

No Room for Debate

The National Constituent Assembly and the
Crumbling of the Rule of Law in Venezuela

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Crumbling of the Rule of Law in Venezuela

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EXECUTIVE SUMMARY

This report addresses the creation, composition and functioning of the current National Constituent Assembly of Venezuela (NCA), and the resulting devastation to the rule of law in the country. The NCA was convened by President Maduro, through Decree No. 2,830, on May 1st 2017. This body was created in an atmosphere of extreme political polarization, under the pretext of drafting a new Constitution, purportedly necessary to bring stability to a country going through a period of mass demonstrations, repression and violence. The NCA was created soon after the opposition to the ruling party of President Maduro won a majority of seats in the National Assembly (Venezuelan Parliament) in the legislative elections of 2015; and after the Supreme Court of Justice suspended the constitutional powers of the National Assembly in a series of highly criticized decisions. The present report concludes that the NCA was illegally convened, among other things, because it had no public endorsement, ignoring the requirements Venezuela's democratic and participatory system.

The NCA was designed with two groups of representatives, one organized by "sectors" and the other by territory. This report concludes that sectorial representation violates the principle of non-discrimination for two reasons. First, by limiting political representation only to certain sectors of society, it excludes citizens belonging to other population groups, preventing them from applying to be part of the NCA. Secondly, it discriminates against those who, even though they belong to "eligible" sectors, cannot accredit their membership to those sectors. In addition, the report concludes that the territorial representation component of the NCA violates the principle of "one person, one vote," (equal suffrage) by not using population to determine the number of representatives per municipality; instead, it assigns each municipality a single representative, and each state capital two representatives, as well as seven representatives for the Capital District. This generates a distortion in the proportional representation of the population and its capacity to elect representatives. For instance, in the territorial representation of the NCA, the state of Falcón has 26 constituents, while the State of Lara is assigned 10 constituents. Therefore, despite having almost twice the population, the state of Lara sends less than half of the number of representatives to the NCA than the state of Falcón.

In regard to how the NCA operates, the report finds that this body has become a de facto parliament, unlawfully assuming legislative powers. Instead of simply drafting a new Constitution, the NCA took over a variety of legislative functions in order to pass electoral, administrative and legislative measures, a role that exceeds the nature and powers of a constituent body. Among other things, this report documents how the NCA has called early presidential elections, approved budgets and loans, rescinded legislative immunity for National Assembly deputies so that they could be arrested and prosecuted, ratified the officials and justices of the National Electoral Council and the Supreme Court of Justice, created a truth commission, and passed laws that discriminate against and penalize fundamental freedoms including political expression.

Lastly, this report proposes a series of recommendations to overcome the ongoing institutional crisis in Venezuela. The most important of these recommendations is to rescind the NCA and allow the National Assembly to operate normally under its full powers. Likewise, the report recommends that the National Assembly be allowed to revise the orders issued by the NCA, rendering them totally or partially ineffective, immediately or conditionally, in order to prevent legal gaps in the interest of legal certainty.

INTRODUCTION

No Room for Debate is the sixth in a series of reports since 2014 by the International Commission of Jurists (ICJ) on Venezuela, assessing the deterioration of rule of law and lack of protection for human rights.¹ The present report shows that the creation, composition and functioning of the current National Constituent Assembly (NCA), and its usurpation of the functions that, according to the Constitution, belong to Venezuela's parliament, the National Assembly, have rendered the rule of law inoperative in Venezuela.

This thematic report addresses the creation, establishment and operation of the NCA, along with its background, context, repercussions and risks. A variety of factual and legal sources were used as a basis for this analysis. The report also draws upon an on-site visit that was carried out in December 2018. During this visit, the ICJ carried out interviews with multiple individuals from civil society and academia, as well as members of the National Assembly. An appointment was requested for a personal meeting with senior NCA officials, but no response was received.² Additionally, the National Assembly and the NCA facilities were visited in person.

Due in part to the lack of transparency that has characterized the functioning of the NCA, the ICJ also made use of certain news media and other open sources, to supplement other primary sources.

The title of this report, "No Room for Debate" refers to two things. On the one hand, since the NCA was installed on August 4th, 2017, it has acted to usurp the constitutionally prescribed functions and authority of the National Assembly, Venezuela's constitutional legislative organ. This has meant that congressional debate, an essential activity for seeking legitimate and peaceful outcomes within a democracy, has lost its meaning and value. The NCA is made up of members associated with or with affinities to the Maduro Government or the United Socialist Party of Venezuela (PSUV) who have avoided contentious debate or compromise with the opposition or dissenting voices. In other words, it is an entity in which everyone agrees with each other and debate is illusory. On the other hand, a boycott was launched against the National Assembly questioning its authority as a national legislative body even before the establishment of the NCA, which affected its operations and even its facilities. In fact, the NCA was installed, defiantly, in the same building where the National Assembly has historically had its headquarters, and the NCA's committees meet in the rooms where the National Assembly's deputies are supposed to meet and debate. This reality gave rise to the name of this report: "No Room for Debate."

¹ The first of these, from 2014, is entitled "Strengthening the Rule of Law in Venezuela"; the second, from 2015, "Venezuela: The Sunset of Rule of Law"; the third, from 2017, "Securing Justice for Serious Human Rights Violations in Venezuela" (available only in Spanish: Lograr justicia por graves violaciones a los derechos humanos en Venezuela); the fourth, also from 2017, "The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch"; and the most recent report, from 2018, "The Trial of Civilians by Military Courts in Venezuela" (available only in Spanish: El juzgamiento de civiles por tribunales militares en Venezuela).

² [Carta dirigida al presidente de la Comisión Constitucional de la Asamblea Nacional Constituyente](#), Dr. Hermann Escarrá, La Francia Building, Municipio Libertado de Caracas, December 11, 2018.

CHAPTER I: BACKGROUND

The analysis of the convocation, composition and functioning of the NCA should not be done in a vacuum. It is necessary to reconstruct the context in which this entity was created, to then understand the extent of the damage done to the rule of law and democracy in Venezuela.

On 6 December 6, 2015, the last election to the National Assembly took place. For the first time since the Assembly was created (under the 1999 Constitution), the opposition won a majority of seats, surpassing the ruling party, which had been in power since Hugo Chávez took office as President on 2 February 2 1999. Out of the National Assembly's 167 representatives, 112 belonged to the opposition, under the umbrella of the Democratic Unity Platform (Mesa de la Unidad Democrática), and 55 belonged to the government's coalition, the Great Patriotic Pole Simón Bolívar (Gran Polo Patriótico Simón Bolívar).

Just before the new National Assembly was inaugurated, in October 2015, 13 Supreme Court justices out of 32, whose terms were not yet over, were urged to take early retirement.³ According to the Venezuelan Observatory of Justice, and statements by Justices Carmen Elvigia Porras and Luis Ortiz Hernández,⁴ some of the requests for early retirement were because of pressure and, in some cases, threats of dismissal, while others were because of offers of trips, or ambassadorial and consular postings.⁵ In an unprecedented move, in the middle of December and following the election of the new National Assembly deputies, the Executive Branch had the outgoing National Assembly, in which the government held a majority, appoint the 13 new Supreme Court justices, instead of allowing the incoming National Assembly, with an opposition majority, to do so. The appointment of these justices did not comply with the requirements established by the Constitution, which specifies that a two-thirds majority in the National Assembly is required to appoint a Supreme Court justice. As the requisite proceedings were not followed, the appointments were overtly unconstitutional. These justices were termed "express justices."⁶

Once the National Assembly, with the opposition majority, was installed on January 5, 2016, its activity was blocked not only by the Executive Branch, but also by the Supreme Court. This may be seen in the systematic way that the President—as well as other pro-government sectors—challenged laws passed by the National Assembly, asking the Supreme Court to examine them under the guise of a "preventive review of constitutionality."⁷ The same happened with the legislature's oversight of acts and appointments by the Executive Branch.⁸ Likewise, all of the legislature's investigative powers set forth in the Constitution were neutralized.⁹ However, the final blow that the National Assembly received from the Supreme Court, which would aggravate the country's political and institutional crisis—in addition to being used to call the National Constituent Assembly—was a series of sentences handed down by the Supreme Court

³ Supreme Court of Justice, [Sala Plena del TSJ acordó aprobar solicitud de jubilación de 13 magistrados y magistradas](#), October 14, 2015.

⁴ "[Ex magistrados del TSJ denunciaron que fueron extorsionados y amenazados para dejar sus cargos](#)", Run Run, February 17, 2016; and "[Ex magistrada: Maikel Moreno y presidenta del TSJ me presionaron para adelantar mi jubilación](#)", Run Run, March 1, 2018.

⁵ Venezuelan Observatory of Justice, [El TSJ: La joya que pocos han podido retener Radiografía sobre la duración de los magistrados del máximo juzgado en sus cargos](#), 2017.

⁶ Venezuelan Observatory of Justice, [Informe sobre el cumplimiento de los requisitos exigidos por parte los magistrados del Tribunal Supremo de Justicia](#), July 2016.

⁷ International Commission of Jurists (ICJ). [The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch](#), August 2017.

⁸ Ibid.

⁹ Ibid.

starting in December 2015, and particularly those of March 2017.¹⁰ With these rulings, the Supreme Court:

[S]uspended the constitutional powers of the National Assembly; arrogated legislative power to itself; granted broad powers to the Executive Branch over social, political, military, criminal, legal, economic and civil matters; eliminated legislative immunity; and decided that the opposition deputies—who were the majority in the National Assembly—had committed a ‘crime against the homeland’ for having passed the ‘Agreement on the Reactivation of the Application of the OAS Inter-American Charter, as mechanism for the peaceful resolution of the conflicts to restore constitutional order in Venezuela,’ on March 21, 2017.¹¹

A number of International (regional and global) organizations strongly criticized the “contempt” rulings, as these were called. In the opinion of the Organization of American States (OAS), the Supreme Court’s decisions were “inconsistent with democratic practice and constitute an alteration of the constitutional order of the Bolivarian Republic of Venezuela.”¹² The Inter-American Commission on Human Rights, for its part, declared that these decisions “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. ...[a] grave interference by the judicial branch in the National Assembly... [and] 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.”¹³

Zeid Raad Al Hussein, who at that time was the United Nations High Commissioner for Human Rights, commented along the same line. He pointed out 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.”¹⁴

The Supreme Court’s decisions sparked more than just international rejection. Inside the country, these triggered a series of massive demonstrations. Hundreds of thousands of Venezuelans took to the streets because they felt that the Executive Branch, in complicity with the Supreme Court, had stripped them of what they had finally obtained after many years of great effort: a majority in the National Assembly. Thus, as of April 1, 2017 until mid-August of the same year, Venezuela was immersed in an intense period of demonstrations and protests, repression and violence. Discontent over the Supreme Court’s decisions was compounded by a socioeconomic crisis that, as several international organizations warned, worsened in 2017, causing “hyperinflation, widespread food shortages, a scarcity of medicines and medical supplies, and the dilapidation of public utility services, such as electricity.”¹⁵

State security forces and armed groups known as “collectives” repressed the demonstrations violently and unlawfully. The government response operations were

¹⁰ Constitutional Chamber: Judgment No. 260 of December 30, 2015, Case. No. AA70-E-2015-000146; Judgment of March 27, 2017, Case. 17-0323; Judgment of March 28, 2017, Case. No. 170325.

¹¹ International Commission of Jurists (ICJ). [*The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch*](#), August 2017. p. 3.

¹² OAS. [*Resolution on the Recent Events in Venezuela*](#), CP/RES. 1078 (2108/17), April 3, 2017, para. 1.

¹³ Press Release No. 041/17, “[*IACtHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela*](#),” March 31, 2017.

¹⁴ Press Release, “[*Preserve separation of powers, Zeid urges Venezuela*](#),” 31 March 2017.

¹⁵ IACtHR, [*Democratic Institutions, the Rule of Law and Human Rights in Venezuela: Country Report*](#). Approved by the Inter-American Commission on Human Rights on December 31, 2017 (OEA/Ser.L/V/II. Doc. 209), para. 473.

characterized by excessive and selective use of force. According to official records, 124 demonstrators were killed,¹⁶ however, according to non-governmental sources, the number of protesters killed was 157.¹⁷ During the demonstrations, hundreds of protesters were arbitrarily detained. At least 600 civilians were tried by military criminal courts, a practice that according to international human rights law may only be employed under highly restrictive conditions, not applicable to this situation.¹⁸

¹⁶ OHCHR, "[Human rights violations and abuses in the context of protests in the Bolivarian Republic of Venezuela from 1 April to 31 July 2017](#)," August 2017.

¹⁷ Venezuelan Observatory of Social Conflict, "[Venezuela: 6.729 protestas y 157 fallecidos desde el 1 de abril de 2017](#)," July 30, 2017.

¹⁸ Inter-American Court of Human Rights ([Case of Radilla-Pacheco v. Mexico](#)), Judgment of November 23, 2009. Serie C No. 209, para. 272–274). See also, among others: [General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial](#), CCPR/C/GC/32 (2007), para. 18-22.

