

12-18-2018

Crimes Against Humanity in Venezuela: Can the ICC Bring Justice to Venezuelan Victims?

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Recommended Citation

Ayumary M. Fitzgerald, *Crimes Against Humanity in Venezuela: Can the ICC Bring Justice to Venezuelan Victims?*, 26 U. Miami Int'l & Comp. L. Rev. 127 (2018)

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CRIMES AGAINST HUMANITY IN VENEZUELA: CAN THE ICC BRING JUSTICE TO VENEZUELAN VICTIMS?

State parties to the Rome Statute submit to the jurisdiction of the International Criminal Court (ICC). This permanent and autonomous Court tries individuals for heinous international crimes, including crimes against humanity (CAH). Crimes such as murder, imprisonment, or torture, when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack, are known as CAH. Under the Statute, national jurisdictions are primarily responsible for investigating and prosecuting those responsible for international crimes. So, before it can assert jurisdiction, the ICC must determine that a state party is unwilling or unable to prosecute crimes against humanity in an effective way. Allegations of CAH in Venezuela, a state party to the Statute, have circulated in the news and social media since 2002. But in 2017, the widespread and systematic murder, imprisonment, and torture, allegedly committed by Venezuelan security forces and colectivos (armed government groups), caught the international community's attention. This Article argues that those crimes are CAH, and that the Venezuelan judiciary is unwilling and unable to genuinely prosecute the potential defendants. Accordingly, the ICC must assert jurisdiction and try Venezuela's President Nicolás Maduro, Defense Minister Vladimir Padrino López, and Interior Secretary Néstor Reverol for CAH.

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Ayumary dedicates this Article to all those who participated in the protests that occurred in Venezuela between April and August 2017; to those who have been imprisoned and tortured for exercising their freedom of speech; and particularly to those who lost their lives for the dream of a free Venezuela. Gloria al Bravo Pueblo de Venezuela. Mis ilusiones by San Luis (ft. Voz Veis and Apache).

I. INTRODUCTION

On March 29, 2017, the Venezuelan Supreme Tribunal of Justice (TSJ)² stripped members of the opposition-controlled National Assembly³ of their parliamentary immunity and ruled it would assumed legislative powers.⁴ Protests began once the decision was publicized.

While Venezuelans peacefully took to the streets in defense of their fundamental rights, the Maduro regime responded strategically and systematically, targeting an unarmed civilian population with violence and terror.⁵ Approximately, one person a day was killed since those protests began, and there were more than 450 investigations into human rights violations.⁶ Reportedly, the systematic

² U.S. Supreme Court equivalent.

³ U.S. Congress equivalent.

⁴ See *Venezuela: OAS SG Denounces Self-inflicted Coup d'État*, ORGANIZATION OF AMERICAN STATES (Mar. 30, 2017), http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-019/17 [hereinafter *OAS Denounces Coup d'État*]; Andrew V. Pestano, *Venezuela high court to take over National Assembly duties*, UPI (Mar. 30, 2017), <https://www.upi.com/Venezuela-high-court-to-take-over-National-Assembly-duties/6171490883553>; Rafael Romo, *Venezuela's high court dissolves National Assembly*, CNN (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/americas/venezuela-dissolves-national-assembly/index.html>.

⁵ *The Collapse of the Rule of Law in Venezuela: What the United States and the International Community Can Do to Restore Democracy: Hearing Before the Subcomm. on W. Hemisphere, Transnational Crime, Civilian Sec., Democracy, Human Rights, and Glob. Women's Issues of the Senate Comm. on Foreign Relations*, 115th Cong. 3 (2017) (statement of Luis Almagro Lemes, Secretary General, Organization of American States), [hereinafter *Almagro's Testimony at US Senate*].

⁶ *Id.*

attacks were carried out by Venezuelan security forces and *colectivos* in thirteen states and Caracas—including in controlled environments such as military installations and other state institutions.⁷

Then on November 16, 2017, Venezuela's deposed Chief Prosecutor, Luisa Ortega Díaz petitioned the ICC to investigate Maduro, Padrino López, and Reverol.⁸ Ortega alleged that "8,290 deaths took place between 2015 and June 2017 on government orders."⁹ She charged the government officials with "over 17,000 arbitrary and politically motivated arrests, hundreds of cases of torture, and the general paramilitarization of civilian population."¹⁰ She also claimed that "the crimes happened under the orders from the executive branch" and that they "represent a broad government strategy to cleanse dissident political views."¹¹

On February 7, 2018, the ICC prosecutor opened a preliminary examination.¹²

⁷ *Crackdown on Dissent Brutality, Torture, and Political Persecution in Venezuela*, HUMAN RIGHTS WATCH (Nov. 29, 2017), <https://www.hrw.org/report/2017/11/29/crackdown-dissent/brutality-torture-and-political-persecution-venezuela> [hereinafter *Crackdown on Dissent*].

⁸ David Zwier, *Former Venezuela chief prosecutor files complaint against nation's president in ICC*, JURIST (Nov. 17, 2017), <http://www.jurist.org/paperchase/2017/11/chicagoillinois-district-court-refuses-to-strike-down-doj-limit-on-funding-to-sanctuary-cities.php>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² International Criminal Court, *Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, ICC

II. ICC MAY ASSERT JURISDICTION OVER CAH IN VENEZUELA.

The preliminary examination process is conducted based on the facts and information available, as well as the overarching principles of independence, impartiality and objectivity.¹³ The analysis considers whether: (1) the Office of the Prosecutor's (OTP) information provides a reasonable basis to believe that a crime within the Court's jurisdiction has been or is being committed [jurisdiction]; (2) the cases may be admissible under Article 17 [admissibility]; and (3) there are substantial reasons to believe that an investigation would serve the interests of justice, accounting for the gravity of the crime and the interests of victims [interest of justice].¹⁴ The prosecutor has indicated that she will rarely

(Feb. 8, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>.

¹³ The Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, ¶ 25 (November 2013),

<http://www.legal-tools.org/doc/acb906/> [Hereinafter OTP Policy Paper]. (Although she is not yet taking an investigation, the prosecutor can seek additional information from states, U.N. organs, nonprofit organizations, and other parties, as well as receive oral or written testimony). Beth Van Schaak & Ronald C. Slye, *International Criminal Law and Its Enforcement Cases and Materials*, 144 (3d ed. 2015) [hereinafter Van Schaack] (citing Rome Statute of the International Criminal Court [hereinafter Rome Statute] art. 15(2), July 17, 1998 and International Criminal Court, *Rules of Procedure and Evidence*, 104(2)).

¹⁴ Rome Statute, *supra* note 13, art. 53(1)(a)-(c); *see also* Van Shaack, *supra* note 13, at 143 n.6 (explaining that Rule 48 of the Rule of Procedure and Evidence of the ICC makes clear that in determining whether there is a reasonable basis to proceed with an investigation under the prosecutors'

decide not to proceed on an investigation based upon an evaluation of the interest of justice, consequently this Article will only address the jurisdiction and admissibility requirements.¹⁵

a. JURISDICTION

The ICC asserts jurisdiction over cases grounded on subject matter, nationality or territoriality, and temporal basis.¹⁶ In her preliminary examination of the situation in Venezuela, the prosecutor must find that all three requirements are met to open an investigation.¹⁷

ICC's subject matter jurisdiction is limited to the most serious crimes concerning the international community: genocide, CAH, war crimes, and the crime of aggression.¹⁸ Section III of this Article addresses this point fully and concludes that CAH were committed by Maduro, Padrino López, and Reverol, between April and August 2017.

