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VENEZUELA, GRAND CORRUPTION, AND  
THE INTERNATIONAL CRIMINAL COURT

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## VENEZUELA, GRAND CORRUPTION AND THE INTERNATIONAL CRIMINAL COURT

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### ABSTRACT

Venezuela's ongoing crisis has resulted in the first-ever joint request from States Parties to the ICC to open a preliminary examination. The evidence presented until now of crimes against humanity focuses on attacks on political opposition and demonstrators. We contend that the situation in Venezuela is not fully comprehensible, and the referral falls short, without looking through the lens of grand corruption. We describe what we mean by grand corruption and how it has corroded Venezuela. We explain how applying a corruption lens to every step of the preliminary examination process – the existence of crimes against humanity, the unwillingness of local justice systems to operate, the gravity of the harm even with a relatively small number of killings, and the interests of justice—is better understood if a corruption-infused analysis is brought to bear. We then turn to some caveats and limiting considerations. Finally, we draw some implications for other, increasingly common, situations where grave violations of international criminal law take place because of, and maintained by, systems of kleptocracy.

### INTRODUCTION

Venezuela has been undergoing a social, political, and economic crisis that has culminated in a preliminary examination by the International Criminal Court (hereafter “ICC”).<sup>3</sup> As the Office of the United Nations High Commissioner for Human Rights put it, we are facing

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<sup>3</sup> International Criminal Court, Informe sobre las actividades de examen preliminar 2018 (Venezuela), 2018. (<https://www.icc-cpi.int/itemsDocuments/2018-otp-rep-PE-Venezuela.pdf>)

“a downward spiral with no end in sight”.<sup>4</sup> The slow-motion downfall has been documented in many reports by international and civil society organizations; it includes the appearance of armed groups acting with the State’s acquiescence, the capture of the Supreme Court of Justice and the Prosecutor’s Office by the Executive Branch, the jailing of opposition politicians and demonstrators, and an economic crisis that has resulted in lack of jobs paying even a subsistence wage, loss of land and livelihood, widespread hunger, lack of medicine, and the exodus of several million Venezuelans from their country.<sup>5</sup>

Submissions to the Court have focused on crimes against humanity committed by police, military and paramilitary forces in the service of the regime, largely in the context of demonstrations and political activities. The operating assumption has been that these are attacks on a civilian population, carried out against opponents of the regime. While numbers are hard to come by, the OAS Expert Group estimated that 131 people had been killed in the context of several years of anti-regime demonstrations, and another 8,292 had been executed in a broader

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<sup>4</sup> OHCHR. Human Rights Violations in the Bolivarian Republic of Venezuela: a downward spiral with no end in sight Report by the Office of the United Nations High Commissioner for Human Rights June 2018 ([https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018\\_EN.pdf](https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018_EN.pdf))

<sup>5</sup> Some of these reports are the following: Human Rights Watch. Venezuela’s Humanitarian Crisis Severe Medical and Food Shortages, Inadequate and Repressive Government Response, 2016.

([https://www.hrw.org/sites/default/files/report\\_pdf/venezuela1016\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/venezuela1016_web_1.pdf))

Inter-American Commission on Human Rights. Democratic Institutions, the Rule of Law and Human Rights in Venezuela, 2017. (<http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>)

ICJ. Venezuela: The Sunset of Rule of Law ICJ Mission Report 2015

(<http://www.icj.org/wp-content/uploads/2015/10/Venezuela-Sunset-of-Rule-of-Law-Publications-Reports-2015-ENG.pdf>)

ICJ. Achieving Justice for Gross Human Rights Violations in Venezuela Baseline Study, July 2017.

(<https://www.icj.org/wp-content/uploads/2017/08/Venezuela-GRA-Baseline-Study-Publications-Reports-Thematic-reports-2017-ENG.pdf>)

ICJ. The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch, 2017.

(<https://www.icj.org/wp-content/uploads/2017/09/Venezuela-Suprem-Court-Publications-Reports-Thematic-reports-2017-ENG.pdf>)

ICJ. The Trial of Civilians by Military Courts in Venezuela, 2018. (Only in Spanish)

(<https://www.icj.org/wp-content/uploads/2018/04/Venezuela-Civiles-Tribunales-Militares-Publications-Reports-Thematic-Reports-2018-SPA.pdf>)

Amnesty International. Report 2017/18, The State of the World’s Human Rights, p. 393.

(<https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>)

context of government repression and political persecution.<sup>6</sup> The widespread or systematic nature of the alleged crimes has been derived from the fact that attacks have occurred in various cities, on numerous occasions. The state or organizational policy, required under the Rome Statute, is that of using illegal means or excessive force to counter political opposition.

But there is a complementary narrative that has received far less attention from those seeking to hold the Venezuelan leadership accountable: the extensive, systemic, controlling corruption that today provides much of the real *raison d'être* of the Maduro government and its military allies. Over the last years, a shadowy alliance of ruling party politicians, high-ranking military officers, organized crime (including but not limited to drug traffickers) and some members of the private sector have looted the Venezuelan economy for their own benefit, using the levers of state power. They have erased the independence of the judiciary and of prosecutors, commandeered not only the oil industry but gold mining, food distribution and even foreign exchange markets, ensured complete impunity for their actions, and used the natural resources and finances of the state to enrich themselves and their cronies. And they have killed or threatened not only demonstrators but indigenous people, artisanal miners, soldiers, and anyone else who got in the way of the massive enrichment and impunity they now enjoy.

Corruption has grown immensely with the passing of the years. As stated in Transparency International's 2017 report, Venezuela is now 169th in a 180-country ranking that lists countries perceived to be most corrupt, surpassed only by countries like Sudan, Afghanistan, Libya and North Korea.<sup>7</sup> We understand that corruption means different things to different people, and are

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<sup>6</sup> OAS Expert Panel Report, Executive Summary, p. 389, at <http://www.oas.org/documents/eng/press/Venezuela-Executive-Summary.pdf>. In addition, submissions to the Office of the Prosecutor recount arbitrary detentions, torture, forced disappearances and persecution. These include detention of political opponents, attacks on demonstrators, torture in detention, and the like.

<sup>7</sup> Transparency International, 2017 report, corruption perception index, ([https://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2017#table](https://www.transparency.org/news/feature/corruption_perceptions_index_2017#table))

here using a narrow definition of “grand corruption” aimed largely at the activities of high-ranking state officials (including military) and their backers in both licit and illicit businesses.<sup>8</sup> We are influenced by recent scholarship in Latin America and elsewhere about the “capture and reconfiguration” of states in the region by networks of corrupt officials and political parties working closely with organized crime groups. These “illicit political-economic networks”<sup>9</sup> use techniques from the illicit financing of political parties and elections; to fake contracts, kickbacks, undue influence and bribery; to control of ports, natural resources, customs, taxes and migration in order to embezzle; to legislative and regulatory changes and the dismantling of institutional accountability; to outright violence, all in order to institutionalize a policy that permits looting the state and its agencies. We are not concerned with “petty” or administrative corruption carried out by lower-level state officials, although we recognize that such low-level corruption is related to the high-level version, and also impacts human rights.<sup>10</sup>

Corruption is not only exacerbating crimes in Venezuela, but motivating their commission and subsequent impunity. In this sense, the wrath of the regime is not only directed towards dissidents and opponents, but also to intimidating and, if necessary, attacking the low

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<sup>8</sup> Martine Boersma, *Corruption: A violation of human rights and a crime under international law?* (Intersentia, 2012), at 29. On the contours of “grand corruption,” see, e.g. Luis Jorge Garay Salamanca, *Una génesis de la ilegalidad: Corrupción, Captura del Estado, Cooptación institucional y Macro-corrupción*, (Bogotá, 2018) at [https://docs.wixstatic.com/ugd/522e46\\_bea7b5eeb2574289bddcd4741c2393c5.pdf](https://docs.wixstatic.com/ugd/522e46_bea7b5eeb2574289bddcd4741c2393c5.pdf); Garay, L.J. y Salcedo-Albarán, E., *Redes Ilícitas y reconfiguración de Estados: el caso de Colombia* (Fundación Vortex/ICTJ, 2012); Chayes, Sarah, *Thieves of State* (NY: Norton, 2015); Chayes, Sarah, *When Corruption is the Operating System: The Case of Honduras* (Carnegie Endowment for International Peace, 2017); Burgis, Tom, *The Looting Machine: Warlords, Oligarchs, Corporations, Smugglers, and the Theft of Africa’s Wealth* (NY: Pegasus, 2013).

