



## **Joint Submission to the UN Special Rapporteur on the Independence of Judges and Lawyers:**

the Case of Judge María Lourdes Afiuni and the Survival of  
the Rule of Law in the Bolivarian Republic of Venezuela

Cc:

UN Special Rapporteur on Violence Against Women

UN Special Rapporteur Free Expression

UN Special Rapporteur on Torture

UN Working Group on Arbitrary Detention

UN Working Group on Discrimination Against Women and Girls

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## Executive Summary

On November 8, 2020, the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia* or TSJ), the highest court in Venezuela, affirmed a five-year prison sentence against Judge María Lourdes Afiuni on the newly invented, fabricated charge of “spiritual corruption”— a first in Venezuelan history. Judge Afiuni continues to suffer in a perpetual state of limbo after an 11-year Kafkaesque criminal process, merely for fulfilling her duties as a judge in applying the law. Her life is now at imminent risk in the event she is sent back to prison to serve her cruel five-year sentence, while currently requiring cancer treatment.

On December 10, 2009, Judge María Lourdes Afiuni was arrested minutes after issuing a ruling in the case of a political prisoner at the time, Eligio Cedeño, in accordance with Venezuelan Criminal Procedure and an opinion by the UN Working Group on Arbitrary Detention. The following day, in a national address, President Hugo Chávez called for Judge Afiuni to receive the maximum penalty under Venezuelan law, 30 years in prison, so that she serve as an example to other judges. President Chávez even directed the National Assembly and TSJ to pass a new law to accomplish that goal, if need be. The authorities proceeded to prosecute Judge Afiuni for corruption, despite admitting that she received no benefit in return for her ruling — a necessary element under Venezuela’s anti-Corruption Law.<sup>1</sup>

The authorities immediately sent Judge Afiuni to a maximum-security prison for more than a year without trial, where she was confined with inmates who she sentenced herself, including for murder. The authorities dismissed multiple requests to transfer her to a safer location. As a result, Judge Afiuni suffered unspeakable abuse at the hands of her inmates and public officials, including arson attempts on her cell, physical attacks with blades, and rape by prison guards and officials from the Ministry of Interior and Justice. On February 2, 2011, after undergoing a total abdominal hysterectomy (removal of the uterus), she was finally transferred to the strictest form of house arrest, but only after an international outcry.

The first trial was then delayed 24 times for trivial reasons until it was annulled in October 2013. The second trial finally began, after continuous interruptions, on April 29, 2015. The proceedings were then suspended *60 more times*. The presiding judge, Manuel Bognanno, did not hold one hearing between January 31, 2018 and February 22, 2019, as he awaited instruction from the president. On February 22, 2019, new prosecutors attended the hearing for the first time,

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<sup>1</sup> **Corruption - Article 89.**

*The civil servant or public official who delays or omits some act of its functions, or that to perform any that is contrary to duty same that they impose, receive or make promise of money or other utility, well by himself or through another person, for himself or for another, will be punished with Prison of three (3) years to seven (7) years and a fine of up to one hundred percent (100%) of the benefit received or promised. See the Law Against Corruption, Nov. 19, 2014, available at <https://www.alc.com.ve/wp-content/uploads/2017/05/Ley-Contra-La-Corrupci%C3%B3n.pdf>.*

although did not press any charges. Nonetheless, the court moved quickly to close the trial phase. On March 21, 2019, Judge Bognanno proceeded to issue the final five-year prison sentence, which contradictorily stated there was no evidence of any benefit received by Judge Afiuni. Instead, Judge Afiuni was condemned for the newly invented crime of “spiritual corruption.” Judge Afiuni now faces a looming prison sentence and is currently under the following restrictions to her liberty: She is prohibited (1) from renewing her identification documents (Venezuelan Identification, Passport, Driver’s license); (2) leaving the country; (3) speaking to the press; and (4) has been suspended from her position as a judge since 2010. She must also periodically report to the court.

Her case represents the erosion of the rule of law in Venezuela and the systematic use of torture and repression to intimidate judges and lawyers. In the words of the former Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, it is also “an emblematic case of reprisal for having cooperated with one of the UN’s human rights organs.”<sup>2</sup> In its 2018 country report on Venezuela, the Inter-American Commission on Human Rights (IACHR) concluded that Afiuni’s case “illustrate[s] the grave crisis faced by the Judiciary in Venezuela with respect to its Independence.”<sup>3</sup> The IACHR further underscored that Judge Afiuni’s arbitrary detention has had “a significant intimidating impact on judges who may fear being treated in the same way, even today.”<sup>4</sup>

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<sup>2</sup> “Venezuela must release judge who suffered sexual violence in jail – UN experts,” UN News Centre, Feb. 14, 2013, <http://www.un.org/apps/news/story.asp?NewsID=44141>.

<sup>3</sup> “Democratic Institutions, the Rule of Law and Human Rights in Venezuela- Country Report,” Inter-Am. Comm’n H.R., Doc. 209, vol. OEA/Ser.L/V/II., 31 Dec. 2017, at 57, para. 95, available at <https://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>.

<sup>4</sup> *Id.* at 54, para. 92.

## Introduction: The Afiuni Case and Erosion of the Rule of Law in Venezuela

It is indisputable that the persecution of Judge Afiuni has created a climate of fear among judges and lawyers, who fear suffering a similar fate. The impact of her case has become so well-known as to be designated the “Afiuni effect.” The chilling resonance of the Afiuni effect has particularly impacted judges presiding over the arbitrary detention of peaceful demonstrators or political opponents, including opposition leader Leopoldo López. In that case, intelligence agents and National Guard officers coerced Judge Ralenis Tovar into signing arrest warrants for three prominent political figures under the explicit threat that she would otherwise end up “like another Judge Afiuni.”<sup>5</sup> Judges and prosecutors have long depended on the will of the President to maintain their positions. The vast majority of judges and prosecutors in Venezuela are provisional appointees, who are easily removed on a discretionary basis.<sup>6</sup> Former Justices of the Supreme Tribunal of Justice (*Tribunal Supremo de Justicia* or TSJ) have expressly stated that all judicial decisions are in line with the President’s interests, and that there is no separation of powers.

In 2018, the Organization of American States-appointed panel of independent international experts concluded in a comprehensive and thorough report that there are reasonable grounds to believe that crimes against humanity have been committed in Venezuela dating back to February 2014.<sup>7</sup> In September 2020, the Human Rights Council’s independent fact-finding mission came to the same conclusion,<sup>8</sup> and found that “the judiciary has itself become an instrument of repression... [and] has failed to act as a check on the other State actors, perpetuating impunity for the violations and crimes committed.”<sup>9</sup>

The persecution of Judge Afiuni— the most emblematic case— must end if Venezuela is to emerge from the current crisis and end the impunity underpinning these crimes. Judge Afiuni’s life is now at imminent risk in the event she is sent back to prison to serve her five-year sentence, while requiring cancer treatment.

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<sup>5</sup> “Report of the General Secretariat of the Organization of American States and the Panel of International Experts on the Possible Commission of Crimes Against Humanity in Venezuela,” OEA/Ser.D/XV.19, 29 May 2018, at 202-203, paras. 43- 44, *available at*: <http://www.oas.org/documents/eng/press/Informe-Panel-Independiente-Venezuela-EN.pdf> [hereinafter “OAS Report on Crimes Against Humanity in Venezuela”].

<sup>6</sup> UN Human Rights Committee, “Concluding Observations on the fourth periodic report of the Bolivarian Republic of Venezuela,” CCPR/C/VEN/CO/4\*, 14 Aug. 2015, *available at* <https://undocs.org/en/CCPR/C/VEN/CO/4>.

<sup>7</sup> OAS Report on Crimes Against Humanity in Venezuela, *supra* note 5.

<sup>8</sup> Human Rights Council, Forty-fifth session, “Detailed findings of the independent fact-finding mission on the Bolivarian Republic of Venezuela,” A/HRC/45/CRP.11, 15 Sept. 2020, at 403, para. 2086, *available at* [https://reliefweb.int/sites/reliefweb.int/files/resources/A\\_HRC\\_45\\_CRP.11.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/A_HRC_45_CRP.11.pdf) [hereinafter “Detailed Findings of the Independent Fact-Finding Mission”]

<sup>9</sup> *Id.*, at 43, 389, paras. 165, 2010.

## **I. Recent Procedural and Medical History<sup>10</sup>**

On March 21, 2019, the Caracas Trial Court N. 17 convicted Judge Afiuni to five years in prison for the crime of “spiritual corruption.” On May 16, 2019, the written copy of the judgment was issued and on May 31, 2019, Judge Afiuni appealed the decision to the Second Instance Court. In October 2019, the Second Instance Court upheld Judge Afiuni’s five-year prison sentence for “spiritual corruption.” Once this ruling was published, Judge Afiuni filed an appeal before the TSJ. She was then denied permission to access her court file, appoint new lawyers, or file briefs. On November 8, 2020, TSJ President, Maikel Jose Moreno Perez, affirmed the five-year prison term for “spiritual corruption.” The case is now pending before an execution court for a determination as to the final sentence.

On September 19, 2020, Judge Afiuni underwent surgery to remove a tumour in her lip after being recently diagnosed with cancer. She will start chemotherapy and radiation the week of November 16, and will require further surgery to receive nutrition (gastrostomy), as she awaits the execution of her prison sentence.

## **II. Factual Background**

### **A. Arrest**

On December 10, 2009, around 10 intelligence agents arrested Judge Afiuni at the Palace of Justice— a central court complex in Caracas— without a warrant or reasons for her arrest and took her to DISIP (now SEBIN) headquarters (“El Helicoide”). She was arrested merely 20 minutes after issuing a decision in the case of Eligio Cedeño— a political prisoner at the time— to impose less restrictive measures after he spent nearly three years in pre-trial detention— in accordance with the two-year pre-trial detention maximum under the Venezuelan Code of Criminal Procedure,<sup>11</sup> and a decision by the UN Working Group on Arbitrary Detention deeming Mr. Cedeño’s prolonged pre-trial detention to be arbitrary.<sup>12</sup> Judge Afiuni’s decision came a month after a court of appeals judge was demoted for determining that Mr. Cedeño’s pre-trial detention exceeded the legal limits.

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<sup>10</sup> The International Bar Association’s Human Rights Institute report, “Legal guarantees and due process: Ten years of the Afiuni case,” detailing the results of over nine years of observing the court proceedings, is annexed hereto.

<sup>11</sup> Code of Criminal Procedure of the Bolivarian Republic of Venezuela, Art. 256, paras. 3 and 4.

<sup>12</sup> *María Lourdes Afiuni Mora v. Bolivarian Republic of Venezuela*, Opinion No. 20/2010, U.N. Doc. A/HRC/16/47/Add.1, U.N. Working Group on Arbitrary Detention, *adopted* 1 Sept. 2010 [hereinafter “WGAD Opinion”], *available at*

<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/115/98/PDF/G1111598.pdf?OpenElement>. The UN Human Rights Committee also concluded that Mr. Cedeño’s detention was arbitrary and ordered his compensation. Communication No. 1940/2010 *available at* [http://www.worldcourts.com/hrc/eng/decisions/2012.10.29\\_Cedeno\\_v\\_Venezuela.pdf](http://www.worldcourts.com/hrc/eng/decisions/2012.10.29_Cedeno_v_Venezuela.pdf). On May 18, 2011, Mr. Cedeño was granted political asylum in the United States.

