

Legal Opinion

In Re: United Nations Credentials Committee

Challenge to the United Nations Credentials of the Delegation of Nicolás Maduro to Represent The Government of Venezuela

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Executive Summary

1. The world has finally taken notice of the urgent crisis in Venezuela. On January 10, 2019, Nicolás Maduro appeared to have been sworn in to a second six-year term of office as President of Venezuela, but he had been elected in a poll that was widely and accurately criticized as neither free nor fair. On January 15, 2019, Venezuela’s National Assembly adopted a Declaration that carefully and specifically explained precisely why, in full accordance with Venezuela’s Constitution and its laws, Maduro was no longer President. The historic clash in Venezuela emanates not from foreign intervention but from the courage and resilience of the Venezuelan people. After suffering for years under an authoritarian Government, living in a man-made humanitarian disaster, and sacrificing their lives to rescue their democracy, they are on the cusp of breaking free from the chains of dictatorship. In fact, as described in detail in this Legal Opinion, the National Assembly had the unequivocal and exclusive legal authority to declare that Maduro had abandoned his position by circumventing the requirement that he be democratically elected. In so doing, and until a new election is held, the Constitution explicitly says the President of the National Assembly “shall take charge of the Presidency of the Republic.” It was on this basis that on January 23, 2019, Juan Guaidó was sworn in as interim President of Venezuela among hundreds of thousands of Venezuelans, who had taken to the streets to protest Maduro’s rule.

2. Since then, nearly 60 states – including Albania, Andorra, Australia, Austria, the Bahamas, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, the Czech Republic, Denmark, the Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kosovo, Latvia, Lithuania, Luxembourg, Malta, the Marshall Islands, Micronesia, Montenegro, Morocco, the Netherlands, North Macedonia, Panama, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, South Korea, Spain, St. Lucia, Sweden, Ukraine, the United Kingdom, and the United States,² have both recognized Guaidó as interim President and his

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² This list is current as of March 23, 2020.

Government as the exclusive sovereign power of Venezuela. It is inevitable many more will follow. In addition, as will be discussed further below, the European Parliament and the Organization of American States have also recognized the Guaidó government, and the International Monetary Fund has refused to lend money to the Maduro regime because it lacks international recognition.³

3. An important next step for the world to empower the new Government with the authority and resources that it requires to address the enormous challenges facing Venezuela is for a group of Member States of the United Nations to prevail in a credentials challenge to the delegation of Nicolás Maduro, which continues to represent Venezuela before the UN General Assembly and other UN organs and agencies. A “delegation,” according to the United Nations, “consists of up to five representatives, five alternate representatives, and as many advisers and experts as required.”⁴ The replacement of the Maduro delegation could occur in two ways. First, the group could present the credentials challenge to the nine-member UN Credentials Committee, which currently includes Antigua and Barbuda, Chile, China, Finland, Ghana, Palau, the Russian Federation, Sierra Leone, and the United States. If a majority of the Credentials Committee voted to revoke the credentials of Maduro’s delegation and to replace them with those of Guaidó’s delegation, then the case would be brought before the General Assembly. A simple majority vote would be required there to affirm the Credential Committee’s recommendation. Neither vote is subject to a veto by the five permanent members of the UN Security Council. This approach would be following the usual order for the consideration of credentials. Second, it would also be possible for the group of Member States to bypass the Credentials Committee entirely and to have the question considered as a separate agenda item of the General Assembly, where it would also require a majority vote. While either option is legally available according a longstanding opinion of the UN Legal Counsel, securing a majority vote in the Credentials Committee first could strengthen the legitimacy of the final outcome, but to be clear it is not required for the Member States to take the challenge to the Credentials Committee. Of course, it would not be advisable to make a credentials challenge through either path unless Member States were confident they would prevail in the required votes.

