

Democratization



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No need to start from scratch

Some initial recommendations for transitional justice in Venezuela

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Venezuela is currently a state captured by corrupt criminal networks, made up of public officials and private actors who have been illegally profiting from public resources¹. In this context of institutionalized corruption, serious human rights violations have also been committed in a systematic and generalized manner, with the tolerance, acquiescence and/or active participation of State agents².

These violations occur within the framework of a gradual process of disintegration of democratic institutions and the collapse of the rule of law³, where control and accountability mechanisms are practically non-existent. The Venezuelan justice system, also co-opted by these corrupt criminal networks, acts as

1 Salcedo-Albarán, Eduardo & Garay-Salamanca, Luis. *Súper red de corrupción en Venezuela: Cleptocracia, nepotismo y violación de derechos humanos*, Vortex Foundation and Scientific Vortex Inc., February, 2021.

2 Detailed conclusions of the Independent International Fact-Finding Mission in the Bolivarian Republic of Venezuela, A/HRC/45/33, September 15, 2020.

3 Idem, paragraph 12.

the **legal arm** of political power, giving rise to a situation of total impunity that only exacerbates the violations⁴.

Faced with the inaction of the national justice institutions, investigations and criminal proceedings have been initiated in third countries for crimes of corruption committed in Venezuela or by Venezuelan citizens. According to information from Transparencia Venezuela, until January 2021 there were close to 100 investigations or criminal proceedings opened in 21 countries against Venezuelan citizens –including high-ranking political and military actors– for drug trafficking, money laundering, and corruption offenses⁵.

In relation to cases of human rights violations (mainly arbitrary detentions, torture and other cruel, inhuman and degrading treatment, forced disappearances and extrajudicial executions), except for the preliminary examination currently open in the International Criminal Court, there are no investigations or processes initiated in third countries. We do not rule out that complaints have been filed⁶, but as far as we know, there are no significant ongoing investigations or formally open processes in any country in the world for these crimes.

What will we do with the legacy of grand corruption and gross human rights violations that this government will

4 For more information see: *Judges on the Tighrope, report on the independence and impartiality of the Judiciary in Venezuela*, International Commission of Jurists, 2021.

5 See: <https://transparenciave.org/transparencia-venezuela-exige-investigacion-exhaustiva-sobre-fondos-sospechosos-en-suiza/>

6 In 2018, a Peruvian politician filed a criminal complaint against Nicolás Maduro before the Peruvian Prosecutor's Office for the arbitrary detention and torture of a Peruvian citizen in Venezuela. See: <https://panamericana.pe/24horas/locales/243485-jorge-castillo-presenta-denuncia-maduro-peruano-presos-venezuela>

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leave behind? Will we ever have an "official truth" about what happened? Is the Venezuelan justice system prepared to trial those responsible for the crimes committed? What reforms must be implemented so that these events are not repeated? How to take advantage of the tools of international law and comparative experience?

Transitional justice, with its rules, standards, and principles, offers some clues to answer these questions. Its mechanisms are designed to obtain **truth, justice, reparation and establish non-repetition measures** in countries that have gone through periods of armed conflict or dictatorships, characterized by massive human rights violations. This is the "toolbox" that Venezuelans have at their disposal to answer the questions posed. The objective of this article is to outline some initial recommendations that, based on the legal framework of transitional justice and comparative experience, may be useful for a successful transition in Venezuela.

1. The search for the truth must have a comprehensive view that incorporates the different dimensions of the crisis and not only violations of civil and political rights

One of the essential elements of transitional justice is the search for the truth about human rights violations that occurred in a given period. The main mechanism for reaching the truth about what really happened are the so-called **truth commissions**, which have traditionally focused on clarifying the circumstances in which first-generation human rights violations were committed and have not addressed economic, social, cultural or environmental rights violations and much less acts of corruption.

But this has been changing in recent years and there are increasingly more experiences of truth commissions that also address **corruption and other economic crimes**, as well as impacts on land and territory rights. As the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition has pointed out: “the scope of truth-seeking mechanisms has been expanded to also address violations of economic, social and cultural rights (for example, the Commission for Reception, Truth and Reconciliation in Timor-Leste), economic crimes (the Truth and Reconciliation Commission in Liberia) and grand corruption and the exploitation of national and public resources (the Truth, Justice and Reconciliation Commission of Kenya)”⁷.

