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**Joint Submission of the INTERNATIONAL COMMISSION OF JURISTS and
the INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE**

**On the preparation by the HUMAN RIGHTS COMMITTEE of a LIST OF
ISSUES for the examination of the FOURTH PERIODIC REPORT of**

VENEZUELA (BOLIVARIAN REPUBLIC OF)

Under the INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Submitted on 25 July 2014

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council in 1957, and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

Established in 1947, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents. The IBA's Human Rights Institute (IBAHRI) works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide.

ICJ-IBAHRI submission to the Human Rights Committee on a List of Issues for the examination of the Fourth Periodic Report of Venezuela (Bolivarian Republic of)

1. During its 114th Session, scheduled for 6 to 24 July 2015, the Human Rights Committee (the 'Committee') will undertake its examination of the fourth periodic report of Venezuela (Bolivarian Republic of) on the implementation of the International Covenant on Civil and Political Rights (the 'Covenant').
2. Ahead of this, during its 112th session, from 7 to 31 October 2014, the Committee will prepare and adopt a List of Issues. The International Commission of Jurists (ICJ) and the International Bar Association's Human Rights Institute (IBAHRI) welcome the opportunity to contribute to the Committee's preparation of the List of Issues.
3. The ICJ and IBAHRI draw the Committee's attention to questions about the following issues, which arise particularly in relation to articles 14, 2(3), and 9(4) of the Covenant:
 - Current practices for the appointment and removal of judges that undermine the independence and impartiality of the courts;
 - Inadequate guarantees for lawyers that impede their ability to defend and uphold the rights of clients;
 - Lack of safeguards for the proper discharge of prosecutorial functions that negatively affect the role of prosecutors in respecting and protecting human rights.
4. This submission is based on the more detailed findings set out in the attached reports by the ICJ, *Strengthening the Rule of Law in Venezuela*, and the IBAHRI, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni* and *The Criminal Trial of Venezuelan Lawyer José Amalio Graterol*.¹

INDEPENDENCE OF JUDGES

5. In its 2001 Concluding Observations on the Third Periodic Review of Venezuela under the Covenant, the Committee expressed concern about the judiciary, observing that:

An extended reform process threatens the independence of the judiciary, given the possibility that judges could be removed as a

¹ ICJ, *Fortaleciendo el Estado de Derecho en Venezuela* (May 2014), available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Informe-A4-elec.pdf> (Spanish only); executive summary *Strengthening the Rule of Law in Venezuela* (May 2014) available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/06/VENEZUELA-Summary-A5-elec.pdf>; IBAHRI, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni* (April 2014) available at www.ibanet.org/Article/Detail.aspx?ArticleUid=cae3da1b-b3a4-4b0d-8b17-21e317b38327; IBAHRI, *The Criminal Trial of Venezuelan Lawyer José Amalio Graterol* (November 2013) available at www.ibanet.org/Article/Detail.aspx?ArticleUid=98bb81cf-da81-4f5d-8645-5c34a7d25080.

result of the performance of their duties, thus infringing Article 2, paragraph 3, and Article 14 of the Covenant.²

6. The adoption of the Organic Law of the Supreme Tribunal of Justice in 2004³ supposedly concluded the reform process of the justice system in Venezuela; in reality however, actual practices for the appointment and removal of judges continue not to comply with national legislation or international standards on the independence of the judiciary.
7. In December 1999, the Venezuelan legislature adopted a Decree that required all judicial posts to be open to a competitive selection process.⁴ This was interpreted to mean that all judges then in office were automatically dismissed and forced to reapply.⁵ At the same time, the evaluation of applications that subsequently took place was conducted without regard to the evaluation procedures specified by the Norms for Evaluation and Public Competitions for the Admission and Permanence in the Judiciary, enacted in 2000.⁶
8. Public tenders for judicial posts were held only during the period from 2000 to 2003, resulting in the appointment of 200 permanent judges. Since 2003, no public tender has taken place for the appointment and promotion of judges in Venezuela. As a result, only some 20% of judges currently in office have guaranteed tenure. The remaining 80% of judges appointed to provisional (52%), temporary (26%), or other offices (2%), do not have security of tenure⁷ and can be removed at will by the Judicial Commission of the Supreme Tribunal of Justice (STJ).

