

# **Achieving Justice for Gross Human Rights Violations in Venezuela** Baseline Study, July 2017

ICJ Global Redress and Accountability Initiative

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® Achieving Justice for Gross Human Rights Violations in Venezuela - A Baseline Study  
ICJ Global Redress and Accountability Initiative

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## BASELINE ASSESSMENT

In Venezuela, the political context of extreme polarization and the breakdown of the rule of law, along with the judiciary's lack of independence, have severely obstructed accountability for those responsible for gross violations of human rights, as well as the right of victims and their families to justice and reparation. The institutional political crisis created since March 2017 has established a volatile and unpredictable short- and medium-term situation, in particular on the possibility of providing accountability for gross human rights violations at the domestic level.

This lack of accountability is a cause of, and in turn aggravates, the serious and persistent human rights situation in Venezuela in a context of: non-compliance with the rule of law; high levels of political polarization; a social, economic and humanitarian crisis; loss of independence of the judiciary; and a growing state of authoritarianism and a militarization of the governing regime. The situation of human rights and fundamental freedoms has deteriorated rapidly in recent years, but particularly since 2014. The effective exercise of fundamental freedoms of expression, association and assembly amongst other political rights, as well as the right to strike, has been undermined, de facto and de jure. Extrajudicial and arbitrary executions, the use of torture, arbitrary detention and the criminalization and prosecution of all forms of political and/or social dissent have not only increased in the last four years, but are increasing with the new situation since March 2017. The hopeful recent change of position of the Public Prosecutor's Office in seeking accountability has now been reversed with the improper dismissal of the Attorney General and her replacement with a close political ally of the President. For the moment, impunity for perpetrators of human rights violations remains widespread in Venezuela.

Venezuela's political crisis cannot be resolved without the establishment of an independent justice mechanism that can address human rights violations, deter further violations and help bring back the rule of law.

### **1 General human rights situation in the country**

#### **1.1 The Bolivarian revolution of Hugo Chávez**

The election of Hugo Chávez as President of the Republic in February 1999 marked a radical change in Venezuela's political and institutional life, previously dominated by the Democratic Action and Social Christian Party (COPEI) that shared power under a bipartisan system.

In April 1999, President Chávez convened a National Constituent Assembly (NCA) to enact a new Constitution. The NCA was dominated by the ruling party, the Fifth Republic Movement. In December 1999, the new political charter was issued: the Constitution of the Bolivarian Republic of Venezuela. In addition to the executive, judicial and legislative branches, the new Constitution created two new powers: citizen and electoral. Congress was dissolved and general elections were called for 30 July 2000, to "re-legitimize all the powers", in particular the new legislative branch (the National Assembly).

During the first six months of 2000, the NCA operated as the legislative body, presenting Bills and making institutional and structural reforms. One of the sectors most affected was the judiciary. Before the adoption of the new Constitution, the NCA established a Judicial Emergency Commission, made up of nine members: four Constituent Assembly members and five persons elected by

the National Constituent Assembly.<sup>1</sup> The Judicial Emergency Commission was empowered to suspend and dismiss judges and to appoint replacements as 'accidental judges' (in large part synonymous with 'provisional judges', mentioned below, meaning judges appointed without following the required procedure of holding a public competition). Furthermore, the NCA decided to rescind the established legal terms for judges, officials of the Judicial Council, the tribunals and the circuit courts.<sup>2</sup> This gave rise to a situation of temporariness for members of the judiciary, which continues to this day and which has undermined the independence of the judiciary. For example, during the year 2002, of the 1,772 judges in Venezuela, only 183 were fully tenured, and 84 per cent of the magistrates and judges were provisional or temporary, without any job stability.

Following the elections of July 2000, in which the Fifth Republic Movement won 92 of the 165 seats and Hugo Chávez was re-elected as President with almost 60 per cent of the votes, the re-elected President announced that he would expand the 'Bolivarian revolution', the platform of his 1999 electoral campaign. To do so, the National Assembly granted him extensive legislative powers through an enabling law, a measure enshrined in the Constitution through which the legislature authorized the executive branch to issue decrees "with the rank and force of a law".<sup>3</sup> Consequently, between December 2000 and November 2001, the executive branch adopted 49 laws on various subjects and fields, including: land reform;<sup>4</sup> hydrocarbons;<sup>5</sup> fisheries and agriculture;<sup>6</sup> banking and the financial sector;<sup>7</sup> and economic matters and investment.<sup>8</sup> Among the most controversial measures were land reform, which provided for the expropriation of large estates; the Organic Law on Hydrocarbons, which increased taxes on transnational companies by 30 per cent, and required a minimum State holding of 51 per cent in joint public-private ventures; and the Law on Agriculture and Fisheries, that gave benefits to artisanal fishing over industrial production.

Furthermore, President Chávez convened a 'union referendum' on whether or not to renew the union's leadership, and decreed a 180-day suspension of the leadership of central, federal and confederated trade unions. Although abstention from the referendum was as high as 72 per cent of eligible voters, 62 per cent of those who did vote in December 2000 voted in favor of renewing the leadership. At the start of 2002, the Government dismissed most of the executives at Petroleum of Venezuela (PDVSA), a strategic company in an economy that was based mainly on oil revenues in a country that was, at the time, the world's fifth largest oil producer.

These initiatives met with opposition from various sectors, such as traditional parties, business associations (such as the Venezuelan Federation of Associations and Chambers of Commerce and Industry, FEDECAMARAS) and the Confederation of Workers of Venezuela (CTV). In December 2001, with the support of mainstream media, Fedecámaras, CTV and a faction of the political opposition called a national strike demanding the restitution of the dismissed PDVSA executives and the resignation of President Chávez.

## 1.2 The 2002 coup d'état

In this atmosphere of high political polarization, in April 2002 a faction of the

<sup>1</sup> Decree on the Reorganization of the Judicial Power and the Penitentiary System, National Constituent Assembly, 19 August 1999, Article 2.

<sup>2</sup> Ibid, Article 12.

<sup>3</sup> Constitution of the Bolivarian Republic of Venezuela, Article 203.

<sup>4</sup> Law on Land and Agricultural Development, Decree No. 1546 (2001).

<sup>5</sup> Organic Law on Hydrocarbons, Decree No. 1510 (2001).

<sup>6</sup> Law on Fisheries and Agriculture, Decree No. 1524 (2001).

<sup>7</sup> Decree No. 1203, No. 1251, No. 1274, and No. 1526 of 2001.

<sup>8</sup> Decree No. 1478, No. 1455, and No. 1552 of 2001.

armed forces, the business community and part of the political opposition staged a coup d'état. The military coup's leaders detained President Hugo Chávez and some senior officials and deputies. Businessman and former Fedecámaras President, Pedro Carmona Estanga, was proclaimed the President of the Republic. The de facto President repealed the 1999 Constitution and the laws that Hugo Chávez had issued under the authority of the Enabling Law, and dissolved other public authorities. The coup was condemned by the Permanent Council of the Organization of American States (OAS),<sup>9</sup> the Inter-American Commission on Human Rights (IACHR), and several leaders of Latin American and Caribbean countries. However, some States (such as the United States of America and Spain) initially did not condemn the coup and merely issued declarations lamenting the acts of violence. The former UN Commission on Human Rights, meeting at that time, declined to comment on the situation, despite the fact that some States promoted a pronouncement by that body. Once the coup d'état was defeated and Chávez restored in the Presidency, Condoleezza Rice, President Bush's National Security Adviser, said: "We do hope that Chavez recognizes that the whole world is watching and that he takes advantage of this opportunity to right his own ship, which has been moving, frankly, in the wrong direction for quite a long time".<sup>10</sup>

A few days later, the constitutionalist sector of the armed forces, headed by General Raúl Isaías Baduel, freed Hugo Chávez who resumed his position as President of the Republic. Facing dissidents within the administration, and growing public protests, the Government proceeded to purge the armed forces, different sectors of the public administration and the PDVSA. In December 2002, a national petroleum strike was held, convened by the CTV, Fedecámaras and factions of the political opposition grouped together under the umbrella of the 'Democratic Coordinator', with active support from mainstream media outlets. The strike lasted until February 2003, with several violent episodes and protest marches by both the opposition and Chavist sectors.

Various efforts were subsequently made for dialogue between the Government and the opposition, to surmount the growing polarization and political crisis. The Carter Center, the Secretary General of the OAS, and the association known as the 'Group of Friends of Venezuela' (convened by Luiz Inácio Lula da Silva and supported by then President of Brazil, Fernando Henrique Cardoso) deployed a number of initiatives that have proven unsuccessful.

### 1.3 Intensifying the Bolivarian revolution

The events of 2002 marked a turning point in the policies of President Chávez's government. On the one hand, the Government intensified its political and economic project, the 'Bolivarian revolution', with the aim of establishing socialism in Venezuela. On the other, it increased the executive branch's control of the entire State apparatus and the militarization of the public administration and society. In addition, the Government launched several initiatives to crack down on the political opposition, all forms of social protest, and any criticism of the regime.

As of 2003, the Chávez administration began to implement a series of social programmes, called missions, including the following: Robinson, Ribas and Sucre Missions on educational matters; Barrio Adentro Mission, for free medical coverage; Vuelvan Caras Mission, for economic inclusion; Mercal Mission for subsidized food; and the Habitat Mission and the Great Housing Mission of Venezuela. Although these missions had significant impact and improved conditions for large swathes of Venezuelan society who had traditionally been

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<sup>9</sup> Permanent Council of the Organization of American States, Resolution 811 (1315-1302).

<sup>10</sup> 'Chavez rises from very peculiar coup', *The Guardian*, 15 April 2002.

socially and economically excluded, they did not yield the proclaimed results. Nonetheless, these missions were the source of considerable public support for Hugo Chávez's government, until the effects of the economic crisis (largely due to falling oil prices) and the humanitarian crisis (in terms of food and medicines) became widespread at the beginning of the 2010s. The Chávez administration began a series of nationalizations of companies in the banking, steel, telecommunications, cement, electrical and food industries. In 2002, the Government consolidated its full control of the PDVA, by using legal measures<sup>11</sup> and by dismissing 12,383 of the company's workers and executives.

In November 2002, the Organic Law on National Security was enacted, which created the Defense Council of the Nation and gave broad powers to the Bolivarian National Armed Forces (FANB) to keep public order. Gradually, the public administration was becoming militarized. High-ranking FANB officials were appointed to senior positions in the Government and companies in strategic sectors of the Venezuelan economy. As political polarization increased and the country's institutional crisis and socio-economic situation worsened, the Government increasingly looked to the military for support. This grew significantly during the final years of Hugo Chávez's administration and even more so when his successor, President Nicolás Maduro, took office. For example, by early 2017, members of the military (active or retired) were at the helm of 11 of the 32 executive ministries,<sup>12</sup> and in 2016 the Maduro government ordained the creation of an oil company under the Defense Ministry and the FANB.<sup>13</sup> In addition, the Government began to promote different initiatives and programmes to organize civil society to work in cooperation with the FANB and other State security bodies. In 2002, at the behest of the Government, the Bolivarian Circles were created as a State-funded network of grassroots organizations to promote the Bolivarian revolution. Although conceived originally as a network for indoctrination, the Bolivarian Circles began to perform activities in support of the State's intelligence services and, on many occasions, they were involved in violent killings of anti-government demonstrators. In 2003, the Government launched the Miranda Mission and created the Bolivarian National Militia, as a corps of armed civilians to support the military work of the FANB.

The Government began to implement various measures and practices to crack down on political opposition, social protest and criticism of the regime, which are still in force today. Public officials were dismissed for criticizing the Government or on suspicion of sympathizing with the political opposition. The Comptroller General of the Republic — elected by the National Assembly, and belonging to the Citizen Power's Republican Ethics Council<sup>14</sup> — lobbied for the disqualification of several political opposition candidates in the 2008 and 2010 legislative elections. In addition, criminal charges were brought against many leaders and members of the political opposition, and several of them were sentenced to imprisonment. In 2009, the Organic Law of Electoral Processes was enacted, limiting the constitutional principle of representation for minorities, and granting discretionary powers to the National Electoral Council.

Since 2003, there has been an increase in attacks, death threats and intimidation of human rights defenders, and senior government officials have publicly derided the work of NGOs. In 2006, the Government implemented initiatives to restrict

<sup>11</sup> Decree No. 2184 (2002).

<sup>12</sup> The following ministries: Defense; Office of the Presidency and Government Performance Monitoring; Interior Relations, Justice and Peace; Productive Agriculture and Lands; Fisheries and Aquaculture; Habitat and Housing; Ecosocialism and Water; Communal and Social Movements; Public Works; Electric Power; and New Frontier of Peace.

<sup>13</sup> Decree No. 2231 (2016), creating the Military Mining, Oil and Gas Limited Company (CAMIMPEG).

<sup>14</sup> Constitution of the Bolivarian Republic of Venezuela, Article 273.



the operations of human rights NGOs, making it impossible for them to receive resources from outside the country. Criminal charges were brought against human rights defenders, invoking different pretexts. Faced with this increasingly critical situation, the IACHR ordered precautionary measures in favor of several human rights defenders and NGOs.

In 2010, the Law on Defense of Political Sovereignty and National Self-Determination was enacted. This law provides that the assets and income of organizations for the defence of political rights should be made up exclusively of national goods and resources (Article 4); it penalizes with fines the receipt of economic aid or financial contributions from foreign persons or organizations (Article 6); it penalizes with fines representatives of political rights organizations or private individuals who invite foreign persons or organizations that, under their sponsorship, express opinions that offend the institutions of the State, senior officials, or violate the exercise of sovereignty (Article 8); it orders the expulsion of foreigners who express opinions that offend State institutions, senior officials, or violate the exercise of sovereignty (Article 8); and it provides for a penalty of political ineligibility for a period of five to eight years the presidents of political rights organizations or others who receive economic aid, financial contributions or sponsor the presence of foreign citizens who undermine the sovereignty, the independence of the nation and its institutions (Article 9).