CHAPTER II: UNCONSTITUTIONAL CREATION AND DESIGN OF THE CONSTITUENT NATIONAL ASSEMBLY

1. AN UNCONSTITUTIONAL, ILLEGITIMATE AND ANTI-DEMOCRATIC CREATION

On May 1, 2017, during the massive protests that Venezuela was experiencing, President Maduro convened, through Decree No. 2,830,¹⁹ a National Constituent Assembly. That same day he also issued Decree No. 2,831,²⁰ appointing a committee to design the criteria to elect the NCA.

According to the Constitution of Venezuela—which, as has already been mentioned, was passed in 1999 under the leadership of former President Chávez—the mission of a National Constituent Assembly is that of “transforming the State, creating a new juridical order and drawing up a new Constitution.”²¹ In theory, it is an organ constituted by the people, endowed with sovereignty;²² and, therefore, a new Constitution can only be issued after submitting it to the people for approval in a referendum. It is important to remember that the Constitution is the “law of laws” or the supreme ideology and foundation of Venezuela’s legal order,²³ and all persons—including the President—are subject to it.²⁴

In its provisions, Decree No. 2,830 maintains that the objectives of calling a NCA are: (1) for peace; (2) to improve the national economic system; (3) to constitutionalize the Missions and Great Socialist Missions (a series of social programs); (4) to broaden the powers of the Justice System; (5) to constitutionalize new forms of participatory and active democracy; (6) to defend the sovereignty and integrity of the nation; (7) to uphold the pluricultural nature of the country; (8) to include a constitutional chapter to consecrate the rights of youth; and (9) for the preservation of life on the planet. Also, article 2 of said decree states that the NCA would be elected using two criteria, one by “sector” and the other by “territory,” “under the guidance of the National Electoral Council, through universal, direct and secret vote.”²⁵

On 1 May, before a crowd of supporters of the Bolivarian Revolution, the President announced his project to the country and the world. In the words of President Maduro:

In use of my presidential powers as head of State, which are constitutional according to article 347, I call for the creation of a constituent power so that the working class and the people engage in a national people's constituent process and convene a National Constituent Assembly. National Constituent Assembly! ... It is time. It is the way. They left us no choice.²⁶

As can be seen, although the new NCA was convened in the name of peace and national reconciliation, its stated objectives, and President Maduro's defiant words, foreshadowed that this organ would not be a forum for seeking common ground, but rather for contention. The NCA did not seek an agreement between the government and its opponents, but rather imposed a unilateral solution beyond an illusory veneer of legality. It disregarded a political opposition, which had secured a majority in the National Assembly, and a resounding blow to the country's institutions.

Beyond the political backdrop, it is crucial to mention that an irreparable defect was made in convening the NCA: the absence of grassroots approval. This omission is not a

¹⁹ Decree No. 2,830, published in *Gaceta Oficial* No. 6,925 Extraordinary issue, May 1, 2017.

²⁰ Decree No. 2,831, published in *Gaceta Oficial* No. 6,295 Extraordinary issue, May 1, 2017.

²¹ Article 347 of the Constitution.

²² Article 5 of the Constitution.

²³ Article 7 of the Constitution.

²⁴ Article 137 of the Constitution.

²⁵ Article 2 of [Decree No. 2,830](#), published in *Gaceta Oficial* No. 6,925 Extraordinary issue, May 1, 2017. Free translation.

²⁶ Luigino Bracci Roa - Situación en Venezuela (May 1, 2017). *Presidente Maduro convoca a Asamblea Nacional Constituyente*. [Video]. Available at: <https://www.youtube.com/watch?v=27C5TUxld94>. Free translation.

trivial detail; it represents nothing less than the legitimacy of an organ that is supposed to have full powers to constitute and enact.

Although the Venezuelan Constitution allows the President to take the initiative of calling for a National Constituent Assembly, this initiative must be endorsed by popular vote in a referendum. This may be deduced by reading the following provisions from chapter III of the 1999 Constitution of Venezuela, in their entirety:

Article 347. The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution.

Article 348. The initiative for calling a National Constituent Assembly may emanate from the President of the Republic sitting with the Cabinet of Ministers; from the National Assembly, by a two thirds vote of its members; from the Municipal Councils in open session, by a two-thirds vote of their members; and from 15% of the voters registered with the Civil and Electoral Registry.

In assessing these articles, it is clear that there is a difference between the initiative to convene and the act itself of convening a National Constituent Assembly. It is one thing for the President of the Republic to take the initiative to call for a referendum so that the people, as the holders of constituent power, may decide whether to call a constituent assembly. It is another thing for the executive authority itself to convene unilaterally the NCA, which should only be decided by popular vote through a referendum. What the President may not as the holder of a limited power, is to replace the people as the original constituent power and convene a constituent assembly directly by decree.²⁷

It may thus be seen that if President Maduro had wanted to convene a National Constituent Assembly he would have had to first call a referendum so that the general public, as the sovereign holder of constituent power, would decide whether to accept this initiative. That was what his predecessor did, former President Chávez, who held a referendum on April 25, 1999 to consult the people on the creation of a National Constituent Assembly to replace the 1961 Constitution. Although the 1999 constituent process was not without deficiency,²⁸ it is clear that—unlike the one begun on May 1, 2017—it was preceded by public endorsement.

In contrast, in the constituent process without consultation that President Maduro began, there was not even any certainty that there would be a referendum to approve the text of the new constitution, since Decree No. 2,830 does not provide guidelines for this, and Decree No. 2,889²⁹ of June 4, 2017, merely “exhorts” the NCA to hold a “referendum of approval.”

In any case, it should be noted that, even if a referendum were held to approve the text of the Constitution, the constituent process would still have irreparable irregularities, having been convened by presidential decree without public endorsement, in an attack on the sovereignty of the Venezuelan people.

Furthermore, it is striking that during the 1999 constituent process, eight months elapsed between the referendum that approved the creation and election of the NCA and the referendum that approved the text of the Constitution. In the current constituent process, more than a year and a half has passed since the decree that convened the NCA, with no official announcement of the text of the new constitution to date.

²⁷ Carlos Ayala Corao, “La Asamblea Nacional Constituyente de Maduro de 2017: Fraude constitucional y usurpación de la soberanía popular (inconstitucionalidad e inconvencialidad de la convocatoria y las bases comiciales),” p. 235. In: *Estudios sobre la Asamblea Nacional Constituyente y su inconstitucional convocatoria en 2017*, Allan R. Brewer-Carías / Carlos García Soto (comp.), Temis, 2017. Free translation.

²⁸ See, for example, Rafael Badell Madrid, *La Asamblea Nacional Constituyente en la Constitución de 1999*, Academia de Ciencias Políticas y Sociales, 2018.

²⁹ [Decree No. 2,889](#), published in *Gaceta Oficial* No. 6,303 Extraordinary issue of 23 May 2017.

Finally, it bears mentioning that President Maduro's inauguration before the NCA on May 24, 2018,³⁰ fell outside the mandated Constitutional procedures. Article 231 of the Constitution declares that the President must be sworn into office before the National Assembly, not before a NCA:

The candidate elected shall take office as President of the Republic on January 10 of the first year of his constitutional term, by taking an oath before the National Assembly. If for any supervening reason, the person elected President of the Republic cannot be sworn in before the National Assembly, he shall take the oath of office before the Supreme Tribunal of Justice.

2. UNCONSTITUTIONAL AND UNCONVENTIONAL COMPOSITION OF THE NATIONAL CONSTITUENT ASSEMBLY

On May 23, 2017, President Maduro adopted Decree No. 2,878,³¹ establishing the "electoral procedures" for the NCA, that is, the rules of operation, the number of representatives and how they would be elected. This stated that the NCA would have a single legislative chamber and would be made up of 545 members. It also confirmed that these members would be elected to represent two areas: by sectors and by territories.

Broadly speaking, it was established that representatives by sector, as its name suggests, would come from some sectors of society and the State. In terms of territories, the NCA representatives would be chosen using an unusual representation model not based on population: one representative per municipality, two representatives per capital city in each state and seven representatives from the Libertador district of Caracas.

Below we examine the proposed design in more detail, considering the proposal in light of Venezuela's constitutional regulations and international obligations.

Representatives by Sector

For the sector area, Decree No. 2,878 established that only persons from the following groups could be nominated as representatives by sector: workers; subsistence farmers and fishermen; students; people with disabilities; indigenous peoples; pensioners; businessmen; and members of local governing councils (comunas) and community councils.

This design was contrary to international standards for free and fair elections, based on the principles of non-discrimination and equal protection of the laws. These principles are protected under all major international human rights treaties to which Venezuela has signed and ratified, including, among others, the International Covenant on Civil and Political Rights, the American Convention on Human Rights³² and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará). It is important to remember that the Constitution of Venezuela incorporates, under the Constitution's treaty provisions, human rights treaties

³⁰ TeleSur (24 May 2018). Venezuela: Juramenta ANC a Nicolás Maduro como presidente 2019/2025. [Vídeo]. Available at: <https://www.youtube.com/watch?v=xOnBB1jPO>

³¹ [Decree No. 2,878](#), published in Gaceta Oficial No. 41,156 of 23 May 2017.

³² Venezuela denounced the American Convention on Human Rights in official diplomatic note No. 000125 dated September 6, 2012, issued by the People's Power Ministry of Foreign Affairs of the Bolivarian Republic of Venezuela. It is crucial to clarify that the denunciation of the American Convention was contrary to the hierarchy and supremacy of the Constitution (articles 7 and 24) and, consequently, had absolutely no legitimacy. As a human rights instrument ratified by the State, the American Convention is part of the Constitution of Venezuela under the Constitution's treaty provisions (article 23 of the Constitution). Therefore, this human rights treaty may only be denounced through the mechanisms of amendment or constitutional reform, or by means of a new constitution issued by a constituent national assembly and approved by public referendum. To learn more on this subject, see: Carlos Ayala Corao, [Inconstitucionalidad de la denuncia de la Convención Americana sobre Derechos Humanos por Venezuela](#), Anuario de Derecho Constitucional Latinoamericano, 2013.

that have been ratified.³³ Furthermore, given its transcendental importance in international law, the Inter-American Court of Human Rights has described the principle of non-discrimination as *jus cogens* (*peremptory international law*).³⁴

Broadly, the principle of non-discrimination obliges States to respect, and give effective protection to all persons against discrimination on the grounds of race, colour, sexual orientation or gender identity, age, gender, religion, language political or other opinion, nationality or migration status, national, or other status .

Relating the above to the case of the NCA, it is important to point out the obvious: given its restrictive nature, the basis for selection by sector excluded large swathes of the Venezuelan population, such as, preschool, primary, high school and university educators, many professions and professional associations, intellectuals, unemployed people, informal sector workers and women heads-of-households.

In this regard, it should be mentioned that differentiated treatment *per se* is not always impermissible under international human rights law. Where such differentiated treatment serves a legitimate and not discriminatory purpose, it may be permissible, where it is proportional, reasonable and objectively different.³⁵

Having mentioned this, note that, except in the case of indigenous communities, which have a special regime,³⁶ the decree in question discriminates against individuals based solely on status grounds, and not for purposes consistent with the right to political participation and other fundamental procedures. Individuals not associated with a social sector or from other social sectors—including marginalized groups such as informal workers— are excluded, and exclusion of these groups is arbitrary, disproportionate and unreasonable.

In fact, the mere requirement of belonging to a sector in order to exercise the right to vote (elect and be elected) is contrary to the principle of “universal” suffrage recognized in article 62 of the Venezuelan Constitution, which states:

All citizens have the right to participate freely in public affairs, either directly or through their elected representatives.

Under article 25 of the International Covenant on Civil and Political Rights (ICCPR)³⁷, every citizen shall have the right and the opportunity, without any of the distinctions and without unreasonable restrictions, to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage. The United Nations Human Rights Committee, the body that oversees the International ICCPR, has affirmed that, to discharge its obligation to ensure this right, the right to suffrage should not be under the condition of membership. In the words of the Committee:

The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties.³⁸

With respect to the design of representation by sectors, the European Commission for Democracy Through Law (Venice Commission), has stated that:

³³ Article 23 of the Constitution.

³⁴ Inter-American Court of Human Rights (Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, September 17, 2003. Series A No. 18, para. 101).

³⁵ Inter-American Court of Human Rights (Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants*, September 17, 2003. Series A No. 18, para. 84). Cf. *General comment No. 18: No discriminación*. U.N. Doc. HRI/GEN/1/Rev.1 at 26, párr. 13.

³⁶ Article 125 of the Venezuelan Constitution provides: “Native peoples have the right to participate in politics. The State shall guarantee native representation in the National Assembly and the deliberating organs of federal and local entities with a native population, in accordance with law.”

³⁷ Venezuela signed the *International Covenant on Civil and Political Rights* on June 24, 1969 and ratified it on May 10, 1978.

³⁸ General comment No. 25: [Article 25 \(Participation in public affairs and the right to vote\)](#). U.N. Doc. HRI/GEN/1/Rev.7, para. 17.

The division of citizens in various sectors according to professional activities and the existence of separated records, one for each sector, create differences that are not legitimate. It assumes that the members of the occupational and/or interest groups cannot reach a comprehensive understanding of the common good in society. Indeed, the division of electors in sectors not only breaks the electoral body in categories but also breaks the equal position of citizens with regard to the law.³⁹

However, beyond the discriminatory approach used to select the representative sectors, it is also important to note that the definition of a sector depends on prior accreditation in a government registry. In other words, although representation by sector seemed to uphold historically marginalized population groups, such as the indigenous people, persons with disabilities and the elderly, these are groups whose members, for the most part, are accredited by government recognition.

