

THE INTERNATIONAL CRIMINAL COURT: INTERCONNECTION
BETWEEN INTERNATIONAL BODIES IN VENEZUELA

by
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In this Article, I focus on the current International Criminal Court case regarding Venezuela’s alleged violations of fundamental human rights and other criminal violations of international law. I begin by outlining the situation in Venezuela and the history that led to this state of affairs. I then review the non-judicial and quasi-judicial activities done in the Venezuelan situation by several international bodies and their inter-relation. Next, I address the ICC activities on the Venezuelan case, particularly its latest standards on timely justice and international cooperation. Following that, I give an overview of the institutional international framework focusing on how the interconnection between the disparate international corps could be effective in protecting human rights. Subsequently, I look into some doctrinal approaches to the legal relationship between international courts and national judiciaries, especially the inoperative ones. I conclude by examining the complementarity and subsidiarity principles working in international human rights and international criminal law, especially in the Venezuelan case.

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I. INTRODUCTION

For the first time in the history of the International Criminal Court (ICC), members of the Assembly of States Parties submitted, as a group, a referral concerning a situation taking place on the territory of another state party. The referring states were Argentina, Canada, Colombia, Chile, Paraguay, and Peru; the subject state party was Venezuela. Since 2006, the ICC prosecutor (OTP) has started three preliminary examinations in the Venezuelan case, including the referral, but has not proceeded to a full investigation.

As I describe in Part III, multiple international human rights bodies, judicial and non-judicial, have already weighed in on the Venezuelan situation. Some of these entities have engaged in investigations and judicial activity, appointed special experts, or announced sanctions. Since at least 2004, reports, investigations, and recommendations have been issued on numerous occasions. These international bodies manifested deep shock and alarm at the devastating humanitarian situation in Venezuela. They have found reasonable grounds for considering that the acts to which the civilian population of Venezuela were subjected, dating back to at least February 12, 2014, constitute crimes against humanity. According to their reports: hundreds of people have died and thousands arbitrarily detained; state agents have allegedly subjected people to cruel and inhuman treatment, including rape; others

have been unjustly tried on criminal charges in military courts.¹ These events have impacted the most vulnerable groups, including children, women, older persons, and indigenous and Afro-descendant persons and have exposed them to human trafficking, forced prostitution, and practices similar to slavery.

Some interconnected factors could divert the ICC and the OTP efforts from timely, fair, and realistic justice. These factors include excessive delay, reliance on the domestic judiciary, and the lack of a clear cooperative strategy with the other international organizations involved in the Venezuelan case. The ICC has at its disposal all of the information it needs to timely admit the case to a full investigation if the ICC would credit conclusions reached by other international bodies, including the Inter-American Commission on Human Rights (IACHR), the United Nations High Commissioner for Human Rights (OHCHR), the United Nations High Commissioner for Refugees (UNHCR), the European Foreign Affairs Council, and the European Parliament. Crediting these timely conclusions, at least on a prima facie basis, would be fully consistent with the ICC's governing statute and would be highly desirable from a policy standpoint.

A deep, sharing, cooperative process between the ICC and the other international bodies in the Venezuelan case would save time because of all the reports, investigations, and recommendations these bodies have already issued. As of 2018, the OTP had a total of nine cases under preliminary examination, from the prior phase to the OTP full investigation, including the Venezuelan case.² The OTP opened three cases for preliminary examination in the Philippines, Bangladesh and Myanmar, and Venezuela.³ The Ukrainian and Palestinian cases have remained under preliminary examination for more than four years,⁴ the Nigerian case for more than eight years,⁵ and the cases related to Colombia, Guinea, and the United Kingdom for more than 10 years.⁶ On April 12, 2019, the ICC Pre-Trial chamber II (ICC Chamber)—after 11 years in a preliminary examination—decided to reject the OTP request for authorization of an investigation into the situation in Afghanistan because “at this stage [an investigation] would not serve the interests of justice.”⁷ The

¹ Rep. Inter-Am. Comm'n H.R., *Democratic Institutions, the Rule of Law and Human Rights in Venezuela* (Dec. 31, 2017), <http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>.

² See generally Int'l Crim. Ct., *Report on Preliminary Examination Activities 2018*, LE BUREAU DU PROCUREUR (Dec. 5, 2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf>.

³ *Id.* at 9.

⁴ *Id.* at 19, 63.

⁵ *Id.* at 55.

⁶ *Id.* at 35, 45, 49.

⁷ Int'l Crim. Ct., Pre-Trial Chamber II, No. ICC-02/17, 32 (Apr. 12, 2019), <https://www.justsecurity.org/wp-content/uploads/2019/04/international-criminal-court-afghanistan.pdf> [hereinafter Decision Pursuant to Article 15 of the Rome Statute].

timely justice principle does not seem to be an accomplishment for the ICC and OTP.

Following Sara Dillon's claims,⁸ effectiveness should be the guide. The Venezuelan situation requires a compatible connection between international human rights law and criminal investigation and prosecutions. In the Venezuelan case, these multiple activities already have involved costly duplication of tasks. The work of these bodies and the task of the ICC, however, all involve a similar set of facts in the Venezuelan case.

This Article focuses on the current ICC case regarding Venezuela's alleged violations of fundamental human rights and other criminal violations of international law. I begin by outlining the situation in Venezuela and the history that led to the current state of affairs. Next, after reviewing the inter-relation of the non-judicial and quasi-judicial activities conducted by several international bodies in the Venezuelan situation, I address the ICC activities on the Venezuelan case, particularly in its latest standards on timely justice and international cooperation. Following that, I give an overview of the institutional international framework, focusing on how the connection between the disparate international corps could protect human rights. Subsequently, I look into doctrinal approaches to the legal relationship between international courts and national judiciaries, especially the inoperative ones. I conclude with the complementarity and subsidiarity principles working in international human rights and international criminal law, especially in the Venezuelan case.

Today's reality in Venezuela teaches us about the need for a harmonious international law system and how the existence of multiple international bodies and rules should converge within a common legal zone to confront human rights crises.

II. THE VENEZUELAN SITUATION

Venezuela is a former Spanish colony that became an independent republic in 1811. Throughout almost the entire nineteenth century, Venezuela suffered continuous armed conflict.⁹ At the beginning of the twentieth century, a military dictatorship began and it remained in power for almost three decades.¹⁰ An incipient democratic process started after the fall of the dictatorship, but it was interrupted by

⁸ Sara Dillon, *Yes, No, Maybe: Why No Clear "Right" of the Ultra-Vulnerable to Protection via Humanitarian Intervention?*, 20 MICH. ST. U. COLL. L. INT'L L. REV. 179, 201 (2012) ("Across time and space—Cambodia, Iraq, the Balkans, Rwanda, Sierra Leone, Uganda, Darfur, Congo and Kyrgyzstan—there is no dearth of examples tailor-made for demonstrating the ineffectiveness of international law and the fecklessness of the international community when it comes to preventing fear, suffering, and slaughter." (footnote omitted)).

⁹ See generally ELÍAS PINO ITURRIETA, PAÍS ARCHIPIÉLAGO: VENEZUELA 1830–1858, at 10 (2001).

¹⁰ See RAFAEL ARRÁIZ LUCCA, VENEZUELA: 1830 A NUESTROS DÍAS. BREVE HISTORIA POLÍTICA 120 (2009) (ebook).

another military dictatorship that lasted for 10 years until 1958.¹¹ In the early sixties, Venezuela became a democratic state—at least until 1999, when the so-called “Socialism of the Twenty-First Century” began a process to dismantle Venezuela democracy.¹²

Although Venezuelan representative democracy continued until 1999, it was a “political system of conciliation” that was already in crisis.¹³ Then, during the second term of the social democratic president Carlos Andrés Pérez, on February 27, 1989, a popular riot ensued and hundreds died.¹⁴ In 1992, Hugo Chávez, a middle-rank military official, failed at two attempts of coup d’état.¹⁵ In 1993, president Pérez was impeached and convicted in a controversial process.¹⁶ That same year, Rafael Caldera, a founder of the Social Christian political party, won his second presidential election, supported by a left-wing coalition. He subsequently pardoned Hugo Chávez.¹⁷

In 1998, Hugo Chávez won his first presidential election and eventually what he called “Socialism of the Twenty-First Century.”¹⁸ According to Ozan Varol: “Stealth authoritarianism refers to the use of legal mechanisms that exist in regimes with favorable democratic credentials for anti-democratic ends[,]” and “creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law.”¹⁹ Chávez presided over such a “stealth authoritarian” government.

Chávez immediately began to adopt a number of mechanisms associated with stealth authoritarianism. In a manner inconsistent with the existing constitutional and democratic principles, he organized the Constituent Assembly with supra-constitutional powers to promulgate a new Venezuelan constitution, which became the

¹¹ See *id.* at 139, 147.

¹² See ALLAN R. BREWER-CARÍAS, *DISMANTLING DEMOCRACY IN VENEZUELA* 65 (2010).

¹³ Juan Carlos Rey, *La Democracia Venezolana y la crisis del sistema populista de conciliación [Venezuelan Democracy and the Crisis of the Populist Conciliation System]*, 74 *REVISTA DE ESTUDIOS POLITICOS* 533, 543 (1991), <http://www.cepc.gob.es/publicaciones/revistas/revistaselectronicas?IDR=3&IDN=ALL> (translated by author).

¹⁴ ARRÁIZ LUCCA, *supra* note 10, at 192–93.

¹⁵ *Id.* at 195–97.

¹⁶ *Id.* at 197.

¹⁷ *Id.* at 199, 201–03.

¹⁸ Juan Forero, *Chávez Restyles Venezuela with “21st-Century Socialism,”* N.Y. TIMES (Oct. 30, 2005), <https://www.nytimes.com/2005/10/30/world/americas/chavez-restyles-venezuela-with-21stcentury-socialism.html>; see also Tim Johnson, *This Is the Day Venezuela Changed. Twenty Years Ago, Hugo Chávez Was Elected President*, MIAMI HERALD (Dec. 6, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/venezuela/article222712665.html>.

¹⁹ Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1684–85 (2015).

“Constitution of 1999.” This supra-constitutional power served to undermine and control all the branches of state powers.²⁰

The Chávez supporters were able to approve unilaterally the electoral rules for the election of the Constituent Assembly. This assembly granted the separation of powers doctrine in the Constitution of 1999 but at the same time imposed absolute control over the branches of state powers.²¹ The Constituent Assembly dissolved the National Assembly (Venezuela’s parliamentary body) and the states’ legislatures.²² The Constituent Assembly also appointed new Supreme Court justices, national ombudsmen, attorneys general, and electoral authorities.²³ The government neutralized independent media by directly or indirectly censoring their anti-government editorial lines.²⁴ It disabled prominent leaders by denying them the right to be elected, severely repressed anti-government protests, violated the human rights of those who dared to disagree, and deployed an effective anti-competition tool—an electoral system tailored to their purposes.²⁵

In 2007, Chávez wanted to replace the Constitution of 1999²⁶ and, according to Brewer, to establish a police and militarist socialist state.²⁷ With this new constitutional project, Chávez also wanted indefinite reelection and an extension of the presidential term from six to seven years.²⁸ He initiated a popular referendum to accomplish this goal but lost. Nonetheless, Chávez won three successive presidential elections and survived a recall referendum against him.²⁹

²⁰ Humberto Briceño León, *Génesis del Autoritarismo del siglo XXI en Venezuela*, No 119 ESTUDIOS SOBRE LA ASAMBLEA NACIONAL CONSTITUYENTE Y SU INCONSTITUCIONAL CONVOCATORIA EN 2017, 113, 115 (2017), <http://allanbrewercarias.net/site/wp-content/uploads/2017/08/estudios-sobre-la-asamblea-nacional-constituyente-2017-con-portada.pdf>.