Whatever the formula adopted in Venezuela, it is essential that it encompasses not only the impact on **civil and political rights**, but also the role played by **corrupt criminal networks** that captured public institutions, especially the judicial system, to guarantee the impunity of the members of these networks. As the Independent International Fact-Checking Mission pointed out, an element of the crisis in Venezuela that deserves further investigation is the nexus between corruption and serious human rights violations. Several of the sources with whom the Mission spoke, all current or former members of the Government and military personnel, indicated that a motivating factor for the human rights violations is the personal economic benefits derived from the capture of State institutions, which constitutes a strong

7 Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and the Guarantees of Non-Repetition of the United Nations, A/HRC/39/53, July, 2018.

incentive for government agents to maintain power and guarantee impunity⁸.

Moreover, it will be essential that the truth-seeking process includes the serious effects on the economic, social, and environmental rights of Venezuelan citizens, who live (survive) in a context of hyperinflation, malnutrition, food and medicine shortages, and a complex humanitarian crisis exacerbated by the COVID-19 pandemic. Until December 2020, the situation had forced more than 5.4 million Venezuelan citizens –about a sixth of the population– to leave the country and, if the crisis continues, this figure could reach 6 million in 2021⁹.

2. Those responsible for the crimes committed,
especially those most highly responsible,
must be identified, prosecuted and punished

Another of the columns of transitional justice is **justice**, which implies that the perpetrators of human rights violations that occurred in a given period are held accountable for the crimes committed. International law is clear in establishing a state obligation to investigate, prosecute and punish those responsible for human rights violations. Amnesties, Self-Amnesties, pardons or any other measure of “forget and forgiveness” are prohibited by international law and would render the victims totally defenseless.

However, comparative experience shows us that it is practically impossible to investigate and prosecute all cases

8 Detailed conclusions of the Independent International Fact-Finding Mission in the Bolivarian Republic of Venezuela, A/HRC/45/33, September 15, 2020, paragraph 116.

9 See: <https://www.vozdeamerica.com/venezuela/oea-estima-cifra-migrantes-venezolanos-podria-superar-la-de-siria-2021>.

and all perpetrators. It is essential that the Venezuelan justice system considers this challenge from the get-go and explores possible measures to face it. One option is to establish **criteria for the selection and prioritization of cases**, which would allow organizing cases based on previously established criteria. Although there is no exact 'recipe' for what these criteria should be, they are usually related to the seriousness of the events and their impact, a common context and patterns that allow joining several cases, the possibility of judging those most responsible, the symbolic effect of the case, among others¹⁰.

Starting from the premise that international law does not set specific penalties or punishments for international crimes, the possibility of establishing **alternative sanctions** to the custodial sentence when certain assumptions are met is also an option that will have to be explored. The Special Jurisdiction for Peace in Colombia is a relevant experience on the use of selection and prioritization criteria, as well as alternative sanctions, while complying with the international obligation of the State to investigate, prosecute and punish.

On the other hand, it is recommended that the search for justice within the framework of a transition process in Venezuela is not limited to the prosecution of the effects on the **rights to life, integrity and freedom** of Venezuelans, but also includes cases of **grand corruption**, which have led to serious violations of

10 For more information on this subject, see the report of the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition, A/HRC/27/56, August 27, 2014. The Colombian experience is the most recent one on transitional justice in which criteria for selection and prioritization of cases were adopted. See: Sánchez, Camilo & Jiménez, Alejandro, La selección y priorización de casos en la Jurisdicción Especial para la Paz, Universitas, Vol. 69, Pontificia Universidad Javeriana, Colombia, 2020

economic, social and environmental rights, as well as tolerated and promoted the former. Although the level of looting of public funds in Venezuela exceeds similar cases in the world, the effects on human rights is perhaps the main characteristic that makes Venezuela a unique case in the world, in terms of macro-corruption, institutional co-optation, impunity and human rights violations¹¹.

Finally, and while the Venezuelan national justice system prepares to respond to such a challenge, the possibility of promoting criminal investigations in third countries through the **principle of universal jurisdiction**, recognized in many countries of the world, must be taken into account. This principle allows national courts to investigate and prosecute people suspected of having committed **crimes against humanity**, regardless of where the crime was committed or the nationality of the victim and perpetrator¹². This was the principle behind the arrest of Augusto Pinochet in London in 2000¹³ and the conviction of a Salvadoran soldier by a Spanish court in 2020, for the murder of five Spanish Jesuit priests in El Salvador more than 30 years ago¹⁴.