As to nationality or territoriality, the ICC can exercise jurisdiction over crimes committed on a state party's

Art. 15 *propio motu*, the prosecutor must consider the factors set out in Art. 53(1)(a)-(c).

¹⁵ Van Schaack, *supra* note 13, at 150. ("The Prosecutor will initiate an investigation unless there are substantial reasons to believe that an investigation would not serve the interests of justice when taking into account the gravity of the crime and the interests of victims."). See Rome Statute, *supra* note 14, at Art. 53(1)(c). ("The interest of justice is then a countervailing consideration to the showing that there are reasonable grounds for believing that the requirements of complementarity and gravity have been met.").

¹⁶ *Id.* at 144.

¹⁷ *Id.*

¹⁸ Rome Statute, *supra* note 14, at Art. 5.

territory or by a state party's national.¹⁹ The alleged CAH were committed in Venezuela, and Maduro, Padrino López, and Reverol are all Venezuelans. Since Venezuela is a State party, the ICC can assert jurisdiction.

Finally, the ICC has temporal jurisdiction over events that occurred after July 1, 2002.²⁰ Venezuela ratified the Rome Statute on June 7, 2000, hence agreeing to submit to the ICC's jurisdiction with respect to CAH as of the Statute's effective date.²¹ So the ICC can assert jurisdiction for CAH committed in Venezuela as of July 1, 2002. The CAH allegedly committed by Maduro, Padrino López, and Reverol between April and August 2017, are therefore within the ICC's temporal jurisdiction. Thus, in her preliminary examination of the situation in Venezuela, the OTP would likely establish all three jurisdictional requirements.

¹⁹ *Id.* at Art. 12.

²⁰ *See id.* at Art. 11(1). Unless a State has made a declaration accepting the jurisdiction of the Court retroactively, if a State becomes a party to the Statute after July 1, 2002, the Statute enters into force on the first day of the month after the 60th day following the date of the deposit of its instrument of ratification, acceptance, approval or accession. *Id.* at Art. 126(2).

²¹ *See Preliminary Examination: Venezuela*, INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/venezuela>

b. ADMISSIBILITY

After establishing jurisdiction, the OTP's analysis will turn to admissibility. Admissibility is governed by Article 17 of the Statute and requires two inquiries: complementarity and gravity.²²

i. COMPLEMENTARITY

The complementarity assessment is based on the underlying facts, as they exist at the time of the determination, and is subject to revision based on changed circumstances.²³ In a preliminary examination, the OTP considers (1) whether a state has jurisdiction over the cases but is unwilling or unable to genuinely prosecute the accused; (2) if the state with jurisdiction has investigated and decided not to prosecute because it is unwilling or unable to genuinely prosecute the accused; and (3) if the accused has already been tried, whether an ICC trial would not be permitted under Article 20(3) of the Rome Statute.²⁴ Here,

²² Van Schaack, *supra* note 13, at 145. In a preliminary examination, the OTP assesses admissibility regarding potential cases. *Id.* Once the prosecutor decides to investigate, the admissibility analysis turns to the particular suspects and cases before the court. *Id.*

²³ See OTP Policy Paper, *supra* note 13, at 15 ¶ 58 (relying on Regulation 29(4), Regulations of the Office of the Prosecutor; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1497, Judgment, ¶ 56 (Sept. 25, 2009).

²⁴ Rome Statute, *supra* note 14, at Art. 17(1)(a)-(c). Also, Article 20(3) contains the *ne bis in idem* principle or rule against double jeopardy. The Rome Statute provides two exceptions to the rule: (1) when a trial took place to shield the accused from ICC jurisdiction over the crime; or (2) when a trial was not conducted independently or impartially to bring the

the double jeopardy principle contained in Article 20(3) will not concern the prosecutor's preliminary examination because Venezuelan authorities have never tried, investigated, or prosecuted the potential defendants.

Venezuela has jurisdiction to investigate and prosecute the crimes alleged in this Article because they were committed in its territory. So, during the preliminary examination, the OTP must consider the genuineness of an investigation and prosecution in Venezuela. The principle is that states bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain exceptional.²⁵ Consequently, where national systems remain inactive or are otherwise unwilling or unable to genuinely investigate and prosecute, the ICC must fill the gap left by the state's failure to satisfy its duty.²⁶

The admissibility determination is not a judgment on the national justice system.²⁷ Hence if a functioning justice system is not investigating or prosecuting the relevant cases, the determining factor is the absence of relevant proceedings.²⁸ The absence of national proceedings for the same person and same conduct is then sufficient to make the case admissible.²⁹ On this basis alone, the prosecutor could open an investigation because the potential defendants here, have never been investigated or prosecuted in Venezuela.

accused to justice. These exceptions are also captured under Article 17(2)(a)-(c).

²⁵ OTP Policy Paper, *supra* note 13, at 23 ¶ 100.

²⁶ *Id.* at 23 ¶ 100.

²⁷ *Id.* at 12 ¶ 46.

²⁸ *Id.*

²⁹ See *id.* at 12 ¶ 47 (relying on *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*).

But the assessment about a state's inability or unwillingness to prosecute must be based on concrete facts, as they exist at the time of the review.³⁰ To determine inability, the OTP may consider if due to a substantial collapse or unavailability of its judicial system, Venezuela is unable to obtain the accused or the necessary evidence or is unable to carry out its proceedings.³¹ To determine unwillingness, the OTP may consider principles of international law and whether proceedings in Venezuela would shield the accused, be unjustifiably delayed, or would not be conducted independently or impartially and thus would not bring the accused to justice.³²

Further, the OTP may consider, *inter alia*, the ability of the competent authorities to exercise their judicial powers in Venezuela; the absence of security for witnesses, investigators, prosecutors and judges; the absence of the required legislative framework to prosecute the same conduct that the ICC plans to pursue; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused.³³ When assessing unwillingness and inability, the OTP

³⁰ See *id.* at 12 ¶ 47 (relying on *Prosecutor v. Joseph Kony et al.*, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, ¶¶ 49-52).

³¹ Rome Statute, *supra* note 14, Art. 17(3).

³² See *id.* at Art. 17(2)(a)-(b).

³³ See OTP Policy Paper, *supra* note 13, at 14 ¶ 57 (relying on *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", ICC-01/11-01/11-344-Red, 31 May 2013, ¶¶ 199-215; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Admissibility of the Case against Abdullah Al-Senussi", ICC-01/11-01/11-466-Red, 11 October 2013, ¶ 235).

considers whether any or a combination of those factors may impact the proceedings as to vitiate their genuineness.³⁴

III. The Venezuelan Government Is Unwilling Or Unable To Genuinely Prosecute Maduro, Padrino López, And Reverol Because There Is No Effective Separation Of Powers. The Maduro Regime Controls The Public Powers – Particularly, The Judiciary.