In October 2013, the National Assembly established a special commission to "investigate the financing of bureaus, political groups or organizations working with the aim of destabilizing and generating social upheaval and coups in the country".<sup>15</sup> According to press reports, during the establishment of this commission, the deputy who presided over it indicated that one of its functions would be "to review the relationship of non-governmental organizations (NGOs) that exist in the country and that are linked to the US State Department, which under the cover of defending human rights are involved in political activities to unbalance and disrupt political peace in the country".<sup>16</sup>

In terms of freedom of expression, the Law on Social Responsibility in Radio and Television was adopted in 2004, placing draconian restrictions on information. Several social media outlets were subjected to harassment and reprisals (such as having advertising from State entities pulled), as well as measures to suspend and revoke licenses and concessions. At the same time, with increasing frequency, journalists who had been critical of the Government began to be attacked and receive death threats and intimidation, and criminal charges were brought against several of them for crimes such as that of insulting the President of the Republic or the FANB.

#### 1.4 The growing socio-economic crisis

By the end of the 2000s, the socio-economic situation in Venezuela was in a phase of decline: inflation was spiralling; poverty levels were up; and increasingly there were problems of shortages of food and basic necessities, as well as shortages of medicines. These serious and growing problems were caused as much by the Government's economic policy and actions as by the fall in the international price of oil, fundamental for a country with an economy based essentially on oil revenues. In 2007/2008 and in 2010/2011, the Government again made use of the Enabling Act, adopting 101 decrees with force of law. However, the situation continued to worsen, particularly from 2013 onward.

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<sup>15</sup> Venezolana de Televisión (VTV), "AN designó comisión para investigar financiamiento a grupos desestabilizadores" (NA appoints commission to investigate financing of destabilizing groups), 2 October 2013.

<sup>16</sup> PSUV, "Instalada Comisión que investigará financiamiento para desestabilizar el país" (Commission installed to investigate funding to destabilize country), 10 October 2013.

In 2015, inflation was 180 per cent; gross domestic product (GDP) growth was negative (-6 per cent); and the unemployment rate increased. By 2016, inflation had exceeded 800 per cent and GDP growth was -23 per cent. Food and medicine shortages, as well as water and energy cuts, turned into a deep and persistent humanitarian crisis. The IACHR found that, in 2016, “[f]ood shortages in Venezuela affect more than 80% of the population and the average Venezuelan citizen does not have the purchasing power to afford the basic food basket”.<sup>17</sup>

As of 2011, social unrest increased rapidly and protests and demonstrations spread throughout the country. Large sectors of the population, which until now had supported the Government’s regime, began to challenge and protest against the Government. Social and political unrest began to intensify as of 2013, manifested as protest marches and demonstrations with the participation of a broad cross-section of Venezuelan society. In 2014 there were 9,286 protests and, in January 2015 alone, there were 518 protests. Throughout 2015, there were more than 1,200 protests over the shortages of food, basic supplies and medicines. These would intensify in 2016 and the first half of 2017.

Starting in 2012, new regulations were put into place to suppress social protests. For example, the 2012 Law for the Defense of People’s Access to Goods and Services makes ‘boycotting’ a crime.<sup>18</sup> This law has been used to charge persons involved in protests and to prevent the exercise of the right to strike at State-owned enterprises for the production of food and consumer products. Another example is the Organic Law Against Organized Crime and Terrorism Financing, which makes peaceful protests or strikes that disturb or disrupt the supply of water, electricity, or any other basic natural resource, treated and punishable as ‘terrorist acts’.<sup>19</sup>

### 1.5 Further crackdowns under President Nicolás Maduro

Nicolás Maduro’s arrival in office as President of the Republic, following the death of Hugo Chávez in March 2013, meant an intensification of the Government’s crackdown on the political crisis and social unrest, as well as increased control of the State apparatus by the executive branch, greater militarization of the regime, and more State repression. A series of regulations was issued. The Government began to promote new initiatives for the militarization of civil society: ‘peace zones’, where armed groups of civilians control the territory of a settlement; the ‘Collectives’, formerly known as ‘Bolivarian Circles’, frequently operating as armed groups of civilians; and the ‘Bolivarian Workers’ Militia’, a corps of civilian combatants, aides to the FANB. These groups have been implicated in numerous cases of extrajudicial execution, torture, forced displacement and arbitrary detention. The FANB’s powers were expanded. In January 2015, the

<sup>17</sup> Inter-American Commission on Human Rights, Annual Report 2016, Chapter IV-B, Venezuela, para. 176.

<sup>18</sup> Article 140: “Those who, jointly or separately, undertake or carry out actions, or are responsible for omissions, that impede, directly or indirectly, the production, manufacture, import, storage, transportation, distribution and marketing of goods, shall be punished with imprisonment from six to ten years” (free translation).

<sup>19</sup> Article 4: “For the purposes of this Law, defining: 1. Terrorist act: an act that intends by its nature or context, to seriously harm a country or an international organization, defined as a crime under Venezuelan law, committed with the aim of seriously intimidating a population; unduly compelling a government or international organization to undertake an action or abstain from an action; seriously destabilizing or destroying the fundamental, constitutional, economic, or social political structures of a country or an international organization. Acts shall be considered terrorist which are carried with or by means of the following: [...] h. disturbance or interruption of the water supply, electricity or any other fundamental natural resource, having the effect of endangering human lives” (free translation).

People's Power Ministry of Defense adopted directives authorizing the use of firearms to control public gatherings and peaceful demonstrations.<sup>20</sup>

Demonstrations and protest marches were violently suppressed, with many violent deaths and hundreds of arbitrary detentions. The FANB, the Bolivarian National Guard, and the Bolivarian National Police were not the only ones responsible for violent deaths of protesters. These were also perpetrated by armed groups of civilian government supporters. In this regard, the Committee against Torture received reports between February and April 2014 of "a total of 437 attacks by armed pro-government groups on demonstrators" and that "many of these attacks were carried out with the complicity and acquiescence of law enforcement officers and have gone unpunished".<sup>21</sup> The NGO Foro Penal Venezolano documented 3,758 arrests related to demonstrations, including the arrests of 372 children and adolescents, between 4 February 2014 and 31 May 2015. Arrests of demonstrators increased in 2016 and 2017.

The United Nations Working Group on Arbitrary Detention has confirmed the existence of a pattern of arbitrary detentions of political opponents and dissidents.<sup>22</sup> Many of the arrested protesters were prosecuted criminally, including by military courts. In this regard, Foro Penal Venezolano has declared that, as of 2017, at least 275 people arrested at demonstrations and protests were being tried by military courts, generally accused of offenses under the Organic Code of Military Justice, such as rebellion and treason. In its 2016 report, the IACHR expressed grave concern about the use of "criminalization and the State's punitive power by State and non-State actors to control, punish, or prevent the exercise of the right to protest". The IACHR found that "criminalization processes usually begins with the filing of baseless allegations or complaints based on criminal offenses that do not conform to the principle of legality or criminal offenses that do not meet Inter-American standards. These criminal offenses are often linked to punishable conduct such as 'incitement to rebellion,' 'terrorism,' 'sabotage,' 'incitement to crime,' and 'attack on or resistance to public authority,' and tend to be arbitrarily applied by the authorities. Often, the misuse of criminal law is preceded by statements made by public officials in which human rights defenders are accused of committing crimes."<sup>23</sup> It became common for detained protesters to be tortured and mistreated.

#### 1.6 The 2015 elections, states of emergency and breakdown of the rule of law

With the legislative elections in December 2015, the composition of the National Assembly changed radically.<sup>24</sup> Of the 167 deputies elected to the National Assembly, 112 were from the opposition (Democratic Unity Roundtable) and 55 belonged to the Government's coalition (Great Patriotic Pole Simón Bolívar). Since 2000 and until that time, the ruling party and its coalition had dominated the National Assembly in number.

Since then, the executive branch and the deputies of the Government's coalition

<sup>20</sup> Resolution 8610 issued "regulations on the actions of the Bolivarian National Armed Forces to control public order, social peace and coexistence in public gatherings and demonstrations", published in *Official Gazette* No. 40,589 of 27 January 2015.

<sup>21</sup> Committee against Torture, Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela, UN Doc CAT/C/VEN/CO/3-4 (2014), para. 13.

<sup>22</sup> Working Group on Arbitrary Detention, Opinion No. 7/2015 (Rosmit Mantilla), para. 28.

<sup>23</sup> Inter-American Commission on Human Rights, Annual Report 2016, Chapter IV-B, Venezuela, para. 172.

<sup>24</sup> In the previous election of deputies in 2011, the pro-Government coalition won 98 of the 165 National Assembly seats, while the opposition bloc (Democratic Unity Roundtable) won 65 seats.

have stepped up their efforts to boycott legislative activity and, above all, to override any Bill contrary to Government policy. The judiciary has been one of the instruments of choice to achieve this. The executive branch has co-opted the Supreme Court of Justice (SCJ) to this end (see section 4.6 below). By means of legal mechanisms, such as requests for rulings on constitutionality,<sup>25</sup> prior to giving approval, President Maduro has almost systematically challenged before the Supreme Court the laws that the National Assembly has passed. Equally systematically, the SCJ has overturned these laws.

In January 2016, the Government declared a state of economic emergency,<sup>26</sup> alleging the existence of an 'economic war' and 'strategies of economic destabilization' against the country. After renewing the state of economic emergency in March that year,<sup>27</sup> the Government declared a state of exception and economic emergency in May 2016.<sup>28</sup> Since then, the state of exception and economic emergency has been continuously renewed. The emergency legislation granted broad discretionary powers to the executive branch, as well as the FANB and State security agencies.

Decree No. 2323, which declared the state of exception and economic emergency, used broad and ambiguous language to give the executive branch discretionary powers "to dictate measures and implement special plans for public security... [against] destabilizing actions that aim to interrupt the country's internal life or its international relations";<sup>29</sup> prevent "foreign interference in the internal affairs of the Venezuelan State";<sup>30</sup> and suspend financing to individuals and organizations.<sup>31</sup> In this regard, the IACHR has warned that this emergency legislation could possibly be used to restrict fundamental freedoms, suspend funding of civil society organizations, and "compromise respect for the rule of law and separation of State powers"<sup>32</sup>. Decree No. 2323 also contained an impunity clause, by establishing the "temporary and exceptional suspension of the execution of sanctions of a political nature against the highest authorities of government and other senior officials, when such sanctions could... undermine the security of the nation".<sup>33</sup> On 17 May 2016, in exercise of its constitutional powers,<sup>34</sup> the National Assembly adopted a resolution rejecting the Declaration of a State of Exception and Economic Emergency, considering that it violated the constitutional requirements. Although the Venezuelan Constitution states that the National Assembly must approve a state of exception,<sup>35</sup> and despite the fact that the Organic Law on States of Exception prevents the Supreme Court from ruling on any declared emergency if approval by the National Assembly is not given,<sup>36</sup> the Supreme Court ruled that the Declaration was constitutional and considered that legislative oversight of states of exception is purely political and

<sup>25</sup> Constitution of the Bolivarian Republic of Venezuela, Article 214.

<sup>26</sup> Decree No. 2184, published in *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6214 (2016).

<sup>27</sup> Decree No. 2270, published in *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6219 (2016).

<sup>28</sup> Decree No. 2323, published in the *Official Gazette of the Bolivarian Republic of Venezuela*, Extraordinary No. 6227 (2016).

<sup>29</sup> Decree No. 2323, Article 2(16).

<sup>30</sup> *Ibid.*

<sup>31</sup> Decree No. 2323, Article 2(18).

<sup>32</sup> Inter-American Commission on Human Rights, Annual Report 2016, Chapter IV-B, Venezuela, para. 56; and IACHR Press Release No. 71/16, "IACHR Expresses Concern Regarding the Declaration of a State of Exception and Economic Emergency", 1 June 2016.

<sup>33</sup> Decree No. 2323, Article 2(7).

<sup>34</sup> Constitution of the Bolivarian Republic of Venezuela, Article 339.

<sup>35</sup> *Ibid.*

<sup>36</sup> Organic Law on States of Exception, Article 34.

not legally binding.<sup>37</sup>

The situation came to a crux in March 2017 when the Supreme Court made two rulings to suspend the National Assembly's constitutional powers.<sup>38</sup> Legislative power was abrogated and sweeping powers were granted to the executive branch over social, political, military, criminal, legal, economic and civil issues. Parliamentary immunity was abolished and it was declared that the opposition deputies (who make up the majority in the National Assembly) had committed a 'crime against the Homeland' for having passed, on 21 March 2017, the Agreement on the Reactivation of the Enforcement Process of the Inter-American Democratic Charter of the OAS, as the mechanism for peaceful conflict resolution to restore constitutional order in Venezuela.

On 3 April 2017, at an extraordinary session, the Permanent Council of the OAS declared that the Supreme Court's decisions were "inconsistent with democratic practice and... an alteration of the constitutional order of the Bolivarian Republic of Venezuela".<sup>39</sup> The IACHR considered that the decisions of the Supreme Court "constitute a usurpation of legislative functions by the judicial and executive branches, and a de facto nullification of the popular vote by which the National Assembly deputies were elected... [and a] grave interference by the judicial branch in the National Assembly". It stated that: "These two rulings jeopardize the effective exercise of human rights and basic democratic principles, due to the concentration of power in the executive and judicial branches and the violation of the principle of separation of powers in a democratic system".<sup>40</sup>

The United Nations High Commissioner for Human Rights also expressed deep concern about the SCJ's decision and noted that "[t]he separation of powers is essential for democracy to function, and keeping democratic spaces open is essential to ensure human rights are protected... Venezuelan citizens have the right to participate in public affairs through their freely chosen representatives, as set out in the International Covenant on Civil and Political Rights, which Venezuela has ratified. Duly elected members of parliament should also be able to exercise the powers given to them by the Venezuelan Constitution."<sup>41</sup> The decisions by the Supreme Court constituted clear breach of the principle of separation of powers and a flagrant departure from the rule of law in Venezuela.