<sup>9</sup> This is the phrase used by the Commission Against Impunity in Guatemala to describe this phenomenon. Cf. Comisionado Iván Velásquez: *investigaciones vinculadas al occidente del país seguirán con normalidad*, October 2018; at <https://www.cicig.org/comunicados-2018-c/investigaciones-vinculadas-al-occidente-del-pais-seguiran-con-normalidad/>

<sup>10</sup> Peters, Anne, *Corruption and Human Rights* (September 2015). Basel Institute on Governance Working Paper No. 20. Available at SSRN: <https://ssrn.com/abstract=2635443> or <http://dx.doi.org/10.2139/ssrn.2635443>; Claudio Nash Rojas, Pedro Aguiló Bascuñán y María Luisa Bascur Campos, [Corrupción Y Derechos Humanos: Una Mirada Desde La Jurisprudencia De La Corte Interamericana De Derechos Humanos](#), May, 2014.

and middle-rank officials in charge of the investigation, prosecution and judgment of major corruption scandals, and to those who might have inside knowledge and become whistleblowers. If dissidents suffer horrible crimes for opposing the government, it is reasonable to assume that anyone exposing the government from within will share the same fate. After all, anyone who dares to expose the government might be treated as a dissident, or worse, within the binary friend-or-enemy logic that the government works hard to enforce.

The lack of functionality of justice systems, or accountability systems more generally, is a feature, not a bug, of the system. These systems don't work to investigate or prosecute human rights and atrocity-related cases because they are *designed* not to work, in order to allow the looting of the state with impunity. Corruption leads to a general disinterest in justice, and impunity is needed to keep control of lucrative business. So far, human rights defenders and international organizations have not explored this perspective. They have denounced atrocities for what they are, but not for what they are hiding.

Incorporating a corruption-based analysis into efforts to achieve a measure of justice for victims of crimes against humanity provides a number of benefits. It allows advocates, prosecutors and judges to *name* the phenomenon for what it is, in a way that resonates with ordinary people and has narrative power. Thus, it fulfills the expressive, naming function of law in cases of mass atrocity.<sup>11</sup> It will also help build support for justice processes within the country and region. It is not by accident that most of the multitudinous demonstrations of the last decade in Latin America have involved outrage over major corruption scandals; the fight against

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<sup>11</sup> Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INTL CRIM. L. Rev. 93 (2002); Mark A. Drumbl, *Atrocity, Punishment, And International Law* 23-45 (2007); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 Yale L.J. 1628 (2015) for discussion of the expressivist theory of law as applied to international crimes.

corruption underpins public support for accountability.<sup>12</sup> It strips away the rhetoric of left versus right that obfuscates and confuses, making clear that at least at this point it is only that: rhetoric to hide rapaciousness.

Seen through the lens of the requirements to open an ICC investigation, a corruption perspective allows prosecutors to incorporate victims beyond the middle class and the cities, to look at systematic violence aimed not only at political opposition but at those opposing loss of their land and livelihood, and to look at perpetrators beyond the police, to the politicians, military, paramilitary and associated actors who are behind the policies. It gives greater coherence to the analysis of state or organizational policy, explaining not just a desire to dismantle the opposition but the driving force behind that desire – to continue to loot, to maintain a system of impunity, to avoid not just political defeat but a loss of resources and a reckoning. It explains some of the reasons why, and the ways that, the state is “unwilling” to investigate and prosecute for purposes of a complementarity analysis. And it adds important aspects to the consideration of gravity, another of the factors considered by the OTP in deciding whether or not to open an investigation.

There are some caveats, nonetheless. We are aware that much of the discussion of corruption and human rights has focused on the impacts of corruption on a wide range of rights, including political participation, due process and access to justice, and economic, social and cultural rights. While we agree with much of this analysis, our focus is narrower: through the discussion of Venezuela as a prime example, we are focusing on the links between the kind of

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<sup>12</sup> See e.g. massive anti-corruption demonstrations in Brazil in 2015, and in Guatemala and Honduras in 2015 and 2017. In Chile, Pinochet lost much of his base of support not for torture and forced disappearance, but when his looting of the state budget and offshore accounts came to light. See Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Penn Press, 2005).

grand corruption described above and the atrocity crimes that are the concern of international – and national -- criminal tribunals. While much of what we describe also constitutes human rights violations, we are here concerned with individual criminal responsibility, not state liability. Finally, we are aware that corruption accusations are easily made, difficult to corroborate, and easily politicized. We are working from secondary sources, and in a highly polarized and fast-changing environment; nonetheless, the overwhelming number and variety of sources suggest the veracity of the basic narrative.

This article proceeds as follows. First, it briefly describes the referral to the ICC for alleged crimes against humanity in Venezuela. Second, it demonstrates, step-by-step, how the OTP could usefully adopt a corruption lens during the investigation and legal characterization of such atrocities. These steps include the analysis of the crimes within the jurisdiction of the Court, the policy element of crimes against humanity, and an analysis of admissibility (complementarity and gravity). Finally, it raises some conclusions highlighting the advantages and risks of using a corruption lens in the assessment of crimes against humanity, and some implications both for Venezuela and for future cases at the ICC and elsewhere. These include a need for international criminal law, and institutions, to grapple more directly with the phenomenon of kleptocracy and state capture in defining, evaluating and combatting “core” international crimes.

#### VENEZUELA AND THE REFERRAL TO THE ICC

The deteriorating situation in Venezuela has increased international attention over the last three years, especially as millions of Venezuelans have fled the country and anti-government demonstrations have been met with repression. The Inter-American human rights system has been especially concerned with Venezuela. The country has been part of Chapter IV of its annual report, dedicated to problematic countries, since 2005. On December 31, 2017, the Inter-



American Commission on Human Rights presented a report entitled “Democratic Institutions, the Rule of Law and Human Rights in Venezuela,” focusing on the deteriorating human rights situation since 2017.

In 2018, the OAS Secretary General appointed a panel of independent international experts to investigate whether international crimes had been committed in Venezuela. In May 2018, the panel found that reasonable grounds exist to believe that crimes against humanity have been committed in Venezuela dating back to at least February 12, 2014. The panel of experts – Santiago Cantón (Argentina), Irwin Cotler (Canada), and Manuel Ventura Robles (Costa Rica) – did not investigate on their own, but rather used the evidence collected in five public OAS hearings. The panel found that reasonable grounds exist to find that that “[t]he opposition, or those identified as such, were branded as the ‘internal enemy’ of the State, turning large segments of the civilian population into targets for the military, paramilitary and regular security forces who operate in a coordinated manner to ‘defend the Bolivarian Revolution.’”<sup>13</sup> The panel recommended that the Secretary General of the OAS should submit the report and the evidence to the International Criminal Court (ICC). The Secretary General did so, and also invited States Parties to the Rome Statute to refer the situation of Venezuela to the OTP.

Meanwhile, on February 8, 2018, the Prosecutor of the International Criminal Court, Fatou Bensouda, opened a preliminary examination regarding alleged crimes against humanity in Venezuela<sup>14</sup> since 2017 under article 15 of the Rome Statute.<sup>15</sup> This occurred after examining

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<sup>13</sup> OAS Expert Panel Report, Executive Summary, p. 2, at <http://www.oas.org/documents/eng/press/Venezuela-Executive-Summary.pdf>.

<sup>14</sup> International Criminal Court, Report on Preliminary Examination Activities 2018 (Venezuela), 2018. (<https://www.icc-cpi.int/itemsDocuments/2018-otp-rep-PE-Venezuela.pdf>)

<sup>15</sup> Article 15 of the Rome Statute states as follows:  
Prosecutor

110 communications. On September 27, 2018, the governments of Argentina, Canada, Chile, Colombia, Paraguay, and Peru referred the situation in Venezuela to the ICC prosecutor for investigation into alleged crimes against humanity since 2014, obviating the need for her to proceed *proprio motu*.<sup>16</sup> This multi-State referral was unprecedented. Never before, since the Rome Statute came into force on July 1<sup>st</sup>, 2002, had a group of State parties jointly sent a referral regarding another State to the Prosecutor of the International Criminal Court under Article 14 of the Rome Statute. Although Article 14 speaks of “a State Party” there is no reason why a number of state parties cannot join together, or why a state cannot ask for an investigation of events in another state. A state referral, unlike a Prosecutor-initiated investigation, need not go to a Pre-Trial Chamber, and thus is presumptively less lengthy. Nonetheless, the Prosecutor must still decide whether or not to open a full investigation.

