



Transition  
of the  
Venezuelan  
Justice  
System

Points to Consider  
in Democratic  
Re-Institutionalization



# Transition of the Venezuelan Justice System

## Points to Consider in Democratic Re-Institutionalization

**Ramiro Orias A.**

Program Officer, DPLF

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# Executive Summary

**D**uring the last two decades of the Bolivarian regime, the Judicial Branch has been subordinated to the Executive Branch in a gradual process of political control and institutional weakening. The Venezuelan justice system is now experiencing its worst crisis. Violations of judicial independence, as well as recurring cases involving the conviction of innocent people, networks of judicial corruption, selective political persecution, and widespread impunity have meant that the justice system in Venezuela has ceased to be a guarantor of human rights and has become the “**legal arm**” of the **political branch**.

For justice reform in Venezuela, unlike many other countries in the region, it is not enough to overcome traditional barriers to access to justice or to correct some dysfunctions in judicial administration; rather, **the conditions affecting its institutional performance must be radically transformed**. A democratic transition in Venezuela requires the existence of an independent, impartial, and transparent judiciary, subject only to the rule of law.

The strategy for the restoration of judicial institutions will face **multiple challenges**, from initially defining the procedures for the removal of those judicial authorities that have contributed to or reinforced this state of affairs, to building and implementing a long-term plan for the institutional reform of its various bodies. Although the principles of permanence, security of tenure, and irremovability from office are guarantees accorded to judges under international law, there are some **exceptions to the irremovability of judges**. One of them applies precisely to the transition processes that follow the collapse of authoritarian and corrupt regimes, where it is fair to hold accountable the judicial and prosecutorial authorities that allowed human rights violations and corrupt acts to take place.

In these kinds of exceptional situations, where the checks and balances that guarantee the rule of law fail or cease to be effective, one of the priorities of a process of transition to democracy should be to **put the justice system back on sound footing** so that it regains its legitimacy, independence, and impartiality.

The roadmap designed to guide the transition of justice in Venezuela’s institutional recovery process could benefit from the **adoption and development of various tools** to address the complex challenges of combating impunity, achieving re-democratization, and dismantling the authoritarian enclaves that will persist in the subsequent period.

First, a **constitutional reform** proposal must be approved in order to restructure the institutions that make up the justice system (the judiciary and the prosecutor’s office, as well as some other oversight institutions); to modify the composition and means of selecting and appointing their most senior authorities and members as a long-term solution; and to establish a system for transition and the removal of the appointed authorities who have been part of the authoritarian regime. In the past year, for instance, first Ecuador and then Peru—with different experiences—found this approach to be the way to reform and reconfigure their judicial government bodies affected by structural corruption.

**International mechanisms to support the transition to justice** could be implemented to begin the process in the short and medium term. For complex scenarios such as the one Venezuela is experiencing, one interesting option could be the creation

of *ad hoc* mechanisms that, with varying degrees of support and cooperation from the international community, aim to strengthen the capacities of Venezuela's judicial bodies to tackle impunity in serious cases of corruption or human rights violations. This type of mechanism can combine everything from technical assistance to investigative powers and complaints before the courts, including the formulation of recommendations and proposed institutional and regulatory reforms.

There is a broad range of experiences at the international level. Within the framework of the United Nations system, **international commissions of inquiry and fact-finding missions** can be established for situations where there are violations of international human rights law and international humanitarian law, including international crimes. In addition, the Minnesota Protocol—also known as the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions—which provides methods, best practices, and procedures for criminal investigations into the disproportionate use of armed force by State agents, recommends the creation of *special commissions of inquiry*, composed of professionals known for their impartiality, competence, and independence, which may include international participation and technical assistance.

In Latin America, unconventional or *ad hoc* international mechanisms have been established, with different mandates. Such is the case of the **International Commission against Impunity in Guatemala (CICIG)**, created with the support of the United Nations and the **Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH)**, created by the Organization of American States (OAS). Another model to consider, although one with a substantive mandate more limited to certain cases or groups of cases, is that of the **Interdisciplinary Group of Independent Experts of Ayotzinapa (GIEI)**, as well as the **Interdisciplinary Group of Independent Experts for Nicaragua (GIEI-Nicaragua)**, which produced an independent report on the crimes against humanity committed in that country during the protests that took place between April and May of 2018. El Salvador's President-elect Nayib Bukele recently announced the establishment of an **international commission against impunity**, and Ecuadorean President Lenin Moreno unveiled the creation of an **International Commission of Experts against Corruption**, which will support the detection, investigation, and prosecution of corruption cases.

Now, the transition of the justice system must be framed within a broader process of **transitional justice**, which should take a holistic approach, and in which the victims and their **rights to truth, justice, and reparation** are placed at the top of the agenda, resolving tensions arising from impunity and the desire for revenge. In this regard, an agreement must be reached to heal the wounds that this period has inflicted on Venezuelan society, and for this it is essential to explore the potential offered by **transitional justice mechanisms**. Although traditionally developed during the democratic transition processes following military dictatorships, these mechanisms can now be useful—from a renewed approach—in overcoming authoritarian and repressive regimes, where systematic abuses of human rights have been committed, facilitated, and instrumental to the operation of grand corruption schemes.

The challenge posed by corruption during democratic transitions occupies a central role today, when—in countries such as Venezuela—grand corruption explains why serious violations of civil and political rights go unpunished. Because of this, it is necessary, for instance, to **broaden the scope of truth-seeking mechanisms to also address violations of economic, social, and cultural rights, economic crimes, and structural corruption**.

Thus, within the framework of the democratic transition process, **justice reform in Venezuela needs to be approached from a multidimensional perspective**, through institutional reforms and accountability processes, with the support of unconventional international *ad hoc* mechanisms to support efforts to combat impunity. Drawing on all these comparative experiences, as well as making renewed use of transitional justice tools, we might consider the relevance of an **international mechanism or commission for Venezuela**, with a broad mandate in the area of justice system reforms, military justice, and transitional justice, which also includes some independent component for investigating serious human rights violations and grand corruption.