²¹ *Constitución de la República Bolivariana de Venezuela*, GACETA OFICIAL DE LA REPUBLICA DE VENEZUELA, No 36.860, Dec. 30, 1999, at 312.179.

²² BREWER-CARIAS, *supra* note 12, at 21.

²³ David Landau, *Constitution-Making Gone Wrong*, 64 ALA. L. REV. 923, 948 (2013).

²⁴ Richard Gonzales, *Venezuela Constituent Assembly Cracks Down on Media*, NAT’L PUB. RADIO: INT’L (Nov. 8, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/08/562954354/venezuela-constituent-assembly-cracks-down-on-media>.

²⁵ Briceño León, *supra* note 20, at 125–26.

²⁶ BIBLIOTECA CONSTRUCCIÓN DEL SOCIALISMO, AHORA LA BATALLA ES POR EL SÍ (2001), <http://www.rebellion.org/docs/55390.pdf>.

²⁷ Allan R. Brewer-Carias, *La reforma constitucional en Venezuela de 2007 y su rechazo por el poder constituyente originario*, INSTITUTO DE INVESTIGACIONES JURÍDICAS DE LA UNAM 407, 413, <https://archivos.juridicas.unam.mx/www/bjv/libros/6/2728/14.pdf>.

²⁸ *Id.* at 433.

²⁹ Daniel Hellinger, *When “No” Means “Yes to Revolution”: Electoral Politics in Bolivarian Venezuela*, 32 LATIN AM. PERSP. 8, 8 (2005).

After Chávez died in 2013, Nicolás Maduro, his handpicked successor, won the election held in April 2013 to serve out the remainder of Chávez's term.³⁰ Maduro's government has become an unmasked, standard authoritarian government.³¹

In 2015, an election took place to choose representatives for the National Assembly.³² The opposition won three-fourths of the seats.³³ Then, in September 2016 the Constitutional Chamber of the Supreme Tribunal of Justice, controlled by the Maduro government, eliminated that legitimate National Assembly elected by the people by declaring void anything it enacted.³⁴ In March 2017, that same tribunal assumed all authority of the former National Assembly.³⁵

Ostensibly to replace the Constitution of 1999, President Maduro convened a new Constituent Assembly on May 1, 2017.³⁶ Maduro was seeking legitimacy because he had widely lost the election for the National Assembly in 2015.³⁷ Maduro issued a decree declaring the assembly to be "an original constituent power" and asserting it to be the "supreme voice" of the people.³⁸ Maduro imposed the supremacy of that power with the absence of limits, excluding the Constitution of 1999 as a limit and concentrating all powers in the Constituent Assembly. Elections were held for the new Constituent Assembly and supporters of the Maduro government

³⁰ William Neuman, *Even in Death, Chávez Is a Powerful Presence*, N.Y. TIMES (Apr. 8, 2013), <https://www.nytimes.com/2013/04/09/world/americas/even-in-death-chavez-dominates-venezuelas-presidential-race.html>.

³¹ Varol, *supra* note 19, at 1677–78.

³² *Venezuela Election: Opposition Coalition Secures "Supermajority,"* GUARDIAN (Dec. 8, 2015), <https://www.theguardian.com/world/2015/dec/09/venezuela-election-opposition-coalition-secures-supermajority>.

³³ *Id.*

³⁴ *Venezuela Supreme Court Says National Assembly Is Void*, BBC NEWS (Jan. 11, 2016), <https://www.bbc.com/news/world-latin-america-35287291>.

³⁵ Tribunal Supremo de Justicia, Sala Constitucional, No: 156, Exp. 17-0325 VI, 4.4 (Mar. 29, 2017) (Venez.). ("It is noted that as long as the situation of contempt and invalidity of the National Assembly actions persists, this Constitutional Chamber will ensure that parliamentary powers are exercised directly by this Chamber or by the body that it has, to ensure the rule of law.") (author translation).

³⁶ Humberto Briceño León, *Asamblea Nacional Constituyente 2017 vs. Constituyente Progresiva en Venezuela*, N° 119, in ESTUDIOS SOBRE LA ASAMBLEA CONSTITUYENTE 371 (2017), <http://allanbrewercarias.net/site/wp-content/uploads/2017/08/ESTUDIOS-SOBRE-LA-ASAMBLEA-NACIONAL-CONSTITUYENTE-2017-CON-PORTADA.pdf>; *see also* Humberto Briceño León, *Despotismo Constituyente. Venezuela 2017*, at 12 (2018), <http://www.fundacionalbertoandriani.com.ve/documentos/despotismo%20contituyente.pdf>.

³⁷ William Neuman, *Venezuelan Opposition Claims a Rare Victory: A Legislative Majority*, N.Y. TIMES (Dec. 6, 2015), <https://www.nytimes.com/2015/12/07/world/americas/venezuela-elections.html>.

³⁸ *Presidente de la Republica, Decreto*, GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, N° 6.295, May 1, 2016, at 1 [hereinafter *Decreto*].

won all the seats.³⁹ The opposition did not participate in this election because the president himself dictated the electoral rules.⁴⁰ Peña Solís has done an exhaustive study about these electoral rules, concluding that they established an electoral system gerrymandered to ensure victories by government supporters.⁴¹

The 2017 Constituent Assembly has dictated despotic and authoritarian decisions. For example, it removed the attorney general of the republic and replaced her.⁴² In addition, it established as a constitutional entity the “Commission for Truth, Justice, Peace and Public Tranquility” that investigates members of opposition parties for alleged lapses of moral and political responsibility.⁴³ As a third example and more importantly, it decreed norms to dictate measures on the competencies, operation, and organization of the constitutional branches of power, subordinating and forcing them to fulfill the mandates of the Maduro supporters.⁴⁴

Maduro was reelected on May 20, 2018, in a process denounced by, among other entities, the Organization of American States,⁴⁵ the Council of Europe,⁴⁶ the United States,⁴⁷ and the Lima Group.⁴⁸ On January 15, 2019, the National Assembly declared that Maduro illegitimately took over the presidency of Venezuela.⁴⁹ As

³⁹ *What Has Venezuela’s Constituent Assembly Achieved?*, BBC NEWS (Aug. 30, 2017), <https://www.bbc.com/news/world-latin-america-41094889>.

⁴⁰ *Decreto*, *supra* note 38, at 4.

⁴¹ José Peña Solís, *Observaciones Preliminares Sobre la Inconstitucionalidad del Decreto Presidencial n° 2878, de 23-5-2017, Contentivo de las Bases Comiciales de la Asamblea Nacional Constituyente “Convocada” por Nicolás Maduro*, in ESTUDIOS SOBRE LA ASAMBLEA NACIONAL CONSTITUYENTE 439, 446 (2017), <http://allanbrewercarias.net/site/wp-content/uploads/2017/08/estudios-sobre-la-asamblea-nacional-constituyente-2017-con-portada.pdf>.

⁴² *Asamblea Nacional Constituyente: Decreto constituyente de remoción de la ciudadana Luisa Marvelia Ortega Diaz como Fiscal General de la República*, GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA N° 6.322, Aug. 5, 2017, at 1.

⁴³ *Asamblea Nacional Constituyente, Ley Constitucional de la Comisión para la Verdad, la Justicia, la Paz y la Tranquilidad Pública*, GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, N° 6.323, Aug. 8, 2017, at 4.

⁴⁴ *Id.* at 25.

⁴⁵ Organization of American States Press Release S-032/18, Resolution on the Situation in Venezuela (June 5, 2018), http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-032/18.

⁴⁶ Resolution of 3 May 2018 on the Elections in Venezuela, EUR. PARL. DOC. 2695 (RSP) (2018), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0199&language=EN>.

⁴⁷ Press Statement from U.S. Sec’y of State Mike Pompeo, *An Unfair, Unfree Vote in Venezuela* (May 21, 2018), <https://www.state.gov/an-unfair-unfree-vote-in-venezuela/>.

⁴⁸ Lima Group, *Declaración del Grupo de Lima*, MINISTERIO DE RELACIONES EXTERIORES DEL PERU (May 21, 2018), <https://www.gob.pe/institucion/rree/noticias/19021-declaracion-del-grupo-de-lima>.

⁴⁹ Asamblea Nacional (@AsambleaVE), TWITTER (Jan. 15, 2019, 4:04 PM), <https://twitter.com/asambleave/status/1085327824515416065?lang=en>.

a result, on January 23, 2019, the President of the National Assembly, Juan Guaidó, formally assumed the functions of interim president. The European Parliament, together with more than 55 countries, has recently recognized Juan Guaidó as legitimate interim president of Venezuela.⁵⁰ Nevertheless, as of this writing, Maduro in fact continues to exercise the presidency. To summarize the situation, the “Socialism of the Twenty-First Century” has controlled Venezuela’s electoral system for almost 20 years.⁵¹ In addition to the problems of governance, according to several reports, severe and serious violations of human rights have occurred, especially since 2014.⁵²

III. ACTIVITIES FROM INTERNATIONAL BODIES IN THE VENEZUELAN CASE

Through their agencies, three nonjudicial international entities have weighed in on the situation in Venezuela: the United Nations, the Organization of American States, and the European Union. These entities have found serious, systematic, and widespread human rights violations and extensive international crimes. The reports refer to the facts involved, the victims, the perpetrators, dates and concrete institutions—in a nutshell: evidence. In fact, these reports have categorized some actions of the Venezuelan government as crimes and they have ordered or recommended criminal prosecutions.

A. *United Nations*

In June 2018, OHCHR issued a 54-page report titled *Human Rights Violations in the Bolivarian Republic of Venezuela: a Downward Spiral With No End in Sight*.⁵³ This 2018 document updates a prior report on human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela between April 1 and July 31, 2017.⁵⁴ According to the report, from January 2014 to April 2018, 12,320 political opponents were arbitrarily detained and over 90 persons were subjected to cruel and inhuman treatment.⁵⁵ Finally, the 2018 report also documented

⁵⁰ Press Release, Eur. Parl., Venezuela: Parliament Recognises Guaidó, Urges EU to Follow Suit (Jan. 31, 2019), http://www.europarl.europa.eu/pdfs/news/expert/2019/1/press_release/20190125IPR24303/20190125IPR24303_en.pdf.

⁵¹ See Javier Corrales, Electoral Irregularities: A Typology Based on Venezuela Under Chavismo (Feb. 6, 2018) (on file with Amherst College).

⁵² See *infra* Part III.

⁵³ Off. of the U.N. High Comm’r H.R., *Human Rights Violations in the Bolivarian Republic of Venezuela: A Downward Spiral with No End in Sight* (June 2018) [hereinafter *Human Rights Violations*].

⁵⁴ *Id.* at ii.