#### A. STEPS TO AN INVESTIGATION

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1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
  2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
  3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.” Rome Statute, *supra*.

<sup>16</sup> According to the referral, [t]he analysis of the panel of experts includes a detailed evaluation of how a situation of commission of crimes against humanity in Venezuela would have been configured, based on generalized or systematic attacks against a part of the civilian population of that country, constituted by the opposition to the government of President Nicolás Maduro.” They give a detailed explanation of how various crimes against humanity would have occurred, including references to specific cases that would serve as examples. A particularly dramatic aspect is the alleged arbitrary detentions, murders, extrajudicial executions, torture, sexual abuse and rape, as well as flagrant attacks against due process, to the detriment of people of both sexes, including minors. At the same time, systematic action was allegedly carried out against young men between 15 and 30 years old, who, without justification, would be arrested or taken away from their homes to accuse them of acts they had not committed, or to kill them on the grounds that they resisted.... The general or systematic actions would be part of security plans (such as the so-called Zamora Plan) designed by the government of President Nicolás Maduro, which involved not only of State security forces, but also organizations and groups of people aligned with the government which, without being part of said forces, act in a coordinated manner with these as part of a State anti-opposition policy. Letter of referral, Sept. 26, 2018, available at [https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela\\_ENG.pdf](https://www.icc-cpi.int/itemsDocuments/180925-otp-referral-venezuela_ENG.pdf).

According to the OTP's Policy Paper on Preliminary Examinations, there are a number of issues that the Prosecutor must consider in deciding whether or not to open an investigation. Article 53(1)(a)-(c) of the Statute establishes the legal framework. It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice. In considering material jurisdiction, the Prosecutor must consider whether crimes within the jurisdiction of the Court have been committed. The standard of proof for proceeding with an investigation into a situation under the Statute is a 'reasonable basis'.<sup>17</sup> We consider corruption as an integral consideration at each stage of this preliminary examination process.

a. **CRIMES WITHIN THE JURISDICTION OF THE COURT**

The relevant crimes here all involve Article 7 of the Rome Statute, crimes against humanity. The Rome Statute lists these crimes and requires that they be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. We look at how the elements of the crime would be enriched through incorporating a corruption lens. To be clear: we are not proposing here that corruption is itself a crime against humanity, as "other inhumane acts"<sup>18</sup> or something else. Rather, we find that the definition of what is a "widespread or systematic" attack, the types of enumerated acts chargeable under Article 7, and the existence of a "state or organizational policy" required by the Rome Statute, all to be facilitated or broadened by taking this approach.

i. **Widespread or systematic attack**

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<sup>17</sup> OTP, Policy Paper on Preliminary Examinations, Nov. 2013, at [https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf).

<sup>18</sup> Article 7(k) of the Rome Statute.

Crimes against humanity must be widespread, that is, “massive, frequent, carried out with a considerable seriousness and directed against a multiplicity of victims,”<sup>19</sup> not the mere sum of spontaneous acts;<sup>20</sup> or systematic, understood “as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as ‘patterns of crimes’ such that the crimes constitute a ‘non-accidental repetition of similar criminal conduct on a regular basis.’”<sup>21</sup>

This is not the first time that the ICC has considered the situation of Venezuela. In the first preliminary examination, focused on government actions around and after the 2002 coup against then-President Chavez, those allegations within the temporal jurisdiction of the Court<sup>22</sup> were found not to constitute a “widespread or systematic attack.” The allegations included 45 victims of murder, 39 to 44 cases of imprisonment, 42 of torture and larger numbers of victims of persecution, all against political opponents. The OTP found that “[e]ven on a generous evaluation of the information provided, 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.”<sup>23</sup>

The current set of communications involves, as noted above, a slightly larger number of allegations of murder of demonstrators, along with a larger number of victims of state violence

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<sup>19</sup> ICC, Trial Chamber III, Situation in the Central African Republic in the case of The Prosecutor v. Jean-Pierre Bemba Gombo, “Judgment pursuant to Article 74 of the Rome Statute”, ICC-01/05-01/08, para. 163. March 21, 2016, [https://www.icc-cpi.int/CourtRecords/CR2016\\_02238.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_02238.PDF)

<sup>20</sup> ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya, “Décision relative à la demande d’autorisation d’ouvrir une enquête dans le cadre de la situation en République du Kenya rendue en application de l’article 15 du Statut de Rome”, ICC-01/09, para. 117, March 31, 2010, [https://www.icc-cpi.int/CourtRecords/CR2011\\_03256.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_03256.PDF)

<sup>21</sup> ICC, Pre-Trial Chamber I, Situation in the Democratic Republic of Congo in the case of The Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Public Redacted Version “Decision on the confirmation of charges”, ICC-01/04-01/07, para. 397, September 30, 2008, [https://www.icc-cpi.int/CourtRecords/CR2008\\_05172.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF)

<sup>22</sup> Those allegations that concerned events prior to July 1, 2002 were outside the temporal jurisdiction of the Court.

<sup>23</sup> Office of the Prosecutor, Response regarding Preliminary Examination, [https://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADB7BCAA91F/143684/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADB7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf).

and information around detention, torture and disappearances, all concerned with political opponents of the regime, and based on both demonstration-related incidents and state raids on poor communities in the name of crime-fighting. But the basic outlines are similar.

One advantage of a corruption lens is that it looks at a broader swath of victims, not just demonstrators or opposition figures, and provides the necessary linkage among various types of violations. For example, in order to keep extracting minerals from the eastern area of the country to both fund the government and enrich themselves and their allies, military forces have engaged in massacres, attacks and ill-treatment of miners and indigenous groups. Members of the Pemon community in the border region with Brazil have been at odds with the government over mining in their traditional territories. A Pemon leader was killed by the military in December 2018,<sup>24</sup> and at least 25 more were killed when they opposed government incursions into their territory in February 2019, in the context of the attempt to move aid into the country. According to the indigenous rights group Survival International, tribal members have fled into the forest, alleging persecution.<sup>25</sup> In their statement, indigenous representatives of the National Assembly claimed repeatedly that one day this crime would be punished by the ICC.<sup>26</sup>

Mineral extraction and export from the eastern “Arco del Orinoco” region has become one of the main sources of foreign exchange of the government, as well as a fertile ground for smuggling to neighboring states and appropriation of revenue. Since 2016, a military owned corporation known as CAMIMPEG has controlled both the commercialization of the resources

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<sup>24</sup> BBC Mundo, Guillermo Olmo. [Quiénes son los pemones y cómo viven en rebeldía contra el gobierno de Nicolás Maduro en una de las zonas más remotas de Venezuela](#), January 4, 2019.

<sup>25</sup> Video: [Parlamento denuncia el asesinato de al menos 25 indígenas pemones. https://www.survivalinternational.org/news/12090](https://www.survivalinternational.org/news/12090).

<sup>26</sup> Video: [Diputados de AN se denuncian "masacre" a la comunidad pemón el pasado](#)

and access to the zone.<sup>27</sup> The unchecked extraction and smuggling of gold, diamonds, and the expensive mineral coltan (blue gold) in this region, has spread violence and amplified social conflicts. Instead of bringing important revenue to the country, armed groups allegedly operating alongside military personnel send the minerals to Colombia for sale on the black market.<sup>28</sup> These activities include keeping journalists and other prying eyes out. The interest in keeping secret information about activities in the mining area is not just to quash opposition to the environmentally dangerous and socially disruptive methods used, but to ensure that smuggling and other illicit practices are not brought to light.

A focus on corruption also helps to explain the systematic nature of what seem otherwise to be random patterns of high levels of violence. For example, one of the most violent regions in the country, Bolivar state, is one of the least populated. Within Bolivar, the three most violent cities in the country are located in the mining zone “Arco Minero del Orinoco”: El Callao, with a rate of 620 homicides for every 100,000 inhabitants; Guasipati, with 458 homicides for every 100,000 inhabitants, and Sifontes, with 199 victims for every 100,000 inhabitants.<sup>29</sup> The “Arco Minero del Orinoco” has witnessed some of the worst massacres of recent years. In March 2016, 28 miners were kidnapped and killed by the “Topo Gang” in Tumeremo.<sup>30</sup> In September 2017, 21 persons were killed by Venezuelan Armed Forces in the city of Piar.<sup>31</sup> In February 2018, 18

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<sup>27</sup> International Crisis Group, [Report # 73 Gold and Grief in Venezuela’s Violent South](#), February 29, 2019; Cf. Organized Crime and Corruption Reporting Project y el International Center for Journalist, [Informe AMO crimen, corrupción y cianuro](#); Executive order No. 2.241, published in the *Gaceta Oficial* No. 40.855, February 26, 2016.