² Human Rights Committee, Concluding Observations Venezuela, UN Doc CCPR/CO/71/VEN (2001), para 13. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/CO/71/VEN&Lang=En.

³ Organic Law of the Tribunal of Justice, Official Gazette No 37,942, 20 May 2004. Available (in Spanish) at www.tsj.gov.ve/legislacion/nuevaleysj.htm.

⁴ Decree of the National Constituent Assembly of Venezuela that creates the Regime of Transitional Power, Official Gazette No 36 859, 29 December 1999, Article 25, which reads in part: 'Todos los cargos de jueces serán sometidos a concurso público de oposición de conformidad con el mandato de la Constitución Aprobada. A tales fines, hasta tanto se apruebe la legislación respectivo, la Comisión Coordinadora de Evaluación y Concursos para Ingreso y Permanencia en el Poder Judicial, designada por la Asamblea Nacional Constituyente, queda facultada para presentar un proyecto que contenga los principios, normas y procedimientos de las evaluaciones, así como lo relativo al ingreso y permanencia en el Poder Judicial.'

⁵ Inter-American Commission of Human Rights, Application to the Inter-American Court of Human Rights in the case of Mercedes Chocrón Chocrón (Case No 12.556), 25 November 2009, para 32. Available at www.cidh.oas.org/demandas/12.556%20Mercedes%20Chocron%20Venezuela%2025%20nov%2009%20INGLES.pdf.

⁶ Norms for Evaluation and Public Competitions for the Admission and Permanence in the Judiciary, Official Gazette No 36 910, 14 March 2000. Available at <http://www.pgr.gob.ve/dmdocuments/2000/36910.pdf>.

⁷ Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, 2004, p 9. Available at: <http://www.hrw.org/sites/default/files/reports/venezuela0604web.pdf>.

9. In the case of *Chocrón Chocrón v Venezuela*, decided by the Inter American Court of Human Rights in 2011, Venezuela itself admitted that:

[t]he process of restructuring the Venezuelan Judiciary required the temporary appointment of judges to cover the existing vacancies [...] [t]hese non-permanent judges have been appointed ... without taking a competitive examination to obtain the post. [...] Consequently, these judges, known as provisional judges, are not on a judicial career path and, therefore, are excluded from the benefits of stability and permanence.⁸

10. In General Comment No 32, the Human Rights Committee referred to proper procedures for appointing judges, and guarantees of security of tenure, as among the requirements necessary to ensure respect for the guarantee of the independence of judges in Article 14 of the Covenant.⁹ It also noted that security of tenure requires that judges may be dismissed only on the basis of serious grounds of misconduct or incompetence and through independent and impartial procedures set out in the constitution or the law.¹⁰ In turn, this is among the safeguards protecting judges from improper influence, inducements, pressure, or interference which is fundamental to securing the independence of the judiciary. The Inter-American Court of Human Rights remarked in the *Chocrón* case that:

[t]he free removal of judges fosters an objective doubt in the observer about the real possibility of judges to decide specific disputes without fear of reprisal.¹¹

11. Venezuela adopted a Judicial Code of Ethics in 2009, which prescribes procedures, competent bodies and grounds for disciplinary offences committed by any judges in the fulfillment of his or her duties.¹² These provisions have not however been applied since the adoption of the Code; instead, provisional judges have been removed and sanctioned by the Judicial Commission through a simple communication that the judge's appointment is 'no longer in effect'. In addition, the Constitutional Chamber of the Supreme Tribunal of Justice issued a judgment in 2013 provisionally suspending the application of the Code of Ethics to all 'temporary, casual, accidental and provisional' judges.¹³ Thus, almost 80% of judges, who already lack any

⁸ *Judgement of 1 July 2011*, Inter-American Court of Human Rights, *Chocrón Chocrón v Venezuela* (Preliminary objection, merits, reparations and costs), para 50.

