

# Lawyers under attack

Barriers to the legal profession in  
Venezuela

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® Lawyers under attack: Barriers to the legal profession in Venezuela

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## I. INTRODUCTION

The International Commission of Jurists (ICJ) has been deeply engaged in documenting and advocating for the reversal of the erosion of the rule of law and the protection of human rights in Venezuela over the past decade. In this sense, the ICJ has documented a wide range of threats, attacks, and obstacles related to the proper functioning of the justice system and the fair administration of justice and accountability for human rights violations.<sup>1</sup> In particular, the ICJ has stressed the lack of guarantees related to the independence of judges, prosecutors and the legal profession.<sup>2</sup> This has had a negative effect on human rights protection, access to justice and accountability for serious human rights violations, some of which amount to crimes under international law.<sup>3</sup>

In addition, the ICJ has called attention to numerous other problems that plague the proper administration of justice, including obstacles to the free exercise of the legal profession. In this regard, in 2014, the ICJ identified four challenges for the practice of the legal profession in Venezuela:<sup>4</sup> (i) the favoritism and partiality with which the government appointed lawyers to positions in the judiciary; (ii) the prosecution of lawyers involved in politically sensitive cases involving State authorities; (iii) the weakening of bar associations that worked on issues concerning the administration of justice; and (iv) undue interference by the judiciary in matters related to the election of the directors and disciplinary tribunals of bar associations. In addition, it should be noted that these challenges were compounded by the high levels of corruption within the justice system and its lack of independence.

Eight years on, these deficiencies are not only still present, but have worsened. Certainly, in a context of increasing authoritarianism, lawyers, particularly those who provide representation in high-profile public cases or who litigate cases of human rights violations, are frequently subjected to various forms of pressure, harassment, intimidation or persecution by the authorities or by third parties who act with their support, tolerance or acquiescence. These attacks include acts of harassment and direct threats. Likewise, legal practitioners face undue obstacles and barriers in the performance of their necessary and legitimate functions and responsibilities in the interests of their clients.

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<sup>1</sup> Since 2014, the ICJ has published seven reports on the deterioration of the rule of law and judicial independence in Venezuela: (i) **Strengthening the Rule of Law in Venezuela** (2014), available in: <https://bit.ly/3rTLM7u>; (ii) **Venezuela: The Sunset of Rule of Law** (2015), available in: <https://bit.ly/37SCv8W>; (iii) **The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch** (2017), available in: <https://bit.ly/3LqoQVa>; (iv) **Achieving Justice for Gross Human Rights Violations in Venezuela** (2017), available in: <https://bit.ly/37LJPTW>; (v) **Venezuela: the judgement of civilians by military courts** (2018), only available in Spanish: <https://bit.ly/3JzrExA>; (vi) **No Room for Debate The National Constituent Assembly and the Crumbling of the Rule of Law in Venezuela** (2019), available in: <https://bit.ly/38sxdB4>; (vii) **Judges on the Tightrope Report on the Independence and Impartiality of the Judiciary in Venezuela** (2021), available in: <https://bit.ly/3KnDbAx>.

<sup>2</sup> International Commission of Jurists, *Strengthening the Rule of Law in Venezuela*, 2014, page 44. Available in: <https://bit.ly/3rTLM7u>.

<sup>3</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020, para. 161.

See also: Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions (Advanced unedited version), A/HRC/48/CRP.5, September 16<sup>th</sup>, 2021, para. 469.

<sup>4</sup> International Commission of Jurists, *Strengthening the Rule of Law in Venezuela*, 2014, page 12. Available in: <https://bit.ly/3rTLM7u>.

Such attacks are not only directed against individual lawyers, but also are structural in nature, impeding the capacity of the legal profession to carry out its essential role in the administration of justice. This includes the role in human rights protection, in a situation where there is a general climate of official intolerance of independence civil society and the enjoyment of the rights to freedom of expression, association, assembly and political participation.

With this briefing paper, the ICJ assesses the restrictions and obstacles to exercise the legal profession in Venezuela, including the risks that lawyers face when they exercise their profession independently.<sup>5</sup> The paper also describes how bar associations have faced acts of harassment and interference in a context of persecution against independent organizations. On this point, the report gives an account of the intervention of bar associations, the suspension of their internal elections, the imposition of non-freely elected authorities and the obligation to hold their elections organized by the electoral authorities of the State.

It should be noted that this paper does not deal with the situation of the independence and function of the judiciary and prosecutors. Regarding the public defense service, it is pertinent to make an additional clarification. Although the principles applicable to the legal profession are fully applicable to the public defense function,<sup>6</sup> which constitutionally has an autonomous nature,<sup>7</sup> public defense attorneys in Venezuela are considered to be civil servants working for the State and under the control of the judiciary. For this reason, the lack of independence of these lawyers is a direct consequence of the lack of independence of the judiciary.<sup>8</sup> This is especially true in relation to the functions of control and supervision of the justice system of which the public defense is a part.<sup>9</sup>

The briefing paper is organized into five sections. After this first introductory section, the second section briefly surveys the international standards applicable to the legal function. It also contains a summary of the Venezuelan legislation that regulates the professional activity of lawyers. The third section describes the main identified patterns of attacks and obstacles to the work of lawyers. The patterns identified include direct attacks on the exercise of the profession, such as those that are a consequence of the causes and clients they represent. The fifth section presents the investigation conclusions and contains a series of recommendations aimed at the respect of the role of lawyers as an essential element in strengthening the rule of law in Venezuela.

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<sup>5</sup> The cases that are identified have been selected as examples that illustrate generalized patterns of affectation to the free and independent exercise of the legal profession in Venezuela. The objective is to illustrate the obstacles that lawyers face in Venezuela, especially when they work in cases of high public or political profile, regardless of the jurisdiction or region of the country in which they litigate.

<sup>6</sup> See: Basic Principles on the Role of Lawyers. See also: Inter-American Commission on Human Rights. Guarantees for the independence of justice operators. Towards strengthening access to justice and the rule of law in the Americas, December 5<sup>th</sup>, 2013, para 189 and 190. Available in: <https://bit.ly/3xXV6eE>

<sup>7</sup> Venezuelan Constitution, articles 253 and 268.

<sup>8</sup> See: International Commission of Jurist, Judges on the Tightrope Report on the Independence and Impartiality of the Judiciary in Venezuela (2021), available in: <https://bit.ly/3KnDbAx>.

<sup>9</sup> Article 3 of the Venezuelan Organic Law of Public Defense (Official Gazette No. 6,207 Extraordinary of December 28<sup>th</sup>, 2015) reads: "*The inspection and monitoring of the provision of Public Defense services corresponds to the Supreme Court of Justice, in accordance with the provisions of the Constitution of the Bolivarian Republic of Venezuela and other laws that govern the matter*". (Free translation)

In identifying patterns of attacks against lawyers, the ICJ conducted some 60 interviews with key actors of the legal profession, such as persons from the Bar Associations of Caracas, Mérida, Táchira, Lara, Zulia and Bolívar, representatives of law schools and individual interviews with lawyers defending human rights. The report also uses reports from reliable civil society organizations on human rights and the situation of human rights defenders in the country.<sup>10</sup>

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<sup>10</sup> Many of the obstacles and challenges to exercise the legal profession have been documented by international human rights protection mechanisms of the United Nations, by the Inter-American Human Rights System, by international organizations that defend the legal profession, and by non-governmental organizations. In this regard, see, for example: Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020; Inter-American Commission on Human Rights, Annual Report 2016, Chapter IV, B. Venezuela, March 15<sup>th</sup>, 2017; Human Rights Institute of the International Bar Association, The Criminal Trial against Venezuelan Lawyer José Amalio Graterol, November 2013; and Amnesty International, Penal Forum and Center for Defenders and Justice, Calculated Repression: Correlation between stigmatization and arbitrary detention for political reasons in Venezuela, February 10<sup>th</sup>, 2022.



## II. INTERNATIONAL AND NATIONAL STANDARDS REGARDING THE EXERCISE OF THE LEGAL PROFESSION IN VENEZUELA

There are a number of international standards on the independent and free exercise of the legal profession that are universally applicable, as well as the particular Venezuelan regulations on the practice of law and the legal framework of bar associations. Venezuela is bound to uphold these standards in its laws, policies and practices regarding the administration of justice in the country.

### **ICJ DECLARATION AND PLAN OF ACTION ON UPHOLDING THE RULE OF LAW AND THE ROLE OF JUDGES AND LAWYERS IN TIMES OF CRISIS (ICJ GENEVA DECLARATION)<sup>11</sup>**

**Principle 7:** Since the protection of human rights may be precarious in times of crisis, lawyers should assume enhanced responsibilities both in protecting the rights of their clients and in promoting the cause of justice and defense of human rights. All branches of government must take all necessary measures to ensure the protection by the competent authorities of lawyers against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure, or any other arbitrary action as a consequence of their professional functions or legitimate exercise of human rights. In particular, lawyers must not be identified with their clients or clients' causes as a result of discharging their functions. The authorities must desist from and protect against all such adverse actions. Lawyers must never be subjected to criminal or civil sanctions or procedures which are abusive or discriminatory or which would impair their professional functions, including as a consequence of their association with disfavored or unpopular causes or clients.