Article 5 of Decree No. 2,878, with the aim of defining who could apply to be part of the NCA, states that:

The National Electoral Council must request the registries for the sectors from the official duly established institutions, trade unions and associations. Information about the workers' sector should be requested according to the type of work activity....⁴⁰

Further ahead, article 7.5 of Decree No. 2,878 adds that:

In terms of the sector, the applicant as a candidate for the National Constituent Assembly is required to present evidence of belonging to the sector, and the other [requisites] established in the regulations issued for this purpose.⁴¹

Thus, according to the guidelines set out in the decree, applicants must prove eligibility by presenting a certificate demonstrating that they belong to the sector that they are applying to represent. In practice, this is misleading and discriminatory, as there is no such single registry for the different sectors, such as fishermen, or for sectors that are excluded, such as the unemployed.

The consequence of the above was that representation by sector was discriminatory because it excluded groups of citizens without justification, in addition to demanding arbitrary government certification, as proving membership was contingent upon official government records. Thus, for example, businesspeople who would be eligible to apply to be part of the NCA are those who had contracted with the State, leading to possible conflicts of interest and excluding those who had not contracted with the State or did not appear in its records.

In summary, except in the case of indigenous communities, which are covered by a special constitutional regime to rectify the historical injustice of exclusion, President Maduro's design for representation by sector violated the right to universal suffrage and discriminated arbitrarily—and doubly—against Venezuelan citizens. On the one hand, it excluded citizens from large population groups, preventing them from applying to be part of the NCA; and on the other hand, it discriminated against those who, even though they belonged to "eligible" sectors, could not accredit their membership.

Representation by Territory

In terms of territorial coverage, the design of the NCA also violated the constitutional principle of proportional representation and, with it, the human right to participate in

³⁹ European Commission for Democracy Through Law (Venice Commission), [*Venezuela, Preliminary Opinion on the Legal Issues Raised by Decree No. 2879 of 23 May 2017 of the President of the Republic on Calling Elections to a National Constituent Assembly*](#), para. 61, July 21, 2017

⁴⁰ Article 5 of [Decree No. 2,878](#), published in *Gaceta Oficial* No. 41,156 of 23 May 2017. Free translation.

⁴¹ Article 7.5 of [Decree No. 2,878](#), published in *Gaceta Oficial* No. 41,156 of 23 May 2017. Free translation.

public affairs under conditions of equality. According to Decree No. 2,878, territorial coverage:

[S]hall produce the election of three hundred sixty-four (364) constituents to the National Constituent Assembly, according to the following distribution: one (1) constituent for each municipality of the country, who shall be elected directly as the candidate who gets the most votes, and two (2) constituents from each state capital who will be elected from a slate of candidates, according to the principle of proportional representation. In the Libertador district of Caracas, Capital of the Bolivarian Republic of Venezuela and the seat of National Power, seven (7) constituents will be chosen from a slate of candidates, according to the principle of proportional representation.⁴²

In this way it was decreed that, regardless of population, there would be a constituent for each municipality, two constituents for the state capitals, and that, for Caracas, a city with more than two million inhabitants, only seven constituents would be elected. This design may seem to have a legitimate purpose: to promote the inclusion of the entire national territory. However, by making the municipalities into electoral districts without taking into account the population in each of them, it completely diminished the principle of proportional representation of the population and electors, a universal precept established in article 63 of the Constitution:

Article 63. Suffrage is a right. It shall be exercised through free, universal, direct and secret elections. The law shall guarantee the principle of personalization of suffrage and proportional representation.

With respect to the measures to distort proportional representation of the population, the IACtHR had already warned that steps should be taken to avoid restricting the effective capacity to elect representatives, since this constitutes an unjustified limitation on the political rights of individuals. The IACtHR also affirmed that any limitation of this nature must be necessary, reasonable, proportional and pursuant to a legitimate purpose in a democratic society. In the words of the IACtHR:

The Commission understands that the above-cited rights to political equality prohibit the states parties to the American Convention from giving unreasonable distinct or unequal treatment to their citizens in the election of their representatives. Therefore, these rights imply that the states parties cannot reduce or water down the effective opportunity for the citizens to elect their representatives, giving greater weight to the votes cast by certain members of society, even if they are representatives of the people.⁴³

The United Nations Human Rights Committee has said that:

The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.⁴⁴

By making the municipalities the criteria for electing the constituents, the presidential decree completely distorted the principle of maintaining proportionality between the parts (municipalities) and the whole (the country). In other words, the "one municipality, one constituent" rule arbitrarily contradicted the principle of equality of suffrage, which declares "one person, one vote."

⁴² Article 3 of [Decree No. 2,878](#), published in *Gaceta Oficial* No. 41,156 of 23 May 2017. Free translation.

⁴³ IACtHR, [Report No. 137/99, Case 11,863, Andés Aylwin Azócar et al.](#), December 27, 1999.

⁴⁴ [General Comment No. 25: Article 25 \(Participation in public affairs and the right to vote\)](#), 29 March 2004, U.N. Doc. HRI/GEN/1/Rev.7 at 194, para. 21.

Under territorial representation for the NCA, Falcón State, with 25 municipalities and 663,265 registered voters, had 26 constituents (one for each municipality and two for its capital Coro); while the State of Lara, with nine municipalities and 1,253,431 registered voters, ended up with 10 constituents (one for each municipality and two for its capital Barquisimeto).⁴⁵ This meant that, despite having almost twice the population, the State of Lara sent less than half of the number of representatives to the NCA than the State of Falcón. This example illustrates perfectly how the proposal to make each municipality an electoral district distorted the proportionality of the population. This result was obviously foreseeable. Consequently, it is difficult to imagine that it was due to an accident of design.

Precisely to avoid distortions as the one described above, the Constitution of Venezuela adopted, for its federal legislative body, a representative model according to the population base in the states, plus three deputies for each federal entity. In this sense, the Constitution establishes:

Article 186: The National Assembly shall consist of Deputies elected in each of the federal entities by universal, direct, personalized and secret ballot with proportional representation, using a constituency base of 1.1% of the total population of the country.

Each federal organ shall also elect three additional deputies.

In conclusion, the design of the territorial representation for the NCA violated Venezuela's international obligations and the equalization principle of "one person, one vote," (equal suffrage) by not taking into account the population to determine the number of representatives per municipality, and assigning each of them a single representative in the same way, as well as assigning each state capital two representatives, and seven representatives for the Capital District. This also violated the right to participate in public affairs under conditions of equality.

3. JUDICIAL AND ELECTORAL COMPLICITY WITH THE CONSTITUENT NATIONAL ASSEMBLY

SUPREME COURT OF JUSTICE

Before examining what the SCJ determined about the creation of the NCA via Executive decree, it is important to recall the ICJ's earlier conclusion that the Court can no longer be seen as independent and has served largely as an instrument to ratify the will of the Executive Branch.⁴⁶ As the ICJ noted:

In March 2017, the Supreme Court of Justice (SCJ) of the Bolivarian Republic of Venezuela made two decisions¹ that suspended the constitutional powers of the National Assembly (NA). Legislative power was arrogated, 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 NA— had committed a "crime against the Homeland" for having passed on March 21, 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.

... The decisions by the Supreme Court constituted a veritable coup and a flagrant departure from the rule of law in Venezuela.⁴⁷

⁴⁵ Bolivarian Republic of Venezuela, Electoral Branch, National Electoral Council, [Resolution No. 170530-00121 \(Distribución por Estado, Corte de Registro Electoral al 30 de abril de 2017\)](#), 30 May 2017.

⁴⁶ International Commission of Jurists (ICJ). [The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch](#), August 2017.

⁴⁷ Ibid, p.4.

On May 31, 2017, the Supreme Court's Constitutional Chamber issued Judgment No. 378. In this ruling it examined whether the President of the Republic could directly convene the NCA, or whether it was necessary to hold a referendum so that the people could agree to a NCA or not. Based on article 348 of the Constitution, the Constitutional Chamber concluded that:

...it is not necessary nor constitutionally required, to hold a consultative referendum prior to convening a National Constituent Assembly, because this is not expressly contemplated in any of the provisions of Chapter III of Title IX.⁴⁸

It should be recalled that in October 2015, 13 of the Supreme Court's justices tendered their resignations.⁴⁹ With this unusual event, the ruling party made sure that the National Assembly, in which the government still held a majority at that time, appointed their replacements.

In fact, if the Constitutional Chamber had used a more holistic, systematic, principled and historical interpretation, instead of its literal exegesis of article 348, it could easily have reached the opposite conclusion.

In the first place, the Constitution of Venezuela established a model of democracy with an emphasis on public participation, which is incompatible with convening a constituent process by decree without consulting the people; hence, the preamble to the Constitution establishes:

The people of Venezuela... to the supreme end of reshaping the Republic to establish a democratic, participatory and self-reliant, multiethnic and multicultural society in a just, federal and decentralized State that embodies the values of freedom, independence, peace, solidarity, the common good, the nation's territorial integrity, comity and the rule of law for this and future generations...

Secondly, it is important to note that the National Constituent Assembly that drafted the Venezuelan Constitution received approval for both the convocation and the electoral proceedings, through a public referendum held on April 25, 1999. This demonstrates the importance of ensuring public endorsement for a constituent process of this importance. In fact, the preamble of the Constitution of Venezuela makes explicit mention of the 1999 referendum:

The people of Venezuela... exercising their innate power through their representatives comprising the National Constituent Assembly, by their freely cast vote and in a democratic Referendum....

Third, the Constitution reiterates that the people's sovereignty is inalienable. Although public power may be exercised either directly by mechanisms of direct participation, or indirectly through suffrage, the fact is that referendums have already been held on issues that were less transcendental than the complete change of the constitutional order and text. For example, in 2007, former President Chávez unsuccessfully called a referendum to carry out a constitutional reform.⁵⁰ Likewise, in 2009, a referendum was held to abolish the limits to the terms of office for the president, state governors, mayors and National Assembly deputies.⁵¹

In this sense, article 5 of the Constitution establishes conclusively that:

Sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by suffrage, through the organs exercising Public Power.

⁴⁸ Constitutional Chamber, Judgment No. 378 of 31 May 2017, [Exp. No. 2017-0519](#), Joint Statement. Free translation.

⁴⁹ Supreme Court of Justice, [Sala Plena del tsj acordó aprobar solicitud de jubilación de 13 magistrados y magistradas](#), 14 October 2015.

⁵⁰ "Chávez pierde el referéndum sobre la reforma de la Constitución", Reuters, 3 December 2007.

⁵¹ "Venezuela celebrará el referéndum sobre la reelección ilimitada el 15 de febrero", El País, 16 January 2009.

The organs of the State emanate from and are subject to the sovereignty of the people.

Fourth, as already mentioned, a joint reading of articles 347 and 348 makes it possible to clearly see that there is a difference between convening a National Constituent Assembly and who may take the initiative to call it. This reveals that, although the President may take the initiative to call a National Constituent Assembly, his proposal must receive public approval through a referendum. The two articles state:

Article 347. The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution.

Article 348. The initiative for calling a National Constituent Assembly may emanate from the President of the Republic sitting with the Cabinet of Ministers; from the National Assembly, by a two thirds vote of its members; from the Municipal Councils in open session, by a two-thirds vote of their members; and from 15% of the voters registered with the Civil and Electoral Registry.

In summary, the analysis by the Constitutional Chamber was limited to a self-serving literal reading of article 348, deliberately ignoring Venezuela's democratic and participatory model and failing to apply a holistic, systematic, principled and historical analysis of the constitutional articles.

THE NATIONAL ELECTORAL COUNCIL

The National Electoral Council (NEC) governs electoral issues in Venezuela. According to article 293 of the Constitution of Venezuela, one of the functions of the NEC is to:

Organization, administration, direction and vigilance of all acts relating to elections to fill public offices by popular vote, as well as referenda.

On June 7, 2017, the NEC adopted Resolution No. 170607-118.⁵² In this resolution it ruled on the presidential decrees to call and convene a NCA. Instead of observing and questioning the absence of the constitutional requirement for a referendum to give approval, and the unconstitutional design of the NCA, the NEC limited itself to making minor adjustments to the proposed electoral bases. Once again, the NEC demonstrated that it is an organ that is not independent from the Executive Branch.

As the IACHR had signalled,⁵³ at least two factors called into question the independence of the NEC.

In the first place, since the 1999 Constitution was passed, the selection of the electoral officials has not been done strictly in keeping with what is established in article 296. According to this provision, "The members of the National Electoral Council shall be designated by a two thirds vote of the members of the National Assembly." However, in 2003, 2005, 2014 and 2016, they were appointed politically by the Supreme Court's Constitutional Chamber, the same chamber that gave the green light to call a National Constituent Assembly without a referendum.

Secondly, the aforementioned article 296 of the Constitution establishes that the NEC "shall consist of five members having no ties to organizations for political purposes." However, in practice, most of the NEC's officials have had clear ties to the ruling party. The most telling example of this irregularity is that of cabinet minister Jorge Jesús Rodríguez, who is also the brother of the current Vice President Delcy Rodríguez. A few

⁵² National Electoral Council, [Resolution No. 170607-118](#), 7 June 2017.

