

## **ICJ POSITION PAPER ON THE DISMISSAL OF THE ATTORNEY GENERAL OF VENEZUELA**

16 August 2017

On 5 August 2017, Venezuela's National Constituent Assembly dismissed the Attorney General of the Republic, Dr Luisa Ortega Díaz. Dr Luisa Ortega Díaz was first appointed Attorney General of the Bolivarian Republic of Venezuela by the National Assembly in December 2007 for the 2008-2014 period and was in 2014 confirmed to continue in office for the period 2014-2021.

The International Commission of Jurists (ICJ) considers that the dismissal of Dr Ortega Díaz was undertaken by a body not competent or empowered by Venezuelan law to do so, nor in observance of the established procedure and grounds defined in the law. The dismissal of the Attorney General appears to have been politically motivated, in retaliation for her critical positions regarding various governmental initiatives and decisions of the Supreme Court of Justice, as well as for her decision to investigate gross violations of human rights allegedly committed by State agents, including senior officials, and armed groups of civilians under the control of the Government. As such, her dismissal not only violates international standards regarding the independence of justice actors, it also removes one of the last remaining institutional checks on executive authority.

In light of Venezuela's political crisis, the dismissal of the Attorney General and her replacement with former National Assembly deputy of the government coalition, also destroys one of the few glimmers of hope for an end to impunity for gross human rights violations in the country.

Under Venezuela's Organic Law of the Office of Public Prosecutions, which remains in force, removal of the Attorney General can only be on account of 'serious misconduct' (as defined by the law) and as a result of an absolute majority vote of the National Assembly, after confirmation by the Supreme Court of Justice. The purported grounds of misconduct by the Attorney General fall well short of the prescribed definition of serious misconduct under the Organic Law.

Dr Luisa Ortega Díaz has in recent times been an outspoken critic of the Government led by President Nicolás Maduro. She has initiated several investigations and brought charges against State officials for the death of persons killed during public demonstrations; challenged decisions of the Supreme Court of Justice suspending the constitutional powers of the former National Assembly, including by requesting that proceedings be initiated against the Supreme Court judges responsible for those decisions; challenged the earlier appointment by the National Assembly of Supreme Court judges and alternates; and challenged the convening of elections for the new Constituent National Assembly. Since she began to criticize Government initiatives and take legal action to re-establish the rule of law, the Attorney General and her family have been the targets of multiple attacks, threats, harassment and campaigns of denigration and stigmatization by Government officials.

### **1. Dismissal of the Attorney General**

On 5 August 2017, the first day of sessions of the newly elected National Constituent Assembly, the Assembly dismissed Dr Luisa Ortega Díaz from her position as Attorney General and announced that she would be subject to a criminal trial. The National Constituent Assembly appointed as her replacement Tareck William Saab, former National Assembly deputy of the government coalition, leader of the United Socialist Party of Venezuela, and Ombudsperson.

The dismissal of the Attorney General was in flagrant violation of Venezuelan law. Until a new constitution is adopted, the Constitution of the Bolivarian Republic of Venezuela of 1999 remains in force, as well as the Organic Law of the Office of Public Prosecutions (Ministerio Público). The 1999 Constitution mandates the National Assembly to create a new legal system and draft a new Constitution,<sup>1</sup> but it in no way assigns the power to dismiss the Attorney General. In accordance with the Organic Law of the Office of Public Prosecutions, the Attorney General can only be removed “by the National Assembly, with a favourable vote of the absolute majority of its members, after confirmation by the Supreme Court of Justice in full session”.<sup>2</sup> Likewise, the Organic Law strictly defines the meaning of “serious misconduct” that may give rise to the removal of the Attorney General.<sup>3</sup> The purported grounds of misconduct by the Attorney General fall well short of the prescribed definition of serious misconduct under the Organic Law.

As such, the dismissal of the Attorney General was made by a body that is not competent or empowered to do so by law, and without compliance with the established procedure or grounds defined by law. Furthermore, the National Constituent Assembly did not have legal or constitutional powers to appoint a new Attorney General.

