

ACCESO A LA JUSTICIA 2021 ANNUAL REPORT

ICC decrees an end to the simulation of justice in Venezuela

Executive Summary



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1. 2021 marked a turning point in the search for justice in Venezuela: Mr. Karim Khan, the prosecutor of the International Criminal Court (ICC), decided to end the preliminary examination phase and open an investigation for crimes against humanity in Venezuela. The announcement, although expected, came as a surprise because it took place within the framework of a three-day visit of the prosecutor to the country. During the same mission in Caracas, carried out between October 31 and November 3, 2021, an unusual Memorandum of Understanding was concluded between the Prosecutor's Office and the Government, with the commitment to collaborate in an independent and impartial manner, but with full respect for the principle of complementarity, the pursuit of cooperation and mutual assistance.
2. The decision was expected, since the former ICC prosecutor, the Gambian jurist Fatou Bensouda, in her report of activities of the preliminary examination 2020, published on December 14, she reiterated what she had mentioned a month earlier, when she said that there were "reasonable grounds" to believe that some of the crimes enshrined in the Rome Statute had been committed in the country.
3. Ms. Bensouda said she believed that four crimes against humanity had been committed in Venezuela (imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law, torture, grave sexual violation and persecution of a group or collectivity with its own identity on political grounds).
4. However, the Prosecutor not only pointed out crimes but also identified possible perpetrators and pointed to the Bolivarian National Police (PNB), the Bolivarian National Intelligence Service (Sebin), the Military Counterintelligence Directorate (DGCIM), the Special Action Forces (FAES) of the PNB, and the Bolivarian National Guard (Guardia Nacional Bolivariana), Bolivarian National Guard (GNB), Scientific, Criminal and Criminalistic Investigations Corps (CICPC), National Anti-Extortion and Kidnapping Command (Conas) and certain units of the Bolivarian National Armed Forces (FANB), as well as civilians "in favor of the Government". The latter seems to be a reference to the colectivos.
5. The State as a whole maneuvered to avoid the opening of the investigation, making believe that crimes that could end up in the court of The Hague were being investigated. On the one hand, the Public Prosecutor's Office did not hesitate to make Copernican turns in notorious cases of serious human rights violations such as the deaths of Councilman Fernando Alban, the student Juan Pablo Pernaleté, and Captain Rafael Acosta Arevalo. Thus, in the first case, the prosecutor imposed by the now-defunct Constituent Assembly, Mr. Tarek William Saab, admitted that he did not commit suicide as initially claimed, while in the second case he admitted that the young man lost his

life due to a tear gas bomb thrown by the National Guard, as claimed by his predecessor, Ms. Luisa Ortega Díaz. And finally, in the case of the officer, he admitted that he died due to the torture inflicted on him by his captors.

6. But in addition to the cases mentioned before, Mr. Saab assured that during the three years and eight months of his administration, 1,064 officers and 136 civilians had been accused of violating human rights, 540 officers and 30 individuals had been arrested, and 133 convictions had been achieved. However, the figures are derisory when compared to the cases of human rights violations occurring in the country. As an example and in order to contrast Saab's figures, the Venezuelan Program for Human Rights Education and Action (Provea) denounced that in 2020 alone there were 2,853 extrajudicial executions.
7. In addition to the twists in some cases and the reactivation of others, Saab added another strategy to impede the investigation: Procrastination. Thus, on May 1, he denounced that Bensouda was acting with her back to Venezuela and was not responding to the information sent to her by his office regarding the ongoing investigations for human rights violations. Although the then prosecutor rejected the accusations, Saab insisted on his complaints and went to the Preliminary Chamber of the ICC, which he asked to exclude from its analysis "illegally removed documentation" and not to accept "sources of information and allegations that are proven to be partial, in bad faith or without any evidentiary rigor."
8. This last action by Saab prevented Bensouda from announcing on June 15, 2021, whether or not to open an investigation in relation to the Venezuelan situation. On that day Bensouda was leaving office. But while on the one hand, he delayed the action of the ICC Prosecutor's Office, on the other hand, Saab announced measures to combat one of the great evils afflicting the Judiciary as a whole: the provisionality of its officers. On October 21, Saab announced "the activation of a special plan of civil service regularization of active provisional prosecutors". This, after in 2018 he himself made all the officials of the agency staff of free appointment and removal, with a slight reform to Article 3 of the Statute that governs the rules of the staff of the Public Prosecutor's Office.
9. The regularization plan seems another move by Saab to feign independence and silence the international criticism that his office and the Judiciary, in general, have received in recent years due to its lack of independence and submission to the Government.
10. The Government also sought to make the ICC Prosecutor's Office believe that it took note of the criticisms on human rights. Thus, at the end of March, Nicolás Maduro decreed the restructuring of the PNB. This corps has been accused of committing extrajudicial executions by both the Office of the High Commissioner (OHCHR) and the UN Fact-Finding Mission. In particular, mention is made of the agency's controversial Special Action Forces (FAES), created by Maduro in 2017 with the excuse of fighting organized crime.