Since April 2017, in response to this situation, demonstrations and protests against the regime have intensified. In the process, there have been more deaths and arbitrary arrests of protesters, charges brought against political and social opponents, and attacks on human rights defenders and journalists. During the second quarter of 2017, more than 80 people have been killed in demonstrations. In the vast majority of these violent deaths, State security forces and armed groups of civilians who back the Government were responsible.

The Government's response to the breakdown of institutional order was to convene, on 1 May 2017, a National Constituent Assembly,<sup>42</sup> and it created a Presidential Commission made up exclusively of ministers, National Assembly deputies and high level officials from the Government's party (United Socialist Party of Venezuela, PSUV) to lay the foundations for the creation and operation of

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<sup>37</sup> Supreme Court of Justice: Case No. 16-0038, Judgment No. 4 of 20 January 2016; and Case 16-0117, Judgment No. 7 of 11 February 2016.

<sup>38</sup> Supreme Court of Justice (Constitutional Chamber): Case No. 17-0323, Judgment of 27 March 2017; and Case No. 17-0325, Judgment of 28 March 2017.

<sup>39</sup> Permanent Council of the Organization of American States, Resolution on the Recent Events in Venezuela, CP/RES.1078 (2108/17) of 3 April 2017, para. 1.

<sup>40</sup> IACHR Press Release No. 041/17, "IACHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela", 31 March 2017.

<sup>41</sup> UN Press Release, "Preserve separation of powers, Zeid urges Venezuela", 31 March 2017.

<sup>42</sup> Decree No. 2830 (2017).

the forthcoming constituent assembly.<sup>43</sup> The decree states that the National Constituent Assembly shall be made up of persons chosen by “industry and geographical areas”. The Bill, considered unconstitutional by many members of the legal profession (including the Federation of Bar Associations of Venezuela)<sup>44</sup> was met by rejection not only by the political opposition and wide swathes of society, but also by persons in the Government’s corner, such as some deputies in the pro-Government legislative coalition, the Attorney General of the Republic, and two Supreme Court judges. The Attorney General of the Republic has lodged a challenge on the measures before the Supreme Court.

A significant aspect of the new scenario posed by the Supreme Court’s rulings and the Government’s call for a National Constituent Assembly, has been the split between stalwart “Chavists” and the Government of President Maduro.

### 1.7 Venezuela and the international community

Venezuela is a State party to numerous United Nations human rights treaties,<sup>45</sup> has recognized the authority of several treaty bodies to hear individual cases,<sup>46</sup> and the investigative authority of two treaty bodies.<sup>47</sup> Although these treaty bodies have made rulings on some individual cases, the Venezuelan Government has refused to abide by these rulings. In addition, the Venezuelan State has not complied with any of the many Opinions adopted by the UN Working Group on Arbitrary Detention.<sup>48</sup> For more than a decade, the Venezuelan Government has refused visits, or has not answered requests to visit the country, by UN Special Procedure mandate holders.<sup>49</sup> The last UN Special Procedure country visit to

<sup>43</sup> Decree No. 2831 (2017).

<sup>44</sup> Federation of Bar Association of Venezuela: ‘Pronunciamiento de los Colegios de Abogados de Venezuela y de la Federación Nacional de Colegios de Abogados de Venezuela’, 2 May 2017; and ‘Colegios de Abogados anunciaron acciones judiciales contra Constituyente’, *Noticias Venezuela*, 3 May 2017.

<sup>45</sup> International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Elimination of All Forms of Discrimination against Women; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Rights of the Child; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; and Convention on the Rights of Persons with Disabilities.

<sup>46</sup> Human Rights Committee; Committee against Torture; Committee on the Elimination of Discrimination against Women; and Committee on the Elimination of Racial Discrimination.

<sup>47</sup> Committee against Torture and Committee on the Elimination of Discrimination against Women.

<sup>48</sup> See, among others, Working Group on Arbitrary Detention Opinions: No. 62/2011 (Sabino Romero Izarra); No. 47/2013 (Antonio José Rivero González); No. 51/2014 (Maikel Giovanni Rondón Romero and 316 others); No. 26/2014 (Leopoldo López Mendoza); No. 30/2014 (Daniel Omar Ceballos Morales); No. 1/2015 (Vincenzo Scarano Spisso); No. 26/2015 (Gerardo Ernesto Carrero Delgado, Gerardo Rafael Resplandor Veracierta, Nixon Alfonzo Leal Toro, Carlos Pérez y Renzo David Prieto Ramírez; and No. 7/2015 (Rosmit Mantilla).

<sup>49</sup> For several years, the following Special Procedures have made requests to visit Venezuela: the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on the situation of human rights defenders; the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the rights to freedom of peaceful assembly and association; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading punishment; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living; and the Special Rapporteur on the right to food.

Venezuela was by the Special Rapporteur on torture in 1996.<sup>50</sup>

At the regional level, although it denounced the American Convention on Human Rights in September 2012, Venezuela is still a State party to three Inter-American human rights treaties.<sup>51</sup> Since 2003, the IACHR has been continuously monitoring the situation in Venezuela.<sup>52</sup> However, the Venezuelan State has systematically ignored the IACHR's recommendations and has also denied IACHR requests to visit the country, made since 2004.

Efforts by the international community to surmount the serious and persistent political crisis have proved fruitless. The Venezuelan Government has largely managed to neutralize attempts by the OAS to have impact on the human rights situation in the country. Venezuela's diplomatic corps, with the active support of Latin American and especially Caribbean countries, was successful at blocking attempts by the OAS Permanent Council to examine the Venezuelan situation in 2014. The Permanent Council's 2014 declaration on solidarity and support for democratic institutions, dialogue and peace in Venezuela illustrates the inability of the OAS to do anything about the serious situation.<sup>53</sup> The failed attempt by the OAS General Assembly to adopt a resolution on Venezuela in 2017 further illustrates this situation. Nonetheless, in 2017, the Venezuelan Government announced its intention to withdraw from the OAS.

Attempts to get other regional fora involved in mediating the political crisis in Venezuela have been unsuccessful, and in some cases resulted in an uncritical endorsement of the Venezuelan authorities, as took place with the Union of South American Nations (UNASUR) in the first half of 2014.<sup>54</sup>

## **2 Accountability of perpetrators of gross human rights violations**

### 2.1 International law and standards on accountability

With respect to all human rights, whether those applicable to a State under customary international law, or those taken up through party status to international and/or regional human rights instruments, States have both negative and positive obligations: negative duties *not* to interfere with the legitimate enjoyment of rights (e.g. to respect the non-derogable right of all persons not to be arbitrarily deprived of life); and positive duties to protect rights

<sup>50</sup> Report of the Special Rapporteur on torture, UN Doc E/CN.4/1997/7/Add.3 (1996).

<sup>51</sup> Inter-American Convention to Prevent and Punish Torture; Inter-American Convention on Forced Disappearance of Persons; and Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women ("Convention of Belém do Pará").

<sup>52</sup> See "Venezuela" in Chapter IV of the Annual Reports of the Inter-American Commission on Human Rights, for the years 2002 (OEA/Ser.L/V/II.117 Doc. 1 rev. 1 of 7 March 2003), 2003 (OEA/Ser.L/V/II.118 Doc. 70 rev. 2 of 29 December 2003), 2004 (OEA/Ser.L/V/II.122 Doc. 5 rev. 1 of 23 February 2005), 2005 (OEA/Ser.L/V/II.124 Doc. 7 of 27 February 2006), 2006 (OEA/Ser.L/V/II.127 Doc. 4 rev. 1 of 3 March 2007), 2007 (OEA/Ser.L/V/II.130 Doc. 22 rev. 1 of 29 December 2007), 2008 (OEA/Ser.L/V/II.134 Doc. 5 rev. 1 of 25 February 2009), 2009 (OEA/Ser.L/V/II. Doc. 51 corr. 1 of 30 December 2009), 2010 (OEA/Ser.L/V/II. Doc. 5 corr. 1 of 7 March 2011), 2011 (OEA/Ser.L/V/II. Doc. 69 of 30 December 2011), 2012 (OEA/Ser.L/V/II.147 Doc. 1 of 5 March 2013), 2013 (OEA/Ser.L/V/II. Doc. 50 Corr.1 of 31 December 2013), 2014 (OEA/Ser.L/V/II. Doc. 13 of 9 March 2015), 2015 (OEA/Ser.L/V/II. Doc. 48/15 of 31 December 2015) and 2016. See also the report *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 of 30 December 2009; and *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118 Doc. 4 rev. 1 of 24 October 2003.

<sup>53</sup> OAS Permanent Council Declaration CP/DEC. 51 (1957/14), 'Solidarity and Support for Democratic Institutions, Dialogue, and Peace in the Bolivarian Republic of Venezuela', adopted on 7 March 2014.

<sup>54</sup> For example, UNASUR/CMRE/Resolution No. 02-2014 (2014) gave unconditional support to the Venezuelan Government.

from interference by others (e.g. to take legislative, administrative, judicial, educative and other necessary measures to guarantee the enjoyment of the right to life by all persons within the State's jurisdiction). The latter positive duty to protect includes the requirement to criminalize acts that constitute gross human rights violations (such as torture and ill-treatment, extrajudicial killings, enforced disappearance and sexual violence) in order to ensure that perpetrators are held to account.

A specific feature of the duty to protect is the obligation to investigate, prosecute and punish all acts that amount to gross violations of human rights. Principle 19 of the UN Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity in this regard provides that: "States shall undertake *prompt, thorough, independent and impartial investigations* of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are *prosecuted, tried and duly punished*" (emphasis added).<sup>55</sup> In the transitional justice setting it is important to recall that, while truth commissions or similar mechanisms are an important aspect of the right to truth (as an element of reparation for victims), they must be used in combination with the investigation of facts undertaken with a view to prosecuting those responsible for gross violations of human rights.<sup>56</sup>

The duty to investigate and hold perpetrators to account requires that investigations be undertaken by independent and impartial investigating authorities: independent of those suspected of being involved, including of any institutions impugned; and impartial, acting without preconceptions, bias or discrimination.<sup>57</sup> For example, investigations into allegations made against security and military forces should be undertaken by an independent commission of inquiry, comprised of members that are independent of any institution, agency or person that may be the subject of investigation.<sup>58</sup> Furthermore, such investigations must be thorough and effective. This requires adequate capacity and resources to be provided to investigating authorities. In the context of extrajudicial killings, and applicable also to other investigations into gross violations of human rights, the revised Minnesota Protocol sets out various recommendations on the practical implications of the need for thorough and effective investigations.<sup>59</sup> The Updated Principles also recall that investigations must be prompt, reflecting the requirement that the duty to investigate is triggered as soon as authorities become aware of allegations of gross human rights violations, regardless of whether a formal complaint has been made.<sup>60</sup>

<sup>55</sup> Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity, UN Doc E/CN.4/2005/102/add.1 (2005).

<sup>56</sup> See, for example, *La Cantuta v Peru*, Inter-American Court of Human Rights, Judgment of 29 November 2006, Series C, No. 162, para 224.

<sup>57</sup> In the context of the investigation of extrajudicial killings, for example, see International Commission of Jurists, *Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution—Investigation and Sanction* (2015), pp. 134-138. See also International Commission of Jurists, *Practitioners Guide No 7: International Law and the Fight Against Impunity* (2015), especially Chapter V.

<sup>58</sup> For example, see: Human Rights Committee, Concluding Observations: Sri Lanka, UN Doc CCPR/C/79/Add.56 (1995), para 15; and *Revised UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (United Nations, 2016) – Minnesota Protocol, Principle 11.

<sup>59</sup> Minnesota Protocol, *ibid*, Principles 12-17. See also: ICJ Practitioners Guides No 7 and 9, *ibid*; and the UN Manual on the Effective Investigation and Documentation of torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) (United Nations, 2004).

<sup>60</sup> See, for example, ICJ Practitioners Guide No 7, above note 57, p. 135.



Where prompt, thorough, independent and impartial investigations conclude that there is a prima facie case that an offence(s) constituting gross human rights violations has been committed, several consequences follow. Alleged perpetrators must be made subject to prosecution, involving all persons allegedly responsible, including superiors, by proceedings that adhere with international fair trial standards.<sup>61</sup> In the context of unlawful killings, the Human Rights Committee has clarified that this means that: "Immunities and amnesties provided to perpetrators of intentional killings and to their superiors, leading to de facto impunity, are, as a rule, incompatible with the duty to respect and ensure the right to life, and to provide victims with an effective remedy".<sup>62</sup> Where a prosecution leads to conviction, the punishment imposed must be commensurate with the seriousness of the crime.<sup>63</sup>

Ensuring the accountability of perpetrators of gross human rights violations also forms key elements of the right of victims to effective remedies and reparation. In the case of extrajudicial killings, for example, the Human Rights Committee has explained that the duty to investigate, prosecute and punish arises from the obligation of States parties to the International Covenant on Civil and Political Rights (ICCPR) to provide an effective remedy to victims of human rights violations, set out in Article 2(3) of the ICCPR, when read in conjunction with the right to life under Article 6.<sup>64</sup> Reparation includes the right to satisfaction and guarantees of non-repetition. In the context of accountability, satisfaction incorporates two key elements: 'justice' through prompt, thorough, independent and impartial investigations that lead to judicial and administrative sanctions against perpetrators; and truth, involving the verification and full and public disclosure of facts.<sup>65</sup> Guarantees of non-repetition are likewise geared towards the combatting of impunity and adopting measures to prevent the commission of further acts amounting to gross violations of human rights.<sup>66</sup> Further elements of the right of victims to effective remedies and reparation are considered in part 3.3 of this report.