# 1 | Background

The Venezuelan justice system is experiencing the worst crisis since former president Hugo Chávez came to power 20 years ago. Its previously existing weaknesses and shortcomings have been aggravated and magnified under the presidency of Nicolás Maduro. The rule of law in Venezuela is now virtually nonexistent due to authoritarian practices, the concentration of power, the lack of free and plural elections, and systematic restrictions on the fundamental rights and freedoms of its citizens. The complete absence of judicial independence, as well as the use of the State’s punitive power to repress and criminally prosecute political dissidents and citizens who protest—including through the military justice system—are the most serious effects on the country’s constitutional system and a violation of its democratic order.

The situation in Venezuela is framed in a context of abuse of power contrary to the rule of law and the systematic infringement of judicial independence.<sup>1</sup> The minimum constitutional conditions that ensure democratic functioning based on independence and separation of powers have been utterly breached. Political domination and the undue interference of the Executive in the other bodies have led to a breakdown of the constitutional order. President Maduro, first by gaining political control of the Supreme Court of Justice (TSJ), and then by electing a Constituent Assembly in violation of the Constitution, has sought to replace the functioning and usurp the powers of the National Assembly, which has been controlled by the opposition since the end of 2015, and is currently the only institutional haven with democratic legitimacy.

During the last two decades of the Bolivarian regime, the Judicial Branch has been subordinated to the Executive Branch in a gradual process of political control and institutional weakening. It began with a decree reorganizing the Judicial Branch and the creation of a Judicial Emergency Commission, to which the Supreme Court of Justice was subordinated, resulting in a purge of judges (1999-2003); then—with the adoption of a new Constitution—the Supreme Court was co-opted through the change in the system of appointment and removal of justices, which gave broad discretion to the governing party in the National Assembly (2004-2010). Later, the Supreme Court and the Public Prosecutor’s Office (Public Ministry) gradually became functional authorities that served the interests of the regime, legalizing and legitimizing the arbitrary actions of the Executive (2009-2012). Finally, the judicial system became militantly partisan (50 per cent of the judges are or have been part of the governing party, and 25 of the 32 Supreme Court justices fail to meet the minimum requirements to serve on the Court), at that stage becoming a tool for enforcing the interests and directives of the Executive to neutralize the opposition-majority National Assembly through declarations of unconstitutionality or the invalidation of all its legislative acts (2013-2018).<sup>2</sup>

Against this backdrop, various international organizations have been closely observing the impact on the rule of law in the country, especially with regard to independence and separation of powers. The United Nations Human Rights Committee and the Working Group on Arbitrary Detention have concluded that “the lack of independence of the judiciary is one of the main human rights concerns in Venezuela.” In March 2019, the UN Special Rapporteur on the independence of judges and lawyers

<sup>1</sup> According to the Rule of Law Index of the World Justice Project (2019), Venezuela has continued to deteriorate in terms of the separation of powers, occupying last place in the world among the 126 countries studied.

<sup>2</sup> See, Louza, L. (2017, January-April). *La estrecha y necesaria relación entre Independencia Judicial, Estado de Derecho, el respeto a los Derechos Humanos y Democracia: Venezuela como caso de estudio* [The Close and Necessary Relationship Between Judicial Independence, Rule of Law, Respect for Human Rights and Democracy: Venezuela as a Case Study]. *Revista Acta Sociológica*, 72, 95-127. DOI: <http://dx.doi.org/10.22201/fcpys.24484938e.2017.72>

called upon Venezuelan authorities to “respect, promote and guarantee the independence and impartiality of the judiciary, including judges and prosecutors, so that they can maintain their independence in the face of undue pressure,” urging the State to stop the partisan use of the justice system.<sup>3</sup>

In its 2018 report, the United Nations Office of the High Commissioner for Human Rights attributed responsibility to the authorities of Venezuela’s executive branch for the systematic and widespread abuse of thousands of demonstrators, excessive use of lethal force, torture, and arbitrary detentions. For its part, the Inter-American Commission on Human Rights (IACHR), noted in its 2017 annual report a serious decline in the observance of human rights, aggravated by a difficult humanitarian crisis, and called on the Venezuelan state, once again, to comply with its international human rights obligations.

In addition, the Secretary General of the Organization of American States (OAS) has prepared two special reports on democracy in Venezuela and has appointed a panel of independent experts who have verified the existence of crimes against humanity in Venezuela and brought complaints against the perpetrators of those international crimes before the International Criminal Court (ICC). The Office of the Prosecutor of the ICC has officially ordered the opening of a preliminary inquiry, a proceeding in which international criminal law and its standards will play a crucial role in the analysis and judicial approach to the situation in Venezuela.

In September 2018, a group of six countries (Argentina, Canada, Colombia, Paraguay, Chile, and Peru), later seconded by France, sent a petition to the Prosecutor’s Office of the International Criminal Court to investigate Maduro’s government for crimes against humanity. On February 25, 2019, the so-called *Lima Group* asked the International Criminal Court (ICC) to “take into consideration” the “grave situation in Venezuela and the denial of access to humanitarian assistance, which constitutes a crime against humanity.”

This complex crisis situation, which began on January 10, 2019, reached an inflection point amidst the usurpation of power and the dismantling of democratic institutions. The Permanent Council of the Organization of American States declared that it did not recognize the legitimacy of Nicolás Maduro’s regime as of January 10, 2019.<sup>4</sup> Currently, more than 50 countries around the world recognize President Juan Guaidó as the leader of the country, in his capacity as president of the National Assembly.

On February 5, the National Assembly passed the Statute Governing the Transition to the Defense and Restoration of the Constitution of the Bolivarian Republic of Venezuela, which provides a roadmap for the recovery of democracy in the country.

Chapter IV of the Statute refers to the **re-institutionalization of the judiciary** and defines the recomposition of the Supreme Court.<sup>5</sup> Article 22 legitimizes the thirteen main justices and the 20 alternates (most of them in exile)<sup>6</sup> appointed by the National Assembly on July 21, 2017.<sup>7</sup> It also provides for the appointment or confirmation of the remaining Supreme Court justices who have been appointed during previous legislatures. “Once all the Justices have been appointed and all the judicial vacancies have been filled, they must be incorporated into the highest judicial body of the Bolivarian Republic of Venezuela as provided in the Organic Law of the Supreme Court of Justice.”