⁵⁵ *Id.* at iii.

violations committed since 2014 involving the use of excessive force, arbitrary detentions, torture, and extrajudicial killings.⁵⁶

The information gathered by OHCHR indicates that human rights violations committed during demonstrations form part of a wider pattern of repression against political dissidents and anyone perceived as opposed or posing a threat to the government.⁵⁷ Extreme poverty increased from 23.6% in 2014 to 61.2% in 2017, with one factor being the ongoing migration crisis in Venezuela.⁵⁸

The OHCHR ended the report with two recommendations to the member states of the Human Rights Council and with 30 recommendations to the Venezuelan authorities.⁵⁹ Tellingly, the OHCHR's 2018 document agreed with the conclusion of the Organization of American States that "there are reasonable grounds . . . for considering that acts to which the civilian population of Venezuela was subjected to dating back to at least February 12, 2014, constitute crimes against humanity."⁶⁰

Subsequent to the 2018 report, on September 5, 2018, the United Nations Special Rapporteur on the human rights of migrants called "for stronger regional cooperation and increased international support to guarantee Venezuelan migrants' rights."⁶¹

On August 13, 2018, the Human Rights Council issued a Secretary General's report titled "Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights." The report, which covered 29 countries including Venezuela, "highlights recent developments within the United Nations system and beyond to address intimidation and reprisals against those seeking to cooperate or having cooperated with the United Nations, its representatives and mechanisms in the field of human rights."⁶² It indicates that governments have a

⁵⁶ *Id.* at ii.

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ *Id.* at 52–54.

⁶⁰ *Id.* at 7 n.38 (citing *Rep. of the General Secretariat of the Org. of American States and the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela*, ORG. AM. STS. (May 29, 2018), <http://www.oas.org/documents/eng/press/Informe-Panels-Independiente-Venezuela-EN.pdf>).

⁶¹ Press Release, U.N. High Comm'r H.R., UN Expert Calls for Stronger Regional Cooperation and Increased International Support to Guarantee Venezuelan Migrants' Rights (Sept. 5, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23516>.

⁶² U.N. Secretary-General, *Cooperation with the United Nations, its Representatives and Mechanisms in the Field of Human Rights*, 1, U.N. Doc. A/HRC/39/41 (Aug. 13, 2018). The report went on: "According to information received, representatives of the Government of Venezuela allegedly threatened and harassed civil society representatives serving as panellists [sic] at a side event during the thirty-fifth session of the Human Rights on 6 June 2017." *Id.* ¶ 76.

tendency to apply laws selectively to restrict and hinder organizations that are likely to cooperate with the United Nations.⁶³

On September 19, 2018, the UNHCR, the UN Refugee Agency and the UN Migration Agency (IOM) announced the appointment of a joint special representative for Venezuelan refugees and migrants in the region.⁶⁴ The special representative works for both agencies to promote dialogue and consensus in the humanitarian response to the migration crisis.⁶⁵

Finally, as of this writing, the UN High Commissioner for Human Rights, OHCHR, and former Chilean President Michelle Bachelet, visited Venezuela from June 19 to 21, 2019.⁶⁶ On July 5, 2019, the OHCHR issued a new report on human rights in Venezuela.⁶⁷ This report confirms violations of the right to an adequate standard of living related to the collapse of public services, such as access to public transportation, electricity, water, and natural gas; discrimination based on political grounds; and excessive use of force in demonstrations since at least 2014.⁶⁸ The report also denounced “torture or cruel, inhumane 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.”⁶⁹ According to the OHCHR, “at least 15,045 persons were detained for political motives between January 2014 and May 2019,” and “[t]housands of people, mainly young men, have been killed in alleged confrontations with state forces during the past years. There are reasonable grounds to believe that many of these killings constitute extrajudicial executions committed by the security forces.”⁷⁰

⁶³ *Id.* ¶ 82.

⁶⁴ Press Release, Joint Statement by UNHCR and IOM on the Appointment of Mr. Eduardo Stein, as a Joint Special Representative for Venezuelan Refugees and Migrants in the Region (Sept. 19, 2018), <http://www.unhcr.org/news/press/2018/9/5ba262454/joint-statement-unhcr-iom-appointment-mr-eduardo-stein-joint-special-representative.html>.

⁶⁵ *Id.*

⁶⁶ Press Release, U.N. Off. High Comm’r H.R., UN Human Rights Chief to Visit Venezuela from 19-21 June (June 14, 2019), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24700&LangID=E>.

⁶⁷ *Human Rights in the Bolivarian Republic of Venezuela*, Hum. Rts. Council, U.N. Doc. A/HRC/41/18, at 1 (2019).

⁶⁸ *Id.* at 3–7.

⁶⁹ *Id.* at 9.

⁷⁰ Rep. on the Situation of Human Rights in the Bolivian Republic of Venezuela, U.N. Off. High Comm’r H.R. on Its Forty-Third Session, U.N. Doc. A/HRC/41/18 (2019), https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session41/Documents/A_HRC_41_18.docx [hereinafter *Situation of Human Rights*].

B. *Organization of American States*

On December 13, 2017, the IACHR, an agency that is part of the Organization of American States, issued a 259-page report titled *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, which fully documents the ongoing Venezuelan crises and presents 76 recommendations.⁷¹ The recommendations cover issues concerning democratic institutions, freedom of expression, poverty, violence, citizen security, sexual violence during arrests, access to justice and due process, torture, arbitrary detentions and the criminalization of social protests and demonstrations. The report concludes:

The Commission can only reiterate its strongest possible repudiation of the outcome of the State's reaction: hundreds of people dead; thousands arbitrarily detained; allegations of torture and cruel, inhuman, and degrading treatment by state agents; people raped, and others unjustly tried on criminal charges in military courts. The IACHR appeals for these acts not to remain in impunity but to allow those who suffered them to obtain justice.⁷²

In March 2018, the IACHR issued its Resolution 2/18 entitled *Forced Migration of Venezuelans*.⁷³ The resolution documents a large number of Venezuelans that have been forced to flee the country as a result of human rights violations, violence, insecurity, political persecution, and scarcity of food and medicines.⁷⁴ These factors have impacted the most vulnerable groups including children, women, older persons, and indigenous and Afro-descendant persons, exposing them to human trafficking, forced prostitution, and practices similar to slavery.⁷⁵ The resolution quotes the commission's prior report, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, which highlights the political, economic, and social crises and the massive violations of human rights in Venezuela.⁷⁶

May 29, 2018 saw the issuance of the 473-page *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*.⁷⁷ The report explicitly declares:

⁷¹ See Rep. Inter-Am. Comm'n H.R., *supra* note 1, at 247–58.

⁷² *Id.* ¶ 474.

⁷³ Forced Migration of Venezuelans Res. 2/18 (Mar. 2, 2018), <https://www.oas.org/en/iachr/decisions/pdf/Resolution-2-18-en.pdf>.

⁷⁴ *Id.* at 1.

⁷⁵ *Id.* at 1–2.

⁷⁶ *Id.* at 1.

⁷⁷ Luis Almagro (Secretary General of the Organization of American States), *Rep. of the General Secretariat of the Org. of American States and the Panel of Independent International Experts on the Possible Commission of Crimes Against Humanity in Venezuela* (May 29, 2018), <http://www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf>.

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.⁷⁸

C. Joint Statement by United Nations Agencies and the Inter-American Commission on Human Rights

In September 2018, IACHR, committees, and organs of the United Nations issued a joint statement proposing the development of a regional response to the massive arrival of Venezuelans to the Americas.⁷⁹ According to this joint statement, 2.3 million Venezuelans had left the country by 2018.⁸⁰ Referring to several other reports and statements from their agencies, this joint statement recommends 17 measures to protect Venezuelan migrants.⁸¹

D. The European Union

On November 13, 2017, the European Foreign Affairs Council “adopted conclusions on Venezuela[] and agreed on targeted sanctions in view of its concerns about the situation in the country” and warned that the “measures will be used in a gradual and flexible manner and can be expanded by targeting those involved in the non-respect of democratic principles or the rule of law and the violation of human rights.”⁸² The document cites the OHCHR report on human rights and recalls the European Union Council conclusions of July 2016 and May 2017.⁸³ Based on the reported violations of human rights in Venezuela, among others grounds, the European Union Council adopted restrictive measures: an embargo on arms that the

⁷⁸ *Id.* at 319.

⁷⁹ Press Release, Inter-Am. Comm’n H.R., Joint Statement for the Development of a Regional Response to the Massive Arrival of Venezuela to the Americas of the Inter-American Commission on Human Rights, and Committees, Organs and Special Procedures of the United Nations (Sept. 5, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/197.asp.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Council of the European Union Press Release 643/17, Venezuela: EU Adopts Conclusions and Targeted Sanctions ¶ 5 (Nov. 13, 2017), https://eeas.europa.eu/sites/eeas/files/council_conclusions_on_venezuela.pdf.

⁸³ Council Decision (CFSP) 2017/2074 of 13 November 2017, Concerning Restrictive Measures in View of the Situation in Venezuela, 2017 O.J. (L 295) 60 (EC).

Venezuelan government might use for internal repression and a freeze on Venezuelan governmental assets.⁸⁴ According to its conclusions, “[t]he measures can be reversed depending on the evolution of the situation in the country.”⁸⁵

On July 4, 2018, the European Parliament adopted a resolution on the migration crisis and humanitarian situation both within Venezuela and at its terrestrial borders with Colombia and Brazil.⁸⁶ In the resolution, the European Parliament states that it:

[i]s deeply shocked and alarmed by the devastating humanitarian situation in Venezuela, which has resulted in many deaths and an unprecedented influx of refugees and migrants to neighboring countries and beyond; [and] expresses its solidarity with all Venezuelans forced to flee their country because of the lack of very basic living conditions, such as access to food, drinking water, health services, and medicines[.]⁸⁷

This European Parliament resolution considers almost all of the reports, conclusions, statements, and declarations issued from experts, reporters, and international bodies, especially those that are part of the United Nations and the Organization of American States.

For my purpose in discussing institutional relations between the international court and other international bodies involved in the Venezuelan case, it is important to point out that in its resolution the European Parliament makes express reference to the ICC by referring to the Rome Statute, the treaty that established the ICC.⁸⁸ In addition, the European Parliament notes the February 2018 statement of the OTP affirming that she will continue the preliminary examinations from the referral submitted by the group of state parties concerning the situation in Venezuela.⁸⁹

E. Additional Government Concerns and Sanctions

A number of countries, acting as international players, have expressed concerns about human rights violations and international crimes in Venezuela; some have even imposed sanctions on key Venezuelan individuals. The “Lima Group” is a body consisting of 14 countries from the Americas: Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay,

⁸⁴ *Id.*

⁸⁵ Council of the European Union Press Release, *supra* note 82.

⁸⁶ Joint Motion for a Resolution, European Parliament Resolution on the Migration Crisis and Humanitarian Situation in Venezuela and at Its Terrestrial Borders with Columbia and Brazil, EUR. PARL. DOC. 2770 (RSP) (July 4, 2018), http://www.europarl.europa.eu/doceo/document/RC-8-2018-0315_EN.pdf.

⁸⁷ *Id.* at 6.

⁸⁸ *Id.* at 3.