**Principle 8:** In times of crisis, lawyers must be guaranteed prompt, regular and confidential access to their clients, including to those deprived of their liberty, and to relevant documentation and evidence, at all stages of proceedings. All branches of government must take necessary measures to ensure the confidentiality of the lawyer-client relationship, and must ensure that the lawyer is able to engage in all essential elements of legal defence, including substantial and timely access to all relevant case files.

### **A. International law and standards relating to the role and exercise of the legal profession**

#### *The role of the lawyer*

International human rights law contains provisions in respect of the role of the lawyer, including expressly in the International Covenant on Civil and Political Rights (ICCPR),

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<sup>11</sup> International Commission of Jurists, ICJ declaration and plan of action on upholding the rule of law and the role of judges and lawyers in times of crisis, 2008. Available at: <https://bit.ly/38x3EyI>  
See also: International Commission of Jurists, Legal Commentary to The ICJ Geneva Declaration, 2011. Available at: <https://www.icj.org/wp-content/uploads/2011/05/ICJ-genevadeclaration-publication-2011.pdf>

to which Venezuela is a party, and the American Convention on Human Rights (ACHR).<sup>12</sup> General standards on the role of the lawyer are set out in the UN Basic Principles on the Role of Lawyers.<sup>13</sup>

An independent and accountable legal profession is a principal element of the rule of law.<sup>14</sup> In relation to the administration of justice, lawyers are necessary to ensure the right to liberty, including habeas corpus and pre-trial rights; the right to a fair trial or hearing by an independent and impartial court; and the right to an effective remedy and reparation.

In general, the role of the lawyer is to provide legal advice or counsel to individuals in respect of their rights and other legal interests. This may take the form of formal legally representation before courts and other official bodies. Within judicial proceedings, the role played by lawyers is essential to guarantee the rights of accused persons. In addition, lawyers can bring actions in cases where a person's human rights have been violated or may be violated, in order to ensure effective remedies and reparation.

The rights to a fair trial, due process and judicial guarantees are provided in Article 14 of the ICCPR, to which Venezuela is a State party. In particular, article 14.3 (b) provides that in criminal proceedings everyone shall be entitled "*to have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing*". Article 14.3(d) provides for the right to assistance of one's own choosing and to have legal assistance assigned, even when the person "*does not have sufficient means to pay for it.*" The right to legal counsel is also enshrined in article 8.2 (d) of the American Convention on Human Rights.

Along the same lines, the UN Human Rights Committee, the supervisory body for the ICCPR, has made clear that "lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter."<sup>15</sup>

#### *The independence of the legal profession and freedom of association*

For the legal advice to be effective, it is necessary for the States to offer guarantees for the independent exercise of the legal profession at an individual and collective level.<sup>16</sup> The UN Basic Principles on the Role of Lawyers establishes that:

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<sup>12</sup> Venezuela has been a party to the American Convention, but purported to withdraw from the treaty in 2013. Whether that withdrawal was valid and effective remains a matter of contention, as does a new purported ratification in 2019. See: Silvia Steininger, Don't Leave Me This Way: Regulating Treaty Withdrawal in the Inter-American Human Rights System, 5 March 2021. Available at: <https://bit.ly/3sGj6Q3>

<sup>13</sup> Adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Available at: <https://bit.ly/3Mr9hgH>

<sup>14</sup> International Commission of Jurists, Tunis Declaration on Reinforcing the Human Rights and Rule of Law, 2019. Available at: <https://bit.ly/3lkVZpT>

<sup>15</sup> UN Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals to a fair trial, UN DOC CCPR/C/GC/32, 23 August 2007, para 34. Available at: <https://bit.ly/3FWDE4>

<sup>16</sup> International Commission of Jurists, Practitioner's Guide #1: International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, 2005, second edition, page. 68. Available in: <https://bit.ly/3xTYA1L>.

*"(...) adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession". (underlining not in original text)*

Principle 2 provides that:

*"Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as [any status-based] discrimination (...)"*

The principles also state that the independence of professional bar associations must be guaranteed. In this regard, Principle 24 stipulates that the *"executive body of professional associations shall be elected by its members and shall exercise its functions without external interference"*.

The right to freedom of association is guaranteed under article 22 of the ICCPR and article 16 of the American Convention. The Basic Principles affirm in Principle 23 that:

*"Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession."*

The UN Human Rights Committee has stressed that the legal criteria established to exercise the profession and access bar associations should not compromise independence in the exercise of the profession.<sup>17</sup> Regarding bar associations, the Committee has noted that a compulsory membership in a State-controlled association is detrimental to such independence.<sup>18</sup>

States must guarantee that lawyers can exercise their functions independently. In addition, States have an obligation to allow lawyers to form associations to advocate for their interests and independence in the exercise of the legal profession.<sup>19</sup> The free exercise of the legal profession *"is an essential requirement for the protection of the human rights of the population"*.<sup>20</sup>

Along with the guarantee of independence, States also have the obligation to respect other essential elements in the exercise of the legal profession. The United Nations Basic

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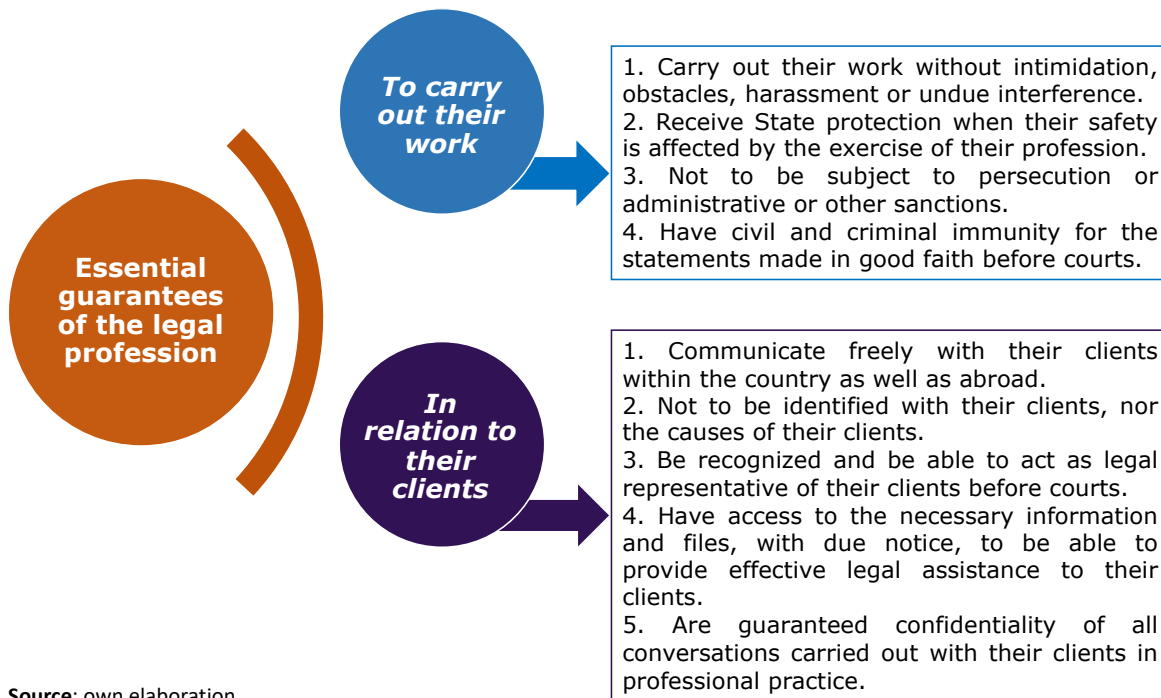
<sup>17</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: Azerbaijan, November 12<sup>th</sup>, 2001, para. 14.

<sup>18</sup> Human Rights Committee, Concluding Observations of the Human Rights Committee: Belarus, CCPR/C/79/Add.86, November 19<sup>th</sup>, 1992, para. 14. Available at: <https://bit.ly/3wxHRz0>

<sup>19</sup> International Commission of Jurists, the ICJ expresses concern over interference in the Caracas Bar Association, July 24<sup>th</sup>, 2008 (free translation). Available in Spanish at: <https://bit.ly/390lp9y>

<sup>20</sup> Id.

Principles on the Role of Lawyers mention minimum guarantees for the exercise of the profession, which are summarized in the following table:<sup>21</sup>



Lawyers also often function as human rights defenders. This category, which not only covers people with legal training, includes all lawyers who work for the defense of human rights from different perspectives, regardless of whether they receive economic remuneration or work pro bono.<sup>22</sup>

In cases where lawyers perform tasks as human rights defenders, the provisions of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms should be considered (Declaration on Human Rights Defenders). In particular, Article 12.2 of the Declaration establishes that States must adopt adequate protection measures so that human rights defenders can carry out their work, which includes protection *"against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action"*.