⁵³ IACHR, [Democratic Institutions, the Rule of Law and Human Rights in Venezuela. COUNTRY REPORT](#):

Approved by the Inter-American Commission on Human Rights on December 31, 2017. (OEA/Ser.L/V/II. Doc. 209), para. 470, 473.

months after being made an official of the NEC, the government of former President Chávez appointed Jorge Rodríguez as Vice-President of the Republic.⁵⁴ Later, he would run for the ruling party (PSUV) and become mayor of Libertador Municipality in Caracas.⁵⁵ Therefore, it is apparent that the NEC ignored its constitutional mission with respect to the convocation of the NCA, demonstrating its lack of independence from the Executive Branch.

In protest of Resolution No. 170607-118, the Democratic Unity Platform held an unofficial public consultation on July 16, 2017.⁵⁶ According to the organizers, more than seven million voters in Venezuela and abroad participated in this unofficial vote.⁵⁷ President Maduro discounted this figure and said that the number of voters was around 600,000 people.⁵⁸

4. ELECTION OF DEPUTIES TO THE NATIONAL CONSTITUENT ASSEMBLY

On July 30, 2017, the deputies that would make up the NCA were selected from the defined sectors and territories. According to the NEC, a total of 8,089,320 voters participated in the election of the 537 members of the NCA.⁵⁹ At the time of writing this report, it is believed that more than 40 have resigned.⁶⁰ Dozens of countries worldwide refused to acknowledge the NCA.⁶¹

As there was no referendum to authorize the act of convening the NCA, it is difficult to assess precisely how much public support existed for the initiative. According to several surveys conducted by polling firms, the majority of Venezuelans did not agree with the convening of a National Constituent Assembly. According to a survey by Datanalisis, 72.2% of Venezuelans were against the NCA and 74.3% of those surveyed considered that the NCA would not solve the country's problems.⁶² Another survey by DATINCORP showed that 73% of Venezuelans did not support the NCA.⁶³

In addition to the above, the company in charge of the electronic voting system used in Venezuela, called Smartmatic, reported "manipulation" in the NCA election. In the words of its director, Antonio Mugica, "the difference between the number announced and the one produced by the system is at least 1 million voters."⁶⁴

5. INSTALLATION OF THE NATIONAL CONSTITUENT

On August 4, 2017, the NCA was installed. The NCA took over rooms in the Federal Legislative Palace, where the National Assembly has historically sat. Diosdado Cabello, who until January 2016 had been the president of the National Assembly, announced that the NCA would be sovereign and plenipotentiary. Cabello apparently had no problem being part of the National Assembly while the majority of deputies were aligned with the

⁵⁴ According to article 236.3 of the Constitution of Venezuela, the President of the Republic appoints the Executive Vice-President.

⁵⁵ Inter-American Commission on Human Rights (October 19, 2015). Venezuela: Derechos Políticos. [Video]. Available at: <https://www.youtube.com/watch?v=vBXeIMSLHSY>.

⁵⁶ ["El grito que dio Venezuela: más de 7 millones de personas respaldan la consulta popular organizada por la oposición para desafiar al gobierno de Nicolás Maduro,"](#) BBC News, 16 July 2017.

⁵⁷ ["El grito que dio Venezuela: más de 7 millones de personas respaldan la consulta popular organizada por la oposición para desafiar al gobierno de Nicolás Maduro,"](#) BBC News, 16 July 2017; ["El 98 % de votantes en la consulta de la oposición rechaza la constituyente,"](#) eitb.eus, 17 August 2017.

⁵⁸ ["Maduro dice que rectores hicieron el "ridículo" con la Consulta Popular y se niega a aceptar el resultado,"](#) La Patilla, 23 July 2017.

⁵⁹ National Electoral Council, [8.089.320 venezolanos votaron para elegir a constituyentes,](#) 31 July 2017.

⁶⁰ ["ANC perdió al menos 40 de sus constituyentes,"](#) Aporrea, 22 January 2018.

⁶¹ ["La lista de los 40 países democráticos que hasta el momento desconocieron la Asamblea Constituyente de Venezuela,"](#) Infobae, 31 July 2017.

⁶² ["Datanálisis: 72% de los venezolanos desaprueba la constituyente,"](#) El Nacional, 19 July 2017.

⁶³ DATINCORP, [Ficha técnica: estudio de coyunturas Venezuela,](#) May 2017.

⁶⁴ ["Smartmatic, la empresa a cargo del sistema de votación en Venezuela, denuncia "manipulación" en la elección de la Constituyente y el CNE lo niega,"](#) BBC, 2 August 2017.

Executive Branch. Once the ruling party lost the majority in the National Assembly, Cabello and several deputies aligned with the ruling party migrated to the NCA to legislate from there.⁶⁵

The NCA's first move was to appoint its president and vice-president. Cabello nominated Delcy Rodríguez as its president. Without the least debate or discussion, the deputies raised their hands in approval. This would be the dynamic that the NCA would employ from now on: approving, without debate, everything that its top leaders—presumably following the orders of the Executive Branch—submitted for its consideration.

Finally, it is crucial to question the supposed absolute nature of the NCA, in the sense that a Constitution, such as the 1999 Constitution of Venezuela, may not be repealed until the text of new constitution has been approved, in accordance with established procedures. What this means is that, until a new Constitution enters into force, nothing and no one can be above the maximum authority of the existing legal system.

6. INTERNATIONAL AND NATIONAL REPERCUSSIONS

After the installation of the NCA, several organizations declared that this organ had no legitimacy and that it represented a risk to democracy and the already fragile separation of powers.

The ICJ published a statement in which it declared that the NCA was called without fulfilling the requirements set forth in article 347⁶⁶ of the Constitution of Venezuela.⁶⁷

The IACHR expressed its concern about democratic fragility in the country after the NCA was installed, which it described as exceeding the authority of a constituent organ. In its words:

The IACHR expresses its concern regarding the competencies assigned to the NCA that could allow it to act as a 'parallel power,' impinging on the role of the National Assembly and its representation of the people.⁶⁸

The European Commission for Democracy through Law (Venice Commission) declared that there were problems with the way that the NCA was convened, in the election of its members, in the number of assembly members, among other things. Likewise, the Venice Commission pointed out that the creation of a new Constitution should involve the greatest possible consensus, for which the participation of multiple political forces and civil organizations would be necessary.⁶⁹

The Office of the United Nations High Commissioner for Human Rights expressed its concern about the political and institutional crisis in Venezuela because of the dismantling of the checks and balances that are essential to maintaining a democratic system. It also declared that it is extremely worrisome that State power was subject to the NCA and its decisions.⁷⁰

On August 9, 2017, the National Assembly itself issued the "Agreement in rejection of the decree of the fraudulent National Constituent Assembly referring to its alleged

⁶⁵ This was also the case of deputies Pedro Carreño, Elvis Amoroso and Tania Diaz.

⁶⁶ Article 347 of the Constitution reads: The original constituent power rests with the people of Venezuela. This power may be exercised by calling a National Constituent Assembly for the purpose of transforming the State, creating a new juridical order and drawing up a new Constitution.

⁶⁷ Press release "[Venezuela: the ICJ deeply concerned by the National Constituent Assembly process,](#)" August 3, 2017.

⁶⁸ Press release No. 131/17, "[IACHR Deeply Concerned about Further Weakening of Separation and Independence of Powers and Undermining of Democratic Institutions in Venezuela,](#)" August 31, 2017.

⁶⁹ European Commission for Democracy Through Law (Venice Commission), [Venezuela, Preliminary Opinion on the Legal Issues Raised by Decree No. 2879 of 23 May 2017 of the President of the Republic on Calling Elections to a National Constituent Assembly](#), para. 78, July 21, 2017.

⁷⁰ OHCHR, [Human rights violations in the Bolivarian Republic of Venezuela: a downward spiral with no end in sight](#), p. 4, June 2018.

powers relative to the constituted powers.⁷¹ In this agreement, the National Assembly declared that any act by the NCA would be null and void for "being irremediably an organ, born under a mantle of usurpation and fraud, incompatible with Democracy and the founding principles of the 1999 constituent process and the current Constitution."⁷²

⁷¹ National Assembly, [Acuerdo en rechazo al decreto de la fraudulenta Asamblea Nacional Constituyente referido a sus pretendidas facultades respecto de los poderes constituidos](#), 9 August 2017.

⁷² Ibid.

CHAPTER III: UNCONSTITUTIONAL ACTS OF THE NATIONAL CONSTITUENT ASSEMBLY

The following sections contain a chronological account of the unconstitutional measures adopted by the ANC.

1. REMOVAL OF ATTORNEY GENERAL LUISA ORTEGA AND INTERIM APPOINTMENT OF TAREK WILLIAM SAAB

On August 4, 2017, following a ruling by the Supreme Court,⁷³ the NCA removed Attorney General Luisa Ortega and appointed Tarek William Saab as her replacement.⁷⁴ In this way the NCA assumed the power to remove and appoint the Attorney General of the Nation, in violation of article 279 of the Constitution of Venezuela.⁷⁵ According to that article, the members of the *Poder Ciudadano* ("Citizen Power") (which comprise the Attorney General, Ombudsman, Comptroller General of the Republic, among others) shall be appointed by the National Assembly. Likewise, this constitutional provision states that the National Assembly is responsible for removing members of the Citizen Power pursuant to a ruling by the Supreme Court.⁷⁶

Various international agencies⁷⁷ were critical of the NCA's removal of Luisa Ortega. She was removed shortly after she denounced the NCA's lack of legitimacy, which she described as immoral.⁷⁸ In this way, her unconstitutional removal looked more like political retaliation than the result of a disciplinary trial. The appointment of Tarek William Saab was also clearly unconstitutional because it was not the domain of the NCA, but the National Assembly, to appoint the head of the investigative agency, chosen by the Republican Ethic Council from a shortlist submitted by an Evaluating Committee.⁷⁹ The appointment seemed all the more inappropriate because Tarek William Saab was well-known as a political affiliate of the ruling party, strongly suggesting the lack of independence and impartiality of the Office of Public Prosecutions.

2. COMMISSION OF TRUTH, JUSTICE, PEACE AND PUBLIC TRANQUILITY

On August 8, 2017, the NCA created the Truth, Justice, Peace and Public Tranquility Commission, by means of the "Constitutional Law" of the Commission for Truth, Justice,

⁷³ "[TSJ admite solicitud de antejuicio de mérito contra fiscal Ortega Díaz y convoca a audiencia pública](#)," *Efecto Cocuyo*, 20 June 2017. Cf. Eurocat (6 August 2017). Primera Sesión Asamblea Nacional Constituye. [Video]. Available at: https://www.youtube.com/watch?v=DyP_4fb6Dfk.

⁷⁴ Decree published in *Gaceta Oficial No. 41.216* of 17 August 2017; Cf. Bolivarian Government of Venezuela, Vice Presidency of the Bolivarian Republic of Venezuela, [ANC designa a Tarek William Saab como Fiscal General de la Repùblica](#), 5 August 2018. Cf. Eurocat (6 August 2017). Primera Sesión Asamblea Nacional Constituye. [Video]. Available at: https://www.youtube.com/watch?v=DyP_4fb6Dfk.

⁷⁵ Article 279 of the la Constitution reads:If the Citizen Power Nomination Evaluating Committee has not been convoked, the National Assembly shall proceed, within such time limit as may be determined by law, to designate the member of the pertinent Citizen Power organ. Members of Citizen Power shall be subject to removal by the National Assembly, following a ruling by the Supreme Tribunal of Justice, in accordance with the procedure established by law.

⁷⁶ Ibid.

⁷⁷ Press release "[Venezuela: dismissal of Attorney General a further blow to the rule of law and accountability](#)," August 16, 2017; Press release "[UN Special Rapporteur on the independence of judges rejects intimidation of Venezuela's Attorney General](#)," 30 June 2017.

⁷⁸ Venezolanos Globalizados (31 July 2017). Declarations by Attorney General, Luisa Ortega Díaz on Nicolás Maduro's National Constituent Assembly. [Video]. Available at: <https://www.youtube.com/watch?v=fixrTBs0uHk>

⁷⁹ Article 279 of the Constitution reads: The Republican Ethic Council shall convene a Citizen Power nomination Evaluating Committee, which shall be made up of a group of representatives from various sectors of society, and shall conduct public proceedings resulting in the provision of a list of three candidates from each organ member of the Citizen Power to be submitted for consideration by the National Assembly, which, by a two-thirds vote of its members, shall select within 30 calendar days the member of the Citizen Power organ under consideration in each case. If the National Assembly has not reached an agreement by the end of this period, Electoral shall submit the list of three candidates to a public referendum.

Peace and Public Peace.⁸⁰ In this way, the NCA effectively usurped a constitutional power of the National Assembly. According to the Constitution of Venezuela, legislative power lies with the National Assembly, not the NCA, whose main purpose, as its name suggests, is the preparation of a constitutional text.

Article 187 of the Constitution of Venezuela clearly establishes that it is the function of the National Assembly:

1. To legislate in matters of national competence and as to the functioning of the various branches of National Power.
2. To propose amendments to and revisions of the Constitution, on the terms established in this Constitution.