11. Another governmental move took place on May 12th, when Maduro ordered the Bolivarian National Intelligence Service (Sebin) and the General Directorate of Military Counterintelligence (DGCIM) to hand over all prisoners in their custody to the Ministry of the Penitentiary Service. Both Bachelet and the International Independent Fact-Finding Mission have accused both agencies of committing arbitrary detentions, torture, and ill-treatment of those in their custody.
12. Weeks later, Maduro announced the creation of a special commission for judicial reform, presided by the deputies of the pro-government National Assembly, Diosdado Cabello, and Cilia Flores, and by Judge Lourdes Suarez Anderson, president of the Constitutional Chamber of the TSJ. Its objective would be to solve in sixty days the overcrowding of the Preventive Detention Centers and also “to take the reins of a complete revolution of the justice system, which will integrate all the organs.” It was the second judicial reform announced in less than a year.
13. And finally, the NA gave another coup d’effect by approving the “criminal cluster” between September 16 and 17. Said cluster of laws repeats failed measures such as reductions in the time frames for prosecutors to investigate and for judges to hold preliminary and presentation hearings. It also included rectifications to controversial modifications implemented less than a decade ago. At the time, Chavismo presented as a panacea to all the ills afflicting the administration of criminal justice. However, among the provisions that were left without effect were those contained in the Organic Code of Criminal Procedure (COPP) which prevented non-governmental organizations from representing victims of human rights violations and facilitated preventive detentions.
14. Another striking aspect of the “criminal cluster” is the humble steps towards the demilitarization of criminal justice. Thus, the reforms of the COPP and the COJM close the doors to the possibility of civilians being tried by military judges, as proscribed by Article 261 of the Constitution. In its report *Repression in Venezuela in Figures*, the Venezuelan Penal Forum, published on November 22, 2021, reported that military courts had prosecuted 875 civilians since 2014.
15. Acceso a la Justicia sustains that the constant changes, reforms, and judicial revolutions in Venezuela reveal no State policy on the matter. However, the mere fact that authorities insist on applying repeated and useless measures forecasts that problems will continue. The real problem is not having judges and prosecutors who are neither impartial nor independent, but mere officials who merely follow orders and who have no stability whatsoever and may be dismissed at any time and without prior procedure, since Article 255 of the Constitution, which establishes that the only way to enter the judicial career is by competitive public examination, is not applied.