The removal of Luisa Ortega Díaz from the office of Attorney General by the National Constituent Assembly is not only a violation of Venezuelan law but also of international standards. The UN Guidelines on the Role of Prosecutors stipulate that “States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”.<sup>4</sup> Likewise, the UN Guidelines on the Role of Prosecutors prescribe that disciplinary procedures against prosecutors must be based on established law and must observe minimum standards of due process, such as a fair hearing and an appeal.<sup>5</sup> The UN Special Rapporteur on the independence of judges and lawyers has thus emphasized that “the dismissal of prosecutors should be subject to strict requirements, which should not undermine the independent and impartial performance of their activities”,<sup>6</sup> and that prosecutors “must only be removed from office for proved incapacity, conviction for a crime, or conduct that renders them unfit to discharge their professional duties”.<sup>7</sup> For its part, the Inter-American Commission on Human Rights has pointed out that, regarding prosecutors, “any proceedings conducted to discipline them because of their conduct must observe the principle of freedom from *ex facto law* and the guarantees of due process”.<sup>8</sup>

The dismissal of Attorney General Ortega Díaz appears to have been politically motivated due to her increasing challenges to Government initiatives and its expanded control over the legislature and judiciary, as well as her demands for accountability for gross human rights violations in the country. Her dismissal removes one of the last

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<sup>1</sup> Constitution of the Bolivarian Republic of Venezuela, Article 347.

<sup>2</sup> Organic Law of the Office of Public Prosecutions (Ministerio Público), Article 22.

<sup>3</sup> Article 23 of the Organic Law of the Office of Public Prosecutions (Ministerio Público) defines serious misconduct as: “(1) An attempt, threat or violation of public ethics and administrative morality; (2) Action taken with grave and inexcusable ignorance of the Constitution of the Bolivarian Republic of Venezuela, of the Organic Law of the Office of Public Prosecutions or other law; (3) A threat, violation or undermining of the fundamental principles established under the Constitution of the Bolivarian Republic of Venezuela; (4) Carrying out politically partisan, trade union or similar activism, or private gainful activities, incompatible with public functions, other than for academic or teaching purposes” (free translation).

<sup>4</sup> UN Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990, para 4.

<sup>5</sup> Ibid, paras 21 and 22.

<sup>6</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/20/19 (2012), para. 70.

<sup>7</sup> Report of the UN Special Rapporteur on the independence of judges and lawyers, UN Doc A/HRC/32/34 (2016), para. 23.

<sup>8</sup> Inter-American Commission on Human Rights, *Guarantees for the independence of justice operators*, OEA/Ser.L/V/II Doc. 44 (2013), para 190.

institutional checks on executive authority and destroys one of the few glimmers of hope for an end to impunity for gross human rights violations in the country.

## **2. The Attorney General and gross violations of human rights**

In previous years, the attitude of the Public Prosecution Office, headed by the Attorney General, was tolerant to gross human rights violations and abuses committed by State agents and groups of armed civilians under the control of the Government, as noted with concern by the Inter-American Commission on Human Rights, the UN Committee against Torture and the ICJ.<sup>9</sup> However, from the end of 2016, and in particular following the decisions of the Supreme Court of Justice (SCJ) of March 2017 (see section 3, below), the Attorney General initiated several investigations and brought charges against State officials for the death of persons killed during public demonstrations. In March 2017, the Attorney General reported that 4,667 people had been killed by the action of State security forces in 2016.<sup>10</sup> At a press conference on 28 June 2017, the Attorney General declared that “we have a State terrorism, where the right to demonstrate, where demonstrations are ruthlessly repressed, where civilians in military justice are prosecuted”.<sup>11</sup> In July 2017, the Attorney General publicly announced the opening of a criminal investigation against senior Government officials after having verified the existence of “patterns of systematic violations of human rights” amounting to “crimes against humanity”.<sup>12</sup>

## **3. The Attorney General and judgments of the Supreme Court of Justice undermining the rule of law**

In March 2017, after a series of decisions since December 2015 undermining the constitutional powers of the National Assembly, the Supreme Court of Justice (SCJ) issued two judgments suspending the constitutional powers of the National Assembly.<sup>13</sup> Legislative power was abrogated and sweeping powers were granted to the executive branch over social, political, military, criminal, legal, economic and civil issues. Parliamentary immunity was abolished and it was declared that the opposition deputies (who make up the majority in the National Assembly) had committed a ‘crime against the Homeland’ for having passed, on 21 March 2017, the Agreement on the Reactivation of the Enforcement Process of the Inter-American Democratic Charter of the OAS, as the mechanism for peaceful conflict resolution to restore constitutional order in Venezuela. The judgments of the SCJ constituted an unwarranted intrusion of the judiciary into the legislative branch and amounted to a severe breach of the principle of separation of powers and a collapse of the rule of law.