<sup>21</sup> United Nations Basic Principles on the Role of Lawyers, Principles 16 to 22.

<sup>22</sup>The UN Special Rapporteur on Human Rights Defenders has made it clear that the category of human rights is not limited to "a privileged elite or professional class". On the contrary, "[e]veryone is a human rights defender when they take up the human rights project through peaceful mean". In this regard, the Special Rapporteur emphasized that a human rights defender is *"any person who, individually or in association with others, acts or seeks to act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms, at the local, national, regional or international levels"*. See: Special Rapporteur on human rights defenders, Situation of human rights defenders, UN Doc A/73/215, July 23rd, 2018, paras. 14 and 15. Available at: <https://bit.ly/39sayW4>

See also: International Commission of Jurists, Access to justice in cases of enforced disappearances and unlawful deaths – Guide for Human Rights Defenders, 2021, p. 49 and ff. Available in: <https://bit.ly/38MbpR4>

## **B. Venezuelan domestic law on the exercise of the legal profession**

The Venezuelan Constitution does not expressly enshrine provisions related to the role of the legal profession. As the Constitution is the State's overarching legal instrument and because it provides for a substantial number of rights, the exercise of the legal profession is necessarily relevant to its entirety. As has been recognized by the government itself,<sup>23</sup> several constitutional provisions contain rights and guarantees that are intimately related to the exercise of the legal profession. Among them are the right to an effective remedy (article 26 and 27); the right to liberty (article 44); the right to due process (article 49), which expressly includes the right to defense and legal assistance as inviolable rights (article 49.1) and the right to fair trial (article 49.3); and right to assembly (article 52).

Article 253 of the Venezuelan Constitution establishes that lawyers are part of the justice system.<sup>24</sup> Article 87 of the Constitution establishes the right to work and article 105 sets forth that the law will establish the conditions for the exercise of the different professions. Regarding the exercise of the legal profession, the main regulation is found in the Lawyer's act (*Ley de Abogados*),<sup>25</sup> which covers public or private legal activities done by lawyers.

Article 7 of the Lawyer's Act establishes that the exercise of the legal profession requires, together with obtaining a law degree, registration in a bar association and in the Lawyer's Social Welfare Institute (*Instituto de Previsión Social del Abogado, INPREABOGADO*).<sup>26</sup> Compliance with these requirements is necessary for a person to be admitted as a legal representative before judges, notaries and other civil, political, and administrative authorities.<sup>27</sup> It is also relevant to mention that article 4 of the Act establishes that every person accessing the court as a plaintiff or defendant in criminal and civil cases must be represented by a lawyer.<sup>28</sup>

Bar associations are defined under article 33 of the Lawyer's Act as:

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<sup>23</sup> Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations Office and other International Organizations, Response II.2.S 20.D.ONU.1, No. 843, Response to the communication of the Mandates of the Working Group on the Arbitrary Detention and of the Special Rapporteur on the Independence of Magistrates and Lawyers in the case of lawyer Tadeo Arrieché Franco, December 29<sup>th</sup>, 2015, para 47. Available in Spanish at: <https://bit.ly/3KTWYsA>

<sup>24</sup> Article 253 provides that "the justice system consists of the Supreme Tribunal of Justice, such other courts as may be determined by law, the Office of Public Prosecutions, the Public Defender's Office, criminal investigation organs, judicial assistants and officials, the penitentiary system, alternative means of justice, citizens participating in the administration of justice in accordance with law and attorneys at law admitted to practice.

<sup>25</sup> Another important set of regulations are contained in the Code of Ethics of the Venezuelan Lawyer.

<sup>26</sup> Pursuant to article 5 of the Institute's regulations, its objective is: "to ensure the social and economic well-being of legal professionals, their families and other persons affiliated with it and ensure by suitable means, protection against contingencies arising from death, illness or total or partial disability of those affiliated to the Institute" (free translation).

<sup>27</sup> Lawyer's Act, Articles 3, 4, 5 and 6.

Similarly, see article 140 of the Organic Code of Criminal Procedure, article 166 of the Code of Civil Procedure and article 87 of the Organic Law of the Supreme Tribunal of Justice.

<sup>28</sup> The right to be assisted by a lawyer is also enshrined in other laws such as article 139 of the Organic Criminal Code of Procedure.

*"(...) professional corporations with legal personality and their own assets, responsible for ensuring compliance with the rules and principles of professional ethics of their members and defending the interests of the legal profession (...)"*. (free translation)

It should be noted that, given the federal organization of Venezuela, there is not one single bar association, but there is one in each territorial political entity (23 states and the Capital District).<sup>29</sup>

In addition, article 43 of the Lawyer's Act establishes the existence of a Venezuelan Federation of Bar Associations, made up of the bar associations and the delegations that depend on them. Article 43 also establishes that the Federation has *"an exclusively professional nature, legal status and its own assets"*. According to article 44 of the Act, the Federation:

*"(...) shall promote the moral and scientific improvement of lawyers, their material and social welfare; it shall promote the defence of the interests and privileges of its member Bar Associations and Delegations and shall increase public recognition in society of the fundamental mission of the legal profession."* (free translation)

Likewise, although the Act does not expressly recognize the independence of lawyers, nor the independence of bar associations, it does establish that the Federation must *"exercise vigilant action to protect the free and independent practice of law"*.<sup>30</sup>

Other laws provide specific guarantees for the practice of law. In particular, the Organic Code of Criminal Procedure (Código Orgánico Procesal Penal) contemplates some guarantees, including the inviolability of lawyers and defense attorneys' offices (article 143); the duty of judges not to restrict the right to defense (article 107); and the right not to be compelled to disclose the communications with their clients (article 210.3).

Finally, it should be highlighted that the domestic legal framework sets out the duty of lawyers to litigate in good faith. It also establishes sanctions (civil and criminal) and fines when they do not exercise their duties appropriately.<sup>31</sup> This includes actions in bad faith, recklessness or when a person practices the profession without law requirements. They can also be sanctioned for disrespectful writings or actions (*escritos o actuaciones irrespetuosas*) in courtrooms.<sup>32</sup>

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<sup>29</sup> Lawyer's act, Article 32.

<sup>30</sup> Lawyer's act, Article 46.2.

<sup>31</sup> Lawyer's act, articles 58 and s.s. and Organic Code of Criminal Procedure, article 106.

<sup>32</sup> See, for example: Code of Civil Procedure, article 171; Organic Law of the Judiciary, article 91; and Organic Law Supreme Court of Justice, article 121 and s.s.

### III. OBSTACLES TO THE FREE EXERCISE OF THE LEGAL PROFESSION IN VENEZUELA

This section examines some of the obstacles that lawyers face in the independent and free exercise of their profession, individually and collectively. From the outset, it should be noted that many of these obstacles persist, and have even increased in recent years, despite the formal existence of the laws highlighted that are aimed at protecting the free and independent exercise of the legal profession. These obstacles are typically more burdensome in respect of human rights representations and cases involving people with a high public profile. They are exacerbated by weaknesses in the independence and effectiveness of the judiciary,<sup>33</sup> and in general, with the continuing erosion of the rule of law and human rights in Venezuela.

The obstacles that lawyers face for the independent and free exercise of the legal profession are of three types:

- i. Obstacles related to the direct exercise of the profession (individual challenges);
- ii. Obstacles related to limitations for the adequate representation of their clients and their role in administering justice; and
- iii. Institutional and structural obstacles.

These obstacles groups are often inevitably interrelated and cannot be considered in isolation. This is because the undue barriers or limitations imposed of a lawyer's clients will generally affect the performance of the legal profession itself. At the same time, the problems faced by individual lawyers are expressions of problems that affect the profession as a whole. Similarly, attacks or threats against institutions can favor or facilitate actions that affect the independence of lawyers or the institutional capacity to protect the independence of the legal profession.

Likewise, it should be noted that many of these obstacles, limitations, and attacks are not typically reflected in official records, such as criminal sentences. For example, in cases in which lawyers have faced undue limitations or where obstacles to their functioning have been complained about, such irregularities are not reflected in the files or the sentences handed down in the cases. In the same sense, in many cases in which lawyers have been victims of threats or attacks, they decide not to report them to the corresponding domestic instances due to the well-founded fear that such threats come from the State security forces.<sup>34</sup>

The most prevalent obstacles and attacks are described below.

#### **A. Harassment, threats, and attacks**

The most frequent obstacle that lawyers face is attacks against them in relation to the carrying out of their professional functions, including when aimed at preventing or

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<sup>33</sup> International Commission of Jurist, *Judges on the Tightrope Report on the Independence and Impartiality of the Judiciary in Venezuela* (2021), available in: <https://bit.ly/3KnDbAx>

<sup>34</sup> See for example: Inter-American Commission on Human Rights, Resolution 28/15, Precautionary Measures No. 127-15 of 28 August 2015 in favor of José Vicente Haro and Pierina Camposeo.

inhibiting them from doing so. In recent years, the attacks have increased, which in parallel has increased the vulnerability in the exercise of the legal profession.