<sup>3</sup> See, United Nations. Office of the High Commissioner for Human Rights. Venezuela must guarantee impartial justice, says UN human rights expert. Available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24239&LangID=E>

<sup>4</sup> See, Organization of American States. Permanent Council. *Resolution on the Situation in Venezuela*. CP/RES. 1117 (2200/19), January 10, 2019. Available at [http://scm.oas.org/doc\\_public/ENGLISH/HIST\\_19/CP40651E03.DOC](http://scm.oas.org/doc_public/ENGLISH/HIST_19/CP40651E03.DOC)

<sup>5</sup> Article 20. It is incumbent upon the National Assembly to determine the time frame to conduct all or part of the necessary formalities that, under Article 333 of the Constitution, allow for the amendment of deadlines and legal requirements in order to recover the legitimacy of the public authorities. It is the duty of all citizens and public officials to cooperate with these procedures. **The National Assembly shall appoint or confirm the Public Authorities:** Citizens’ Branch, Presidents of the Electoral Council, and **Supreme Court Justices** (emphasis added).

<sup>6</sup> Access to Justice. The Venezuelan Observatory of Justice. (July 26, 2017, 26). *Gobierno y TSJ reprimen a nuevos magistrados con justicia militar* [Government and TSJ Suppress New Justices with Military Justice]. *Acceso a la Justicia*. Available at <https://www.accesoaljusticia.org/el-gobierno-con-tsj-reprime-a-nuevos-magistrados-con-justicia-militar/>

<sup>7</sup> Access to Justice. The Venezuelan Observatory of Justice. (July 21, 2017). *El parlamento no creó un Tribunal Supremo de Justicia paralelo*. *Acceso a la Justicia* [Parliament Did Not Create a Parallel Supreme Court of Justice]. Available at <https://www.accesoaljusticia.org/el-parlamento-no-creo-un-tribunal-supremo-de-justicia-paralelo/>



In this context, it should be noted that, unlike the vast majority of countries in the region, the challenges of judicial reform in Venezuela go far beyond the traditional procedural delays and backlogs, high rates of prison overcrowding or pretrial detention, which can be addressed through judicial management improvement programs—quite conventional where there are *normal institutional conditions*.

The recurring convictions of innocent persons, judicial corruption networks, selective political persecution, and official impunity reveal a more complex and deeply rooted problem that has made the Venezuelan justice system wholly incapable of fulfilling its role as guarantor of its citizens' human rights. Thus, the approach to the reform of the Venezuelan justice system must reflect this *exceptional situation*. **Today's challenge is not only to lift the traditional barriers to access to justice or to correct some dysfunctions in judicial management, but also to radically transform the conditions that affect its independent, impartial, and transparent institutional performance, reconstructing and reorganizing the system almost in its entirety.**

In a scenario of political capture, arbitrariness, and institutional dismantling such as the one that the Venezuelan justice system is currently undergoing, and where a situation of structural impunity has been created, the possibility of authentic, complete, and exhaustive accountability for the Bolivarian regime does not seem likely. It is clear that the current judicial authorities have lost all capacity and credibility to democratically transform the justice system from within, let alone to address impunity for the serious human rights violations and major acts of corruption committed during this period; moreover, as a result of their own behavior, judges have become the perpetrators of those crimes, a situation that has been characterized as a *mafia State*.<sup>8</sup>

The transition to democracy in Venezuela requires the existence of an independent judiciary, subject only to the rule of law. It requires the implementation of a true judicial career system, based on the assessment of professional merit and competence, where entry, tenure, training, promotion, and retirement from the bench are managed by a system that ensures an autonomous judiciary government vis-à-vis political and other powers that be.

In this regard, there is a need to recover judicial institutionalism, establishing a new system for the selection, appointment, and removal of senior judicial authorities who can lead the process of justice reform and re-institutionalization, respecting international standards of judicial independence and the applicable constitutional framework.

The strategy to recover the institutionalism of the justice system faces the challenge—among many others—of defining the appropriate mechanisms to replace those justice system authorities that have collaborated, contributed to, encouraged, participated in, or promoted the present state of affairs. The Venezuelan Constitution establishes *impeachment*<sup>9</sup> for the removal of high court judges. This mechanism imposes certain political and legal conditions, such as a qualified majority of votes and the need to guarantee due process, which must be met.

**Within the framework of the democratic transition process, the reform and recomposition of the justice system requires an innovative and unconventional approach that will contribute to its strategic viability, based on the use of multiple tools and new ad hoc mechanisms established specifically for the fight against impunity, respecting international conventions and instruments for the protection of human rights.**

<sup>8</sup> See, InSight Crime. Investigation and Analysis of Organized Crime. (May 22, 2019). Venezuela. Available at <https://www.insightcrime.org/venezuela-organized-crime-news/>; InSight Crime. Investigation and Analysis of Organized Crime. (May 22, 2019). 7 Reasons for Describing Venezuela as a "Mafia State." Available at <https://www.insightcrime.org/investigations/seven-reasons-venezuela-mafia-state/>

<sup>9</sup> Article 265. The justices of the Supreme Court of Justice may be removed by a qualified majority of two thirds of the members of the National Assembly, following a hearing granted to the interested party, in the event of serious misconduct already characterized as such by the Citizens' Branch, under the terms established by law.

## 2

## Standards of judicial independence in a context of democratic transition: the exception of irremovability

The principle of permanence, security of tenure, and irremovability in judicial positions is one of the guarantees recognized by international law. For example, the United Nations Basic Principles on the Independence of the Judiciary stipulate that judges shall be guaranteed tenure for the periods established, as well as the irremovability of judges until the expiration of the term for which they have been appointed. It adds that judges may only be suspended or removed from office only for reasons of incapacity or behavior that renders them unfit to discharge their duties.