⁸⁹ *Id.*

Peru and Santa Lucia.⁹⁰ These countries joined together to find ways to address the situation in Venezuela. In addition, the European Union,⁹¹ the United States of America,⁹² Panama,⁹³ and Switzerland,⁹⁴ among other countries, have imposed sanctions against several Venezuelan officials and prominent figures, including travel bans and asset freezes. Albania, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Macedonia, Montenegro, Norway, the Republic of Moldova and Ukraine have aligned with the European Union's position on Venezuela.⁹⁵

IV. THE VENEZUELAN CASE BEFORE THE ICC AND ITS LATEST STANDARDS ON TIMELY JUSTICE AND INTERNATIONAL COOPERATION

The OTP should formally submit a report to the ICC Pre-Trial Chamber regarding whether the case is admissible based on its gravity and whether the Venezuelan state is unwilling or unable to genuinely carry out the investigation and prosecution. The gravity is demonstrated by the reports “beyond any reasonable doubt” in connection with the “unwillingness and unavailability” of the domestic judicial system to prosecute the case—an issue I explore next.

On September 27, 2018,⁹⁶ the OTP received a referral letter from Argentina, Canada, Colombia, Chile, Paraguay, and Peru regarding the situation that had been ongoing in Venezuela since February 12, 2014.⁹⁷ In the history of the ICC, this was

⁹⁰ Lima Group, *supra* note 48.

⁹¹ Council Decision, *supra* note 83, at art. 1.

⁹² *Venezuelan Related Sanctions*, U.S. DEP'T TREASURY, <https://www.treasury.gov/resource-center/sanctions/programs/pages/venezuela.aspx> (last visited Sept. 9, 2019).

⁹³ *Por la cual se dispone la publicación de la lista de personas expuestas políticamente de la República Bolivariana de Venezuela*, GACETA OFICIAL (Panama), at 6 (Mar. 28, 2018), https://www.gacetaoficial.gob.pa/pdfTemp/28493_A/GacetaNo_28493a_20180328.pdf.

⁹⁴ Press Release, Switz. Fed. Council, Sanctions Against Venez. (Mar. 20, 2018), <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-70265.html>.

⁹⁵ Press Release, European Council, Declaration by the High Representative on Behalf of the EU on the Alignment of Certain Third Countries Concerning Restrictive Measures in View of the Situation in Venez. (Jan. 22, 2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/02/14/declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-alignment-of-certain-third-countries-concerning-restrictive-measures-in-view-of-the-situation-in-venezuela/>.

⁹⁶ *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Referral by a Group of Six States Parties Regarding the Situation in Venezuela*, INT'L CRIMINAL CT. (Sept. 27, 2018), <https://www.icc-cpi.int/Pages/item.aspx?name=180927-otp-stat-venezuela> [hereinafter *Fatou Bensouda*].

⁹⁷ Referral Letter from the Gov'ts of Arg., Can., Chile, Colom., Para., and Peru, to the Int'l. Criminal Court Office of the Prosecutor (Sept. 26, 2018), https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf.

the first referral submitted by a group of state parties concerning a situation in the territory of another state party.⁹⁸ On September 28, 2018, the president of the ICC assigned the Venezuelan situation to Pre-Trial Chamber I.⁹⁹ The referral points to the conclusions of a number of other international bodies as “relevant circumstances,”¹⁰⁰ including an IACHR report from December 31, 2017, 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* from May 29, 2018, that recommended referral to OTP, and a June 2018 report from OHCHR entitled *Human Rights Violations in the Bolivarian Republic of Venezuela: a Downward Spiral with No End in Sight*.¹⁰¹

The 2018 six-country referral was not the first time the ICC was apprised of problems in Venezuela. On February 9, 2006, Luis Moreno-Ocampo, the former OTP of the ICC, decided not to open an investigation into Venezuela because a considerable number of the events alleged had taken place prior to the consent of the court’s temporal jurisdiction.¹⁰² Although the crimes against humanity allegedly committed against political opponents fell within the jurisdiction of the court, the former OTP felt the allegations did not satisfy the elements for prosecution for a number of reasons: lack of precision, internal and external inconsistencies, an absence of vital data such as the dates and location of incidents, and lists that duplicated the names of alleged murder victims.¹⁰³ The former OTP concluded: “the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied.”¹⁰⁴ In the following years, the situation has become worse and worse, as international reports show.

A few months before the referral on February 8, 2018, Fatou Bensouda, the current OTP, opened a preliminary examination on the situation in Venezuela to analyze crimes allegedly committed since at least April 2017 in the context of the protests and public demonstrations against the current Venezuelan political regime.¹⁰⁵ Bensouda’s examination process was added to the examination that opened as a result of the six-country referral.¹⁰⁶ On December 5, 2018, the OTP issued a new report informing: “The Office will also keep in touch with a variety of reliable

⁹⁸ *Fatou Bensouda, supra* note 96.

⁹⁹ *Preliminary Examination: Venezuela*, INT’L CRIM. CT., <https://www.icc-cpi.int/venezuela> (last visited Feb. 5, 2020).

¹⁰⁰ Referral Letter, *supra* note 97.

¹⁰¹ *Id.*

¹⁰² Letter from Luis Moreno-Ocampo, Chief Prosecutor of the Int’l. Criminal Court (Feb. 9, 2006), <https://www.legal-tools.org/doc/c90d25/pdf/>.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Fatou Bensouda, supra* note 96.

¹⁰⁶ *Id.*

sources and parties interested in all matters relevant to the preliminary examination of the situation in Venezuela, such as the government of Venezuela, the sending states, international organizations, and civil society.”¹⁰⁷

The ICC procedural system can be triggered by a state or Security Council referral or by a *proprio motu* decision from the OTP to open a preliminary examination. In the Afghanistan case, the ICC distinguished these methods as follows:

If the jurisdiction is triggered by State or Security Council referrals, the Prosecution, after having analysed the information, can start investigations at any time, unless it determines that there is no reasonable basis to proceed under article 53 (1). Conversely, if the Prosecution intends to open an investigation in the absence of a referral and on its own initiative, in the context of one of the “situations” it has been observing, it must seek prior authorisation of the Pre-Trial Chamber. The mechanism is designed to set boundaries to and restrain the discretion of the Prosecution acting *proprio motu*, in order to avoid manifestly ungrounded investigations due to lack of adequate factual or legal fundaments.¹⁰⁸

In a case by referral, the OTP can proceed to a full investigation without the pre-trial chamber authorization, but if the OTP wants to proceed forward from *proprio motu* examination to a full investigation, there must be pre-trial chamber authorization. The current Venezuelan case was opened *proprio motu* at first, but the six-state referral came a few months later; the result is that the OTP was allowed to proceed with a full investigation without chamber authorization.

In the Afghanistan case, the OTP initiated, *proprio motu*, a preliminary examination in 2006.¹⁰⁹ This was 11 years after the OTP requested authorization to investigate alleged war crimes in an armed conflict not of international nature, allegedly committed in the territory of Afghanistan since 2003. However, after January 2017, President Trump’s administration canceled U.S. visas to the ICC staff, on the grounds that the ICC court’s judicial activities were politically motivated.¹¹⁰ On April 12, 2019, the ICC Pre-Trial Chamber II rejected the OTP request to proceed to a full investigation on the Afghanistan case on the grounds that it would not serve the interests of justice.¹¹¹ Nevertheless, in the same decision, the ICC Chamber II found the case within its jurisdiction based on *ratione materiae* because there was

¹⁰⁷ *Informe Sobre las Actividades de Examen Preliminar* [Report on Preliminary Exam Activities], INT’L CRIM. CT. OFF. PROSECUTOR (Dec. 5, 2018), <https://www.icc-cpi.int/itemsDocuments/2018-otp-rep-PE-Venezuela.pdf> [translation by author].

¹⁰⁸ Int’l Crim. Ct., Pre-Trial Chamber II, No. ICC-02/17, ¶ 32 (Apr. 12, 2019), <https://www.justsecurity.org/wp-content/uploads/2019/04/international-criminal-court-afghanistan.pdf>.

¹⁰⁹ *Id.* ¶ 44.

¹¹⁰ Press Release, Michael R. Pompeo, U.S. Sec’y of State, Remarks to the Press (Mar. 15, 2019), <https://www.state.gov/remarks-to-the-press-6/>.

¹¹¹ Int’l Crim. Ct., Pre-Trial Chamber II, No. ICC-02/17, ¶ 32.

reasonable basis to believe that the incidents underlying the request had occurred; *ratione loci* because the alleged crimes were taking place within the territory of Afghanistan and *ratione temporis* because the alleged incidents occurred within the temporal jurisdiction of the court.¹¹² At the same time, the ICC Chamber II held the case admissible: “The Chamber, conclusively, finds that at this stage that the potential cases arising from the incidents presented by Prosecutor appear to be admissible,”¹¹³ and “[c]onclusively . . . finds that the gravity threshold under article 17(1)(d) is met in respect of all the ‘categories’ of crimes for which the Prosecution requests authorisation to investigate.”¹¹⁴

The ICC Chamber II found the Afghanistan case admissible because of the lack of cooperation from national authorities; in other words, the Chamber II found that the proceeding conducted internally by some of the states involved was limited or did not show that a criminal investigation or prosecutions had been conducted.¹¹⁵ But at the same time the ICC Chamber II rejected the case because it doubted that it could get enough cooperation from relevant authorities to proceed effectively.¹¹⁶ On June 7, 2019, the OTP submitted a “Request for Leave to Appeal” the ICC Chamber II decision on the Afghanistan case.¹¹⁷ Among other grounds for the appeal, the OTP argued the need for expeditious justice:

In circumstances in which the Pre-Trial Chamber has already noted with concern the time that has elapsed since some of the earliest substantiated criminal allegations in this situation, the negative implications of the Decision for expeditiously advancing these proceedings—by concluding the preliminary examination, and opening an investigation of these allegations—are manifest and unavoidable.¹¹⁸

Nevertheless, the OTP did not justify why it took 11 years to request authorization to investigate the alleged war crimes.

The ICC’s approach in the Afghanistan case is problematic because it seems to contradict the ICC’s purpose and some of the principles outlined in this Article. First, the lack of national cooperation is an obstacle to opening a full investigation. However, the ICC is supposed to come into play when there is a lack of genuine

¹¹² *Id.* ¶ 45.

¹¹³ *Id.* ¶ 79.

¹¹⁴ *Id.* ¶ 86.

¹¹⁵ *Id.* ¶ 74.

¹¹⁶ *Id.* ¶ 44.

¹¹⁷ Request for Leave to Appeal the “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan,” No. ICC-02/17-34 (June 7, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_03060.PDF.

