The International Criminal Court and Venezuela

Summary of the Office of the Prosecutor (OTP) Preliminary Examination of the Situation in Venezuela

Written for AMICC by Emily Quinn
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I. Summary

The Bolivarian Republic of Venezuela (hereafter, Venezuela), has been through a long period of social unrest. This is partly resulting from hyperinflation and mismanagement of the economy, together with government repression against members of the opposition. The economic crisis has resulted in widespread shortages of food and medical supplies throughout the country and the exodus of more than three million Venezuelans to neighboring states. The government has responded aggressively to demonstrations by members of the opposition, including by deploying military and police units (FAES) and paramilitary groups (‘colectivos’). The Plan Zamora integrated and coordinated actions by the armed forces with paramilitary groups to put down demonstrations that began in April of 2017. The International Criminal Court (ICC) is examining alleged crimes against humanity, including arbitrary detentions, extrajudicial killings, torture and abuse of prisoners, excessive use of force against demonstrators, and sexual crimes. These are alleged to have been committed by members of the security services. The Court is also assessing alleged crimes committed by the opposition, including extrajudicial executions of police and military personnel.

II. Background of the ICC’s examination of the situation in Venezuela.

The International Criminal Court initiated the preliminary examination into the situation in the Venezuela, focused on alleged crimes committed since April 2017. Before the preliminary examination in 2018, former prosecutor Luis Moreno-Ocampo declined to open an investigation in 2006 into allegations of crimes against humanity in Venezuela. These alleged crimes were committed during political unrest and demonstrations against the Chavez government in the early 2000’s.

The current examination was opened under Article 15 of the Rome Statute. Prosecutor Fatou Bensouda announced her decision on February 8, 2018. On September 27, 2018, States Parties to the Rome Statute including the Argentine Republic, Canada, the Republic of Colombia, the

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Republic of Chile, the Republic of Paraguay, and the Republic of Peru referred the situation in Venezuela to the ICC. This preliminary examination covers alleged crimes from February 12, 2014 to the present. The Venezuela situation is currently assigned to Pre-Trial Chamber I.

III. Allegations

No formal charges will be listed before the end of the preliminary examination. However, the Office of the Prosecutor is currently reviewing open source materials, which allege that crimes against humanity were committed during periods of social and political unrest in 2014, and again between 2017 and 2019. Specifically, communications from the referring states (Argentina, Canada, Colombia, Chile, Paraguay, and Peru) cite the Inter-American Court of Human Rights Report and the GIEI (Grupo Interdisciplinario de Expertos Independientes) findings from 2018. Allegations include that state security forces used excessive force to put down and disperse demonstrations following the arrest of opposition leader Leopoldo López in 2014 and during the recent demonstrations. The government is also alleged to have arrested and detained thousands of people without due cause, tortured and maltreated detainees, and committed extrajudicial executions. The preliminary examination also covers whether members of the opposition movement committed crimes against humanity following attacks that killed members of the security services.

The Office of the Prosecutor is only analyzing allegations of crimes against humanity now, but not genocide, war crimes, or the crime of aggression. The crime of genocide refers to the intent to destroy in whole or in part a national, ethnic, racial or religious group. War crimes refer to crimes committed as part of a plan or policy during an armed international or domestic conflict. For the purposes of the Venezuela examination, there is no internal conflict, as the majority of demonstrators are unarmed. The crime of aggression refers to international aggression on national territorial, which is not relevant to this case.

IV. Jurisdiction

Venezuela ratified the Rome Statute on June 7, 2000. Therefore, the International Criminal Court has jurisdiction on incidents occurring on Venezuelan territory or committed by Venezuelan nationals beginning on July 1, 2002. The situation is now in the second stage of the preliminary examination, where the Prosecutor determines whether the subject matter of the case fits within

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6 Rome Statute.
the Court’s jurisdiction. The next step will be for the Prosecutor to determine the admissibility of the case, including questions of complementarity, gravity, and elements of justice.