16. The decision of the ICC Prosecutor's Office to set its sights on Venezuela has several readings, the first and most evident being that the victims and their families are closer to seeing how their aggressors will not go unpunished. Likewise, the decision represents a milestone for the region, as it is the first case related to Latin America to be analyzed by the Court. And finally, it reveals that the government's attempts to feign justice have failed. Nevertheless, it should be noted that, although this represents significant progress, it opens the way to a new process that may last for a long time.
17. Venezuela reached 2021 as a de facto State forged by institutions that, throughout these last two decades, have risen against the flow of the Constitution and the international standards in terms of the rule of law and democracy recognized in treaties signed by the country. This "no holds barred" policymaking has allowed the authorities of the governing party to increasingly screw and hold themselves in power, in addition to imposing their political model in a definitive manner
18. However, in 2021 some changes took place. Thus, the TSJ lifted the siege that since 2016 it engulfed around the Parliament and returned its powers to it. The reason? The ruling party has almost 90% of the seats in the new Legislative.
19. The installation of the new NA elected in the questioned elections of 2020, on January 5, 2021, also led to the end of the state of economic emergency imposed by the Maduro government in 2016 and endorsed by the Constitutional Chamber of the TSJ. The state of exception and economic emergency was part, together with the rulings of the TSJ, of the strategy implemented by the Executive to dismantle and liquidate the NA with an opposition majority.
20. The recovery of the NA by Chavismo did not end the persecution against the members of the former Parliament. On the contrary, the results of the questioned legislative elections of December 2020 have been the excuse to intensify its persecution of political dissent. Acceso a la Justicia recorded threats against members of the former Legislative from their successors, from the TSJ, and even from the Office of the Comptroller General of the Republic (CGR).
21. In its eagerness to give a veneer of legality to the institutionalism of the country and to disguise the co-optation of the public powers, the NA set in motion the procedure to appoint the rectors of the CNE, under the excuse that the CNE appointed by the TSJ, usurping functions of the former NA, was set on a temporary basis as established in judgment No. 68 of June 5, 2020.
22. This process raised more than reasonable doubts. In the first place, it was set in motion by a Parliament elected in elections plagued with advantageous practices and irregularities. Secondly, it repeated the vices that in the past led to the appointment of persons who did not meet the constitutionally required conditions to occupy such positions.

23. Despite the doubts, on February 9, the members of the Electoral Nominations Committee were sworn in by the plenary of the pro-government NA. Then, with great speed, its regulations were approved on February 11, 2021. In a matter of weeks Pedro Calzadilla, Enrique Márquez, Alexis Corredor, Tania D’Amelio and Roberto Picón were appointed as electoral rectors. The mere fact that one was chosen as a minister and the other as a deputy for the opposition did not matter.
24. Simultaneously to the appointment of the CNE, the Parliament repealed the Law for the Regularization of the Constitutional and Legal Periods of the State and Municipal Public Powers, an instrument which prohibited the holding of joint national, regional and municipal elections. As a result, the elections of governors, regional deputies, mayors, and council members were set for November 21.
25. Given the imminent process, the Chavismo resumed its strategy of political disqualifications aimed to assure its hegemony before the mega-elections. On February 23, the Office of the Comptroller General of the Republic (CGR) announced the disqualification of twenty-eight members of the NA elected in December 2015 for refusing to submit a sworn statement of assets.
26. At the same time, Maduro promised to eliminate the controversial figure of the protectorates per state and municipality, a sort of parallel government in the opposition governorships and mayoralties, but advanced in the establishment of the so-called Communal State, through the unconstitutional bill of the Organic Law of Communal Cities. Likewise, the TSJ dismissed the judicial actions of dissident Chavismo.
27. The European Union Electoral Observation Mission, invited to follow the process, concluded that the same “showed the persistence of structural deficiencies, although the electoral conditions improved compared to the three previous national elections.” Among these deficiencies, it mentioned the intervention by the TSJ of the opposition parties or dissidents of Chavismo and the disqualifications.
28. The EU-EOM also found that the line dividing the government and the ruling party continues to be very blurred during the electoral campaign, if not non-existent. “The ruling party’s campaign was predominant throughout the country, and had a mobilized base and in some cases with the participation of public officials, “the observer group reported while admitting that “the privileged access to fuel, as well as the extensive use of state resources, the delivery of goods, such as food packages, gas bottles or water pumps, affected the level playing field.”
29. The observers also noted the advantageism and the use of public funds displayed by the ruling party during campaign times and the coercive measures and pressures on voters. But above all, the incapacity of the CNE to put a stop to such situations.