## **B. Presidential Order for Maximum Penalty: A Forgone Conclusion**

The day after Judge Afiuni's arrest, President Hugo Chávez announced in a national address on television and radio that Judge Afiuni was an "outlaw" who committed a crime "more serious than an assassination" and should be sentenced to the "maximum penalty [under Venezuelan law]— 30 years in prison," which should serve as an example to other judges, adding that she would have been put before a firing squad in earlier times.<sup>13</sup> During the public broadcast, President Chávez sought to further intimidate other judges from performing their duties independently by ordering the National Assembly and TSJ President to pass a new law to prosecute Judge Afiuni "because a judge who frees an outlaw is much worse than the outlaw himself."<sup>14</sup> A few days later, President Chávez went even further, calling for judge Afiuni to receive "35 years."<sup>15</sup>

## **C. Detention**

### *i. Torture and Abuse in Detention*

In December 2009, the court rejected a request by Judge Afiuni's counsel to halt her transfer to the maximum-security facility Instituto Nacional de Orientación Femenina (INOF), where her life and physical integrity would be at risk amongst at least 20 inmates whom she sentenced herself, including those convicted of murder.<sup>16</sup> At INOF, there was no separation between pretrial detainees and convicted prisoners. She was held at INOF for over a year without trial— from December 18, 2009 to February 2, 2011— where inmates made several attempts on her life. She was held in a 2x3 meter cell with bloodstains and feces on the walls, without a working toilet and wherein she remained confined even during a fire.<sup>17</sup> Throughout her detention, she was prohibited from leaving her cell. She also faced violent threats of rape and death, both verbally and in writing. On a number of occasions, other inmates physically attacked her, cutting her with

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<sup>13</sup> See Youtube Video, Plasmatico, "Chávez demands 30 years of prison for Judge who freed political prisoner Eligio Cedeño" (Chávez pide 30 años cárcel para la Juez que liberó preso político Eligio Cedeño), December 12, 2009, *available at* <http://www.youtube.com/watch?v=wHnVzZGBvfl&feature=related>. See WGAD Opinion, *supra* note 11, para. 13; *see also* Simon Romero, "Criticism of Chávez Stifled by Arrests," New York Times, 3 Apr. 2010, *available at* <https://www.nytimes.com/2010/04/04/world/americas/04venez.html>.

<sup>14</sup> See YouTube Video, Frank de Prada, Cedeño (declarations made by President Hugo Chávez), *available at*: <http://www.youtube.com/watch?v=UxhYpnQFHMM&feature=related>.

<sup>15</sup> See YouTube Video, Frank de Prada, Judge Afiuni (Juez Afiuni), 21 Dec. 2009, *available at* <http://www.youtube.com/watch?v=AOWPXh3yxBM&NR=1>.

<sup>16</sup> "Tightening the Grip: Concentration and Abuse of Power in Chávez's Venezuela," Human Rights Watch, July 2012, at 36, *available at* <https://www.hrw.org/sites/default/files/reports/venezuela0712webwcover.pdf>.

<sup>17</sup> Valentina Issa Castrillo, "De Juíza a Presidiária: a História De Maria Lourdes Afiuni, Condenada e Violentada Por Desafiar Hugo Chávez" *Gazeta Do Povo*, 3 Feb. 2020, *available at* [https://www.gazetadopovo.com.br/mundo/de-juiza-a-presidiaria-a-historia-de-maria-lourdes-afiuni-condenada-e-violentada-por-desafiar-hugo-chavez/?utm\\_source=salesforce&utm\\_medium=emkt&utm\\_campaign=newsletter-bom-dia&utm\\_content=bom-dia?ref=link-interno-materia](https://www.gazetadopovo.com.br/mundo/de-juiza-a-presidiaria-a-historia-de-maria-lourdes-afiuni-condenada-e-violentada-por-desafiar-hugo-chavez/?utm_source=salesforce&utm_medium=emkt&utm_campaign=newsletter-bom-dia&utm_content=bom-dia?ref=link-interno-materia).



blades and burning her with cigarettes. On January 3, 2010, a group of inmates planned to “burn the judge alive” by setting fire to Judge Afiuni’s cell with gasoline.<sup>18</sup>

Despite these threats to her life, the court again dismissed her counsel’s requests to transfer her to a safer detention center or for alternative measures to pretrial detention.<sup>19</sup> On January 6, 2010, the Attorney General’s Office (AGO) even requested she be transferred to a “maximum security” zone within the prison. The AGO further made falsified public statements that the judge was safe at INOF and falsely attributed to her a desire to remain there and a gratitude to “the guards in charge of her permanent protection, as well as the members of the National Guard.” The AGO made these statements despite possessing Judge Afiuni’s documented testimony that she was receiving death threats at INOF.

On January 11, 2010, the Inter-American Commission on Human Rights (IACHR) granted Judge Afiuni precautionary measures, considering her physical integrity and life to be at risk in her place of detention, and ordered her transfer to a safe location and permission to receive medical attention from doctors of her choosing.<sup>20</sup> Despite the IACHR ruling, Judge Afiuni remained at INOF. As a result, she was tortured and suffered a serious deterioration to her health, including breast cysts, bladder issues and an emergency operation to remove her uterus. In March 2010, prison authorities tried to assign an inmate serving a 13-year sentence for homicide to Judge Afiuni’s cell, inflicting further psychological pressure and putting her physical safety at risk. After four months of imprisonment, Judge Afiuni was suffering acute physical and mental distress and lost 15 KG of weight.<sup>21</sup> In November 2010, two inmates approached her cell wielding knives and threatened to take her life.<sup>22</sup> That same month, Judge Afiuni began to suffer hemorrhages in her uterus.<sup>23</sup>

## ii. *State-Orchestrated Sexual Violence in Prison*

The General Secretariat of the OAS has highlighted that Venezuela has “a history of using sexual violence, including threats, lascivious acts, and rape, as a form of

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<sup>18</sup> “Annual Report of the Inter-American Commission on Human Rights 2010,” Doc. 5, rev. 1, OEA/Ser.L/V/II, 7 Mar. 2011, paras. 75, 640, *available at* <http://www.cidh.org/pdf%20files/IACHR-ANNUAL-REPORT-2010.pdf>.

<sup>19</sup> “The Case of María Lourdes Afiuni Mora: Legal Report,” Jan. 17, 2013, at 25, *available at* <https://hrf.org/wp-content/uploads/2020/07/Legal-Report-on-the-Case-of-Maria-Lourdes-Afiuni-Mora.pdf>.

<sup>20</sup> “President’s resolution regarding the request of provisional measures presented by the Inter-American Commission regarding Venezuela, Case María Lourdes Afiuni,” Inter-Am. Ct. H.R., 10 Dec. 2010, para. 12, *available at* [http://www.corteidh.or.cr/docs/medidas/Afiuni\\_se\\_01.doc](http://www.corteidh.or.cr/docs/medidas/Afiuni_se_01.doc) [in Spanish, hereinafter “Provisional Measures Resolution”].

<sup>21</sup> “Alternative Report to the Third and Fourth combined periodic reports due to be submitted by the Bolivarian Republic of Venezuela in 2004 to the Committee against Torture,” Foro por la Vida Coalition of Venezuelan NGOs, Feb. 2014, *available at* [https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VEN/INT\\_CAT\\_CSS\\_VEN\\_18656\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/VEN/INT_CAT_CSS_VEN_18656_E.pdf).

<sup>22</sup> Provisional Measures Resolution, *supra* note 19, para. 2(t).

<sup>23</sup> “Tightening the Grip,” *supra* note 15, at 37.

punishment in detention facilities.”<sup>24</sup> This pattern is well-documented.<sup>25</sup> The systematic use of sexual violence in prisons is particularly acute in women’s prisons like INOF, where sexual exploitation by the guards is rampant. According to Judge Afiuni, every weekend, an inmate would be taken to the infirmary to be raped by a public official as part of what she believes was a business. The Director of INOF, Isabel González, would allow these public officials to enter the prison freely, particularly at night. One night in December 2010, Judge Afiuni was taken to the infirmary and violently raped by INOF guards and officials from the Ministry of Interior and Justice, which led to a miscarriage. During Judge Afiuni’s detention, Venezuelan prisons were under the direction of the Ministry of Interior and Justice, headed by Tareck Zaidan El Aissami. Judge Afiuni later stated in court that her “vagina, anus and bladder were destroyed when INOF guards and officials from the Ministry of Interior and Justice raped her.”<sup>26</sup>

By January 2011, there was already proof within the possession of the national government that Judge Afiuni was violently raped during her first month at INOF.<sup>27</sup> President Chávez was personally informed of the rape in 2010, but the government failed to investigate or redress the crime.<sup>28</sup> In November 2012, details of the rape were made public in the book *Afiuni, The Commander’s Prisoner*.<sup>29</sup> Once the book was published, military officials forcefully removed Judge Afiuni from her home and brought her to the District Attorney’s Office to finally start an investigation without her attorneys present.

#### **D. Sexual Assault and Denial of Medical Treatment**

In November 2010, Judge Afiuni was subjected to frequent invasive bodily searches, including of her genitals, in reprisal for remarks she made from her cell that were aired on the national television channel Globovisión. On multiple occasions, Judge Afiuni was transferred to the Dr. Carlos Arvelo Military Hospital for medical examinations, even though she was tried as a civilian. During a November 8, 2010 gynecological examination, she was made to undress in the presence of more than 20 National Guard officials under the charge of Lt. Maestre Márquez.<sup>30</sup>

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<sup>24</sup> OAS Report on Crimes Against Humanity in Venezuela, *supra* note 5, at 168.

<sup>25</sup> *Id.*, at 378-382.

<sup>26</sup> “¿Qué fue de la Juez Afiuni?” La Patilla, 25 Jul. 2015, *available at* <http://www.lapatilla.com/site/2015/07/25/que-fue-de-la-juez-afiuni/>.

<sup>27</sup> As confirmed by Judge Afiuni’s lawyer, José Amalio Graterol. *See* Sendai Zea, “Jueza Afiuni revela por primera vez los abusos que le aplicaron rojos funcionarios en la cárcel,” Runrunes, Nov. 22, 2012, *available at* <http://runrun.es/runrunes-de-bocaranda/runrunes/58994/jueza-afiuni-revela-por-primera-vez-los-abusos-que-le-aplicaron-rojos-funcionarios-en-la-carcel.html>.

<sup>28</sup> Maria Eugenia Diaz and William Neuman, “Venezuelan Judge Who Angered Chávez Says She Was Raped While in Prison,” New York Times, November 26, 2020, *available at* <https://www.nytimes.com/2012/11/27/world/americas/jailed-under-hugo-chavez-judge-alleges-prison-rape.html>.