## 2.2 Accountability at the national level

The issue of accountability for gross human rights violations and the fight against impunity faces many problems, both in legal terms and with regard to State practices and policies.

The Venezuelan Constitution states that gross human rights violations and crimes against humanity may not be subject to amnesties or pardons, have no statute of limitations and are within jurisdiction of the ordinary courts.<sup>67</sup> However, not all acts involving gross human rights violations are criminalized; where they exist, there are shortcomings in their definitions; individual responsibility is undermined

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<sup>61</sup> See, for example: ICJ Practitioners Guide No 7, above note 57, especially Chapter VI; UN Human Rights Committee, 'Draft General Comment No 36. Article 6: Right to life', UN Doc CCPR/C/GC/R.36/Rev.2 (2015), para 29; Minnesota Protocol, above note 58, para 1.

<sup>62</sup> Draft General Comment 36, *ibid*, para 29.

<sup>63</sup> See, for example, ICJ Practitioners Guide No 7, above note 57, pp. 217-222.

<sup>64</sup> Draft General Comment 36, above note 61, para 29. See also International Commission of Jurists, *Practitioners Guide No 2: The right to a remedy and to reparation for gross human rights violations* (2007), chapters IV and VIII.

<sup>65</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its resolution 60/147 (2006), paras 3(b), 4 and 22(b) and (f); and ICJ Practitioners Guide No 2, above note 64, chapters V and VII(IV).

<sup>66</sup> See, for example: Draft General Comment 36, above note 61, para 29; Basic Principles and Guidelines on the Right to a Remedy and Reparation, *ibid*, para 23; and ICJ Practitioners Guide No 2, above note 64, chapter VI.

<sup>67</sup> Constitution of the Bolivarian Republic of Venezuela, Articles 29 and 261.

by lack of command responsibility and lack of responsibility in the case of following superior orders; and the jurisdiction of military courts extends to gross human rights violations committed by members of the armed forces. While an overriding lack of political will to hold perpetrators to account has prevailed for many years, recent changes in the position of the Attorney General of the Republic and the Office of Public Prosecutions may signal a move away from impunity in the country.

Ordinary criminal law criminalizes various acts involving human rights violations, including torture and cruel, inhuman or degrading treatment;<sup>68</sup> enforced disappearance;<sup>69</sup> arbitrary detention;<sup>70</sup> violence against women and femicide;<sup>71</sup> and racial discrimination.<sup>72</sup> However, some of these offenses are not in accordance with the definitions of these crimes under international law. For example, as regards the crime of torture (set out in Article 17 of the Special Law to Prevent and Punish Torture and other Cruel, Inhuman or Degrading Treatment), the Committee against Torture has stated that: “the definition of torture... is incomplete inasmuch as it applies solely when the victims are in the custody of a public official. Article 17 also does not categorize as torture any pain or suffering inflicted at the instigation of, or with the consent or acquiescence of a public official or by another person acting in an official capacity. The conduct of public officials, at whose instigation or with whose consent acts of torture are committed by another individual, is likewise not categorized as complicity or participation in torture.”<sup>73</sup> The Committee against Torture has concluded that these shortcomings in the criminalization of torture “open real or potential loopholes for impunity”.<sup>74</sup> By way of further example, the crime of enforced disappearance (as defined in Article 180-A of the Criminal Code) presents serious problems. In cases attributable to State agents, the crime of enforced disappearance is limited to situations of illegal deprivation of liberty and does not include as perpetrators persons or groups of persons acting with “the authorization, support, or acquiescence of the State”. The Inter-American Court of Human Rights (IACtHR) has concluded the crime of enforced disappearance, as set out in the Criminal Code, does not reflect the criteria established by the Inter-American Convention on Forced Disappearance of Persons.<sup>75</sup>

Furthermore, several crimes under international law are not mentioned in Venezuelan law. Although the Constitution<sup>76</sup> and case law<sup>77</sup> refer to crimes against humanity, and Venezuela is a State-party of the Rome Statute of the International Criminal Court,<sup>78</sup> these crimes are not specified in national law. The country’s criminal law does not mention genocide, even though Venezuela ratified the Convention on the Prevention and Punishment of the Crime of Genocide in 1960. Forced recruitment and use of children by armed forces is not fully punishable under Venezuelan criminal law, even though Venezuela is a party to

<sup>68</sup> Special law to prevent and punish torture and other cruel, inhuman or degrading treatment, of 2013.

<sup>69</sup> Criminal Code, Article 180-A.

<sup>70</sup> Ibid, Articles 175, 177, 180, and 181.

<sup>71</sup> Organic Law on the Right of Women to a Life Free of Violence, Articles 39 et seq.

<sup>72</sup> Organic Law against Racial Discrimination, Articles 38 et seq.

<sup>73</sup> Committee against Torture Concluding Observations, above note 21, para. 7.

<sup>74</sup> Ibid.

<sup>75</sup> *Case of Blanco Romero et al. v. Venezuela*, Series C No. 138, Judgment of 28 November 2005, para. 105.

<sup>76</sup> Constitution of the Bolivarian Republic of Venezuela, Article 29.

<sup>77</sup> See, among others: Supreme Court of Justice (Criminal Appeals Chamber): Case No. 01-847, Judgment No. 869 of 10 December 2001; and Case No. 06-1656, Judgment No. 1747 of 10 August 2007.

<sup>78</sup> Law Approving the Rome Statute of the International Criminal Court, published in *Official Gazette* No. 37,098 of 3 December 2000, and *Official Gazette*, Extraordinary No. 5507 of the same date.

the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and notwithstanding that the Constitution prohibits forced recruitment.<sup>79</sup> Forced recruitment — of either children or adults — is only considered a crime when committed by “illegal armed groups”.<sup>80</sup>

In terms of individual criminal responsibility, Venezuelan law has shortcomings. Venezuelan criminal law does not contemplate the principle of superior responsibility. Moreover, except in cases of torture<sup>81</sup> and enforced disappearance,<sup>82</sup> criminal law does not specify that exoneration from criminal liability on the grounds of following orders does not apply to gross human rights violations.<sup>83</sup>

Although the Constitution assigns the prosecution of gross human rights violations and crimes against humanity to the jurisdiction of the ordinary criminal courts,<sup>84</sup> the Organic Code of Military Justice (COJM) provides the possibility that soldiers accused of these crimes may be tried by military courts (see further section 4.8 below). The COJM states that military courts are authorized to hear cases concerning crimes ‘related’ to a military criminal offense.<sup>85</sup> The COJM also defines as military crimes, and therefore puts these under the jurisdiction of the military courts, “the [unnecessary] use of weapons or violence against anyone”,<sup>86</sup> meaning that cases of extrajudicial execution and torture may be considered as falling under the jurisdiction of military courts, along with attacks on and/or appropriation of private property.<sup>87</sup>

Beyond these problems and shortcomings in Venezuela’s legislation, the biggest problem in terms of impunity has been the absence of political will by the Office of Public Prosecutions (Ministerio Público) to investigate gross human rights violations and bring perpetrators to justice. Effectively, the Attorney General’s Office (Fiscalía General de la República) does not investigate the vast majority of allegations of gross human rights violations. For example, as noted by the IACHR, most of the targeted killings of peasants and rural leaders recorded since 2002 in the context of the implementation of the Law on Land and Agricultural Development (2001), have gone unpunished, as have extrajudicial executions of socially marginalized people perpetrated by vigilante groups.<sup>88</sup> Furthermore, in 2009, the IACHR confirmed that a “pattern of impunity exists regarding cases of violence, which particularly affects communicators, human rights defenders, union members, persons participating in demonstrations, imprisoned persons, peasants [campesinos], Indigenous peoples, and women”.<sup>89</sup> According to information from Venezuelan civil society organizations presented to the IACHR, “of the 8,813 new cases of human rights violations that were presented to the Attorney General’s Office (Fiscalía General de la República) in 2012, 97% were either dismissed or closed by the prosecuting authority, while charges were

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<sup>79</sup> Constitution of the Bolivarian Republic of Venezuela, Article 134.

<sup>80</sup> Law against kidnapping and extortion, 2009, Article 9.

<sup>81</sup> Special Law to prevent and punish torture and other cruel, inhuman or degrading treatment, Article 30.

<sup>82</sup> Criminal Code, Article 180-A.

<sup>83</sup> *Ibid*, Article 61.

<sup>84</sup> Constitution of the Bolivarian Republic of Venezuela, Articles 29 and 261.

<sup>85</sup> Organic Code of Military Justice, Article 123.

<sup>86</sup> *Ibid*, Article 573.

<sup>87</sup> *Ibid*, Article 574.

<sup>88</sup> Inter-American Commission on Human Rights, Annual Report 2005, OEA/Ser.L/V/II.124 Doc. 7 of 27 February 2006, paras. 308 et seq.

<sup>89</sup> Inter-American Commission on Human Rights, Annual Report 2009, OEA/Ser.L/V/II. Doc. 51 corr. 1 of 30 December 2009, para. 472

brought in the remaining 3% of the cases".<sup>90</sup> In 2014, the Committee against Torture noted with concern that "of 31,096 complaints of human rights violations received from 2011 to 2014, only 3.1 per cent resulted in prosecution by the Office of Public Prosecutions (Ministerio Público)".<sup>91</sup>

Nevertheless, from late 2016 to 2017, and in particular as the result of the Supreme Court's decisions of March 2017 that stripped the National Assembly of its constitutional powers, the Attorney General of the Republic began to show signs of independence from the Government's political leadership and launched several investigations and brought charges against State officials for the deaths of persons killed during public demonstrations. The stance of the Office of Public Prosecutions (Ministerio Público) on the Government's call for a National Constituent Assembly saw a 180-degree turn in the office's position on human rights violations.

### **3 Access to effective remedies and reparation for victims of gross human rights violations**

#### 3.1 International law and standards on remedies and reparation

Every person who is a victim of a human rights violation, whether amounting to a 'gross' human rights violation or otherwise, has the right to effective remedies and reparation. Broadly speaking, this entails the right of victims to defend their rights, to obtain recognition of a violation(s), to cessation of any continuing violation(s) and to adequate reparation. It requires that rights-holders have equal and effective access to justice mechanisms, including through access to judicial bodies that have the competence to adjudicate and provide binding decisions as to the remedies and reparation to be granted to victims.<sup>92</sup> It should be recalled that, where appropriate, such as in cases of the unlawful killing of a person, a 'victim' includes "the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".<sup>93</sup>

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation recall that adequate, effective and prompt reparation is intended to promote justice by redressing gross human rights violations, requiring reparation to be proportionate to the gravity of the violation(s) and the harm suffered.<sup>94</sup> Full and effective reparation entails:<sup>95</sup>

- Restitution, aimed at re-establishing, to the extent possible, a victim's situation as it was before the violation was committed;
- Compensation, calling for fair and adequate monetary compensation (including for medical and rehabilitative expenses, pecuniary and non-pecuniary damage resulting from physical and mental harm caused, loss of earnings and earning potential and for lost opportunities such as employment and education);

<sup>90</sup> Inter-American Commission on Human Rights, Annual Report 2012, OEA/Ser.L/V/II.147 Doc. 1 of 5 March 2013, para. 378.

<sup>91</sup> Committee against Torture Concluding Observations, above note 21, para. 8.

<sup>92</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 65, paras 3 and 11; and ICJ Practitioners Guide No 2, above note 64, especially chapter III.

<sup>93</sup> UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 65, para 8.

<sup>94</sup> Ibid, para 15.

<sup>95</sup> See, for example: UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 65, paras 15-23; and ICJ Practitioners Guide No 2, above note 64, especially chapters V, VI and VII.

- Rehabilitation, aimed at enabling the maximum possible self-sufficiency and functioning of the victim, involving restoring previous functions affected by the violation and the acquisition of new skills that may be required as a result of the changed circumstances of the victim resulting from the violation;
- Satisfaction, including through the cessation of any continuing violation(s), justice in the form of the holding to account of the perpetrator(s) of the violation, and truth in the form, amongst other things, of the verification and full and public disclosure of facts, the search, recovery and identification of direct victims and public apology and commemorations; and
- Guarantees of non-repetition, geared towards the combatting of impunity and adoption of measures to prevent the commission of further acts amounting to gross violations of human rights, including through monitoring of State institutions (including civilian oversight of military and security forces), training of law enforcement and other officials, the adoption and dissemination of codes of conduct for public officials, law, policy and institutional reform, the protection of lawyers and human rights defenders representing the interests and rights of victims, and the strengthening of the independence and effectiveness of judicial mechanisms.

### 3.2 Access to remedies and reparation at the national level

Venezuela's Constitution<sup>96</sup> and legislation<sup>97</sup> provide for judicial recourse and reparation for victims of gross human rights violations. However, the law essentially defines two kinds of reparation: restitution and compensation. In this sense, other forms of reparation such as rehabilitation, satisfaction and guarantees of non-repetition prescribed by international standards, as described above, are not contemplated in the legislation.

To obtain redress in the form of restitution and compensation, the legal system provides two legal remedies: civil action in criminal proceedings;<sup>98</sup> and administrative proceedings. In the latter case, the possibilities for redress are limited and involve lengthy and complicated proceedings, undermining their effective nature within the terms of international standards on the right to effective remedies and reparation.

With regard to criminal proceedings, procedural law provides that victims of punishable offenses have the right to access the organs of administration of criminal justice for free, expeditiously, without undue delay or useless formalities, so long as this is without prejudice for the rights of the suspects or defendants.<sup>99</sup> In cases of human rights violations, any natural person or association for the defence of human rights can file a criminal complaint before the Ombudsman's Office.<sup>100</sup> However, participatory and prosecutory powers and rights of the victim and their families in criminal proceedings are limited.<sup>101</sup> In addition, reparation must come from the criminal offender, associates and other persons legally responsible, and this depends on their assets and the ability to effectively seize these assets.

