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ICG – International Crisis Group

Venezuela: International Criminal Court Probe Puts Maduro in a Quandary

The International Criminal Court has announced an investigation into crimes against humanity committed during Venezuelan opposition protests in 2017. In this Q&A, Crisis Group expert Mariano de Alba explains that it remains unclear how the enquiry will proceed.

What happened?

On 3 November, at the end of a three-day visit to Venezuela, Karim Khan, the new Prosecutor of the International Criminal Court (ICC), [announced](#) that he will launch an investigation into crimes against humanity in the country. These include allegations of systematic human rights violations during the massive demonstrations that engulfed Venezuela between April and July 2017, when the confrontation between the Maduro government and the opposition hit a peak. According to the Office of the UN High Commissioner for Human Rights, 124 protesters [died](#) and over 5,000 were detained.

To cap off his visit, the Prosecutor signed a [memorandum of understanding](#) with President Nicolás Maduro. The memorandum both acknowledges the Prosecutor’s decision to proceed with the investigation and records Venezuela’s perspective that this step was unwarranted since national authorities should handle the allegations. On its face, it keeps open the possibility that Caracas may (with the Prosecutor’s cooperation) take another shot at holding perpetrators accountable, stating that Venezuela will “adopt all necessary measures to ensure the effective administration of justice, in accordance with international standards, with the support and active engagement of the Office of the Prosecutor”. But it also contemplates that the Prosecutor may deem those efforts unsatisfactory and notes the obligation to “facilitate the effective discharge of the Prosecutor’s mandate” on Venezuelan territory.

The Prosecutor’s decision to open the investigation is, in many ways, a landmark. It is the first time that crimes committed in the Americas have come under formal ICC investigation. Khan made his move based in part on the conclusion that, so far, Venezuelan authorities have proven unwilling or unable to mount a genuine effort to bring the alleged perpetrators to justice. A fact-finding mission set up by the UN Human Rights Council [concluded in September](#) that Venezuela “is not taking tangible, concrete and progressive steps to remedy violations, combat impunity and redress the victims through domestic investigations and prosecutions”. Various victims’ associations in Venezuela [had called upon the ICC Prosecutor](#) to move to a formal investigation, saying they will never get redress from the country’s judicial system or its political masters.

How did the investigation start and what will it focus on?

The mass protests in 2017 were [sparked by](#) Maduro’s moves to strip the opposition-held National Assembly of its powers and replace it with a Constituent Assembly fully controlled by the government’s coalition. These demonstrations were by [many accounts](#) met with excessive and, in numerous cases, [lethal force](#). Security forces made thousands of seemingly arbitrary arrests, and many of those detained were reportedly abused or maltreated.

The ICC Office of the Prosecutor took up the matter in 2018. In February, it [opened](#) a “[preliminary examination](#)”, which is the process by which it determines if an investigation is warranted. In September 2018, Argentina, Canada, Colombia, Chile, Paraguay and Peru [formally referred](#) the situation in Venezuela to the Office of the Prosecutor, throwing their weight behind an investigation. The group of states also asked for the probe to be broadened to cover events from February 2014, when an earlier set of protests generated widespread violence.

Late in 2020, the Office [shared publicly](#) that it had found a reasonable basis to believe that crimes against humanity had been committed. It also made clear that it had decided to focus attention on the allegations relating to the period since April 2017, and particularly on reports of arbitrary detentions carried out by civilian authorities, the armed forces and pro-government individuals, which in many cases reportedly led to torture, sexual violence and persecution of opposition supporters. The Prosecutor might decide to look at other alleged crimes at a later stage.

The Office of the Prosecutor has already [identified](#) branches of the Venezuelan security forces alleged to have been involved in the crimes under investigation. These include, among others, the Bolivarian National Police, the Bolivarian National Guard, the Special Action Forces, the Directorate General of Military Counterintelligence and

units of the Bolivarian National Armed Forces. In keeping with ICC policy, prosecutors will start by looking at allegations of individual criminal responsibility on the part of high-level officials in these forces, which have played critical roles in stamping out dissent on behalf of the Maduro government.

Meanwhile, in February 2020, the Maduro government asked the Office of the Prosecutor to initiate another “[preliminary examination](#)”, arguing that the application of U.S. sanctions on Venezuela constitutes a crime against humanity. That exploratory enquiry has been opened and is still under way.

How have Venezuelan authorities responded to the ICC's efforts so far?

Caracas’ position is that the Prosecutor should not have undertaken the investigation. Maduro said he respected Khan’s decision, but he [added](#) that “we have made clear we do not share it”.

Months before Khan’s visit, Venezuelan authorities quibbled with the conduct of the preliminary examination, arguing before a pre-trial chamber of the Court that the Prosecutor’s office was not sharing enough information with the government and hindering cooperation. In July, the chamber [rejected](#) Venezuela’s request that it assert judicial control over the examination. The memorandum of understanding seems to be an effort to move past these disagreements and create the foundation for a better working relationship in the future – it [specifically calls](#) for the creation of “mechanisms to enhance cooperation between the Parties” – but it is still unclear whether Venezuelan authorities will actually abide by the promise to collaborate.