The ICJ's review of various cases indicates that violence and intimidation is a strategy to prevent lawyers from carrying out functions of their profession, such as, for example, filing legal actions, representing a person in court, or denouncing a situation before international mechanisms.

The attacks include acts aimed at stigmatization and threats in media with ties to the government or the ruling party, the United Socialist Party of Venezuela (*Partido Socialista Unido de Venezuela*, PSUV). In many cases, these attacks have triggered other serious crimes or human rights violations, such as arbitrary arrests for political reasons. On this point, an investigation carried out by Amnesty International, Penal Forum and the Center for Defenders and Justice found "*a direct relationship between stigmatization and hate speech in media with links to the government or the United Socialist Party of Venezuela (PSUV) and politically motivated arbitrary detentions, which complement and feed back on each other*".<sup>35</sup>

#### **Stigmatization through State media**

The stigmatization has affected defense lawyers in high-profile public cases. This was the case of Joel García Hernández, lawyer for Deputy Juan Requesens. On 7 July 2019, García Hernández and other individuals were named on the television program "*Con el Mazo Dando*" as individuals allegedly involved in a conspiracy to assassinate two pro-government political leaders. They were described as "murderers" and "terrorists" and accused of "defending murderers and violators of human rights".<sup>36</sup>

Another example is the lawyer and human rights defender, Humberto Prado Sifontes, who complained that accusations made by the host in various broadcasts of the program led to acts of harassment, intimidation, and surveillance against him and his work team. In this regard, before the Inter-American Court of Human Rights, the representatives of lawyer Prado Sifontes alleged "*acts of harassment in Venezuelan airports, intervention and public exposure of private communications, threats to invalidate identification documents, as well as unjustified reviews and monitoring*".<sup>37</sup>

The Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela<sup>38</sup> has highlighted that in the television program "Con el Mazo Dando",

<sup>35</sup> Amnesty International, Penal Forum and Center for Defenders and Justice, Venezuela: Calculated repression: Correlation between stigmatization and politically motivated arbitrary detentions, page. 11. Available in: <https://bit.ly/3F0ioSG>

<sup>36</sup> News 24, "Con el Mazo Dando", 3 July 2019, minute 1:08:02 and following. Available in Spanish: <https://youtu.be/TKGI56Ez-0c?t=4082>

<sup>37</sup> Inter-American Court of Human Rights, Matters of Certain Penitentiary Centers of Venezuela. Humberto Prado. Marianela Sánchez Ortiz and family with regarding Venezuela. Provisional Measures. Order of the Inter-American Court of Human Rights of July 8, 2020, para 10 (free translation).

<sup>38</sup> The Mission was established by the United Nations Human Rights Council on 27 September 2019. Currently, the mandate of the Mission ends in September 2022. The mission was established "to investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims". See: Human Rights Council, Resolution adopted by the Human Rights Council on 27 September 2019, A/HRC/RES/42/25, 8 October 2019, para 24. Available at: <https://bit.ly/3FUXIkM>



broadcast by the State television station, accusations are frequently leveled at people who are considered opponents of the Venezuelan government. Many people smeared in the program have subsequently been subjected to harassment and arbitrary arrest.<sup>39</sup>

Lawyers who work in high profile public cases or who work as victims' representatives in cases of human rights violations are frequently targets of intimidation, harassment, threats and surveillance against them or their families. These actions are committed by State agents, such as judges, prosecutors, police, intelligence officials, and lawmakers, as well as by certain private actors.<sup>40</sup> In the case of private actors, they often act on behalf of the authorities or third parties with the tolerance, acquiescence, or support of the authorities.

On this point, the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (FFM) documented that one of the factors that affects the right to defense is the harassment and intimidation of defense attorneys or their families from security forces. According to the FFM, of 56 legal professionals interviewed by members of the FFM:

*"57 percent said they had received some form of threats or harassment against themselves or their families. The threats they claim came from military, police or intelligence officials and in one case, from members of colectivos. Such harassment included surveillance, receiving intimidating phone calls or being blocked from entering tribunals".<sup>41</sup>*

Similarly, the FFM determined that the profiling carried out by the State security forces against people who "*challenge official narratives*" included lawyers and defense attorneys.<sup>42</sup> Many of the people profiled have been investigated and arrested. In addition, the FFM established that relatives, friends and colleagues of the profiled persons have also been detained in order to "*to extract information about or apply pressure*".<sup>43</sup>

### **Harassment and intimidation against defense lawyers who work in high profile cases**

Theresly Malavé Wadskie is a defense lawyer involved in various cases of high public profile, including political opponents of the Venezuelan government. She has been

<sup>39</sup> Regarding the effects of the accusations made in "Con el Mazo Dando", program against people accused of terrorism, see: UN International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 470 and s.s.

See also: Human Rights Committee, Final observations on the fourth periodic report of the Bolivarian Republic of Venezuela, CCPR/C/VEN/CO/4, 14 August 2015, para. 18; Inter-American Commission on Human Rights, High Time to Pull the Plug of Televised Reprisals Against Rights Defenders in Venezuela, 22 July 22th 2015, available in: <https://bit.ly/37RolFd>

<sup>40</sup> See for example: Inter-American Court of Human Rights, Provisional Measures regarding Venezuela, Matters of Certain Penitentiary Centers of Venezuela Humberto Prado, Marianela Sánchez Ortiz and Family, July 8<sup>th</sup>, 2020; Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, UN Doc A/HRC/45/CRP.11, September 15<sup>th</sup>, 2020, para. 359.

<sup>41</sup> International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions (Advanced unedited version), UN Doc A/HRC/48/CRP.5, 16 September 2021, para. 313.

<sup>42</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020, para. 23.

<sup>43</sup> Id., para. 24.

involved in cases where the due process was allegedly not respected and in cases with allegations of torture and cruel, inhuman and degrading treatment in the facilities of the General Directorate of Military Counterintelligence (*Dirección General de Contrainteligencia Militar*, DGCIM).

Several of her clients have criminal proceedings before the special jurisdiction against terrorism (*jurisdicción especial contra el terrorismo*). Because of her work before this jurisdiction, Malavé Wadskier has alleged that she has suffered harassment and intimidation. In this regard, she has stated that the judge of the First Special Court on Terrorism has engaged in hostile treatment against her only for demanding respect for the human rights of her clients. Among others, her clients have alleged that the judge denied Malavé Wadskier access to the tribunal. Her clients have also stated that, on some occasions, the judge did not allow her to file petitions.

She has also alleged that she has suffered acts of harassment by officials of the DGCIM, including that they have stationed patrols in front of her house and have followed her family activities. Additionally, on 27 September 2021, the officials broke into her building without any kind of court order.<sup>44</sup>

Most of these actions against lawyers remain unredressed and perpetrators enjoy near total impunity. At the same time, it strengthens the sense of fear and vulnerability felt by lawyers and their clients. In particular, it should be underlined that threats and intimidation have a direct effect on "*the ability to arm an adequate defence*".<sup>45</sup>

## **B. Obstacles imposed in respect representation of clients**

In the exercise of their professional functions, lawyers find themselves faced with impediments that prevent them from being able to adequately represent and assert the interests of their clients. One of the most used practices is the interception of communications with their clients or with third parties (for example, advisors, journalists or witnesses), in breach of the principle of lawyer/client confidentiality.<sup>46</sup>

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<sup>44</sup> World Organization Against Torture: Venezuela: Harassment against human rights lawyer Theresly Malavé Wadskier. Date Nov. 09, 2021, available (in Spanish) at <https://www.omct.org/es/recursos/llamamientos-urgentes/venezuela-hostigamiento-contra-la-abogada-de-derechos-humanos-theresly-malav%C3%A9-wadskier>; International Federation for Human Rights, Venezuela: Harassment against human rights lawyer Theresly Malavé Wadskier. Date Nov. 09, 2021, Available (only in Spanish) at: <https://www.fidh.org/es/temas/defensores-de-derechos-humanos/venezuela-hostigamiento-contra-la-abogada-de-derechos-humanos>; United Nations. Joint communication of several special procedures of the Human Rights Council (situation of human rights defenders; working group on arbitrary detention; special rapporteur on the rights to peaceful assembly and association, special rapporteur on the independence of judges and lawyers; and special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism) addressed to the Bolivarian Republic of Venezuela, dated 14 January 2022 Ref. AL Ven 9/21 Urgent appeal in the cases of Engels Vladimir Puertas Ochoa, Theresly Malavé Wadskier, Yasnaia Villalobos, Javier Tarazona and Rodney Alvarez Rodríguez. Available (only in Spanish) at: <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?qId=26930>

<sup>45</sup> International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions (Advanced unedited version), A/HRC/48/CRP.5, 16 September 2021, para. 315. See also: International Commission of Jurists, Strengthening the Rule of Law in Venezuela, 2014, page. 48. Available in: <https://bit.ly/3rTLM7u>

<sup>46</sup> See, for example: Amnesty International, Venezuela: The faces of impunity. One year since the protests, victims are still waiting for justice, 2015, page. 42. Available in: <https://bit.ly/3s8nUNQ>

The right to legal assistance, as noted above protected under international law and by the Venezuelan Constitution,<sup>47</sup> has also been limited, impeded or denied in the course of procedures carried out by the security forces, including the raid of offices, houses, and properties without observing legal requirements; and searches and temporary confiscations of electronic equipment (cellphones and computers). In addition, the refusal by to allow access to legal counsel has extended to interrogations and interviews conducted by police officials.<sup>48</sup> On some occasions, judges, prosecutors, and police officers have prevented the engagement by persons of private defense counsel.<sup>49</sup>

These types of actions not only affect the lawyer's commitment to their clients, but also, in the vast majority of cases, it translates into violations of due process. It has also facilitated the commission of serious human rights violations, such as torture and short-term enforced disappearances.

