

Strengthening the Rule of Law in Venezuela

Executive Summary



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Preface

The International Commission of Jurists (ICJ) has prepared this brief English-language document to accompany the report "**Fortaleciendo el Estado de Derecho en Venezuela**" ("Strengthening the Rule of Law in Venezuela"). This document includes English translations of the Preface, Executive Summary, Conclusions and Recommendations, and Methodology and Acknowledgements chapters of the original Spanish-language report. The main body of the report is excluded from this document and remains available only in Spanish.

The report seeks to contribute to the development of the rule of law, democracy, and human rights in the country. The independence of the justice system is one of the principal concerns of the ICJ, cutting across its geographic and thematic areas of work. For this reason, in recent years, the ICJ decided to give a new impetus to reinforce its Centre for the Independence of Judges and Lawyers, which has produced this report.

The fundamental right to prompt and effective access to justice, before a competent, independent and impartial tribunal previously established by law, is recognized in human rights treaties and other international standards. Every State, whatever its system of government, has an international duty to protect and respect this right, and to adopt the measures necessary to guarantee its effective enjoyment by all persons under its jurisdiction.

In the case of Venezuela, legal responsibility arises directly from the International Covenant on Civil and Political Rights, which Venezuela ratified in 1978, as well as the American Convention on Human Rights. (Although Venezuela denounced the American Convention in 2012, the Convention is of continuing relevance not least because it itself provides in Art 78.2 that "denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation." In any event, the ICJ urges Venezuela to reconsider and to rejoin the Convention.)

The report also relies on instruments such as the Universal Declaration of Human Rights and the American Declaration of Human Rights that, although not legally binding in themselves, are widely accepted as authoritative and reflect or elaborate upon legal obligations of the States under treaty or customary international law. Such instruments are also an important source for international human rights monitoring mechanisms such as the United Nations Human Rights Council and its expert special procedures, and the Inter-American Commission of Human Rights.

An independent judiciary is the cornerstone for democracy and the rule of law; it is an indispensable condition for the full protection and guarantee of all other

human rights. Fair trial and other procedural rights are therefore not only human rights in and of themselves, full respect for fair trial and other judicial guarantees are also recognised to be essential for the protection of all human rights.

This report resulted from an ICJ project in Venezuela to train lawyers and other actors within the justice system to use international standards and mechanisms related to the protection of human rights.

This report notes the lack of independence of the judiciary in Venezuela, starting with the functions of the Office of the General Attorney, which has the duty to investigate and prosecute crimes. Non-compliance with its own internal provisions has resulted in an institution without independence from other branches of the government and other political actors. In addition, the fact that almost all of the public prosecutors have been appointed without security of tenure and can be removed at will, makes them particularly vulnerable to improper interferences from superior authorities and other external pressures, affecting the autonomy of their functions.

Similarly, appointments to judicial offices, ranging from the Supreme Tribunal of Justice (STJ) to the lower courts, are predominantly based on political criteria. The majority of judges are appointed on temporary provisional terms and are susceptible to external pressures, since a Judicial Commission of the TSJ, characterized by clear political tendencies, can remove them at will. Furthermore, even the minority of judges who in theory enjoy security of tenure can in practice be suspended from office without any specific accusation or legal procedure having been initiated against them. The emblematic case of Judge Maria Lourdes Afiuni illustrates this situation. The “titular” (i.e. permanent) Judge Afiuni was arrested in her office by the police and subjected to an arbitrary criminal procedure that ended with the deprivation of her liberty. She was targeted for ordering that a pre-trial detainee be released on bail, citing among other things a recommendation for release that had been issued by the UN Working Group on Arbitrary Detention. The then-President of Venezuela Hugo Chávez Frías expressly demanded, on national television and radio, the detention of Judge Afiuni. During the time of her imprisonment, while she was placed together with ordinary criminal convicts, Judge Afiuni was a victim of inhuman and cruel treatment. The implicit messages sent by her case gave rise to the so-called “Afiuni Effect” whereby the rest of the judiciary are wary of finding against the government for fear of similar reprisals, with devastating consequences for the independent administration of justice in the country.

The report also notes the restrictions imposed by the State on the legal profession. For instance, the State has improperly interfered in the Bar Associations through suspension of the internal elections of their executive bodies and forced substitution of procedures imposed by the electoral authorities

of the Government. The State has also attempted to impose appointments of members of the board of directors of the Bar Association of Caracas.

A judiciary characterized by lack of independence, as in Venezuela, cannot effectively fulfil its role in maintaining the rule of law. Venezuela has one of the highest homicide rates in Latin America, and indeed in the world. The incidence of impunity – cases in which no-one is held criminally responsible – in such cases amounts to 95 per cent, reaching 98 per cent in cases related to human rights violations. Likewise, the administration of justice is prevented by external pressures from fulfilling its duty to protect people from abuses of government power. Indeed, the justice system is itself being abused, made to serve as a mechanism for the persecution of political opponents and dissidents and other critics of the political system in the country, including political, peasant and union leaders, human rights defenders, and students.