⁹ Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007) para 19.

¹⁰ Human Rights Committee, General Comment No 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007) para 20.

¹¹ *Judgement of 1 July 2011*, Inter-American Court of Human Rights, *Chocrón Chocrón v Venezuela* (Preliminary objection, merits, reparations and costs), para 99.

¹² Judicial Code of Ethics (Código de Ética del Juez Venezolano y Jueza Venezolana), Official Gazette No 39 236, 6 August 2009, Article 2. Available at: www.pgr.gob.ve/dmdocuments/2009/39236.pdf.

¹³ Supreme Tribunal of Justice of Venezuela (hereinafter 'STJ'), Constitutional Chamber, File No 09-1038, 7 May 2013.

formal guarantee of tenure, can be removed from office without following the legal procedures established by the Code of Ethics.

12. The lack of tenure, as well as the arbitrary removal of judges without following prescribed and fair procedures, adversely affects the impartiality and independence of judges. Indeed, in a 2009 report on Venezuela, the Inter-American Commission of Human Rights found that '[i]n some cases, judges were removed almost immediately after adopting judicial decisions in cases with a major political impact.'¹⁴
13. Security of tenure is a required guarantee for judges to decide cases without unwarranted interference. The lack of guaranteed tenure for around 80% of Venezuelan judges, and the risk of discretionary dismissal of judges without any disciplinary proceeding (let alone one that is fair, impartial, and independent and based solely on reasons of serious misconduct or incapacity) impedes the right to access an effective remedy, as per Article 2, paragraph 3, and the right to a fair trial according to Article 14.
14. The ICJ and IBAHRI therefore consider that Venezuela should guarantee security of tenure and independence of all judges, whether permanent, provisional or of any other statutes, by strictly following the disciplinary grounds and procedures prescribed in the Judicial Code of Ethics. Venezuela should only make judicial appointments pursuant to the prescribed public competitions, and cease the practice of provision, temporary and other *ad hoc* appointments.
15. The ICJ and the IBAHRI consider that the treatment of Judge María Lourdes Afiuni is emblematic of the lack of respect for judicial independence in Venezuela.¹⁵
 - a. On 11 December 2009 Judge Afiuni was arbitrarily arrested without a warrant and without reasons for her arrest, following her decision to release a so-called 'political prisoner' in accordance with the Venezuelan Penal Code and a United Nations Working Group on Arbitrary Detention decision.¹⁶ The arrest and the other violations of the Covenant that followed (including during her detention and trial) have caused widespread national and international concern,¹⁷ including from the United Nations

¹⁴ Inter-American Commission of Human Rights, *Human Rights and Democracy in Venezuela*, Annual Report 2009, OAS Doc 54 OEA/Ser L/V/II, Executive Summary para 15, detail in Chapter III, paras 285–301. Available at www.cidh.oas.org/pdf%20files/VENEZUELA%202009%20ENG.pdf.

¹⁵ IBAHRI, *Venezuelan Justice System in Crisis* (March 2003); IBAHRI, *Justice under Threat: A Report on the rule of law in Venezuela* (June 2007); IBAHRI, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela* (April 2011); IBAHRI, *The Criminal Trial of Venezuelan Lawyer José Amalio Graterol* (November 2013). All reports are available at www.ibanet.org/Human_Rights_Institute/Work_by_regions/Americas/Venezuela.aspx.

¹⁶ UN Working Group on Arbitrary Detention Opinion No 10/2009 (Bolivarian Republic of Venezuela) [www.unwqadatabase.org/un/Document.aspx?id=2419&terms=\(+afiuni+\)](http://www.unwqadatabase.org/un/Document.aspx?id=2419&terms=(+afiuni+)).