The decisions of the SCJ elicited strong reactions by the international community. The Permanent Council of the Organization of American States declared that the Supreme

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<sup>9</sup> Inter-American Commission on Human Rights, Annual Report 2009, OEA/Ser.L/V/II. Doc. 51 corr. 1 of 30 December 2009, para. 472; Committee against Torture, Concluding observations on the combined third and fourth periodic reports of the Bolivarian Republic of Venezuela, UN Doc CAT/C/VEN/CO/3-4 (2014), para. 8; and ICJ, ‘Venezuela: The Sunset of Rule of Law. ICJ Mission Report 2015’, p. 20 et seq, at URL <https://www.icj.org/venezuela-human-rights-and-rule-of-law-in-deep-crisis/>.

<sup>10</sup> Panorama.com.ve, ‘Fiscal General Luisa Ortega: en sentencias del TSJ se evidencian varias violaciones del orden constitucional’, 31 March 2017, at URL [www.panorama.com.ve/politicayeconomia/Fiscal-general-de-la-Republica-Luis-Ortega-Existe-una-lamentable-pugna-institucional-20170331-0038.html](http://www.panorama.com.ve/politicayeconomia/Fiscal-general-de-la-Republica-Luis-Ortega-Existe-una-lamentable-pugna-institucional-20170331-0038.html).

<sup>11</sup> *El Tiempo* (Colombia), ‘Fiscal general afirma que en Venezuela hay “terrorismo de Estado”’, 28 June 2017, at URL [www.eltiempo.com/mundo/luisa-ortega-denuncia-a-maduro-103584](http://www.eltiempo.com/mundo/luisa-ortega-denuncia-a-maduro-103584).

<sup>12</sup> *El Tiempo* (Colombia), ‘La Fiscal de Venezuela acusa a Maduro de “ambición dictatorial”’, 31 July 2017, at URL <http://www.eltiempo.com/mundo/latinoamerica/fiscal-general-de-venezuela-luisa-ortega-dijo-que-constituyente-de-maduro-es-dictatorial-115178>.

<sup>13</sup> Supreme Court of Justice (Constitutional Chamber): Case No. 17-0323, Judgment of 27 March 2017; and Case No. 17-0325, Judgment of 28 March 2017.

Court's decisions were "inconsistent with democratic practice and... an alteration of the constitutional order of the Bolivarian Republic of Venezuela".<sup>14</sup> The Inter-American Commission on Human Rights considered that the decisions of the Supreme Court "constitute a usurpation of legislative functions by the judicial and executive branches, and a de facto nullification of the popular vote by which the National Assembly deputies were elected" and stated that the judgments "jeopardize the effective exercise of human rights and basic democratic principles, due to the concentration of power in the executive and judicial branches and the violation of the principle of separation of powers in a democratic system".<sup>15</sup> The UN High Commissioner for Human Rights expressed deep concern about the SCJ's decisions and noted that "[t]he separation of powers is essential for democracy to function, and keeping democratic spaces open is essential to ensure human rights are protected".<sup>16</sup>

At a press conference on 31 March 2017, the Attorney General publicly criticized the SCJ decisions. She said that the decisions disclosed several violations of the constitutional order and ignorance of the model of government enshrined in the Constitution of the Bolivarian Republic of Venezuela. She described the decisions as causing a rupture of the constitutional order of the country.<sup>17</sup>

#### **4. The Attorney General and the SCJ judges**

In July 2017, the Attorney General requested the SCJ to initiate proceedings against six principal members and two alternate members of the Constitutional Chamber of the SCJ on the basis that those judges were the authors of the March 2017 judgments mentioned earlier. As a precautionary measure, she also requested the suspension of those judges. The Chief Prosecutor's claim was rejected by the SCJ without reasons given.