The publication of this report coincides with a situation of acute social and political unrest in Venezuela, where significant social protest has been taking place since February 2014. According to figures provided by official and non-official sources, the number of persons detained in connection with the protests so far amounts to some 2 500 people. At the time of publication, 100 people are still detained, around 1 200 people have been criminally prosecuted resulting in a number of judicially imposed restrictions on their liberty and freedoms. At least 42 people have died in the context of the protests, among which are 38 civilians, and 4 members of law enforcement and security agencies. According to documented cases, excessive use of force is one of the reasons for some of these deaths, which may amount to extrajudicial killings. In this context, the participation of armed groups of civilians acting with acquiescence, protection, and even coordination with the law enforcement agencies of the State is particularly serious. In addition, at least 14 cases of alleged torture or other cruel inhuman or degrading treatment or excessive use of force against detainees, by members of law enforcement and security agencies, have been recorded to date.

Although the Office of the General Attorney has investigated some of these cases, and has in fact detained several law enforcement officials, no substantial progress in the investigations of these cases has been reported to date.

The current situation in Venezuela demonstrates the consequences of the absence of an independent judiciary capable of guaranteeing the right of every person to participate in peaceful protests without becoming a victim of criminalization or repression. Indeed, the system of justice itself has functioned as a mechanism to criminalize the civil protest, by indicting 1 200 detained people without evidence of their participation in any criminal act. Additionally, the judiciary has not made any significant progress in the punishment of those responsible for the violation of human rights involving the repression of recent

protests by law enforcement agencies, and armed groups of civilians protected by these agencies.

This report hopes to contribute to the strengthening of a democratic State, respectful of the rule of law with a truly autonomous and genuine justice system, embodied by independent and impartial judges committed to and capable of discharging their duties. It aims to ensure the effectiveness of the right of access to justice and due process of law, and the protection of all human rights in general for all people under the jurisdiction of the State of Venezuela. It strives for a judiciary capable of effectively exercising its functions of control over the excesses of organs of the public power. The road map to follow is not only written in the Constitution of Venezuela, but also recognized in international human rights instruments and in the jurisprudence of international and regional human rights mechanisms. Consequently, we hope that the recommendations formulated by the ICJ in this report will assist the State and civil society of Venezuela in the realization of justice and the rule of law as a shared objective.

Geneva, May 2014

Wilder Tayler
Secretary General
International Commission of Jurists

I. Executive Summary

Guarantees for judicial independence are enshrined in the Constitution and other laws in Venezuela. These guarantees are not, however, followed in practice. Measures introduced in the 1999 Constitution and subsequent laws have led to ambiguity in determining which rules currently apply to the judiciary, contributing to legal uncertainty. Many formal procedures that should safeguard the independence of judges and prosecutors are not in practice applied to the vast majority of officials, who are appointed to provisional or temporary offices. Actual practices in relation to the judiciary, prosecutors and the office of the Attorney General, as well as lawyers and the legal profession, are undermining the rule of law and the independence of the administration of justice in Venezuela.

The Judiciary

The independence of the judiciary in Venezuela is seriously threatened. Security of tenure is not sufficiently guaranteed. Indeed, the vast majority of judges hold temporary appointments with no security of tenure at all. Authorities exercising disciplinary powers do not apply the criteria and norms arising from the national judicial Code of Ethics nominally in force, let alone norms reflected in international standards for the independence of the judiciary.

Interference by the Legislative and the Executive Branch, and improper interference with lower court judges by the superior judicial authorities, has caused further deterioration in the independence of the judiciary. Such interference may have started as isolated episodes but has now progressed to become systematic and entrenched as a *modus operandi* of the relevant authorities. Some judges have been individually singled out for personal persecution. The prominent case of judge Maria Lourdes Afiuni, persecuted for conducting her judicial functions in an independent manner, is emblematic. The highly publicized actions against her have negatively impacted the independence of other judges, who must now fear similar reprisals should they give rulings unfavourable to the government.

Legal and Constitutional Framework

The 1999 Constitution recognizes the principle of separation of powers in different branches of government (Article 136), and the independence and financial autonomy of the Judicial Branch and the Supreme Tribunal of Justice (Article 254). The Constitution also incorporates the principal guarantees required by international standards on admission to the judicial profession, the promotion of individual judges to higher posts within the judiciary, and the removal and suspension of judges; it mandated the establishment of a Judicial Code of Ethics, setting out a disciplinary regime (Article 254 and 267). The Constitution does not recognise freedom of association of judges, justices, public prosecutors, and public defenders; indeed it explicitly prohibits every form of association between judges (Article 256).

The Constitution allowed for a period of years, following its adoption in 1999, for the legislative body to enact a law governing the functions of the STJ, the Organic Law of the Supreme Tribunal of Justice, which among other things should regulate

disciplinary powers through the disciplinary tribunals and courts belonging to the STJ, and the administration of the Judiciary through the Executive Directorate, an organism ascribed to the STJ. However, no such law was enacted until May 2004. During the interim, two Commissions in fact headed the Judicial Branch: The Commission for the Functioning and Restructuring of the Judicial System, and the Judicial Commission of the Supreme Tribunal of Justice. Under these ad hoc arrangements, adopted by decree, the Commission for the Functioning and Restructuring of the Judicial System exercised disciplinary powers over judges, while the Judicial Commission could appoint or remove them at will. This situation weakened the independence of the judiciary allowing improper interference of other branches of the Government in the disciplinary, appointment and removal procedures.