On this matter, the FFM found that the intelligence bodies transferred the detainees to the headquarters of the Bolivarian National Intelligence Service (*Servicio Bolivariano de Inteligencia Nacional, SEBIN*) and "*once there, officials interrogated detainees without the presence of a lawyer and/or refused to allow them to contact their lawyers when requested*".<sup>50</sup> In relation to cases of short-term enforced disappearance,<sup>51</sup> the FFM documented cases where:

*"(...) Bolivarian National Intelligence Service officials and other authorities either denied having the person in detention or told family members and lawyers trying to locate them that they did not have any information. The whereabouts of detainees remained unknown for periods ranging from a few days – in most cases – to several weeks".<sup>52</sup> (underlining not in original text).*

The FFM has determined that, in order to obtain "confessions" or information, many detainees have been subject to torture or cruel or inhuman treatment while they were held uncommunicated.<sup>53</sup> The lack of access to legal counsel helps to facilitate human rights violations such as arbitrary detention and torture and ill-treatment.

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<sup>47</sup> Venezuelan Constitution, article 49.1.

<sup>48</sup> As an example, see: CIVILIS Human Rights, FIDH / Venezuela: Criminalization of Convite A.C and search of its headquarters, December 2020. Available in Spanish at: <https://bit.ly/3Edt4wO>; World Organization Against Torture, Venezuela: Illegal search of the headquarters of Fundaredes and the maternal home of its director, July 16<sup>th</sup>, 2021. Available in Spanish at: <https://bit.ly/3JIBq9o>

<sup>49</sup> Acceso a la Justicia, Chronology of the "Fundaredes" case. Available in Spanish at: <https://bit.ly/3JVG1wi>

<sup>50</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, 25 September 2020, para. 45.

<sup>51</sup> Enforced disappearance is a violation composed of the following elements: (i) that a person be deprived of their liberty; (ii) that the deprivation of liberty has been committed by State agents or by individuals acting with authorization, support or acquiescence of those; and (iii) it is denied that the deprivation of liberty has taken place or the fate or whereabouts of the person is concealed. Consequently, enforced disappearance does not require a minimum temporal element. It is possible that a person is only "disappeared" for a short period of time. On this subject see: International Commission of Jurists, International legal framework on enforced disappearance and extrajudicial killing, 2020, page. 9 and ff. Available in Spanish at: <https://bit.ly/3jICW8l>

<sup>52</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020, para. 46.

<sup>53</sup> Id., para. 48 and 72.

Judges, prosecutors, police or intelligence officers often illegally restrict access to archives, files and other documents necessary to defend their clients. In addition, prison personnel and police officials disproportionately restrict the time lawyers have, to meet with their clients who are in prison. Moreover, the authorities do not guarantee that meetings are held in private.<sup>54</sup>

#### **Lack of access to files**

On 8 October 2018, the opposition Council member of the Libertador Municipality in the Capital District, Fernando Alberto Albán Salazar, died while he was in Bolivarian National Intelligence Service (*Servicio Bolivariano de Inteligencia Nacional*, SEBIN) custody.<sup>55</sup> Although the Prosecutor's office affirmed that it had been a suicide, relatives, acquaintances and members of the opposition rejected the official version. Subsequently, the Prosecutor's office opened an investigation into the death of Albán Salazar, in which two SEBIN officials were accused of breaching their custody obligations (*quebrantamiento de sus obligaciones de custodia*). Despite their multiple requests, Mr. Albán Salazar's lawyers were unable to access the case file, nor were they able to join the process as parties to the criminal proceeding.<sup>56</sup>

The attacks on and threats to the exercise of the legal profession has typically been exacerbated in periods of crisis.<sup>57</sup> This was the case of the civic and political protests in Venezuela in 2014 and 2017, where arbitrary arrests of demonstrators took place.<sup>58</sup> In this context, detainees were prevented from appointing lawyers of their choice and were forced to be represented by public defenders, who are not independent from judicial authorities.<sup>59</sup>

Making matters worse, these public defenders frequently advised the detainees to admit to the accusations and the charges. They failed in their responsibility to question the lawfulness of the arrests or to allegations of human rights violations, including of the rights to freedom of expression and assembly of the detained protesters.

This situation was particularly serious during the 2017 protests because the Government decided to tackle the protests using the special measures established in the "Zamora Plan".<sup>60</sup> The purpose of the Plan was to "*to ensure internal order in the country, involving*

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<sup>54</sup> Id., para. 75

See also: Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 612.

<sup>55</sup> BBC News, Death of Fernando Albán in a SEBIN police station: 3 unknowns in the case of the opponent who died in Venezuela, 10 October 2018. Available only in Spanish: <https://bbc.in/3JMhtB4>

<sup>56</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 654 and ff.

<sup>57</sup> International Commission of Jurists, ICJ declaration and plan of action on upholding the rule of law and the role of judges and lawyers in times of crisis, 2008. Available at: <https://bit.ly/38x3Eyl>

<sup>58</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, 25 September 2020, para. 128 and 130.

<sup>59</sup> On this subject, see: Human Rights Center of the Andrés Bello Catholic University, "Let there be no trace: The concealment of medical and legal evidence in the framework of demonstrations and detentions", 2015, Only available in Spanish: <https://bit.ly/3Emqmf8>; Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020, para. 74.

<sup>60</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 1549.

military (including the Bolivarian Militia) and police and intelligence force".<sup>61</sup> Within the Plan, the protests are mentioned as threats to internal order and a military response to them is established.<sup>62</sup>

One of the consequences of the plan was the modifications in the procedure when people were detained in the context of the protests. In this regard, the FFM documented the following:

*"In the 2014 cases the Mission examined, detainees were generally brought to the closest facilities of the detaining force, whether military, GNB detachments or local police facilities. After 2017, with Plan Zamora in effect, the detainees were generally brought to the nearest REDI or ZODI for detention. In the cases investigated, the detainees stayed between three days and almost three years in detention. In almost all cases reviewed, the detainees were not allowed to contact their families or lawyers before the initial appearance hearing".*<sup>63</sup>

Additionally, the Plan also made it easier for people detained in the context of the protests to be brought before military courts.<sup>64</sup> Under international standards, military courts should generally only be used for military personnel, not civilians.<sup>65</sup> Frequently, these people were accused of "treason against the country", "terrorism" or "rebellion".<sup>66</sup>

### **C. Criminal prosecution against lawyers**

Lawyers have also been subject to criminal proceedings, sometimes solely for exercise of their professional function or because they are associated with the clients they represent.<sup>67</sup> These processes can also be a "sanction" for exercising some of their fundamental freedoms, such as the right to peacefully assemble, the right to freedom of association, the right to freedom of expression and the right to political participation. They may also be invoked in response to lawyers who are applying for positions within public office, or for questioning or denouncing what they consider to be arbitrary or ill-founded decisions of the judicial authorities during trials. Likewise, these criminal proceedings are not only opened arbitrarily, without well-founded reasons, but they are also carried out without respect for due process.

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<sup>61</sup> Id., para. 229.

<sup>62</sup> Id., para. 1551.

See also: Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Report, A/HRC/45/33, September 25<sup>th</sup>, 2020, para. 127.