Aware that the ICC Prosecutor’s decision to move into the investigatory phase was looming, Venezuelan authorities have sought of late to prove that they are willing to take modest steps in the direction of accountability. They have released some political prisoners, rushed to improve conditions at detention centres and prosecuted low-level officers involved in the type of crimes the ICC is looking at. A Venezuelan tribunal, for example, [sentenced](#) a military officer to 23 years in prison for murdering a young protester outside a Caracas military airport in 2017. (Only weeks earlier, another tribunal had [acquitted](#) the officer – a decision that the Attorney General’s office quickly challenged.)

Yet if Caracas is seeking to persuade the ICC Prosecutor to turn back from his investigation based on the idea that it is taking adequate steps on its own, trying low-level officers is unlikely to meet the bar. The government’s main dilemma is that the ICC’s longstanding practice is to focus on holding accountable those most responsible for the crimes in question; in many cases, those people may be precisely the individuals that Caracas most wishes to shield.

How is the investigation phase likely to proceed?

Khan’s main task now will be to assemble evidence of criminal responsibility and determine against whom, if anyone, to bring charges. Due to the Court’s limited resources and expanding docket, the Prosecutor’s policy is to focus on a relatively small number of individuals. As noted above, [ICC policy](#) is to pay the greatest attention to those most responsible for the most severe crimes.

The memorandum of understanding states that no “suspect or target” has yet been identified, which is consistent with the investigation being in its early stages. The question will be whether it is possible to identify such individuals. Developing evidence that can stand up in court is no small task. Until now, international efforts like the fact-finding mission set up by the UN Human Rights Council have used “reasonable grounds to believe” as their standard of proof, but in order to convict, the Prosecutor must be able to prove the accused’s guilt “beyond reasonable doubt”. Moreover, the Office of the Prosecutor is likely to struggle if it cannot rely on national authorities to investigate on its behalf. Local prosecutors usually have extensive access to evidence and witnesses in their own countries, and can carry out inspections and searches without major obstacles, a capacity that the ICC lacks.

If, notwithstanding the memorandum, Venezuelan authorities are unwilling to offer meaningful cooperation, Khan’s office could look for ways to pursue the probe nonetheless. For instance, it could ask other states or international organisations for cooperation.

Finally, during the investigation phase, the Prosecutor can request a pre-trial chamber of the Court to issue an arrest warrant if it can show “[reasonable grounds](#)” that someone committed a crime. Even then, however, the ICC must look to state parties to apprehend and deliver the individual in question to The Hague, which the ICC Rome Statute requires them to do. This will be challenging if by then Caracas has decided not to cooperate and the accused officials stay inside Venezuela or restrict their travel to countries that are unwilling to detain them.

Will the memorandum of understanding stand the test of time?

It remains to be seen. The decision to open an investigation shows that the Office of the Prosecutor has enough information of serious criminality to warrant a full enquiry. At the same time, the fact that Venezuelan authorities have recently taken conspicuous yet still insufficient steps to address past crimes suggests that they are not indifferent to the investigation’s likely effects on the government’s international reputation and its grip on power.

The conundrum is that Venezuela’s own efforts to stave off the ICC could heighten tensions within the government. If the government wants to persuade the Prosecutor not to advance with the ICC probe, it will likely have to allow the prosecution inside Venezuela of high-ranking officers allegedly most responsible for the crimes under investigation. Depending on how senior the officers are, such prosecutions could create tremendous blowback in the government coalition, above all in its police and [military wings](#). Until now, and particularly during the last three

years of bitter political feuding between government and opposition, chavismo has cherished loyalty within its ranks. Going after high-level officials could alter those people's appraisal of the benefits of remaining doggedly faithful to the government.

An additional challenge for the government is that genuine prosecutions of the sort demanded by the ICC would also require an overhaul of the Venezuelan justice system, which has deteriorated over recent decades and grown deferential to the executive. The judiciary lacks independence and is rife with corruption. ([According](#) to the fact-finding mission appointed by the UN Human Rights Council, there are reasonable grounds to believe that “Supreme Tribunal justices routinely receive orders with respect to how to decide judgments”). The [announcement](#) in September by the government and opposition delegations at the Norway-led negotiations in Mexico that they would start discussions on the justice system could have given a boost to reform efforts. But the government has [suspended](#) its participation in the talks following the extradition by Cape Verde to the U.S. of a businessman linked to Maduro's government.

How patient is the Prosecutor likely to be?

Ultimately, much depends on Prosecutor Khan's assessment of whether the Venezuelan-led enquiries move fast enough and go after the right people. Even in opening the investigation he signalled that he will defer to the principle of “positive complementarity”. This principle entails that the ICC steps in only when states are unwilling or unable to carry out genuine investigations and prosecutions. It also means that Khan's office will actively support states willing to cooperate and show deference to their national judicial systems. That is why, just before visiting Venezuela, he closed the seventeen-year preliminary examination in Colombia for war crimes and crimes against humanity, having been assured that Colombian authorities will back the judiciary and the Special Jurisdiction for Peace (a mechanism created by the country's 2016 peace accord), all while cooperating with the ICC. Likewise, the Prosecutor confirmed in his [formal announcement](#) of the Venezuela investigation that his “office will support any sincere and meaningful effort undertaken by the Venezuelan Government to reform and revitalise the justice and penal system in order to enable genuine accountability in Venezuela for the victims of alleged crimes”.

But the Prosecutor's deference is unlikely to be indefinite. He may well change his approach if Venezuelan authorities fail to make quick and meaningful progress on accountability and judicial reform. For a government so determined to ensure its political control and the loyalty of its coalition, overhauling the justice system and prosecuting senior officials is a price that will be hard to bear.

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