¹¹⁸ *Id.*

judicial cooperation in the state at issue.¹¹⁹ The second troubling aspect of the Afghanistan approach is that the ICC Chamber set up as particularly relevant the significant time that elapsed between the alleged crimes and the OTP's request.¹²⁰ This approach to elapsed time could be compared in some ways with a statute of limitations. This concept, however, contradicts the Rome Statute's purpose as established in Article 29: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations."¹²¹

These two problematic aspects with the dictum in the ICC's approach to Afghanistan could present problems for resolving the Venezuelan situation. First, the Venezuelan case began in 2006 and so could be thwarted by the temporal concerns expressed by the court. Second, it is highly probable that Venezuela's government will not cooperate with international justice efforts. The existence of numerous reports containing facts about the Venezuelan conditions might not be sufficient. The OTP mainly relies on similar authoritative reports from the United Nations Assistance Mission in Afghanistan (UNAMA) and the Afghan Independent Human Rights Commission (AIHRC).¹²²

In the Venezuelan case the interests of justice would be better served if the OTP and the ICC gave timely legal weight and probative value to the reports issued by several international bodies. I propose that the OTP seek timely assistance from international entities in collecting new evidence for the preliminary examination in the Venezuelan case. In addition, relying on already existing reports would prevent the ICC from spending scarce resources on investigation, a concern that also influenced its approach in the Afghanistan case.¹²³

V. INTERNATIONAL FRAMEWORK, DOMESTIC JUDICIARY, AND THE LEGAL INTERSECTIONALITY ZONE IN THE VENEZUELAN CASE

This Part reviews the international bodies' general framework and the role that some doctrines give to those bodies' interconnection in the international justice system. Subsequently, I look into approaches to the interconnection between international courts and a state's national judiciary, including a Venezuelan constitutional

¹¹⁹ See *infra* Part VI.A for a discussion on the principle of complementarity.

¹²⁰ Int'l Crim. Ct., Pre-Trial Chamber II, No. ICC-02/17, ¶ 89 (Apr. 12, 2019), <https://www.justsecurity.org/wp-content/uploads/2019/04/international-criminal-court-afghanistan.pdf> ("All of these elements concur in suggesting that, at the very minimum, an investigation would only be in the interests of justice if prospectively it appears suitable to result in the effective investigation and subsequent prosecution of cases within a reasonable time frame.").

¹²¹ Rome Statute of the Int'l Criminal Court art. 29 ¶ 1, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002).

¹²² Int'l Crim. Ct., Pre-Trial Chamber II, No. ICC-02/17, ¶ 18.

¹²³ *Id.* ¶ 95.

perspective. I conclude that if the ICC gives timely legal weight to reports issued by several international bodies about the local judiciary, it should find the Venezuelan case admissible and open a full investigation. Once the case is preliminarily examined (*proprio muto*) or investigated (referral), the OTP submits the case before the pre-trial chamber if it decides to proceed forward. According to Article 17 of the Rome Statute, the pre-trial chamber could also declare the case inadmissible on the grounds of insufficient gravity or the domestic judiciary's willingness and ability to genuinely investigate and prosecute the case.¹²⁴

A. *International Institutional Framework*

Over the last 50 years, the international community has created multiple specialized bodies related directly or indirectly to the field of human rights. Some of these bodies have a general focus over a group of states, for example the ICC,¹²⁵ the United Nations Human Rights Council,¹²⁶ the IACHR,¹²⁷ the Inter-American Court of Human Rights (Inter-American Court),¹²⁸ the Council of Europe Commissioner for Human Rights,¹²⁹ the European Court of Human Rights,¹³⁰ the African Commission on Human and Peoples' Rights,¹³¹ and the African Court on Human and Peoples' Rights.¹³² Others were established to address problems specific to individual states. These include the International Criminal Tribunal for the former Yugoslavia,¹³³ the International Criminal Tribunal for Rwanda,¹³⁴ the Special Court

¹²⁴ Rome Statute, *supra* note 121, at art. 17.

¹²⁵ *Id.* at art. 4.

¹²⁶ UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/Home.aspx> (last visited Dec. 23, 2019).

¹²⁷ *What Is the IACHR?*, ORG. AM. STS., <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Dec. 23, 2019).

¹²⁸ *I/A Court History*, INTER-AM. CT. HUM. RTS., <http://www.corteidh.or.cr/historia-en.cfm> (last visited Dec. 23, 2019).

¹²⁹ *The Mandate*, COUNCIL EUR., <https://www.coe.int/en/web/commissioner/mandate> (last visited Dec. 23, 2019).

¹³⁰ *The Court in Brief*, EUR. CT. HUM. RTS., https://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf (last visited Dec. 23, 2019).

¹³¹ *State Parties to the Africa Charter*, AFR. COMM'N ON HUM. & PEOPLES' RTS., <http://www.achpr.org/states/> (last visited Dec. 23, 2019).

¹³² *Welcome to the African Court*, AFR. CT. ON HUM. & PEOPLES' RTS., <http://www.african-court.org/en/index.php/12-homepage1/1208-welcome-to-the-african-court1> (last visited Dec. 23, 2019).

¹³³ UNITED NATIONS: INT'L CRIM. TRIBUNAL FORMER YUGOSLAVIA, <http://www.icty.org/> (last visited Dec. 23, 2019).

¹³⁴ *The ICTR in Brief*, UNITED NATIONS, <http://unictr.irmct.org/en/tribunal> (last visited Dec. 23, 2019).

for Sierra Leone,¹³⁵ the Special Tribunal for Lebanon,¹³⁶ the Extraordinary Chambers in the Courts of Cambodia,¹³⁷ the Serious Crimes Investigation Team Timor-Leste,¹³⁸ and the International Commission Against Impunity in Guatemala.¹³⁹ The courts with universal jurisdiction reported 249 cases between 2002 and 2009.¹⁴⁰ According to Slye:

Universal jurisdiction arose initially in the context of criminal prosecutions, but is also found to some extent in civil litigation, particularly in the United States. Under the principle of universal jurisdiction, a state may assert jurisdiction over an offender regardless of the nationality of the offender or victim, the place of commission of the wrongful act, or any other link to the state asserting jurisdiction.¹⁴¹

Finally, some countries' constitutions, such as Venezuela's, allow jurisdiction of international bodies to protect human rights and prosecute international crimes.

By design, each international human rights body has its own legal tools and mechanisms for addressing territorial jurisdiction, applicable law, questions about the international body's predominant task, and the international body's ability to interact with national courts and other international bodies.¹⁴² In some cases, such as universal jurisdiction in several American civil cases, international law is enforced extraterritorially in a country without a connection to the case.¹⁴³ In addition to differences in available tools, these bodies differ in the tasks they undertake. Some focus exclusively on human rights violations generally without criminal jurisdiction,

¹³⁵ SPECIAL CT. SIERRA LEONE, <http://www.rscsl.org/index.html> (last visited Dec. 23, 2019).

¹³⁶ *About the STL*, SPECIAL TRIBUNAL LEB., <https://www.stl-tsl.org/en/about-the-stl> (last visited Dec. 23, 2019).

¹³⁷ *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS CTS. CAMBODIA, <https://www.eccc.gov.kh/en/introduction-eccc> (last visited Dec. 23, 2019).

¹³⁸ *Serious Crimes Investigation Team*, UNITED NATIONS MISSION TIMOR-LESTE, <https://unmit.unmissions.org/serious-crimes-investigation-team> (last visited Dec. 23, 2019).

¹³⁹ *¿Qué es la CICIG?*, COMISIÓN INTERNACIONAL CONTRA LA IMPUNIDAD EN GUATEMALA, <https://www.cicig.org/que-es-la-cicig> (last visited Dec. 23, 2019).

¹⁴⁰ Maximo Langer, *The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes*, in *THE FIRST GLOBAL PROSECUTOR: PROMISE AND CONSTRAINTS* 204, 224 (Martha Minow et al. eds, 2015).

¹⁴¹ Ronald C. Slye, *Domestic Application of International Human Rights Norms and Universal Jurisdiction*, OXFORD RES. ENCYCLOPEDIA INT'L STUD. 1 (Nov. 2017), <https://oxfordre.com/internationalstudies/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acre-fore-9780190846626-e-45>.

¹⁴² See generally Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1 (2013).

¹⁴³ *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124–25 (2013); *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

such as the Inter-American Court and the IACHR, while others, such as the ICC, focus only on international crimes.¹⁴⁴

Each of these bodies of law has its own procedural or jurisdictional regulations as well as prescriptive or substantive sets of norms, international treaties, and legal principles. This ensemble of provisions, together with the practices developed, should be approached as a harmonious international law system. The regulations of various bodies such as the Inter-American human rights system, the United Nations human rights bodies, and other courts and agency systems must be compatibly assimilated and relevant to the work of the ICC.¹⁴⁵ As Judge Mac-Gregor has said, “[t]he lack of coherence could generate injustices for those who have the misfortune to live in a jurisdiction that adheres to a different or less protective interpretation of international standards.”¹⁴⁶

International law should apply in every case involving a gross and serious violation of international criminal law including crimes against humanity. Indeed, international criminal law and international human rights law should apply in lieu of any national laws that transform, displace, override, or repeal the international law.

The Rome Statute internationally recognized human rights, the applicable treaties, and the principles and rules of international law as a harmonious *corpus legis* that is integrated directly by the Rome Statute itself.¹⁴⁷ International criminal law and international human rights law regulate the causes that have a universal impact, and individual states cannot apply their own rules that are incompatible with the international laws. This principle has been set statutorily by Article 27 of the Vienna Convention on the Law of Treaties: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”¹⁴⁸ Michael Hamilton and Antoine Buyse, citing the Strasbourg Court’s discussion of the Vienna Convention, note:

“[T]he [Vienna] Convention and its Protocols cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part.” This includes “any relevant rules of

¹⁴⁴ Huneeus, *supra* note 142, at 1, 11.

¹⁴⁵ *What is the IACHR?*, *supra* note 127 (“The inter-American human rights system was born with the adoption of the American Declaration of the Rights and Duties of Man in Bogotá, Colombia in April of 1948. The American Declaration was the first international human rights instrument of a general nature. The IACHR was created in 1959 and held its first session in 1960. Since that time and until 2009, the Commission has held 134 sessions, some of them at its headquarters, others in different countries of the Americas.”).

¹⁴⁶ Eduardo Ferrer Mac-Gregor, *What Do We Mean When We Talk About Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights*, 30 HARV. HUM. RTS. J. 89, 95 (2017).

¹⁴⁷ Rome Statute, *supra* note 121, at art. 21.

¹⁴⁸ Vienna Convention on the Law of Treaties (with annex), art. 27, May 23, 1969, 1155 U.N.T.S., 331, 339.

international law applicable in the relations between the parties', and in particular the rules concerning the international protection of human rights."¹⁴⁹

Discussing a harmonious interpretation of international law, according to Hamilton and Buyse, the European Court has engaged with inter-American norms on several occasions and in various ways. As they describe: "The argument presented here is underpinned by systematic analysis of 70 Court cases—those which, over a 10-year period from 1 January 2007 to 31 December 2016, contain some reference to the Inter-American Commission or Court of Human Rights."¹⁵⁰ To put it in their words: "The global multiplication of norm-generating bodies undoubtedly offers opportunities for interpretative burden-sharing."¹⁵¹ Some international bodies looking for a compatible system in common areas have decided to expand the applicable law to sources external to the body's own treaty or statutory regulation. The Strasbourg Court has made references to the IACHR and the Inter-American Court and has been receptive to norms from external sources or, in other words, to "normative transplantation."¹⁵² Commenting on this phenomenon, Hamilton and Buyse identified several ways in which the court might engage with external regulations: "These include broadening the ambit of an existing right, modifying the threshold test for finding a violation, supplementing the positive obligations attached to a right or extending the range of available remedies."¹⁵³

International criminal law and international human rights law reflect a strong tendency toward a global and transnational legal system. Anthony Colangelo, commenting on universal crimes, asserts, "[s]tates cannot lawfully commit or sanction them through domestic law."¹⁵⁴

International bodies such as the ICC have as a general matter acknowledged the common intersectional area created by their overlap and have officially expressed willingness to cooperate with one another's tasks. The Relationship Agreement between the ICC and the United Nations entered into force on October 4, 2004.¹⁵⁵ In this document, the two bodies agree to cooperate closely on several important issues: the ICC's submission of documents and information concerning cases before the court to the United Nations; the avoidance of undesirable duplication in the collection of information relating to matters of mutual interest; and cooperation on

¹⁴⁹ Michael Hamilton & Antoine Buyse, *Human Rights Courts as Norm-Brokers*, 18 HUMAN RIGHTS L. REV. 205, 215 (2018) (quoting *Marguš v. Croatia*, 2014-III Eur. Ct. H.R. 1, 59).