<sup>29</sup> *Ibid.*

<sup>30</sup> “Annual Report of the Inter-American Commission on Human Rights 2015, Chapter IV.B Venezuela,” at para. 277, *available at* <http://www.oas.org/en/iachr/docs/annual/2015/doc-en/InformeAnual2015-cap4-Venezuela-EN.pdf>.

On December 10, 2010 and January 11, 2011, Judge Afiuni was taken to the hospital due to heavy bleeding and tachycardia. On January 13, 2011, she was transferred to Victorino Santaella Hospital where there were no cardiologists and she was therefore unable to receive the required cardiology tests. Finally, on January 28, 2011, Judge Afiuni was transferred to the hospital Oncológico Padre Machado where it was determined that she required an immediate abdominal hysterectomy. On February 2, 2011, after nearly three months of hemorrhaging, fevers, anemia and continuous pain, Judge Afiuni finally underwent surgery. That same day, Judge Afiuni was transferred to house arrest due to an international outcry against her torture and denial of medical treatment.

Between April and August 2011, the presiding Judge Alí Paredes continued to reject a number of requests for medical tests or to amend the house arrest conditions to allow for medical visits.

### **E. Court Proceedings**

On December 12, 2009, the prosecutor, Alicia Monroy, charged Ms. Afiuni with the crimes of corruption, accessory to an escape, criminal conspiracy and misuse of authority/abuse of power.<sup>31</sup> The first preliminary hearing, originally scheduled for April 7, 2010, was deferred three times due to contrived reasons and finally took place on May 17, 2010. Judge Leidys Azuaje presided over the hearing— a judge that was commonly assigned by the government to political cases and who was assigned to this case in circumvention of the general procedure for selecting judges.<sup>32</sup> At the hearing, the public prosecutor Emilce Ramos Julio admitted on the record that there was no tangible evidence that Judge Afiuni derived any benefit in relation to the corruption charge against her— a requisite element of the crime under Article 62 of the Anti-Corruption Law.<sup>33</sup> The prosecutors argued instead that the one who received the benefit was a third party— the defendant, Mr. Cedeño. Despite the lack of evidence, Judge Azuaje admitted the charge of corruption and ordered Judge Afiuni's continued pretrial detention.

#### *First Trial*

The trial was first brought before Judge Ingrid Bohórquez, who refused to preside. The case was then transferred to Judge Alí Paredes, a provisional appointee, who just weeks before Judge Afiuni's arrest pledged his life to President Chávez on the president's website: "I give my life for the Revolution. I would never betray this process and much less my Commander."<sup>34</sup> Judge Paredes then set a date for trial to be solely heard by the judge alone, in violation of the legal requirement for a trial by jury and judge. In September 2010, Judge Paredes

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<sup>31</sup> WGAD Opinion, at 93, para.12.

<sup>32</sup> "The Case of María Lourdes Afiuni Mora," *supra* note 18, at 25.

<sup>33</sup> "La ejecución de la justicia: el proceso penal de la jueza María Lourdes Afiuni," International Bar Association's Human Rights Institute, Apr. 2014, at 13, *available at* <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=AADB0A01-F07D-42DF-A389-064E83ED8DA8>.

<sup>34</sup> "Tightening the Grip," *supra* note 15, at 35.

dismissed Judge Afiuni's chosen defense counsel for an assigned public defender in retaliation for expressing her intention to exercise her constitutional right under Article 350 of the Venezuelan Constitution.<sup>35</sup>

After the dismissal of multiple appeals to replace her pretrial detention with less restrictive measures, the court only transferred her to house arrest on February 2, 2011 due to an international outcry over her torture in detention resulting in her surgery that day. Judge Afiuni was then placed under crippling house arrest conditions prohibiting her from leaving her apartment at any time or speaking with the press; and requiring the 24-hour presence of 16 members of the National Guard at her residence and weekly court appearances escorted by a motorcade of about 30 armed military officers.

After the recusal of two more judges and more than a dozen postponements, the trial finally began on November 28, 2011 without Judge Afiuni present. Between February 2011 and October 2013, the trial was delayed approximately 24 times for trivial reasons. On October 23, 2013, Judge Afiuni's trial was annulled because the public prosecutors stopped attending the scheduled hearings. On June 14, 2013, Judge Afiuni was released from house arrest, although remained banned from leaving the country, using social media, or speaking to the media, and was required to continue reporting to the court every 15 days.

### *Second Trial*

On April 29, 2015, after continuous suspensions and interruptions, a second trial began. According to the IBAHRI's trial observers:

- a) The proceedings of the second trial were suspended more than 60 times between April 2015 and January 31, 2018;
- b) The proceedings were marked by inconsistencies in the testimony of prosecution witnesses, including from SEBIN agents; and
- c) Public officials interviewed feared reprisals and stated they were merely acting as instructed, even though they disagreed with the charges against Judge Afiuni.

For over a year, from January 31, 2018 to February 22, 2019, the presiding judge, Manuel Bognanno, did not hold one hearing in Judge Afiuni's case, waiting for orders from the Executive on how to sentence her. During this period, Judge Bognanno even adjourned the rest of his caseload, including ruling on defendants in detention. On February 22, 2019, new prosecutors attended the hearing for the first time. On March 21, 2019, the Public Prosecutor's Office decided not to press any charges against Judge Afiuni due to a complete lack of evidence that she received any benefit for her order to release Mr Cedeño on bail, as was

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<sup>35</sup> On October 13, 2010, the 4° Court of Appeals of Caracas overturned the decision of the 26° Court, and reinstated Judge Afiuni's defense attorneys. During the time when her defense attorneys were removed, they were denied access to her case file. *See* The Case of María Lourdes Afiuni Mora, *supra* note 18, at 15.

consistently confirmed by witnesses.<sup>36</sup> Nonetheless, Judge Bognanno proceeded to deliver a sentence of 5 years in prison for the newly invented crime of “spiritual corruption,” while acknowledging that there was no evidence of a benefit derived by Judge Afiuni— a necessary element for the crime of corruption.

## **F. Suspension of Judgeship**

On December 11, 2009, the TSJ Judicial Commission dismissed Judge Afiuni from her post indefinitely without any notice, hearing, disciplinary proceeding, or the right to remuneration. On July 18, 2017, in the disciplinary proceedings, Judge Afiuni was assigned a lawyer to replace her chosen lawyer. Judge Afiuni has thus far been denied access to her disciplinary file.

## **G. Conviction of Afiuni’s Lawyer José Amalio Graterol**

On June 4, 2012, Judge Afiuni’s lawyer José Amalio Graterol was arrested in retaliation for defending Judge Afiuni and publicly criticizing the authorities’ handling of her case. Eleven days later, Venezuela’s Criminal Code of Procedure was amended by presidential decree and Mr. Graterol was sentenced to prison in accordance with the amendment enacted *after* his arrest. Just as Judge Afiuni’s case has left judges fearful of exercising their duties independently, the persecution of José Graterol has left lawyers fearful of taking on politically unpopular cases.

## **H. Harassment of Judge Afiuni’s Family**

Over the years, the paramilitary forces loyal to President Maduro, or “Colectivos” have consistently harassed and intimidated Judge Afiuni’s family. At the beginning of February 2020, Judge Afiuni’s brother received four consecutive death threats over the phone from Colectivo members. Then, on February 27, 2020, Judge Afiuni’s uncle (father’s brother) was subjected to an attempted kidnapping by a famous gang, whose leader goes by “Coqui,” which was aided by a SEBIN officer.

## **I. The Afiuni Effect**

It is indisputable and well documented that Judge Afiuni’s detention and torture has created a climate of fear amongst judges and lawyers in Venezuela, who fear suffering a similar fate for taking positions at odds with the government’s interests.<sup>37</sup> This phenomenon has become so well-known as to be designated the

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<sup>36</sup> “Graterol: Sentencia contra la juez Afiuni es un ‘error inexcusable’ al carecer de pruebas,” Tal Cual, 21 Mar. 2019, *available at*

<https://talcualdigital.com/graterol-sentencia-contra-la-juez-afiuni-es-un-error-inexcusable-al-carecer-de-pruebas/>.

<sup>37</sup> Detailed Findings of the Independent Fact-Finding Mission, *supra* note 8, at 161-162, 362-363, 381-382; OAS Report on Crimes Against Humanity, *supra* note 18, at 180, 201-203, 269-270, 392-393, 428-434; “Tightening the Grip,” *supra* note 15, at 42-43; “Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela,” International Bar Association, Apr. 2011, at 67-71, *available at* <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=C51C643B-EE80-4B03-BA62-DC61E10B8ED0>

dubious title of the “Afiuni effect.” A number of former judges and lawyers have testified to this effect, or “law of fear,” before the OAS, among other forums.<sup>38</sup> According to one of the most prominent human rights organizations in Venezuela, PROVEA, Judge Afiuni’s case has had a particularly salient impact on peaceful protesters often kept in pretrial detention, as judges evade granting alternative measures to pretrial detention for “fear of losing their jobs or ending up in jail like Judge (María) Afiuni”<sup>39</sup>

In late 2017, the Organization of American States’ (OAS) panel of independent international experts on the situation in Venezuela— including Irwin Cotler, the Chair of the Raoul Wallenberg Centre for Human Rights— heard extensive witness testimony unmasking the systematic assault on the judiciary and the rule of law, and how the torture of Judge Afiuni is used to intimidate and coerce the judiciary as a whole. Ralenis Tovar, a former Caracas judge, was one such witness to describe the techniques used by the intelligence services to force judges to execute the government’s will. She testified that on February 12, 2014, after 10PM, she received phone calls from unknown callers and the President of the Supreme Tribunal of Justice summoning Judge Tovar to her office. When she arrived, the National Guard and military intelligence officers were surrounding the offices and escorted her to her office with four prosecutors, as well as a number of agents from the National Guard and the intelligence agencies DGCIM and SEBIN.<sup>40</sup> The Prosecutors ordered her to sign arrest warrants for three prominent political figures, including Leopoldo Lopez, the most popular opposition leader, or, as one of the intelligence agents threatened her, she would end up “like another Judge Afiuni.”<sup>41</sup> Further demonstrating the predetermined sham process, two hours beforehand, President Maduro announced on national television that the court already issued the arrest warrant. At about 12:30AM, fearing for her life, Judge Tovar signed the arrest warrants.

### **III. Violations of Venezuelan and International Law**

#### **A. Total Violation of the Right to a Fair Trial**

Judge Afiuni was denied the basic minimum guarantees of a fair trial as provided in the International Covenant on Civil and Political Rights (ICCPR), to which Venezuela is a party.

##### *i. Presumption of Guilt: Violation of ICCPR 14.2*

The day after Judge Afiuni’s arrest, in a national address, President Hugo Chávez labeled Judge Afiuni an enemy of the state and demanded that she receive the

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; “Open Letter to President Hugo Chávez,” Sternford Moyo, IBAHRI Co-Chair 13 Feb. 2012, *available at* <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=5907E767-FBBF-4CC4-BFCF-4A6323CF9303>.