In 2009 a judicial Code of Ethics entered into force with the stated aim of establishing a disciplinary regime for “every judge within the territory of the Bolivarian Republic of Venezuela...in exercise of permanent, temporary, occasional, accidental or provisional jurisdiction,”¹ including the Justices of the STJ. However, following a constitutional judgment of the Constitutional Chamber of the STJ in 2013, the Code is only applicable to titular judges who have been permanently admitted to the judicial career, and not to temporary judges. This left temporary judges unprotected by any proper formal procedures for appointment, discipline or removal, and the temporary judges are therefore vulnerable to arbitrary interference through the Judicial Commission of the STJ.

Appointment Procedure and Security of Tenure

International standards on the independence of the judiciary clearly recognise the importance of objective criteria in the selection of judges,² as well as the application of public procedures previously determined by law to select, appoint and promote judges.³ In this regard, in 2000 the Commission for the Functioning and Restructuring of the Judicial System enacted Norms for the Evaluation and Public Competitions for the Admission and Permanence in the Judiciary. Under these Norms, the judges that have been serving in office for a year or more should have received performance evaluations in order to continue their career in the Judiciary. The Norms also provided regulations for public tenders and procedures to fill vacant judicial positions.

Contrary to the provisions stated in the Norms, however, all judges were dismissed from office and forced to re-apply in the same manner as any other lawyer who aspired to occupy the position of judge and enter the judicial career.⁴ Further, the only public competitions for judicial posts took place from 2000 to 2003. Since 2003, there have been no public competitions for judicial appointments and promotions. As

¹ Original text in Spanish: “todos los jueces y juezas dentro del territorio de la República Bolivariana de Venezuela ...en ejercicio de manera permanente, temporal, ocasional, accidental o provisoria”

² Leandro Despouy, Special Rapporteur on the independence of judges and lawyers, Promotion and Protection of all Human Rights, Civil, political, Economic, Social and Cultural Rights, Including the Right to Development, UN Doc. A/HRC/11/41 (2009), para. 30

³ Statute of the Ibero-American Judge, Article 11, VI Iberoamerican Summit of Presidents of Supreme Courts and Tribunals of Justice, Spain, 2001.

⁴ Decree of the National Constituent Assembly of Venezuela that creates the Regime of Transitional Power, Official Gazette No. 36.859, 29 December 1999, Article 25.

a result, only some 20% of judges currently in office have security of tenure. The remaining 80% of judges have little or no security of tenure, as they were appointed to provisional or temporary offices from which they can be removed at will by the Judicial Commission of the STJ.

Disciplinary Regime and Removal from Office

As mentioned above, the Judicial Code of Ethics was enacted in 2009 with the aim of guiding the conduct of all judges in Venezuela, including provisional or temporary judges.⁵ The Code also established the competent bodies and procedures for sanctioning disciplinary offences committed by judges in the performance of their duties, as well as the grounds and circumstances in which those sanctions could be applied.

However, not only was the Judicial Code of Ethics enacted some nine years after the adoption of the Constitution, in 2013 the Constitutional Chamber of the STJ provisionally suspended the application of the Code to the Justices of the STJ, as well as the “temporary, casual, accidental and provisional”⁶ judges. The judgment also held that the Judicial Commission of the STJ is competent to punish and remove “temporary, casual, accidental and provisional” judges.

The lack of implementation of the Judicial Code of Ethics does not comply with international standards on the independence of the judiciary, as the disciplinary regime prescribed by law consequently applies only to a small fraction of judges, given that the vast majority of judges are provisional or temporary. Consequently, almost 80% of judges can be removed and sanctioned by the Judicial Commission by a simple communication expressing that the appointment is “no longer in effect”. The absence of a legally prescribed procedure with appropriate safeguards for fairness and objectivity does not fulfil the guarantees of due process of law and adversely affects the independence of judges.

The Office of the Public Prosecutor

The autonomy and independence of public prosecutors in Venezuela are seriously affected by improper interference from the Attorney General and other political actors in Venezuela. The lack of security of tenure and transparency in their selection, and the allocation of criminal investigations and procedures without regard to technical criteria and workload of public prosecutors, have yielded an inability or unwillingness of prosecutors to bring perpetrators of crime to justice in an effective and equal manner. The result is a climate of insecurity and impunity that surpasses 90% concerning common felonies, and it is higher in relation to crimes involving violations of human rights. Additionally, the disciplinary regime set out in the Organic Law of the Office of the Public Prosecutor⁷ has not been respected in practice, and public prosecutors have been removed without proper procedures determined by Law.

⁵ Judicial Code of Ethics of Venezuela, Official Gazette No. 39.236, 6 August 2009, Article 1 – 2.

⁶ Supreme Tribunal of Justice, Constitutional Chamber, File No. 09-1038, 7 May 2013. Available online at: <http://www.tsj.gov.ve/decisiones/scon/Julio/983-16713-2013-09-1038.html> (only in Spanish)

⁷ Organic Law of the Public Prosecutor Office, Official Gazette No. 38.647, 19 March 2007.