<sup>96</sup> Constitution of the Bolivarian Republic of Venezuela, Articles 49 (8) and 259.

<sup>97</sup> See for example: Special Law to prevent and punish torture and other cruel, inhuman or degrading treatment of 2013, Article 10; Criminal Code, Articles 113 et seq; Organic Law on the Right of Women to a Life Free of Violence Articles 61 et seq; and Code of Criminal Procedure, Articles 23, 49 and 118.

<sup>98</sup> Code of Criminal Procedure, Article 49 et seq.

<sup>99</sup> Ibid, Article 23.

<sup>100</sup> Ibid, Article 121.

<sup>101</sup> Ibid, Article 120.

In 2015, the Venezuelan Government adopted the National Human Rights Plan 2015-2019 which, among its long-term programme actions, proposes to “[a]dvance in the approval and enactment of laws on the subject of... [r]eparation and rehabilitation for the victims of human rights violations”. However, no legislation has as yet been developed in this area.

#### **4 Independence and accountability of justice actors**

##### 4.1 The role of justice actors and institutions in the pursuit of redress and accountability

The equal administration of justice for all without fear or favour is essential to the ability of a State to discharge its obligations to hold perpetrators of gross human rights violations to account and to provide effective remedies and reparation to victims.<sup>102</sup> In turn, the equal administration of justice relies on several factors, including:

- The operation of independent judicial mechanisms comprised of judges whose independence is protected from interference by the executive branch or third parties (including, for example, as a result of dismissal or disciplinary action initiated on the basis of judicial decisions that are unfavourable to the executive, or other forms of interference or intimidation, or threats from police, security forces or private actors);
- The impartial adjudication by judges of cases, which may be negatively influenced, for example, by appointment processes for judges, the internal allocation of cases and/or corruption;
- The accountability of judges and prosecutors, including for corruption or lack of adherence with fair trial standards;
- The competence of judges and prosecutors, for example including as a result of adequate training and knowledge of international law and standards, particularly concerning obstacles to redress accountability and the available means to overcome such challenges;
- The knowledge and skills of lawyers and human rights defenders that act to pursue accountability or redress for victims; and
- The ability of such lawyers and other representatives to act free from external interference, undue influence or persecution.

##### 4.2 Venezuela’s judiciary

Venezuela’s judiciary is characterized by its shaky independence from the executive branch. Although the Constitution<sup>103</sup> and laws formally guarantee judicial independence, these guarantees are not applied in practice, since the legislation and subsequent case law have established a transitional regime that has been in place for more than 17 years, causing legal uncertainty. This has been a subject of concern for the Human Rights Committee,<sup>104</sup> the Committee against Torture,<sup>105</sup> the Special Rapporteur on the independence of judges and

<sup>102</sup> See, for example: Practitioners Guide No 7, above note 57, pp. 318-325; and UN Basic Principles and Guidelines on the Right to a Remedy and Reparation, above note 65, para 12.

<sup>103</sup> Constitution of the Bolivarian Republic of Venezuela, Articles 136 and 253 et seq.

<sup>104</sup> Human Rights Committee: Concluding Observations on the third periodic report of Venezuela, UN Doc CCPR/CO/7/VEN (2001); and Concluding Observations on the fourth periodic report of Venezuela, UN Doc CCPR/C/VEN/CO/4 (2015).

<sup>105</sup> Committee against Torture Concluding Observations, above note 21.

lawyers,<sup>106</sup> the IACHR<sup>107</sup> and the IACtHR.<sup>108</sup>

#### 4.3 The judicial branch under permanent transition

In August 1999, during the adoption of the Constitution, the National Constituent Assembly (NCA) established a Judicial Emergency Commission (CEJ)<sup>109</sup> made up of nine members (four Constituent Assembly members and five persons elected by the National Constituent Assembly) with powers to suspend and dismiss judges and to appoint replacements as 'accidental judges' (in large part synonymous with 'provisional judges', meaning judges appointed without following the required procedure of holding a public competition). Furthermore, the NCA decided to rescind the established legal terms for judges, officials of the Judicial Council, the courts and the circuit courts.<sup>110</sup>

With the adoption of the new Constitution in 1999, the NCA tasked the National Assembly to approve, within one year, legislation on the judicial system, an organic law on public defence,<sup>111</sup> and an organic law of the Supreme Court of Justice. The latter law, among other things, assigns the disciplinary authority of the judiciary to disciplinary courts under the Supreme Court of Justice (SCJ) and assigns the administration of the judiciary to the Executive Directorate of the Magistracy (DEM), also within the SCJ. The NCA also provided that, although the Supreme Court does not determine the organization of the Executive Directorate of the Magistracy, the Commission on the Functioning and Restructuring of the Judicial System (CFRSJ) would exercise the powers of governing and administration, inspection and oversight of the courts and the public defender's office, as well as the Judicial Council and the Judicial Emergency Commission (CEJ).<sup>112</sup> Similarly, the NCA decided that judicial disciplinary competence, corresponding to the disciplinary courts would be exercised by the CFRSJ until the National Assembly had passed legislation to define disciplinary processes and courts.<sup>113</sup>

Although the transitional regime was supposed to last for one year, legislation

<sup>106</sup> See, amongst other reports of the Special Rapporteur on the independence of judges and lawyers: UN Doc E/CN.4/2005/60/Add.1 (2005); and UN Doc A/HRC/14/26/Add.1 (2010).

<sup>107</sup> See "Venezuela" in Chapter IV of the Annual Reports of the Inter-American Commission on Human Rights, for the years 2002 (OEA/Ser.L/V/II.117 Doc. 1 rev. 1 of 7 March 2003), 2003 (OEA/Ser.L/V/II.118 Doc. 70 rev. 2 of 29 December 2003), 2004 (OEA/Ser.L/V/II.122 Doc. 5 rev. 1 of 23 February 2005), 2005 (OEA/Ser.L/V/II.124 Doc. 7 of 27 February 2006), 2006 (OEA/Ser.L/V/II.127 Doc. 4 rev. 1 of 3 March 2007), 2007 (OEA/Ser.L/V/II.130 Doc. 22 rev. 1 of 29 December 2007), 2008 (OEA/Ser.L/V/II.134 Doc. 5 rev. 1 of 25 February 2009), 2009 (OEA/Ser.L/V/II. Doc. 51 corr. 1 of 30 December 2009), 2010 (OEA/Ser.L/V/II. Doc. 5 corr. 1 of 7 March 2011), 2011 (OEA/Ser.L/V/II. Doc. 69 of 30 December 2011), 2012 (OEA/Ser.L/V/II.147 Doc. 1 of 5 March 2013), 2013 (OEA/Ser.L/V/II. Doc. 50 Corr.1 of 31 December 2013), 2014 (OEA/Ser.L/V/II. Doc. 13 of 9 March 2015), 2015 (OEA/Ser.L/V/II. Doc. 48/15 of 31 December 2015) and 2016. See, also, the report *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 of 30 December 2009; and *Report on the Situation of Human Rights in Venezuela*, OEA/Ser.L/V/II.118 Doc. 4 rev. 1 of 24 October 2003.

<sup>108</sup> *Case of Reverón Trujillo v. Venezuela*, IACtHR Series C No. 197, judgment of 30 June 2009; *Case Chocrón Chocrón v. Venezuela*, IACtHR Series C No. 227, judgment of 1 July 2011; and *Case Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, IACtHR Series C No. 182, judgment of 5 August 2008.

<sup>109</sup> Decree on the Reorganization of the Judicial Power and the Penitentiary System, Article 2.

<sup>110</sup> *Ibid*, Article 12.

<sup>111</sup> Constitution of the Bolivarian Republic of Venezuela, Fourth Temporary Provision (5).

<sup>112</sup> Decree whereby the Transitional Regime for Public Powers is established, published in *Official Gazette* No. 36,857 (1999).

<sup>113</sup> *Ibid*, Article 23.

relating to the judicial system was issued years later: the Organic Law of the Supreme Court was issued in May 2004 (LOTSJ-2004),<sup>114</sup> which was later superseded by a new law in 2010;<sup>115</sup> the Organic Law of Public Defense was issued in September 2008;<sup>116</sup> the Organic Law of the Office of Public Prosecutions (Ministerio Público) in March 2007; the Justice System Law in April 2009; and the Code of Ethics of Venezuelan Judges in August 2009.<sup>117</sup> The enactment of this legislation did not end the transitional regime. Through various mechanisms and procedures, it has remained in effect until today, creating a situation of permanent temporariness of the Venezuelan judicial system.

In March 2009, the SCJ declared another comprehensive overhaul of the judiciary.<sup>118</sup> When LOTSJ-2004 was enacted, the judiciary was under the direction of two committees: the CFRSJ<sup>119</sup> and the SCJ's Judicial Commission.<sup>120</sup> Under the transitional regime, the CFRSJ exercised disciplinary powers over judges, while the SCJ's Judicial Commission could provisionally or temporarily appoint them, and remove them at will. This situation remained in effect, and LOTSJ-2004 provided that the CFRSJ would continue to exercise disciplinary functions until new legislation was enacted and the disciplinary jurisdiction and corresponding disciplinary courts were established.<sup>121</sup> LOTSJ-2004 also provided for the reorganization and restructuring of the Executive Directorate of the Magistracy (DEM).<sup>122</sup>

In 2009 the National Assembly amended the Code of Ethics of Venezuelan Judges (CEJV),<sup>123</sup> and the National Assembly was temporarily authorized to "appoint the judges and alternates for the Judicial Disciplinary Tribunal and the Judicial Disciplinary Court",<sup>124</sup> until the judicial electoral colleges were created pursuant to the Constitution<sup>125</sup> and the CEJV.<sup>126</sup> In June 2011, the National Assembly appointed the disciplinary judges for the Judicial Disciplinary Tribunal and the Judicial Disciplinary Court. That same month, the CFRSJ lost its powers over judicial disciplinary matters.<sup>127</sup> Although the scope of the CEJV covers every judge who is invested "under the law to act on behalf of the Republic in the exercise of the jurisdiction, being permanent, temporary, casual, accidental or provisional",<sup>128</sup> in 2013 the Supreme Court's Constitutional Chamber suspended the application of the code with regard to temporary, occasional, accidental or provisional judges, excluding them from the disciplinary procedures established by this law, and it assigned to the Supreme Court's Judicial Commission the authority to punish and remove these categories of judges.<sup>129</sup> Consequently, the Disciplinary Jurisdiction only has competence over tenured judges, who constitute

<sup>114</sup> Published in *Official Gazette* No. 37,942 (2004).

<sup>115</sup> Published in the *Official Gazette*, Extraordinary No. 5991 (2010). The text of the law was reprinted with amendments to Article 92 and published in the *Official Gazette* No. 39,483 (2010).

<sup>116</sup> Published in *Official Gazette* No. 39,021 (2008).

<sup>117</sup> Published in the *Official Gazette* No. 39,236 (2009).

<sup>118</sup> Resolution No. 2009-0008 (2009).

<sup>119</sup> CFRSJ members were elected by the National Constituent Assembly.

<sup>120</sup> The Judicial Commission is an entity made up of one judge from each of the Supreme Court's chambers.

<sup>121</sup> Organic Law of the Supreme Court of Justice 2004, overriding temporary and final provision (e).

<sup>122</sup> *Ibid*, overriding temporary and final provision (a).

<sup>123</sup> Published in *Official Gazette* No. 39,493 (2010).

<sup>124</sup> Law on the Partial Amendment of the Code of Ethics of Venezuelan Judges 2010, Article 9.

<sup>125</sup> Constitution of the Bolivarian Republic of Venezuela, Article 270.

<sup>126</sup> Code of Ethics of Venezuelan Judges, Articles 46 et seq.

<sup>127</sup> CFRSJ Resolution No. 001-2011 (2011).

<sup>128</sup> Code of Ethics of Venezuelan Judges, Article 2.

<sup>129</sup> Judgment No. 516 (2013).



a small minority.

#### 4.4 'Provisional' judges

The vast majority of judges in Venezuela have been appointed on a temporary or provisional basis. They are referred to as 'provisional', 'alternate' or 'temporary' judges. In the last decade, the percentage of 'provisional' judges has fluctuated between 66 and 80 per cent of the 2,000 Venezuelan judges. According to official figures, during the years 2005-2006, there were 1,390 provisional judges; in 2008 some 1,451 non-permanent judges were appointed;<sup>130</sup> and in 2010, out a total of 1,914 judges, 1,473 were 'provisional'. In May 2014, the ICJ found that "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 SCJ".<sup>131</sup> In 2016, the IACHR found that 66 per cent of judges were 'provisional'.

The formal procedures that are supposed to safeguard the independence of the judiciary are not applied in practice to provisional judges, who do not have any security in their position and jobs. These judges are appointed at the discretion of the SCJ, without an open public competition (as required by the Constitution), and they are subject to discretionary removal by the SCJ's Judicial Commission, without any legal cause, due process or appeal rights. The SCJ's Constitutional Chamber has established consistent, binding case law, according to which "the provisional judges may be removed from office in the same manner as they were appointed: discretionally" because "provisional judges do not have security of tenure".<sup>132</sup> Thus, provisional judges may be removed and punished by simple notification from the SCJ's Judicial Commission, without observing the basic requirements of due process and international standards applicable to the independence of the judiciary.

In 2005, the Supreme Court adopted the Rules for Evaluations and Public Competitions for Entry into and Promotion within the Judicial Career.<sup>133</sup> Since 2007, the National School of Magistrates has offered an initial training programme for aspiring judges. However, in 2009, the IACHR concluded that these provisions "have fallen into disuse, since no competitions have been organized and all appointments since 2002 have been made without any sort of oversight or procedure".<sup>134</sup> According to the President of the Judicial Disciplinary Court, in 2013, temporary, occasional, accidental or provisional judges "are the majority, because competitive examinations for admission to the judicial career have not taken place for seven years".<sup>135</sup>

The use of disciplinary power over judges, in particular provisional judges, has been vague and arbitrary. The IACHR has noted that "the fact that they [the dismissal of judges] occurred almost immediately after the judges in question handed down judicial decisions in cases with a major political impact, combined with the fact that the resolutions establishing the destitution do not state with clarity the causes that motivate the decision, nor do they refer to the procedure

<sup>130</sup> "Jurisdicción Disciplinaria Judicial" (2014) 10(3) *Revista Ad Litteram*, pp. 24-25, at URL <http://www.jdj.gob.ve/revistaadlitteram.html>.