The Inter-American Court of Human Rights has repeatedly stated that judges and justices should enjoy irremovability in their positions, as this results in “reinforced guarantees” of stability for purposes of ensuring the independence necessary for access to justice in the cases they hear and decide. The irremovability of judges is also guaranteed until the end of the term for which they have been appointed.

According to the inter-American case law, under the **principle of judicial irremovability** it is only acceptable to remove judges and justices for well-founded reasons related to violations of the rules governing judicial conduct. The guarantee that protects judges from being easily removed means that removal proceedings must respect due process and, in keeping with the right to appeal, an effective remedy must be provided to challenge that decision and have it reviewed by another independent authority. Accordingly, the inter-American jurisprudence establishes that those guarantees “apply independent of the name given to each separation or termination under domestic law, be it [cessation, dismissal, or removal].”

In the case of *Reverón Trujillo v. Venezuela*, the Inter-American Court held that “judges have reinforced guarantees due to the necessary independence of the Judicial [Branch].” It reiterated the importance of the separation of powers, as well as the obligation of the State to guarantee its institutional facet, “that is, with regard to the Judicial [Branch] as a system, as well as in connection with its individual aspect, that is, with regard to the specific judge as an individual.”<sup>10</sup> The Court insisted that the guarantees derived from judicial independence include: “an adequate appointment process, tenure in the position, and the guarantee against external pressures.”<sup>11</sup> It recalled that, “the authority in charge of the process for the dismissal of a judge shall be allowed to act independently and impartially in the proceedings established for that effect and allow the exercise of the right to a defense.”<sup>12</sup> “tenure is a guarantee of judicial independence that at the same time is made up [of] the following guarantees: continuance in the position, an adequate promotions process, and no unjustified dismissals or free removal.”<sup>13</sup>

In the case of the *Constitutional Court v. Ecuador*, the Inter-American Commission on Human Rights (IACHR)<sup>14</sup> argued that the dismissal of judges before the completion of their constitutional term and through the decision of a political body constituted violations of judicial independence. In addition, the IACHR indicated that these types of decisions raise doubts about the objectives they pursue, resulting in a kind of implicit penalty against judicial officials in retaliation for how they have discharged their duties. The Inter-American Court subsequently found that the justices were dismissed by a resolution

<sup>10</sup> I/A Court H.R., *Case of Reverón Trujillo v. Venezuela*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, para. 67.

<sup>11</sup> *Ibidem*, para. 70.

<sup>12</sup> *Ibidem*, para. 78.

<sup>13</sup> *Ibidem*, para. 79.

<sup>14</sup> November 28, 2011. Available at <https://www.oas.org/en/iachr/decisions/court/12597FondoEn.pdf>

of the National Congress stemming from a political alliance intended to create a Supreme Court aligned with the political majority that existed at that time, as well as to prevent criminal proceedings against the incumbent president and a former president. It characterized this situation as a case of abuse of parliamentary power, in a framework clearly contrary to the democratic rule of law.

International human rights standards on the independence of the judiciary also recognize some **exceptions to judicial irremovability**. One of them applies to the transition processes that follow the collapse of authoritarian and corrupt regimes, where it is only fair for judicial and prosecutorial authorities to be held accountable for allowing or failing to resolutely confront human rights violations and acts of corruption, which could perhaps have been prevented in the absence of an institutionalized system of impunity. **In these kinds of exceptional situations, where the checks and balances that guarantee the rule of law fail or cease to be effective, a process to put the justice system back on sound footing is warranted.**

The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, in Report A/HRC/39/53 of 2018, has made it clear that one of the biggest problems affecting post-conflict situations is impunity for perpetrators of human rights violations. “Justice systems are often weak or non-operational in the aftermath of mass violations, which obstructs any chance of accountability or the realization of the right to justice for past abuses.” He also stated that “Conflict and the rule of authoritarian regimes often lead to the disintegration of social trust.” This, moreover, requires a better understanding of the phenomenon of corruption, which will not only shed more light on the conditions that have allowed gross violations of human rights to take place, but will also help to identify the structural deficiencies that should be addressed in relation to “guarantees of non-repetition.”

In his 2015 Report, the Special Rapporteur had already examined in detail the crucial elements for the formulation of State policies on “guarantees of non-repetition.” In order to bring clarity to this concept, he pointed out that these include judicial reforms, which are necessary to ensure an independent and effective judiciary for the protection of rights. The Rapporteur added, among other aspects, that “In situations where the judiciary has been appointed in its entirety by the previous regime and is considered to be complicit in the violations committed, it will be necessary to investigate the background of the judges.”

In accordance with paragraph 30 of the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, adopted by the United Nations Commission on Human Rights in 2005, the principle of the irremovability of judges may be restricted in circumstances where the judges have “unlawfully appointed or who derive their judicial power from an act of allegiance.” Under this approach, in certain circumstances relating to the process of re-establishing democracy or transitioning to democracy, it is appropriate to dismiss or remove judges in order to address the “impunity gap.”

Similarly, Report A/HRC/35/31 presented in 2017<sup>15</sup> by the Special Rapporteur on the independence of judges and lawyers, which addresses the issue of corruption and organized crime, refers to the role of the judiciary during periods of transition to provide an independent and impartial justice system. The report states that, “In transition processes, whether post-conflict or post-authoritarian, it is normal to hold to account judges involved in human rights violations and corruption who wish to retain their posts.” Referring to the dilemmas that authorities may encounter during transitional periods, especially with regard to the prosecution by certain judges of human rights violations, crimes, and abuses committed by members of a regime that may have appointed them, the Special Rapporteur has noted that, “one priority of a country in transition to peace or democracy may be to ‘clean up’ its judiciary in order to restore its legitimacy, independence and impartiality, and ultimately its public credibility.”

In Report A/HRC/11/41 of 2009,<sup>16</sup> the Special Rapporteur noted that the irremovability of judges is one of the fundamental pillars of judicial independence. This principle can only be overridden in exceptional circumstances, such as, “in situations of transition from an authoritarian to a democratic system, in which the objective of limitations to the principle of irremovability

<sup>15</sup> See, United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers. A/HRC/35/31, 9 June 2017. Available at <https://undocs.org/A/HRC/35/31>

<sup>16</sup> See, United Nations. General Assembly. Human Rights Council. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. A/HRC/11/41, 24 March 2009. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/125/63/PDF/G0912563.pdf?OpenElement>

would be to end impunity and to prevent the reoccurrence of serious human rights violations.”