Likewise, the Attorney General had in 2015 requested the divestiture of 13 principal judges and 20 alternates. The election of these judges had taken place by a simple majority in the National Assembly, despite the requirement for the votes of two thirds of National Assembly deputies to elect judges, under the Organic Law of the Supreme Court.<sup>18</sup> The appointments were made by the National Assembly after the 2015 elections but before the new legislative period began, by which time the pro-Government parliamentary chamber would lose its majority. In this regard, it should be noted that prior to this new election of judges, on 14 October 2014, the Supreme Court's Plenary Chamber accepted the resignation of 13 judges.<sup>19</sup> However, on 17 February 2016, two of them (Judges Carmen Elvigia Porras and Luis Ortíz Hernández) testified before the National Assembly Evaluation Committee on the Appointment of Supreme Court Justices that all 13 judges had been pressured to apply for their retirements a year before their constitutionally-established terms ended, in order to create vacancies for

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<sup>14</sup> Permanent Council of the Organization of American States, Resolution on the Recent Events in Venezuela, CP/RES.1078 (2108/17) of 3 April 2017, para. 1.

<sup>15</sup> IACHR Press Release No. 041/17, "IACHR Condemns Supreme Court Rulings and the Alteration of the Constitutional and Democratic Order in Venezuela", 31 March 2017.

<sup>16</sup> UN Press Release, "Preserve separation of powers, Zeid urges Venezuela", 31 March 2017.

<sup>17</sup> Panorama.com.ve, 'Fiscal General Luisa Ortega: en sentencias del TSJ se evidencian varias violaciones del orden constitucional', 31 March 2017, at URL [www.panorama.com.ve/politicayeconomia/Fiscal-general-de-la-Republica-Luis-Ortega-Existe-una-lamentable-pugna-institucional-20170331-0038.html](http://www.panorama.com.ve/politicayeconomia/Fiscal-general-de-la-Republica-Luis-Ortega-Existe-una-lamentable-pugna-institucional-20170331-0038.html).

<sup>18</sup> The Organic Law of the Supreme Court of Justice (LOTSJ-2004) provides that if, after the National Assembly has convened four plenary sessions to elect judges to the Supreme Court, a two-thirds majority of votes is not reached, then the election may be done with a simple majority. As noted by the Inter-American Commission on Human Rights, LOTSJ 2004 "did away with the requirement of broad political consensus for their election": see Inter-American Commission on Human Rights, *Democracy and Human Rights in Venezuela*, OEA/Ser.L/V/II. Doc. 54 (2009), para. 198.

<sup>19</sup> "SCJ aprobó jubilación anticipada de 13 de sus miembros", *El Universal*, 14 October 2015.

pro-Government judges to be appointed in December,<sup>20</sup> before the opposition majority took their seats in the National Assembly pursuant to the December 2015 elections.<sup>21</sup>

## **5. The Attorney General and the convening of a National Constituent Assembly**

Faced with increased anti-Government demonstrations in response to the SCJ rulings of March 2017, the Government on 1 May 2017 convened a National Constituent Assembly,<sup>22</sup> and it created a Presidential Commission made up exclusively of ministers, National Assembly deputies, and high level officials from the Government's party (United Socialist Party of Venezuela) to lay the foundations for the creation and operation of the forthcoming constituent assembly.<sup>23</sup> The convening decree established that the National Constituent Assembly would be made up of persons chosen by "industry and geographical areas". The decree, considered unconstitutional by many members of the legal profession (including the Federation of Bar Associations of Venezuela) was not only rejected by the political opposition and wide swathes of society, but also by some deputies of the pro-Government parliamentary coalition, the Attorney General and two judges of the SCJ. As pointed out by the ICJ, the resulting election "failed to comply with Article 347 of the current Constitution, which provides the legal basis for convening of a National Constituent Assembly. In particular, a significant portion of the members of the National Constituent Assembly should be chosen in open and universal elections, but instead are to be selected from restricted social sectors."<sup>24</sup>

In June 2017, the Attorney General lodged a challenge against the convening decree before the Supreme Court, on the grounds that it was unconstitutional. The SCJ refused to admit the appeal filed by the Chief Prosecutor.<sup>25</sup>

With the election of National Constituent Assembly members on 30 July 2017, the Attorney General warned, in public statements, that "all political rights are in danger", expressing her view that the National Constituent Assembly "has no legitimacy".<sup>26</sup>

## **6. Retaliations against the Attorney General**

On 20 June 2017, the SCJ initiated a procedure to remove the Attorney General after receiving a request from a pro-Government National Constituent Assembly deputy and leader of the ruling Socialist Party of Venezuela.<sup>27</sup> It was argued that the Attorney General's questioning of the convening decree for the National Constituent Assembly elections and the SCJ's judgments constituted "serious misconduct" against the Constitution. Likewise, the SCJ ordered the freezing of the bank accounts of Dr Ortega Díaz and forbade her from leaving Venezuela. The United Socialist Party of Venezuela

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<sup>20</sup> National Assembly, Accord by which Principal and Deputy Justices are Appointed to the Supreme Court of Justice, *Official Gazette* No. 40,816 (2015).