11 Eduardo Salcedo-Albarán y Luis Garay-Salamanca; *Súper red de corrupción en Venezuela: Cleptocracia, nepotismo y violación de derechos humanos*. Editorial (Fundación Vortex y Scientific Vortex Inc., febrero de 2021), 108-109.

12 For more information see: <https://trialinternational.org/topics-post/universal-jurisdiction/>

13 See: https://elpais.com/internacional/2018/10/16/america/1539652824_848459.html

14 See: <https://elpais.com/espana/2021-02-03/el-supremo-confirma-la-pena-de-133-anos-impuesta-para-el-unico-acusado-de-la-matanza-de-los-jesuitas-espanoles-en-el-salvador.html>

3. In-depth and informed reflection is needed about the reforms that justice institutions need, as well as the standards that should guide those reforms

One of the main goals of the transition period should be to **recover democratic institutions**. Facing the conditions of impunity for the violation of human rights, as well as the structures of grand corruption entrenched in the state apparatus, will be part of the most important challenges that a **renewed and independent justice system** will have to face.

In Venezuela, it will not be enough to overcome the traditional barriers to access to justice or to correct some dysfunctionalities in judicial management. Instead, a **radical transformation of the conditions that have affected its institutional performance**, which turned the judicial institution into an extension of the executive power, will be necessary. The democratic transition in Venezuela, thus, supposes the existence of an independent, impartial and transparent judicial body, subject only to the rule of law as an indispensable requirement.

To this end, a **roadmap** must be designed that includes the appointment of new high authorities of the justice system and the public ministry who can guide institutional reform as an urgent measure. Furthermore, the need and feasibility of establishing **two sub-systems within criminal justice** should be explored, one for **corruption** and the other for the prosecution of **human rights violations**, which may function while a long-term reorganization of the justice institutions is taking place.

Various experiences in the region show the advantages of **subsystems or special courts** for the prosecution of **human rights violations**. To combat **corruption and related crimes**, some

countries have also created specialized courts, whose members are selected within the framework of public processes, subject to strict probity controls and supervision of personal records. Unlike ordinary courts and prosecutors where specialty is not an insurmountable requirement, the members of an anti-corruption sub-system must be specialists in organized crime and financial crimes, in addition to other relevant topics for the investigation of these cases.

Another dilemma posed by post-conflict or post-dictatorship societies is **how to make those responsible for these crimes be tried by the judges they themselves appointed?** For this reason, one of the priorities of the countries in transition must be the consolidation of the judiciary, so that it can regain its independence. In his A/HRC/11/41 report of 2009, the Special Rapporteur on the Independence of Judges and Lawyers pointed out that the **tenure of judges** is one of the fundamental pillars of judicial independence that can only be violated in **exceptional circumstances**. One of these circumstances, the report points out, can occur in situations of transition from an authoritarian regime to a democratic system “in which the objective of limitations to the principle of irremovability would be to end impunity and to prevent the reoccurrence of serious human rights violations”¹⁵.

In the same sense, Report A/HRC/35/31 presented in 2017 by this same special rapporteur, in which it addresses the issue of corruption and organized crime, maintains that: “one priority of a country in transition to peace or democracy may be to **“clean up”** its judiciary in order to restore its legitimacy, independence

15 Report of the Special Rapporteur for the Independence of Judges and Lawyers, A/HRC/11/41, March 24, 2009, in: https://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf, paragraph 64.

and impartiality, and ultimately its public credibility”¹⁶. In order to avoid any arbitrariness, abuse or “reckoning” in the processes of dismissal and appointment of new officials, the Rapporteur underlines the need to respect the **international standards** applicable to these situations, such as fair trial and appointment of judicial authorities¹⁷.

Opposing the direction of what is established in the norms, standards, doctrine and international jurisprudence in this matter would not only call into question the reforms that are being promoted, but could also lead to the subsequent **international responsibility of the Venezuelan State** in international instances of protection of human rights.

4. The need to create an ad-hoc mechanism
that collaborates with national institutions
in the search for justice should be evaluated

Assessing whether the Venezuelan justice system has the capabilities or could have them in the short term to prosecute cases of human rights violations and grand corruption will need to be assessed, as well as whether the conditions exist for it to do so independently and impartially. If the conclusion is that these conditions do not exist, the possibility of creating an **ad-hoc mechanism or system** that helps Venezuelan judicial authorities respond to the legacy of the past should be evaluated, while national institutions are strengthened.