Lack of autonomy and improper interference

The role of public prosecutors, as defined by international standards, is crucial in the administration of justice. Prosecutors must perform their duties "fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights."⁸ In order to do so, prosecutors must be able to perform their professional functions without improper interference,⁹ in a fair and objective manner.¹⁰ Likewise, the laws and rules regulating the performance of public prosecutors "shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process..."¹¹

In this regard, the Organic Law of the Office of the Public Prosecutor establishes a hierarchical structure, as well as incorporating the principles of unity of operation and indivisibility, in theory aimed at guaranteeing the consistency and fairness of decisions taken in criminal prosecutions. In practice, however, the Attorney General has interpreted these principles to require the Attorney General's prior permission for decisions in every procedure, including those of mere formality. This diminishes the autonomy of public prosecutors, exacerbating the absence of an objective system to allocate cases,¹² and the lack of security of tenure of prosecutors, enhancing the risks of improper interference by other branches of the Government, especially in politically sensitive cases which have usually been "handled by a small group of prosecutors."¹³

Appointment Procedure and Security of Tenure

In order to be appointed as a public prosecutor in Venezuela, the Organic Law of the Public Prosecutor Office determines that all candidates must successfully complete the academic program of the National Academy of Public Prosecutors,¹⁴ and participate in public tenders organized on the basis of the requirements established in the Organic Law.¹⁵

In line with international standards, the public tenders and the creation of the National Academy of Public Prosecutors should have aimed at ensuring that only individuals of integrity and ability, with appropriate training and qualifications, were appointed as public prosecutors.¹⁶ Nevertheless, until January 2014, only two public tenders for prosecutors have been carried out in Venezuela, and only four individuals have been appointed as public prosecutors in application of the Organic Law of the

⁸ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Guidelines on the Role of Prosecutors, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), guideline 12.

⁹ Ibid., guideline 4

¹⁰ Ibid., guideline 13, see also International Association of Prosecutors, Standards of professional responsibility and statement of the essential duties and rights of prosecutors, 1999, Article 3.

¹¹ Guidelines on the Role of Prosecutors, Op. Cit., note 8, guideline 17.

¹² *Report on Democracy and Human Rights in Venezuela*, Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II., Doc. 54 (2009), para. 308.

¹³ Ibid.

¹⁴ Resolution of the General Attorney No. 263, Official Gazette No. 38.905, 8 April 2008.

¹⁵ Organic Law of the Public Prosecutor Office, Op. Cit. note 7, articles 99 - 114

¹⁶ Guidelines on the Role of Prosecutors, Op. Cit., note 8, guideline 1.

Public Prosecutor Office. The rest of prosecutors in office are provisional¹⁷ and have been selected by procedures not provided by the law, or directly appointed by the Attorney General, and could be removed from office at will.

Disciplinary Regime and Removal from Office

International standards on the role of prosecutors provide that all disciplinary procedures against public prosecutors must guarantee an objective evaluation and decision, and be determined in accordance with the law and regulations enacted for that purpose.¹⁸ Likewise, prosecutors shall be entitled to expeditious and fair hearings based on previously established law or legal regulations.¹⁹ Along these lines, Article 117 of the Organic Law of the Office of the Public Prosecutor provides the grounds on which public prosecutors and other officials of the Office of the Public Prosecutor could be sanctioned after the finalization of due processes established by law.²⁰ The Organic Law also provides that these procedures shall be established by the Regulations of the Office of the Public Prosecutor.

The legal framework in Venezuela concerning the disciplinary regime of public prosecutors in theory appears to comply with these international standards. However, the Regulations of the Office of the Public Prosecutor are only applied to officials and prosecutors with security of tenure.²¹ Therefore, as the vast majority of prosecutors in Venezuela have not been appointed by public tender, and could be removed at will by the Attorney General, the disciplinary regime provided by these Regulations is not applied. These practices prevent the proper fulfilment of the duties of the Office of the Public Prosecutor and diminish the quality of their services.

The Legal Profession

The legal profession has faced massive challenges in Venezuela. First, governmental favouritism in judicial appointments towards lawyers graduated from governmental universities, and the prosecution of lawyers involved in politically sensitive cases, have created a hostile environment for the independent practice of Law in Venezuela. Second, the constant weakening of the Bar Associations in their advocacy role in matters related to the administration of justice, and the unwarranted meddling of the judiciary in aspects related to the election of the Directorate and Disciplinary Tribunals of the Bars, have undermined the ability of the legal profession as an institution to defend the independence of lawyers in the country.

Legal Education and Licensing

¹⁷ See (Spanish): "Avanza plan para titularizar a los fiscales del Ministerio Público", in *El Universal*, 31 January 2012,

¹⁸ Guidelines on the Role of Prosecutors, Op. Cit., note 8, guideline 22.

¹⁹ International Association of Prosecutors, Op. Cit., note 10, article 6.

²⁰ Organic Law of the Public Prosecutor Office, Op. Cit. note 7, articles 118

²¹ Resolution on the General Attorney No. 60, *Regulations of the Office of the Public Prosecutor*, Official Gazette No. 36,654, 4 March 1999, Article 116.