<sup>28</sup> International Crisis Group REPORT 73 / LATIN AMERICA & CARIBBEAN 28 FEBRUARY 2019, Gold and Grief in Venezuela’s Violent South (<https://www.crisisgroup.org/latin-america-caribbean/andes/venezuela/073-gold-and-grief-venezuelas-violent-south>). See also Fernando Fernández, *Materiales de Sangre* (Observatorio de Delito Organizado, 2015) (between 11 and 270 tons of gold annually are illegally produced and trafficked).

<sup>29</sup> OVV-LACSO: [Informe Anual de Violencia 2018](#), December 30, 2018.

<sup>30</sup> International Crisis Group REPORT 73 / LATIN AMERICA & CARIBBEAN 28 FEBRUARY 2019, Gold and Grief in Venezuela’s Violent South (<https://www.crisisgroup.org/latin-america-caribbean/andes/venezuela/073-gold-and-grief-venezuelas-violent-south>)

<sup>31</sup> El Nacional, [21 personas murieron en Bolívar en enfrentamiento con el Ejército](#), 11 September, 2017.

were killed by Venezuelan Armed Forces in the city of Guacipati.<sup>32</sup> These were presented as deaths in combat as part of the conflict between miners and the military in the struggle for the control of gold mining reserves. Adopting the lens of corruption – fights for control of resource extraction in order to smuggle, or for enrichment of military leaders – adds a more systemic explanation to the attacks. Thus, the deaths reported in the Arco Minero area, although reported as confrontations with criminals, are quite likely state-sanctioned extrajudicial killings.

Many of the violent deaths are committed by State security forces under circumstances in which the victim presented “resistance to the authorities”. These attacks have often been disguised by media reports of armed confrontations, reports made credible by the extremely high level of lethal violence in the country.<sup>33</sup> For example, one of the highest sources of killings have now become the poor neighborhoods of Caracas and surrounding states, many carried out by so-called OLP (Operation to Liberate and Protect the People)<sup>34</sup> groups in the name of fighting crime. The victims are almost always poor young men, and the attacks are carried out by state forces sometimes working in conjunction with paramilitary groups known as “colectivos.” But understanding why particular groups of young men become more or less targeted takes on a different hue if one considers that the colectivos also control the retail drug traffic, kidnapping, extortion and other rackets as well as security in these neighborhoods. If they are working with the regular security forces to choose targets for extrajudicial killings, the patterns of regime

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<sup>32</sup> El Pais, [18 mineros ilegales mueren en un enfrentamiento con el Ejército venezolano en la región de Guayana](#), February 11, 2018.

<sup>33</sup> According to the Venezuelan Violence Observatory, the 2018 rate of violent deaths amounts to 81.4 every 100,000 inhabitants. This rate makes Venezuela the most violent country in the region, registering twice the victims in countries with high levels of extreme poverty such as Honduras (40 victims every 100,000 inhabitants), and more victims than countries overcoming armed-conflicts such as El Salvador (60 victims every 100.000 inhabitants)VV-LACSO: [Informe Anual de Violencia 2018](#), December 30, 2018.

<sup>34</sup> These military-style operations in poor neighborhoods were billed as a way to fight criminal gangs and especially armed paramilitaries. However, they have resulted in turning territory over to pro-government ‘colectivos’ and powerful people, as well as in multiple killings and detentions. See Connectas, OLP: the Mask of official terror in Venezuela, at <https://www.connectas.org/especiales/olp/en/venezuela-crime-without-borders/>.

opponents may coincide with patterns of rivals or potential competitors – or may explain why young men with no obvious political ties are nonetheless targeted as opponents in areas where these paramilitaries provide repressive services in exchange for criminal control over territory.<sup>35</sup>

In general, many homicides have occurred under unclarified circumstances in which security forces may have been involved. Thus, in 2018 there were 10,422 homicides, 7,523 victims who presented “resistance to the authorities”, 5,102 unclarified homicides still under investigation (“muertes en averiguación”), amounting to a total of 23,047 victims of violence-related causes.<sup>36</sup> As the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have documented, it is common for extrajudicial killings in Venezuela to be staged as confrontations or armed engagements during routine procedures. According to these bodies, such “deaths in combat” are frequently accompanied by threats to relatives and witnesses, contributing to impunity and revealing police complicity and corruption.<sup>37</sup>

## **ii. Substantive crimes connected to a corruption analysis**

A slightly different example involves food smuggling and control. Here corruption is not only context, but gives rise to new acts that could constitute crimes against humanity. A clear example is the creation of a humanitarian emergency in order to profit from it. A 2016 AP

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<sup>35</sup> See Insight Crime, “The devolution of state power: the ‘colectivos’, in Venezuela: A Mafia State (May 18, 2108); “Maduro Relies on ‘Colectivos’ to Stand Firm in Venezuela,( March 18, 2019).

<sup>36</sup> OVV-LACSO: [Informe Anual de Violencia 2018](#), December 30, 2018.

<sup>37</sup> For example, in the *Diaz Loreto* case, the Commission found that:

“24. As for the modus operandi, the IACHR has identified that, in some instances, deaths are staged as confrontations or armed engagements during routine procedures, in the course of carrying out either arrest warrant or search warrant operations. In these cases, the victim is killed at the site of the operation and under the pretext of an armed confrontation of a criminal with the police forces. In other cases, the executions take place once the victims have been illegally and/or arbitrarily detained and are under state custody. In other circumstances, after illegal raids are conducted by hooded or unidentified individuals, the victims are murdered by them”. Other reports and cases have similarly found that police carry out extrajudicial killings through feigned confrontations. E.g. Inter-American Commission on Human Rights, [Report on the Situation of Human Rights in Venezuela](#), OEA/Ser.L/V/II.118, doc. 4 rev. 2, 29 December 2003, paras. 333, 345; see also I/A Court H.R., [Case of the Barrios family v. Venezuela](#). Merits, Reparations and Costs. Judgment of November 24, 2011. Series C No. 237, para. 38.



investigation found that since the military was given control over food distribution in 2016, corruption has increased, including bribes to allow imports into the country, the use of phantom businesses to create fake contracts and bills, and vastly inflated prices billed for imported foods.<sup>38</sup> Thousands of tons of food have rotted in the docks because insufficient bribes were offered.<sup>39</sup> Fake purchases of foodstuffs have been used to launder money.<sup>40</sup> Food smuggling has become lucrative, and is therefore tightly controlled by the military and its allies. Military officers have been implicated in smuggling flour into the country for sale on black markets<sup>41</sup>. Businessman Samar Lopez, with close ties to former VP and current Industry Minister Tarek El-Aissami, was accused of marking up imports of food destined for the government's CLAP<sup>42</sup> food distribution program and siphoning off over \$100 million;<sup>43</sup> meanwhile, the Mexican firms accused of marking up inferior foodstuffs destined for Venezuela are under criminal investigation in Mexico.<sup>44</sup>

All this is taking place at a time when vast swaths of the population suffer malnutrition and hunger, and there have even been reports of starvation. The government's food policy clearly violates its human rights obligations. But if the policy is carried out knowing that the primary result will be to enrich high-ranking military officers and their friends in organized crime and the private sector, and knowing that widespread and severe food shortages among the

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<sup>38</sup> Hanna Dreier and Joshua Goodman, Ejército de Venezuela trafica alimentos en época de hambre, AP, Dec. 27, 2016, <https://apnews.com/45b25be7186f4dbb95b6371810b62d8a>.

<sup>39</sup> Id.

<sup>40</sup> Entrevistas W, "Nicolás Maduro, Jorge Rodríguez y Diosdado Cabello están relacionados con caso Odebrecht", nov. 4, 2017.

[http://www.wradio.com.co/escucha/archivo\\_de\\_audio/nicolas-maduro-jorge-rodriguez-y-diosdado-cabello-estan-relacionados-con-caso-odebrecht/20170904/oir/3569025.aspx](http://www.wradio.com.co/escucha/archivo_de_audio/nicolas-maduro-jorge-rodriguez-y-diosdado-cabello-estan-relacionados-con-caso-odebrecht/20170904/oir/3569025.aspx)

<sup>41</sup> Insight Crime, Sept. 1, 2016.

<sup>42</sup> (Comités Locales de Abastecimiento y Producción, Local Food Production and Distribution Committees)

<sup>43</sup> Insight Crime, Feb. 22, 2017.