¹⁶ Report of the Special Rapporteur for the Independence of Judges and Lawyers, A/HRC/35/31, June 9, 2017. In: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/159/85/PDF/G1715985.pdf?OpenElement>, paragraph 40

¹⁷ Idem.

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Two relevant examples for Venezuela are those of the International Commission to Combat Impunity in Guatemala (**CICIG**) and the Mission to Support Corruption and Impunity in Honduras (**MACCIH**). The first was created by agreement between the Guatemalan State and the United Nations, and its objective was to collaborate with Guatemalan institutions in the identification and prosecution of corrupt criminal networks, while the second was created by an agreement between the Honduran State and the Organization of American States (OAS). Both the CICIG and the MACCIH had a complementary role to that of the Public Ministry and in both cases they had the support of international experts and researchers.

Another interesting experience is that of **hybrid or mixed courts** (Cambodia, East Timor, Sierra Leone, Lebanon, among others), created to try mainly human rights violations and crimes against humanity, and made up of national and international judges, with the United Nations support. A more recent and closer example is that of the **Special Jurisdiction for Peace of Colombia**, which, without being exactly a mixed system (all its members are Colombian), did use a mixed system (made up of Colombians and foreigners) for the selection of its magistrates¹⁸.

Although *ad hoc* mechanisms are not rigid models and are adjusted to the reality and needs of each context, common elements are: the support of an intergovernmental organization such as the UN or the OAS, a complementary role to that of national institutions, and a mixed integration (national and international). In the case of Mexico, for example, the United Nations High Commissioner for Human Rights recommended that the Mexican State establish an **Advisory Council** of renowned experts in the field of human rights and the fight against impunity to advise the

¹⁸ See: <https://www.ideaspaz.org/especiales/magistrados/>

Mexican State on strategies and reforms that promote investigation and punishment capacities, and to reverse the prevailing rate of impunity in the country¹⁹.

If the creation of an ad-hoc mechanism is finally chosen, which with the support of the international community will accompany the process of institutional reconstruction of justice in Venezuela, it will be essential that it is built on comparative experience and lessons learned in order to avoid repeating the same errors of other mechanisms.

5. Women must play a fundamental role in the transitional justice process, not only as victims, but as leaders of the process of truth, justice, reparation and non-repetition.

It is necessary to place special emphasis on the role of women in the transitional justice process, not only as **victims** of human rights violations and other crimes, but as **key actors** in the search for truth, justice, reparation and design of measures that guarantee non-repetition. On the other hand, it is important to highlight the constructive role that women can play in the processes of dialogue and negotiation for democratic reconstruction and national reconciliation. The teams that carry out these processes must also be **led by women**.

The transitional justice mechanisms that are developed must have a **gender perspective**, seeking to comprehensively address the needs of women during the conflict, as well as their challenges in terms of efforts to search for truth, justice, reparation of damage

19 United Nations, Office of the High Commissioner for Human Rights in Mexico, Recomendaciones a México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos, Mr. Zeid Ra'as Al Hussein and Response of the Mexican State, Mexico City, November 2016.

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and building a lasting peace. In the case of Venezuela, building a transitional justice process with a gender perspective is an urgent matter and must encompass both the general context of a complex humanitarian crisis, and gender violence in the context of political repression.

At the end of 2020, the Human Rights Council decided to extend the mandate of the Independent International Fact-Finding Mission for two more years, until September 2022, so that the Mission can continue to investigate the serious human rights violations that occur in Venezuela, “including those involving sexual and gender-based violence, committed since 2014, with a view of combating impunity and ensuring full accountability for perpetrators and justice for victims”²⁰.

In this context, it is more necessary than ever to **strengthen the capacities of Venezuelan civil society** to monitor, make visible and carry out a comprehensive defense both at the national and international level in cases of sexual and gender violence, to document individual cases and patterns that may later be taken up by the transitional justice mechanisms implemented in Venezuela, as well as to play a constructive role in the subsequent process of democratic reunion.

20 Resolution 45/20 of the United Nations Human Rights Council, A/HRC/RES/45/20, October 13, 2020, paragraph 15. This same resolution dictates “Urges the Venezuelan authorities to adopt appropriate measures to address reported acts of violence and harassment; sexual violence against women and girls in detention in the Bolivarian Republic of Venezuela, which includes accounts of physical, sexual and verbal abuse, threats and intimidation; the sexual exploitation of women and girls for food, protection and privileges; and the ill-treatment, torture and denial of rights of women human rights defenders, nurses, teachers, civil servants, political prisoners and detainees in detention centres”, paragraph 6.