<sup>131</sup> ICJ, *Strengthening the rule of law in Venezuela*, 2014, p. 9, at URL <http://www.icj.org/strengthening-the-rule-of-law-in-venezuela/>.

<sup>132</sup> Supreme Court of Justice (Constitutional Chamber), Judgment of 20 December 2007. See also, Judgment No. 1082 of 11 August 2015.

<sup>133</sup> Published in *Official Gazette* No. 38,282 (2005).

<sup>134</sup> IACHR, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 (2009), para. 204.

<sup>135</sup> Tulio Jiménez, "Editorial, Jurisdicción Disciplinaria Judicial" (2013) 6(2) *Revista Ad Litteram*,. 1, at URL <http://www.jdj.gob.ve/revistaadlitteram.html>.

through which the decision was adopted, sends a strong signal—to society and to other judges—that the judiciary does not enjoy the freedom to adopt rulings that go against government interests and, if they do so, that they face the risk of being removed from office”.<sup>136</sup>

#### 4.5 Tenured judges

In 2017, of the 2,000 of the judges in Venezuela, only 700 are tenured judges. In principle, tenured judges have job stability and, in accordance with the Constitution and the Code of Ethics of Venezuelan Judges (CEVJ), are answerable to the disciplinary jurisdiction. However, the SCJ’s Judicial Commission has implemented the practice of suspending tenured judges to investigate them. One of the most representative cases is that of Judge María Lourdes Afiuni, who was suspended in 2009 because of an investigation and disciplinary action.<sup>137</sup> This situation, coupled with the climate of persecution of public officials who disagree with Government policy, has inhibited the vast majority of tenured judges in the administration of justice, particularly in cases of human rights violations.

#### 4.6 The Supreme Court of Justice

The Supreme Court of Justice (SCJ) is the highest court of Venezuela. It oversees constitutionality; is the court of appeals; adjudicates administrative disputes between the Republic, the states, municipalities, or other public entities; resolves conflicts of jurisdiction between courts, whether ordinary or special; and oversees the legality of the acts of the executive branch. In addition, the SCJ is the organ that governs and administers the judiciary and is responsible for the inspection and supervision of the courts and the public defenders’ offices, as well as preparing and executing the judiciary’s budget.

In 2004, with the enactment of the Organic Law of the Supreme Court (LOTSJ), the make-up of the Supreme Court was expanded from 20 to 32 judges, elected by vote of two thirds of the National Assembly,<sup>138</sup> which was at that time dominated by the ruling party. In 2005, the UN Special Rapporteur on the independence of judges and lawyers stated that this new law allowed the coalition in power in the National Assembly to appoint 12 judges, thus obtaining a majority of judges on the Supreme Court, creating a highly politicized judiciary”.<sup>139</sup>

In December 2010, new SCJ judges were appointed right after the election of National Assembly deputies in September of that year, but before the new legislative session began in January 2011. The appointments were made to ensure that judges sympathetic to the ruling party were elected while the necessary votes were available in the legislature. Thus, of the nine principal judges appointed in 2010, at least five had been National Assembly deputies and members of the United Socialist Party of Venezuela (the ruling party); one had been a deputy to the Andean Parliament, a member of the Government’s party, and had previously been the Ambassador to Canada by the appointment of the President; and another had previously been the Attorney General of the Republic, a member of the executive branch appointed by the President.

In 2014, despite needing the votes of two thirds of the deputies to elect

<sup>136</sup> IACHR, *Democracy and Human Rights in Venezuela*, above note 134, para. 301.

<sup>137</sup> Judicial Commission of the Supreme Court of Justice Resolution No. 2009-0143 (2009), by which it was decided to suspend without pay Judge María Lourdes Afiuni Mora from her position as Judge of First instance of the Criminal Court Circuit of the Metropolitan area of Caracas.

<sup>138</sup> LOTSJ-2004, Article 8; and LOTSJ-2010, Article 38.

<sup>139</sup> Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc E/CN.4/2005/60/Add.1 (2005), para. 167.

judges,<sup>140</sup> the ruling party in the National Assembly proceeded to elect 13 principal Supreme Court judges and three deputy judges, with a simple majority, once again securing political control of the highest court. In this regard, it should be noted that prior to this new election of judges, on 14 October 2014 the Supreme Court's Plenary Chamber accepted the resignation of 13 judges.<sup>141</sup> However, on 17 February 2016, two of them (Judges Carmen Elvigia Porras and Luis Ortíz Hernández) testified before the National Assembly Evaluation Committee on the Appointment of Supreme Court Justices that all 13 judges had been pressured to apply for their retirements a year before their constitutionally-established terms ended, in order to create vacancies for pro-Government judges to be appointed in December,<sup>142</sup> before the opposition majority took their seats in the National Assembly pursuant to the December 2015 elections.<sup>143</sup>

Currently, the great majority of Supreme Court judges are members of the United Socialist Party of Venezuela (PSUV) and/or former Government officials.<sup>144</sup> Many of them hold significant positions on the SCJ. Thus, gradually but steadily, the Government's party has co-opted the SCJ and turned it into an appendage of the executive branch.

With the December 2015 elections, the composition of the National Assembly changed radically.<sup>145</sup> Of the 167 deputies in the National Assembly, 112 are from the opposition coalition (Democratic Unity Roundtable) and 55 belong to the Government's coalition ("Simón Bolívar" Great Patriotic Pole), whereas since 2000 and until that point, the ruling party and its coalition had dominated the National Assembly in number.

Since then, the executive branch and deputies from the ruling party coalition have intensified their actions to boycott legislative proceedings and, in particular, to block any bill contrary to the government's policy. The judiciary has played a key role and the executive branch has coopted the SCJ. By means of legal mechanisms, such as the "request for a ruling on constitutionality prior to giving approval" provided by article 214 of the Constitution, Maduro has, almost systematically, challenged before the Supreme Court, the laws that the National Assembly has passed.

The SCJ has become the instrument of the executive branch and the ruling

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<sup>140</sup> The Organic Law of the Supreme Court (LOTSJ-2004) provides that, if after the National Assembly has convened four plenary sessions to elect judges to the Supreme Court, a two-thirds majority of votes is not reached, then the election may be done with a simple majority. As the IACHR has noted, LOTSJ 2004 "did away with the requirement of broad political consensus for their election" (*Democracy and Human Rights in Venezuela*, above note 134, para. 198).

<sup>141</sup> "SCJ aprobó jubilación anticipada de 13 de sus miembros", *El Universal*, 14 October 2015.

<sup>142</sup> National Assembly, Accord by which Principal and Deputy Justices are Appointed to the Supreme Court of Justice, *Official Gazette* No. 40,816 (2015).

<sup>143</sup> "Ex magistrados del SCJ denunciaron que fueron extorsionados y amenazados para dejar sus cargos", [www.RunRun.es](http://www.RunRun.es), 17 February 2016; and "Ex magistrada: Maikel Moreno y presidenta del SCJ me presionaron para adelantar mi jubilación", [www.RunRun.es](http://www.RunRun.es), 1 March 2016.

<sup>144</sup> For example, SCJ President Maikel José Moreno Pérez; Second SCJ Vice-President and President of the Constitutional Chamber, Juan José Mendoza Jover; President of the Political-Administrative Chamber, María Carolina Ameliach Villarroel; President of the Civil Chamber, Yván Bastardo Darío Flores; Justice Calixto Ortega Ríos, PSUV deputy to the Latin American Parliament (2000-2005) and National Assembly deputy (2006-2010); Electoral Chamber Justice Jhannett María Madriz Sotillo, a member of the PSUV Bolivarian Movement's Superior Council; and Justices Arcadio Delgado Rosales, Malaquías Gil Rodríguez, and Christian Zerpa.

<sup>145</sup> In the previous election of National Assembly deputies in 2011, the PSUV had won 98 of the 165 seats, while the opposition coalition (Democratic Unity Roundtable) won 65 seats.

party. Its rulings have not been made “impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”, as required by the Basic Principles on the Independence of the Judiciary,<sup>146</sup> but rather in accordance with the judges’ partisan loyalty and ideology.

Thus, in particular since December 2015, the Supreme Court has issued a number of rulings<sup>147</sup> that have stripped the National Assembly of all of its constitutional powers, which have been assumed by the Supreme Court itself, and rescinded several laws, including the 2016 Law on Amnesty and National Reconciliation; abolished parliamentary immunity; granted sweeping powers to the executive branch over social, political, military, criminal, legal, economic, and civil issues; approved successive states of exception declared by the Government since January 2016; and conferred broad powers to the Bolivarian National Armed Forces (FANB), State security forces, and public security organs. Furthermore, following a series of declarations by the National Assembly in support of the efforts and initiatives of the international community concerning the Venezuelan crisis,<sup>148</sup> the Supreme Court considered that the opposition deputies, who make up the majority in the National Assembly, had committed a ‘crime against the Homeland’.

In addition, the Constitutional Chamber of the SCJ has issued several decisions through which it has dismissed or disqualified, and even sentenced to imprisonment for up to 15 months, mayors who are close to the opposition or who did not comply with judicial orders to prevent demonstrations and protest marches against the Government. In some cases, the procedure has not observed due process guarantees and sanctions have been imposed in a single instance. In a recent complaint before the UN Human Rights Committee, concerning a mayor sentenced to imprisonment without due process for contempt of an order by the Supreme Court to prevent demonstrations and protest marches, the Committee concluded that this constituted arbitrary detention. The Committee underlined that: “the imposition of a draconian penalty of imprisonment for contempt of court without adequate explanation and without independent procedural safeguards is arbitrary”.<sup>149</sup> The Committee also concluded that there had been a violation of the mayor’s rights to a fair trial, humane

<sup>146</sup> UN Basic Principles on the Independence of the Judiciary, endorsed by General Assembly resolutions 40/32 (1985) and 40/146 (1985), Principle 2.

<sup>147</sup> See SCJ Constitutional Chamber judgments: Case No. 17-0323, 27 March 2017; Case No. 170325, 28 March 2017; Case No. 16-0038, No. 4 of 20 January 2016; Case No. 16-0117, No. 7 of 11 February 2016; No. 9 of 1 March 2016; Case No. 16-0038, No. 184 of 17 March 2016; Case No. 2011-000373, No. 269 of 21 April 2016; Case No. 2016-0271, No. 274 of 21 April 2016; Case 16-363, No. 327 of 28 April 2016; Case 2016-000397, No. 343 of 6 May 2016; Case No. 16-0470, No. 411 of 19 May 2016; Case 11-0373, No. 473 of 14 June 2016; Case 16-0524, No. 478 of 14 June 2016; Case No. 16-0153, No. 614 of 19 July 2016; Case No. 16-0470, No. 615 of 19 July 2016; Case No. 16-0343, No. 264 of 11 April 2016; Case 16-0683, No. 618 of 20 July 2016. See also SCJ Electoral Chamber judgments: Case No. AA70-E-2015-000146, No. 260 of 30 December 2015; Case No. AA70-X-2016-000001, No. 1 of 11 January 2016; and Case No. AA70-X-2016-000007, No. 108 of 1 August 2016.

<sup>148</sup> Agreement on the Reactivation of the Process of Application of the OAS Inter-American Charter as a mechanism for peaceful conflict resolution to restore constitutional order in Venezuela, adopted on 21 March 2017; Agreement urging compliance with the Constitution, and on the responsibility of the National Executive Power, the Supreme Court of Justice and the National Electoral Council in the preservation of peace and for democratic change in Venezuela, adopted on 10 May 2016; and Agreement that backs the interest of the international community of the G-7, OAS, UNASUR, MERCOSUR and the Vatican in the Venezuelan crisis, adopted on 31 May 2016.

<sup>149</sup> *Vicencio Scarano Spisso v. Venezuela*, Human Rights Committee Communication 2481/2014, UN Doc CCPR/C/119/D/2481/2014 (2017), para. 7(4).

treatment during his detention, and his political rights.

This situation has undermined the independence and impartiality of the judiciary, allowing undue interference from other State branches in disciplinary proceedings and the appointment and removal of judges. This situation has also undermined the right to effective remedy, to be heard by an independent and impartial court and to a fair trial. In 2015, the IACHR noted in this regard that “the lack of independence and autonomy of the judiciary from political power is one of the weakest points of democracy in Venezuela... this lack of independence has allowed the use of punitive power of the State to criminalize human rights defenders, penalize peaceful protest and prosecute political dissidents”.<sup>150</sup>

#### 4.7 Office of Public Prosecutions

The Office of Public Prosecutions (Ministerio Público) is an organ of the national government, within the Citizen Power branch, and under the direction of the Attorney General of the Republic (AG). The National Assembly elects the Attorney General for a seven-year term. The AG’s constitutional functions include, among others, to order and direct the investigation of crimes, protect victims and witnesses of criminal acts, and institute criminal proceedings.

The Office of Public Prosecutions (OPP) has serious problems. Almost all of the prosecutors are provisional. In 2015, according to the AG, the OPP had only five tenured judges.<sup>151</sup> According to information available on the Office website, in 2016 none of the prosecutors working for the divisions that have national coverage were tenured. Provisional prosecutors are selected and appointed without following any legally established procedures, or they are appointed directly by the Attorney General. The disciplinary system established under the Organic Law of the Office of Public Prosecutions<sup>152</sup> has not been put into effect and prosecutors may be removed without following due process established by law.