¹⁵⁰ *Id.* at 209.

¹⁵¹ *Id.* at 226.

¹⁵² *Id.* at 209.

¹⁵³ *Id.* at 213.

¹⁵⁴ Anthony J. Colangelo, *Universal Jurisdiction as an International "False Conflict" of Laws*, 30 MICH. J. INT'L L. 881, 897 (2009).

¹⁵⁵ *United Nations - International Criminal Court Cooperation*, U.N. OFF. LEGAL AFF., <http://legal.un.org/ola/UNICCCooperation.aspx> (last visited Feb. 5, 2020).

investigations, which would include ICC-requested testimony of an official of the United Nations.¹⁵⁶ On April 25, 2012, the IACHR signed a cooperation agreement with the OTP of the ICC in which the entities agreed to assist each other in carrying out their respective mandates, including sharing information on decisions, resolutions, and documents in their mutual interest.¹⁵⁷ On November 19, 2014, the OHCHR and the IACHR “signed a joint declaration on collaboration.”¹⁵⁸ This agreement “aims to strengthen the partnership between the universal and regional human rights systems, by reinforcing . . . joint actions, regular consultations and [the] exchange of information.”¹⁵⁹ The European Union on March 29, 2011, enacted a council decision to assist and cooperate with the ICC: “The Member States shall contribute, when requested, with technical and, where appropriate, financial assistance to the legislative work needed for the participation in and implementation of the Rome Statute by third States.”¹⁶⁰

Nonetheless, the ICC seems skeptical about implementing a clear cooperative strategy for burden-sharing with other international bodies’ work to reach justice in a timely fashion. Referring to this matter, the HRW report said: “While the OTP has had some isolated meetings with authorities from the US government and the Inter-American human rights system, it did not pursue a specific strategy to develop coordinated or joint efforts on complementarity.”¹⁶¹

This compatible interconnection has grown in the international law field directly or indirectly related to international human rights law and international criminal investigations or prosecutions. Consider the Inter-American Court: “In the context of deciding individual cases, traditionally the main task of the Court was to determine whether a state action or omission constituted a violation of the Convention and whether there was international state responsibility.”¹⁶² As Alexandra Huneus stated, this judicial body is not a criminal court but has actively monitored prosecutions of international crimes in roughly 51 cases across 15 states.¹⁶³ Huneus

¹⁵⁶ *Id.*

¹⁵⁷ Memorandum of Understanding on Cooperation (Apr. 25, 2012), <http://www.oas.org/en/iachr/docs/acuerdos/AcuerdoCPI2012.pdf>.

¹⁵⁸ *Cooperation Agreements*, INTER-AM. COMM’N HUM. RTS., <http://www.oas.org/en/iachr/mandate/mou.asp> (last visited Oct. 13, 2019).

¹⁵⁹ *Id.*

¹⁶⁰ 2011 O.J. (L 76/56) 57.

¹⁶¹ HUM. RTS. WATCH, *PRESSURE POINT: THE ICC’S IMPACT ON NATIONAL JUSTICE LESSONS FROM COLOMBIA, GEORGIA, GUINEA, AND THE UNITED KINGDOM* 55 (2018), <https://www.hrw.org/report/2018/05/03/pressure-point-iccs-impact-national-justice/lessons-colombia-georgia-guinea-and>.

¹⁶² Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT’L L.J. 45, 49 (2015).

¹⁶³ Huneus, *supra* note 142, at 1–2.

describes these actions as quasi-criminal jurisdiction.¹⁶⁴ Tellingly, she found that other international bodies have also embarked on this course: the European human rights system, the African Union, and the East African Community have announced that they may add criminal jurisdiction to their courts.¹⁶⁵ Additionally, the Inter-American Court has constructed a notion of crimes against humanity; according to Medellín-Urquiaga, it is using the Rome Statute to do so.¹⁶⁶

The work of two or more of these bodies could be interrelated on any particular matter; at times, unfortunately, these bodies might duplicate or compete with one another. Harmonizing this diverse design could positively impact the ability to efficiently address a concrete situation like the Venezuelan case. Harmonization is a goal for international human dignity protection, as Harold Hongju Koh has affirmed:

In an age of globalization, this means using transnational law to help organize the activities and relations of myriad transnational players, not simply nation-states, with the goal not of reflecting parochial state interests, but of advancing an enlightened global system dedicated to the promotion of human dignity.¹⁶⁷

A number of such tools arise in the overlapping jurisdiction of multiple international bodies described in the Venezuelan case. First, merely belonging to the same international entities subjects Venezuela to both the monitoring and the jurisdictional functions of these international bodies. Second, each of these international organizations has a body of law that should be applied in a compatible way to all the member states within the interconnected zone. Finally, all international bodies involved in the current Venezuelan situation share, directly or indirectly, the obligation of protecting human rights.

The global applicability to external sources of law in the international law system has been promoted by leading commentators, as indicated by Hamilton and Buyse: “The weight to be attached to external norms also depends on whether the desired goal is one of harmonization and achieving uniformity in international law.”¹⁶⁸

B. Intersectionality and the Venezuelan Situation: A Constitutional Perspective

Let’s imagine that an international body is a geometric circle whose area, or jurisdiction, encompasses the humanitarian situations that occur within its member

¹⁶⁴ *Id.* at 2.

¹⁶⁵ *Id.* at 4.

¹⁶⁶ Ximena Medellín-Urquiaga, *The Normative Impact of the Inter-American Court of Human Rights on Latin-American National Prosecution of Mass Atrocities*, 46 *ISR. L. REV.* 405, 410 (2013).

¹⁶⁷ Harold Hongju Koh, Commentary, *Is There a “New” New Haven School of International Law?*, 32 *YALE J. INT’L L.* 559, 572 (2007).

¹⁶⁸ Hamilton & Buyse, *supra* note 149, at 219.

states. Now let's imagine another circle as another international body that has jurisdiction over the same case for the same reason. The area of this common jurisdiction creates a zone of legal interconnection between these two circles, between these two international organizations, which is what is happening in the Venezuelan case. This Venn diagram illustrates my point: the Venezuelan case and the referral states are under the jurisdiction of several international bodies at the same time.

The coexistence of the international bodies' jurisdiction over Venezuela and the six referral countries must provide compatible, harmonious, and efficient legal tools that they can utilize toward justice. Academic commentators in this field have given less attention to interconnection between and among international bodies. The participation of several international human rights entities in the Venezuelan case shifts the focus of the analysis to the relationship among these international bodies.

I will now explore how the convergence of several international bodies can offer a coherent approach to the Venezuelan human rights crisis. The discussion begins by identifying the countries that co-exist within the convergence, the relevant legal factors shared by the entities whose overlap creates the interconnected area, and the need for harmonious legal approaches among the diverse international bodies.

Within the intersectional area of the Venn diagram are Venezuela, the subject state party, and the six countries that referred the Venezuelan case to the ICC: Argentina, Canada, Colombia, Chile, Paraguay, and Peru. They, along with Venezuela, are all state parties to the Rome Statute and therefore subject to the jurisdiction of the ICC.¹⁶⁹ All seven countries are also members of the United Nations.¹⁷⁰ All are also parties to the Organization of American States,¹⁷¹ and as such subject to the jurisdiction of the IACHR.¹⁷² Although Venezuela withdrew from the Organization of American States on April 27, 2017,¹⁷³ the withdrawal would not be effective until April 27, 2019.¹⁷⁴ The same state parties are subject to the Inter-American

¹⁶⁹ *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Dec. 23, 2019).

¹⁷⁰ *Member States*, UNITED NATIONS, <http://www.un.org/en/member-states/> (last visited Dec. 23, 2019).

¹⁷¹ *Who We Are: Member States*, ORG. AM. STS., http://www.oas.org/en/about/member_states.asp (last visited Dec. 23, 2019).

¹⁷² Rep. Inter-Am. Comm'n H.R., *supra* note 1, ¶ 55.

¹⁷³ Letter from Nicolás Maduro Moros, President of the Bolivian Republic of Venezuela, to Luis Almagro, Sec'y Gen. of the Org. of Am. States (Apr. 27, 2017), http://www.oas.org/en/sla/dil/docs/a-41_note_venezuela_04-28-2017.pdf.

¹⁷⁴ *Venezuela to Withdraw From OAS as Deadly Protests Continue*, BBC NEWS (Apr. 27, 2017), <https://www.bbc.com/news/world-latin-america-39726605>.

Court as signatories of the American Convention of Human Rights (American Convention)¹⁷⁵ with the exception of Canada, which never signed this Convention. Venezuela removed itself from the American Convention, and therefore partially from the Inter-American Court jurisdiction by denouncing it on September 10, 2012.¹⁷⁶

The European Union has also been involved in the Venezuelan case, as explained previously. All parties of the European Union are also in a common zone with the six referral countries and Venezuela. All state parties of the European Union and the seven countries mentioned are state members of the United Nations and of the ICC. Thus, the common legal area brings into play diverse international bodies, regulations, investigations, and reports that overlap regarding the same Venezuelan case.

As noted above, the seven countries that co-exist in the intersectionality area are all signatories to the Rome Statute. That statute provides legal grounds to establish cooperation between the ICC, the United Nations, and other international bodies participating in this area. As we saw before, these bodies have issued several reports about the Venezuelan situation.¹⁷⁷ These reports could provide crucial evidence in the ICC consideration of the Venezuelan case. The Rome Statute provides sufficient legal authority for the ICC to rule on the relevance, admissibility, and probative value of these reports.¹⁷⁸

For greater effectiveness for the Venezuelan case, I should highlight that legal cooperation is established by the Rome Statute and is therefore enforceable.¹⁷⁹ Furthermore, the ICC has authority to “ask” for cooperation from state parties. Specifically, the ICC has explicit authority to make direct requests to state parties for reports or expertise.¹⁸⁰ In addition, under this legal cooperation the ICC could request witness testimony, investigations, or expertise that might be easier for international agencies with longstanding experience on the case to produce than for the court itself.¹⁸¹

Under Article 5 of the Rome Statute, the ICC has jurisdiction over the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.¹⁸² Crimes against humanity are alleged in the referral to the ICC, so I will proceed

¹⁷⁵ American Convention on Human Rights: “Pact of San José, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S 123.