In Report E/CN.4/2005/60 of 2004, the UN Special Rapporteur on the independence of judges and lawyers similarly stated that the judiciary also faces enormous challenges as it prepares for a transition to democracy and the rebuilding of institutions. “In the field of justice, the most urgent challenges [include] the fight against impunity [...]. But the new authorities may face dilemmas. For instance, how to try criminals by judges appointed by those very criminals?”

One of the priorities for countries in transition must therefore be to restructure the judiciary so that it regains its independence and impartiality in the investigation of such crimes. The report also maintains that:

Although it may be seriously tainted for having served the previous regime, the judiciary is the institution to which victims turn and from which they are entitled to expect truth and justice. In order to clean up the judiciary, the State usually has to review the method of appointing and dismissing judges, particularly those of the Supreme Court, since that is the body with ultimate responsibility for the respect of human rights and fundamental freedoms and the preservation of the rule of law.

The Rapporteur recommends taking into account that “cleaning up without observing international standards for a fair trial or the basic principles for the independence of the judiciary may, far from strengthening the judicial system, undermine it.” In order to prevent arbitrariness, abuse, and the settling of scores, the dismissal of judges and their reappointment through a new selection process must fully respect international fair trial standards and the Basic Principles on the Independence of the Judiciary.

Against this backdrop, **this evaluation poses specific challenges in light of the general principle of the irremovability of judges, which, as we have noted above, can only be overcome in exceptional circumstances, such as transition processes and democratic reconstruction.**

There are several ways to re-institutionalize the Judicial Branch, from initiating a procedure to review defects that may render null and void the irregular appointments of the justices of the TSJ,<sup>17</sup> to proceedings for malfeasance in office, to a constitutional amendment that establishes a procedure to create a new justice system.

In any case, new appointments must comply with the criteria established in general recommendation No. 9 of the Country Report on Venezuela of the Inter-American Commission on Human Rights (February 2018), which states that:

The procedures for selecting and appointing TSJ [justices] 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.

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<sup>17</sup> It is important to note that in addition to the institutional mechanisms for removing judges for violating the principles of judicial integrity and conduct, there is also the possibility of examining the legitimacy of appointments and the potential existence of fundamental defects that would render those appointments null and void—an aspect that is beyond the scope of this document, and that deserves separate and special study.

## 3

## A few proposals for reflection

The design of a roadmap to guide the transition of the justice system through the process of recovering democratic institutionalism in Venezuela, given the exceptional situation it is currently facing, could benefit from the adoption and development of multiple tools. Some of these tools are provided for within the domestic legal system, but need to be complemented by **unconventional mechanisms** in order to tackle the complex challenges of re-democratization and dismantle the enclaves of the authoritarian regime that will persist in the post-conflict period.

### 3.1 International mechanisms to support judicial transition

As we have seen, the Venezuelan justice system has not been able to deal impartially and effectively with corruption and human rights violations committed or shielded by the regime. This is not only because of its limited technical capacity to investigate complex crimes, but also because of its structural weakness which—far from protecting the independence of judges to investigate cases that may involve major political actors—exposes them to various types of interference, pressure, and obstacles, selectively allowing the most high profile cases to go unpunished, and weaponizing the criminal law to prosecute detractors, opponents, and dissidents.

The United Nations system offers the possibility of establishing **international commissions of inquiry and fact-finding missions**,<sup>18</sup> as essential tools for situations where there are violations of international human rights law and international humanitarian law, including international crimes. They have been used increasingly by the Security Council, the General Assembly, the Human Rights Council, the Secretary-General, and the United Nations High Commissioner for Human Rights to address such violations in a growing variety of contexts.

Over the past two decades, a number of independent international commissions of inquiry have been established to examine some of the most serious cases of international crimes, such as in the former Yugoslavia, Darfur, Timor-Leste, Lebanon, and Guinea, as well as in the most recent human rights investigations in Côte d’Ivoire, Libya, the Occupied Palestinian Territory, the Syrian Arab Republic, the Democratic People’s Republic of Korea, Sri Lanka, and the Central African Republic.

It should also be noted that for more specific situations requiring the investigation of crimes allegedly committed by the State’s own law enforcement agencies, such as extrajudicial executions, the highest international standards of due diligence, transparency, and legality must be applied to ensure an effective and impartial investigation. In this regard, for instance, the case law of the European Court of Human Rights has established the need for the investigation to be (i) carried out by persons who are independent and impartial, (ii) with professional competence and qualifications, (iii) using appropriate procedures, making effective use of all available resources, and with the support of qualified technical and administrative staff.

The United Nations has also adopted the Minnesota Protocol—also known as the Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions—which provides methods, best practices, and procedures for criminal investigations into the disproportionate use of armed force by State agents, recommends the creation of *special*

<sup>18</sup> See, United Nations. Office of the High Commissioner for Human Rights. Commissions of Inquiry and Fact-Finding Missions on Human Rights and International Humanitarian Law. Guidance and Practice. New York and Geneva, 2015. Available at [https://www.ohchr.org/Documents/Publications/Col\\_Guidance\\_and\\_Practice.pdf](https://www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf)

*commissions of inquiry*, composed of professionals known for their impartiality, competence, and independence, which may include international participation and technical assistance.<sup>19</sup>

Paragraph 39 of the Minnesota Protocol states that

In specific circumstances a State may establish a special mechanism such as a commission of inquiry or another transitional justice mechanism. An international investigation mechanism with the expertise and capacity to conduct an independent and objective investigation may be appropriate.

For complex scenarios such as the one Venezuela is experiencing, one interesting option could be the creation of ***ad hoc mechanisms*** that, with varying degrees of support and cooperation from the international community,<sup>20</sup> aim to strengthen the capacities of Venezuela's judicial bodies to tackle impunity in serious cases of corruption or human rights violations.<sup>21</sup> These mechanisms, established by an international agreement, can combine everything from technical assistance to investigative powers and complaints before the courts, including the formulation of recommendations and proposed institutional and regulatory reforms.