The NCA's creation of a truth commission, in addition to being unconstitutional, was contrary to the very nature of the truth commissions. This mechanism, typically seen in transitional justice situations, seeks to vindicate the victims and uncover the historical truth that was unknown, which led or contributed to the existence of a conflict and consequent violations of human rights. A truth commission created and directed by an organ composed entirely of the ruling party, such as the NCA, would not have the impartiality needed for such an important task.

Furthermore, it is important to mention that, although truth commissions have been recognized as useful and important instruments for overcoming an armed conflict, their existence does not exempt States from their international obligations. In the words of the Inter-American Court of Human Rights, "the activities and information that this Commission will eventually obtain do not substitute the obligation of the State to establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures."⁸¹

3. RULES TO GUARANTEE THE FULL INSTITUTIONAL FUNCTIONING OF THE NATIONAL CONSTITUENT ASSEMBLY IN HARMONY WITH THE PUBLIC POWERS

On August 8, 2017, a decree was passed establishing the "regulations to guarantee the full institutional functioning of the national constituent assembly in harmony with the public powers."⁸² Although the name of this decree has the appearance of promoting harmonious cooperation among the institutions of the State, in fact it arbitrarily made all public powers subordinate to the NCA. In particular article 5 is notable, which says:

All agencies of the Public Power are subordinated to the National Constituent Assembly, and are obliged to comply with and enforce the legal acts that emanate from that Assembly for the purpose of preserving peace and public tranquility, sovereignty and national independence, the stability of the socioeconomic and financial system, and the effective guarantee of the rights of all the Venezuelan people.⁸³

The illegitimate NCA subordinated to its authority a legitimate organ of public power: the National Assembly, which was elected by popular vote in accordance with the Constitution. With this decision, the NCA also revealed that its priority was not to draw up a new constitutional text, but to exercise political control over all the constitutional powers of the State.

⁸⁰ Ley Constitucional de la Comisión para la Verdad, la Justicia, la Paz y la Tranquilidad Pública, published in *Gaceta Oficial No. 6,323 Extraordinary issue* of 8 August 2017.

⁸¹ Inter-American Court of Human Rights. (*Case of Gomes Lund et al. ("Guerrilha Do Araguaia") v. Brazil*, Judgment of 24 November 2010. Series C No. 219, para. 297).

⁸² Decree published in *Gaceta Oficial No. 6,323 Extraordinary issue* of 8 August 2017.

⁸³ Ibid. Free translation.

Evidently, this was not a problem for the Executive Branch, which created the NCA in an arbitrary manner, as an instrument to pass its bills under an illusory veneer of legality. After all, if the NCA were not an instrument at the service of the Executive Branch, it would not have convened or designed it as it did.

4. RATIFICATION OF THE NEC

On August 11, 2017, the NCA ratified the appointment of several officials of the National Electoral Council, including its president, Tibisay Lucena.⁸⁴ Four days later, on August 15, the NCA ratified Luis Emilio Rondón González as the head of the NEC.⁸⁵

As such, the NCA appropriated the constitutional authority of the National Assembly. According to article 296 of the Constitution of Venezuela, it is the job of the National Assembly to appoint, through a qualified majority, the NEC's officials:

Article 296. The National Electoral Council shall consist of five members having no ties to organizations for political purposes; three of these shall be nominated by civil society, one by the schools of law and political science of the national universities, and one by the

Citizen Power.

The three members nominated by civil society shall have six alternates in ordinal sequence, and each of the members designated by the universities and Citizen Power shall have respectively two alternates. The National Board of Elections, the Civil Status and Voter Registration Commission and the Commission on Political Participation and Financing shall each be presided over by a member designated by civil society. The members of the National Electoral Council shall hold office for seven years and shall be elected separately: the three nominated by civil society at the beginning of each term of office of the National Assembly, and the other two halfway through such term of office.

The members of the National Electoral Council shall be designated by a two thirds vote of the members of the National Assembly. The members of the National Electoral

Council will designate their President among them in accordance with the Law.

The members of the National Electoral Council shall be subject to removal by the National Assembly, following a ruling of the Supreme Tribunal of Justice.

This action was particularly serious when one takes into account that all of the NEC's officials were elected in an unconstitutional manner, through decisions by the Supreme Court's Constitutional Chamber.⁸⁶ In fact, in a judgment on December 26, 2014, the Constitutional Chamber usurped the constitutional authority of the National Assembly and proclaimed itself as being in charge of appointing the members of the NEC.⁸⁷ As such, the NCA's ratification of the NEC officials was also unconstitutional, revealing the NEC's lack of impartiality.

⁸⁴ Decree published in la *Gaceta Oficial* [No. 6,326](#) Extraordinary issue of 11 August 2017.

⁸⁵ Decree published in la *Gaceta Oficial* [No. 41,214](#) of 15 August 2017.

⁸⁶ Academy of Political and Social Sciences, [Dictamen sobre la necesaria independencia e imparcialidad del Consejo Nacional Electoral como garantía esencial para la realización de elecciones libres y democráticas](#), p. 9-15, 3 March 2018.

⁸⁷ Constitutional Chamber, Judgment of 26 December 2014, [Exp. No. 14-1343](#), Joint statement.

5. RATIFICATION OF THE SUPREME COURT JUSTICES

By mid-2015, most of the Supreme Court's justices had been appointed unconstitutionally, either because they did not get the vote of two thirds of the members of the National Assembly, or because the requisites and procedures for the preselection of candidates, established by the Constitution and the Organic Law of the Supreme Court, were not followed.⁸⁸ On top of this, was the December 2015 appointment of the 13 "express justices," appointed arbitrarily by the outgoing National Assembly⁸⁹ following the questionable early retirement of a group of justices. Despite these dubious matters, on August 15, 2017, the NCA ratified the Supreme Court's justices.⁹⁰

The Constitution of Venezuela establishes that the National Assembly appoints the Supreme Court's justices for a single period of 12 years, but it does not refer to the ratification of the appointment. In this sense, the act of ratification of an appointed magistrate is problematic. Consider article 264 of the Constitution:

The justices of the Supreme Tribunal of Justice shall be elected for a single term of 12 years. The election procedure shall be determined by law. In all cases, candidates may be proposed to the Judicial Nominations Committee either on their own initiative or by organizations involved in the field of law. After hearing the opinion of the community, the Committee shall carry out a pre selection to be submitted to the Citizen Power, which shall carry out a second pre selection to be submitted to the National Assembly, which shall carry out the final selection.

Citizens may file objections to any of the candidates, for cause, with the Judicial Nominations Committee or the National Assembly.⁹¹

The ratification of the magistrates was problematic, taking into account that the Supreme Court had been turned into an instrument of the Executive Branch⁹² and that, months earlier, the Supreme Court's Constitutional Chamber had endorsed the convocation of the NCA without there having been a referendum. It would appear that the procedure of ratification was used to try to "legalize" the irregular appointment of the Supreme Court's justices, which was incompatible with the Constitution and the Organic Law of the Supreme Court.

6. APPOINTMENT OF THE OMBUDSMAN

On August 5, 2017, Alfredo Ruiz was appointed as interim Ombudsman⁹³ to replace Tarek William Saab who left that job when the NCA appointed him as Attorney General of the Nation. On August 17 of the same year, the NCA ratified Ruiz as interim Ombudsman by "constituent decree."⁹⁴ Finally, on November 20, 2017, the NCA swore-in Ruiz as the official Ombudsman.⁹⁵

In accordance with the Organic Law of the Ombudsman's Office, the Ombudsman "shall be appointed... for a single period of seven years, by the National Assembly, with a two

⁸⁸ Venezuelan Justice Observatory, [Los magistrados de la revolución](#), 2016; Venezuelan Justice Observatory, [Informe a AN 3-2](#); CONVITE, [Sin Justicia no hay Estado de Derecho](#), November 2016.

⁸⁹ Venezuelan Justice Observatory, [El TSJ: La joya que pocos han podido retener Radiografía sobre la duración de los magistrados del máximo juzgado en sus cargos](#), 2017; Venezuelan Justice Observatory, [Informe sobre el cumplimiento de los requisitos exigidos por parte los magistrados del Tribunal Supremo de Justicia, July 2016](#).

⁹⁰ Decree published in *Gaceta Oficial* [No. 41,214](#) of 15 August 2017.

⁹¹ Article 264 of the Constitution.

⁹² International Commission of Jurists (ICJ). [The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch](#), August 2017.

⁹³ "Alfredo Ruiz Angulo es el nuevo defensor del pueblo," *El Nacional*, 5 August 2017.

⁹⁴ Decree published in *Gaceta Oficial* [No. 41,216](#) of 17 August 2017.

⁹⁵ Multimedio VTV (20 November 2017). ANC designa a Alfredo Ruiz Angulo como Defensor del Pueblo. [Video]. Available at: <https://www.youtube.com/watch?v=paU-HE0qTaI>.

thirds vote by its members.”⁹⁶ By disregarding the Organic Law, the NCA usurped the National Assembly’s authority.

It should be pointed out that under the direction of Tarek William Saab, the Venezuelan Ombudsman’s Office was demoted from category “A” to category “B” by the Subcommittee on Accreditation of the International Coordinating Committee (ICC) for National Institutions for the Promotion and Protection of Human Rights, because of the lack of independence and impartiality in Venezuela. The ICC, an agency with speaking rights at the United Nations, oversees compliance with the Paris Principles, concerning the proper functioning of national human rights institutions.⁹⁷

7. CONSTITUTIONAL DECREE FOR COEXISTENCE

In the session of August 18, 2017, the NCA passed a “constitutional decree” by which it assumed “the powers to legislate on matters directly aimed at guaranteeing the preservation of peace, security, sovereignty, the socioeconomic and financial system, the purposes of the State and upholding the rights of Venezuelans, as well as to enact legislative acts in the form of laws related to the aforementioned matters.”⁹⁸

Although since it was created the NCA had been usurping the powers of the National Assembly, with this constitutional decree the NCA officially proclaimed itself as the regular legislative body, overstepping the usual powers of a constituent entity. Although formally nothing was taken away from the National Assembly, in practice a second legislature was created, one without any checks or balances.

8. REMOVAL OF THE GOVERNOR-ELECT OF ZULIA STATE AND NEW CALL TO ELECTION

On October 15, 2017, opposition leader Juan Pablo Guanipa won the election as governor of Zulia State.⁹⁹ However, Guanipa refused to be sworn-in before the NCA as he considered the entity fraudulent.¹⁰⁰ Although his electoral victory was recognized, the Legislative Council of Zulia State, whose majority was aligned with the government’s party, ruled that Guanipa had committed an “absolute forfeit” for refusing to be sworn-in before the NCA.¹⁰¹ On October 26, 2017, the NCA decided to call a new election for governor of Zulia State.¹⁰²

With this decision, the NCA assumed electoral functions that are clearly outside the authority of a constituent entity. Furthermore, the dismissal of Guanipa set a dangerous antidemocratic precedent because it disregarded the public will in an act of political retaliation.

⁹⁶ Article 17 of [Ley Orgánica de la Defensoría del Pueblo](#), published in *Gaceta Oficial* No. 37,995. Free translation.

⁹⁸ Luigino Bracci Roa – *Situación en Venezuela* (19 August 2017). *Asamblea Nacional Constituyente, sesión completa, 18 de agosto de 2017*. [Video]. Available at: <https://www.youtube.com/watch?v=f0I5BZIHJJE>.

⁹⁹ [“Venezuela: convocan para diciembre elecciones municipales y repetición de comicios en el estado Zulia por ‘falta absoluta’ del gobernador opositor,”](#) BBC, 26 October 2017.

¹⁰⁰ [“Habla Juan Pablo Guanipa, el único gobernador que no quiso juramentarse en Venezuela: la oposición ‘no puede participar en procesos electorales sin verdaderas garantías.’”](#) BBC, 26 October 2017.

¹⁰¹ [“Venezuela: convocan para diciembre elecciones municipales y repetición de comicios en el estado Zulia por ‘falta absoluta’ del gobernador opositor,”](#) BBC, 26 October 2017.

¹⁰² Decree published in *Gaceta Oficial* [No. 41,265](#) of 26 October 2017.

9. LAW AGAINST HATE, FOR PEACEFUL COEXISTENCE AND TOLERANCE

On November 8, 2017, the NCA published in the Official Gazette the "Constitutional Law" against Hate, for Peaceful Coexistence and Tolerance.¹⁰³ Again, the NCA usurped the legislative powers that, in accordance with the aforementioned article 187 of the Constitution of Venezuela, correspond to the National Assembly.

Despite its positive name, this law has provisions that restrict fundamental freedoms, such as freedom of expression, protected under the Inter-American Convention on Human Rights and the International Covenant for Civil and Political Rights; for which reason it should have been put to considerable political—and legal—debate before it was passed. Furthermore, it implied a change in the State's criminal policy, by increasing the penalties for a broad range of ambiguously defined crimes. Its passage, by an entirely pro-government entity, which deliberately did not seek political consensus, in itself represented a risk for Venezuela's democracy.