4. There would be at least three immediate benefits for the new Government of Venezuela if the credentials challenge succeeded. First, the United Nations is the only multilateral institution with the legitimacy conferred by having universal membership of all the countries in the world. As such, speaking as a government’s authorized representative at the United Nations bestows a unique platform that can persuade other states to take action. It would be both a symbolic and highly substantive step towards the restoration of democracy in Venezuela for the new Government to be recognized by the United Nations as the exclusive sovereign power in the country. Such a decision would also undoubtedly have enormous impact on the National Armed Forces, which are, for the moment, keeping Maduro in power. Second, the new Government could immediately make formal representations to the Secretary-General, other organs of the United Nations, and the UN humanitarian agencies. This would enable the Government to rapidly work

³ *OAS Accepts Guaidó Ambassador as Representative of Venezuela, Ousts Maduro Appointee*, MIAMI HERALD, Apr. 9, 2019 and Patricia Laya & Alex Vasquez, *IMF Won’t Lend to Venezuela Because Maduro Lacks Recognition*, BLOOMBERG, Mar. 17, 2020.

⁴ THE GA HANDBOOK: A PRACTICAL GUIDE TO THE UNITED NATIONS GENERAL ASSEMBLY, Permanent Mission of Switzerland to the United Nations, 2017.

to secure assistance to address the humanitarian emergency, to ask for support in raising funds through a multilateral fund, and to authorize access for UN agencies to address the needs of the Venezuelan people on the ground. And finally, with the new Government's recognition by the United Nations, global banks would cut off Maduro's access to the Government's assets and income streams and place them under the exclusive control of the new Government.

5. Importantly, an examination of the precedents of the practice of the Credentials Committee, described in detail in the Appendix, demonstrates that if this credentials challenge were to be decided on the merits alone, the credentials of the Maduro delegation would be revoked and the delegation of the new Government would be recognized. In short, the Credentials Committee has been willing to approve the credentials of democratically-elected governments and groups in restored democracies even in circumstances where they did not have effective control of all of the territory of the country concerned. It is true that the overwhelming majority of credentials requested by Member States are accepted by the Credentials Committee and the General Assembly without question. But where a situation arises from internal or external repression – especially with stolen elections or a refusal to accept the outcome of a freely-conducted election – the Credentials Committee may consider other factors such as the legitimacy of the entity requesting the credentials, the means by which it achieved and retains power, and its human rights record. Beyond that precedent, in this case there is the added and undeniable legal authority in the Constitution for the replacement of Maduro by the declaration of the National Assembly.

6. Of course, it is inevitable that a credentials challenge regarding Venezuela will not be decided exclusively on the merits. But for those Member States from outside the region that might be inclined to reject the challenge, they will need to reflect carefully on the precedent they could create if they decline to defer to the very strong will of the region when making this decision. They must consider that the Organization of American States (OAS) and the Lima Group both strongly rejected Maduro's re-election as neither free nor fair. And they should observe that a large group of influential countries in the region have already individually recognized the new Government, including Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Panama, Paraguay, Peru, and the United States. For Member States from outside the region that will nonetheless still consider rejecting the challenge, they should consider their reaction if the above Member States sought to tell them from a distance which Government in a country in their own region was the proper representative of the people.

7. In short, while it will undoubtedly take intense effort, there is strong precedent and legal justification for a group of Member States to challenge the credentials of Maduro's delegation to the United Nations and to prevail. And succeeding in this effort could not be more urgent both as a humanitarian imperative and to restore democracy in Venezuela through a new set of free and fair presidential elections.

A. Introduction

8. The international community consistently avoids, where possible, rendering judgments regarding the legitimacy of the governments of Member States of the United Nations. As a general matter, the legal capacity of a government to assert rights, incur obligations, or authorize acts on behalf of a State is not subject to any systematic process of assessment on democratic grounds.

For this and other reasons most governments avoid formal recognition of new governments where successors are naturally occurring. International organizations, however, cannot avoid determining who they will accept as entitled to act on behalf of a Member State, and in certain cases they have taken positions on the legitimacy of governments, especially where they have stolen elections or refused to give up power after being replaced through constitutional and legal means.

9. There are two dimensions to State participation in the General Assembly: Membership and Representation. Membership of the United Nations is governed by Articles 4 to 6 of the UN Charter. In short, a State is admitted to membership after being approved by the General Assembly, upon the recommendation of the Security Council. And a State that has persistently violated the principles of the UN Charter can be expelled in the same way. Representation refers to the presence in the General Assembly of a delegation representing the Member State, and is addressed in Rules 27-29 of the General Assembly's Rules of Procedure.⁵ It is representation that is at issue in a credentials challenge.