<sup>44</sup> The Associated Press, Mexico prosecutors find fraud in Venezuela food aid program, oct 18, 2018.

<https://www.seattletimes.com/nation-world/mexico-prosecutors-find-fraud-in-venezuela-food-aid-program/>

civilian population will result, and that those food shortages will further enrich those involved, is that not also the crime against humanity of extermination?<sup>45</sup> The systematic nature, the deliberate decision to withhold food in order to increase bribes and kickbacks, and the knowledge that widespread hunger and death will result, would seem to bring these corrupt acts within the ambit of article 7(b).<sup>46</sup> If, as reported, distribution of food (and medicine)<sup>47</sup> further depend on showing loyalty through the presentation of a party ID, then those denied food or medicine due to their political views would moreover have suffered the crime of persecution under Article 7(h).<sup>48</sup> Without a corruption lens on the events, these connections may be missed.

### iii. State or organizational policy

Unlike the statutes of earlier international criminal tribunals, the definition of crimes against humanity in the Rome Statute requires showing the existence of a State or organizational policy.<sup>49</sup> Whether or not this element is necessary, is redundant, or is confusing for judges has

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<sup>45</sup> Article 7(2)(b) Defines extermination as including “the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population in Rome Statute.” In *Prosecutor v. Vujadin Popovic*, the Court said: “With respect to Beara’s argument concerning the nexus between the acts of extermination and the widespread and systematic attack on a civilian population, the Appeals Chamber recalls that the nexus requirement is fulfilled by an act which, by its nature or consequences, is objectively part of the attack, coupled with knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.” [Prosecutor v. Vujadin Popovic, Case No. IT-05-88-A, Judgement \(AC\), 30 January 2015](#), para. 570

<sup>46</sup> Article 30(2)(b) of the ICC Statute, states that a person has intent ‘in relation to a consequence, [where] that person means to cause that consequence or is aware that it will occur in the ordinary course of events’. Such *dolus eventualis* suffices to hold the members of government responsible for crimes against humanity perpetrated against their own people in peacetime by placing them in conditions of life, which in the ordinary course of events would deprive them of access to sufficient food and medical care. Ilias Bantekas, Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies, *Journal of International Criminal Justice*, Volume 4, Issue 3, July 2006, Pages 466–484, <https://doi-org.uchastings.idm.oclc.org/10.1093/jicj/mql025>

<sup>47</sup> NY Times, “It is Unspeakable’: How Maduro Used Cuban Doctors to Coerce Venezuela Voters”, Mar. 17, 2019, at <https://www.nytimes.com/2019/03/17/world/americas/venezuela-cuban-doctors.html>.

<sup>48</sup> “Art. 7(h): Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”

<sup>49</sup> Article 7(2)(a): ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

been the subject of much controversy,<sup>50</sup> which we will not repeat. At a minimum, the argument runs, “[i]f it were not present, the necessary ‘widespread or systematic attack on a civilian population’ could also be carried out by an individual, a small group, or a spontaneous assemblage of a number of people.”<sup>51</sup> Whatever its merits, the ICC requires a showing that such a policy exists.

The underlying concern has always been to distinguish crimes requiring international attention from common crimes, no matter how frequent or widespread, for which national courts are presumptively sufficient. In other words, to distinguish crimes which can be adequately dealt with by national courts, including crimes by mafias, motorcycle gangs and deranged individuals. Moreover, the concern is to avoid squandering the limited resources of the international courts on anything less than the most heinous crimes, capable of affecting peace and security.

But increasingly, crimes of grand corruption share with other international crimes the characteristic that national courts are unable to deal well with them, due to the degree of state capture. Judges are not independent, prosecutors are bought or threatened, witnesses are intimidated or worse. The same impunity-related rationales invoked with respect to ‘core crimes’ apply here.

David Luban writes that “Crimes against humanity are when our organizational nature turns against us and people work together to commit atrocities; they are ‘politics gone cancerous’.”<sup>52</sup> Grand corruption surely fills that bill – the entire apparatus of the state has been

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<sup>50</sup> See, e.g., Halling Matt , "Push the Envelope--Watch It Bend: Removing the Policy Requirement and Extending Crimes against Humanity " (2010 ) 23 :4 Leiden J Int'l Law 827; Schabas William A , "Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes" (2010 ) 23 :4 Leiden J Int'l Law 847.

<sup>51</sup> Gerhard Werle, Boris Burghardt, Do Crimes Against Humanity Require the Participation of a State or a ‘State-like’ Organization?, *Journal of International Criminal Justice*, Volume 10, Issue 5, December 2012, Pages 1151–1170.

<sup>52</sup> D. Luban, ‘A Theory of Crimes Against Humanity’ (2004) 29 Yale Journal of International Law 85.

turned from any concern with the common good, to a machine for private enrichment. A massive refugee exodus, the inability to provide basic electricity, food and security, and the increasing number of deaths have given rise to regional and global concern. What could be more cancerous?

Moreover, what makes these crimes particularly dangerous is that the perpetrators are able to use control of territory and resources, of either the state or an organization, to carry out the crimes. Here understanding the policy as the effort on the part of state and state-related actors to maintain themselves in power *in order to* continue looting the state actually furthers coherence: it allows what might otherwise be understood as disparate actions, against disparate populations, to lose their randomness and be understood as part of a linked set of acts.

In many parts of the world, the kinds of crimes once considered “ordinary” – murders, rapes, forced displacement or torture by organized crime syndicates, gangs, or paramilitary groups – are now carried out with the participation, connivance or acquiescence of state actors, not for political reasons but because they are participants in vast schemes of looting of the state involving both public and private actors. The worry is not that these crimes will be mistakenly characterized too often as constituting crimes against humanity, but that the opposite will occur: they will be too frequently mischaracterized as “mere” ordinary crimes. When these crimes are committed to silence whistleblowers, rivals or inconvenient witnesses, or to clear out an area so that illegal mining, logging or other resource extraction, extortion or smuggling activities can take place, they should be properly characterized as crimes against humanity.

Moreover, the difference between a State policy and that of an organization is becoming difficult to pull apart, and is in any case irrelevant. States act through, with, and in

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collusion with private groups like organized crime and quasi-private groups like paramilitaries (here, the ‘colectivos’). It is precisely this collusion or joint action in a network, for mutual benefit, that is at the heart of these crimes. This is more than simple tolerance or complicity, and creates difficulties defining whose policy is to be included. In the context of Venezuela, there is both a state and an organizational policy intertwined with each other.

**b. ADMISSIBILITY: COMPLEMENTARITY AND GRAVITY**

In addition to crimes within the Court’s jurisdiction, the Office of the Prosecutor must be satisfied that the State (or States) involved cannot or will not deal with the crimes within the domestic legal system, and that the crimes are sufficiently grave to have a claim on extremely limited resources. In both these inquiries, a corruption lens provides valuable insights.

**i. Complementarity**

Article 17 requires showing that the State is “unable or unwilling” to carry out its own investigations. Given that a formal legal system exists in Venezuela and continues to operate for other types of crime, the discussion has focused on the “unwilling” prong.

**1. The justice system**

Venezuela’s justice system has increasingly lost its independence and impartiality as a result of actions by the current government. Back in 2015, a few days before the installation of the recently elected National Assembly—whose opposition deputies made up the majority in the house for the first time in 17 years—the outgoing Assembly appointed replacements to 13 of the 32 judges of the Supreme Court of Justice, who requested early retirement under dubious

circumstances.<sup>53</sup> According to “El Observatorio Venezolano de la Justicia”, some of these judges were threatened with impeachment while others were promised embassies.<sup>54</sup> This coincidence was not surprising for Venezuelans; in fact, since the year 2000, only 7 out of 84 Supreme Court judges completed their 12-year period.<sup>55</sup> Be that as it may, with this collective “early retirement of Justices” the government ensured that, prior to losing the Legislative Assembly, it would take over the Judiciary.

The Prosecutors’ Office is similarly not independent. Former Prosecutor Luisa Ortega (who had been appointed by then-President Chávez) was dismissed in 2017 by the Supreme Court of Justice;<sup>56</sup> the dismissal was unlawful because, according to article 279 of the Venezuelan Constitution, the Attorney General can only be removed from office with the approval of the National Assembly.<sup>57</sup> With Ortega living in exile, the National Constituent Assembly designated a new Attorney General, Tarek Saab, an old and unconditional supporter of the current government.<sup>58</sup> Just as with Ortega’s dismissal, the designation of Saab was unlawful since article 21 of the Organic Law of the Attorney General’s Office states that such designation is a prerogative of the National Assembly, not the National Constituent Assembly.<sup>59</sup>

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<sup>53</sup> El Observatorio venezolano de la Justicia, El TSJ: La joya que pocos han podido retener Radiografía sobre la duración de los magistrados del máximo juzgado en sus cargos (<https://www.accesoalajusticia.org/wp-content/uploads/2017/03/El-TSJ-La-joya-que-pocos-han-podido-retener.pdf>).