<sup>38</sup> OAS Report on Crimes Against Humanity in Venezuela, *supra* note 5, at para. 432.

<sup>39</sup> “Strengthening the Rule of Law in Venezuela,” International Commission of Jurists, Jun. 2014, para. 30, *available at* <http://www.icj.org/wp-content/uploads/2014/11/Venezuela-Strengthening-the-RoL-Publications-Reports-2014-Eng.pdf>.

<sup>40</sup> OAS Report on Crimes Against Humanity in Venezuela, *supra* note 5, at paras. 43, 392, 428.

<sup>41</sup> *Id.*, at paras. 43-44, 202-203.

maximum penalty of 30 years in prison to serve as an example to other judges. President Chávez even ordered the National Assembly and President of the Supreme Tribunal of Justice to pass a new law to achieve that end.

ii. *Trial by Loyalist Judges: Violation of ICCPR 14.1*

The presiding judge of the first trial, Judge Alí Paredes, publicly pledged his life to President Chávez and the revolution, vowing to never deviate from Chávez' word on the president's website just weeks before Judge Afiuni's arrest. He then sought to preside over the trial without jurors, in violation of Venezuelan law at the time requiring a three-member panel of a judge and two jurors. The presiding judge of the second trial, Manuel Bognanno refused to hold a single hearing from January 31, 2018 to February 22, 2019, while he awaited orders from the Executive on how to sentence Ms. Afiuni.

iii. *Arrested Without Warrant or Reason: Violation of ICCPR 14.3 (a)*

Judge Afiuni was arrested without a warrant and was not informed of the charges or reasons for her arrest in violation of ICCPR Article 14(3)(a). However, it is clear that she was arrested solely for performing her duties as an independent and impartial judge. She was arrested minutes after ruling to release Eligio Cedeño – a political prisoner at the time— from pre-trial detention.

iv. *A Mockery of Justice and ICCPR 14.3(c)*

In a complete mockery of the right to be tried without undue delay, Judge Afiuni was only sentenced almost a decade after her arrest, even though the maximum penalty was seven years under the charge of corruption. Overall, the two trials were postponed nearly 100 times for trivial reasons.

v. *Systematic Violations of Right to Counsel and a Defence Under ICCPR 14.1 and 14.3(b) and (d)*

During the first trial, in September 2010, Judge Paredes replaced Judge Afiuni's chosen defence counsel with an assigned public defender in retaliation for her declaration to exercise her constitutional right under Article 350 of the Venezuelan Constitution in her defence. Judge Afiuni's defence attorneys were then denied access to the court file during their dismissal. Judge Afiuni's lawyer, José Graterol, was later arbitrarily arrested and imprisoned during the first trial. In June 2012, he was arrested a day after publicly criticizing the authorities' handling of Judge Afiuni's case. A few days later, President Chávez amended the Criminal Procedure Code by decree to allow for trials *in absentia*, basing Mr. Graterol's charge on a retroactive use of the amended provision.

Moreover, Judge Afiuni's rights under ICCPR article 14.1 and 14.3(b) were systematically violated by the courts, failing to adequately notify her of hearings,

proceeding without her present or denying her access to the courts and her file for prolonged periods of time, sometimes lasting over an entire year.<sup>42</sup> These actions and intimidation tactics fundamentally undermined the underlying equality of arms principle under Article 14 of the ICCPR and Judge Afiuni's very ability to present any defence.

## **B. Violation of Principle of Legality and ICCPR Article 15.1**

Judge Afiuni was ultimately convicted of the newly invented crime of "spiritual corruption," which never existed before and violates the principle of legality. The court records from the first and second trial, and final decision, explicitly state that there was no evidence that Judge Afiuni received a benefit for provisionally releasing Mr. Cedenó— a necessary element of the Corruption charge against her. In the first trial, Judge Azuaje accepted the prosecutors' argument that, despite the absence of any evidence that Judge Afiuni received a benefit, the "benefit" was received by a third party— the defendant— and the court admitted the charge of corruption for trial. In doing so, the court relied on a logic that would allow future corruption charges against any judge for issuing decisions that "benefit" the defendant— a precedent that would undermine any semblance of an impartial and independent judiciary.

## **C. Violations in Detention**

### *i. Violation of Right to be Separated from General Prison Population*

The requirement to separate pretrial detainees from the sentenced prison population is a well-established rule under international law. Article 10.2 of the ICCPR provides: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons."<sup>43</sup> The IACHR has interpreted this separation requirement as extending to "different institutions" altogether.<sup>44</sup> In this case, Venezuelan authorities had a heightened duty to separate Judge Afiuni from the INOF prison population, which included at least 20 inmates whom she herself had sentenced, including for murder. Nonetheless, the authorities refused to transfer Judge Afiuni to a safer detention facility, despite multiple appeals by her lawyers documenting the imminent physical attacks and death threats she faced, and in defiance of an order from the IACHR requesting her immediate transfer. In fact, the authorities attempted to put her life in further

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<sup>42</sup> UN Human Rights Committee, "General Comment No. 32, Article 14" (Right to equality before courts and tribunals and to fair trial), 23 Aug. 2007, CCPR/C/GC/32, para. 9, *available at* <https://www.refworld.org/docid/478b2b2f2.html>.

<sup>43</sup> International Covenant on Civil and Political Rights, 10 May 1978. *See also* UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 8 Jan. 2016, Rule 11(b); UN Human Rights Committee, "General Comment No. 21, Article 10" (Humane Treatment of Persons Deprived of Their Liberty), para. 9.

<sup>44</sup> *Yvon Neptune v. Haiti*, Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R., 6 May 2008, paras. 146 and 147, *available at* [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_180\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.pdf).



danger by requesting that she be transferred to a maximum-security zone within INOF and assigned an inmate serving a 13-year sentence for homicide to be her cellmate.

The authorities not only flagrantly breached Venezuela's obligations under ICCPR Article 10.2, but knowingly confined Judge Afiuni to dangerous quarters, which resulted in her suffering abuse and torture at the hands of inmates and public officials.

## ii. *Violation of the Prohibition of Torture*

Venezuela is also a state party to the Convention Against Torture (CAT), the Convention on All Forms of Discrimination Against Women (CEDAW), and the Optional Protocol thereto, allowing for individual complaints. Under international law, states are to be held responsible for the wrongful acts of public officials, acting as organs of the State.<sup>45</sup> In 2019, the UN Committee Against Torture found that rape and other acts of sexual violence constitute torture under CAT.<sup>46</sup> Special Rapporteurs on Torture and the Committee on the Elimination of Discrimination Against Women have also recognized rape as a form of torture,<sup>47</sup> where rape in detention is a particularly grave and abhorrent form of torture.<sup>48</sup>

In this case, the State of Venezuela is responsible for the rape perpetrated by its public officials from the Interior and Justice Ministry and INOF in a detention facility, which caused Judge Afiuni severe, lasting and incalculable physical and mental suffering, including a miscarriage, hysterectomy and the aftereffects.<sup>49</sup> As early as December 2010, President Chavez was personally informed of the rape and by January 2011, the government possessed proof of the crime, including signs of torture, which was registered with INOF. However, the authorities failed to conduct an investigation as is required by Article 12 of the CAT. Moreover, under Venezuelan and international law, the victim is not required to initiate a

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<sup>45</sup> International Law Commission, "Responsibility of States for Internationally Wrongful Acts," 2001, Art. 4, available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

<sup>46</sup> *Mrs. A v. Bosnia and Herzegovina*, Committee Against Torture, Communication No. 854/2017, Views of 22 Aug. 2019, UN Doc. CAT/C/67/D/854/2017, available at <https://trialinternational.org/wp-content/uploads/2019/08/Decision-CAT-A-BIH-2August2019.pdf>; See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, Sept. 2 1998, at para. 597 ("rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.")

<sup>47</sup> See Committee on the Elimination of Discrimination Against Women, "General Recommendation No. 19: Violence against Women," UN Doc. A/47/38, 11th session, at para. 7, available at <https://www.refworld.org/docid/453882a422.html>.

<sup>48</sup> Human Rights Council, Seventh Session, "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak," A/HRC/7/3, 15 Jan. 2008 at para. 36, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/101/61/PDF/G0810161.pdf?OpenElement>.

<sup>49</sup> See *Aydin v. Turkey*, App. No. 23178/94, 25 Eur. Ct. H.R. Rep. 251 (1998); see also Commission on Human Rights, Fiftieth session, Report of the Special Rapporteur on Torture, E/CN.4/1995/34, 12 Jan. 1995, at para. 16 (deeming rape in detention a particularly egregious violation of inherent dignity and right to physical integrity), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G95/100/85/PDF/G9510085.pdf?OpenElement>.

complaint into the crime of rape at all, rather the State (AGO) has a legal duty to investigate the crime *ex officio* as soon as it becomes aware of the allegation.<sup>50</sup>

As a result, Venezuela is in standing breach of its obligations under CAT Articles 12 and 14(1). The authorities must therefore carry out a prompt and impartial investigation; identify and prosecute those responsible and ensure that Judge Afiuni, and all victims of state torture, receive just restitution, compensation, rehabilitation and measures to guarantee there is no recurrence of the violations.

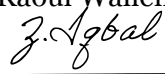
## Conclusion

Venezuela cannot move forward or hope to restore an independent judiciary without addressing and redressing Judge Afiuni's 11-year ordeal. Judges, prosecutors, and lawyers must be able to perform their professional functions without interference, harassment, threats or intimidation.<sup>51</sup> An independent judiciary and functional legal system are preconditions to Venezuela's long-term recovery from its unprecedented humanitarian disaster and for the victims of state repression to obtain justice.

We therefore request that the UN Special Procedures immediately intervene directly with the Government of Venezuela on behalf of Judge María Lourdes Afiuni to:

1. Annul her unjust conviction and sentence;
2. Conduct a thorough, fair and impartial investigation into her torture;
3. Provide her with effective, adequate and prompt compensation; and
4. Reinstate her position as an acting judge.

  
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<sup>50</sup> *Velásquez-Rodríguez v. Honduras*, Judgment (Merits), Inter-Am. Ct. H.R., 29 Jul. 1988, available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf); *Pueblo Bello Massacre v Colombia* (2006) Judgment, Merits, Reparations and Costs, Inter-Am. Ct. H.R., 31 Jan. 2006, at para. 143, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_140\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf); *González et al. ("Cotton Field") v. Mexico*, Judgment (Preliminary Objection, Merits, Reparations, and Costs), 16 Nov. 2009, at para. 290; *Perozo et al. v Venezuela*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 28 Jan. 2009, at para. 298, available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_195\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_195_ing.pdf).

<sup>51</sup> See Human Rights Council, Forty-fourth session, "Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers," A/HRC/44/L.7, 14 Jul. 2020, at 3, para. 1, available at <https://undocs.org/en/A/HRC/44/L.7>.