Quality legal education is essential for lawyers to be made aware of their ethical duties towards their clients²² and their role to guarantee the rule of law. Under international standards governments, professional associations of lawyers and educational institutions are jointly to ensure that lawyers have appropriate education and training.²³

In Venezuela legal education is taught in universities, and students graduate with a legal degree. In 2005, the Government of Venezuela opened the Bolivarian University of Venezuela (BUV) and it was approved to teach Legal Studies. The programme of Legal Studies in BUV differs from that taught in other national and international universities. Essential subjects such as civil law, and civil and criminal procedure are absent from the programme of studies, while other crucial subjects are taught only on an elective basis, such as criminal law and the penitentiary system. However, graduates from the BUV receive a legal degree and are licensed to practice Law even if the program of studies they have followed has excluded essential topics. Besides, the government in practice has shown favouritism regarding appointments to judicial offices, favouring graduates of the BUV, while leaving aside more qualified candidates, or in some cases even constraining judicial appointments only to lawyers graduating from the BUV.²⁴ The favouritism appears to be based at least in part on the ideological character of the programme at the BUV relative to other universities, and as such impermissibly discriminates on the basis of political opinion or belief, and undermines confidence in the courts as an independent guarantor of equality before the law. Given the narrow scope of subject-matter at BUV, such favouritism also potentially undermines the quality and effectiveness of the judiciary.

Compulsory membership to professional associations is required to practice law in Venezuela. These procedures for such mandatory membership do not comply with international standards, as they are neither strict nor clear.²⁵ The Bar Associations in Venezuela do not have discretionary power over the membership and affiliation to the associations, because the only requirement needed to become a member is to be in possession of a law degree granted by any university in the country, even if the programme of studies does not comply with international standards, as is the case of the BUV.

Independence of Bar Associations and Disciplinary Regime for Lawyers

The role of Bar Associations in the independence of lawyers is fundamental; international standards provide that they must uphold professional standards and ethics, and protect their members from persecution and improper restrictions and infringements. In doing so, Bar Associations must be able to exercise their functions without external interference of any kind.²⁶

²² United Nations, Basic Principles on the Role of Lawyers, Congress on the Prevention of Crime and the Treatment of Offenders (1990), Principle 10.

²³ Ibid.

²⁴ See (Spanish only): "Presidente Chávez anuncia creación de Misión Justicia Socialista", Ciudad CSS, 16 January 2010. Available at: <http://www.ciudadcss.info/?p=27270> accessed 17 April 2014.

²⁵ Gabriela Knaut, Special Rapporteur on the Independence of Judges and Lawyers, Report to the Human Rights Council, Mission to Mozambique, UN. Doc. A/HRC/17/30/Add.2 (2011), para. 89.

²⁶ United Nations, Op. Cit. note 22, Preamble.

Under international standards, lawyers are entitled to fair and appropriate procedures when complaints are made against them, including the right to a fair hearing, and the guarantees of the due process of law.²⁷ Additionally, "disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review."²⁸

The disciplinary regime for lawyers in Venezuela is established in the Law of Lawyers²⁹ and the Code of Ethics.³⁰ Both of them set out the grounds on which a disciplinary prosecution may be commenced against a lawyer, the procedures that must be followed, and the competent body to lead the process. In Venezuela, this disciplinary power falls upon the Disciplinary Tribunals of the Bar Association, whose members are elected by the General Assembly of the Association for a three year term.

These procedures are characterized by a lack of transparency, because the decisions of the tribunals are not published. Nevertheless, the arrangements are generally perceived positively as the tribunals have not been used as a means of wrongfully sanctioning lawyers for the due exercise of their professional duties. However, the Judicial Code of Ethics allows any judge to impose disciplinary sanctions on lawyers during a judicial proceeding. Although the courts and tribunals have not developed jurisprudence in the matter, the fact that judges are given this poorly-defined legal power is a potential threat to the guarantees of due process of law, as it appears to bypass the competence of the Disciplinary Tribunals of the Bar Associations, and the right to a fair hearing.

Interference by the Electoral and Constitutional Chambers of the STJ in the election of the members of the boards and disciplinary tribunals of the Bar Associations³¹ have weakened their autonomy and independence, diminishing their involvement in matters of the state, and attributing to them a purely marginal role as a simple association of lawyers in the country.

The Independence of the Judiciary and the Protection of Human Rights

Article 23 of the 1999 Constitution recognizes that human rights treaties, to which Venezuela is party, have constitutional hierarchy over other laws of the national legal system. Additionally, the Constitution establishes under Article 31 the right of every individual to address complaints to international human rights bodies established by treaties, in order to protect their human rights. In principle, judges should play an important role in the protection of internationally recognised human rights, but in

²⁷ Ibid, principle 27.

²⁸ Ibid, principle 28.

²⁹ Law of Lawyers, Official Gazette No. 1081, 23 January 1967. Articles 59-74

³⁰ Code of Ethics of Lawyers, Official Gazette No. 4506, 23 December 1992.