10. No specific criteria have been authoritatively articulated to govern the General Assembly's credentials decisions.⁶ Resolution 396(V) of December 14, 1950, entitled "Recognition by the United Nations of the Representation of a Member State," provides in paragraph 1 that:

[W]henver more than one authority claims to be the government entitled to represent a Member State in the United Nations, the question should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.

11. The next to last draft of Resolution 396(V) had included a supplemental recommendation, which said:

The following should be among the factors to be taken into consideration in determining any such question:

- (i) The extent to which the new authority exercises effective control over the territory of the Member State concerned and is generally accepted by the population;
- (ii) The willingness of that authority to accept responsibility for the carrying out by the Member State of its obligations under the Charter;
- (iii) The extent to which that authority has been established through internal processes in the Member State.⁷

But this further explanation was ultimately not accepted by the Ad Hoc Political Committee.⁸

⁵ *Rules of Procedure of The General Assembly*, U.N. Doc. A/520/REV.15, Oct. 30, 2000.

⁶ See "Legal Aspects of Problems of Representation in the United Nations," Memorandum Prepared for the Secretary-General, U.N. Doc. S/1466, Mar. 9, 1950.

⁷ U.N. Doc. A/AC.38/L.45, Nov. 21, 1950, at 9.

⁸ *Id.*, at 16.

B. The Case of Venezuela

(a) *The Internal Situation*

12. After winning its independence from Spain in 1821, Venezuela was ruled by a series of military leaders. Democracy was established permanently in the country in 1958, when dictator Marcos Pérez Jiménez was displaced in a coup and Rómulo Betancourt of the Democratic Action party became president. In subsequent decades, Venezuela, with the largest amount of proven oil reserves in the world, benefitted from booming oil prices and high levels of economic growth. But in the 1980s, oil prices plummeted and Venezuela experienced a severe economic recession and debt crisis. Then President Carlos Andrés Pérez, also of the Democratic Action Party, was forced to take austerity measures and seek loans from the International Monetary Fund, sparking widespread riots and martial law.⁹ It was in this context of political unrest that then Colonel Hugo Chávez, a left-wing activist, and his supporters launched an unsuccessful military coup in 1992. After serving a two-year period in jail, he was pardoned and eventually elected president by a wide margin in December 1998.

13. Democracy in Venezuela suffered under Chávez, who served as President of Venezuela from 1999 until his death in 2013.¹⁰ Following *Chavismo*, a left-wing political ideology,¹¹ Chávez enacted a series of social and economic measures – termed the Bolivarian Revolution – aimed at improving quality of life for Venezuelans.¹² Unfortunately, despite Chávez’s lofty ambitions, his presidency saw a dramatic concentration of power,¹³ erosion of democracy and the rule of law, and disregard for human rights protections.¹⁴ His Government carried out a political takeover of Venezuela’s Supreme Court, dramatically expanded the Government’s ability to control the content of the country’s broadcast and news media, and sought to block international organizations from monitoring the country’s human rights practices.¹⁵ During Chávez’s presidency, thousands of opposition leaders and government critics were subjected to political persecution, ranging from loss of government jobs to criminal prosecution in the country’s courts,¹⁶ where they had little chance of a fair trial.¹⁷ Chávez’s economic model also proved unsustainable. Government price controls put in place by Chávez in 2002, which initially aimed to reduce the prices of basic goods, caused inflation and widespread shortages.¹⁸ Additionally, the murder rate under Chávez’s administration quadrupled, making Venezuela one of the most violent countries in the world.¹⁹

⁹ *Venezuela Profile–Timeline*, BBC NEWS, Aug 29, 2018.

¹⁰ Ami Sedghi, *How Did Venezuela Change Under Hugo Chávez?*, THE GUARDIAN, Mar. 6, 2013.

¹¹ Larisa Epatko, *In Venezuela, Will ‘Chavismo’ Last Without Hugo Chávez?*, PBS, Apr. 12, 2013.

¹² *Socialism After Chávez: Political Divisions Deepen Amid Unrest in Venezuela*, PBS NEWSHOUR, Apr. 18, 2014.