¹⁷⁶ *Actions Regarding Multilateral Treaties*, ORG. AM. STS. DEP’T INT’L L., http://www.oas.org/en/sla/dil/inter_american_treaties_recent_actions_2012.asp (last visited Dec. 23, 2019).

¹⁷⁷ *See supra* Part III.

¹⁷⁸ Rome Statute, *supra* note 121, at art. 69.4.

¹⁷⁹ *Id.* at art. 87.1.

¹⁸⁰ *Id.* at art. 87.6.

¹⁸¹ *Id.* at art. 69.4.

¹⁸² *Id.* at art. 5.

preliminarily under the assumption that the ICC has jurisdiction over the case. Violations of human rights are quite often involved in the international crimes considered by the ICC, and the Rome Statute has foreseen this situation. Article 21.3 provides: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”¹⁸³ Applicable human rights are defined by covenants that include, among others, the American Convention,¹⁸⁴ the International Covenant on Civil and Political Rights,¹⁸⁵ and the International Covenant on Economic, Social and Cultural Rights.¹⁸⁶

The ICC must first apply the Rome Statute. Importantly, Article 21.1 subsection (b) of that statute provides that the court may apply “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”¹⁸⁷ This provision opens up an expansive spectrum for the applicability of external legal sources, such as general principles derived by the court from national laws of the legal systems of the world.

Venezuela has human rights obligations to several countries due to its engagement in international conventions. For example, some international agreements impose obligations on Venezuela to prosecute and punish those who have committed international crimes.¹⁸⁸ These include the Convention on the Suppression and Punishment of the Crime of Apartheid¹⁸⁹ and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁹⁰ The customary international law¹⁹¹ can be viewed “as an extrapolation of conventional rules so

¹⁸³ *Id.* at art. 21.3.

¹⁸⁴ American Convention on Human Rights, *supra* note 175.

¹⁸⁵ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

¹⁸⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁸⁷ Rome Statute, *supra* note 121, at art. 21(1)(b).

¹⁸⁸ Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 INT’L REV. RED CROSS 375, 376 (2006).

¹⁸⁹ International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. IV, Nov. 30, 1973, 1015 U.N.T.S. 243.

¹⁹⁰ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

¹⁹¹ Bruce Cronin, *Treaty Law: New Trends*, OXFORD RES. ENCYCLOPEDIA INT’L STUD. 6 (Jan. 2018), <https://oxfordre.com/internationalstudies/internationalstudies/abstract/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-355?rskey=WjZrKW&result=24> (“A second challenge to a strict positivist interpretation of treaties is the twentieth century trend toward codifying customary practices into legally binding multilateral agreements. According to diplomatic tradition, some practices – such as diplomatic immunity or the protection of civilians during wartime – have become so widespread, habitual, and commonly accepted that they achieve the status of a customary norm that cannot be overridden by individual choice. When coupled with an unambiguous agreement among political actors that such practices

widely accepted that non-party states consent to be bound by the principle as equivalent to a general rule.”¹⁹² Accordingly, “this could be the situation of states which refuse to become a party to a specific instrument for political reasons.”¹⁹³ Venezuela was a signatory to the American Convention and later denounced it as a way to avoid the jurisdiction of the Inter-American Court.¹⁹⁴ Venezuela has been part of the Inter-American system and the United Nations system, thus bound by its legal instruments and subject to its jurisdiction. These conclusions are also supported by constitutional prescriptions. Neil Walker, in discussing constructive constitutionalism and sovereignty, shows us:

[M]any contemporary constitutions accept the normative authority of international law and international treaties in general, or of specific international regimes or judicial authorities. In so doing, they tend to rank international norms highly in comparison to domestic norms and, in some cases, equivalent to or even above constitutional norms themselves.¹⁹⁵

Today’s applicable Venezuelan Constitution incorporated the international bodies’ jurisdiction into the Venezuelan national legal system and provides a basis for harmonizing the potential conflict between the principle of state sovereignty and the international cooperation that I am discussing. Legal cooperation between the international bodies and the ICC does not conflict with domestic jurisdictional sovereignty in the Venezuelan case because Venezuela’s constitution expressly recognizes the coexistence of the state jurisdictional sovereignty and the enforceability of international human rights law and international criminal law. Article 23 of Venezuela’s constitution prescribes that international human rights laws have a constitutional rank and supersede the national laws.¹⁹⁶ In addition, the global or universal enforceability of those international obligations emerge from Article 31 of the Venezuela Constitution, which creates the right to make claims seeking protection for human rights before the international bodies.¹⁹⁷ Article 31, in other words, gives any Venezuelan citizen the right to go to an international body—a court or quasi-judicial agency—to seek relief. Thus, the Venezuela Constitution has incorporated

constitute a legal obligation (a principle known as *opinio juris*), positivists consider law based on customary practice to be a consensual act. From a positivist standpoint, then, customary law reflects implied consent inasmuch as it is derived from actual state practice and confirmed by *opinio juris* within the international community.” (citations omitted)).

¹⁹² Philippe, *supra* note 188, at 386.

¹⁹³ *Id.*

¹⁹⁴ *Tratados Multilaterales*, ORG. AM. STS., https://www.oas.org/dil/esp/tratados_B-32_Convencion_Americana_sobre_Derechos_Humanos_firmas.htm (last visited Dec. 23, 2019).

¹⁹⁵ Neil Walker, *Sovereignty and Beyond: The Double Edge of External Constitutionalism*, 57 VA. J. INT’L L. 799, 814–15 (2018).

¹⁹⁶ CONST. OF THE BOL. REP. OF VENEZ., Dec. 20, 1999, art. 23.

¹⁹⁷ *Id.* at art. 31.

the ICC jurisdictional authority into the internal law system, allowing the applicability of the external international statutes and customary human rights law to the Venezuelan case.

It could therefore be argued that the international customary law¹⁹⁸ and the constitutional provisions keep Venezuela bound, in specific circumstances, by the American Convention. In addition, as Judge Mac-Gregor concluded when discussing countries that withdrew from the convention, “the Inter-American Court still has jurisdiction in cases against Trinidad and Tobago and Venezuela in specific circumstances, even after the denouncement of the Convention.”¹⁹⁹ This jurisdiction could include claims linked to the current ICC case against Venezuela that arose before denunciation of the treaty. The fact that today Venezuela is a non-party to the American Convention does not preclude its international substantive obligations and responsibilities for serious human rights violations and international crimes against humanity. More than that, it is possible to argue—based on the progressive principles underlying the human rights system—that once a state enters into an international or national human rights agreement or recognition, it may not reverse its path. As Colangelo has observed: “States Parties have created through their entrance into the treaty a customary international legal prohibition that extends into the territories of all States, irrespective of their status under the positive law of the treaty.”²⁰⁰ The Venezuela Constitution has enacted the right of the people to seek protection before international bodies.

Venezuela may claim that its non-party status means that subjecting it to the Inter-American Court would be a breach of its national sovereignty. But Venezuela has no sovereignty claim under international law on the grounds that it denounced the American Convention, even if the violations and supposed crimes occurred within the country. No state can claim legitimate sovereignty when in conflict with international laws prohibiting international crimes against humanity or any other universal crime.²⁰¹ The notion of universal crime today includes serious international human rights and humanitarian law violations, genocide, crimes against humanity, and torture, among others.²⁰² Any serious violations of human rights are within the international prescriptive and jurisdictional law, and the substantive law will be the same regardless of the status of the state with respect to one specific treaty

¹⁹⁸ Cronin, *supra* note 191, at 6.

¹⁹⁹ Mac-Gregor, *supra* note 146, at 110.

²⁰⁰ Colangelo, *supra* note 154, at 913.

²⁰¹ *Id.* at 883.

²⁰² *Id.* at 888–89.

or agreement. This is part of what international lawyers “call *ius cogens*, or ‘peremptory norms’ that cannot be canceled by treaty or even by decisions of the United Nations.”²⁰³

C. *The Relation Between the National Judiciary and the ICC*

Still, there is a tendency in international law to rely on the domestic judiciary. This could come from the persuasive influence of the traditional dualist doctrine in international law, prioritizing domestic law over international law within the domestic legal system.²⁰⁴ Two scholars follow a tendency in the international human rights and criminal fields to rely to a certain extent on the domestic judicial system in legal interaction with the international bodies. Let’s review these two academics’ approaches.

First, to describe these interrelationships in the field of international justice systems on human rights, Huneeus has proposed a tripartite typology of jurisdictions. She takes into account:

[M]echanisms for criminal accountability created since the Cold War’s end [that] establish different types of relationships between the international or extraterritorial court . . . and the affected state and its justice system . . . are created not to replace, but rather to coexist and interact with, and ultimately even improve, the local justice system.²⁰⁵

Huneeus’s first category is “direct criminal jurisdiction” and entities in this category have “the legal authority to single-handedly open and conduct a prosecution from abroad, with or without consent of the state where the crime took place.”²⁰⁶ The bottom line is that “national justice systems are cast as auxiliary while the international takes over, in a hands-on way, the prosecution.”²⁰⁷ Examples of organizations in this category include the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Huneeus’s second category is “hybrid criminal jurisdiction, wherein international actors and the state

²⁰³ Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 6 (2013). Regarding sovereignty under modern international law, Ronald Dworkin has affirmed that “[a] government is illegitimate if it violates the basic human rights of its citizens . . . [and] fails in its duties when it uses the shield of sovereignty to decline to protect people in other nations from war crimes, genocide, and other violations of human rights.” GENERAL THEORY OF INTERNATIONAL LAW 45 (Siegfried Wiessner ed., 2017) (citing Dworkin, *supra*, at 17–18).

²⁰⁴ Slye, *supra* note 141, at 1.

²⁰⁵ Huneeus, *supra* note 142, at 28.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 31.

justice system prosecute as partners.”²⁰⁸ An example of a “hybrid criminal jurisdiction” entity is the Extraordinary Chambers in the Court of Cambodia.²⁰⁹ And Huneeus’s third category is “quasi-criminal jurisdiction,” which is “the actual work of conducting the prosecution and trial falls entirely to the national system” and “the international body decrees and then closely monitors the prosecution.”²¹⁰ Examples of entities with “quasi-criminal jurisdiction” include the Inter-American Court and the Council of Europe when they issue orders to the national judiciary to prosecute someone. The international bodies in this tripartite categorization rely almost exclusively on domestic justice, either as an auxiliary, as a partner, or just monitoring the local court.

Second, Judge Mac-Gregor of the Inter-American Court has proposed an alternative approach to understanding the relationship between international and national justice.²¹¹ Some relationships are horizontal. An example is a communication between the Inter-American Court and the European Court in its “Two-Way Path.”²¹² As Judge Mac-Gregor explains, each court has used the other’s jurisprudence as a persuasive doctrinal source. On the other hand, some relationships are vertical. An example is a relationship between the national courts of a particular state and the Inter-American Court, a relationship that exists within the framework of “conventionality control.”²¹³ Conventionality control “requires that all State authorities, but particularly judges, apply the Convention as interpreted by the Court in all their interventions.”²¹⁴ In the context of the Inter-American Court, the degree of this control varies according to the types of agreements a state has ratified. Judge Mac-Gregor uses the term “bindingness” to refer to the level of a country’s engagement in the convention.²¹⁵

Regarding domestic judiciary participation in international justice, on May 3, 2018, Human Rights Watch (HRW), a non-governmental organization, issued its report about the ICC’s four current cases.²¹⁶ Some of these cases have been an effort by the ICC and the OTP to conduct investigations, examinations, or prosecutions through national judiciary process. The HRW’s report has stated:

This suggests that the OTP’s current approach—to defer to national proceedings where there is at least a stated government intention to proceed, but to carefully calibrate whether and how actively to encourage such proceedings

²⁰⁸ *Id.* at 30.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 31.