<sup>21</sup> "Ex magistrados del SCJ denunciaron que fueron extorsionados y amenazados para dejar sus cargos", *www.RunRun.es*, 17 February 2016; and "Ex magistrada: Maikel Moreno y presidenta del SCJ me presionaron para adelantar mi jubilación", *www.RunRun.es*, 1 March 2016.

<sup>22</sup> Decree No. 2830 (2017).

<sup>23</sup> Decree No. 2831 (2017).

<sup>24</sup> ICJ Press Release, 'Venezuela: the ICJ deeply concerned by the National Constituent Assembly process', 3 August 2017, at URL <https://www.icj.org/venezuela-the-icj-deeply-concerned-by-the-national-constituent-assembly-process/>.

<sup>25</sup> Supreme Court of Justice (Electoral Chamber): Case No. 2017-000036, Judgment No 67 of 12 June 2017.

<sup>26</sup> *El Tiempo* (Colombia), 'La fiscal de Venezuela acusa a Maduro de 'ambición dictatorial'', 31 July 2017, at URL [www.eltiempo.com/mundo/latinoamerica/fiscal-general-de-venezuela-luisa-ortega-dijo-que-constituyente-de-maduro-es-dictatorial-115178](http://www.eltiempo.com/mundo/latinoamerica/fiscal-general-de-venezuela-luisa-ortega-dijo-que-constituyente-de-maduro-es-dictatorial-115178).

<sup>27</sup> *El Universal*, 'TSJ decide este martes si enjuicia a la fiscal Luisa Ortega Díaz', 4 July 2017, at URL [http://www.eluniversal.com/noticias/politica/tsj-decide-este-martes-enjuicia-fiscal-luisa-ortega-diaz\\_659813](http://www.eluniversal.com/noticias/politica/tsj-decide-este-martes-enjuicia-fiscal-luisa-ortega-diaz_659813).

asked the SCJ to form a medical board to psychologically evaluate Dr Ortega Díaz, alleging that her positions revealed mental insanity.

After the confirmation on 3 July 2017 by the National Assembly of Rafael González as Deputy Prosecutor, the SCJ appointed a new Deputy Attorney General of the Republic, Katherine Harrington, on 4 July 2017. By doing so, the SCJ usurped the exclusive powers of the Attorney General, violating the provisions of the Organic Law of the Office of Public Prosecutions (Ministerio Público).<sup>28</sup> Access to the premises of the Public Prosecutor's Office was then made subject to military control, to prevent the Attorney General from accessing her office.

In a ruling of 12 July 2017, the SCJ issued a precautionary measure to obstruct and limit the functions of the Public Prosecutor's Office, just after the Prosecutor's Office presented criminal charges against some officials of the executive branch and their relatives.<sup>29</sup>

Since she began to criticize Government initiatives and take legal action to re-establish the rule of law, the Attorney General and her family have been the targets of multiple attacks, threats, harassment and campaigns of denigration and stigmatization by higher levels of government. The Inter-American Commission on Human Rights on 3 August 2017 issued precautionary measures in favour of Luisa Ortega Díaz and her next of kin.<sup>30</sup>

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<sup>28</sup> Article 25(3) of the Organic Law of the Office of Public Prosecutions (Ministerio Público) establishes that the duties and powers of the Attorney General of the Republic include the appointment of the Vice-Prosecutor or Deputy Prosecutor General of the Republic, after authorization by an absolute majority of the members of the National Assembly.

<sup>29</sup> Supreme Court of Justice Case No 17-0658, Judgment No 357 of 12 July 2017.

URL <http://historico.tsj.gob.ve/decisiones/scon/julio/201056-537-12717-2017-17-0658.HTML>.

<sup>30</sup> Inter-American Commission on Human Rights Press Release No 115/17, 'IACHR grants protection measure in favor of the Attorney General of the Republic of Venezuela, Luisa Ortega Díaz', 4 August 2017, at URL [http://www.oas.org/en/iachr/media\\_center/PReleases/2017/115.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/115.asp).