Referring to this law, the IACHR's Office of the Special Rapporteur for Freedom of Expression, said that:

Formulas such as those used on Venezuela's "Anti-Hate Law" that establish vague and open-ended offenses such as the "promotion or encouragement" of all kinds of "discrimination" make it possible to prohibit a wide range of public speech that is protected by international law. Furthermore, it is particularly troubling that such broad and ambiguously defined offenses are punishable by excessive prison terms (ten to twenty years), which will have a systemic chilling effect in Venezuela's public forums and social networks. In addition, the "Anti-Hate Law" imposes on all media—print, radio, television, and subscription-based, as well as those media whose content can be created or reproduced on the Internet—a number of limitations in the name of "peace, public tranquility, and the nation," and gives the State excessive powers.

... The Office of the Special Rapporteur also wishes to emphasize the lack of precision and clarity in the set of obligations placed on media outlets and Internet platforms. According to the text, the law requires media outlets—through broad and ambiguous provisions that criminalize the mere dissemination of content—to screen, and even decide whether to keep or censor, the speech of third parties. This has the potential to create a chilling and intimidating effect incompatible with a democratic society.¹⁰⁴

The above demonstrates that the NCA not only usurped the legislative authority of the National Assembly, but that it did so to the detriment of basic freedoms.

10. REMOVAL OF THE MAYORS OF METROPOLITAN CARACAS AND ALTO APURE DISTRICT

On December 20, 2017, the NCA adopted a decree through which it "[s]upresses and orders the liquidation of the Metropolitan City Hall, the Metropolitan City Council and the Metropolitan Comptroller, all of these from the Metropolitan Area of Caracas and the Alto Apure District, and their associated bodies and entities...."¹⁰⁵

This decree violated the Constitution of Venezuela, which, in article 18, created the capital district as a special territorial political unit.¹⁰⁶ Likewise, number 3 of the Third

¹⁰³ "Ley Constitucional contra el Odio, por la Convivencia Pacífica y la Tolerancia," published in *Gaceta Oficial No. 41,274* of 8 November 2017.

¹⁰⁴ Press Release No. R179/17, "[Office Of The Special Rapporteur For Freedom Of Expression Expresses Serious Concern Over The Enactment Of The "Anti-Hate Law" In Venezuela And Its Effects On Freedom Of Expression And Freedom Of The Press,](#)" November 10, 2017.

¹⁰⁵ Decree published in *Gaceta Oficial No. 41,308* of 27 December 2017.

¹⁰⁶ Article 18 of the Constitution.

Temporary Provision of the Constitution, created the Alto Apure District, a district that was formalized through a special law in 2001.¹⁰⁷

Beyond the illegality, it is extremely troubling that this measure appeared to aim to intentionally persecute the Venezuelan opposition. Recall that from 2008 to 2017 Caracas's City Hall had been in the hands of opposition leader Antonio Ledezma, who was publicly elected and then placed under arbitrary detention for several years.¹⁰⁸

11. SPECIAL TAX REGIME FOR THE ORINOCO MINING ARC

On December 27, 2017 the NCA passed the "Constitutional Law" of the Tax Regime for the Sovereign Development of the Mining Arc.¹⁰⁹ The Orinoco Mining Arc is a vast expanse of land around the Orinoco River, abundant in gold and heavy minerals. This mineral belt runs mainly through the states of Bolívar and Amazonas. In 2011, former President Chávez presented an action plan for the development of the Orinoco Mining Arc.¹¹⁰ Given its economic potential, in 2016 Nicolás Maduro issued a decree officially creating the "Orinoco Mining Arc National Strategic Development Zone."¹¹¹ However, instead of being an engine for economic development, the Orinoco Mining Arc has become a zone of deforestation and serious environmental damage, violence, illegal groups and illegal mining.¹¹²

By creating a law with tax effects for the Orinoco Mining Arc, the NCA once again usurped the National Assembly's constitutional authority. Paragraph 6 of article 187 of the Constitution of Venezuela explicitly states that it is the responsibility of the National Assembly "[t]o discuss and approve the national budget and any bill relating to the taxation system and to public credit."¹¹³

Needless to say, the unregulated development of this area could have disastrous consequences for the country in environmental and human terms, which reinforces the need for this issue to be handled with true democratic debate.

12. EARLY PRESIDENTIAL ELECTION FOR THE 2019 – 2026 TERM

On January 23, 2018, the NCA, through a "constitutional decree," it ruled that the presidential election for the 2019-2026 term would be held several months earlier than what was established in the electoral calendar.¹¹⁴ Historically in Venezuela, the election of the President of the Republic is held during the last months of the year (typically in the month of December), immediately before the start of the new constitutional term. This has been the case since 1959, and for the first three elections of Hugo Chávez, in 1998, 2006 and 2012. After the death of former President Chávez in 2013, an extraordinary presidential election was called for April 14 of that same year. However, this was in compliance with article 233 of the Constitution, which establishes that when

¹⁰⁷ "Ley Especial que crea el Distrito del Alto Apure," Decree published in *Gaceta Oficial No. 37,326* of 16 November 2001.

¹⁰⁸ IACHR, *Democratic Institutions, the Rule of Law and Human Rights in Venezuela. COUNTRY REPORT*: Approved by the Inter-American Commission on Human Rights on December 31, 2017. (OEA/Ser.L/V/II. Doc. 209), para. 169.

¹⁰⁹ "Ley Constitucional del Régimen Tributario para el Desarrollo Soberano del Arco Minero," published in *Gaceta Oficial No. 41,310* of 29 December 2017.

¹¹⁰ International Crisis Group, *Report # 73 Gold and Grief in Venezuela's Violent South*, 28 February 2019; Cf. Organized Crime and Corruption Reporting Project and International Center for Journalists, *Arco Minero del Orinoco: crimen, corrupción y cianuro*, 2017.

¹¹¹ Decree No. 2,241, published in *Gaceta Oficial No. 40,855* of 26 February 2016.

¹¹² International Crisis Group, *Report # 73 Gold and Grief in Venezuela's Violent South*, 28 February 2019; Cf. Organized Crime and Corruption Reporting Project and International Center for Journalists, *Arco Minero del Orinoco: crimen, corrupción y cianuro*, 2017.

¹¹³ Article 187 of the Constitution.

¹¹⁴ Luigino Bracci Roa – *Situación en Venezuela (23 January 2018)*. Asamblea Nacional Constituyente, sesión completa 23 January 2018, llamado a elecciones. [Video]. Available at: <https://www.youtube.com/watch?v=AIu9IDK7Ho8&t=4706s>.

the President becomes permanently unavailable, a new election shall be held within 30 consecutive days.

Without any legal basis for its decision, the NCA decreed that the presidential election would take place earlier, within the first four months of the year. Once again, the NEC showed its lack of independence and announced that the presidential election would be held on April 22, 2018. Then, on 1 March of the same year, the NEC announced that the presidential election would be held together with the elections for State Councils and City Councils on May 20, 2018.¹¹⁵

It was clearly unconstitutional and undemocratic of the NCA to call the elections earlier. It was unconstitutional because there is no legal basis for the NCA to make that decision, which, in any case, corresponds to the NEC. It was antidemocratic because, in practice, it demonstrated that elections in Venezuela do not have clear playing rules that provide legal certainty, and, on the contrary, these rules are changeable at the whim of the Executive Branch.

This presidential election, furthermore took place in the midst of public protests against the arbitrary outlawing of important opposition parties and the arbitrary declaration that the main opposition candidates, for example, Leopoldo López and Henrique Capriles, would be ineligible to run.¹¹⁶

13. DECREE REPEALING REGULATIONS ON ILLEGAL CURRENCY EXCHANGE

On February 2, 2018 the NCA passed a constitutional decree through which it repealed article 138 of the Law on the Central Bank of Venezuela, and with this the regulations that since 2003 had prevented illegal currency exchange operations.¹¹⁷

The 2003 currency exchange regime that was created with the intention of preventing capital flight and money laundering, gave rise, in practice, to strict foreign currency exchange controls. It gave the Currency Administration Commission (CADAVID) the power to regulate and distribute the currencies that enter the State's accounts. Its repeal seemed a tacit acknowledgment that the measures promoted at the time by former President Chávez did not produce positive results, and that individuals' right to directly carry out foreign exchange transactions should be restored.

From a legal point of view, with this measure, the NCA usurped the National Assembly's authority, endowed by article 138 of the Constitution of Venezuela, according to which the National Assembly is responsible for legislation on any matter concerning the national budget, the tax regime and public credit, thereby creating legal insecurity.

14. REMOVAL OF LEGISLATIVE IMMUNITY FOR NATIONAL ASSEMBLY DEPUTIES

In August 2017 and 2018, the NCA rescinded legislative immunity for several National Assembly deputies, including Germán Ferrer, Juan Requesens and Julio Borges.¹¹⁸ According to article 200 of the Constitution of Venezuela, National Assembly deputies shall have immunity from the moment they are sworn-in and until the end of their term in office. This means that they can only be arrested and prosecuted by the Supreme Court, with the prior authorization from the National Assembly, for the alleged

¹¹⁵ National Electoral Council, [CNE convoca comicios presidenciales, de consejos legislativos y concejos municipales para el 20 de mayo](#), 1 March 2018.

¹¹⁶ IACHR, [Democratic Institutions, the Rule of Law and Human Rights in Venezuela. COUNTRY REPORT](#): Approved by the Inter-American Commission on Human Rights on December 31, 2017. (OEA/Ser.L/V/II. Doc. 209), para. 19, 171.

¹¹⁷ Decree published in [Gaceta Oficial No. 41,452](#) of 2 August 2018.

¹¹⁸ [Conozco a los diputados a quienes el chavismo les allanó la inmunidad parlamentaria](#), "Efecto Cocuyo, 8 August 2018. Cf. Voz de América, (8 August 2018). ANC allana inmunidad de diputados de la oposición. [Video]. Available at: <https://www.youtube.com/watch?v=K1z8DMxN060>.

commission of crimes, unless they are caught *in flagrante delicto*, in which case they may be placed under house arrest.¹¹⁹

The NCA violated this provision and took it upon itself to assume the power to rescind the deputies' legislative immunity that they could be arrested and prosecuted. According to Tarek William Saab, who the NCA had appointed Attorney General, Juan Requesens and Julio Borges had allegedly been involved in the attempted murder of President Maduro on August 7, 2018.¹²⁰ Neither of them was caught *in flagrante delicto*. However, that same day Juan Requesens was escorted from his home by officials of the Bolivarian National Intelligence Service (SEBIN). It was not until the day after his arrest that the NCA rescinded his legislative immunity. The arrest occurred before his legislative immunity was rescinded and without the authorization of the National Assembly. This demonstrates that the NCA carried out a an arbitrary and unlawful detention.

The NCA also rescinded legislative immunity for Deputy Germán Ferrer, the husband of former Attorney General Luisa Ortega. According to Attorney General Tarek William Saab, Ferrer was allegedly involved in corruption, extortion, criminal association and money laundering.¹²¹ Once again, the NCA usurped the National Assembly's authority, violating article 200 of the Constitution of Venezuela. Beyond the question of criminal responsibility in itself, to begin a criminal investigation against Ferrer—with enough evidence to request that he be stripped of office—a few days after his wife's removal, would appear to have been an act of political retaliation.

It should be mentioned that the Supreme Court violated the deputies' right to due process because, according to article 22 of the Organic Law of the Supreme Court, prior to deciding whether the case merited prosecution, the court must hold a hearing so that the accused and the Attorney General may present their arguments.¹²²

15. APPOINTMENT OF THE COMPTROLLER GENERAL

On October 23, 2018, the NCA appointed Elvis Amoroso as the Comptroller General of the Republic. Amoroso was active in the ruling PSUV party, a former legislator and, until then, he had served as second vice president of the NCA.¹²³ As a member of the Citizen Power Branch, the Comptroller General of the Republic must be appointed by the National Assembly from a list of three candidates presented by a Nomination Evaluating Committee, as per article 279 of the Constitution of Venezuela.

By doing so, NCA clearly usurped another power of the National Assembly, and, in passing, it ensured that this oversight agency would be in the hands of an unconditional supporter of the ruling party. With this appointment, the NCA had appointed all of the highest authorities of the Citizen Power Branch (Comptroller General of the Republic, Attorney General of the Republic and Ombudsman), whose duties are, according to article 273 of the Constitution of Venezuela, "preventing, investigating and punishing actions that undermine public ethics and administrative morals; to see to sound management and legality in the use of public property, and fulfillment and application of the principle of legality in all of the State's administrative activities, as well as to

¹¹⁹ AIVEN, Equipo de Documentación (24 August 2018). *Juan Requesens: Un diputado detenido arbitrariamente*. [Blog post]. Available at: <https://www.amnistia.org/en/blog/2018/08/7524/juan-requesens-un-diputado-detenido-arbitrariamente>.

¹²⁰ "TSL declaró procedente enjuiciar a Juan Requesens y solicitó detención de Borges," *El Universal*, 8 August 2018.

¹²¹ "Constituyente retira inmunidad parlamentaria a diputado Germán Ferrer," *Efecto Cocuyo*, 17 August 2017. Cf. Luigino Bracci Roa – Situación en Venezuela (16 August 2017). *Fiscal Tarek William Saab, rueda de prensa sobre red de extorsión de Germán Ferrer*. [Video]. Available at: https://www.youtube.com/watch?v=II2GBXdg_Do&t=480s.

¹²² Article 22 of the Organic Law of the Supreme Court of Justice of Venezuela.