³¹ See: STJ, Constitucional Chamber, Judgment of 14 February 2008, file 04-1263. Available only in Spanish: <http://www.tsj.gov.ve/decisiones/scon/febrero/11-140208-04-1263.htm> (accessed 22 April 2014) Also see: Electoral Chamber, Judgment No. 105, File No. AA70-X-2007-000048, 4 August 2003. Available only in Spanish: <http://www.tsj.gov.ve/decisiones/selec/Diciembre/234-131207-X00048.htm> (accessed 22 April 2014). And others.

practice the judiciary in Venezuela have frequently failed in doing this, instead giving priority to governmental interests citing the principle of sovereignty.

The situation worsened when, on 6 September 2012, Venezuela denounced the American Convention on Human Rights, withdrawing from the Jurisdiction of the Inter-American Court and depriving the victims of defence. Civil society, human rights defenders and academics presented a popular action of unconstitutionality to the Constitutional Chamber of the STJ on September 2012. Even without the American Convention, Venezuela is still subject to regional and international human rights standards with implications for the judiciary, prosecutors and legal profession. These include the American Declaration of Human Rights, the International Covenant on Civil and Political Rights and a wide range of United Nations standards, and the judiciary in Venezuela should assert a strong role in protecting internationally-recognised human rights.

Having analysed the legal framework in which the Judiciary and the Office of the Attorney General operate, and actual practices in relation to the legal system, the report concludes that the independence of legal institutions in Venezuela is being seriously undermined. To reverse this threat to the rule of law, all public authorities must act in accordance with the constitutional and legal framework; national laws and practices must be brought into line with international human rights standards; the ability of lawyers freely to practice their profession must be assured. To these ends, the report includes detailed recommendations that aim to help strengthen independent judicial institutions, consolidate the rule of law, and ensure an independent justice system in which all Venezuelans can have confidence.

II. Conclusions and Recommendations

The information presented in the report about the legal framework applicable to judges and lawyers, considered together with the actual practices in this regard, lead to the conclusion that the independence of legal institutions in Venezuela is very weak. This has contributed to a climate of growing insecurity. As observed by the United Nations Development Program (UNDP) in its Latin America Regional Report for 2013-2014, "Such insecurity has multiple negative impacts on human development: it profoundly affects the capabilities and the freedoms of the people, the way they build their lives in society and their relationship with the institutions of the State. Such insecurity generates significant costs, from the spending of public institutions and private costs of citizens in order to obtain security, to the irreparable costs of damage to the life and physical integrity of the people."³²

It is of the utmost importance that the legal and political institutions of the State – especially the judiciary and the Attorney’s General Office – be strengthened and become the fundamental pillar of democracy, as guardians of the rule of law. In particular, it is necessary for institutions such as the Supreme Tribunal of Justice and the Attorney’s General Office to uphold the system of checks and balances between branches of the state, guaranteeing that other branches do not unduly interfere in areas within the exclusive competence of the judiciary or prosecutors. In practice, however, according to the information available to the ICJ, undue interference by the Executive Branch is becoming a systematic practice in Venezuela. In order to give full effect to the provisions of the Constitution, members of the public institutions involved in the administration of justice should be chosen from among the best candidates, through public contests “founded on principles of honesty, suitability and efficiency”, and their promotion must be “based on a system of merits,” as the Venezuelan Constitution of 1999 requires. The implementation of such regulations will represent a (first) step along the path toward the achievement of true independence of judges, justices, prosecutors, public defenders, and lawyers in Venezuela.

The fact that more than fourteen years after the adoption of the Constitution, all but four public prosecutors, and 70% of judges, hold only provisional or temporary office, cannot be justified under either the Venezuelan Constitution or international law. The lack of security of tenure renders the system of justice vulnerable to improper influence and manipulation.

When a judicial system lacks independence, individual judges become fearful of applying the law justly and impartially, because they fear reprisals or professional consequences. Lawyers also become fearful of being persecuted, subjected to disciplinary or criminal procedures for exercising their profession, or that the processes in which they represent clients will be paralyzed; consequently they are unable to fulfil the crucial role of lawyers, recognised by national and international

³² Unofficial translation of United Nations Development Program, Regional Human Development Report 2013-2014, Citizen Security with a human face: Evidence and Proposals for Latin America, November 2013, p. 93, available (in Spanish only) at: <http://www.latinamerica.undp.org/content/dam/rblac/img/IDH/IDH-AL%20Informe%20completo.pdf>

law, for the defense of human rights. In Venezuela, the situation has become even starker after the detention of Judge Maria Lourdes Afiuni and the criminal investigation and process started against her, targeted simply for having duly fulfilled her judicial functions.

The examination of the actions of the public prosecutor in criminal proceedings, has revealed a success rate of 12.55% from 2008 until 2012: in the perception of the population, this translates to a mismanagement of public resources, encourages a loss of confidence in the justice system, and represents one of the main causes of impunity, which in turn helps to perpetuate the feeling of citizen insecurity.

The different branches of the Venezuelan State must, each respecting the limits of their respective powers, undertake to improve the situation for judges, prosecutors and lawyers. To achieve this goal, the first step would be to begin implementing on a *bona fide* basis the current constitutional and legal regulations that should in theory help secure the rule of law. Doing so would, it is to be hoped, initiate a virtuous cycle that builds rather than erodes confidence in the judicial system.