A number of unconventional or *ad hoc* international mechanisms have been established in the region in recent years, with different mandates. Such is the case of the **International Commission against Impunity in Guatemala (CICIG)**, created with the support of the United Nations and the **Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH)**, created by the Organization of American States (OAS). Another model to consider, although one with a substantive mandate more limited to certain cases or groups of cases, is that of the **Interdisciplinary Group of Independent Experts of Ayotzinapa (GIEI)**, which was the outcome of a precautionary measure ordered by the IACHR and created by agreement between the government of Mexico, the victims' representatives, and the IACHR; as well as the **Interdisciplinary Group of Independent Experts for Nicaragua (GIEI- Nicaragua)**, which produced an independent report on crimes against humanity committed in that country in 2018.

<sup>19</sup> See, Minnesota Protocol on the Investigation of Potentially Unlawful Deaths (2016). The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. Available at <https://www.ohchr.org/Documents/Publications/MinnesotaProtocol.pdf>

<sup>20</sup> Article 28 of the Statute. The Interim National Unity Government .... shall request the ongoing presence of international organizations specialized in the guarantee and defense of human rights in order to support the democratic transition process and report to the international community on the situation of human rights in Venezuela.

<sup>21</sup> DPLF. *La lucha contra la impunidad desde el derecho internacional. Reflexiones a partir de las experiencias heterodoxas en latinoamérica: La CICIG en Guatemala, la MACCIH en Honduras y el GIEI en México* [The fight against impunity under international law. Reflections from unorthodox experiences in Latin America: The CICIG in Guatemala, the MACCIH in Honduras and the GIEI in Mexico]. Available at [http://www.dplf.org/sites/default/files/lucha\\_impunidad\\_d2\\_docweb\\_03212017.pdf](http://www.dplf.org/sites/default/files/lucha_impunidad_d2_docweb_03212017.pdf)

## Recommendations of the GIEI-Nicaragua on the justice system

6. Investigate the actions and **possibly separate judges and other servants from the justice system**, if proven that they violated due process or failed to maintain their independence from the governing power. These vetting procedures **must comply with international standards**.

7. Create a **judicial career** based on objective criteria and personal **merit** for the admission, promotion and dismissal of magistrates and judges, including members of the Supreme Court of Justice. This career system must include objective criteria for the selection and appointment of magistrates and judges, that are clearly defined and established by law. These criteria must require that individuals admitted to the judicial branch be of **high moral character and recognized competence**, juridical ability and independence to fill that position.

8. Appoint magistrate and judges through public competitions based on merits, with appropriate citizen supervision.

9. Taking into consideration the lack of independence demonstrated by the justice system, promote its reform and create necessary mechanisms to ensure that the violent events that occurred from April 18th onwards be put on trial before **judicial bodies composed of [judges] that guarantee impartiality** and aptitude, with the appropriate resources. In order to do so, various possibilities must be considered, **including the participation of international judges and/or support and advice from international actors**.

10. Promote its reform and create the **necessary mechanisms to guarantee the revision of sentences** handed down and of future judgments by the current courts, in order to establish whether those procedures violated constitutional guarantees or legal provisions, and due process of law. While this revision process is being carried out, defendants or convicted individuals must remain in liberty. This effort must be assigned to [judges] that are duly selected on the basis of their personal and professional qualifications, with due regard to their autonomy and independence. The possibility of summoning **[judges] from other countries and/or requesting international aid or support** should be evaluated in fulfilling this task.

16. The GIEI recommends the urgent creation of a Special Unit [of the Public Prosecutor's Office] [...]. [To this end, at least initially, the advisability of] summoning **international prosecutors**, along with national ones, to constitute this Special Unit should be evaluated.

Depending on the situation, it might also be possible to establish institutional structures with some degree of **international participation or collaboration**. Hybrid mechanisms, made up of international officials and national authorities—selected with the highest standards of suitability and transparency—can be advantageous when society's trust in the traditional actors of the justice system has eroded, and even more so when at least some of these actors may bear responsibility for the acts to be investigated. The creation of international mechanisms is a tool that has also resulted in the strengthening of these processes, such as the International Commission Against Impunity in Guatemala (CICIG), the Mission to Support the Fight against Corruption and Impunity in Honduras (MACCIH), or the current process being implemented in Mexico to investigate the disappearance of the 43 students in Ayotzinapa (emphasis added).

[http://www.oas.org/es/cidh/actividades/giei-nicaragua/GIEI\\_INFORME.pdf](http://www.oas.org/es/cidh/actividades/giei-nicaragua/GIEI_INFORME.pdf)

El Salvador's President-elect Nayib Bukele recently announced the creation of an **international commission against impunity**,<sup>22</sup> to support anti-corruption efforts in that country. In addition, Ecuador's President Lenin Moreno recently announced the decision to call on the international community and international institutions to join together to create an **International Commission of Experts against Corruption**, which will provide independent support for the detection, investigation, and prosecution of corruption cases.<sup>23</sup>

In addition, the United Nations Office of the High Commissioner for Human Rights recommended that Mexico establish an Advisory Council of renowned experts in the field of human rights and the fight against impunity to advise the Mexican State on strategies and reforms to foster the capacities to investigate and prosecute and to reverse the impunity rates prevailing in the country.<sup>24</sup>

Following this recommendation, a broad platform of Mexican civil society organizations, faced with growing evidence of collusion by municipal and state officials in crimes against humanity perpetrated by members of organized crime in various parts of Mexico, has been stressing the urgent need for an "internationalized" body that can competently and independently investigate whether public officials and members of drug cartels participated in these crimes. This body, which would be authorized to investigate and prosecute heinous crimes linked to corruption, has been named the **International Mechanism against Impunity in Mexico** (MICIM).<sup>25</sup>

Another discussion that took place in the region was related to the necessary, possible, and reasonable degree of international participation in the trial of crimes against humanity. This discussion took place in Colombia at the time of designing the **Special Jurisdiction for Peace** (JEP), which was studied at length by DPLF.<sup>26</sup> The possibility was initially considered of developing a hybrid judicial model like the one used in Bosnia, where the temporary inclusion of international judges and prosecutors in the country's War Crimes Chamber (which had jurisdiction over international crimes, as well as economic crimes and corruption cases) helped ensure justice for the most serious and heinous crimes committed during the wars in the former Yugoslavia. Another similar case, also with a mixed approach, was that of the Extraordinary Chambers in the Courts of Cambodia for the trial of crimes committed by the Khmer Rouge. These courts are part of the domestic judicial structure of the Cambodian State, but are comprised by international judges, who work alongside Cambodian judges appointed through the ordinary mechanisms.