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International Bar Association's Human Rights Institute (IBAHRI)

## Legal guarantees and due process Ten years of the Afiuni case

'The emergence of civilisation has called for reconciling the necessity that the State provides society with security—this being one of the justifications for the State's very existence—and the ethical and, ultimately, legal requirement that the State does so without harming human dignity or prejudging guilt, which must be determined at trial.'

Inter-American Court of Human Rights, opinion of Justice García Ramírez in  
*Fermín Ramírez vs. Guatemala*, 2005.

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# Introduction

In this report, the International Bar Association's Human Rights Institute (IBAHRI) presents the results of more than nine years of observation of a crucially important trial in the Bolivarian Republic of Venezuela. It contains the conclusions of the reports prepared by previous IBAHRI observers who have followed the course of the criminal prosecution against Justice María Lourdes Afiuni.

The International Bar Association ([IBA](#)), founded in 1947, is the world's leading organisation of legal practitioners, bar associations and law societies. Through its body of members, the IBA influences the development of international law. IBAHRI was founded in 1995 under the honorary chairmanship of Nelson Mandela, to promote, protect and ensure the enforcement by the legal profession of international human rights law, within the framework of the State of Law.

IBAHRI's role in trial observation supports these goals by allowing for an assessment of the ability and function of the judiciary to ensure access to justice in the national setting. IBAHRI focuses closely on the safeguards that ensure a fair, timely and public trial, guided by the principles of legality and respect for human dignity, in accordance with international standards.

This report sets out the main conclusions of our observation of the court proceedings conducted in the context of the criminal proceedings brought against Justice María Lourdes Afiuni, with particular focus on the second trial, which started on 29 April 2015, after the first proceedings were set aside by the Venezuelan Supreme Court on 23 October 2013.

As discussed in this report, the results of the observation of the Afiuni case confirm the complex situation of judicial safeguards that Venezuela is facing. This has previously been documented by various international bodies, including IBAHRI in its initial reports on the independence of the judiciary in Venezuela in 2003, 2007 and 2011 respectively.<sup>1</sup>

The deterioration of judicial independence in Venezuela, which affects all parts of the public sector, is reflected in the current paralysis of the legal system. It is witnessed in the intervention in the National Assembly by the Supreme Court, in the persecution of political opponents, in the unlawful election of the Constituent National Assembly on 30 July 2017, in the substantial violations of the rights of demonstrators and opponents and in the precarious conditions of judicial safety at the national level. The escalation of the crisis in the justice sector has even led to fresh arrests of judges and the departure from the country of various court officials for this reason.

The Inter-American Commission on Human Rights (IACHR) expressed concern on these various aspects in February 2018, in its Venezuela Country report entitled '*Human Rights Situation in Venezuela*'. In the report, the IACHR refers to the severe deterioration of human rights and the serious political, institutional, economic and social crisis that Venezuela is currently experiencing. It places special emphasis on what it calls '*acts of harassment and intimidation against judges*', stating that over a number of years, multiple reports have been filed of acts of this kind, affecting the exercise of judicial independence and placing undue pressure on officials in taking decisions. Thus, '*IACHR advises that, on the one hand,*

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<sup>1</sup> Venezuela: a report on the situation of the justice system (IBAHRI, 2003); *Venezuela: Justice threatened* (IBAHRI, 2007); *Distrust of Justice: The Afiuni case and the independence of the judiciary in Venezuela* (IBAHRI, 2011).

*such acts have up to now had a significant intimidating effect, and, on the other, alarming acts of this kind have continued to occur*.<sup>2</sup>

The Commission specifically describes the Afiuni case as emblematic and having an intimidating effect on other officials, as was the case with former Judge Ralenis Tovar, who accepted that she had ordered the arrest of Leopoldo López out of fear of reprisals.<sup>3</sup>

More recently, the report prepared by the Office of the High Commissioner for Human Rights at the request of the UN Human Rights Council, to be submitted at the 41st Session, reflected the extreme deterioration of legal institutions and the responsibility of state bodies for unlawful detentions and the lack of legal guarantees was recognised.

*According to the report: ‘The intelligence services (SEBIN and DGCIM) have been responsible for arbitrary detentions, mistreatment and torture of political opponents and their families. Armed groups contribute to this system by exercising social control in local communities, and supporting the security forces in their repression of demonstrations and dissidents... Those institutions responsible for the protection of human rights, such as the State Public Prosecutor’s Office, the judges and the Public Defender, do not generally carry out timely, effective, exhaustive, independent, impartial and transparent investigations into violations of human rights and other offenses committed by state agents, nor do they bring those responsible to justice or protect victims and witnesses. Such inaction contributes to impunity and the repetition of the violations’.*<sup>4</sup>

With the intensifying political crisis in Venezuela, it must be mentioned that at a certain point the Afiuni case fell into a state of lethargy and was largely forgotten, both nationally and internationally. This increased the burden on the judge’s life plans<sup>5</sup>, on top of the silent attrition and loss of hope for those involved in the case.

In this context and close to the tenth anniversary of the arrest of Judge Afiuni, the judgment of 21 March 2019, which sentenced Judge Afiuni to five years’ imprisonment, was confirmed, leading IBAHRI to issue this report.

Sections 1 and 2 of this report provide the context of the observation mission and review the key points on the background of the case. Section 3 sets out our findings and the related analysis.

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2 IACHR. Venezuela Country Report entitled ‘Human Rights Situation in Venezuela’. 2018. Available at: [www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf](http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf)

3 Cfr audiovisual material of the public hearings at the OAS on Venezuela, OAS, 16 October 2017, cited in the Venezuela Country Report entitled ‘Human Rights Situation in Venezuela’. 2018. Available at: [www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf](http://www.oas.org/es/cidh/informes/pdfs/Venezuela2018-es.pdf).

4 Office of the High Commissioner for Human Rights. A/Hrc/41/2018.

5 The Inter-American Court of Human Rights has introduced ‘effects on life plans’ into the assessment criteria for the determination of harm in relation to human rights. As will be seen in the respective section, this report adopts those criteria, which are currently standard in issues relating to damages.

# 1. The observation mission

A fair trial and the protection and safeguarding of human rights are inextricably linked. The principle of human dignity must guide the administration of justice in all respects and is an essential element of the rule of law.

International observation is a key tool for the defence of human rights, based on the principles of legality and public openness that must characterise any form of judicial action. By virtue of its broad recognition by national constitutions and international courts, observation amounts to an essential principle in the development of the fundamental right to a fair and public trial.<sup>6</sup>

The requirement that judicial proceedings be conducted in public is enshrined in a range of international instruments, such as Resolution 53/144 of 1998 of the United Nations General Assembly,<sup>7</sup> the International Covenant on Civil and Political Rights (Article 14(1)), the European Convention on Human Rights (Article 6(1)), the American Convention on Human Rights (Article 8(5)) and the Arab Charter of Human Rights (Article 13(2)), among others.<sup>8</sup>

In the firm belief that observation missions are an effective safeguard of due process, IBAHRI decided to monitor the progress of this case, which, as of today, has run for exactly ten years. At the outset, the Afiuni case was observed on the basis of the public interest concerns surrounding judicial independence, and because the accused was herself a judge.

IBAHRI had scrutinised the independence of the Venezuelan justice system before undertaking the observation of Afiuni, having visited the country in 1998, 2003, 2007 and 2011.<sup>9</sup>

While the Afiuni observation mission was in progress, IBAHRI attended all hearings throughout the proceedings to assess the manner in which they were conducted. IBAHRI worked alongside all parties involved to ensure our own impartiality.

Despite the difficulties created by the increasingly severe political crisis, the observation mission managed to maintain its presence in the country. All steps were taken for its actions to be conducted safely, impartially and to a high standard of performance. The local authorities allowed the observation to take place. IBAHRI extends our thanks to them and to all the organisations and individuals who provided assistance.

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6 Amnesty International. Fair Trials. Amnesty International Manual. (E.D.A.I.). Madrid, 2005.

7 United Nations General Assembly resolution 53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms 85th plenary meeting, 9 December 1998. Available at: [www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration\\_sp.pdf](http://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration_sp.pdf).

8 International Bar Association (IBAHRI) report, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni*, February 2014. Available at: [http://w2.ucab.edu.ve/tl\\_files/CDH/Lineastematicas/Afiuni%20\(April%202014\)%20-%20combined.pdf](http://w2.ucab.edu.ve/tl_files/CDH/Lineastematicas/Afiuni%20(April%202014)%20-%20combined.pdf).

9 Venezuela: a report on the situation of the justice system (IBAHRI, 2003), Available at: [www.ibanet.org/Document/Default.aspx?DocumentId=A66ED814-33EE-4F79-9560-F884A3C7A958](http://www.ibanet.org/Document/Default.aspx?DocumentId=A66ED814-33EE-4F79-9560-F884A3C7A958); Venezuela: Justice threatened (IBAHRI, 2007) [www.ibanet.org/Document/Default.aspx?DocumentId=B2BADBD1-E30F-4621-951C-B896F64345AD](http://www.ibanet.org/Document/Default.aspx?DocumentId=B2BADBD1-E30F-4621-951C-B896F64345AD); Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela (IBAHRI, 2011). Available at: [www.ibanet.org/Document/Default.aspx?DocumentId=0E0DC15A-4F39-4EE6-81F5-F36A60D90231](http://www.ibanet.org/Document/Default.aspx?DocumentId=0E0DC15A-4F39-4EE6-81F5-F36A60D90231).



## 2. Background of the case

The Afiuni case started with the arrest of Justice María Lourdes Afiuni in December 2009, when she was Control Judge 31 of the Caracas Metropolitan Area. She was arrested without a warrant in connection with her decision to release an alleged political prisoner, replacing custodial measures with other precautions. Government officials—including the president of the republic—publicly stated that the judge was guilty before the trial had been completed.<sup>10</sup>

She was charged before Caracas Trial Court No. 26 with offences of corruption for her own benefit, abuse of authority and acting as an accessory to a suspect's escape.

The initial period of remand custody ran for more than three years. A pre-trial hearing was held in May 2010, but the trial did not officially commence until November 2012. 25 witnesses testified in the first oral trial proceedings, but none of them gave evidence that might call into question Judge Afiuni's conduct or prove her guilt.

Judge Afiuni was deprived of her freedom from 17 December 2009 to 14 June 2013. During her detention at the Instituto Nacional de Orientación Femenina (INOF, 'National Institute for Women's Guidance'), Judge Afiuni suffered a number of violations of her rights. Many reports produced by international bodies and organisations concerned with human rights complained of offences against her rights to life, physical safety and freedom while detained under inadequate conditions of confinement.<sup>11</sup>

In June 2013, remand custody was replaced with a duty to appear before the court at scheduled times, as well as prohibitions on Judge Afiuni leaving the country, using social media or speaking to the press. These restrictions are still in place today.

The first proceedings were suspended and set aside on 23 October 2013, with an order that the procedure be started afresh. Oral trial proceedings recommenced on 29 April 2015, with charges of corruption, acting as an accessory to a criminal's escape, abuse of authority and criminal conspiracy. The public prosecutor called 27 witnesses and expert witnesses and introduced 37 documentary exhibits as evidence.