Venezuela's national public power is divided into Legislative (National Assembly), Executive, Judicial, Citizen (*Ciudadano*), and Electoral.³⁵ The Citizen power is performed by the Republic's Moral Council, which is composed by the People's Defender, the Republic's General Controller, and the Chief Prosecutor.³⁶ The Chief Prosecutor is appointed by a two third vote of the National Assembly³⁷ and directs the public ministry for a period of seven years.³⁸ The public ministry investigates and prosecutes criminal conduct.³⁹

Although there is a constitutional division of powers, the Maduro regime effectively controls the judiciary. Efforts to control the judiciary began in 2004, when (then) president Hugo Chávez and partisan lawmakers expanded the Supreme Tribunal of Justice (TSJ) from twenty to thirty-two

³⁴ See *id.* at 14 ¶ 58.

³⁵ CONSTITUTION OF THE BOLIVARIAN REPUBLIC OF VENEZUELA, Art. 136 https://www.oas.org/juridico/mla/sp/ven/sp_ven-int-const.html [hereinafter Venezuelan Constitution].

³⁶ *Id.* Art. 273. The Chief Prosecutor is the U.S. Attorney General equivalent.

³⁷ *Id.* at Art. 279.

³⁸ *Id.* at Art. 284.

³⁹ *Id.* at Art. 285.

members and filled the new seats with supporters.⁴⁰ Then in 2010, Chávez's lawmaker supporters accelerated the process for naming new TSJ justices,⁴¹ and before the National Assembly was installed that year, selected nine new TSJ justices.⁴²

Maduro's political control over the TSJ translates directly into control over lower courts because the TSJ effectively controls the appointment and removal of lower court judges.⁴³ In 2010, the TSJ's Judicial Commission voided the appointment of 67 judges and appointed 1064 nonpermanent judges.⁴⁴ Then, in March 2012, the TSJ appointed 89 additional provisional judges.⁴⁵ The Commission has also granted stability of tenure to hundreds of provisional and temporary judges.⁴⁶ These new positions were not won through open competitions, as required by the Venezuelan constitution, but rather through promotions of

⁴⁰ *Tightening the Grip: Concentration and Abuse of Power in Chavez's Venezuela*, HUMAN RIGHTS WATCH (Jul. 17, 2012), <http://www.hrw.org/sites/default/files/reports/venezuela0712webwcover.pdf> [hereinafter *Tightening the Grip*].

⁴¹ *See id.* at 10 (explaining that voters had reduced the pro-Chávez majority in the National Assembly from close to 100% to approximately 60% of the seats, so they made this move only five days after the legislative elections).

⁴² *See id.* at 11 (explaining that to create the new vacancies, the TSJ gave several justices authorization to retire before the conclusion of their constitutional 12-year terms).

⁴³ *See id.*

⁴⁴ *Id.* at 11, n. 7.

⁴⁵ *Id.*

⁴⁶ *Id.* at 12.

provisional and temporary judges who had been appointed at the full discretion of the Commission.⁴⁷

The authorities' failure, interference, intimidation, and arbitrary suspensions have undermined the independence and impartiality of Venezuela's judges and prosecutors.⁴⁸ According to the International Commission of Jurists (ICJ), the lack of security of tenure and transparency in the selection of prosecutors, as well as the allocation of criminal investigations ignoring the prosecutor's experience and workload, have yielded the prosecutor's inability or unwillingness to bring criminals to justice in an effective and equal manner.⁴⁹ Additionally, with 70% of judges holding only provisional or temporary office, there is a climate of insecurity and impunity that surpasses 90% concerning common felonies, and even more for crimes involving violations of human rights.⁵⁰

Likewise, the Maduro Regime controls the Citizen and Legislative powers. The regime has gained control leveraging similar techniques as those used by Chávez. For instance, in December 2014—although the Constitution requires a two-thirds vote—the pro-Maduro National Assembly appointed the People's Defender and the

⁴⁷ *Id.*

⁴⁸ *Venezuela: weak legal system threatens democracy*, INTL. COMMISSION OF JURISTS (Jun. 5, 2014), <https://www.icj.org/venezuela-weak-legal-system-threatens-democracy-and-human-rights-reforms-urgently-needed-new-report-says/> [hereinafter ICJ's *Venezuela: weak legal system*].

⁴⁹ *See id.*

⁵⁰ *Id.*

Republic's General Controller, and ratified Luisa Ortega as Chief Prosecutor with just a simple majority.⁵¹

Surprisingly, in December 2015, for the first time in seventeen years, the Venezuelan opposition won control of the National Assembly, altering the balance of power.⁵² But this only accelerated Maduro's plan to control the public powers in Venezuela. In January 2017, Maduro announced an "economic state of emergency," that allowed him to rule by decree.⁵³ Then in February 2017, the TSJ bypassed the National Assembly to grant Maduro broad emergency powers over the economy.⁵⁴ And in late March 2017, the TSJ stripped the opposition-controlled National Assembly's members of their parliamentary immunity and ruled that it would assume legislative powers.⁵⁵ Although the court

⁵¹*Chavismo elige por mayoría simple a fiscal general, defensor y contralor*, EL NUEVO HERALD (Dec. 22, 2014), <http://www.elnuevoherald.com/noticias/mundo/america-latina/venezuela-es/article4824984.html>.

⁵²Peter Wilson, *Venezuela's opposition wins legislative majority*, USA TODAY (Dec. 7, 2015), <https://www.usatoday.com/story/news/world/2015/12/07/venezuela-opposition-victory/76909468/>.

⁵³Frances Martel, *Venezuela Declares "Economic emergency" That Allows President to Rule by Decree*, BREITBART (Jan. 16, 2016), <http://www.breitbart.com/national-security/2016/01/18/venezuela-declares-economic-emergency/>.

⁵⁴Assoc. Press in Caracas, *Venezuela under 'economic emergency' as court gives Maduro decree powers*, THE GUARDIAN (Feb. 11, 2016), <https://www.theguardian.com/world/2016/feb/12/venezuela-under-economic-emergency-as-court-gives-maduro-decree-powers>.

⁵⁵See Pestano, *supra* note 4, at 1 (reporting that the TSJ accused the legislative body of overstepping its authority—primarily citing the opposition's efforts to remove Maduro from power—and held it in contempt. Ironically, the next day, Maduro "interceded" to undo,

rescinded a portion of that ruling, Maduro subsequently announced his plan to provide plenary power to a new national constituent assembly that could re-write the constitution.⁵⁶ Finally, in August 2017, 545 delegates of the new national constituent assembly, elected under suspected fraud, were sworn in the legislative palace.⁵⁷ The new constituent immediately dismissed Chief Prosecutor Luisa Ortega Diaz.⁵⁸

convening an emergency late-night dialogue, after which the court rescinded a portion of its ruling on the morning of April 1, 2017); Romo, *supra* note 4, at 1; *see also* OAS Denounces Coup d'État, *supra* note 4, at 1 (reporting that the OAS Secretary General called for the urgent convocation of the Permanent Council under Article 20 of the Democratic Charter and stated that the situation has reached this point despite the warnings outlined in the reports of May 30, 2016 and March 14, 2017).