The **Peace Accords between the Government of Colombia and the FARC** established that a mixed body composed of representatives of the European Council on Human Rights, the UN Secretary General, the judges of the Criminal Chamber of the Supreme Court of Justice, the delegation in Colombia of the International Center for Transitional Justice (ICTJ), and the Permanent Commission of the State University System should be responsible for selecting and appointing peace judges.<sup>27</sup> Thus formed, this Selection Committee finally chose 51 Colombian judges and fourteen foreign judges who do not have decision-making capacity, but who as recognized international experts will guide, assist, and support the proceedings with *amicus curiae*.

<sup>22</sup> See, *Elsalvador.com*. (February 5, 2019). *Bukele reitera que creará comisión contra la impunidad* [Bukele Reiterates that He Will Create Commission Against Impunity]. Available at <https://www.elsalvador.com/noticias/nacional/565166/bukele-reitera-que-creara-comision-contra-la-impunidad/>

<sup>23</sup> See, *El Comercio*. (February 19, 2019). *Cinco integrantes tendrá la Comisión Internacional de lucha contra la Corrupción en Ecuador* [International Commission against Corruption in Ecuador to Have Five Members]. Available at <https://www.elcomercio.com/actualidad/integrantes-comision-internacional-anticorrupcion-ecuador.html>

<sup>24</sup> See, United Nations. Office of the High Commissioner for Human Rights. Mexico. Recommendations to Mexico by the United Nations High Commissioner for Human Rights, Mr. Zeid Ra'ad Al Hussein and Response of the Mexican State, Mexico City, November 2016. Available [in Spanish] at [http://www.hchr.org.mx/images/doc\\_pub/RecomendacionesHC\\_web.pdf](http://www.hchr.org.mx/images/doc_pub/RecomendacionesHC_web.pdf)

<sup>25</sup> See, *Propuesta ciudadana para la construcción de una política sobre verdad, justicia y reparación a la víctimas de la violencia y de las violaciones a derechos humanos* [Citizens' proposal for the construction of a policy on truth, justice, and reparation for victims of violence and human rights violations], Mexico, January 2019. Available at <http://cmdpdh.org/project/propuesta-ciudadana-para-la-construccion-de-una-politica-sobre-verdad-justicia-y-reparacion-a-la-victimas-de-la-violencia-y-de-las-violaciones-a-derechos-humanos/>

<sup>26</sup> DPLF. *The Special Jurisdiction for Peace in Colombia: Recommendations for the Selection of Judges of the Chambers and Divisions of the Tribunal for Peace*, Washington DC, April 26, 2016. Available at [http://www.dplf.org/sites/default/files/the\\_special\\_jurisdiction\\_peace\\_colombia\\_web\\_06\\_03\\_2016\\_0.pdf](http://www.dplf.org/sites/default/files/the_special_jurisdiction_peace_colombia_web_06_03_2016_0.pdf)

<sup>27</sup> See, *El Espectador. Redacción Judicial*. (February 15, 2017). *Lista comisión que elegirá a magistrados de la JEP* [Commission Ready to Select JEP Judges]. *El Espectador*. Available at <https://www.elespectador.com/noticias/judicial/lista-comision-que-elegira-magistrados-de-la-jep-articulo-680068>



In view of all these comparative experiences, it may be appropriate for there to be an **international mechanism or commission against impunity in Venezuela**, potentially under the responsibility of the Inter-American Commission on Human Rights (IACHR) or the Office of the United Nations High Commissioner for Human Rights (OHCHR). Such a mechanism could have a broad mandate to coordinate international cooperation in specific and operational aspects in the area of justice reforms, military justice, and transitional justice, which also includes some independent mechanism with specific functions to investigate serious human rights violations and grand corruption. This body could lead or assist in the organization of an international oversight mechanism for various democratic re-institutionalization processes in Venezuela, such as the process of appointing new judges and prosecutors, as well as the main authorities of the justice system.

Considering that the Venezuelan justice system has been totally co-opted, de-institutionalized, and delegitimized, all judges, prosecutors, and senior justice system officials elected during the transition, including the members of the TSJ, the Prosecutor General, the People's Ombudsperson, and others, should be selected and appointed in accordance with the procedures set forth in the Bolivarian Constitution but also with the technical assistance of international bodies such as the Inter-American Commission on Human Rights (IACHR) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the support of international and Latin American organizations with substantial experience in this type of process for the selection and appointment of judges.

Such international assistance could, for instance, contribute to the transparency of selection and appointment processes, to the informed participation of civil society organizations, and to the establishment of objective criteria for the assessment of candidates' knowledge, experience, and personal, professional, and public backgrounds, while respecting their rights and, in particular, due process guarantees. The objective is, first, to ensure that the best and most honest professionals remain in the justice system and, second, to avoid any sort of "witch-hunt" or revenge in these selection and appointment processes.

One of the IACHR's mandates is to provide technical assistance to States in the area of human rights, including due process guarantees and judicial independence. Accordingly, the IACHR may in due course issue a specific report, at the request of the State itself, on the application of international standards that should be taken into account in these processes for the selection and appointment of judges and prosecutors.<sup>28</sup>

Given the fragility of the institutions of Venezuela's justice system, it will be vitally important to explore some of these models that also contribute to the attainment of justice and truth in the process of democratic transition.