The lack of transparency in the selection of prosecutors, their lack of stability because of being subject to discretionary removal, as well as the lack of technical criteria in assigning criminal investigations to the prosecutors, has limited prosecutors’ ability or willingness to bring the perpetrators of crime to justice in an effective and equitable manner. This has given rise to a climate of insecurity with impunity that exceeds 90 per cent for cases of common crimes, and that is much higher for crimes involving human rights violations.

Given the situation of temporality, prosecutors are highly susceptible to pressures and interference from the Government. In 2015, the ICJ found that the fundamental function and autonomy of the OPP had greatly declined and that “the institution has been transformed into an instrument to repress dissidence in all its expressions, destined to carry out orders from the Government”.<sup>153</sup> Thus, for example, in the case of opposition leader Leopoldo López, the prosecutor on the case declared, after leaving Venezuela, that he had been pressured by the Government to use false evidence in the trial against López.<sup>154</sup>

<sup>150</sup> Inter-American Commission on Human Rights, Annual Report 2014, para. 328.

<sup>151</sup> In considering the fourth periodic report of the Bolivarian Republic of Venezuela, the Human Rights Committee noted that it “found it regrettable that it had received no information on the percentage of prosecutors of the Public Prosecution Service who were tenured and, in that regard, was concerned about reports indicating that the percentage was very low” (above note 104, para. 15).

<sup>152</sup> Published in *Official Gazette* No. 38,647 (2007).

<sup>153</sup> ICJ, ‘Venezuela: The Sunset of Rule of Law. ICJ Mission Report 2015’, p. 21, at URL <https://www.icj.org/venezuela-human-rights-and-rule-of-law-in-deep-crisis/>.

<sup>154</sup> See among others: Youtube, [Primeras declaraciones del fiscal Franklin Nieves-CASO LEOPOLDO LOPEZ- a su salida de Venezuela](#), 23 October 2015; BBC, “Fiscal del caso

Nevertheless, as noted above (section 3.2.2), the shift in the Attorney General's stance during 2017 gives rise to legitimate expectations of a change in policy at the Office of Public Prosecutions.

#### 4.8 The military criminal jurisdiction

The Venezuelan Constitution states that "[h]uman rights violations and the offense of violating humanity rights shall be investigated and adjudicated by the courts of ordinary competence"<sup>155</sup> and that the "[m]ilitary courts jurisdiction is limited to offenses of a military nature".<sup>156</sup> However, as noted above (section 3.2.2), the Organic Code of Military Justice authorizes military courts to hear cases of gross human rights violations committed by the military.

The military criminal justice system is governed by the 1998 Organic Code of Military Justice (COJM),<sup>157</sup> which entered into force on 1 July 1999. The 1998 COJM basically reproduced, almost verbatim, the 1938 Code of Military Justice. More than a new Code, this was a partial procedural amendment of certain provisions relating to the Attorney General's Office, the trial system and the principle of oral trials; innovations that were introduced by Article 261 of the Constitution. The Organic Law of the Armed Forces also contains several provisions relating to the military courts.

Even though Venezuela's Constitution states that "the military criminal jurisdiction is an integral part of the Judicial Power",<sup>158</sup> the existence of military courts in fact constitutes a 'special jurisdiction' under the executive branch. Because of its high dependence on the executive branch, and being made up mainly of active duty military officials, it may be said that rather than being a true judicial jurisdiction this is a service or agency of the Government's executive branch. Effectively, the officials of the Military Justice system are: the President of the Republic, the Defense Minister, the Army or Navy operations commander, commanders of the military or naval jurisdictions, and other FANB officials.<sup>159</sup> The Defense Ministry exercises "oversight of the administration of military justice"<sup>160</sup> and the "Commanders of the Military Regions are the heads of the jurisdiction for purposes of Military Justice".<sup>161</sup>

The President of the Republic, as an official of the military justice system, has sweeping powers over military criminal matters; is authorized to order a military trial in certain cases, when deemed appropriate for the interests of the nation;<sup>162</sup> may order the discontinuance of a military trial, when deemed appropriate, at any stage in the proceedings;<sup>163</sup> and has the power to create Permanent War Councils "where and when in his judgment these are required to better serve the needs of Military Justice".<sup>164</sup>

For purposes of organization and jurisdiction of the military courts, the COJM distinguishes between peacetime, wartime and states of exception when guarantees are suspended. In peacetime, the following are organs of the military courts: the Supreme Court of Justice; the Court Martial; Permanent War Councils;

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Leopoldo López dice que el juicio contra el opositor venezolano fue 'una farsa', 24 October 2015; EXCELSIOR, "Fiscal venezolano denuncia presiones en el caso de Leopoldo López", 31 October 2015.

<sup>155</sup> Constitution of the Bolivarian Republic of Venezuela, Articles 29 and 261.

<sup>156</sup> Organic Code of Military Justice, Article 261.

<sup>157</sup> *Official Gazette*, Extraordinary No. 5263 (1998).

<sup>158</sup> Constitution of the Bolivarian Republic of Venezuela, Article 261.

<sup>159</sup> Organic Code of Military Justice, Article 28.

<sup>160</sup> *Ibid*, Article 64.

<sup>161</sup> *Ibid*, Article 400.

<sup>162</sup> *Ibid*, Article 54.

<sup>163</sup> *Ibid*, Article 54.

<sup>164</sup> *Ibid*, Article 40.

Ad Hoc War Councils; military judges of Permanent First Instance; and ad hoc examining judges.<sup>165</sup> The Supreme Court hears appeals and requests to overturn judgments of the military courts on grounds of impeachment of FANB generals or naval admirals.<sup>166</sup>

Permanent War Councils are made up of three members: two must be officers of at least the rank of major and the third member may be a lawyer who is a commissioned officer.<sup>167</sup> As such, all the members of the Permanent War Council are servicepersons, professionals or commissioned officers. The officer with the highest rank and seniority presides over the Council. Members are appointed by the Court Martial, at the recommendation of the Defense Minister. War Councils conduct preliminary hearings for all cases involving charges against senior and junior officers of the armed forces, members of the troops and civilians subject to military jurisdiction.<sup>168</sup> Permanent War Councils also hear appeals of cases that have been heard by military judges of Permanent First Instance.

The Court Martial is made up of five principal members and ten alternates appointed by the Supreme Court at the recommendation of the Defense Minister.<sup>169</sup> Members of the Court Martial must hold senior officer ranks in the armed forces or be lawyers with three years of professional practice. Four of the principal members must hold senior officer rank in the armed forces and the one with the highest rank and seniority presides over the Court Martial. Among other powers, the Court Martial may be consulted or hear appeals against judgments by the War Councils.<sup>170</sup>

The role of public prosecutor in the military criminal jurisdiction is exercised by the Attorney General of the Armed Forces.<sup>171</sup> Military prosecutors and their alternates are appointed by the President of the Republic and must be active duty officers. It is not necessary to be a lawyer to serve as a prosecutor.<sup>172</sup> The Military Prosecutor General acts before the Court Martial, whereas Military Prosecutors act before the Permanent War Councils. Military Prosecutors are appointed by the President of the Republic. When acting before a military court, whether a Court Martial or War Council, the military prosecutor must have the same rank as the president of the respective court. The Military Prosecutor General and military prosecutors represent military justice in all military criminal proceedings; they are parties to the case; and they may appeal decisions of the military courts.

The military criminal jurisdiction has an Audit Service of the Armed Forces,<sup>173</sup> consisting of an Auditor General, an assistant auditor and auditors assigned to the Permanent War Councils and Permanent Courts of First Instance. The Auditor General and other auditors are appointed and may be removed by the President of the Republic, and must be lawyers and commissioned officers. The Audit Service of the Armed Forces advises the President of the Republic, the Defense Ministry and the military courts on military justice. When the members of a Permanent War Council are not lawyers, it is the responsibility of the auditor of that organ to: monitor the conduct of trials and advise the court; review all the

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<sup>165</sup> Ibid, Article 27.

<sup>166</sup> Constitution of the Bolivarian Republic of Venezuela, Article 266. It should be noted that the procedures for "impeachment" are set forth in Article 215 of the 1961 Constitution, but did not apply to Armed Forces generals and admirals.

<sup>167</sup> Organic Code of Military Justice, Article 41.

<sup>168</sup> Ibid, Articles 43 and 593.

<sup>169</sup> Ibid, Articles 31 et seq.

<sup>170</sup> Ibid, Articles 38 and 593(3).

<sup>171</sup> Ibid, Articles 70 et seq.

<sup>172</sup> Ibid, Article 77, which provides that "[w]hen the Prosecutor is not a lawyer, he may ask the Court to request from the immediate military authority, the appointment of an advisor".

<sup>173</sup> Ibid, Articles 81 et seq.

summaries before the respective judge declares them terminated; and issue a written opinion for sentencing.<sup>174</sup>

The COJM provides for various types of procedures.<sup>175</sup> The ordinary procedure used before a Permanent War Council has two phases: instruction or summary; and the trial.<sup>176</sup> Instruction or summary may only be initiated by the prosecutor once the corresponding military authority has given the order to open the proceeding. This authority may be, as appropriate: the President of the Republic; the Defense Minister; the heads of military regions; garrison commanders; commanders in theatres of operations; and heads of military units in action.<sup>177</sup> The COJM regulates aspects concerning the summary, criminal investigation authority, arrest, questioning, evidence, indictment, trial, judgment, and resources, as well the procedure for appeal.

Because of its considerable dependence on the executive branch and its make-up primarily of active service members of the military, it may be concluded that Venezuela's military courts do not meet the necessary and inherent conditions of independent and impartial courts, as required by both Article 8 of the ACHR and Article 14(1) of the ICCPR. Judges and prosecutors, as military officers, are officials of the executive branch and are subject to the principles of hierarchical subordination and military discipline. This situation is completely contrary to the principle of separation of powers that is essential for the proper administration of justice.

Although the Constitution provides that "[m]ilitary courts' jurisdiction is limited to offenses of a military nature"<sup>178</sup> — a provision that has been interpreted in case law to mean that civilians are excluded from military jurisdiction — Venezuelan law<sup>179</sup> gives the military courts a wide range of jurisdiction, authorizing them to try civilians and former members of the FANB. As such, military courts have heard trials concerning various offences under the ordinary Criminal Code<sup>180</sup> and matters pertaining to other laws.<sup>181</sup> Thus, from the point of view of jurisdiction, Venezuelan military criminal law allows military courts to try civilians.

Between 2000 and 2010, there were several cases of civilians tried by military courts. One of the most illustrative cases was that of former General Francisco Usón Ramírez, prosecuted before military courts for comments made on a television programme in April 2004, in which he questioned the official account of the death of two soldiers after they had been dismissed from the military. In the same way, some journalists who were critical of the Government were tried before military courts for the alleged crime of slandering the FANB and/or disclosure of information that compromises the military. Starting in 2015, this practice has increased. By May 2017, more than 300 civilians who had been detained during protests and marches were brought to trial before military courts, charged with offences under the military code, such as rebellion and treason. In most cases, the defence lawyers are only allowed to see the defendants in the courtroom; they may only speak to the defendants for a few minutes before the

<sup>174</sup> Ibid, Article 86.

<sup>175</sup> The ordinary procedure (with a summary and plenary phase); special procedure for cases in flagrante; procedure for Sole Instance Court Martial (against which only a cassation measure may be used); extraordinary procedure for wartimes or during the suspension of constitutional guarantees, before Ad Hoc War Councils and the Supreme Military Council.

<sup>176</sup> Organic Code of Military Justice, Articles 163 et seq.

<sup>177</sup> Ibid, Article 163.

<sup>178</sup> Constitution of the Bolivarian Republic of Venezuela, Article 261.

<sup>179</sup> See, among others, Organic Code of Military Justice, Articles 123-128, 464 and 505.

<sup>180</sup> Such as crimes against the independence and security of the nation, armed uprising against legitimate authorities, and piracy (ibid, Articles 128-135, 138, 139, 144 and 153).

<sup>181</sup> See, among others: Organic Law on Narcotic Drugs and Psychotropic Substances and Organic Law on National Security.



hearings, and their access to the criminal charges is restricted.

#### 4 Post-report update

Events taking place since the preparation of this report, and just prior to its launch, must be noted, albeit briefly, because of their potentially significant impact on redress and accountability in Venezuela.

On 31 July 2017, National Constituent Assembly (NCA) elections were held, accompanied by widespread demonstrations and a response by authorities that left a number of people killed, injured or arbitrarily detained.<sup>182</sup> Amongst allegations of electoral fraud, the elections appear to have taken place in violation of Article 347 of the Constitution. Whereas a significant portion of the members of the NCA should be chosen through open and universal election, they have been selected from restricted social sectors. Of further concern, the new NCA is tasked with revision of the Constitution, the outcome of which may significantly impact the rule of law in Venezuela. The ICJ has in this regard recalled that, until the new Constitution is approved by proper means, the current Constitution of 1999 must be respected. Furthermore, revision of the Constitution must: fully guarantee the basic principles of the rule of law, including the separation of powers, legislative autonomy, the independence of the judiciary, the subordination of military forces to the civil authority and the principle of legality and judicial control of executive action; and also fully guarantee the protection of human rights and fundamental freedoms. In light of the allegations surrounding the elections, the ICJ has also called for prompt and independent investigations into: alleged electoral fraud on the day of the poll; and allegations of arbitrary detention of, excessive use of force against and killings of demonstrators.<sup>183</sup>

On 5 August 2017, Attorney General and Chief Prosecutor, Louisa Ortega Díaz, was dismissed from her office by a unanimous vote of the new NCA. Her dismissal was undertaken by a body not competent or empowered by Venezuelan law to do so, nor with observance of the established procedure and grounds defined in the law. The dismissal of the Attorney General appears to have been politically motivated, in retaliation for her critical positions regarding various governmental initiatives and decisions of the Supreme Court of Justice and for the legal steps she took against them in those regards, as well as for her decision to investigate gross violations of human rights committed by State agents, including senior officials, and armed groups of civilians under the control of the Government.<sup>184</sup> Her replacement by government supporter, Tarek Willian Saab, appears to put an end to hopes of a new policy by the Office of Public Prosecutions (Ministerio Público) to investigate allegations involving gross human rights violations (see sections 2.2 and 4.7 above). The ICJ has called for her reinstatement and for the independence of the Office of Public Prosecutions to be respected.<sup>185</sup>

<sup>182</sup> See, amongst other sources, UN Press Release, 'UN human rights team's findings indicate pattern of rights violations amid mass protests in Venezuela', 8 August 2017, at URL

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21948&LangID=E>.