In light of the above considerations, the ICJ makes the following recommendations:

Concerning the judiciary:

- a. To carry out public competitions for judicial appointments, as provided for in the Rules of Evaluation and Competitive Examinations for the Admission and Permanence in the Judiciary, which should be administered by independent authorities and incorporate a substantive role for judges.
- b. To ensure that competitions for permanent titular judicial offices are equally open to all lawyers who comply with the requirements indicated in the Rules of Evaluation and Competitive Examinations for the Admission and Permanence in the Judiciary.
- c. To cease the practice of systematically appointing provisional, temporary, casual, accidental or any other types of posts that depart from the ordinarily prescribed judicial recruitment process through resolutions of the Judicial Commission of the Supreme Tribunal of Justice; a practice that undermines the independence of the Judiciary and international law standards.
- d. To guarantee the security of tenure and independence of provisional judges (including temporary, occasional, accidental, or any other type of posts different from the judge of career), including by lifting the suspensory effect of the 7 May 2013 judgment of the Constitutional Chamber of the Supreme Tribunal of Justice on the code of ethics. In consequence, affirm that the provisions of the Code of Ethics of the Venezuelan Judge apply to all judges and justices operating within the jurisdiction of Venezuela, and not only to the titular judges; and not to recognize a discretionary and arbitrary power of the Judicial Commission of the Supreme Tribunal of Justice to appoint and remove judges without reasons.
- e. To cease the abusive practice of the Judicial Commission of the Supreme Tribunal of Justice whereby the Commission has suspended without remuneration titular judges without previous proceedings, and without any

- allegation of the possible commission of disciplinary offenses, in violation of essential guarantees of the due process of law.
- f. To ensure that the suspension for precautionary reasons of a judge shall be decided, and then only if the circumstances justify it, by the exclusively competent Disciplinary Tribunal or Court, and only when a disciplinary investigation is underway, and only for so long as the disciplinary process takes to conclude.
 - g. To ensure that the appointment of members of the Tribunal and Court that constitute the judicial disciplinary mechanism is exclusively based on the criteria of competence, experience and integrity, in a non-partisan manner without regard to political affiliation.
 - h. To undertake a constitutional reform or issue a constitutionally binding interpretation that recognizes the right of freedom of association for lawful purposes of judges and justices, in accordance with existing international standards, and to facilitate the creation of associations of judges.
 - i. To adopt the necessary legislation to complete the legal framework regulating the functioning of the judiciary, in particular legislation regarding the judicial career and the Organic Law of the Judicial Power.
 - j. To ensure, with regard to the rules and principles of the Inter-American System, that Venezuela fulfils and implements interim and final decisions adopted by the Inter-American Commission of Human Rights and the precautionary measures and judgements of the Inter-American Court.
 - k. To ensure, with regard to the rules and principles of the international human rights system, that Venezuela respects international human rights and complies with the recommendations contained in the decisions of treaty bodies and reports by United Nations special procedures.

Concerning prosecutors and the Office of the General Attorney:

- a. To comply with the constitution and admit public prosecutors to the Attorney General's Office only through public tenders, designed objectively to select the most qualified candidates, and ensuring security of tenure of public prosecutors (almost 100% of whom do not currently enjoy security of tenure).
- b. To cease the regular practice of appointing or removing public prosecutors through resolutions of the Attorney General's Office issued without providing reasons.
- c. To repeal the provision of the Statute of the Personnel of the Attorney General's Office, by effect of which the guarantees of the disciplinary jurisdiction provided in the Organic Law of the Attorney General's Office have not been applied to the vast majority of public prosecutors.
- d. To ensure that the provision of initial training and capacity building for public prosecutors by means of courses delivered in a specialized Academy does not become a bottleneck, limiting the possibility of equal participation in public competitions for admission to the Public Prosecutor's Office, or slowing the process of tenure for the position of Public Prosecutor, or distorting the objectivity of the selection process.
- e. To ensure public prosecutors have decisional and operational autonomy, including by reversing the practice of centralizing decision-making in the

- Office of the Attorney General or in centres of political power.
- f. To systematize efforts to enhance the efficiency and effectiveness of the work of the Attorney General's Office in its capacity as a governing body for criminal investigations in Venezuela, in order to combat the growing rate of impunity for violations of human rights. Any reform initiative should start by reconsidering internal procedures and regulations of the Public Prosecutor's Offices that have a direct impact on effectiveness and efficiency, such as: addressing the high rate of rotation of prosecutors; ending the practice of assigning cases without considering technical expertise and workload; bringing greater transparency to prosecutions and ensuring an orientation towards public service; and ending the politicization of the function of the public prosecutor.
 - g. To ensure the impartiality of the work of public prosecutors in all cases, including those that could be considered politically sensitive.