¹²³ "DESIGNAN A ELVIS AMOROSO COMO NUEVO CONTRALOR GENERAL DE LA REPÚBLICA," *EL UNIVERSAL*, 23 OCTOBER 2018. Cf. MULTIMEDIA VTV (23 OCTOBER 2018). *LA ANC NOMBRA A ELVIS AMOROSO NUEVO CONTRALOR DE LA REPÚBLICA*. [VIDEO]. AVAILABLE AT: <https://www.youtube.com/watch?v=EyRbPPk9EAk>.

promote education as a process that helps create citizenship, together with solidarity, freedom, democracy, social responsibility and work.”¹²⁴

The lack of independence of the Comptroller General of the Republic vis-a-vis the Executive Branch is particularly worrying if one takes into account the high level of corruption in Venezuela. According to Transparency International’s 2017 annual index, of 180 countries Venezuela ranks 169th in terms of perceived corruption.¹²⁵ However, contrary to what would be expected under these circumstances, the authority of the Comptroller General of the Republic has been used for political purposes to disqualify important Venezuelan opposition leaders, through unconstitutional and inappropriate administrative proceedings.¹²⁶

16. APPROVAL OF THE 2019 BUDGET

On December 19, 2018, just as the year was ending, the NCA passed a bundle of laws with implications for the country’s national budget and economic sustainability. These were: the Budget for the 2019 fiscal year, the Special Law for annual indebtedness for the 2019 fiscal year and the 2019 Annual Operating Plan. The aforementioned article 187 of the Constitution of Venezuela establishes that it is the responsibility of the National Assembly:

To discuss and approve the national budget and any bill relating to the taxation system and to public credit.

To authorize appropriations in addition to the budget.

To approve the general guidelines for the national economic and social development plan to be submitted by the National Executive during the third quarter of the first year of each constitutional term.

To authorize the National Executive to enter into contracts in the national interest, in the cases established by law. To authorize contracts in the municipal, state and national public interest, with foreign States, or official entities or with companies not domiciled in Venezuela.

Evidently, and as it has been set forth, the approval of the budget and other laws on economic matters, is the responsibility of the National Assembly. Therefore, the NCA violated the Constitution of Venezuela and arrogated a power that constitutionally corresponds to the National Assembly. It should be noted that, at the time this bundle of measures was approved, the country was facing a difficult economic crisis characterized by a hyperinflation of 1 million%, according to the International Monetary Fund.¹²⁷

17. DISSOLUTION OF THE NATIONAL ASSEMBLY AND NEW ELECTION

On January 8, 2019, during the NCA’s first session of the year, Deputy Gerardo Marques proposed dissolving the National Assembly and holding a new election to “re-legitimize” this organ.¹²⁸ Later, on February 2 of the same year, President Maduro announced, in front of a crowd of people, that he was in favor of that initiative.¹²⁹

As of the time of writing this report, this initiative has not materialized.

¹²⁴ Article 273 of the Constitution.

¹²⁵ Transparency International, [Corruption Perceptions Index 2017](#), 21 February 2018.

¹²⁶ See, among others, Inter-American Court of Human Rights ([Case of López Mendoza v. Venezuela](#), Judgment of September 1, 2011. Series C No. 233).

¹²⁷ [“Venezuela’s 2018 Inflation to Hit 1.37 Million Percent, IMF Says.”](#) Bloomberg, October 8, 2018.

¹²⁸ [“Constituyente Gerardo Márquez propone a la ANC disolver el Parlamento venezolano.”](#) Efecto Cocuyo, 8 January 2019.

¹²⁹ [“Maduro propone adelantar las elecciones parlamentarias para “este mismo año” en Venezuela,”](#) CNN en español, 2 February 2019. Cf. Luigino Bracci Roa – Situación en Venezuela (2 February 2019). Maduro adelantará elecciones de la Asamblea Nacional: Harán cabildos abiertos para consultas. [Video]. Available at: <https://www.youtube.com/watch?v=5nFTNmLqWxs&t=1s>.

18. CONSTITUENT LAW OF THE HOMELAND PLAN 2019–2025

In the session of the day of April 2, 2019, the NCA passed, without much debate, the "Constituent Law" of the Homeland Plan (Plan de la Patria) 2019-2025.¹³⁰ In theory, this extensive document contains the goals and strategies to make Venezuela a "socialist power." The 1999 Constitution defines Venezuela as a Social and Democratic State of Law and Justice, with fundamental principles such as political pluralism.¹³¹ In terms of economic matters, the Constitution enshrines the right to property and economic freedom.¹³²

The fact that the Homeland Plan 2019-2025 was passed by the NCA, and not by the National Assembly (as was done in 2013¹³³), showed that national political agreement on the country's economic model does not exist. With the approval of the Homeland Plan, the idea was to implement a single ideological model on all of Venezuelan society, violating the constitutional principle of political pluralism,¹³⁴ as well as the constitutional authority of the National Assembly to: "Approve the general lines of the economic and social development plan of the Nation."¹³⁵

19. REMOVAL OF JUAN GUAIDÓ'S LEGISLATIVE IMMUNITY

On April 2, 2019 the NCA approved the rescinding of legislative immunity of Juan Guaidó, President and Deputy of the National Assembly.¹³⁶ With the backing of the National Assembly, Deputy Guaidó had proclaimed himself Acting President of Venezuela on January 23, 2019, citing article 233 of the Constitution.¹³⁷ This provision states:

Should the President of the Republic become permanently unavailable to serve by reason of any of the following events: death; resignation; removal from office by decision of the Supreme Tribunal of Justice; permanent physical or mental disability certified by a medical board designated by the Supreme Tribunal of Justice with the approval of the National Assembly; abandonment of his position, duly declared by the National Assembly; and recall by popular vote.

When an elected President becomes permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic.

It is important to keep in mind that the National Assembly did not recognize the last presidential election, when Nicolás Maduro was elected, among other reasons, because it was held in advance in May 2018 at the request of the NCA (see point 12).¹³⁸ Deputy

¹³⁰ "[Asamblea Constituyente de Venezuela aprueba Plan de la Patria 2019-2025](#)," Telesur Noticias, 2 April 2019. Cf. teleSUR TV (2 April 2019). [Video]. ANC de Venezuela aprueba Plan de la Patria 2019-2025. Available at: https://www.youtube.com/watch?v=Izr5KUX_RF8&t=123s.

¹³¹ Article 2 of the Constitution.

¹³² Articles 112 and 115 of the Constitution.

¹³³ Published in *Gaceta Oficial*, No. 6,118 Extraordinary issue of 4 December 2013.

¹³⁴ Article 2 of the Constitution.

¹³⁵ Article 187 of the Constitution.

¹³⁶ Luigino Bracci Roa – Situación en Venezuela (2 April 2019). [Video]. ANC aprueba allanamiento de inmunidad de Juan Guaidó: Diosdado Cabello lee el decreto. Available at: <https://www.youtube.com/watch?v=e-9-T6NE82o>. Cf. "[Asamblea Constituyente decreta continuar el proceso contra Guaidó](#)," CNN en español, 2 April 2019.

¹³⁷ "[El presidente de la Asamblea Nacional Juan Guaidó se autoproclama presidente interino de Venezuela](#)," CNN en español, 23 January 2019.

¹³⁸ Luigino Bracci Roa – Situación en Venezuela (23 January 2018). *Asamblea Nacional Constituyente, sesión completa 23 January 2018, llamado a elecciones*. [Video]. Available at:

<https://www.youtube.com/watch?v=A1u9IDK7Ho8&t=4706s>. Cf. Consejo Nacional Electoral, [CNE convoca comicios presidenciales, de consejos legislativos y concejos municipales para el 20 de mayo](#), 1 March 2018.

Juan Guaidó became the leader of the opposition in Venezuela and dozens of countries recognized him as the Acting President of the Republic.¹³⁹

The removal of Juan Guaidó's legislative immunity was granted at the express request of the Supreme Court¹⁴⁰ in the context of the preliminary investigation started by Attorney General Tarek William Saab, who had been appointed by the NCA. According to the Attorney General, Deputy Guaidó was allegedly linked to the episodes of violence that began on January 22, 2019.¹⁴¹ The Attorney General asked the Supreme Court to order precautionary measures, such as forbidding Guaidó from ceding ownership of property, blocking his bank accounts, and forbidding him to leave the country. The Supreme Court accepted the request by the Attorney General's Office,¹⁴² but Guaidó did not comply with these measures and left the country on an international tour.¹⁴³ For this reason, the Supreme Court asked the NCA to rescind Guaidó's legislative immunity in order to pursue the criminal investigation against him.¹⁴⁴ That resolution was adopted in an arbitrary manner because the procedures established in the Organic Law of the Supreme Court were not followed, nor was a pretrial investigation of merit done.¹⁴⁵

In addition to the political implications, the NCA's removal of Guaidó's legislative immunity was an unconstitutional act. Article 200 of the Constitution of Venezuela is clear in stating that the authority to rescind a deputy's immunity corresponds to the National Assembly. This regulation also states that the Supreme Court may not prosecute a deputy without the prior approval of the National Assembly. The constitutional text reads as follows:

Deputies of the National Assembly shall enjoy immunity in the exercise of their functions from the time of their installation until the end of their term or resignation. Only the Supreme Tribunal of Justice shall have competence over any crimes may be charged as committed by members of the National Assembly, and only the Supreme Tribunal of Justice, subject to authorization in advance from the National Assembly, shall have the power to order their arrest and prosecution. In the case of a flagrant offense committed by a legislator, the competent authority shall place such legislator under house arrest and immediately notify the Supreme Tribunal of Justice of such event.

Public officials who violate the immunity of members of the National Assembly shall incur criminal liability and shall be punished in accordance with law.

Clearly, the NCA usurped the authority of the National Assembly and left Guaidó vulnerable to criminal charges with no guarantee of impartiality. For one thing, his indictment was in the hands of Tarek William Saab, an unconditional Chavist, who went from being a questionable Ombudsman, due to his lack of political independence,¹⁴⁶ to being appointed Attorney General by the NCA. Furthermore, Guaidó's trial would be before the Supreme Court, an organ that had become an instrument of the Executive

¹³⁹ "[Los países que reconocen a Guaidó como presidente interino de Venezuela](#)," CNN en español, 4 February 2019.

¹⁴⁰ Luigino Bracci Roa – Situación en Venezuela (1 April 2019) *Maikel Moreno lee solicitud del TSJ para allanar inmunidad de Juan Guaidó*. [Video]. Available at: https://www.youtube.com/watch?v=LdJdZ_9g060.

¹⁴¹ Vivo play (29 January 2019) *William Saab solicitó al TSJ medidas cautelares contra Juan Guaidó*. [Video]. Available at: https://www.youtube.com/watch?v=cZmUnd_9hNs.

¹⁴² "[TSJ aprobó medidas cautelares en contra de Juan Guaidó](#)," El Nacional, 29 January 2019.

¹⁴³ "[Juan Guaidó regresa a Venezuela](#)," CNN en español. 4 March 2019.

¹⁴⁴ Luigino Bracci Roa – Situación en Venezuela (1 April 2019) *Maikel Moreno lee solicitud del TSJ para allanar inmunidad de Juan Guaidó*. [Video]. Available at: https://www.youtube.com/watch?v=LdJdZ_9g060.

¹⁴⁵ Article 22 of the Organic Law of the Supreme Court of Justice of Venezuela.

¹⁴⁶ Under the direction of Tarek William Saab, the Venezuelan Ombudsman's Office was demoted from category "A" to category "B" by the Sub-committee on Accreditation of the International Coordinating Committee (ICC) for National Institutions for the Promotion and Protection of Human Rights, because of the lack of independence and impartiality in Venezuela. The ICC, an agency with speaking rights at the United Nations, oversees compliance with the Paris Principles, concerning the proper functioning of national human rights institutions. See: Global Alliance of National Institutions for the Promotion and Protection of Human Rights, [Report and Recommendations of the Session of the Sub-Committee on Accreditation](#), 9-13 May 2016, p. 56.

Branch.¹⁴⁷ Nor would he receive any guarantees of fair trial from the Ombudsman, Alfredo Ruiz Angulo, who was also appointed by the NCA (see point 6) and who, according to article 15 of the Organic Law of the Ombudsman's Office, is supposed to ensure the rights and guarantees of persons and intervene in jurisdictional proceedings *ex officio* or at the request of one of the parties.¹⁴⁸

It is extremely worrying that, during the NCA session in which Guaidó's immunity was rescinded, the NCA proposed the creation of people's courts to judge and "execute" so-called "traitors of the homeland."¹⁴⁹ This bill reflects how the punitive power of the State was used as an instrument for the purpose of political persecution, in addition to violating the right to be tried by a competent, independent and impartial judicial authority.¹⁵⁰

¹⁴⁷ International Commission of Jurists (ICJ). *The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch*, August 2017.

¹⁴⁸ *Gaceta Oficial* No. 37,995 of 5 August 2004.

¹⁴⁹ La verdad (3 April 2019). *Para mí el allanamiento de muy poco*. [Video]. Available at: https://www.youtube.com/watch?v=c5rwFbgn_xo.