V. Potential Next Steps

On January 23, 2019, the President of the National Assembly Juan Guaidó swore himself in as the interim president of Venezuela, declaring Maduro unfit to hold office following elections that many viewed as fraudulent. The legality of Guaidó’s claim to the presidency comes from the argument under the Venezuelan Constitution, the 2018 election was wholly illegal and unconstitutional because of Maduro’s alleged unconstitutional creation of the Constituent Assembly, which therefore lacked the competency to summon elections. Guaidó and opposition leaders claim that because Maduro was not elected in a constitutional election, the presidency is vacant. In that case, the Constitution gives the presidency temporarily to the President of the National Assembly. If Guaidó’s claim is accepted, then Maduro is not the legal president of Venezuela. However, Maduro has continued to claim that he is the rightful president and has declined to concede power. The result of this is two competing claims to the executive branch, leading the United States and numerous other Latin American and European states to support Guaidó. Given the political instability in Venezuela, it is unclear exactly what impact a change in leadership would have on the Court’s preliminary examination and how this could potentially influence the Prosecutor’s decision to continue with a complete investigation. However, there are two potential scenarios for the Court’s examination, which depend on the result of the Maduro-Guaidó leadership challenge.

First, there is the possibility that Maduro remains in power, disregarding the constitutional questions raised by his election. This could result in the challenging situation of the Court prosecuting a head of state. This has previously been a difficult point for the ICC, with examples of unsuccessful prosecutions of heads of state including the Kenyatta and Gbagbo cases. Additionally, Maduro has previously denounced the ICC examination and referred to the humanitarian crisis in Venezuela as a “fabrication” by the United States and its western allies and therefore is unlikely to assist with an investigation.

Second, if Maduro is forced from office and Guaidó or another member of the opposition takes power, the chances that the opposition cooperates with an investigation may or may not significantly change. Opposition leaders may be interested in pursuing justice domestically for victims. The Court’s complementarity clause likewise supports domestic justice systems, so long as criminal justice mechanisms are consistent with international norms. However, during a transition of government Venezuela may not have complete capacity to carry out trials of political rivals. Furthermore, Maduro’s corruption of the judiciary raises questions about the feasibility of domestic trials. This would result in Venezuela not meeting the complementarity

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requirements under the Rome Statute. In this scenario, an opposition government may welcome the assistance of the ICC.

VI. Additional Anticipated Questions and Responses

Can the International Criminal Court effectively investigate and/or prosecute a sitting head of state?

Theoretically, the Court has jurisdiction over all nationals of a State Party, including sitting heads of state. However, the ICC has had difficulty successfully prosecuting a sitting president. Examples of unsuccessful prosecutions were made against Uhuru Kenyatta of Kenya and Laurent Gbabgo of the Ivory Coast. The Court indicted Omar Hassan Ahmad Al Bashir of Sudan on 4 March 2009, but he has not been delivered to The Hague.

What interest does the United States have in the situation in Venezuela?

The United States is interested in Venezuela for several reasons. Venezuela is the fifth largest crude oil supplier to the U.S and American foreign direct investment (FDI) is largely based in the petroleum sector. The Trump Administration has levied sanctions against numerous sectors of the Venezuelan economy, including targeted sanctions against members of the Maduro government. According to the Center for Strategic and International Studies (CSIS), the United States government should be concerned with the situation in Venezuela for the following reasons: Venezuela’s geographic location in reference to the US, American national security threats (Venezuela has had close ties with Iran and Hezbollah), regional influence, humanitarian concerns, and trade.

Does the current blockade of food and humanitarian assistance at the border with Cúcuta, Colombia qualify as a crime against humanity?

The Maduro administration has thus far refused to allow humanitarian aid, including food and medical supplies, to cross the border with Colombia for over two weeks. Questions have arisen as to whether the refusal of this humanitarian aid is itself a crime against humanity. The Rome Statute defines a crime against humanity as “a widespread or systemic attack directed against any civilian population with knowledge of the attack.” This barring of humanitarian aid would fall under Article 7 K of the Rome Statute, which includes, “other inhumane actors of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.” Therefore, the blockade at the Colombian border may qualify as a crime against

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12 Rome Statute, Article 7.
humanity if it can be demonstrated that this act was intended to cause great and widespread civilian suffering.