigation. It would analyze facts committed since April 2017, which included excessive use of force in the context of demonstrations, arbitrary detentions, and torture by members of the Venezuelan State. On September 27, 2018, the ICC Prosecutor received a referral from six States parties to the Rome Statute - Argentina, Canada, Colombia, Chile, Paraguay, and Peru - to initiate an investigation into crimes against humanity allegedly committed in Venezuela since February 12, 2014. In December 2020, the Office of the Prosecutor stated that the information available provides reasonable grounds to believe that crimes against humanity have been committed in Venezuela. These include crimes such as political persecution, imprisonment or other severe deprivation of physical liberty, torture, rape, and/or other forms of sexual violence by civilian authorities, members of the armed forces, and government supporters.

On November 3, 2021, after visiting Venezuela as part of the preliminary examination, Prosecutor Khan announced that the preliminary examination had been concluded and decided to formally open an investigation. The Prosecutor's announcement was accompanied by an agreement between the Bolivarian Republic of Venezuela and the Office of the Prosecutor to continue fostering cooperation between the parties to facilitate genuine criminal investigations in Venezuela.

However, shortly thereafter, the Venezuelan government asked the ICC Prosecutor to stop the investigation calling for the activation of article 18 (2) of the Rome Statute, on the basis that the Venezuelan State itself was investigating these facts. Therefore, the process was temporarily suspended. On June 27, 2023, the Pre-Trial Chamber decided to allow the ICC Prosecutor to resume his investigation on Venezuela. Then, on July 3, Venezuela appealed this decision and requested an extension to formalize the appeal, which was granted until August 14, 2023. Once formalized, it will be necessary to wait for the judge's decision on this appeal.

It is important to note that the preliminary examination concluded in November 2021 is called Venezuela I. However, on February 13, 2020, the Government of Venezuela requested to investigate alleged crimes against humanity committed as a result of the implementation of sanctions adopted by the U.S. government in 2014. This became the Venezuela II Preliminary Examination, and is currently still open, in the second of the four phases that make up the examination (initial assessment, competence, admissibility, analysis of the interests of justice). The following questions and answers refer to the investigation opened under Venezuela I.

### **3. What decision did the Pre-Trial Chamber of the International Criminal Court adopt on May 4, 2023?**

In 2022, the Venezuelan government asked the ICC to stop its investigation since Venezuela had undertaken its own investigations. It did so by activating Article 18 (2) of the Rome Statute. As the Prosecutor did not accept the request made by the State of Venezuela, the study was suspended until the judges of the Pre-Trial Chamber had decided on the matter.

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States have priority in investigating and punishing crimes committed under their jurisdiction. The ICC can only act when the justice system of a State party to the Rome Statute is unwilling or unable to perform its functions. This is known in international criminal law as the principle of complementarity.

Amid this incident, the ICC Prosecutor requested to resume the investigation. As a result, the Pre-Trial Chamber ordered the Victims Participation and Reparations Section (VPRS) to seek the views and concerns of victims on the request to resume the investigation. In that process, the VPRS received the views and concerns of approximately 8,900 victims and issued a public version of the report on those testimonies received. The Court maintains strict confidentiality of the information received, precisely to preserve the safety of the victims. In the case of the incident opened based on the aforementioned article, the information received from the victims is not transmitted either to the ICC Prosecutor or to the Government of Venezuela; only the Pre-Trial Chamber has access to it.

It should be noted that on February 28, 2023, the Venezuelan Foreign Ministry issued a statement saying that the proceedings before the ICC were politically motivated and mentioned that a person who had presented his testimony before the VPRS had allegedly been interviewed by the authorities and his testimony had been denied. Taking into account the confidentiality of the process before the ICC, such an assertion by the Venezuelan State is very serious, as it contributes to creating fear and discouraging the participation of victims before the ICC.

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The Venezuelan government asked to respond to the VPRS report, insofar as it considered that these were new facts that the State could not reasonably have foreseen. To this, the Court replied on May 4 that it did not authorize Venezuela's request, that a response to the victims was not appropriate at this stage of the proceedings, and that, in any event, the arguments presented by the State were "very broad in nature and do not persuasively identify any specific aspect of the VPRS report that requires a response from Venezuela." The Court also explained that the VPRS collects the views and concerns of "potential" victims because the Court is not yet at the stage where they have been recognized as "victims" and, therefore, they are not formally part of the proceedings at this stage. As a result the VPRS report cannot be answered by the State.

It should be noted that, after Venezuela appealed the decision made by the Preliminary Chamber that allowed the Prosecutor to continue with the investigation, the VPRS requested to participate before the Appeals Chamber. On July 21, 2023, the Appeals Chamber determined that it was appropriate for the VPRS to send written observations on the general interests of the victims and granted it a period of 21 days to do so.



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#### 4. The Venezuelan Ministry of Foreign Affairs issued a statement on the decision of the Preliminary Chamber of May 4, 2023. Why is that statement false?

The Venezuelan government wanted to create confusion around the decision adopted by the Pre-Trial Chamber on May 4. On May 8, the Ministry of Foreign Affairs issued a statement in which it "welcomes the decision adopted" and says that this decision recognizes that the VPRS report only reflects the opinions of potential victims and that, with this pronouncement, the ICC confirms that "there are no victims of crimes against humanity since such crimes have never been committed in the national territory." Nothing could be further from the truth. At no time did the ICC say that there were no victims of crimes against humanity or that such crimes had not been committed in Venezuela. By twisting the technical language of the Court, the government has tried to create confusion and despair among the victims.