These new proceedings, after multiple adjournments, gave rise to a decision on 21 March 2019, confirmed by the same court on 19 October the same year. Although the Venezuelan Criminal Procedural Code requires that a trial is conducted orally and held at a single hearing,<sup>12</sup> the conduct of the trial was adjourned on more than 60 occasions from commencement to 31 January 2018. Subsequently, hearings were scheduled for each Friday in February and March, and at 15-day intervals from April until the date of the decision (21 March 2019). None of the hearings scheduled were actually held during a period of over a year, because the court had been permanently and indefinitely closed down.

Following the date of the decision, more than seven months elapsed until the Interim Court sat to decide on the appeal against the decision on the appeal filed by the defence team of Judge Afiuni.

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10 The order to release was based on a decision of the UN Working Group on Arbitrary Detention (WGAD), which stated that the defendant's detention was arbitrary (extract from an internal report on a visit conducted in June 2015).

11 International Commission of Jurists, Human Rights Watch, Amnesty International, the Inter-American Commission on Human Rights, American Bar Association Center for Human Rights (ABA), US Department of State. Bureau of Democracy, Human Rights and Labor, 2016, UN, among others.

12 Articles 17, 335, 336 and 337 of the Criminal Procedural Code provide for a concentrated oral procedure, in the sense that 'once the legal arguments have begun, they must be concluded on the same day. If that is not possible, they shall continue for the minimum number of consecutive days'. (Article 17) 'The Court shall hear legal arguments on a single day. If that is not possible, legal arguments shall continue for as many consecutive days as necessary to reach their conclusion. The hearing may be adjourned for a maximum of ten days, calculated consecutively' (Article 335).

### 3. Ten years of observation: main findings regarding legal guarantees and due process

In December 2019, ten years will have passed since Judge Afiuni was arrested. She was deprived of her freedom for more than three years and has subsequently been under ‘preventive’ restrictions.

This Section details various findings identified by observing the proceedings, regarding the safeguards for due process, judicial independence, access to justice and exhaustion of internal appeals.

#### Absence of safeguards for due process

Due process within the framework of the right to a fair trial is the central focus of this report, which emphasises that human dignity must prevail as a mandatory hallmark of the State’s administration of justice.<sup>13</sup>

In this respect, the Inter-American Court has consistently held that an absence of adequate and effective internal remedies leaves the victim defenceless. The Court concluded that: *‘this is a right in itself, but it is also instrumental in that it enables the exercise of other rights. Hence, a violation of this right is all the more serious because due process is a safeguard of the protection of substantive rights and of the prevention of arbitrary use of power’*.<sup>14</sup>

As a human right, due process is considered in the category of *jus cogens* of observance *erga omnes*, as an essential element for the effectiveness of rights as a whole,<sup>15</sup> and is widely recognised in a wide range of international legal instruments and in the democratic constitutions of sovereign states.<sup>16</sup> The highlighted issues either arise from or lead to violations of due process.

This report focuses particularly on the intrinsic elements of due process and the right to a fair trial: the presumption of innocence, independence and impartiality in the administration of justice and timeliness. Some of the sections below are specifically devoted to illegal or arbitrary arrest, judicial independence and adverse effects on life.

In its report in April 2011, IBAHRI warned of serious shortfalls undermining due process and the right to a fair trial in the criminal proceedings against Judge Afiuni.<sup>17</sup> Specific reference was made to serious defects such as government officials’ statements asserting Judge Afiuni’s guilt, and violation of the rights to freedom, to information, to a proper defence and to the presumption of innocence.<sup>18</sup>

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13 Francisco Javier Ferrer Arroyo. Due process from the perspective of the Inter-American Court of Human Rights. Law Journal of the University of Palermo, May 2015, pp. 155-184 Year 14, No 1.

14 Inter-American Court of Human Rights, *Constitutional Court vs. Peru*, January 31, 2001. Available at: [www.corteidh.or.cr/docs/casos/articulos/Seriec\\_71\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/Seriec_71_esp.pdf).

15 Florabel Quispe Remón. Ius cogens in the Inter-American system: Its relationship with due process. Law Journal No 34, Barranquilla, 2010.

16 Universal Declaration of Human Rights (Arts. 10 and 11), International Covenant on Civil and Political Rights (Arts. 14 and 15), American Convention on Human Rights (Arts. 8, 9, 25), Basic Principles on the Independence of the Judiciary, adopted by the United Nations General Assembly in 1985, Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, among others.

17 International Bar Association (IBAHRI), *Report by the International Bar Association Human Rights Institute on the visit to the Bolivarian Republic of Venezuela from February 8-11, 2011: Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela*, April 2011. Available at: [www.ibanet.org/Document/Default.aspx?DocumentUId=0e0dc15a-4f39-4ee6-81f5-f36a60d90231](http://www.ibanet.org/Document/Default.aspx?DocumentUId=0e0dc15a-4f39-4ee6-81f5-f36a60d90231).

18 *Ibid.*

The findings of the report concluded that Judge Afiuni ‘*was deprived of her freedom in the absence of proper safeguards, because no justification was given for a restriction on freedom in proceedings that prima facie ought to have been merely administrative rather than judicial. In addition, the Delegation learned that the judge was not properly informed of the reasons for her arrest, in breach of Venezuelan law and international treaties. As a result of these serious breaches of due process, we believe the arrest of the judge to have been arbitrary. The Delegation concludes that the judge’s right of defence has not been protected: for instance, multiple applications for the judges to recuse themselves went unanswered, or were dismissed by the very judges whom the defendant was seeking to have recused. The consequence of this was that counsel for the defence was barred from accessing the case file, as Judge Afiuni declared herself to be in disobedience due to several violations of due process*’.<sup>19</sup>

As to the presumption of innocence, senior government officials asserted her guilt in advance: for instance, the then-President of the Republic, Hugo Chávez, who called for Judge Afiuni’s arrest.<sup>20</sup> This is indisputably a direct and serious interference with the administration of justice that undermines the principles of separation of powers in a state under the rule of law.

We highlight that the Venezuelan authorities acted in breach of observation no.32 of the United Nations Human Rights Committee, which requires all government authorities to abstain from prejudging the outcome of a trial.

The February 2014 report addresses the paucity of evidence and arbitrariness inherent in keeping the defendant in detention, albeit subsequently in the form of house arrest.<sup>21</sup> At the pre-trial hearing on 17 May 2010, the prosecutor acknowledged that there was no tangible evidence of any bribe in connection with the corruption charge, but argued that the ‘benefit’ obtained was the freedom of the defendant. Nonetheless, the court granted the prosecution leave to proceed and, on that basis, ordered that detention in custody be continued.

IBAHRI highlights that the Venezuelan criminal justice system requires that trial proceedings be conducted orally and in public, to honour the principles of open and timely justice. Similarly, Venezuelan law calls for the application of the principles of concentration and continuity, requiring that the trial start and finish within a single day or, if this is impracticable, ‘the minimum number of consecutive days’.<sup>22</sup>

Another matter highlighted in the 2014 report which remains relevant at present relates to ‘*the frequent procedural delays caused by the judge while hearing the case, and the prosecutor’s failures to appear in trial proceedings on inadequate grounds (family reasons, vacations, administrative reasons)*’.<sup>23</sup>

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19 *Ibid.*

20 President Hugo Chávez’s prejudicial statements against Judge Afiuni can be heard at [www.youtube.com/watch?v=AOWPXh3yxBM](http://www.youtube.com/watch?v=AOWPXh3yxBM).

21 International Bar Association (IBAHRI), report, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni*, February 2014. [www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539](http://www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539).

22 Procedural Code. Art. 17 ‘Concentration: Once the debate has begun, it shall end on the same day. If this is not possible, it shall continue for the minimum number of consecutive days’. Concentration means the trial must be completed in a single day, as a single hearing. The lawmaker provides that, if this is not possible, the trial may be adjourned for a maximum term of ten days, calculated continuously and only in the cases indicated in Article 335 of the Code of Criminal Procedure, inasmuch as a prolonged lapse between the taking of evidence and the verdict detracts from recollection of specific details and perceptions gained with the immediacy of the evidence. Article 335 of the Code of Criminal Procedure: ‘Concentration and continuity. The court will conduct the debate in one day. If this is not possible, the debate shall continue for as many consecutive days as necessary until its conclusion’. Article 257: ‘The process constitutes a fundamental instrument for the implementation of justice. Procedural laws shall provide for simplification, uniformity and efficiency of procedures and shall adopt a short, oral and public procedure. Justice shall not be sacrificed by reason of the omission of inessential formalities’.

23 International Bar Association (IBAHRI), report, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni*, February 2014. Available at: [www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539](http://www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539).

When hearings were, in fact, held, evidence was taken from no more than one witness per sitting. There were also defects in locating and summoning witnesses, thus causing further delays.

The second implementation of the trial displayed the same kind of irregularities. As mentioned earlier, the proceedings were halted on many occasions, in particular for one year and 22 days between 31 January 2018 and 22 March 2019. This was one of the basic grounds of the appeal filed by the defence against the Judgment of 21 March 2019, since it was a flagrant breach of the principle of concentration contained in Article 17 of the Procedural Code and would lead to the invalidity of the proceedings.

In this regard, the higher court, on hearing the appeal, interpreted the period of ten days' suspension as working days without counting the days where the court did not pay attention to it – called, in local terms, 'court not sitting'. In this specific case the observation mission was able to determine that Court Seventeen, where the Afiuni case was allocated, sat on only 13 days of the entire year, and that there were no grounds to justify such paralysis of the court, affecting not only the Afiuni case but all those being dealt with by that Court.

Although house arrest had been lifted, restrictions were still in place on the defendant's freedom of movement, freedom of speech and freedom to work, as she had been suspended from office for an indefinite period with no right to compensation. In this respect, the order resolving the appeal against the decision imposed also fails to define the period during which the restrictive measures should remain in place, giving the Court the scope to make such a determination. That leads us to conclude that the harm caused by the violation of due process, amply documented in this report, continues.

IBAHRI has found that these irregularities were also present in the disciplinary proceedings that are being conducted in parallel to the criminal proceedings with the aim of removing Judge Afiuni from office.

Although the disciplinary proceedings were outside the scope of the observation mission, the IBAHRI was able to gather information over the course of visits relating to irregularities in independence and impartiality which resembled those witnessed in the criminal proceedings. According to the information obtained to date, Judge Afiuni has not been allowed to see the case file for those proceedings, and the requested copies have not been issued to her. In addition, her ability to see the case file has been made subject to the condition that she agree to be represented by a public defender imposed on her against her wishes. This is clearly contrary to the standards of the right to legal advice and a free choice of lawyer. Both these rights are essential to the effectiveness of the right to a fair trial.