¹⁷ For a detailed analysis of the *Afiuni* case, including the abuse suffered during her detention in a maximum security prison please see IBAHRI, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela* (April 2011) and report on IBAHRI's international

High Commissioner from Human Rights¹⁸ and several United Nations Special Rapporteurs.¹⁹ In 2010 the United Nations Working Group on Arbitrary Detention recommended:

(a) The immediate release of Ms Afiuni and her simultaneous reinstatement to the position of judge that she occupied at the time of her arrest and to her office at the court, with all her rights;

(b) Alternatively, the trial of Ms Afiuni in accordance with the rules of due process of law, and the granting of her human right to be released on bail;

(c) The provision of some form of effective reparation to Ms Afiuni for the damage caused by her arbitrary detention.²⁰

b. Following numerous delays her trial eventually started in November 2012, however on 23 October 2013 the prosecution failed to attend an evidentiary hearing, which caused the trial to be 'interrupted' and annulled. The court has ordered a re-trial which started on 11 July 2014 and four years since her arrest, Judge Afiuni's case has not yet been resolved.

c. There is no doubt that the treatment of Judge Afiuni was intended to send a message to other judges who may have considered acting independently in cases involving government interests. Immediately following her arrest, the late President Hugo Chávez Frías had stated on national television:

She should be in prison. This judge has to pay, with all the force of the law, for what she has done, together with any judge who thinks of doing the same.²¹

16. The *Afiuni* case has created an atmosphere of fear amongst judges, known as the 'Afiuni effect'. Prior to the case, the IBAHRI found that Venezuelan judges were fearful of disciplinary proceedings or dismissal if they returned decisions

observation of the Afiuni trial *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni* (April 2014).

¹⁸ Statement by UN High Commissioner for Human Rights at the 10th Biennial Conference of the International Women Judges Association, September 2010.

¹⁹ Joint statement from UN Special Rapporteur on the Independence of Judges and Lawyers, UN Special Rapporteur on the Situation of Human Rights Defenders, UN Special Rapporteur on Torture and other forms of Cruel, Inhuman and Degrading Treatment and Special Rapporteur on Violence Against Women, *Venezuela must release judge who suffered sexual violence in jail* (February 2013), available at www.un.org/apps/news/story.asp?NewsID=44141#.U7wGMPIdX94.

²⁰ UN Working Group on Arbitrary Detention Opinion No 20/2010 (Bolivarian Republic of Venezuela) [www.unwqadatabase.org/un/Document.aspx?id=2419&terms=\(+afiuni+\)](http://www.unwqadatabase.org/un/Document.aspx?id=2419&terms=(+afiuni+)).

²¹ 'Chávez pidió 30 años de cárcel para jueza que liberó Cedeño' *El Universal* (10 December 2009). Translated from the Spanish '*Ella debe estar en la cárcel. Esa juez debe pagar, con toda la fuerza de la ley, por lo que hizo, junto con cualquier juez que piensa en hacer algo similar.*'

unpopular with the executive.²² As a result of the *Afiuni* case, in particular the multiple violations of the Covenant that have occurred throughout the process and the above-mentioned statement that her case should be considered exemplary, Venezuelan judges are now fearful of criminal proceedings and/or losing their liberty. This has caused significant damage to judicial independence in the country and as reported by the IBAHRI following its 2011 visit to Caracas, 'Nobody wants to be the next Afiuni'.²³

17. The ICJ and the IBAHRI consider that the Venezuelan criminal justice system – in particular the system of provisional judges, the lack of implementation of the judicial code of ethics and inadequate parameters regarding the appointment and removal process for judges, as well as frequent executive interference – does not contain adequate systemic safeguards to guarantee judicial independence, violating Judge Afiuni's right to a fair trial by an independent and impartial tribunal under Article 14 (1) of the Covenant, or her right to an effective remedy under Article 2(3).
18. The ICJ and the IBAHRI consider that Judge Afiuni has been subjected to multiple due process and other violations of the Covenant throughout the criminal process,²⁴ in particular:
 - a. On 11 December 2009 Judge Afiuni was arbitrarily arrested without a warrant and without reasons for her arrest. This violates her right to freedom from arbitrary arrest contained in articles 9(1) and (2) of the Covenant.
 - b. After her arrest late President Hugo Chávez Frías immediately appeared on national television calling for her imprisonment and saying that her case should be an example to other judges, violating her right to a fair trial and the presumption of innocence contained in articles 14 (1) and (2) of the Covenant, as well as representing an unacceptable Executive encroachment into the independence of the judiciary.
 - c. Between December 2009 and February 2011, Judge Afiuni was subjected to serious physical abuse in a female maximum security prison, including rape, which amounted to violations of her rights to liberty, personal integrity, freedom from torture or other forms of cruel, inhuman and degrading treatment, and to have adequate conditions of detention, as contained in articles 7, 9 and 10 of the Covenant.
 - d. During the preliminary hearing on 17 May 2010, the Public Prosecutor admitted that there was no tangible evidence of a bribe in relation to the corruption charge against her but argued that the 'benefit' she had