<sup>54</sup> El Observatorio Venezolano de la Justicia, El TSJ: La joya que pocos han podido retener Radiografía sobre la duración de los magistrados del máximo juzgado en sus cargos, 2017. (<https://www.accesoalajusticia.org/wp-content/uploads/2017/03/El-TSJ-La-joya-que-pocos-han-podido-retener.pdf>)

<sup>55</sup> El Observatorio Venezolano de la Justicia, El TSJ: La joya que pocos han podido retener Radiografía sobre la duración de los magistrados del máximo juzgado en sus cargos, 2017. (<https://www.accesoalajusticia.org/wp-content/uploads/2017/03/El-TSJ-La-joya-que-pocos-han-podido-retener.pdf>)

<sup>56</sup> TJS, Sala Plena, comunicación del 4 de agosto de 2017. (<https://www.youtube.com/watch?v=BLEpRXdUxQc>)

<sup>57</sup> Article 279: Members of Citizen Power shall be subject to removal by the National Assembly, following a ruling by the Supreme Court of Justice, in accordance with the procedure established by law.

<sup>58</sup> Video, ANC designa a Tarek William Saab como Presidente de la Comisión por la Verdad, Justicia y Paz, published on August 5, 2017. ([https://www.youtube.com/watch?v=slq63p7\\_5Dg](https://www.youtube.com/watch?v=slq63p7_5Dg))

<sup>59</sup> LEY ORGÁNICA DEL MINISTERIO PÚBLICO G.O. (38647 de 19/3/2007). Artículo 21. El Fiscal o la Fiscal General de la República será juramentado o juramentada por la Asamblea Nacional dentro de los diez días siguientes a su designación.

(<http://www.derechos.org/ve/pw/wp-content/uploads/Ley-Org%C3%A1nica-del-Ministerio-P%C3%BAblico.pdf>)

It is impossible to understand the full scope of the domestic system's unwillingness to prosecute crimes by the authorities, or the reasons for it, without considering the impact of corruption. For example, one of the largest corruption scandals ever uncovered in Latin America involves a massive bribery/kickbacks scheme by Brazilian construction giant Odebrecht aimed at nearly a dozen governments in the region. The Odebrecht scandals have swept up government officials in twelve countries, including Peru, Brazil, Dominican Republic, Colombia, Panama, Guatemala, Argentina, Mexico, and Ecuador. However, unlike in most of these countries, in Venezuela no inquiries have been pursued. According to the information provided by the U.S. Department of Justice and the plea agreement signed between Odebrecht S.A. and the United States, Venezuela is the country in the region that received the most bribes.<sup>60</sup> The plea agreement clearly states that:

“In or about and between 2006 and 2015, ODEBRECHT made and caused to be made approximately \$98 million in corrupt payments to government officials and intermediaries working on their behalf in Venezuela in order to obtain and retain public works contracts.

[...]

[For example,] Odebrecht paid an intermediary to help it obtain contracts with a Venezuelan state-owned and state-controlled company. During the negotiations, the intermediary made it clear that the money would be used to pay a bribe in exchange for obtaining certain service agreements and amendments, and that the intermediary represented various directors of the state-owned and state-controlled company. Odebrecht paid the intermediary approximately

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<sup>60</sup> *Cfr.* UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, PLEA AGREEMENT UNITED STATES OF AMERICA PLEA AGREEMENT - against - ODEBRECHT S.A., Defendant. (<https://www.justice.gov/opa/press-release/file/919916/download>)

\$39 million.”<sup>61</sup> This corruption scandal directly involves President Nicolas Maduro, who, according to the former Attorney General, Luisa Ortega, received between 8 and 10 million dollars in relation to Odebrecht.<sup>62</sup> Separately, Ortega accused Maduro of receiving \$50 million in bribes for his presidential campaign.<sup>63</sup> In addition, Diosdado Cabello, current President of the National Constituent Assembly and former President of the National Assembly, allegedly also received money from the Brazilian company.<sup>64</sup> Of the public works contracted for in the course of these transactions, at most are unfinished, and the contracts were apparently inflated.<sup>65</sup>

The inaction of the Attorney General’s Office and the judicial branch regarding these allegations may make more sense if we consider the existing promiscuous relationship between judges and public contracts. Judges have been doing surprisingly well as businessmen in a country which, according to the World Bank’s ease of doing business index, is one of the worst worldwide.<sup>66</sup> A recent investigation published by the internet portal Armando Info revealed that, in the past 20 years, 559 companies that held public contracts with the State have had 461 judges in their executive boards. Of these, 19 judges participated simultaneously in three or four companies. Currently, at least 106 judges linked to these companies still belong to the Judiciary Branch and are members of the United Socialist Party of Venezuela. Surprisingly, 131 of those

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<sup>61</sup> UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK, PLEA AGREEMENT UNITED STATES OF AMERICA PLEA AGREEMENT - against - ODEBRECHT S.A., Defendant., para. 68, 70. (<https://www.justice.gov/opa/press-release/file/919916/download>)

<sup>62</sup> DW, Luis Ortega acusa a Mauduro de recibir al menos 8 millones de dólares para Odebrecht, 28 August, 08.2017 (<https://www.dw.com/es/luisa-ortega-acusa-a-maduro-de-desviar-al-menos-8-millones-de-d%C3%B3lares-para-odebrecht/a-40276404>)

<sup>63</sup> Proceso, <https://www.proceso.com.mx/563093/mexico-y-venezuela-el-cinismo-judicial-frente-al-caso-odebrecht>

<sup>64</sup> The New York Times, Key Maduro Ally in Venezuela Is Linked to Illegal Campaign Gifts, October 14, 2017 (<https://www.nytimes.com/2017/10/14/world/americas/venezuela-nicholas-maduro-diosdado-cabello-odebrecht-video.html>)

<sup>65</sup> Jim Wyss, “Venezuela’s ex-prosecutor Luisa Ortega accuses Maduro of profiting from nation’s hunger,” Miami Herald, Aug. 23, 2017, <https://www.miamiherald.com/news/nationworld/world/americas/venezuela/article168977357.html#storylink=cpy>.

<sup>66</sup> The [World Bank, Ease of doing business index](#), 2018.



companies are dedicated to construction work in a time of shortage of both bricks and cement in the country. The remaining companies provide services in different fields such as imports, health, tourism, communications, real estate, etc. None of them seems to have an expertise in legal affairs.<sup>67</sup>

The precariousness of judicial careers also makes judges less independent. As of 2017, only 27% of the judges in Venezuela were “career judges” (that is, appointed permanently), as opposed to “provisional judges”, who exercise jurisdictional functions under short-term contracts and can be dismissed without a disciplinary procedure.<sup>68</sup> In the last decade, the percentage of provisional judges has been between 66% and 88%.<sup>69</sup> While a pliant provisional judge may be rewarded with state contracts, a less pliant one may be easily removed.

In the same line of reasoning, being an independent judge may be reason for punishment. Back in 2009, the Executive Branch “made an example” of Justice Maria Lourdes Afiuni. Justice Afiuni was convicted for deciding that Eligio Cedeño, a banker accused of participating in illegal dollar transactions, could be released on bail prior to his trial. She supported her decision on a recommendation for release issued by the UN Working Group on Arbitrary Detention.<sup>70</sup> Afiuni was arrested immediately after the hearing in her office by the police and subjected to a procedure that ended with the deprivation of her liberty for many years in inhuman conditions. As of today, she is still facing an endless trial. Cedeño fled the country. The case was seen at the

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<sup>67</sup> Armando Info, [Los jueces en Venezuela asfaltan calles y firman sentencias](#), February 17, 2019.

<sup>68</sup> Inter-American Commission on Human Rights. Democratic Institutions, the Rule of Law and Human Rights in Venezuela, 2017. (<http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>), paras. 84-89

<sup>69</sup> Comisión Internacional de Juristas, [Achieving Justice for Gross Human Rights Violations in Venezuela, Baseline Study](#), July 2017, pág. 23.