²¹¹ Mac-Gregor, *supra* note 146, at 104–13.

²¹² *Id.* at 104.

²¹³ *Id.* at 113.

²¹⁴ Dulitzky, *supra* note 162, at 52.

²¹⁵ Mac-Gregor, *supra* note 146, at 110.

²¹⁶ HUM. RTS. WATCH, *supra* note 161.

depending on its assessment of the likeliness of genuine proceedings—appropriately recognizes certain inherent limits.²¹⁷

As I discuss in Part VI, the Venezuelan judiciary is not reliable as it has been completely packed by the regime. Venezuela's inoperative rule of law shows how important trustworthy international actors that work together and disregard a untrustworthy local judiciary are to delivering justice.

VI. THE INTERNATIONAL PRINCIPLES GOVERNING THE ADMISSIBILITY OF THE VENEZUELAN CASE

As is well known in international law, the boundaries or limits between prescriptive and adjudicative principles are far from sharp. The adjudicative principles central to my inquiry are the ones that serve to choose the *locus forum* and, consequently, to decide the issue of admissibility before the ICC, which is where the legal interrelation between international bodies could play a critical role.

Let's imagine the ICC, based on the complementarity principle, arriving at the conclusion that the national judiciary in Venezuela is sufficiently fair and autonomous to judge the accusations over the Venezuelan officials' government. At the same time, let's suppose the IACHR, applying the principle of subsidiarity, reaches the opposite conclusion, meaning that today fairness and autonomy could not be expected from the Venezuelan judicial system. It appears clear that there are potential contradictory decisions from distinct international bodies. The alternative, a cooperative interrelation, will advance a coherent international law system.

A. *The Jurisdictional Principle of Complementarity: The ICC Locus Forum*

The preamble to the 1998 Rome Statute emphasizes: "the International Criminal Court established under this statute shall be complementary to national criminal jurisdictions."²¹⁸ This statement is classically defined as a "functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction."²¹⁹ It reconfirms the principle recognized by statute to the International Criminal Tribunals for the former Yugoslavia and Rwanda and presupposes the existence of the national and international justice operating in a subsidiary way. According to this principle, a national system of justice that is trustworthy, independent, impartial, and fair in dealing with any given alleged international crime maintains jurisdictional primacy over the situation. If the domestic judicial system lacks those qualities for the concrete case in controversy, the

²¹⁷ *Id.* at 9.

²¹⁸ Rome Statute, *supra* note 121, pmb1.

²¹⁹ Philippe, *supra* note 188, at 380.

international systems of criminal justice replace the domestic and take over legal jurisdiction of the situation.

The power to decide if the national judiciary works properly has been granted to the international criminal justice system and in the case at hand to the ICC. Under Article 17 of the Rome Statute, the court would rule the case admissible if the Venezuelan state is “unwilling or unable genuinely to carry out the investigation or prosecution” and if the case is sufficiently grave.²²⁰ A state is considered unwilling or unable to proceed if it has the purpose of shielding the accused person from criminal responsibility, if there is an unjustified delay, or if there is a lack of independent or impartial legal procedure.²²¹ The case would also be declared admissible if the Venezuelan national criminal justice system has substantially collapsed or is unavailable. The issue of admissibility is one where the legal interrelation between international bodies could play a critical role.

In June 2018, the OHCHR issued a 54-page report on the Venezuelan situation.²²² The OHCHR documented violations of the right to access to justice for protest-related killings, excessive use of force and killings in other types of security operations, extrajudicial killings, arbitrary detentions, violations of due-process guarantees, torture, attacks, and restrictions on democratic space.²²³ All of these reported situations reveal the gravity of the case, at least since 2014. The report asserts that all branches of the Venezuelan state are subordinate to the “National Constituent Assembly.”²²⁴ Regarding the admissibility requirements of the Rome Statute, this report has an entire chapter entitled “Violations of the right to truth and justice of the families of people killed during protests.”²²⁵ This chapter demonstrates that the Venezuelan judicial authorities have not conducted independent and impartial investigations about the killings of protestors leading to punishment of the perpetrators. Regarding the availability of the justice system, the report points out that the Attorney General’s Office “lost its capacity to conduct independent forensic examinations in cases of human rights violations allegedly committed by members of the security forces,” due to a generalized lack of cooperation and blockage of the criminal investigation, and documented unjustified judicial delays of criminal proceedings.²²⁶ The report also documented cases where relatives of persons killed have themselves been victims of harassment that was aimed at dissuading the victims from seeking justice.

²²⁰ Rome Statute, *supra* note 121, at art. 17.1.a.

²²¹ *Id.* art. 17.2.a–c.

²²² *Human Rights Violations, supra* note 54.

²²³ *Id.* at ii.

²²⁴ *Id.* at 4.

²²⁵ *Id.* at 9.

²²⁶ *Id.* at 10–13.

On December 31, 2017, the IACHR issued its report, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, which considered the Venezuelan government's excessive use of force, criminalization of social protest, arbitrary detentions, torture, sexual violence during social protests, the restriction or absence of access to justice and due process, and a massive violation of the rights to freedom of thought and expression.²²⁷ The report took a similar approach to the OHCHR report on access to food, health, education, and housing among an extensive catalog of violations of human rights. Similar to the OHCHR document, the IACHR includes in its report a whole chapter on the issues pertinent to the admissibility of the Venezuelan case before the ICC.²²⁸ This chapter, "The Democratic Institutional System," clearly and extensively documents the lack of an independent, impartial, and fair judicial system in Venezuela, and it particularly outlines the relations between the executive and judicial branches.

Both reports have extensively addressed and documented the elements related to the admissibility of the Venezuelan case before the ICC. These reports should be included in the factual data available for examination by the ICC and its OTP. They were issued under the authority of international treaties, and, as discussed above, the bodies creating the reports relied not only on customary law but also on statutory authority to rule on these reports in the Venezuelan case.²²⁹

Conclusively, on July 5, 2019, the OHCHR's new report on the human rights situation in the Bolivarian Republic of Venezuela, concerning the admissibility requirements of the Rome Statute, also addressed the issue:

Institutions responsible for the protection of human rights, such as the Attorney-General's Office, the courts and the Ombudsperson, usually do not conduct prompt, effective, thorough, independent, impartial and transparent investigations into human rights violations and other crimes committed by State actors, bring perpetrators to justice, and protect victims and witnesses. Such inaction contributes to impunity and the recurrence of violations.²³⁰

B. *The Principle of Subsidiarity in the International Human Rights Forum*

In his article discussing the field of human rights, Jorge Contesse outlines two versions of the subsidiarity principle: the normative and the descriptive.²³¹ The nor-

²²⁷ Rep. Inter-Am. Comm'n H.R., *supra* note 1.

²²⁸ *Id.* at 45–105.

²²⁹ *See supra* Part III.

²³⁰ Situation of Human Rights, *supra* note 70, § 33.

²³¹ Jorge Contesse, *Subsidiarity in Global Governance: Contestation and Deference in the Inter-American Human Rights System*, 79 L. & CONTEMP. PROBS. 123, 124–26 (2016).

mative version can be understood as a rebuttable presumption in favor of local jurisdiction to decide matters of law.²³² The descriptive version “describes a relationship between two institutions or norms, by which one supplements the other” without giving any preference to the national or international system. The version describes the type of any given concrete interrelation between the “institutions or norms.”²³³ The descriptive version allows for both international intervention and deference to the national without prioritizing one over the other.²³⁴

According to Contesse, as a result of the Cold War, a concern emerged to restore democracy and to promote justice in Latin America. The military dictatorships that engaged in massive and gross human rights violations have become, since the 1980s, democratic systems.²³⁵ When the American Convention entered into force in 1978,²³⁶ the Inter-American system on human rights confronted those dictatorships’ political and social heritage. Because the national courts were not competent enough, the subsidiarity principle operated as a tool to impose international criterion on the interpretation of the law and to make international factfinding prevail over the factfinding undertaken by the national judicial systems. The shift towards embracing the subsidiarity principle “as a principle for international governance—that is, the degree of deference it grants to the assessment of a situation by the member state concerned”²³⁷ was a necessary one. The process operated similarly to the complementarity principle in the field of international criminal justice.²³⁸

The Inter-American system on human rights could face criticism from those in favor of high state autonomy and deference to the individual state. However, the region’s history during the ’60s and ’70s shows that when democracy is at risk, democratic actors return to the support afforded by international interference, rebutting the presumption in favor of national remedies because national remedies seem non-existent, illusory, or institutionally problematic. Although “most of the states today in the region have left behind authoritarian and dictatorial regimes,”²³⁹ the shift has not led to a completely democratic Latin America. In addition to the old authoritarian model of Cuba there are new authoritarian models in the region, such as

²³² *Id.* at 125.

²³³ *Id.* at 126 (quoting Gerald Newman, *Subsidiarity*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 361 (D. Shelton ed., 2013)).

²³⁴ *Id.*

²³⁵ *Id.* at 123.

²³⁶ *What Is the IACHR?*, *supra* note 127.

²³⁷ Contesse, *supra* note 231, at 123.

²³⁸ *See supra* Part VI.A.

²³⁹ Contesse, *supra* note 231, at 123.

Nicaragua and Venezuela. These new authoritarian regimes falsely claim to be democratic and have been quite well studied by specialists in the field.²⁴⁰

VII. CONCLUSION

The international bodies have collected the evidence and now the ICC has a great challenge: the timely delivery of justice. More than 12 years have passed since the first OTP decided not to open an investigation into the Venezuela situation. More than a year has passed since the OTP opened a second “preliminary examination.” The 2018 six-country referral is still pending without the ICC and its OTP having decided to open a full investigation, so far.

Efficacy is a permanent objective in our world for the international law system. An untimely and unnecessary duplicative process would weaken ICC legitimacy. The global justice system and Venezuelans are clamoring for a fair and timely international process. International law has developed the appropriate legal tools to rule fairly and efficiently on matters similar to those that the United Nations, the Organization of American States, and the European Union have already been cooperating to solve in the current Venezuelan situation. If international legal cooperation among the international bodies approaching the Venezuelan case prevail, justice might be reached. If not, impunity once again will predominate.

Let us imagine for a moment living on a daily basis in a country in which all those well-reported violations and suspected crimes have occurred—how would life be for a regular human being in such conditions? The gross violation of human rights and the alleged international crimes must be prosecuted.

²⁴⁰ See, e.g., David Landau, *Constitution-Making and Authoritarianism in Venezuela: The First Time as Tragedy, the Second as Farce*, in CONSTITUTIONAL DEMOCRACY IN CRISIS? 161 (Mark A. Graber et al. eds., 2018).