As previously noted, the Court referred in that decision to "potential" victims because, for the Court, all victims are potential victims until they have been recognized as such within the process. However, this does not imply that there are no victims of crimes against humanity in Venezuela.

#### 5. Why did the ICC Pre-Trial Chamber authorize its Prosecutor to resume his investigation on Venezuela?

On June 27, 2023, the ICC Pre-Trial Chamber decided to allow its Prosecutor to resume his investigation on Venezuela even though the Venezuelan State had requested it be stopped since it had allegedly undertaken its own.

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Among the reasons for this, the Chamber considered:

I. Although Venezuela has taken some steps to investigate, its criminal proceedings at the domestic level do not sufficiently reflect the scope of the ICC Prosecutor's investigation, and the investigations are insufficient in matters of discrimination and crimes of a sexual nature.

II. There are at least two patterns. The first, which concerns more than half of the cases, is that investigations were opened between 2021 and 2022, but the punishable acts were committed in 2017. The second is that, among the investigations that were opened before 2021, the majority had a significant period of inactivity with no apparent justification for this. In most cases, a suspected person has not been identified as a possible perpetrator.

III. The Venezuelan State seems to admit that it is not investigating allegations of events that occurred under the contextual elements of crimes against humanity. This is to the extent that it has denied that there has been a widespread or systematic attack against the civilian population or that there was a State policy to commit such an attack. These assertions by the State make it very clear that there are no domestic criminal investigations into alleged crimes against humanity committed in Venezuela.

IV. The focus of the investigations that have been carried out at the domestic level is on the direct perpetrators or material authors of the acts, without any further investigation into the chain of command and those at the highest level responsible. This is also in line with what the State has indicated in considering that the violations have been isolated events and under possible acts of abuse of power by certain officials.

## 6. What is actually happening then?

1) The government itself has delayed the investigation by activating the mechanism contemplated in Article 18(2) of the Rome Statute. Above all, it is important to mention that it did so based on the argument that it is investigating these crimes when international pronouncements abound that attest to the impunity and lack of independence and impartiality of the Judiciary. An example of this is the reports of the Fact-Finding Mission of the United Nations Human Rights Council, which has concluded that there are reasons to believe that crimes against humanity have been committed in Venezuela.

2) The ICC Prosecutor requested that the investigation be resumed because he believes that the information provided by the State is insufficient to establish that a genuine, independent, and impartial investigation is being conducted into alleged crimes against humanity committed in Venezuela since at least 2014.

3) The Pre-Trial Chamber decided to authorize the ICC Prosecutor to resume the investigation. It did so also taking into account the information received from the VPRS.

4) Venezuela appealed that decision to the Pre-trial Chamber and requested that the investigation be suspended while the appeal was resolved. On July 20, 2023, the Appeals Chamber decided that it did not find sufficient reasons to support said request and, therefore, rejected it. This means that the investigation by the ICC Prosecutor's Office continues while the appeal is being resolved. The proceedings before the ICC are long and we are only at the beginning of the road, but it does not mean that it is impossible to achieve justice for the victims through these means.

## 7. What does the recent visit of ICC Prosecutor Karim Khan to Venezuela and the decision to open an office in that country mean?

On June 10, 2023, ICC Prosecutor Karim Khan completed his third official visit to Venezuela. At the end of the visit, the Office of The Prosecutor signed a Memorandum of Understanding with President Nicolás Maduro, which was not published, establishing the installation of an ICC Office of the Prosecutor in Venezuela. It is presumed that with this agreement, the ICC will be able to increase the scale and impact of its presence in Venezuela, which would allow it to expand the national interface for its work and seek to identify and support meaningful efforts to enhance national justice initiatives within the mandate of the investigation.

During the visit, Prosecutor Khan outlined a number of priority areas in which the OTP will provide advice and assistance to the Venezuelan authorities, in line with the principles of the Rome Statute. These include legislative development assistance and the sharing of knowledge and best practices with national authorities to rebuild justice in Venezuela. It also allows national counterparts to increase their knowledge of the Rome Statute and ways to cooperate with the ICC. However, it is important to note that the office is designed for technical assistance to the State. So far, it is not known whether this office will have a mechanism to attend to victims and receive their testimonies. Nor is it known what its protocols for confidentiality and protection of victims and their representatives will be. This is of concern to members of civil society.

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The opening of the Caracas office also includes special advisors who will be able to provide technical assistance to Venezuela to facilitate the transfer of knowledge in order to deepen and strengthen partnerships to carry out the office's mandate. Additionally, it was agreed that the Venezuelan State will issue several multiple-entry visas to be granted to various members of the ICC team to allow them easier access to Venezuela.

## **8. What are the victims and human rights organizations working on these cases doing?**

At this stage of the proceedings, victims and human rights organizations in Venezuela continue to do valuable work consisting of:

- Continuing to document cases of people who have been victims of crimes under the jurisdiction of the ICC.
- Fighting misinformation, which creates confusion about what is happening before the ICC and the scope that this investigation may have.
- Require the various bodies of the ICC to maintain communication with them, as well as transparency regarding the exchanges it has with the State, especially in terms of cooperation and technical assistance aimed at building or guiding public policies.

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- Generate information and raise awareness both nationally and internationally about the importance of truth, justice, reparation, and guarantees of non-repetition for the victims of crimes against humanity and human rights violations in Venezuela.
  - Recalling the principle of complementarity mentioned above, advocate for a democratic and peaceful transition that allows for the reconstruction of the independence and impartiality of the judiciary, as well as the reestablishment of the rule of law.
  - Denounce all acts of intimidation and reprisals for attending, reporting, or interacting with the ICC.



Source: Edilson Gamez/Getty Images

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