²² *Ibid* at note 1, IBAHRI Reports *Venezuelan Justice System in Crisis* (March 2003) and IBAHRI, *Justice under Threat: A Report on the rule of law in Venezuela* (June 2007).

²³ IBAHRI, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela* (April 2011), p 11.

²⁴ See: report on IBAHRI's observation of the Afiuni trial *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni* (April 2014); IBAHRI, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela* (April 2011).

obtained was the freedom of the prisoner. Nevertheless, the court accepted the charge and ordered the continuation of her pre-trial detention on that basis, in violation of Venezuelan criminal procedure and articles 9(1)-(3) and 14(1) of the Covenant.

- e. The frequent procedural delays caused by the presiding judge and the prosecution failing to appear at the trial for various inadequate reasons (family, holidays, administrative reasons) resulted in hearings being postponed approximately 24 times between February 2011 and December 2013. This has resulted in a criminal process that has been drawn out to over four years, which the IBAHRI and ICJ consider a violation of her right to a fair trial and to be tried within a reasonable time, contained in articles 14(1) and (3).
19. In light of the above, the ICJ and IBAHRI recommend that the **List of Issues** adopted by the Committee for the examination of the fourth report of Venezuela should address the appointment and removal of judges; in particular, the ICJ and IBAHRI suggest the following questions that the Committee could include in the list of issues:
- ***What measures is the State taking to secure the effective independence of the judiciary and to prevent improper interference in the administration of justice?***
 - ***What percentage of judges currently hold permanent appointments with security of tenure?***
 - ***What if any measures guarantee security of tenure for judges currently appointed to provisional, temporary, casual, ad hoc or any type of appointment other than permanent appointment?***
 - ***When will further public tenders and evaluations for the appointment and promotion of judges take place? Please indicate proposed dates for public competitions, the number and types of appointments open for competition, the characteristics of the procedure, and the composition of the body responsible for appointing and promoting judges.***
 - ***How many judges have been removed from office since 2004? Please provide annual figures.***
 - ***What procedure is currently followed for the removal of judges with provisional, temporary, casual, ad hoc or any types of appointment other than permanent appointment?***
 - ***Are there any limits under current law in Venezuela to the reasons for which a provisional, temporary, casual or ad hoc judge may be removed? Are any limits in place as a matter of policy? Is there any obligation under Venezuelan law to provide the judge with the reason for removal?***

- **How many judicial appointments have been annulled by the Judicial Commission of the Supreme Tribunal of Justice? On an aggregate basis, please provide information on the procedure followed for the cancellation of the appointments, the grounds for cancellation, and the types of posts held by removed judges.**
- **In relation to the case of Judge Afiuni:**
 - **What steps is the State taking to implement the recommendations in Opinion No 20/2010 of the United Nations Working Group on Arbitrary Detention?**
 - **What steps is the State taking to ensure Judge Afiuni's right to a fair trial and to liberty and security of the person in her forthcoming trial and to provide reparation for the physical and psychological abuse she has suffered during her detention?**

THE LEGAL PROFESSION

20. The ICJ and IBAHRI are concerned by a number of challenges faced by individual lawyers, and the legal professional bodies, in fulfilling their roles in upholding human rights, as contemplated for instance in the UN Basic Principles on the Role of Lawyers.