## Arbitrary detention and judicial independence

IBAHRI's observation mission in 2011 called on the Venezuelan Government and on the judiciary to release Judge Afiuni because her being kept in detention was arbitrary and, hence, illegal, as well as being in violation of the principles of presumption of innocence, due process and the right to a fair trial.<sup>24</sup>

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24 International Bar Association (IBAHRI). *Report by the International Bar Association Human Rights Institute on the visit to the Bolivarian Republic of Venezuela from February 8-11, 2011: Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela*, April 2011. Available at: [www.ibanet.org/Document/Default.aspx?DocumentUid=0e0dc15a-4f39-4ee6-81f5-f36a60d90231](http://www.ibanet.org/Document/Default.aspx?DocumentUid=0e0dc15a-4f39-4ee6-81f5-f36a60d90231).

At the time, these recommendations were based on evidence that the arrest of María Lourdes Afiuni, and entry into her chambers, was unsupported by a warrant. She was not informed of the charges for which she was being arrested and there was no legal reason for arrest.<sup>25</sup>

In the 2014 IBAHRI report, observers stated: *‘The independence of the Venezuelan judiciary and, even more so, of the executive, has sharply declined since the visit conducted in 2007. This situation has adversely affected the impartiality of judges, the observance of the right to due process, and the credibility of the Venezuelan judiciary and, in general, of the State under the rule of law, which is vital to the stability of democracy, justice and respect for human rights.’*<sup>26</sup>

Having obtained all the evidence offered by the public prosecutor and in particular the witness statements, IBAHRI can confirm, among other things, that the arrest was unjustified.<sup>27</sup>

Several witnesses have confirmed that there was no arrest warrant and, therefore, the report on entry by law enforcement officers into the defendant’s chambers makes no reference to any such warrant.<sup>28</sup>

Similarly, no testimony proved the existence of an arrest warrant against Judge Afiuni. This demonstrates the illegal nature of the arrest and the direct connection between this fact and the weakening of judicial independence, given the political backdrop of the arrest.

The above leads to the conclusion that the Venezuelan judiciary has acted in clear breach of the Constitution of the Bolivarian Republic of Venezuela, which, in consonance with the governing international standards in this domain, declares in Article 44 that personal freedom is inviolable, and, unless caught in the act of committing an offense, no one may be arrested or detained except by virtue of a warrant issued by a judge.

This action also violates the constitutional provisions whereby everyone must be put on trial while on release, except for reasons specified by law and found by the court to apply in each specific case.<sup>29</sup>

The breach of those constitutional requirements and deficient safeguards during confinement caused irreparable harm to the life and physical, psychological and moral safety of Judge Afiuni, as a result of the Venezuelan State’s refusal to adopt the precautionary measures recommended by the Inter-

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25 International Bar Association (IBAHRI), *Trial observation report: The María Lourdes Afiuni Case*, December 2013. Available at: [www.americanbar.org/content/dam/aba/administrative/individual\\_rights/aba\\_chr\\_trial\\_report\\_afioni\\_spanish.pdf](http://www.americanbar.org/content/dam/aba/administrative/individual_rights/aba_chr_trial_report_afioni_spanish.pdf).

26 International Bar Association (IBAHRI), report, *The Execution of Justice: The Criminal Trial of Judge María Lourdes Afiuni*, February 2014. Available at: [www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539](http://www.ibanet.org/Document/Default.aspx?DocumentUid=177DC243-8A94-4E3D-9F1E-B0C7A4D97539).

27 It should be considered that in the course of the initial trial proceedings—which were set aside in June 2013—several witness statements were taken, none of which pointed to any impropriety in Judge Afiuni’s conduct.

28 For instance, testifying at the hearing of 10 March 2017, Wilmer Ayala declined to acknowledge the existence of an arrest warrant. This was confirmed by Néstor José Quintana Rodríguez on the same date, and by Daniel Gutiérrez in testimony given on 18 January 2017. (IBAHRI Report, June 2017.)

29 ‘Article 44. Personal freedom is inviolable; consequently: 1. No person may be arrested or detained except by virtue of a court warrant, unless caught in the act. In this case, he shall be brought before a judicial authority no later than forty-eight hours from the time of arrest. He or she shall be tried in liberty, except for the reasons determined by law and found to apply by the judge in each case. The posting of bail as required by law to grant the release of the detained person shall not give rise to any tax. 2. Every arrestee has the right to communicate immediately with his or her family, lawyer or trusted person; and they, in turn, have the right to be informed of the place where the arrestee is located, to be immediately notified of the reasons for the arrest, and to have a written record made in the case file of the physical and mental state of the arrestee, either by themselves or with the assistance of specialists. The competent authority shall keep a public record of any arrest made, including the identity of the person arrested, the place, time, conditions of the arrest, and the official(s) making the arrest. With regard to the arrest of foreign nationals, the consular notification provided for in international treaties on the subject shall also be observed. 3. The penalty shall not have effects beyond the convicted person. There shall be no life sentences or humiliating penalties. A term of imprisonment shall not exceed thirty years. 4. Any authority executing a measure involving deprivation of liberty shall be obliged to identify itself. 5. No person shall continue to be detained after an order for release by the competent authority, or after the completion of the sentence imposed.’ Constitution of the Bolivarian Republic of Venezuela. Available at: <https://venezuela.justia.com/federales/constitucion-de-la-republica-bolivariana-de-venezuela/titulo-iii/capitulo-iii>.



American Court of Human Rights in 2010, which foresaw the imminent danger that Judge Afiuni was then facing.<sup>30</sup>

In relation to judicial independence, in its 2011 report IBAHRI stated that *‘these factors raise serious doubts as to the existence of a mechanism of checks and balances among the different branches of government power, and severely erode the already weakened credibility of the Venezuelan judiciary, while exacerbating the harsh political and social division of the country. IBAHRI concludes that the separation of powers, which is essential to a democratic State under the rule of law, is sharply deteriorating in Venezuela’*.<sup>31</sup>

At the time, in light of those circumstances, the following recommendations were made: *‘IBAHRI calls upon the Venezuelan State to assure the separation of powers so as to strengthen the rule of law and the independence and impartiality of the judiciary. Therefore, IBAHRI urges the State to take the necessary steps to ensure that judicial appointments and removals are consistent with national and international standards safeguarding an independent judiciary; IBAHRI requests that the State adopt the measures required to end the provisional status of most judges in Venezuela by conducting competitive selection procedures as mandated by the Constitution; we recommend to the State that it amend the internal laws and practices that allow unrestricted removal of provisional judges, so as to secure the necessary stability for them to act independently and impartially until the competitive selection procedures are carried out; and IBAHRI urges senior government officials and members of the judiciary to refrain from making statements that might exert political pressure on the judiciary and undermine the separation of powers’*.<sup>32</sup>

In congruence with concerns raised by IBAHRI, the Inter-American Commission on Human Rights expressed concern in its 2014 annual report, including particular concern regarding the high proportion of judges and public prosecutors with provisional status, the alleged breach of some statutory and constitutional procedures for their appointment and removal, and alleged persecution of judges in retaliation for their decisions in the exercise of their power.<sup>33</sup>

The Inter-American Commission reasserted its concern in its annual reports for 2016, 2017 and 2018. The 2016 report discusses uncertainty in judicial office: *‘Continuing with the monitoring the Commission performs of access to justice and the fragile status of judicial independence, it has observed in the past that a large number of judges in Venezuela have provisional appointments and can be removed without a disciplinary proceeding, a situation that persisted in 2016. In this regard, it should be noted that the Constitutional Chamber of the Supreme Tribunal of Justice (TSJ) ratified its authority to remove temporary judges, stating that the judicial disciplinary jurisdiction does not have authority to process provisional judges accused of any irregularities. PROVEA stated that this means that fewer than 700 of the country’s 2,000 judges have a right to trials with due process guarantees because they are permanent, while the remaining 66 per cent, because they are temporary, can be removed by the Judicial Committee at any moment and without any prior procedure. It indicated that, according to the TSJ, in 2015, the number of floating judges increased to 279; 54 courts were established throughout the country; and 1,576 administrative judges were appointed, along with 555 civil judges and 292 criminal judges.’*<sup>34</sup>

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30 Decision of the President of the Inter-American Court of Human Rights of 10 December 2010. Request for provisional measures submitted by the Inter-American Commission on Human Rights with respect to Venezuela. Re María Lourdes Afiuni, [www.corteidh.or.cr/docs/medidas/afiuni\\_se\\_01.pdf](http://www.corteidh.or.cr/docs/medidas/afiuni_se_01.pdf).

31 International Bar Association (IBAHRI), *Report by the International Bar Association Human Rights Institute on the visit to the Bolivarian Republic of Venezuela from February 8-11, 2011: Distrust in Justice: The Afiuni case and the independence of the judiciary in Venezuela, April/ 2011*. Available at: [www.ibanet.org/Document/Default.aspx?DocumentUid=0e0dc15a-4f39-4ee6-81f5-f36a60d90231](http://www.ibanet.org/Document/Default.aspx?DocumentUid=0e0dc15a-4f39-4ee6-81f5-f36a60d90231).

32 *Ibid.*

33 CIDH, *CIDH Annual Report 2014*, 2014, [www.oas.org/es/cidh/docs/anual/2014/docs-es/Anual2014-cap4Venezuela.pdf](http://www.oas.org/es/cidh/docs/anual/2014/docs-es/Anual2014-cap4Venezuela.pdf).

34 IACHR, *IACHR Annual Report* (2016). Available at: [www.oas.org/es/cidh/docs/anual/2016/docs/informeannual2016cap4b.venezuela-es.pdf](http://www.oas.org/es/cidh/docs/anual/2016/docs/informeannual2016cap4b.venezuela-es.pdf).

Conclusions from the second stage of the observation from 2015 remained relevant, and in fact, judicial independence became increasingly compromised.

Signs of this included the constant changes in the officials representing the public prosecutor's office, and the fact that criminal proceedings are shaped directly by the national political situation of the time. In the Afiuni case, the appointed public prosecutor has been replaced any number of times, and, in some cases, officials interviewed by the observation committee expressed concern about reprisals; they said they did not agree with all the charges laid against Judge Afiuni, and were merely following 'orders'.<sup>35</sup>

Moreover, when evidence was taken from members of the Venezuelan intelligence agency Servicio Bolivariano de Inteligencia Nacional (SEBIN) who were present at the time of the events under investigation, they stated that they had, at all times, followed orders from their superiors, or were unaware of vital elements of the investigation. None of these witnesses gave evidence that might prove the offences with which Judge Afiuni is charged.<sup>36</sup>

In 2017, after the public prosecutor Luisa Ortega left office, the public prosecution department shifted its stance: for the first time, it dropped the remaining prosecution witnesses who were yet to testify, and instead cast doubt on the Court's diligence in summoning witnesses and moving the proceedings forward.<sup>37</sup>

Finally, as to the disciplinary proceedings now in progress against Judge Afiuni, we highlight the risk of legal uncertainty that emerges from the fact that the disciplinary procedure is not codified in statute. The procedure is governed on a supplemental basis as to penalties and, in general, by the precedents of the disciplinary tribunal itself.