<sup>183</sup> ICJ Press Release, 'Venezuela: the ICJ deeply concerned by the National Constituent Assembly process', 3 August 2017, at URL <https://www.icj.org/venezuela-the-icj-deeply-concerned-by-the-national-constituent-assembly-process/>.

<sup>184</sup> Joe Parkin Daniels, 'Venezuela chief prosecutor denounces 'siege' after troops surround her office', *The Guardian*, 5 August 2017, at URL <https://www.theguardian.com/world/2017/aug/05/venezuela-chief-prosecutor-luisa-ortega-removed>.

<sup>185</sup> ICJ Press Release, 'Venezuela: dismissal of Attorney General a further blow to the rule of law and accountability', 16 August 2017, at URL <https://www.icj.org/venezuela-dismissal-of-attorney-general-a-further-blow-to-the-rule-of-law-and-accountability/>.

The new National Constituent Assembly has also created a Commission for Truth, Justice and Public Legitimacy. The establishing law, passed unanimously by the NCA on 8 August 2017, was described by the head of the NCA as a “powerful instrument to stifle violence, hatred and intolerance”.<sup>186</sup> This came alongside a declaration by President Maduro that the NCA will strip legal immunity from the national assembly that has opposed him,<sup>187</sup> adding to fears that the Commission will be used to silence Government opposition,<sup>188</sup> rather than to discharge the State’s duty to promptly, independently and effectively investigate allegations of gross human rights violations and act as a mechanism for a peaceful and sustainable transition.

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<sup>186</sup> BBC News, ‘Venezuela’s new assembly creates “truth commission”’, 9 August 2017, at URL <http://www.bbc.com/news/world-latin-america-40874099>.

<sup>187</sup> Fabiola Zerpa and Andrew Rosati, ‘Venezuela Assembly’s “Truth Commission” is ready to hound opponents’, *Bloomberg*, 9 August 2017, at URL <https://www.bloomberg.com/news/articles/2017-08-08/venezuela-assembly-s-truth-commission-ready-to-hound-opponents>.

<sup>188</sup> JURIST, ‘Venezuela Constituent Assembly creates truth commission’, 10 August 2017, at URL <http://www.jurist.org/paperchase/2017/08/venezuela-constituent-assembly-creates-truth-commission.php>.

## ANNEX: GLOBAL ACCOUNTABILITY BASELINE STUDIES

The aim of this report is to provide a baseline assessment of the situation in Venezuela pertaining to the accountability of perpetrators of gross human rights violations and the access to effective remedies and reparation of victims of such violations; alongside an assessment of the independence and accountability of judges and lawyers and the ability of justice mechanisms and justice actors to provide for accountability and redress. The report is part of the ICJ's Global Redress and Accountability Initiative, currently focused on seven countries (Cambodia, Mozambique, Myanmar, Nepal, Tajikistan, Tunisia and Venezuela) with the aim to combat impunity and promote redress for gross human rights violations. It concentrates on the transformative role of the law, justice mechanisms and justice actors, seeking to achieve greater adherence of national legal and institutional frameworks with international law and standards so as to allow for effective redress and accountability; more independent justice mechanisms capable of dealing with challenges of impunity and access to redress; and judges, lawyers, human rights defenders, victims and their representatives that are better equipped to demand and deliver truth, justice and reparation.

In all regions of the world, perpetrators of gross human rights violations enjoy impunity while victims, especially the most vulnerable and marginalized, remain without effective remedies and reparation. Governments of countries in transition and/or experiencing a wider rule of law crisis often seek to provide impunity for perpetrators of gross violations of human rights, or make no effort to hold them to account, or misuse accountability mechanisms to provide arbitrary, politically partial justice. Yet international law requires perpetrators to be held accountable and victims to be provided with effective remedies and reparation, including truth and guarantees of non-recurrence. This is reinforced by the 2030 Sustainable Development Agenda, which recognizes the need to build peaceful, just and inclusive societies that provide equal access to justice, are based on the rule of law and respect for human rights, and provide for accountability.

Impunity and lack of redress dehumanizes victims and acts as an impediment to the cementing of democratic values and the rule of law. Lack of accountability and claims for justice dominate national debates, frequently leading to a paralysis or reduced functioning of the institutions of the State and detracting from the pursuit of other rule of law and development initiatives. Impunity threatens a nascent democracy by rendering its constitution hollow, weakening its judiciary and damaging the political credibility of its executive. Public institutions often act in ways that bring them into disrepute and undermine the public confidence in them that is required for sustainable transition: through the legislature enacting laws providing for impunity; through law enforcement and the judiciary acting on a selective basis or without independence; and/or through the executive ignoring rule of law based judgments by higher courts. A failure to guarantee redress and accountability has too often also resulted in former structures of power, to the extent that they enjoy impunity, transforming into criminal and hostile elements that may perpetuate violence and conflict.

### Methodology

For more than a decade, the International Commission of Jurists has been working on the human rights situation in Venezuela. The ICJ has focused on: monitoring the situation of the judiciary and the rule of law in general; promotion of international standards on the independence of the judiciary; defense of members of the legal profession and judges; and strengthening the capacity of human rights non-governmental organizations in the use of United Nations protection procedures and mechanisms and the pursuit of strategic litigation

before international bodies.

While monitoring of the situation of the judiciary and the rule of law in general, the ICJ has undertaken the following activities:

- In 2000, 2002 and 2005, the ICJ published several reports on the situation of judges in Venezuela, the judicial transition regime and other measures that have been implemented that have undermined the independence of the judiciary.<sup>189</sup>
- In 2014, an ICJ fact-finding mission examined the independence of the judiciary and the rule of law in Venezuela and produced the report *Strengthening the Rule of Law in Venezuela*.<sup>190</sup>
- In 2015, a fact-finding mission examined the independence of the judiciary and the rule of law in Venezuela and produced the report *The Sunset of Rule of Law*.<sup>191</sup>
- In 2015, in association with the International Bar Association's Human Rights Institute and the International Association of Judges' Iberoamerican Group, the ICJ presented an alternative report to the UN Human Rights Committee on the situation of human rights and the judiciary in Venezuela, as part of Venezuela's periodic review under the ICCPR.<sup>192</sup>
- In February 2016, in association with the International Bar Association's Human Rights Institute and the International Association of Judges' Iberoamerican Group, the ICJ presented a stakeholder submission to the UN Human Rights Council's Working Group on the Universal Periodic Review (UPR), as part of Venezuela's second cycle review under the UPR.<sup>193</sup>
- During the first half of 2017, the ICJ prepared a study on case law of the Supreme Court of Venezuela, showing how it has undermined the principle of separation of powers, annulled the constitutional powers of the National Assembly, and led to a deviation from the rule of law in that country. Publication of that report is imminent.

To promote international standards on the independence of the judiciary, the ICJ has undertaken the following activities:

- Between 2006 and 2009 the ICJ hosted various seminars in association with the Bar Association of Caracas, aimed at lawyers in Caracas and other Venezuelan cities, on the independence of the judiciary, focused on the ICJ's Practitioner's Guide No. 1 on *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors*.
- In 2013, the ICJ, along with several bar associations in Venezuela, held five workshops on international standards for the independence of the judiciary.

<sup>189</sup> See: ICJ, 'Attacks on Justice 2000: Venezuela', at URL <https://www.icj.org/venezuela-attacks-on-justice-2000-venezuela/>; ICJ, 'Attacks on Justice 2002: Venezuela', at URL <https://www.icj.org/venezuela-attacks-on-justice-2002-venezuela/>; and ICJ, 'Attacks on Justice 2005: Venezuela', at URL <https://www.icj.org/attacks-on-justice-2005-venezuela/>.

<sup>190</sup> ICJ, 'Strengthening the Rule of Law in Venezuela', at URL <https://www.icj.org/strengthening-the-rule-of-law-in-venezuela/>.

<sup>191</sup> ICJ, 'Venezuela: The Sunset of Rule of Law', above note 153.

<sup>192</sup> International Bar Association Human Rights Institute, International Association of Judges and International Commission of Jurists, 'Alternative report to the UN Human Rights Committee for its examination of the periodic report of Venezuela', at URL <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=8b28e415-7e4c-4620-b456-8192ea0bd834>.

<sup>193</sup> International Bar Association Human Rights Institute, International Association of Judges and International Commission of Jurists, Stakeholder submission on the second cycle of the Universal Periodic Review of Venezuela, at URL <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=fa3a455e-a9a4-4c44-a804-204a73075057>.

In terms of the defense of members of the legal profession and judges, the ICJ has made various statements and initiated procedures before human rights bodies of both of the United Nations and the Inter-American system. Among these, the ICJ intervened in the cases of the arrest and prosecution of Judge María Lourdes Afiuni; the attacks on lawyer Carlos Ayala Corao; the annulment of the Board of Directors of the Caracas Bar Association; the murder of environmental issues prosecutor Danilo Anderson; and the dismissal of the judges of the First Administrative Court.

To strengthen the capacity of human rights NGOs in the use of United Nations protection procedures and mechanisms, and the pursuit of strategic litigation before international bodies, the ICJ has undertaken the following activities:

- In 2008, the ICJ, in association with the Due Process of Law Foundation, filed an *amicus curiae* brief on independence of the judiciary before the Inter-American Court of Human Rights (IACtHR) in the case *Apitz Barbera et al. (First Administrative Court) v. Venezuela*.
- Also in 2008, the ICJ presented expert testimony on the autonomy of the independence of the judiciary and the impact on the defense of human rights before the IACtHR, in the case *Reverón Trujillo v. Venezuela*.
- In 2009, the ICJ presented expert testimony on military crime and freedom of expression before the IACtHR, in the case *Francisco Usón Ramírez v. Bolivarian Republic of Venezuela*.
- In 2009, the ICJ sent a letter to the Permanent Council of the OAS concerning the ruling of the Supreme Court of Venezuela's Constitutional Chamber in which the Chamber declared unenforceable the judgment of the IACtHR in the case *Apitz Barbera et al. (First Administrative Court) v. Venezuela*.
- In 2012, the ICJ sent a legal document to the Permanent Council of the OAS concerning Venezuela's notice of denunciation of the American Convention on Human Rights.
- In 2015, the ICJ hosted, in association with Venezuelan NGO Espacio Público, a seminar on United Nations mechanisms and procedures for protecting human rights, aimed at journalists and social commentators.
- In 2016, the ICJ in association with Venezuelan NGOs PROVEA and Foro Penal Venezolano, hosted several events to strengthen the capacity of NGOs and members of the legal profession in Venezuela. These events focused on the use United Nations mechanisms to protect human rights and launch legal actions. Two seminars were held (one in Caracas and the other in Barquisimeto) on the system for individual communications before the UN Human Rights Committee and Committee against Torture, the procedures of the Special Rapporteurs and Working Groups on enforced disappearance and arbitrary detention, and the proceedings of the Human Rights Council's Universal Periodic Review. The ICJ also advised human rights defenders and lawyers on how to prepare and present petitions to the Human Rights Committee and the Working Group on Arbitrary Detention.

### **Partners and key stakeholders**

Several Venezuelan NGOs have worked regularly with ICJ as counterparts: the Venezuelan Program for Education and Action in Human Rights (PROVEA), Espacio Público, and Foro Penal Venezolano. Likewise, in implementing its activities, the ICJ has had the cooperation of two of its Commissioners from Venezuela: Pedro Nikken, former President of the ICJ, and Carlos Ayala Corao, member of the ICJ Executive Committee. ICJ Commissioner, Alejandro Salinas of Chile, has also been actively involved in ICJ activities concerning Venezuela.

PROVEA is one of the oldest NGOs in Venezuela. Founded in 1988, PROVEA is dedicated to the promotion and defence of human rights, with special emphasis on economic, social, cultural and environmental rights. It has national coverage and is active in international human rights, including at United Nations and Inter-American human rights fora. PROVEA hosts activities to promote human rights, as well as undertaking training, research, reporting, defence, litigation and advocacy. Since its foundation, PROVEA has had a relationship of cooperation and working with the ICJ.

Espacio Público is an NGO that promotes and defends human rights, specializing in the promotion and defence of freedom of expression and the right to information. Established in 2004, Espacio Público pursues various activities, including: research and documentation of the situation of freedom of expression in Venezuela; training and support for NGOs to publicize information on human rights; litigation for the defence of freedom of expression; defence of journalists persecuted for the exercise of their profession; and human rights training for journalists and social commentators.

The NGO Foro Penal Venezolano is a national network of more than 200 lawyers and 1,750 human rights activists throughout the country. Through its national network, Foro Penal Venezolano provides legal aid and representation, free of charge, to political prisoners and persons arbitrarily detained or persecuted for political reasons, as well as victims of human rights violations, before both national and international bodies. Foro Penal Venezolano also researches and publishes on the situation of persons deprived of their freedom for political reasons.

The main persons addressed by ICJ's actions are: Venezuelan judges and prosecutors; Venezuelan human rights defenders and human rights NGOs; members of the legal profession; and journalists and social commentators. At the same time, detained persons, persons persecuted for political reasons, and victims' associations benefit from the ICJ's activities because these are directed at the promotion and defence of the rule of law and the independence of the judiciary, as well as the protection of human rights.

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