⁵⁶ *See* Julia Jones & Stefano Pozzebon, *Venezuelans reject constitutional rewrite in non-binding referendum*, CNN (Jul. 17, 2017), <https://www.cnn.com/2017/07/17/americas/venezuela-referendum-votes/index.html> (reporting that over seven million of Venezuelans voted in a non-binding referendum organized by the country's main opposition parties. The overwhelming majority voted against Maduro's plan. Maduro, of course, called the vote "a meaningless internal exercise."); *see also* Colin Dwyer, *In Unofficial Vote, Venezuelans Overwhelmingly Reject Constitutional Rewrite*, NPR (Jul. 17, 2017), <https://www.npr.org/sections/thetwo-way/2017/07/17/537657163/in-unofficial-vote-venezuelans-overwhelmingly-reject-constitutional-rewrite>.

⁵⁷ Cody Weddle & Patricia Mazzei, *Venezuela installs new all-powerful assembly rejected by U.S.*, MIAMI HERALD (Aug. 04, 2017), <http://www.miamiherald.com/news/nation-world/world/americas/venezuela/article165446552.html>

⁵⁸ Patricia Mazzei, *Chief prosecutor ousted as new Venezuelan assembly targets Maduro foes*, MIAMI HERALD (Aug. 05, 2017),

Hence, in its preliminary examination, the OTP will likely find complementarity based on the Venezuelan judiciary's unwillingness to investigate and prosecute these potential defendants because the Maduro regime effectively controls the public powers.⁵⁹ The regime controls the courts and the courts have manipulated the Venezuelan constitution and laws to consolidate all governmental authority under the regime's control.⁶⁰ Additionally, the OTP will likely find complementarity because, the Venezuela judiciary's substantial collapse renders it unable it to prosecute heinous CAH. In Venezuela, there is a clear absence of security for witnesses, investigators, prosecutors and judges,⁶¹ as well as a lack of adequate resources for and

<http://www.miamiherald.com/news/nation-world/world/americas/venezuela/article165653222.html>

⁵⁹ See Secretary General Updated Report on Venezuela to the Permanent Council, OAS 1-73, 1 (Mar.14, 2017) OSG/128-17,

<http://www.oas.org/documents/eng/press/Informe-VZ-II-English-Final-Signed.pdf> [hereinafter OAS Second Report] ("The rule of law no longer exists in Venezuela; it has been eliminated by a judiciary under the complete control of the Executive Branch that has invalidated every law passed by the National Assembly along with its constitutional powers").

⁶⁰ *Id.* at 2; ICJ's Venezuela: weak legal system, *supra* note 48, at 1; see also OAS Secretary General Invoked Democratic Charter and Convened Permanent Council on Venezuela OSG-243-16, 1-114, 65, May 30, 2016 <http://www.oas.org/documents/eng/press/OSG-243.en.pdf>

[hereinafter OAS First Report] ("there is currently no clear separation and independence of the branches of government in Venezuela, with the co-opting of the Judicial branch by the Executive branch being one of the clearest cases of this").

⁶¹ OAS Second Report, *supra* note 59, at 2; ICJ's Venezuela: weak legal system, *supra* note 48, at 1.

effective investigation and prosecution,⁶² particularly of this magnitude.

a. GRAVITY

The gravity assessment is the key to distinguish crimes investigated by the ICC and crimes investigated in domestic systems.⁶³ In this analysis, the OTP focuses on the crimes' scale, nature, manner of commission, and impact.⁶⁴ These four factors are set in the ICC's precedent and in OTP's Regulation 29(2).⁶⁵

To assess the crimes' scale, the OTP considers the number of direct and indirect victims, the extent of the harm—particularly, the bodily or psychological harm caused to the victims and their families—and their geographical or temporal spread.⁶⁶ As to the crimes' nature, the OTP considers each offense's specific elements.⁶⁷

⁶² ICJ's Venezuela: weak legal system, *supra* note 48, at 1.

⁶³ Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 5 (2017).

⁶⁴ *Id.* at 11 (relying on *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, ¶ 31 (Feb. 8, 2010)). *See also* Regulation 29(2), Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Effective Apr. 23, 2009 <https://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf> [hereinafter Regulation 29(2)].

⁶⁵ Regulation 29(2), *supra* note 64; *see also* OTP Policy Paper, *supra* note 13, at 15 ¶ 61 (explaining that the assessment of gravity includes both quantitative and qualitative considerations).

⁶⁶ OTP Policy Paper, *supra* note 13, at 16 ¶ 62.

⁶⁷ *Id.* at 15 ¶ 63.

Further, to assess the crimes' manner of commission, the OTP considers the means employed to execute the crime, the perpetrator's degree of participation and intent, and the extent to which the crimes were systematic, resulted from a plan or organized policy, or resulted from abuse of power or official capacity.⁶⁸ The OTP also considers the use of cruelty, the victims' vulnerability, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups.⁶⁹ Finally, to assess the crimes' impact, the prosecutor considers the sufferings victims endured and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.⁷⁰

During its preliminary examination, the OTP will likely find that the alleged crimes meet the scale requirement because the harm caused to the victims and their families extended to hundreds of civilians killed and tortured, as well as thousands unlawfully imprisoned.⁷¹ These approximate stats are demonstrative: 167 deaths were reported in connection with civilian demonstrations,⁷² 3,589

⁶⁸ *Id.*

⁶⁹ *Id.* at 15-16 ¶ 64.

⁷⁰ *Id.* at 16 ¶ 65.

⁷¹ See Crackdown on Dissent, *supra* note 7, at 54; see also OAS, *Fourth Report on Venezuela* OSG/ 445-17, 1-40, 5-6, Sep. 25, 2017 <http://scm.oas.org/pdfs/2017/CP38157REPORT.pdf> [hereinafter OAS Fourth Report]; OAS, *Third Report on Venezuela*, 1-55, 19, 1 Jul. 19, 2017 <http://www.oas.org/documents/eng/press/TERCER-INFORME-VENEZUELA-ENGLISH-Final-signed.pdf> [hereinafter OAS Third Report].

⁷² Crackdown on Dissent, *supra* note 7, at 54.

people were arrested in the demonstrations (as of July 4, 2017),⁷³ 16,000 were injured, thousands were victims of violence;⁷⁴ and at least 120 new cases of people tortured by various security agencies were reported.⁷⁵ Additionally, the crimes large geographical or temporal spread includes criminal conduct committed over the course of, at least, five months and carried out, repeatedly, in thirteen states and Caracas.⁷⁶

⁷³ OAS Third Report, *supra* note 71, at 19

⁷⁴ OAS Fourth Report, *supra* note 71, at 5-6; *compare* Ford, *supra* note 63, at 28 (relying on *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Art. 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)) (explaining that the ICC's investigation about the situation in Kenya covered attacks by groups associated with two rival political parties that took place in the aftermath of a disputed election).

⁷⁵ OAS Third Report, *supra* note 71, at 33. The Centre for Studies and Analysis for Latin America (CASLA) has been denouncing to the ICC the systematic torture by the Venezuelan government since July 2016. *Id.*; *compare* Ford *supra* note 63 at 28 (relying on *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Art. 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)) (explaining that in Kenya, more than 1,100 people were killed, at least 900 were raped, more than 3,500 were seriously injured, and more than 350,000 were displaced from their homes. And the killings, rapes and sexual violence were often done in a particularly brutal fashion).