<sup>70</sup> HUMAN RIGHTS COUNCIL, PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT Opinions adopted by the Working Group on Arbitrary Detention, ([A/HRC/13/30/Add.1](#), pág. 325).

time as an object lesson for other judges who might dare to act against the wishes of the Executive.

## 2. The Link to Organized Crime: The Cartel de los Soles

Another reason why the components of the justice system are not independent or impartial has to do with the alliance between high-ranking officials and organized crime. Shannon O’Neil, in her 2017 expert testimony before the Committee on Foreign Relations of the United States Senate, declared:

“The nation [Venezuela] has become a preferred drug smuggling route out of South America, with cocaine heading to the United States through Central America and the Eastern Caribbean, and to Europe through West Africa. The Venezuelan government effectively ended anti-narcotics cooperation a decade ago; since then Drug Enforcement Administration (DEA) and Department of Justice (DOJ) investigations point to active collusion and collaboration between prominent government officials and drug traffickers.”<sup>71</sup>

O’Neil was confirming what Carlos Tablante —Venezuelan former minister and ex-chairman of the Commission Against the Illicit Use of Drugs — said in 2013: high-ranking government officials had been collaborating with drug traffickers from Colombia and Mexico and had made Venezuela the preferred route to send cocaine overseas. In his book, named “Estado Delincuente” (in English, Criminal State), Tablante describes a parallel hidden State in Venezuela dedicated to arms and drugs trafficking.<sup>72</sup> Tablante was one of the prominent

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<sup>71</sup> Options for U.S. Policy in Venezuela, [Prepared statement by Shannon K. O’Neil, Before the Committee on Foreign Relations United States Senate](#), 1st Session, 115th Congress, March 2, 2017.

<sup>72</sup> Carlos Tablante, Marcos Tarra, [Meet the “Delinquent State”](#).

members of the political party “Movimiento al Socialismo” (MAS), a former ally of late President Hugo Chávez.

According to the Congressional Research Service, to this day the U.S. Treasury Department has imposed drug trafficking-related sanctions on at least 22 individuals, including Diosdado Cabello.<sup>73</sup> In 2017, sanctions were imposed on former Vice President Tareck el Aissami and on Walid Makled, a businessman who was extradited from Colombia to Venezuela back in 2011 on drug trafficking charges. Most recently, in 2018, sanctions were also imposed on Pedro Luis Martin, former Intelligence Chief of Venezuela.<sup>74</sup>

According to the investigative organization Insight Crime, high-ranking members of each of the armed services participate in the drug trade, both as allies and as competitors.<sup>75</sup> This military-dominated organized crime group is known as the “Cartel of the Suns”, named for the golden stars that National Guard generals wear on their epaulets.<sup>76</sup> In an interview to CNN, Michael Vogel, former DEA chief of operations, said that “it wouldn’t be possible to transport that amount of cocaine without high levels of corruption.”<sup>77</sup> He also mentioned that this shipment of cocaine might be part of the operations of the Cartel of the Suns. As the economic and political situation has worsened, the Maduro government depends increasingly on maintaining the loyalty of the military. This perhaps explains not only why there have been few

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<sup>73</sup> U.S. DEPARTMENT OF THE TREASURY, PRESS RELEASES, [Treasury Targets Influential Former Venezuelan Official and His Corruption Network](#), May 18, 2018.

<sup>74</sup> Congressional Research Service, [Venezuela: Overview of U.S. Sanctions](#), November 21, 2018. Re El Aissami, not only the U.S. government but Venezuela’s own intelligence services confirmed his links to drug trafficking and Hezbollah. Nicholas Casey, “Secret Venezuela Files Warn About Maduro Confident,” New York Times, May 2, 2019.

<sup>75</sup> For more on the Cartel de los Soles, see <https://www.insightcrime.org/venezuela-organized-crime-news/cartel-de-los-soles-profile/> and related articles.

<sup>76</sup> Insight Crime, [Drug Trafficking within the Venezuelan Regime: The ‘Cartel of the Suns’](#), May 17, 2018.

<sup>77</sup> CNN en español, [Arrestan a dos familiares de la primera dama de Venezuela por posible narcotráfico, por Kay Guerrero, Claudia Domínguez](#), 11 Noviembre, 2015.

investigations into drug-running by military officers, but also why the justice system has been hollowed out, as described above. It also explains high levels of violence in the border areas with Colombia, where Colombian groups like the ELN and FARC dissidents now act in collusion with Venezuelan authorities.<sup>78</sup>

The result of high-level collusion with traffickers and other organized crime figures is that the justice system, disabled to avoid prosecution of illegal and corruption-related activities, is unable to perform its tasks at all. To understand how pervasive the “unwillingness” runs, it is important to understand why it is important to the government that the justice system be subservient across the board. The impunity and dysfunction of the system are a feature, not a bug.

#### **iv. Gravity**

In addition to proving that Article 17’s complementarity requirements have been met, the policy paper on preliminary examinations establishes, as a separate step, consideration of the gravity of the situation under Article 17(1)(d). In order to establish the gravity of potential cases that might come before the Court, the OTP considers factors including the scale, nature, manner of commission of the crimes, and their impact. The manner of commission may assess, among others, the degree of participation and intent of the perpetrator, systematicity and abuse of power or official capacity.<sup>79</sup> The impact of crimes includes “the social, economic and environmental damage inflicted on the affected communities.”<sup>80</sup> The Pre-Trial Chamber held early on that the

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<sup>78</sup> Insight Crime, [Drug Trafficking within the Venezuelan Regime: The ‘Cartel of the Suns’](#), May 17, 2018.

<sup>79</sup> International Criminal Court. Policy Paper on Preliminary Examinations, para. 64. ([https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf))

<sup>80</sup> International Criminal Court. Policy Paper on Preliminary Examinations, para. 65. ([https://www.icc-cpi.int/iccdocs/otp/otp-policy\\_paper\\_preliminary\\_examinations\\_2013-eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf))

nature, manner and impact of the attack are critical, and to be evaluated on a qualitative, not simply qualitative, level.<sup>81</sup>

In a 2016 article, Ester Hava García proposed that the existence of indicators of grand corruption be *per se* indicators of gravity, in that they always indicate abuse of power by perpetrators as well as grave harm to the affected population.<sup>82</sup> Thus, where there is a showing that grand corruption is present, a case that otherwise meets the scale and nature requirements should be automatically considered grave. More ambitiously, even if the scale or nature of the crimes fell below the numbers seen in other cases, the fact that they were committed within a context of severe impact and abuse of power would weigh heavily on the side of a finding of gravity. Thus, in the Venezuelan case, even if the number of killings or other crimes were relatively small, the possibility of their continued commission, and of increases in scale and scope, due to the need to maintain a situation of impunity and access to resources to maintain systemic or grand corruption, would indicate that the case met the gravity requirement.

The OTP has moved towards considering background conditions, in theory at least. The OTP's Policy Paper on Case Selection affirms that "the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land."<sup>83</sup>

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<sup>81</sup> Prosecutor v. Abu Garda, Decision on the Confirmation of Charges, ICC 02/05-02/09-243-Red, PTC I, 8 Feb. 2010, para. 31.

<sup>82</sup> Ester Hava García, Gran Corrupción: estrategias para evitar su impunidad internacional, Nuevo Foro Penal No. 87, junio-diciembre 2016, Universidad EAFIT, P. 90.

<sup>83</sup> international Criminal Court. Office of the Prosecutor Policy Paper on Case Selection and Prioritisation, Sept 15, 2016, para. 41. ([https://www.icc-cpi.int/itemsdocuments/20160915\\_otp-policy\\_case-selection\\_eng.pdf](https://www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf))

Despite this much-remarked on paragraph,<sup>84</sup> and despite the existence of a number of cases where these conditions obtain, to date the OTP has not elaborated on how it is applying ‘particular consideration’ in any concrete case. A communication regarding land-grabbing in Cambodia that resulted in widespread dislocation of the civilian population and attacks on community leaders that opposed it, has not to date resulted in the opening of a preliminary examination.<sup>85</sup> The crimes being committed in the Arco del Orinoco region, in the context of mining controlled by the military and affiliated gangs, might provide a concrete way of implementing the Policy Paper.

While the OTP has not to date done something similar regarding corruption, it has branched out from early cases that involved armed conflict to consider other contexts in which crimes against humanity may be committed. Perhaps most pertinent, it accepted a preliminary examination of extrajudicial killings and other crimes committed in the context of the “drug war” in the Philippines. As in most places – including Venezuela (and Mexico, where petitions to open a preliminary examination are long-pending) – drugs, impunity generally, and corruption are closely connected.<sup>86</sup> By taking on crimes committed in this context, the Court may more easily consider some of the atrocities committed in other drug-related wars.