¹³ *Venezuela: Chávez’s Authoritarian Legacy*, HUMAN RIGHTS WATCH, Mar. 5, 2013.

¹⁴ *Id.* See also *Venezuela Violates Human Rights, OAS Commission Reports*, CNN, Feb. 24, 2010.

¹⁵ *Venezuela: Chávez’s Authoritarian Legacy*, *supra* note 13. See also *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela*, HUMAN RIGHTS WATCH, June 17, 2004.

¹⁶ *Criminals or Dissidents?*, THE ECONOMIST, Feb. 17, 2011.

¹⁷ *WORLD REPORT 2010*, HUMAN RIGHTS WATCH, Jan. 31, 2010.

¹⁸ Matthew Walter, *Chávez Price Controls Mean Record Oil Fails to Prevent Shortage*, BLOOMBERG, May 23, 2008.

¹⁹ Manuel Rueda, *How Did Venezuela Become So Violent?*, FUSION, Jan. 8, 2014.

14. Nicolás Maduro, who was elected Chávez's successor after narrowly defeating his opponent Henrique Capriles in 2013, continued the intimidation, censorship, and persecution of critics that began under Chávez.²⁰ Notably, in September 2013, Maduro's decision to withdraw from the American Convention on Human Rights took effect, leaving Venezuelans without access to the Inter-American Court of Human Rights, an international tribunal that had protected their rights for decades in a wide array of cases.²¹ In addition, many of the economic and social challenges faced by Chávez, including violence, inflation, and shortages of goods, intensified during Maduro's rule. Taken together, these factors contributed to widespread discontent and dissatisfaction with the Government among the Venezuelan population.²²

15. As a result of the high levels of violence,²³ corruption, inflation,²⁴ and scarcity of basic goods in the country,²⁵ a number of prominent opposition leaders, including Leopoldo López, Maria Corina Machado, and Antonio Ledezma, presented a political platform labeled *La Salida* (the Exit) in January 2014. This platform proposed several democratic and constitutional means for solving the political and economic crisis, including a call for the resignation of then President Maduro, a recall referendum under Article 72 of the Venezuela's Constitution, a Constituent Assembly, and as a last resort, constitutional amendments.²⁶ The leaders also urged Venezuelans to engage in non-violent protests against the Government.

16. Widespread discontent with Maduro's Government led to a series of anti-government protests and political demonstrations in Venezuela beginning in February 2014.²⁷ Led by opposition leaders, protestors converged in cities across Venezuela to protest the deteriorating economy and security levels. Though demonstrations were initially peaceful, some turned violent after armed pro-government gangs (*colectivos*) and government security forces got involved. In the weeks that followed, the Government responded to these protests with a wave of repression, resulting in over 40 deaths and more than 3,000 arrests.²⁸ It falsely blamed opposition leaders for inciting the protestors to violence, including through "subliminal messages," and imprisoned several leading politicians, including Leopoldo López.

17. Amidst a worsening economic crisis and brutal government repression, Venezuelans voted overwhelmingly for the opposition during the country's parliamentary elections on December 6, 2015. In elections that were universally regarded as free and fair, the opposition coalition won a supermajority of 112 seats to Maduro's socialist party and its allies' 55 seats.²⁹ In the months preceding the elections, Maduro had attempted to hamper the opposition's mobilization efforts by

²⁰ WORLD REPORT 2014, HUMAN RIGHTS WATCH, Jan. 21, 2014.

²¹ *Id.*

²² *Socialism After Chávez: Political Divisions Deepen Amid Unrest in Venezuela*, *supra* note 12.

²³ *Id.*

²⁴ *Venezuela Hikes Minimum Wage 30 Percent Amid High Inflation*, CHICAGO TRIBUNE, Apr. 29, 2014.

²⁵ Anatoly Kurmanav & Corina Pons, *Venezuela Inflation Hits 16-Year High as Shortages Rise*, BLOOMBERG, Nov. 7, 2013 and Corina Pons & Jose Orozco, *Venezuela Planning Third Dollar Supply System as Scarcity Rises*, BLOOMBERG, Feb. 11, 2014.