21. Article 16 of the UN Basic Principles on the Role of Lawyers provides:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

22. Article 24 of the UN Basic Principles on the Role of Lawyers provides:

Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

23. Furthermore, Principles 27 and 28 state:

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
24. Judgments of the Supreme Tribunal of Justice have interfered in the election of members of the Executive Board and Disciplinary Tribunal of different Bar Associations in Venezuela. In 2003, for example, a judgment issued by the Electoral Chamber of the STJ ordered the Bar Association of Barinas to carry out the election of the members of the Executive Board according to the regulations issued by the National Electoral Council in lieu of the bar association's own regulations.²⁵ The Constitutional Chamber of the STJ issued a judgment in a case in 2008 that set out a list of names that the Court ordered be appointed as interim members of the Executive Board and Disciplinary Tribunal of the Bar Association, pending an election that the Court ordered be conducted in a manner other than that provided for in the Bar Association's own regulations.²⁶
25. Additionally, Article 2, paragraph 2, and Article 20 of the Judicial Code of Ethics enacted in 2009 allow any judge to directly impose disciplinary sanctions during a judicial proceeding on lawyers, and any other intervener in the process. These provisions undermine the competence given to the Disciplinary Tribunals of the Bar Associations by the Law of Lawyers and the Code of Ethics that establishes the proceedings and grounds for sanctioning lawyers for the improper performance of their duty.²⁷ The provisions weaken the independence of lawyers, as they potentially undermine due process and the right to a fair trial of lawyers.
26. The situation of some lawyers in Venezuela who take cases challenging government interests is illustrated by the case of José Amalio Graterol.
- a. Mr Graterol is defence lawyer to Judge María Lourdes Afiuni. On 3 June 2012, Mr Graterol strongly criticised the Venezuelan authorities' handling of the *Afiuni* case and the situation of judicial independence in the country. The following day, he received a telephone call from a court official warning him that 'something' was being prepared against him. That afternoon, in a separate case, Mr Graterol's client refused to appear at his trial, alleging that the presiding judge was not impartial. The Venezuelan penal code as it stood at the time provided for the right of an accused not to be tried in his or her absence, and Mr Graterol refused to consent to the trial proceeding in the absence of the accused.²⁸ Mr Graterol was arrested

²⁵ STJ, Electoral Chamber, Judgment No 146, File No AA70-E-2001-0000131, 22 October 2001. Available in Spanish only at www.tsj.gob.ve/decisiones/selec/octubre/146-221001-000131.HTM.

²⁶ STJ, Constitutional Chamber, File No 04-1263, 14 February 2008. Available in Spanish only at www.tsj.gob.ve/decisiones/scon/febrero/11-140208-04-1263.HTM.

²⁷ Law of Lawyers, Official Gazette No 1081, 23 January 1967, articles 58–74, available in Spanish only at www.tsj.gob.ve/legislacion/la.htm and Code of Ethics of Lawyers, Gazette No 33257, 25 November 1985, Article 27 available in Spanish only at www.pgr.gob.ve/dmdocuments/1985/33357.pdf.

²⁸ Organic Code of Criminal Procedure 1998 (with amendments 2000, 2001), Extraordinary Official Gazette No 5.558 14 November 2001, included the following provision: 'The accused