### 3.2 National transitional justice mechanisms

It is also crucial to define a holistic approach, in which the victims and their rights to truth, justice, and reparation are placed at the top of the agenda, resolving tensions arising from impunity and the desire for revenge.

In this sense, and with the aim of healing the wounds that this period has inflicted on Venezuelan society, an agreement must be reached on what kind of entity should be created to seek the truth, and what the scope of its mandate should be. Will it seek only to investigate and prosecute serious human rights violations, such as police abuses, arbitrary detentions, torture, cruel and inhuman treatment, and extrajudicial executions? And how will the grand corruption that encouraged that impunity be addressed? What about responsibility for deaths due to malnutrition, lack of medicines, and the collapse of the public health system? What reparation policy should the state devise for the victims of these violations? And will it be possible for guarantees of non-repetition to go from symbolic gestures to structural reforms of the institutions of democracy?

To this end, the potential offered by **transitional justice mechanisms** should be explored. These mechanisms, traditionally developed during the democratic transition processes following military dictatorships, can now be useful—from a renewed approach—in overcoming authoritarian and repressive regimes, where systematic human rights abuses have been committed and grand corruption has taken root.

<sup>28</sup> See, IACHR. *Guarantees for the independence of justice operators: Towards strengthening access to justice and the rule of law in the Americas*. OEA/Ser.L/V/II, Doc. 44, December 5, 2013. Available at <https://www.oas.org/es/cidh/defensores/docs/pdf/Justice-Operators-2013.pdf>

Let us remember, as the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence stated in Report No. A/HRC/39/53 of July 2018, that:

Originally, transitional justice mechanisms have not included addressing violations associated with corruption or other economic crimes, but rather focused on gross violations relating to civil and political rights, such as disappearances, extrajudicial killings, torture and other ill-treatment.

However, the scope of **truth-seeking mechanisms has gradually expanded to also address violations of economic, social, and cultural rights** (e.g., the Commission for Reception, Truth, and Reconciliation in Timor-Leste), economic crimes (the Liberian Truth and Reconciliation Commission), and large-scale corruption and the exploitation of natural or public resources (the Truth, Justice, and Reconciliation Commission of Kenya).<sup>29</sup>

The challenge posed by corruption during democratic transitions is becoming increasingly significant, when in countries such as Venezuela it is clear that grand corruption explains the situation of impunity for serious violations of civil and political rights, and is partially responsible for undermining the economic, social, and cultural rights of a segment of the population. For this reason, an in-depth assessment of the interrelationship between corruption and serious human rights violations is needed to determine how transitional justice mechanisms can help further the aim of addressing corrupt acts and other economic crimes that have contributed to or allowed such crimes to be committed in the country.

These mechanisms include a variety of approaches, including non-judicial tools, to provide a response to impunity in the transition from conflict, arbitrariness, and violence to peace, democracy, and the rule of law. A transitional justice policy can include many interrelated elements, from the institutional reform of the justice system, in order to adequately dismantle the structural machinery of the authoritarian regime, to the creation of **Truth Commissions** with the mandate to investigate and denounce systematic patterns of abuse of power.

For example, in order to identify patterns and cases of undue interference in Ecuador's justice system during Rafael Correa's administration, a **Truth and Justice Commission** was created last year. This national body received nearly 1,500 complaints about cases in which the Ecuadorian government had exerted political pressure, at least 300 of which have been identified as cases of political persecution. The report concluded that at least 495 judges, substitute judges, and prosecutors had engaged in irregular conduct in the cases examined.<sup>30</sup>

In the short-term scenario, the key actors in a transitional justice process should include the victims of serious human rights violations and victims' organizations. To this end, one of the challenges should be to build a national registry of victims, not based on official data—which do not exist—but rather on information provided by civil society organizations and international human rights organizations such as the IACHR, OHCHR, or the International Criminal Court.

This registry should not only be limited to victims of serious violations of civil rights (life, integrity, freedom), but should also include serious violations of social rights, especially the right to health of vulnerable sectors of society.

<sup>29</sup> The regulation of the United Nations Transitional Administration in East Timor establishing the Commission for Truth, Reception, and Reconciliation defined the thematic scope as human rights violations “committed within the context of the political conflicts in Timor-Leste between 25 April 1974 and 25 October 1999,” to wit: “(i) violations of international human rights standards; (ii) violations of international humanitarian law; and (iii) criminal acts.” These included violations of economic, social, and cultural rights. The law creating the *Truth and Reconciliation Commission of Liberia* define its mandate with reference to “human rights violations,” that is: “1) violations of international human rights standards, including, but not limited to acts of torture, killing, abduction and severe ill-treatment of any person; 2) violations of international humanitarian law, including, but not limited to crimes against humanity and war crimes.” The mandate also includes “economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts.” The law establishing the *Truth, Justice, and Reconciliation Commission of Kenya* instructs it to investigate, *inter alia*: “violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office.” The law covers the following with regard to economic crimes: “grand corruption and the exploitation of natural or public resources,” “the irregular and illegal acquisition of public land,” “[the] economic marginalization of communities,” and “the misuse of public institutions for political objectives” (emphasis added).

<sup>30</sup> See, *El Universo*. (February 25, 2019). *Mesa de la Verdad y Justicia confirma papel de la justicia en casos de persecución política* [Truth and Justice Commission Confirms Role of Justice System in Political Persecution Cases]. Available at <https://www.eluniverso.com/noticias/2019/02/25/nota/7207577/ mesa-verdad-justicia-confirma-papel-justicia-casos-persecucion>

Thus, once the justice system is restored with the proper guarantees of independence, impartiality, and due process, judicial proceedings brought against persons who are currently imprisoned, exiled, and persecuted for political reasons may be reviewed and closed, as appropriate. In all cases, these judicial proceedings should be reopened and brought to a conclusion with the defendants out of custody.

In sum, given the concentration of powers and the authoritarian regime to be overcome, the reform and transition of the new justice system in Venezuela requires a multidimensional approach. This should include unconventional tools that will help to build an independent and transparent justice system, through the development of international and national *ad hoc* mechanisms to support efforts to combat impunity and contribute to the democratic reconstruction of the justice system.