⁷⁶ Crackdown on Dissent, *supra* note 7, at 1; *compare* Ford *supra* note 63 at 28 (relying on *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Art. 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)) (explaining that, similarly, in Kenya, the attacks took place all over the country over a period of approximately two months, although the investigation apparently focused on fifteen locations).

Likewise, the OTP will likely find that the crime's nature is met because the alleged conduct meets the enumerated crimes of Article 7(1) of the Rome Statute.⁷⁷ Section III of this Article argues in detail that Maduro, Padrino López and Reverol could be held responsible for murder, imprisonment, and torture.

Moreover, the OTP will likely find that the alleged crimes meet the manner of commission factor because the crimes were systematic attacks resulting from state policy. Reportedly, the Venezuelan government's strategic and systematic target of unarmed civilians resulted in one or two protestors killed each day.⁷⁸ Section III(b) of this Article argues this point extensively, but the following reports are illustrative. For instance, between April and July 2017, the Venezuelan government deployed an excessive number of military and police officers throughout the country, as well as armored vehicles known as "whales" or "rhinoceroses", which were used offensively to disperse protestors.⁷⁹

The government also leveraged an indiscriminate and excessive use of tear gas canisters; officers used the containers of toxic gases, not only to disperse people, but to fire them directly and point-blank at the demonstrators,

⁷⁷ See Rome Statute, *supra* note 14, at Art. 7(1)(a) (murder), (e) (imprisonment), (f) (torture).

⁷⁸ OAS Third Report *supra* note 71, at 1.

⁷⁹ *Id.* at 18-19.

Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017, COMMISSION OF HUMAN RIGHTS (8, Aug. 2017), http://www.ohchr.org/Documents/Countries/VE/HCHReportVenezuela_1April-31July2017_EN.pdf [hereinafter OHCHR Report].

seriously injuring and even killing some people.⁸⁰ This conduct will likely lead the OTP to finding that the attacks resulted either from a plan or organized policy, or from abuse of power or official capacity.⁸¹

Finally, the OTP will likely find that the alleged crimes meet the impact factor. In Venezuela, at least two million displaced persons have had to emigrate for social, economic, and political reasons.⁸² 54% of all children are malnourished.⁸³ And as of July 25, 2017, there were 620 political prisoners; more than 430% as compared to the 117 political prisoners accounted for prior to the start of the demonstrations in April 2017.⁸⁴

In sum, in addition to complementarity, the OTP is likely to find gravity and establish admissibility.⁸⁵ Yet, to

⁸⁰ OAS Third Report, *supra* note 71, at 19; compare Ford, *supra* note 63, at 28-29 (relying on *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Art. 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)) (explaining that, like in Venezuela, in Kenya, the victims were largely civilians who were targeted because of their actual or perceived support for a rival group); see also OHCHR Report, *supra* note 82, at 20 (reporting that in some cases, people were arrested even though they were not demonstrating, just because they were perceived to support the opposition).

⁸¹ See OTP Policy Paper, *supra* note 70 at 13 ¶ 63.

⁸² OAS Fourth Report, *supra* note, 71 at 5-6.

⁸³ *Id.* at 5-6.

⁸⁴ *Id.* at 5.

⁸⁵ See Ford, *supra* note 63, at 29 (relying on *Situation in the Republic of Kenya*, ICC-01/09-19-Corr, Decision Pursuant to Art. 15 of the Rome Statute on Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010)) (explaining that regarding the Kenya investigation, the OTP concluded that the alleged acts constituted CAH and met the gravity threshold).

open an investigation, the OTP must find reasonable basis to believe that the alleged crimes are CAH under Article 7. The following section demonstrate this point.

IV. SOS CRIMES AGAINST HUMANITY IN VENEZUELA.

After World War I, humanity has sought to criminalize individual conduct for heinous crimes committed by state actors that are the product of state action and policy; CAH is such heinous crime.⁸⁶ The ICC can assert jurisdiction to investigate and prosecute CAH when any of the crimes enumerated in Article 7(1) of the Rome Statute—such as murder, imprisonment, or torture—are committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.⁸⁷

a. ENUMERATED CRIMES

i. MURDER, ARTICLE 7(1)(A) OF THE ROME STATUTE.

⁸⁶ M. Cherif Bassiouni, *Crimes Against Humanity Historical Evolution and Contemporary Application*, CAMBRIDGE (2011). Generally, to reach the heinous nature of an international crime, the criminal conduct must directly or indirectly threaten the international community's peace and security; shock the international community's conscience; affect multiple state's public safety and economic interests; involve more than one state's citizens; or require international cooperation because the criminal conduct's is the product of state policy. *Id.* at 8-9. The OTP considers some of these factors when assessing gravity because gravity serves as the key to distinguish crimes investigated by the ICC from crimes investigated in domestic systems. *See Ford, supra* note 63, at 5.

⁸⁷ Rome Statute, *supra* note 14, at Art. 7(1).

Murder is an intentional killing without lawful justification⁸⁸ that may be committed by act or omission.⁸⁹ Lawful justification involves excuses and defenses under customary criminal practice of the states, such as self-defense, coercion, necessity, and reasonable mistake of law or fact.⁹⁰ The death of the victim can be inferred from the facts to the case, but the prosecutor must prove the causal link between the killing and the death of the victim.⁹¹

Between April and August 2017, at least 167 deaths were reported in connection with the demonstrations in Venezuela.⁹² As of July, security forces were allegedly responsible for at least forty-six killings and *colectivos* for twenty-seven.⁹³ On July 30, 2017, alone, the day the constituent assembly members were elected, at least twenty-nine people were killed.⁹⁴ Reportedly, 67 people were killed by firearms or by another type of projectile; thirty were aged twenty-one or younger; at least twenty-four were students and approximately fourteen were eighteen or younger.⁹⁵

⁸⁸ Bassiouni, *supra note 87*, at 365.

⁸⁹ *Id.* at 372 (relying on *Prosecution v. Bemba Gombo*, Case No. ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 132 Jun. 15, 2009; *Prosecutor v. Katanga & Chui*, case No. ICC-01/04-01/07, Decision on the confirmation of charges, ¶ 421, Sep. 30, 2008).

⁹⁰ *Id.* at 365.

⁹¹ *Id.* at 372 (relying on *Prosecution v. Bemba Gombo*, Case No. ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 132 Jun. 15, 2009).

⁹² Crackdown on Dissent, *supra note 7*, at 54.

⁹³ OHCHR Report, *supra note 80*, at 10-11; Crackdown on Dissent, *supra note 7*, at 54-55.

⁹⁴ Crackdown on Dissent, *supra note 7*, at 54.

⁹⁵ OAS Third Report, *supra note 71*, at 25. Of those who were not killed by firearms, at least eight were electrocuted and seventeen died of other wounds or accidents. *Id.*

Security forces systematically used their service weapons, less-lethal weapons (e.g. tear gas cans), and firearms with less-lethal ammunition (such as plastic pellets) to shoot at demonstrators at a close range, aiming at vulnerable parts of the body.⁹⁶ For instance, reportedly, on April 26, 2017, a Bolivarian National Guard (GNB) officer, fired a tear-gas projectile, designed to be fired at long range, into Juan Pablo Pernaleté's chest from only fifteen meters away, killing him at impact.⁹⁷ Similarly, on June 22, 2017, a GNB officer shot David Vallenilla in the thorax with a buckshot from the other side of a fence at an Air Force base in Caracas.⁹⁸

⁹⁶ OHCHR Report, *supra* note 80, at 12.