- (apparently on the order of the presiding judge, though during his subsequent trial she denied issuing such an order), and charged with 'obstruction of justice'.
- b. Mr Graterol was eventually convicted on 18 December 2012 to six months in prison and his appeal was denied on 15 July 2013. At the time of writing, he is waiting for a 'psychosocial' examination that will determine whether he will serve his sentence in prison or on conditional release.
- c. The ICJ and the IBAHRI are concerned by the multiple due process violations of the Covenant in the case, elaborated in the attached report, in particular: the apparent lack of a written record of any judicial order for Mr Graterol's arrest (or, if no judicial order was in fact made, the lack of an order itself), the lack of evidence presented by the prosecution, and the significant procedural delays throughout the case, violating articles 9(1), 14(1) and (3) of the Covenant.
- d. Furthermore, the ICJ and the IBAHRI consider that Mr Graterol's prosecution also contravenes several guarantees for the functioning of lawyers contained in the UN Basic Principles on the Role of Lawyers, Principles 16 (non-interference), 18 (lawyers should not be associated with the causes of their clients) and 23: '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...'
- e. The IBAHRI, in its 2011 report, said that it was encouraged that it had not heard of any threats or harassment against lawyers taking politically sensitive cases, including Afiuni's defence counsel. This situation subsequently dramatically changed and the IBAHRI is now extremely concerned at the creation of a 'Graterol effect', which risks creating a chilling effect, similar to the 'Afiuni effect' described above, amongst the Venezuelan legal profession, with lawyers fearful of being deprived of their liberty for taking politically sensitive cases or expressing their views publicly on justice-related matters.
27. In light of the above, the ICJ and IBAHRI recommend that the **List of Issues** adopted by the Committee for the examination of the fourth report of Venezuela should address the guarantees for the proper functioning of the legal profession. In particular, the ICJ and IBAHRI suggest that the Committee consider including the following questions in the list of issues:
- ***What procedures will the State Party take to ensure the right of lawyers to form and maintain independent professional associations? Please specify the steps taken to safeguard the autonomy of bar associations in the country, the reasons for the***

shall have the following rights: [...] Not to be judged in his/her absence, except under the provisions of the Constitution of the Republic.' A few days later, on 12 June 2012, the Criminal Procedure Code was amended by presidential decree to delete the right 'Not to be judged in his/her absence, except under the provisions of the Constitution of the Republic.'

judicial orders interfering with bar association elections in 2003 and 2008, and the measures that it will adopt in order to allow bar associations to elect their authorities under the regulations of bar associations.

- **Will the State consider amending Article 2(2) and Article 20 of the Judicial Code of Ethics, as regards the disciplinary powers given to judges (ie, allowing judges to unilaterally and summarily discipline lawyers representing clients in a process before them)? If so, what is the time frame for this amendment?**
- **As regards the case of José Amalio Graterol:**
 - **Please provide information about the consistency of the arrest and prosecution with articles 14 and 9 of the Covenant?**
 - **What explanation does the government have regarding the basis and motivation for his prosecution, given the strong inference that it is a reprisal for his duly discharging his duties as a lawyer to defend the rights of his client and the peaceful exercise of protected freedom of expression?**
- **What steps is the State taking to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference in accordance with the UN Basic Principles on the Role of Lawyers?**

THE SITUATION OF PROSECUTORS

28. The UN Guidelines on the Role of Prosecutors recognise the need for Prosecutors to be able to carry out their functions with effectiveness, impartiality and fairness, free from bias or any other kind of discrimination, without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.²⁹ Failure to provide such guarantees can lead to violations of, for example, articles 2, 9, or 14 of the Covenant.
29. To this end, Article 2(a) of the UN Guidelines provides in relevant part that States shall ensure that:
- Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of ... political or other opinion, ... or other status...
30. In Venezuela, the procedure and criteria for the appointment of prosecutors is established by the Organic Law of the Public Prosecutor Office, which states

²⁹ United Nations Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Guidelines 3, 4, 12 to 16.

that public tenders must be undertaken to select and appoint prosecutors,³⁰ and that candidates must complete the academic programme of the National Academy of Public Prosecutors³¹ in order to be appointed. Likewise, the Organic Law guarantees the permanence of all prosecutors selected in accordance with these provisions,³² and prescribes disciplinary proceedings and grounds for their removal.³³

31. However, these provisions are not respected in Venezuela in practice. Only 4 of the 803³⁴ public prosecutors currently in office were appointed by public tenders (carried out in 2012 and 2014). The vast majority (99.5%) of prosecutors have not been appointed by public tenders, and can be removed at will by the Attorney-General, as the disciplinary regime provided by the Organic Law only applies to 'career' prosecutors, that is, those appointed by public tender.
32. The Attorney-General has stated that there is a continuing programme of public competitions to select and appoint public prosecutors in Venezuela,³⁵ and that currently there are 53 candidates³⁶ to occupy 217 posts during 2014.³⁷ However, there are still approximately 600 prosecutors lacking guaranteed tenure; they remain exposed to undue influence and interferences.
33. Moreover, the autonomy of public prosecutors appears to be diminished by practices that interfere with the proper and objective functioning of prosecutors. A high degree of centralised control is exercised by the Office of the Attorney-General. Further, the Inter-American Commission of Human Rights in 2009 reported allegations that:

³⁰ Organic Law of the Public Prosecutor Office, Official Gazette No 38 647, 19 March 2007, Article 94 and articles 99–114, available in Spanish only at www.ministeriopublico.gob.ve/c/document_library/get_file?uuid=0dc9403e-2554-46f5-9320-fde48f654a79&groupId=10136.

³¹ Resolution of the General-Attorney No 263, Official Gazette No 38 905, 8 April 2008.

³² Organic Law of the Public Prosecutor Office, doc cit, Article 89.

³³ *Ibid*, articles 117 to 119.

³⁴ See: *2013 Annual Report of the Public Prosecutor Office to the National Assembly*, January 2014, p 29. Available in Spanish only at www.mp.gob.ve/c/document_library/get_file?uuid=017b714e-2c2c-4f03-9de6-0e73c72840bc&groupId=10136.

³⁵ See: *Luisa Ortega Díaz niega que fiscales venezolanos no sean independientes*, El Nuevo Herald, 13 June 2014. Available at www.elnuevoherald.com/2014/06/13/1772297/fiscal-venezolana-asegura-no-es.html.

³⁶ *Ibid*.

³⁷ See: *Ministerio Público inició proceso de recepción de credenciales para aspirantes a la carrera fiscal*, Public Prosecutor Office website. Available at www.mp.gob.ve/web/guest/escuela-nacional-de-fiscales?p_p_id=101_INSTANCE_jB3X&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&p_p_col_id=column-2&p_p_col_pos=1&p_p_col_count=2&_101_INSTANCE_jB3X_struts_action=%2Fasset_publisher%2Fview_content&_101_INSTANCE_jB3X_urlTitle=ministerio-publico-inicio-proceso-de-recepcion-de-credenciales-para-aspirantes-a-la-carrera-fiscal&_101_INSTANCE_jB3X_type=content&redirect=%2Fweb%2Fquest%2Fescuela-nacional-de-fiscales.

[t]he Attorney General's Office does not have an objective system for assigning cases, and that matters are cherry-picked. As proof of this it is claimed that [...] all investigations related to the interests of the ruling party and the executive branch are handled by a small group of prosecutors.³⁸

34. The circumstances explained above increase the risk of improper interference by other branches of the government, especially in politically sensitive cases, impeding the access of victims to an effective remedy as intended in Article 2, paragraph 3, and the right of defendants to equal treatment before the courts and tribunals, as guaranteed in Article 14.
35. In light of the above, the ICJ and IBAHRI recommend that the **List of Issues** adopted by the Committee for the examination of the fourth report of Venezuela should address the safeguards for the proper discharge of prosecutorial functions; in particular, the ICJ and IBAHRI suggest the following questions that the Committee could include in the list of issues:
 - ***What is the current total number of public prosecutors, and of them, how many have been appointed through public tenders and therefore are subject to the disciplinary regime prescribed under the Organic Law? On what grounds can public prosecutors who were not hired through a process involving public tender be removed? May they be dismissed at will?***
 - ***What is the estimated time frame to select and appoint the total number of public prosecutors through public tenders, as required by the Constitution and the law?***
 - ***Has the State Party considered any reform initiative in order to enhance the efficiency and effectiveness of the functioning of the Office of the Attorney-General?***
 - ***How does the State Party ensure that cases are allocated to Prosecutors on the basis of technical expertise and workload, in an impartial manner, in particular those considered politically sensitive?***

³⁸ Inter-American Commission of Human Rights, *Democracy and Human Rights in Venezuela*, 2009, Chapter III, para 308.