<sup>63</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 1582. (*emphasis added*)

<sup>64</sup> See: El Tiempo, Envían a tribunales militares a detenidos en protestas en Venezuela, 9 May 2017. Available at: <https://bit.ly/3M2CZrC>; The New York Times, Venezuela Tries Protesters in Military Court 'Like We Are in a War', 12 May 2017. Available at: <https://nyti.ms/38Q1nyf>; Inter-American Commission on Human Rights, IACHR Welcomes Reform of Venezuela's Military Criminal Court System, Calls for Effective and Immediate Implementation, 14 October 2021. Available at: <https://bit.ly/38KBOyK>

<sup>65</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32, 23 August 2007, para 22. Available at: <https://bit.ly/3lgNOD7>; See also: Draft principles governing the administration of justice through military tribunals, UN Doc. E/CN.4/2006/58, 13 January 2006, Principle 5. Available at: <https://bit.ly/3wyk560>

<sup>66</sup> See: El Tiempo, Envían a tribunales militares a detenidos en protestas en Venezuela, 9 May 2017. Available at: <https://bit.ly/3M2CZrC>

<sup>67</sup> In this regard, it should be noted that Principle 18 of the Basic Principles on the Role of Lawyers provides: "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions".

### **Criminal prosecution for representing high-profile cases**

A significant number of lawyers have been subject to criminal processes because of the clients they represent.

#### The case of lawyer José Amalio Graterol

José Amalio Graterol has represented Judge María de Lourdes Afiuni Mora since April 2010.<sup>68</sup> Judge Afiuni Mora was arrested at the end of 2009 and subject to criminal prosecution for the legitimate exercise of her judicial function. Her's is one of the most emblematic cases of the deterioration of judicial independence in Venezuela.<sup>69</sup>

In 2012, because of the public complaints he made outside of the courtroom about the lack of guarantees and independence in the case of Judge Afiuni Mora, Graterol began to receive threats and intimidation.<sup>70</sup>

On 4 June 2012, as part of a trial for the murder of one of his clients, Graterol was arrested by order of the Vargas Judicial Circuit Court (today, La Guaira). The official reason for the arrest was that Graterol had refused to allow the trial to continue without his client's presence. During the trial, Graterol had highlighted that the accused's presence was a requirement under the Organic Code of Criminal Procedure. Despite this official reason, Graterol had previously been warned by court bailiffs to have a "passive attitude" during the trial. The court bailiffs informed him that the judges had been upset by his statements the day before on the television program "Yo Prometo".<sup>71</sup> During the program, Graterol not only strongly criticized the process against Judge Afiuni Mora, but also stated that the judiciary was not independent, nor did it respect due process. In addition, he described several judges and justices as "the jurists of the horror of the Bolivarian revolution".<sup>72</sup>

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<sup>68</sup> International Bar Association's Human Rights Institute, The Criminal Trial against the Venezuelan Lawyer José Amalio Graterol, November 2012, p. 10. Available in: <https://bit.ly/3y3xVzx>

<sup>69</sup> On 10 December 2009, the 31st Control Judge of Caracas, María de Lourdes Afiuni Mora, was arrested hours after having ordered the conditional release of a person who had been in preventive detention for more than two years, the maximum period of preventive detention provided for in Venezuelan law. Aside from Venezuelan law, the judge's decision was based on a recommendation from the United Nations Working Group on Arbitrary Detention. The arrest of the judge was made without a court order. After almost two years under arrest, in 2011, the judge was placed under house arrest for health reasons. In 2013, she was granted parole. In 2019, the judge was sentenced to five years in prison for the crime of spiritual corruption (corruption without money). To date, the judge is forbidden to leave country. At the time, President Hugo Chaves Frías described the judge as a "bandit" and demanded that "in the name of the country's dignity" she be sentenced to 30 years in prison. For this reason, many people, and his own lawyer José Amalio Graterol, affirmed that the judge was "Chavez's personal prisoner". On the case of the judge, see: International Commission of Jurists, Strengthening the Rule of Law in Venezuela, 2014, page 28 and s.s. Available in: <https://bit.ly/3rTLM7u>; International Bar Association's Human Rights Institute, IBAHRI condemns sentence against Venezuela's Judge María Lourdes Afiuni. Available at: <https://bit.ly/3rXI9ha>; and BBC News, María Lourdes Afiuni: the ordeal of "Chavez's personal prisoner" who was released 10 years later, July 5<sup>th</sup>, 2019. Available in Spanish at: <https://bbc.in/3ruGFdM>

<sup>70</sup> International Bar Association's Human Rights Institute, The Criminal Trial against the Venezuelan Lawyer José Amalio Graterol, November 2012, page. 10. Available in: <https://bit.ly/3y3xVzx>

<sup>71</sup> Id., page. 10 y 11.

<sup>72</sup> The intervention (in Spanish) of the lawyer Graterol in the program can be consulted at the following link: <https://www.youtube.com/watch?v=u0N1lVcIck8>

On 12 June 2012, Graterol was released. Hewas subsequently charged and tried for obstruction of justice.<sup>73</sup> On 18 December 2012, Graterol was found guilty of obstructing justice for his conduct on 4 June and was sentenced to six months in prison. For his conviction, a "reform" of the Organic Code of Criminal Procedure was applied retroactively. The reform, issued on 15 June 2012 established that trials were possible in the absence of the accused, in contravention of the ICCPR.<sup>74</sup>

#### The case of the lawyer Tadeo Arrieche Franco

Tadeo Arrieche Franco was an external lawyer for the supermarket chain "Día a Día Supermercados". At the beginning of 2015, the company was subject to audits and inspections by the National Superintendence for the Defense of Socioeconomic Rights (*Superintendencia Nacional para la Defensa de los Derechos Socioeconómicos*) for alleged irregularities in the distribution of food. Prior to these events, President Nicolás Maduro Moros had announced the intervention of the supermarkets and had accused their directors of being involved in a "food war".<sup>75</sup>

In his role of the company's lawyer, Arrieche Franco intervened in the control and inspection processes. Shortly thereafter on 8 February 2015, the lawyer Arrieche Franco was arrested. Subsequently, he was charged and accused of the crimes of "boycott" and "destabilization of the national economy" based on the alleged irregularities committed by his client, even though he did not participate in the activities carried out by the supermarket chain. His only relationship with the company was to act as its legal representative.<sup>76</sup> Arrieche Franco was arbitrarily deprived of liberty until November 2015. As of this writing, the investigation against him remained active.

Lawyers who have applied for positions within public office have also been targeted for prosecution. For instance, the lawyers who applied to 2017 the selection process for justices of the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia, TSJ*) were investigated by the intelligence services.<sup>77</sup> These investigations are alleged to relate to the political situation at that time, whereby the National Assembly, which was leading the process, was controlled by the opposition.<sup>78</sup>

On the 20 July 2017, the Constitutional Chamber of the TSJ declared the selection process null and void.<sup>79</sup> In its decision, the Chamber warned the National Assembly and

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<sup>73</sup> International Bar Association's Human Rights Institute, The Criminal Trial against the Venezuelan Lawyer José Amalio Graterol, November 2012, page. 11 and 12. Available in: <https://bit.ly/3y3xVzx>  
See also: Venezuela: The Sunset of Rule of Law (2015), page 52. Available in: <https://bit.ly/37SCv8W>

<sup>74</sup> International covenant on civil and political rights, article 9.3 and 14.

<sup>75</sup> BBC, Venezuela: Maduro announces new food chain intervention, 3 February 2015. Available in Spanish at: <https://bbc.in/3uKKiyj>

<sup>76</sup> Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on the independence of judges and lawyers, Reference: UA VEN 8/2015, July 9<sup>th</sup>, 2015. Available in Spanish at: <https://bit.ly/38IUUVQ>  
See also: International Commission of Jurists, Venezuela: The Sunset of Rule of Law, 2015, footnote 52. Available in: <https://bit.ly/37SCv8W>

<sup>77</sup> Constitutional Block of Venezuela, Complaint before the national and international community May 2<sup>nd</sup>, 2018, Available in Spanish at: <https://bit.ly/38O81Fg>

<sup>78</sup> See for instance: Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 585. And ff.