⁹⁷ Crackdown on Dissent, *supra* note 7, at 57 (reporting that Juan Pablo was a 20-year-old basketball player and public accounting student who was participating in an anti-government demonstration in Altamira, Caracas. The report also states that (then) Chief Prosecutor, Luisa Ortega Díaz, established that a GNB officer indeed fired the fatal round); OHCHR Report, *supra* note 80, at 12; *see also* Crackdown on Dissent, *supra* note 7, at 58 (similarly reporting that on June 17, 2017, 17-year-old, Neomar Lander was separated from his mother when GNB and Bolivarian National Police (PNB) officers moved to disperse the demonstration. She later found him dead and described him with a "hole" in his chest that was "just too big").

⁹⁸ OHCHR Report, *supra* note 80, at 13 (stating that the act was recorded in video footage which showed David approaching the perimeter fence to throw what looked like a rock. The Chief Prosecutor's Office reported that the 20-year-old was hit by buckshot in the thorax and ordered the detention of a Sargent of the Bolivarian Air Force. A criminal court in Caracas issued an arrest warrant against the Sargent, which had not been complied with at the time of the report); *see also* Crackdown on Dissent, *supra* note 7, at 57 (similarly reporting that on August 13, 2017, 16-year-old student and soccer player, Luis Guillermo Espinoza, died several weeks after a GNB officer shot him in the head at point blank range

So the OTP will likely find that Venezuelan armed security forces intentionally killed demonstrators, without lawful justification,⁹⁹ when they systematically used their service weapons to shoot at demonstrators, at a close range, aiming at vulnerable parts of the body.¹⁰⁰

ii. IMPRISONMENT, ARTICLE 7(1)(E) OF THE ROME STATUTE.

Imprisonment is the unlawful deprivation of liberty of an individual without due process of law.¹⁰¹ The deprivation of liberty can be achieved by an act or omission with the intent to deprive the civilian of his physical liberty without due process of law.¹⁰² It can also be achieved with reasonable knowledge that the act or omission was likely to cause a deprivation of liberty without due process of law.¹⁰³

during a demonstration in San Diego, Carabobo state. Luis was trying to run away from GNB members on June 5 when three motorcycles surrounded him. Luis resisted the officers' beating and then tried to run away. "One officer pointed his gun at Luis's head and he stopped for a second," "[t]he guard turned his head and Luis began to run again," then a witness heard the shot and saw Luis on the floor).

⁹⁹ See Bassiouni, *supra* note 87, at 365.

¹⁰⁰ OHCHR Report, *supra* note 80, at 12.

¹⁰¹ Bassiouni, *supra* note 87, at 444 (relying on *Prosecutor v. Kordic & Cerkez*, Case No. IT-95-14/2-T, Judgment, ¶ 192, Feb. 26, 2001).

¹⁰² *Id.* (relying on *Prosecutor v. Simic*, Case No. IT-95-9. Trial Judgment, ¶¶ 64-5, Oct. 17, 2003).

¹⁰³ *Id.* (relying on *Prosecutor v. Simic*, Case No. IT-95-9. Trial Judgment, ¶¶ 64-5, Oct. 17, 2003).

To find imprisonment, the OTP considers several factors and Article 7's express mandate.¹⁰⁴ The factors include whether the arrest was the result of a valid warrant; whether detainees were informed of the reasons for the detention; whether formal charges were filed; whether the detainees were informed of their procedural rights, and whether the continued detention was lawful.¹⁰⁵ Additionally, Article 7 expressly prohibits imprisonment that is contrary to international law and other "other severe deprivation of physical liberty."¹⁰⁶

In Venezuela, thousands of protesters and bystanders were unlawfully detained during the demonstrations, and many were subsequently prosecuted in military courts.¹⁰⁷ Again, approximately 3,589 were arrested in the demonstrations,¹⁰⁸ and as of July 25, 2017, there were approximately 620 political prisoners.¹⁰⁹ Reportedly, *colectivos*—civilian armed groups with no power to arrest under Venezuelan law—aided police and GNB officers' unlawful detentions.¹¹⁰

There were multiple violations including the lack of arrest warrants, incommunicado detention, lack of access to legal counsel, and breaches of the principle of presumption

¹⁰⁴ *Id.* (relying on *Prosecutor v. Krnojelac*, Case No. IT-97-25, Judgment, ¶¶ 119-22, Mar. 15, 2002).

¹⁰⁵ *Id.* (relying on *Prosecutor v. Krnojelac*, Case No. IT-97-25, Judgment, ¶¶ 119-22, Mar. 15, 2002).

¹⁰⁶ Rome Statute, *supra* note 14, at Art. 7(1)(e); *see also* Bassiouni *supra* note 87, at 444.

¹⁰⁷ Crackdown on Dissent, *supra* note 7, at 1.

¹⁰⁸ OAS Third Report, *supra* note 71, at 19.

¹⁰⁹ OAS Fourth Report, *supra* note 71, at 5.

¹¹⁰ Crackdown on Dissent, *supra* note 7, at 51.

of innocence.¹¹¹ The UN High Commissioner for Human Rights (OHCHR) recorded multiples unlawful detentions including: Caracas (766), Zulia (630), Carabobo (608), Anzoátegui (413), Miranda (405), Lara (337), Táchira (334), Bolívar (271), and Aragua (269).¹¹²

The OHCHR recorded multiple other irregularities. For instance, security forces arrested people without a court order and later claimed they had been caught *in flagrante delicto*; people were arrested on their way to demonstrations; others were detained while they were peacefully demonstrating; others were apprehended hours after they had taken part in a demonstration.¹¹³ In some cases, people were arrested even though they were not demonstrating, just because they were perceived to support the Venezuelan opposition.¹¹⁴

Hence the OTP will likely find that under the state policy of the Maduro regime, state forces aided by *colectivos* imprisoned civilians or severely deprived them of their physical liberty. It will likely also find that officers committed unlawful arrests, without a valid warrant or informing of the reasons for the detention.¹¹⁵ Further, it will likely find that official arrests included incommunicado detention, lack of access to legal counsel and breaches of the principle of presumption of innocence.¹¹⁶ And the deprivation of liberty was directed against those who

¹¹¹ OHCHR Report, *supra* note 80, at 20.

¹¹² *Id.*

¹¹³ *Id.* (According to the OHCHR, a medical doctor witnessed national guards entering hospitals to arrest injured protestors).

¹¹⁴ *Id.*

¹¹⁵ Crackdown on Dissent, *supra* note 7, at 51.

¹¹⁶ OHCHR Report, *supra* note 80, at 20.

protested against the Maduro regime, or were perceived to support the opposition.¹¹⁷

iii. TORTURE, ARTICLE 7(1)(F) OF THE ROME STATUTE.