¹⁵⁰ The right to a competent, independent and impartial judge is enshrined in many international instruments such as the American Convention on Human Rights (article 8.1), the International Covenant on Civil and Political Rights (article 14.1), the Universal Declaration of Human Rights (article 10), and the American Declaration of the Rights and Duties of Man (article 16).

CHAPTER IV: RECOMMENDATIONS TO THE VENEZUELAN AUTHORITIES

Due to the institutional crisis aggravated by the unconstitutional convocation of the National Constituent Assembly, as well as the unconstitutional and undemocratic design of that body and its irregular functioning, the **International Commission of Jurists makes the following recommendations to the Venezuelan authorities:**

- Rescind the National Constituent Assembly and allow the National Assembly to operate normally, in accordance with the Constitution, with all its powers and authority as the organ for debate, legislation and oversight;
- Annul the orders issued by the National Constituent Assembly that endanger or undermine the right to life, safety and freedom of the people. For example, the decision to rescind the legislative immunity of some National Assembly deputies;
- Allow the National Assembly to review the orders issued by the National Constituent Assembly, to render them totally or partially ineffective, immediately or conditionally, so that gaps are not left in the law, in the interest of ensuring legal certainty;
- Allow the National Assembly to fully resume its constitutional powers without obstacles to its exercise; and designate, in accordance with the Constitution and the law, the officials to lead: the Attorney General's Office, the Ombudsman's Office, the Comptroller General's Office of the Republic, the National Electoral Council and the Supreme Court of Justice; and
- Publicly acknowledge that any initiative to convene a National Constituent Assembly may take place only, in accordance with the Constitution of Venezuela, after a duly held referendum that approves: (i) the convocation to the National Constituent Assembly; (ii) the criteria for electing its members and its operations. Furthermore, a National Constituent Assembly should be finite in time; and its realm of authority should be fundamentally limited to drawing up a new constitutional text, which will also be submitted to a public vote, along with its possible temporary provisions.

CHAPTER V: CONCLUSIONS

On May 1, 2017, President Maduro convened, through Executive Decree No. 2,830, a National Constituent Assembly. This maneuver came after months of demonstrations protesting a series of decisions by the Supreme Court which suspended the constitutional powers of the democratically elected National Assembly.

The creation and functioning of the National Constituent Assembly have rendered the rule of law inoperative in Venezuela. The NCA's illegal convening, its unconstitutional design, and its installation in the chambers of the Federal Legislative Palace, demonstrated that this entity with "plenipotentiary" (absolute and without limits) power for constitutional reform, is nothing more than an illegitimate instrument of the Executive Branch, created to usurp the functions and authority of the National Assembly and other agencies of public power.

Since its installation, on August 4, 2017, the National Constituent Assembly has demonstrated that its primary purpose is not to draft a new constitutional text, but to take over legislative functions in order to pass electoral, administrative and legislative measures, a role that exceeds the nature and powers of a constituent body. Among other things, this report documents how the National Constituent Assembly called early presidential elections, approved budgets and loans, rescinded legislative immunity for National Assembly deputies so that they could be arrested and prosecuted, ratified the officials and justices of the National Electoral Council and the Supreme Court of Justice, appointed the top-ranking Citizen Power authorities, created a truth commission, and passed laws that discriminate against and penalize political dissidence.

Instead of serving as a forum in which to arrive at agreements based on logical arguments, debate and consensus, the National Constituent Assembly is an entity solely for pro-government deputies, who obediently and promptly approve everything put forth for their consideration, however arbitrary and ambivalent. The curious and no less dangerous "unanimity" with which the National Constituent Assembly operates, reflected in the absence of debate or exposure to dissenting ideas, demonstrates the imposition of a single political vision in which there is no room for disagreement. Meanwhile, the political and economic crisis in the country is becoming more acute.

This report demonstrates that the unchecked single-party National Constituent Assembly, created by the government of Nicolás Maduro, has frequently violated the Constitution of Venezuela established by former President Hugo Chávez. Beyond being unconstitutional, the real danger of the National Constituent Assembly is that it is a servile body, designed to cater to the desires of whoever holds executive power. The National Constituent Assembly has destroyed the fundamental pillars of the rule of law, including the separation of powers, citizen control over the public administration and political power, the independence of the Judicial Branch, and respect for human rights and democracy.

ANNEX 1

The International Commission of Jurists recalls the most recent recommendations that several international human rights authorities have made to the Venezuelan State. Only through full compliance with these measures will it be possible to restore the rule of law in Venezuela and substantially improve the human rights situation.

A. Several States made the following recommendations for the to the **United Nations Human Rights Council Working Group for the Universal Periodic Review**, to be taken up by Venezuela:

- “Ensure full respect of the institutional balance established by the Constitution, and take the necessary measures to restore as early as possible the prerogatives of the elected parliament (France)”;¹⁵¹
- “Engage in a constructive dialogue with the National Assembly, with agreed outcomes on economic and governance challenges by July 2017 (United Kingdom of Great Britain and Northern Ireland)”;¹⁵²
- “Engage in a dialogue among all Venezuelans, including the opposition, to resolve political divisions, the economic crisis and the humanitarian situation (United States of America)”;¹⁵³
- “Promote equal participation in political and public affairs as a key means of overcoming the current political and humanitarian crisis (Czechia)”;¹⁵⁴
- “Permit genuine expression of dissent by releasing political prisoners, allowing the elected National Assembly to carry out its functions and permitting peaceful protest and independent media reports (United States of America)”;¹⁵⁵
- “Channel social, political and institutional conflicts through dialogue and democratic participation, while ensuring judicial independence and the separation of powers (Norway).”¹⁵⁶

B. The **United Nations Human Rights Committee, the supervisory body for the ICCPR**; made recommendations to the Venezuelan State in its 2015 Periodic Review on the implementation of the State’s obligations under the ICCPR:

- “[T]ake immediate steps to ensure and uphold the full autonomy, independence and impartiality of judges and prosecutors and guarantee that they are free to operate without pressure or interference of any kind”;¹⁵⁷
- “Ensure that no public official takes measures or performs acts that may constitute intimidation, persecution, disparagement or undue interference in the work of journalists, human rights defenders, social activists, lawyers or members of the political opposition or in the exercise of their rights under the Covenant [International Covenant on Civil and Political Rights]”;¹⁵⁸
- “[T]ake all necessary steps to guarantee the full and effective exercise of the right to freedom of expression and freedom of the press.... Consider the possibility of decriminalizing defamation and repealing provisions that establish

¹⁵¹ [Report of the Working Group on the Universal Periodic Review: Bolivarian Republic of Venezuela](#), A/HRC/34/6, 27 February-24 March 2017, para. 133.18.

¹⁵² Ibid., para. 133.39.

¹⁵³ Ibid., para. 133.40.

¹⁵⁴ Ibid., para. 133.217.

¹⁵⁵ Ibid., para. 133.188.

¹⁵⁶ Ibid., para. 133.218.

¹⁵⁷ [Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela](#), CCPR/C/VEN/CO/4, 14 August 2015, para. 15.

¹⁵⁸ Ibid., para. 17 (b).

criminal penalties for persons who offend or fail to show respect for the President or other senior officials and any other similar provisions, and, in any event, restrict the application of criminal law to the most serious cases, bearing in mind that imprisonment is never an appropriate punishment in such cases;"¹⁵⁹ and,

- "[T]ake the necessary measures to ensure that all individuals under its jurisdiction are able to fully enjoy their rights to freedom of peaceful assembly and freedom of association."¹⁶⁰

C. **The IACR has also made recommendations on the rule of law, democracy and human rights to Venezuela.** Below are some of the key the recommendations from its last report, from the year 2017:

- "Restore constitutional order, ensuring: (i) the independence and balance of powers, (ii) the right to political participation without discrimination for the entire population, (iii) citizen oversight of the activities of the different branches of government";¹⁶¹
- "As regards the independence of the judiciary, adopt urgent and decisive measures to: (i) significantly reduce the number of provisional judges and increase that of tenured judges; (ii) only remove judges, even those with provisional status, by means of a disciplinary proceeding or an administrative decision that strictly observes the guarantees of due process, in particular the obligation to provide due cause; and (iii) provide guarantees of stability in the position. The procedures for selecting and appointing TSJ magistrates should include publication in advance of announcements of selection process, as well as their deadlines and procedures; there just be equal opportunity guarantees for all candidates; civil society must be involved and eligibility must be based on merit and professional qualifications";¹⁶²
- "Refrain from any act of harassment or intimidation, or any action that might imply a threat or direct or indirect pressure on a judge's exercise of his or her judicial function";¹⁶³
- "Take resolute steps to ensure the separation of powers and the proper exercise by the National Assembly of its constitutionally recognized functions, including the removal of the status of contempt and the classification of treason for the actions of deputies, and respect for due process in the event of the need to lift parliamentary immunity";¹⁶⁴
- "With respect to the National Constituent Assembly, revoke the measures that exceed the powers of a constituent body and harm the separation of powers and representative democracy, and refrain from adopting decisions that exceed those powers";¹⁶⁵
- "With respect to the National Electoral Council, adopt measures to ensure its independence by enforcing the election mechanism and requirements established in the Constitution, as well as ensuring against improper interference in its decisions on the political rights of Venezuelans";¹⁶⁶
- "As regards the Ombudsperson's Office, adopt the necessary measures to enable it to carry out its constitutionally assigned functions properly and to contribute to effective protection of human rights in Venezuela, including the adoption of laws

¹⁵⁹ Ibid., para. 19.

¹⁶⁰ Ibid., para. 20.

¹⁶¹ IACR, [*Democratic Institutions, the Rule of Law and Human Rights in Venezuela: Country Report*](#).

Approved by the Inter-American Commission on Human Rights on December 31, 2017 (OEA/Ser.L/V/II. Doc. 209), Chapter 6, "Recommendations," para. 477.2.8.

¹⁶² Ibid., para. 477.2.9.

¹⁶³ Ibid., para. 477.2.10.

¹⁶⁴ Ibid., para. 477.2.11.

¹⁶⁵ Ibid., para. 477.2.12.

¹⁶⁶ Ibid., para. 477.2.13.

to incorporate guarantees of independence and plurality in the appointment and removal of the Ombudsperson";¹⁶⁷ and

- "In relation to the Public Prosecutors' Office, implement the necessary measures so that it performs its investigative role efficiently and effectively, including, as applicable, bringing the appropriate criminal actions and giving particular attention to cases involving human rights violations."¹⁶⁸

D. **The Committee against Torture**, the supervisory body for the UN Convention against Torture, in its 2014 review of Venezuela's periodic report, recommended that Venezuela:

- "Take steps, as a matter of urgency, to ensure the full independence and non-removability of judges in conformity with applicable international standards. Specifically, the State party should, as soon as possible, organize independently administered public competitive examinations for entry into the judiciary, put an end to the appointment of temporary judges and ensure the security of tenure and independence of current temporary judges";¹⁶⁹
- "[S]ecure the immediate release of Leopoldo López and Daniel Ceballos and all those who have been arbitrarily detained for having exercised their right to self-expression and peaceful protest";¹⁷⁰
- "Ensure that the institutions entrusted with maintaining public safety are civilian in nature, as stipulated in article 332 of the State party's Constitution";¹⁷¹
- "[R]efrain from discrediting the work of human rights defenders and to publicly acknowledge the essential watchdog role that they and journalists play as regards the fulfilment of obligations under the Convention... [and] ensure the effective protection of human rights defenders and journalists against threats and attacks to which they may be exposed on account of their activities";¹⁷² and,
- "Ensure that alleged acts in breach of the Convention committed against its political opponents during their detention are duly investigated and the perpetrators punished."¹⁷³

E. **The Committee on the Rights of the Child**, the supervisory body for the Convention on the Rights of the Child, concerned over the detention of children during demonstrations, in its 2014 Review of Venezuela's periodic report, recommended the State adopt:

- "[A]ll necessary measures to protect children from harassment and arbitrary detention and ensure the right of children to participate in demonstrations, in accordance with article 13 of the Convention [of the Rights of the Child]."¹⁷⁴

F. **The Committee for the Elimination of Discrimination against Women**, the supervisory body for the Convention against all Forms of Discrimination against Women, in its 2014 review of Venezuela's periodic report, called on Venezuela to:

¹⁶⁷ Ibid., para. 477.2.14.

¹⁶⁸ Ibid., para. 477.2.15.

¹⁶⁹ United Nations. Committee against Torture. *Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela*, CAT/C/VEN/CO/3-4, 12 December 2014, para. 16.

¹⁷⁰ Ibid., para. 9.

¹⁷¹ Ibid., para. 12.

¹⁷² Ibid., para. 14.

¹⁷³ Ibid., para. 18.

¹⁷⁴ United Nations. Committee on the Rights of the Child. *Concluding observations on the combined third to fifth periodic reports of the Bolivarian Republic of Venezuela*, CRC/C/VEN/CO/3-5, 13 October 2014, para. 39.

- “[E]nsure their right to participate in demonstrations as well as their right to express their opinions, in accordance with international standards, and to take all measures necessary to protect women and girls from arbitrary detention and harassment.”¹⁷⁵

¹⁷⁵ United Nations. Committee on the Elimination of Discrimination against Women. [*Concluding observations on the combined seventh and eighth periodic reports of the Bolivarian Republic of Venezuela*](#), CEDAW/C/VEN/7-8, 14 November 2014, para. 25.

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