<sup>79</sup> Supreme Court of Justice, Decision No. 545, 20 July 2017. Available in Spanish at: <https://bit.ly/37qh0w1>

the people who participate in the selection process that the usurpation of functions was a crime and that the decisions of the Chamber were *"of mandatory compliance, under penalty of the legal consequences that the Venezuelan legal system has established for the respect and maintenance of the constitutional public order and the preservation of the democratic system"*.<sup>80</sup>

Despite this, on the next day (21 July), the Assembly appointed 33 new justices for the TSJ, immediately after which the Constitutional Chamber of the TSJ requested "coercive actions" to be taken against the new judges. President Maduro spoke in a similar vein, stating that he intended to arrest them and freeze their assets.<sup>81</sup>

Before long, most of the elected judges had to flee the country, hide or seek refuge in embassies. Others were arrested and criminally prosecuted.<sup>82</sup>

### **Criminal prosecution for political reasons**

The case of lawyer Ángel Zerpa Aponte exemplifies the use of criminal justice to prevent people, considered as part of the opposition, from holding public office. Zerpa Aponte was a career judge until he was suspended by the TSJ in 2010. Later, he worked as an academic and carried out a series of judicial actions in which he questioned decisions adopted by the executive branch and the TSJ.<sup>83</sup>

On 21 July 2017, before the National Assembly, Zerpa Aponte was sworn in as a magistrate of the TSJ. The next day he was detained by SEBIN officers. At the time of his arrest, when he asked about what was happening, the officers told him: "Didn't you see the TV? Maduro ordered your detention".<sup>84</sup>

Initially, his case was processed before the military criminal justice where he was accused of the crime of usurpation of functions and treason. He was denied the possibility of appointing his own lawyer and was assigned a military public defender. Despite the appointment, Zerpa Aponte chose to represent himself. After a month of detention, on 23 August 2017 he was released on parole, but all his assets were frozen, and he was prohibited from leaving the country. Later, in October 2017, the case was referred to the ordinary justice system.<sup>85</sup> Upon evaluating the conditions during his detention, the

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See also: BBC News, National Assembly of Venezuela appoints new justices despite warning from the Supreme Court, July 21<sup>st</sup>, 2017. Available in Spanish at: <https://bbc.in/3Oct6tj>; BBC News, Supreme Court of Venezuela threatens "legal consequences" to justices who agree to be appointed by the National Assembly, July 21<sup>st</sup>, 2017. Available in Spanish at: <https://bbc.in/3Eib6sR>

<sup>80</sup> Supreme Court of Justice, Decision No. 545, 20 July 2017, numeral 5 of the final part (free translation). Available in Spanish at: <https://bit.ly/37qh0w1>

<sup>81</sup> BBC News, "We are not opposition judges, but from Venezuela": the unprecedented initiative of the magistrates who seek to create a parallel Supreme Court in exile, 4 September 2017. Available in Spanish at: <https://bbc.in/3xvzy8J>

<sup>82</sup> Id.

<sup>83</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions, A/HRC/45/CRP.11, 15 September 2020, para. 577 to 581.

<sup>84</sup> Id., para. 585.

<sup>85</sup> Id., para. 586 and ss.



FFM concluded that lawyer Zerpa Aponte had been subjected to cruel, inhuman, or degrading treatment or punishment.<sup>86</sup>

#### **D. Institutional shortcomings and obstacles**

Attacks on the independence and security of lawyers do not occur in a vacuum. On the contrary, they develop from an institutional environment that does not adequately provide for independence within the justice system or the protection of human rights.

##### **Lack of independence of judicial actors**

The ICJ's 2017 report "The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch" demonstrated that the judicial authorities lacked the institutional capacity to act with autonomy, independence and legitimacy.<sup>87</sup> They have similarly been unable to guarantee effective access to remedies and reparation measures for the human rights violations committed against lawyers and their clients, even though judicial authorities are aware that their actions and omissions contribute to violating human rights.

On this issue, the FFM determined that by "*either act or omission, members of the justice system have been involved in serious human rights violations*".<sup>88</sup> Specifically, the FFM concluded that judicial actors (judges and prosecutors) bear responsibility in two different ways.<sup>89</sup> First, the FFM found that judicial actors had a direct role in human rights violations, particularly arbitrary detentions. This because judges and prosecutors: "*(...) sustain[ed] arrest warrants, pre-trial detention orders and criminal charges based on facts and supporting evidence that did not involve criminal acts or individualize the defendant's participation. In some cases, prosecutors and judges sustained detentions or charges on the basis of illegally-obtained, manipulated or fabricated evidence, including evidence obtained via torture or coercion.*"<sup>90</sup>

Second, the FFM concluded that the judicial actors have "*failed to act as a check on other State actors, perpetuating impunity for the crimes committed.*"<sup>91</sup> The conduct of judicial actors has not only allowed for impunity for crimes, but also created a perverse incentive for new violations and abuses to be committed.

Additionally the executive authorities have used the judiciary as a subordinate power to assert their interests. As a consequence, lawyers cannot effectively defend the rights of their clients when an act or government interest is seen to clash with the exercise of those rights. Regarding the influence of the executive branch over the judiciary, the FFM determined that there were "*reasonable grounds to believe that high-level political actors*

<sup>86</sup> Id., para. 598.

<sup>87</sup> International Commission of Jurists, The Supreme Court of Justice of Venezuela: an Instrument of the Executive Branch, 2017, page 51, available in: <https://bit.ly/3LgoQVa>

<sup>88</sup> International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions (Advanced unedited version), A/HRC/48/CRP.5, 16 September 2021, para. 5.

<sup>89</sup> Id., para. 5

<sup>90</sup> Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela, report (advanced unedited version), A/HRC/48/69, September 16<sup>th</sup>, 2021, para. 113.

<sup>91</sup> International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela, Detailed Conclusions (Advanced unedited version), A/HRC/48/CRP.5, September 16<sup>th</sup>, 2021, para. 5.

*had exerted significant influence over certain members of the judiciary (...) directly contributing to the perpetration of violations and crimes”.*<sup>92</sup>

The lack of independence and impartiality of judges is related to the use of non-transparent mechanisms for their appointment.<sup>93</sup> The selection processes used violate the constitutional provisions that order the holding of public competitive examinations and the verification of professional skills.<sup>94</sup> Provisional judges do not enjoy the security of tenure in their positions because their permanence is at the discretion of the Judicial Commission of the Supreme Court of Justice, which appoints or dismisses them arbitrarily.<sup>95</sup> This situation prevents judges from acting independently, especially when it comes to deciding against the wishes of their superiors or the executive branch.<sup>96</sup>

Lastly, it should be mentioned that lawyers cannot access public office under equal conditions. In this regard, for example, there is discrimination for political reasons in the access and permanence in the exercise of public functions.<sup>97</sup> Similarly, some lawyers have advantages depending on the university from which they graduated.<sup>98</sup> Some of them have benefited from the absence of transparent, public and competitive mechanisms for access to such functions.<sup>99</sup>

#### **E. The interference on the operation of the Bar Associations**

Bar associations have not been a position to defend the independence of the legal profession of their members and affiliates. This is largely because these institutions have been affected by the authoritarian context that exists in Venezuela.

In particular, the autonomy and independence of the bar associations was strongly affected with the entry into force of the current 1999 Constitution.<sup>100</sup> This is due to the fact that article 293.6 of the Constitution establishes as a constitutional function of the electoral power, headed by the National Electoral Council (*Consejo Nacional Electoral*), the organization of elections for professional associations.

Since the adoption of the new Constitution, the intervention in the electoral processes of bar associations has increased through judicial decisions of the TSJ.<sup>101</sup> In this regard,

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<sup>92</sup> *Id.*, para. 6.

<sup>93</sup> International Commission of Jurists, *Judges on the Tightrope. Report on the Independence and Impartiality of the Judiciary in Venezuela* (2021), page 47. Available at: <https://bit.ly/3KnDbAx>.

<sup>94</sup> *Id.*, page. 26.

<sup>95</sup> *Id.*, page. 28 and 29.

<sup>96</sup> *Id.*, page. 28 and 29.

<sup>97</sup> See in this regard Inter-American Court of Human Rights. Case of San Miguel Sosa et al. v. Venezuela. Fund, Reparations and Costs. Judgment of February 8<sup>th</sup>, 2018. Series C No. 348. Para. 145-146.

<sup>98</sup> International Commission of Jurists, *Strengthening the Rule of Law in Venezuela*, 2014, page. 41. Available in: <https://bit.ly/3rTLM7u>

<sup>99</sup> International Commission of Jurists, *Judges on the Tightrope. Report on the Independence and Impartiality of the Judiciary in Venezuela*, 2021, page 26. Available in: <https://bit.ly/3KnDbAx>

<sup>100</sup> Acceso a la Justicia, *Brief report on the intervention of the Supreme Court of Justice in the professional bar associations of Venezuela (2000-2020)*, p. 1. Only available in Spanish at: <https://bit.ly/3KEwaLD>

<sup>101</sup> On this point, see: Acceso a la Justicia, *The takeover of the Bar Associations of Venezuela 2000-2020*, p. 15 and ff. Available in Spanish at: <https://bit.ly/3rtMl84>; Acceso a la Justicia, *Brief report on the intervention of the Supreme Court of Justice in the professional bar associations of Venezuela (2000-2020)*. Available in Spanish at: <https://bit.ly/37ZtdIq>

the Constitutional Chamber and the Electoral Chamber of the TSJ have issued decisions on the bar associations of Caracas,<sup>102</sup> the states of Aragua<sup>103</sup> and Zulia,<sup>104</sup> the Federation of Bar Associations of Venezuela<sup>105</sup> and the Lawyer's Social Welfare Institute<sup>106</sup> to annul or suspend their electoral processes.