Under the Statute, the definition of torture as a CAH does not require specific purpose, unlike the definition of torture as a war crime.¹¹⁸ Torture means the intentional infliction of severe pain or suffering, physical or mental, upon a person in custody or under control of the accused, which is not inherent or incidental to lawful sanctions.¹¹⁹ The conduct must cause an important degree of pain and suffering to amount to torture [*actus reus*].¹²⁰ The infliction of pain or suffering must be intentional [*mens rea*].¹²¹

On June 15, 2017, the Centre for Studies and Analysis for Latin America (CASLA) reported an increase in torture in Venezuela since April 2017.¹²² Reportedly, once the victims were detained, government agents subjected detainees to severe infliction of pain and suffering, including severe

¹¹⁷ *Id.*

¹¹⁸ Bassiouni, *supra* note 87, at 418 (relying on *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 194-95 Jun. 15, 2009).

¹¹⁹ Rome Statute, *supra* note 14, at Art. 7(2)(e).

¹²⁰ Bassiouni, *supra* note 87, at 418 (relying on *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 193 Jun. 15, 2009).

¹²¹ *Id.* (relying on *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08-15, Decision on the confirmation of charges, ¶ 194-95 Jun. 15, 2009 and explaining that it excludes the requirement of knowledge set out in Article 30(3) of the Statute).

¹²² OAS Third Report, *supra* note 71, at 33.

beatings, electric shocks, and asphyxiation among others.¹²³ CASLA reported at least 120 new cases of people tortured by various security agencies, particularly, by the GNB, PNB, the Bolivarian National Intelligence Service (SEBIN), and some local police from states and cities whose authorities are members of the government party.¹²⁴ According to CASLA, the officers' intention was not only to carry out orders but also to do the greatest possible physical damage, to punish their victims for demonstrating, and even as vengeance.¹²⁵

The officers applied systematic and gruesome methods of torture on detainees. First, officers applied toxic or tear gas powder directly to the victim's face, which was then covered with plastic bags to make the effect even more overwhelming.¹²⁶ Second, the officers shut the victims up in very small spaces (small armored cars, or together in groups in rooms no bigger than 2 meters x 2 meters) until they fainted or had serious respiratory difficulties.¹²⁷ Third, officers pushed toxic powder into their victims' nostrils to force them to open their mouths to breathe, and then forced them to eat human excrement.¹²⁸ Lastly, officers threw tear gas canisters at their victims inside armored vehicles, where the victims were being detained, and then shut the vehicle's door causing them to asphyxiate and faint.¹²⁹

¹²³ Crackdown on Dissent, *supra* note 7, at 1.

¹²⁴ OAS Third Report, *supra* note 71, at 33. The Centre for Studies and Analysis for Latin America (CASLA) has been denouncing to the ICC the systematic torture by the Venezuelan government since July 2016. *Id.*

¹²⁵ *Id.* at 33-34.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ OAS Third Report, *supra* note 71, at 33-34.

¹²⁹ *Id.*

The threat or perpetration of sexual violence as torture was another systematic form of abuse reported on detainees.¹³⁰ 80% of the new cases CASLA reported included claims by detainees that they had been stripped naked, threatened, or raped by officers.¹³¹

Other forms of systematic torture included hits to the victim's heads with the butts of weapons, helmets and blunt objects. Reports of kicks to the face, ribs and lumbar region were systematic in 100% of the cases presented.¹³² Electric shocks to the genitals, head and elbows, forcing victims to kneel or lie down to get at them more easily, handcuffing them hand and foot, covering their heads, or suspending them by the arms and allowing them to touch the floor only with the tips of their toes for hours on end, were also systematically practiced.¹³³

Hence it is likely that the OTP will find that under the Maduro regime's state policy, officers inflicted a significant degree of pain and suffering upon civilians while they were in custody or under local police, GNB, PNB, or SEBIN's control.¹³⁴ Further, it will likely find that the pain and suffering suffered by civilians was the result of the officers' unlawful treatment.¹³⁵ The gruesome methods, which included sexual violence, likely demonstrate that the torture was knowingly committed, and that the officers' intended to

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ OAS Third Report, *supra* note 71, at 34.

¹³⁴ *See id.* at 33.

¹³⁵ *See id.* at 34.

carry out orders, but also to do the greatest damage possible in support of state policy.¹³⁶

b. WIDESPREAD OR SYSTEMATIC ATTACK DIRECTED AGAINST A CIVILIAN POPULATION.

The ICC has interpreted the *civilian population* qualifier to mean “groups distinguishable by nationality, ethnicity or other distinguishable features,” including groups defined by its perceived political affiliation.¹³⁷ CAH must have been committed as part of a “widespread or systematic” attack against such groups.¹³⁸ The underlying principle was to exclude isolated and random acts, and ordinary crimes under national law, from the ambit of CAH.¹³⁹ As such, the state or organizational policy mandate of Article 7(2)(a), is a necessary component of the widespread or systematic attack on the civilian population.¹⁴⁰

¹³⁶ See OAS Third Report, *supra* note 71, at 33-34.

¹³⁷ Van Schaack, *supra* note 13, at 444 (citing *Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamend Hussein Ali* (Case No. ICC-01/09-02/11) Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, para.110 (ICC Pre-Trial Chamber II (Jan. 23, 2012))) (emphasis added) [hereinafter *Prosecutor v. Kenyatta*].

¹³⁸ Rome Statute, *supra* note 14, at art. 7(1) (emphasis added).

¹³⁹ Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT'L L. 334, 353 n. 136 (2013) (relying on Machteld Boot, Rodney Dixon & Christopher K. Hall, *Article 7: Crimes Against Humanity, in Commentary on the Rome Statute of the International Criminal Court* 117, 127 (Otto Triffterer ed., 1999)). [hereinafter Sadat on CAH].

¹⁴⁰ *Id.* at 353, n. 136 (relying on Machteld Boot, Rodney Dixon & Christopher K. Hall, *Article 7: Crimes Against Humanity, in Commentary on*

CAH must involve crimes “pursuant to or in furtherance of a State or organizational policy to commit such attack.”¹⁴¹ Although there does not appear to be a *per se* state-action requirement, there does need to be some plan on behalf of some organization.¹⁴² So the Rome Statute eliminates a strict state-action requirement, but the defendant must have committed CAH as part of a plan and not for purely personal motives.¹⁴³ Further, the ICC Pretrial Chamber II has concluded that an organization is established by sufficient evidence of (1) a hierarchically structured organization; (2) the existence of an effective system ensuring compliance by members with the rules and orders imposed by higher levels of command; (3) training and quasi-military characteristics; and (4) exercise of control over geographic areas and its population.¹⁴⁴

The Venezuelan government did not conceal its intention to violate the population’s human rights or to murder civilians.¹⁴⁵ In fact, in April 2017, Maduro announced the Zamora Plan with which he intended to arm a million civilian militias (*colectivos*), assuring there would be “a rifle for each militia member” to respond to the protests.¹⁴⁶ A second phase of the Zamora Plan was

the Rome Statute of the International Criminal Court 117, 127 (Otto Triffterer ed., 1999)).

¹⁴¹ Rome Statute, *supra* note 14, at Art 7 (2)(a).

¹⁴² Sadat, *supra* note 140, at 156.

¹⁴³ *Id.* at 156-57.

¹⁴⁴ Van Schaack, *supra* note 13, at 451 (citing *Prosecutor v. Kenyatta*, Pre Trial Chamber II ¶ 228).

¹⁴⁵ OAS Fourth Report, *supra* note 71, at 5.