30. Despite the promises of recognition and collaboration made by the government after the elections, in which only three governorships remained in the hands of the opposition, a few days after the elections, the National Executive took away from two of the states it lost (Zulia and Cojedes) infrastructures such as airports and bridges they administered.
31. In 2021, the Judicial Power was in the sights of the United Nations High Commissioner for Human Rights (UNHCHR) and of the International Independent Fact-Finding Mission on the Bolivarian Republic of Venezuela.
32. In the report presented in July 2021, High Commissioner Michelle Bachelet stated that the judicial system systematically violates at least five fundamental rights of citizens: the right to liberty, right to defense, right to justice without delay, right to an independent court, and right to public trials in the right place; thus confirming that in Venezuela there is no impartial justice or due process.
33. On the other hand, the Independent International Fact-Finding Mission blamed the omission or complicity of the Judiciary for the abuses that have been taking place in the country. "If the prosecutorial and judicial actors had adequately and fully performed their constitutional role, they could have prevented the commission of many of these crimes and violations or, at the very least, they could have placed rigorous obstacles to hinder the ability of members of the State's public security and intelligence services to commit them," reads the report.
34. The Mission revealed that the DCGIM applies sippenhaf to dissidents in its custody. This practice consists of imprisoning relatives of the detainees to pressure them to confess or collaborate with their plans. The term is not an interpretation of the Mission but instead quotes what the officials said: that they are aware that this mechanism of repression has its origins in Nazism and that this is what they let their victims know.
35. Another irregularity identified by the UN Mission has been issuing preventive detention orders on a routine basis and not as an exceptional measure, without offering sufficient or adequate justification. As well as several obstacles to exercising the right to defense and delays in different parts of the process.
36. The Mission attributed the justice system's attitude to the situation of co-optation and submission to the Government since the arrival of Hugo Chávez to power in 1999. The instance denounced that the process of the kidnapping of justice has been based on the control of the TSJ and the Public Prosecutor's Office using the appointment of officials related to the government. At present, twenty-nine of the thirty-two magistrates are members of the United Socialist Party of Venezuela (PSUV), were ministers or deputies for that party, or have family ties with government authorities. The control of the highest court, on the other hand, has facilitated the domination of the rest of the system, thanks to the non-holding of competitive examinations.

37. In 2021 Acceso a la Justicia published *Diaria injusticia. Historias de decepción en tribunales de Venezuela* (n/t: *Daily injustice. Stories of disappointment in Venezuelan courts*) a work that shows the (lack of) justice of the TSJ, its incredible delay and inefficiency. It also shows how ordinary citizens are discriminated. Especially in cases where the State is involved, the citizens do not get a timely response. Moreover, suppose the State is found liable. In that context, they are not compensated according to the value of the current currency, thus leaving the person without real reparation, even if he/she wins the case.
38. It also presented *Mitos y realidades de la violencia contra la mujer en Venezuela. Historia de otro fracaso del Poder Judicial*, (n/t: *The myths and realities of violence against women in Venezuela. History of another failure*) a report on the Judiciary's treatment in Venezuela, and specifically the TSJ, has given to cases of violence against women.
39. Likewise, Acceso a la Justicia participated in the III Universal Periodic Review of Human Rights process. The country was submitted in January 2022 in the United Nations Human Rights Council, with the report *The consolidation of a de facto state in Venezuela*. The statement denounced the non-compliance with the recommendations accepted by the State in the previous cycle and denounced that this situation has served to build a State model different from the one foreseen in the 1999 Constitution.
40. Despite trying to prevent the ICC Prosecutor's Office from initiating the investigation of Case Venezuela 1 for the commission of crimes against humanity in the country, all the maneuvers undertaken by the Government of Nicolás Maduro turned out to be unsuccessful (simulation of justice in notorious cases of human rights violations; delaying tactics on the part of the Public Ministry when sending reports and requesting judicial control to the Preliminary Chamber of the ICC; the supposed end of the eternal provisionality in the Attorney General's Office; the police restructuring and the "criminal cluster"). In this sense, the commitment acquired with the Prosecutor General's Office through the Memorandum of Understanding to collaborate independently and impartially to achieve cooperation and mutual assistance between both accounts for how justice always prevails at the end of the day.