In addition, Judge Afiuni has been barred from exercising her right to an impartial lawyer, insofar as Susana Barreiro (the current Chief Public Defender) was, in fact, the official who replaced Judge Afiuni after her arrest (and was later promoted to Chief Public Defender).<sup>38</sup> Moreover, Ms Barreiro is the official in charge of appointing the *ex officio* defence counsel, despite the fact that she displays many signs of compromised impartiality.<sup>39</sup>

We must make reference in this report to the concern expressed throughout the course of the proceedings by Judge Afiuni's defence team about the irregularities in the disciplinary proceedings, which were being conducted without allowing the respondent to take part.

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35 International Bar Association (IBAHRI), *Observation Report*, November 2016.

36 *Ibid.*

37 International Bar Association (IBAHRI), *Observation Report*, June 2017.

38 "What would Susana Barreiros do as public defender?" *El Nacional*, December 10, 2015, Available at: [www.el-nacional.com/noticias/politica/que-hara-susana-barreiros-como-defensora-publica\\_40434](http://www.el-nacional.com/noticias/politica/que-hara-susana-barreiros-como-defensora-publica_40434).

39 Susana Barreiro was the judge responsible for convicting Leopoldo López, a Venezuelan opposition leader, and she was accused of committing irregularities during the trial.

## Denial of justice and exhaustion of internal appeals: irreparable harm to life plans

The observation conducted throughout the proceedings has been able to confirm the irregularities identified at an early stage in various earlier reports published by IBAHRI, in which violations of due process and legal guarantees have arisen from various sources.

Finally, IBAHRI highlights the effects caused so far by the flagrant violations of due process discussed throughout this report. All internal appeals have been exhausted, and the effects of the violations of her rights are ongoing, and she has received no compensation for the harm sustained as a result of the Venezuelan State having acted contrary to local legal requirements and relevant international standards.

IBAHRI highlights that the Venezuelan criminal justice system, in accordance with international principles, requires that trial proceedings be conducted orally and in public, to honour the principles of open and timely justice. Similarly, Venezuelan law calls for the application of the principles of concentration and continuity, requiring that the trial be begun and completed within a single day or, if this is impracticable, ‘the minimum number of consecutive days’.<sup>40</sup>

However, despite the indefinite and unjustified extension at various stages of the proceedings, the judge of Trial Court 17 of the Caracas Metropolitan Area, Manuel Bognanno, refused at the time to issue a judgment and insisted that certain witnesses had still to be heard.

On two occasions the defence requested the lifting of the restrictions still imposed on Judge Afiuni, apparently based on a similar decision pending on appeal, but no timely ruling was forthcoming there, either.<sup>41</sup> Both applications were based on the fact that the restrictions on Judge Afiuni had already run for longer than the maximum prison term on the books for this offense. The court’s approach can be regarded as a denial of justice, in that it limits access to an effective remedy, based on internal procedural rules which restrict the indefinite extension of measures.<sup>42</sup>

For the case in question, the term of two years established by Venezuelan criminal law for the maintenance of precautionary measures has long since expired, and the maximum term of any possible sentence has already elapsed, as the defence has pointed out.<sup>43</sup>

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<sup>40</sup> Code of Criminal Procedure. Article 17 ‘Concentration: Once the debate has begun, it shall end on the same day. If this is not possible, it shall continue for the minimum number of consecutive days’. Concentration means the trial must be completed in a single day, as a single hearing. The lawmaker provides that, if this is not possible, the trial may be adjourned for a maximum term of ten days, calculated continuously and only in the cases indicated in Article 335 of the Code of Criminal Procedure, inasmuch as a prolonged lapse between the taking of evidence and the verdict detracts from recollection of specific details and perceptions gained with the immediacy of the evidence. Article 335 of the Code of Criminal Procedure: ‘Concentration and continuity. The court will conduct the debate in one day. If this is not possible, the debate shall continue for as many consecutive days as necessary until its conclusion’. Article 257: ‘The process constitutes a fundamental instrument for the implementation of justice. Procedural laws shall provide for simplification, uniformity and efficiency of procedures and shall adopt a short, oral and public procedure. Justice shall not be sacrificed by reason of the omission of inessential formalities.’

<sup>41</sup> Argument put forward by Justice Bognanno at the hearings on 12 and 31 January, 2018.

<sup>42</sup> ‘Article 230: Proportionality. A measure of personal coercion may not be ordered when it appears disproportionate to the seriousness of the offense, the circumstances in which it was committed and the probable sanction. In no event may such measure exceed the minimum penalty laid down for each offense or a period of two years; in the case of several offenses, the minimum penalty for the most serious offense shall be considered. As an exception, and when there are compelling grounds for maintaining personal coercion measures that are close to expiration, the Public Prosecutor’s Office or the private prosecution may request an extension, which may not exceed the minimum penalty provided for the offense charged, and when there are several offenses charged, the minimum penalty provided for the most serious offense shall be considered. An extension may also be requested when such expiration is caused by undue delay attributable to the accused or his or her defence counsel. That these circumstances are present must be shown by the Public Prosecutor or the private prosecution. If the case is before the Court of Appeals, the application shall be received and immediately referred, with the necessary instructions, to the Court of First Instance currently or formerly hearing the case, and that Court shall decide on the application.’

<sup>43</sup> The month of December 2017 marked the eighth anniversary of the commencement of the trial against Judge Afiuni, and the maximum penalty for the offences for which she is being tried is seven years.



The judge's argument that the decision should be left to the Court of Appeal should be regarded as a delaying tactic, especially since the Court of Appeal took over two years to issue a ruling from the lodging of the appeal.

Recent reports produced by the UN Human Rights Council<sup>44</sup> and the OAS<sup>45</sup> raise the alarm as to the current situation of political prisoners in Venezuela: *'The number of political prisoners in Venezuela is the highest it has been since the military dictatorship of the 1950s, with close to 676 political prisoners at the height of the 2017 protests. After stabilising at around 220 in the first four months of 2018, the number of political prisoners spiked again in the weeks leading up to the fraudulent presidential elections of 20 May 2018. As of 13 May 2018, there were 338 political prisoners behind bars. Since 2013, more than 1,300 people have been held as political prisoners. Detention facilities operate autonomously, regularly ignoring court orders to free those in detention. The evidence also disclosed the criminal complicity of judges and prosecutors in ordering these arbitrary arrests, imprisonments, and deprivations of liberty.'*<sup>46</sup>

The findings to date regarding serious violations of Judge Afiuni's human rights by the State of Venezuela must form the basis for a discussion of the direct effects on her life plans since any curtailment of the freedom of a human being deprives her of the power of choice and the ability to make progress in her life. Hence, the protracted detention of Judge Afiuni has indisputably been the main obstacle to the fulfillment of her 'life plans', because freedom is an essential condition of any such goal.<sup>47</sup>

According to the Inter-American Court of Human Rights, harm to life plans does not constitute an economic loss, because from a legal standpoint that aspect is captured by emerging damages and loss of profit. A reference to harm to life plans is a reference to the 'full self-actualisation of the person concerned', who has a range of hopes and purposes for their life in accordance with their qualities and aptitudes.<sup>48</sup>

Given this conceptual assumption, we emphasise that, for ten years, in addition to direct violations of the right to life, physical safety and freedom, the imposition of arbitrary restrictions that are contrary to both the internal legal order and international law had the effect of nullifying and directly affecting Judge Afiuni's life plans, defined as *'personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. Strictly speaking, those options are the manifestation and guarantee of freedom. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard.'*<sup>49</sup>

The curtailment of life plans is no minor loss, as this can be *'devastating, because a life plan touches on the very meaning of a human being's life, on whatever it is that enables him or her to live fully, to achieve his or her hopes*

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44 Human Rights Council. United Nations. Universal Periodic Review (UPR) Report for Venezuela <https://transparencia.org.ve/wp-content/uploads/2017/02/Informe-del-EPU-2017-1.pdf>.

45 Organization of American States. Report of the General Secretariat of the Organization of American States and the Panel of Independent International Experts on the Possible Commission of Crimes against Humanity in Venezuela, Washington D.C., 29 May 2018. <https://reliefweb.int/sites/reliefweb.int/files/resources/Informe-Panel-Independiente-Venezuela-ES.pdf>.

46 *Ibid.* p. xi.

47 Sessarego, C. F. (December 1996). PUC Law. *Damage to life plans*. Available at: [http://dike.pucp.edu.pe/bibliotecadeautor\\_carlos\\_fernandez\\_cesareo/articulos/ba\\_fs\\_7.pdf](http://dike.pucp.edu.pe/bibliotecadeautor_carlos_fernandez_cesareo/articulos/ba_fs_7.pdf).

48 Inter-American Court of Human Rights. *Loayza Tamayo vs. Peru*. Judgment of 27 November 1998 (Reparations and Costs). Available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_42\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_42_esp.pdf).

49 *Ibid.*

*and dreams; it is the correlate of the so-called “inside” that lends shape to a personal calling. Every human being lives “according to” and “for” his or her plan of existence. He or she tries to make that plan a reality, to make it concrete, to turn it into a “way of life”, into his or her guiding mode of existence’.*<sup>50</sup>

## Conclusion

- The observation has enabled IBAHRI to witness the gradual weakening of the judiciary and the deterioration of democratic structures. These processes are corroding the separation of powers against a backdrop of severe political turmoil.
- Unfortunately, the efforts of IBAHRI and other international organisations and forums have not succeeded in putting an end to the violations of Judge Afiuni’s fundamental rights. Although the shift from imprisonment to house arrest and subsequent restrictions was regarded at the time as a step forward, given the serious risks to life and physical safety then prevailing, it remains the case that the remaining restrictions are causing irreparable harm to Judge Afiuni’s life plans. The defendant and her defence team show signs of fatigue and despair, owing to the absence of a fair trial and due process.
- Over this period of ten years, the proceedings have lacked the proper safeguards, mainly due to the absence of judicial independence and arbitrary decision-making.
- The process of taking and examining evidence was rife with unjustified delays, cancelled hearings and failure to summon witnesses on time. In the best of cases, only one or two witnesses would appear at a given sitting of the court.
- The Court never ruled on the merits of the application for the restrictions on Judge Afiuni to be lifted, or on the application for a declaration that the maximum term of any potential sentence has already elapsed. The final decision was based on an offence which is not recognised in national criminal legislation, ‘spiritual corruption’.
- These features of the proceedings are contrary to the principles of legality, promptness, due process and timeliness, which are human rights standards that have been enshrined in instruments such as the American Convention on Human Rights, among others.
- All the issues identified and discussed throughout this report point to the liability of the Venezuelan State, which has nonetheless failed to abide by the recommendations of IBAHRI and other international organisations and forums.

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50 Sessarego, C. F. (December 1996). PUC Law. *Damage to life plans*. Available at: [http://dike.pucp.edu.pe/bibliotecadeautor\\_carlos\\_fernandez\\_cesareo/articulos/ba\\_fs\\_7.PDF](http://dike.pucp.edu.pe/bibliotecadeautor_carlos_fernandez_cesareo/articulos/ba_fs_7.PDF).

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