For example, the Electoral Chamber has made decisions as to when and how the elections of the authorities of associations -such as the boards of directors, the disciplinary tribunals and tax officials- are carried out. For instance, in 2002, the Electoral Chamber suspended the electoral process to elect the directive and disciplinary court of the Aragua State's Bar Association.<sup>107</sup> Likewise, in 2004, the Chamber ordered the Federation of Bar Associations of Venezuela to convene an extraordinary assembly "*for the purpose of electing the members of the Board of Directors, the Disciplinary Court, and other authorities of the Board of Directors*".<sup>108</sup>

In a similar manner, in 2008 the Constitutional Chamber declared null the election of the Board of Directors and the Disciplinary Court of the Bar Association of the Capital District. The Constitutional Chamber then appointed a Board of Directors and a Provisional Disciplinary Court, as well as the members of the electoral body that would carry out the election.<sup>109</sup> The ICJ condemned this decision because it unjustifiably disregarded "*the free will expressed by the majority of the members of the Caracas Bar Association*".<sup>110</sup> Furthermore, those provisionally appointed turned out to be members or closely associated with the ruling party.

Similarly, in a number of decisions the Chambers of the TSJ have invoked constitutional provisions to declare that several internal regulations of the bar associations are null. This has modified the rules of how the elections are carried out inside the associations. For example, in 2007 the Constitutional Chamber determined that the regulations that required the solvency of bar members to support the presentation of lists or candidates were null and void. According to the Chamber, these legal regulations were against

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<sup>102</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 103/2003; Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 197/2005; Supreme Court of Justice, Constitutional Ruling No. 11/2008.

<sup>103</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 88/2003.

<sup>104</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 71/2014; Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 176/2014.

<sup>105</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 008/2004; Supreme Tribunal of Justice, Constitutional Ruling No. 1329/2004; Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 135/2004; Supreme Tribunal of Justice, Judgment of the Constitutional Court No. 1825/2007.

<sup>106</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 184/2012; Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 50/2013; Supreme Tribunal of Justice, Constitutional Ruling No. 419/2018.

<sup>107</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 0088/2003. Available in Spanish at: <http://historico.tsj.gob.ve/decisiones/selec/julio/88-090703-000048.HTML>

<sup>108</sup> Supreme Tribunal of Justice, Judgment of the Electoral Chamber No. 0008/2004, EXP No. AA70-E-2003-000111. Available in Spanish at: <https://bit.ly/3Mam6LS>

<sup>109</sup> Supreme Tribunal of Justice, Judgment of the Constitutional Chamber No. 0011/2008. Available in Spanish at: <https://bit.ly/38WwYhZ>

<sup>110</sup> International Commission of Jurists, ICJ expresses concern about meddling in the Caracas Bar Association, 24 July 2008 (free translation). Available in Spanish at: <https://bit.ly/3MebhrU>

constitutional provisions.<sup>111</sup> The Chamber argued that the solvency requirement violated the right to equality and non-discrimination (article 21), the right to political participation (article 62), the right to vote (article 63) and the National Electoral Council's function over electoral processes (article 293.6).<sup>112</sup>

It is worth noting that these decisions have been taken in a context of institutional weakness and political control over the judiciary, which has especially affected the TSJ and its chambers.<sup>113</sup> The ruling party's supporters did not obtain a majority in the bar associations through electoral means. Therefore, the decisions cannot be considered as impartial or independent.

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<sup>111</sup> The solvency requirement was provided for, in the sole paragraph, of article 36 of the Lawyer's act and in article 7 of the Regulations of the Lawyer's act on Choice in Professional Organisms and the Lawyer's Social Welfare Institute.

<sup>112</sup> In this regard, see, for example: Supreme Tribunal of Justice, Judgment of the Constitutional Chamber No. 1,825/2007. Available in Spanish at: <https://bit.ly/38UVIXX>

<sup>113</sup> On this subject see: International Commission of Jurists, Judges on the Tightrope. Report on the Independence and Impartiality of the Judiciary in Venezuela, 2021. Available in: <https://bit.ly/3KnDbAx>.

## **IV. CONCLUSIONS AND RECOMMENDATIONS**

Based on the analysis above, the ICJ concludes that lawyers in Venezuela cannot fully exercise their profession freely and independently. The imposition of targeted or institutional obstacles and attacks against lawyers are in contravention of Venezuela's legal obligations and of standards governing the independence and role of the legal profession.

Lawyers who assert themselves independently are frequently subjected to intimidation, harassment, and threats, both within and outside the formal justice system. In some instances, they have been victims of arbitrary detention and even criminal prosecution. Furthermore, when lawyers take on the defense of people with a high public profile, they are typically identified with the causes of their clients and are classified as political opponents, which increases their risk of being harassed or subject to sanction.

At the same time, the right to freedom of association of lawyers has been violated by the measures that have been adopted to intervene, co-opt and weaken the bar associations. Following the entry into force of the new Constitution, the elections of the authorities of the associations have been subject to the intervention of the National Electoral Council and decisions of the Supreme Tribunal of Justice.

In this situation, judicial actors have played a central role. They have not provided guarantees so that people can access effective remedies and be heard by free and independent authorities. Similarly, the executive branch uses the judiciary as an instrument of repression and control, which significantly restricts the actions that lawyers can take to discharge their professional responsibilities and enforce their clients' rights.

Lawyers must work in a context where they are constantly subjected to curtailments as to how they should practice their profession. The limitations imposed on them seek to prevent them from accepting certain cases, denouncing procedural irregularities, access international human rights protection mechanisms.

In light of the above, the ICJ reiterates the need to urgently reestablish the rule of law in Venezuela, including taking measures to guarantee the independence of the legal profession. In relation to the professional practice of lawyers, the ICJ makes the following recommendations to the responsible the authorities:

1. Ensure that prosecutors, judges, police officers and intelligence personnel cease and desist from all actions aimed at limiting the free, independent, and safe exercise of the legal profession, including the undue criminalization of lawyers. In addition, the national government and the judicial actors must take effective measures to protect lawyers against any threat, retaliation, harassment, pressure, harassment, or any other arbitrary action that comes from State agents or third parties.
2. Executive officers, prosecutors and judges should guarantee that lawyers can exercise all the rights and prerogatives contemplated in Venezuelan Constitution and

domestic legislation and Venezuela's international legal obligations. This includes access to competent, independent and impartial judges, access to case files and means of evidence, and the use of legal remedies and actions provided by legislation, without any of undue hindrances, harassment or threats.

In addition, judges, prosecutors, police officials, intelligence personnel and prison personnel should receive comprehensive training on international law and standards relating to human rights and the administration of justice, including those related to the right to a fair trial and the right to an effective remedy and reparation.

3. Executive officers, prosecutors and judges should refrain from persecuting, arresting, harassing and attacking in any way the lawyers who represent victims of human rights violations or people who are critical of the government authorities or are actual or perceived as a supporter of the political opposition.
4. The Office of the Attorney General should carry out effective, impartial, and independent investigations of the threats, attacks and harassment committed against lawyers. These investigations should be aimed at prosecuting and convicting all those responsible for the crimes, including high-profile officials. Similarly, the investigations must consider the possible existence of patterns and practices committed by officials or individuals who have perpetrated these attacks or who have tolerated them.
5. Judges should exercise their inherent judicial authority to ensure that all people have access to a lawyer of their choice, in criminal and civil matters, and without any type of distinction regarding the subject matter, including cases of corruption, money laundering and terrorism.
6. Judges and police officials must guarantee in practice the ability of lawyers to meet for an adequate time and in a confidential manner with their clients who are deprived of their liberty, in accordance with international legal obligations including articles 9 and 14 of the ICCPR.
7. The Office of the Attorney General should act to guarantee the lawyers can enjoy the civil and criminal immunity in respect of the statements made in the professional practice and the information received from their clients.
8. Executive officers, lawmakers and the judiciary should take act legal and practical steps to guarantee the rights and fundamental freedoms of lawyers, in particular the right to freedom of expression and association of lawyers. To this end, any attack or undue restriction on these rights should be effective and impartially investigated and redressed.
9. Executive officers, lawmakers and the judiciary should act to ensure the autonomy and independence of the bar associations, under law and operational, as well as that of the Lawyer's Social Welfare Institute and the Federation of Bar Associations. To do so, the National Electoral Council and the judicial authorities should allow the

execution of electoral processes, for the appointment of their managing representatives, in a free and competitive manner without undue intervention by authorities.

10. Executive officers and lawmakers should ensure that the processes for appointing judges, prosecutors, public defenders, and other officials of the justice system are carried out through public competitions that are open to all persons who meet the requirements, without any discrimination. These provide for the conditions essential for lawyers to function in the justice system.
11. Executive officers, lawmakers and the judiciary must prohibit military tribunals from assuming any jurisdiction over civilians and serious violations of human rights involving military personnel.
12. The national government should invite international human rights mechanisms (universal and regional) that are mandated to address question involving the administration of justice to visit the country, including the Inter-American Commission on Human Rights and the United Nations Human Rights Council's, Special Rapporteur on the freedom of peaceful assembly and of association; Special Rapporteur human rights defenders; and Special Rapporteur on the independence of judges and lawyers; and the Working Group on arbitrary detention.

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