¹⁴⁶ *Id.*

launched a month later.¹⁴⁷ While there is no accessible public or official document explaining what Plan Zamora entails, military and public officials have referred to it to justify the use of military jurisdiction for civilians and to deploy the GNB to control demonstrations.¹⁴⁸ The implementation of the Zamora Plan resulted in increased violence against demonstrators.¹⁴⁹

Consequently, state officers systematically used disproportionate force to suppress anti-government protests. Venezuelan security forces—including the Bolivarian National Guard (GNB), the Bolivarian National Police (PNB), the Bolivarian National Intelligence Services (SEBIN), and local police—aided by *colectivos* murdered, imprisoned, and tortured Venezuelan groups distinguishable by their opposition to the Maduro regime.¹⁵⁰ The officers' use of extreme and lethal force, caused hundreds of deaths and injuries.¹⁵¹

Colectivos are civilian armed-groups that the Maduro regime and the state armed forces have leveraged to commit CAH in Venezuela. Although this Article does not elaborate further on this point, the OTP will likely consider *colectivos* quasi-state actors because they have established (1) a hierarchically structured organization; (2) an effective system ensuring compliance by members with the rules and orders imposed by higher levels of command exists; (3) they possess training and quasi-military characteristics; and (4)

¹⁴⁷ OHCHR Report, *supra* note 80, at 8.

¹⁴⁸ *Id.* at 8.

¹⁴⁹ *Id.*

¹⁵⁰ See Crackdown on Dissent, *supra* note 7, at 54.

¹⁵¹ See *id.* at 1.

they exercise of control over geographic areas and its population.¹⁵² Moreover, the association of *colectivos* and official armed-forces was apparent. Notably, *colectivos* alongside or in-sight of security forces suppressed demonstrations, at times, shooting live ammunition at protesters and detaining individuals who were then turned over to the security forces.¹⁵³

Lastly, the widespread murder, imprisonment, and torture of civilians by state armed-forces and *colectivos* were not isolated and random acts. The crimes were carried out repeatedly, across thirteen states and Caracas—including in controlled environments such as military installations and other state institutions—between April and August 2017.¹⁵⁴ Hence the OTP will likely find that state armed-forces and *colectivos* committed the widespread murder, imprisonment, and torture of civilians pursuant to or in furtherance of a state or organizational policy of the Maduro regime.¹⁵⁵

¹⁵² See Van Schaack, *supra* note 13, at 451 (citing *Prosecutor v. Kenyatta*, ¶ 228).

¹⁵³ Crackdown on Dissent, *supra* note 7, at 55. Illustrative of this argument is that on July 5, 2017, *colectivos* attacked and surrounded the then opposition-controlled National Assembly in Caracas for several hours. *Id.* This attack occurred in plain sight of security armed-forces, who appeared to do little to protect the institution or disperse the pro-government armed groups. *Id.*

¹⁵⁴ Crackdown on Dissent, *supra* note 7, at 2.

¹⁵⁵ Rome Statute, *supra* note 14, at Art. 7 (2)(a).

c. WITH KNOWLEDGE OF THE ATTACK.

CAH must be committed with knowledge of the attack.¹⁵⁶ As a matter of law, an attack directed against any civilian population need not be attributed to the person charged, neither does the person charged need to be the leader, or even a member, of the organization within the meaning of Article 7(2)(a).¹⁵⁷ So the Statute does not require a tight link between the accused and the organization bearing the policy to commit the widespread or systematic attack.¹⁵⁸

In April 2017, the Maduro regime introduced the Zamora Plan, which called on *colectivos* and armed-forces to assist in responding to protests.¹⁵⁹ Notably, OHCHR's analysis revealed that, based on the types of injuries suffered by demonstrators, the use of force progressively escalated upon the implementation of Plan Zamora.¹⁶⁰ So Venezuela's President, (Maduro), Defense Minister (Padrino López), and Interior Secretary (Reverol) likely had knowledge of the crimes committed by state armed-forces and *colectivos* supporters of the regime. Moreover, reporters found no evidence that key high-level officials—including those who

¹⁵⁶ See *id.* at Art. 7(1).

¹⁵⁷ Van Schaack, *supra* note 13, at 450 (citing *Prosecutor v. Kenyatta*, ¶ 223). The term "state or organizational policy" applies to organizations within the state such as the military, police, or intelligence services. See also Rome Statute, *supra* note 14, at Art. 7 (2)(a).

¹⁵⁸ Van Schaack, *supra* note 13, at 451 (citing *Prosecutor v. Kenyatta*, para. 223).

¹⁵⁹ OAS Third Report, *supra* note 71, at 20.

¹⁶⁰ OHCHR Report, *supra* note 80, at 8.

knew or should have known about the widespread crimes— had taken any steps to prevent and punish the crimes.¹⁶¹

Lastly, the world has seen the brutal force used to prevent citizens from demonstrating against the Maduro regime in Venezuela.¹⁶² Maduro, Padrino López, and Reverol's knowledge of the crimes is simply undeniable, and as such the OTP would likely conclude.

V. CONCLUSION

The ICC can bring justice to Venezuelan victims, and the OTP has taken the first step by initiating a preliminary examination. During its review, the OTP will likely find a reasonable basis to believe that the heinous crimes committed in thirteen states and Caracas, between April and August 2017, are CAH. Likely, it will also find that the Maduro regime controls the Venezuelan judiciary as to render it unwilling and unable to genuinely prosecute the potential defendants. Accordingly, the Court can admit the case and assert jurisdiction.

The OTP will likely find that the Venezuelan government did not conceal its intention to harm civilians distinguishable because of their opposition to the Maduro regime. Maduro intended to arm *colectivos*, justified the use of military jurisdiction for civilians, and deployed the GNB to deter protesters under the Zamora Plan. Upon the Plan's

¹⁶¹ Crackdown on Dissent Report, *supra* note 7, at 2. The Maduro regime had also publicly targeted political opponents such as Leopoldo Lopez and Antonio Ledezma. OAS Fourth Report, *supra* note 71, at 6. These intimidating actions show that the Maduro regime sought to silence political opponents and, through them, the Venezuelan people. *Id.*

¹⁶² OAS Fourth Report, *supra* note 71, at 22.

implementation, violence against demonstrators increased, and state-forces and *colectivos* systematically murdered, imprisoned, and tortured hundreds of demonstrators. So the heinous crimes resulted from a plan or organized policy, or from an abuse of power or official capacity. The conduct left at least two million displaced persons and approximately 620 political prisoners. Hence the OTP will likely conclude the crimes were committed as part of a widespread and systematic attack, directed against any civilian population, with knowledge of the attack.

The international community has finally heard Venezuelans' SOS call. The OHCHR, OAS's Secretary General, Human Rights Watch, CASLA, and Foro Penal Venezolano are among the institutions that have loudly condemned the CAH committed in Venezuela by the Maduro regime. But whether the ICC will ultimately bring justice to the Venezuelan victims remains to be seen, as the Court will face many obstacles, including getting custody of Venezuela's President, Nicolás Maduro, Defense Minister, Vladimir Padrino López, and Interior Secretary, Néstor Reverol. For now, the ICC preliminary examination of the situation in Venezuela feels like a victory for Venezuelan victims. Venezuelan victims have lost many battles, many have lost their lives. So hope is, for now, what they continue to hold on to.