Concerning the legal profession:

- a. To guarantee the autonomy of all universities in the country, allowing them to organize programmes for the study of law according to the highest quality standards of training.
- b. That the Bolivarian University of Venezuela should adapt the programme of the career of legal studies leading to law degrees, to ensure the development of those skills and competencies that are necessary to carry out the professional duties of lawyers, such as they are conceived in general terms in other universities that offer a career in Law within and outside Venezuela.
- c. To grant without discrimination to all graduates of all universities that teach Law in Venezuela, equal opportunities for admission to the judiciary, the Office of the Attorney General, the Office of the Public Defender, as well as to all other public agencies in the justice system.
- d. To ensure that the Bar Associations are autonomous in their organization and in the election of their authorities, for them to assume a leading and authoritative role as promoters and defenders of the Constitution, the Rule of Law, the independence of the judiciary and legal profession, and human rights.
- e. To promote a culture of continuous training for lawyers, as well as for judges, justices, prosecutors of the Office of the Attorney General, and others involved in the administration of justice, and to provide the resources and tools needed to cement an organized and permanent training system. In particular, to strengthen the education and training in public international law and human rights, ensuring public awareness of international human rights treaties ratified by the State and other international standards and that they are put into practice by all actors within the legal system.
- f. To amend Article 2(2) and 20 of the Code of Ethics of the Venezuelan Judge, as regards the disciplinary powers given to judges over every participant in judicial proceedings, even if the person in question is not a member of the judiciary (i.e. allowing judges unilaterally to discipline lawyers appearing before them).

- g. That the Disciplinary Tribunals of the Bar Associations should exercise their own disciplinary powers in relation to the members of the Associations by transparent means, and allowing for accountability by transmitting to the Federation information about on-going procedures, and making available to the public relevant statistics and other data.
- h. To undertake all necessary measures to prevent a sort of "Graterol Effect" (the lawyer who has faced reprisals for acting on behalf of Judge Afiuni) in terms of indirect intimidation and persecution of lawyers, which would parallel the "Afiuni Effect" of indirect intimidation of judges.

III. Methodology and Acknowledgements

The present report arises from the work of the International Commission of Jurists (ICJ) to support the independence of judges and lawyers in Venezuela, within the framework of international standards on the administration of justice, and in particular the international treaties signed and ratified by the Republic of Venezuela.

The ICJ carried out five seminars in Venezuela during 2013, through its Centre for the Independence of Judges and Lawyers (CIJL), in coordination with the National Human Rights Commission of the Federation of Bar Associations of Venezuela. The Seminars took place in the cities of Caracas, San Cristobal (Táchira State), Puerto Ayacucho (Amazonas State), Coro (Falcon State) and Barquisimeto (Lara State). They involved lawyers, trade union representatives of Venezuelan civil society, as well as former justices, former judges and former public defenders from Venezuela. Among the issues addressed in the seminars were: the role of the Supreme Tribunal of Justice and the Attorney General's Office in a democratic society; the role of the Bar Associations in the promotion and strengthening of the independence of the judiciary; the importance of the training for lawyers in human rights; their legal obligations in the exercise of their profession; and the protection of the rights of victims of human rights abuses to file claims and seek remedies. The Venezuelan and international participants in the seminars also discussed the regulatory framework and the functioning of the Venezuelan justice system today. The jurists also formulated recommendations and proposals to promote respect for the rule of law and the independence of the judicial system as a whole, in accordance with international standards and the international obligations of the Government of Venezuela in relation to human rights and administration of justice.

The ICJ also conducted a four-day mission to Caracas in 2003, carried out by an Honoured Judge of the Supreme Tribunal of Spain, and a CIJL staff member. The ICJ delegation met with persons active in various aspects of the Venezuelan justice system. The issues discussed included: elements of the career paths for the judiciary and the office of the public prosecutor; security of tenure; the composition of the Supreme Tribunal of Justice of Venezuela; the grounds and procedures for removal of judges and justices; the ways in which the principle of checks and balances has been implemented in practice; guarantees for lawyers to be able to exercise their profession independently; and the means by which the office of the public prosecutor carries out its functions. The ICJ was deeply concerned by the findings of earlier research, reported complaints and other information gathered prior to the mission. As such, the delegation sought to deepen and contextualize its understanding and advocacy concerning the attacks that occurred against the independence of the judiciary and the legal profession, as well as the autonomy of officials from the office of the Attorney General, in the context of the process of reform of the administration of justice in Venezuela. The delegation addressed the constitutional, normative, political and factual aspects of these issues, and their impacts at both the institutional and the individual level.

The present report is based on the findings, conclusions and recommendations that arose from the ICJ activities described above, as well as additional research and

interviews. It also draws on official sources and data published by the Government of Venezuela and other Venezuelan authorities.

The report concludes with recommendations of a technical and legal nature, as well as suggested good practices. The aim is to present concrete measures that can help to stop further weakening of the judicial system in Venezuela, and can help Venezuela to comply with international standards on independence of the judiciary, lawyers, and prosecutors as the cornerstone for the Rule of Law.

The ICJ is particularly grateful for the many distinguished international and Venezuelan lawyers who have played a fundamental role in this project, who contributed to such rich discussion during the seminars and other activities. In addition to their contribution, this report is based on information provided by the widest range of actors within the Venezuelan justice system, and draws on the experiences generously shared by all the participants in the activities carried out by the ICJ in Venezuela during 2013. To those engaged with the ICJ in this process, thank you.

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