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<sup>84</sup> See, e.g., Don Anton, Adding a Green Focus: The Office of the Prosecutor of the International Criminal Court Highlights the 'Environment' in Case Selection and Prioritisation, Dec. 3, 2016, at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2879775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2879775).

<sup>85</sup> This Week in Asia. Alan Robles. Philippines’ corrupt customs bureau makes mockery of Duterte’s war on drugs, Nov. 9, 2018. (<https://www.scmp.com/week-asia/politics/article/2171465/philippines-corrupt-customs-bureau-makes-mockery-dutertes-war>)

<sup>86</sup> The New York Times, Miguel Syjuco, May 23, 2018. (<https://www.nytimes.com/2018/05/23/opinion/corruption-rodriigo-duterte-philippines.html>). Re Mexico, see, e.g., FIDH, Military and civil authorities reported to the International Criminal Court for crimes against humanity committed in Chihuahua, Mexico, June 11, 2018, at <https://www.fidh.org/en/region/americas/mexico/military-and-civil-authorities-reported-to-the-international-criminal>. This is the third referral regarding Mexico presented to the OTP, to date without results

**v. The interests of justice**

Until recently, the presumption was that the interests of justice requirement was met unless there were extraordinary circumstances of some kind. Such circumstances might arise, for example, if an investigation would upset a delicate moment in internal or international peace negotiations, or if defendants were unable to understand and participate in a trial. However, that presumption may have changed recently, when Pre-Trial Chamber II decided that the Prosecutor's *proprio motu* effort to investigate crimes in Afghanistan should not move forward. The Chamber found that the other requirements of the Rome Statute were met, but that "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."<sup>87</sup>

Even if this line of reasoning stands, it seems that a Venezuela investigation would face far fewer difficulties than one in Afghanistan. The referral from neighboring states, the amount of evidence already collected, and the existence of strong civil society groups would make a Venezuela investigation, no matter its subject matter, effective enough to overcome this bar.

**III. Concerns with the Proposed Approach**

Venezuela is not the only case where systemic corruption and atrocity crimes are intertwined. Increasingly, situations involving crimes against humanity are even more likely than those currently before the ICC<sup>88</sup> to involve a murky mix of actions to control territory and

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<sup>87</sup> Decision of Pre-Trial Chamber II, April 12, 2019, paragraph 89, available at <https://www.icc-cpi.int/afghanistan>.

<sup>88</sup> The Democratic Republic of the Congo seems an especially apt example. See, e.g. Brookings Institution, A Roadmap for the United States in DRC and other Budding African Democracies, Feb. 22, 2019, available at <https://www.brookings.edu/blog/order-from-chaos/2019/02/22/a-roadmap-for-the-united-states-in-drc-and-other-budding-african-democracies/>.

resources for personal, organizational or political gain, combined with ever-more sophisticated international networks to fund these actions and hide the proceeds. Sarah Chayes counted some 60 countries where “corruption is the operating system”<sup>89</sup> and that number is growing. The overlay of those countries with those at risk of atrocities is substantial. For the ICC, or international justice more generally, continued relevance will increasingly require grappling with this underlying reality.

We recognize that adding a corruption lens to international justice creates complications. Some of these are legal: there is no penal definition of corruption per se,<sup>90</sup> only of the underlying acts such as embezzlement, bribery, money laundering or influence-peddling.<sup>91</sup> Some are political: anti-corruption speech can be easily politicized and manipulated. Everyone agrees, in principle, that corruption harms; politicians of different stripes are quick to accuse their opponents or predecessors even though they might have participated in the prior government themselves, or their campaign may have been funded by the same companies that later ended up involved in monumental corruption scandals.

Furthermore, there are real questions about institutional capacity. The ICC’s Prosecutor early on recognized the links between atrocity and illicit finance, but also that “following the money” requires resources and a specialized skill-set that may exceed the Court’s capabilities. Investigating grand corruption, especially when linked (as it often is) to organized crime, creates new and serious risks to investigators and witnesses. Current situations already outstrip the

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<sup>89</sup> Chayes, Sarah, *When Corruption is the Operating System: The Case of Honduras* (Carnegie Endowment for International Peace, 2017).

<sup>90</sup> Transparency International defines corruption as the abuse of entrusted power for private gain, by either public or private actors.

<sup>91</sup> See UN Convention Against Corruption. It is important to note for purposes of transnational prosecutions that UNCAC contains an “extradite or prosecute” provision when alleged offenders are found in the territory of a state party.



Court's capacity, and resources are unlikely to become more plentiful. Asking the Court to do more may be unrealistic.

More broadly, the question of relative institutional strengths may point to other ways at getting at the problem of state capture and grand corruption as it relates to atrocity crimes. National offices, such as the U.S. OFAC,<sup>92</sup> and international bodies like UN Sanctions Committees already investigate and sanction crimes resulting from grand corruption. National prosecutors' offices increasingly collaborate on following money trails. Innovations like Guatemala's International Commission Against Impunity (CICIG) show both the promise of attacking illicit political-economic networks and the perils of backlash.<sup>93</sup> Proposals for an International Anti-Corruption Court or a Latin American Corruption Court, while probably premature, could become viable as bottom-up pressure to curb kleptocracy increases.<sup>94</sup>

While all this is true, it does not change our basic point. None of these existing or future bodies focuses on the connection between grand corruption and atrocity crimes (although CICIG's mandate does emerge from a pattern of rights violations). None have a mandate that requires the participation of, or redress for, victims. And in any case, the existence of multiple investigative bodies can lead to synergies and new opportunities for collaboration.

## CONCLUSION

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<sup>92</sup> The Office of Foreign Assets Control (OFAC) in the Treasury Department administers US economic sanctions. The US Global Magnitsky Act, Executive Order 13818 signed on December 20, 2017, allows for a wide variety of sanctions on corrupt individuals as well as human rights violators.

<sup>93</sup> OSJI, Against the Odds: CICIG in Guatemala, March 2016, at <https://www.opensocietyfoundations.org/reports/against-odds-cicig-guatemala>; WOLA, "Guatemala's Backlash Against Accountability," 21 March 2019, at <https://www.wola.org/analysis/guatemalas-backlash-accountability/>.

<sup>94</sup> Eduardo Cáceres impulsa una Corte Penal Latinoamericana para la Corrupción, September 22, 2017, <https://sanjuanhoj.com/noticia/10220/eduardo-caceres-impulsa-una-corte-penal-latinoamericana-para-la-corrupcion>; Mark L. Wolf, The World Needs an International Anti-Corruption Court, *Daedalus* Volume 147 | Issue 3 | Summer 2018, p.144-156; "Colombia Propone una Corte Internacional Anti Corrupcion", Jan. 24, 2019; at: <https://www.cancilleria.gov.co/newsroom/news/colombia-propone-corte-internacional-anticorrupcion>.

While we are cognizant of the difficulties, we believe that in the end a corruption lens, as we have applied it here, will help strengthen and focus the Court's work in cases like Venezuela, where systemic corruption plays a key explanatory role. It allows for a broader scope when denouncing and judging human rights violations and atrocities, pulling the evidentiary string to the point of fully understanding its causes and rethinking ways to address them. It has narrative power, and exposes ideological discourses of both left and right as simple rhetoric, thus changing the national and international context in which the Court will have to seek support and potentially creating new alliances.

Beyond the ICC, countries with universal jurisdiction statutes for either atrocity crimes, corruption or both can use the analysis above to charge not only corruption but also atrocity-related crimes – an important consideration for advancing the interests of victims. They might also consider incorporating the return of stolen assets to victims, at least in the many cases where these are identifiable. Seeing corruption and atrocity as interconnected will strengthen the fight against both.<sup>95</sup>

If a transition does take place in Venezuela, the corruption lens becomes even more important. If the current regime crumbles, many people will jump ship to the “winning” side. Without a thorough housecleaning of those involved in corrupt networks, including their control of sources of income from smuggling, trafficking, taxes and duties, public contracts, and financing of political parties, those networks will continue to thrive under the new political dispensation. The faces and rhetoric will have changed, but not enough else. The victims of the current regime and its policies deserve better.

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<sup>95</sup> Note that the UN Convention on Corruption (UNCAC), like a number of human rights-related treaties, has an “extradite or prosecute” provision allowing proceedings when the putative offender is found on the territory of a State party. UN Convention on Corruption, art. 42, UNGA Res. 58/4, 31 Oct. 2003.