²⁶ *See generally Anti-Maduro Protests Persist in Venezuela, Dozens Jailed*, REUTERS, Feb. 14, 2014.

²⁷ *Venezuela: Political Spiral of Violence a Threat to the Rule of Law*, AMNESTY INT'L, Mar. 31, 2014.

²⁸ Thabata Molina, *Who Died in Venezuela's 2014 Protests?*, PANAM POST, Nov. 11, 2014.

and Andrew Cawthorne & Eyanir China, *Venezuela's Maduro, Opposition to Talk, Unrest Death Toll Hits 40*, REUTERS, Apr. 10, 2014.

²⁹ *Venezuela Election: Opposition Coalition Secures "Supermajority,"* THE GUARDIAN, Dec. 8, 2015. *See also In Power Struggle, Venezuela's High Court Declares Parliament in Contempt*, LOS ANGELES TIMES, Jan. 11, 2016.

using public resources to fund the campaigns of pro-government candidates, clamping down on independent media, disqualifying countless opposition candidates from running for office, and refusing to allow credible independent election observers in to the country. After the elections, the lame-duck National Assembly – still controlled by Maduro’s party – stacked the Supreme Court of Venezuela with pro-government appointees to ensure his control over the judiciary.³⁰

18. In early 2016, the Maduro-controlled Supreme Court alleged voting irregularities in the elections of four National Assembly members and arbitrarily stripped them of their seats, thereby preventing the opposition from retaining its supermajority in the National Assembly, which would have given it greater authority to challenge Maduro.³¹ The National Assembly nevertheless swore in the members who had been stripped of their seats, leading the Supreme Court to rule that the legislature was in contempt of court and in violation of the constitutional order.

19. Through 2016, Maduro relied on the Supreme Court to obstruct the National Assembly and grant him greater executive powers. On January 15, 2016, Maduro declared an economic state of emergency that purportedly allowed him to rule by decree and thereby bypass the National Assembly. After the National Assembly rejected this move, Maduro appealed to the Supreme Court, which ruled in his favor.³² On April 11, 2016, the Supreme Court also unanimously repealed a law passed by the National Assembly, which would have provided amnesty to political prisoners.³³

20. In April 2016, frustrated by Maduro’s obstruction of the National Assembly, and after Maduro ignored its call for his resignation, the political opposition initiated the process for a constitutionally-provided presidential recall referendum.³⁴ Under the Constitution, the referendum required three stages of petition signings from the electorate which, once validated by the National Electoral Council (CNE), would lead to either new elections, if the process were completed before the halfway mark of the president’s term, or to the Vice President assuming power otherwise. Unfortunately, Maduro and the pro-government CNE thwarted the referendum process through undemocratic means. Though the opposition submitted the first round of signatures to the CNE on May 2, 2016, it approved them only after a three-month delay.³⁵ The CNE then prolonged the scheduling of the second stage of the referendum process, leading to strong international criticism, including a joint statement issued by OAS 15 countries condemning the delay.³⁶ The Venezuelan people also protested the CNE’s inaction by taking to the streets in September 2016.³⁷ On September 21, 2016, the CNE announced a timeline in which the referendum would take place

³⁰ Kejal Vyas & Anatoly Kurmanaev, *Maduro’s Allies Stack Venezuela’s Supreme Court*, THE WALL STREET JOURNAL, Dec. 23, 2015.

³¹ Sibylla Brodzinsky, *Venezuela Deadlock Ends as Opposition Lawmakers Barred by Court Step Aside*, THE GUARDIAN, Jan. 13, 2016.

³² Deisy Buitrago & Alexandra Ulmer, *Venezuela Top Court Grants Maduro Economic Emergency Powers, Opposition Cries Foul*, REUTERS, Feb. 11, 2016.

³³ *Venezuela’s Supreme Court Overturns Amnesty Bill*, BBC, Apr. 12, 2016.

³⁴ Manuel Rueda, *Venezuela Blocks Humanitarian Aid as Crisis Gets Crazier*, FUSION, June 1, 2016.

³⁵ Daniel Kai & Andrew Cawthorne, *Venezuela Election Board Okays Opposition Recall Push First Phase*, REUTERS, Aug. 1, 2016.

³⁶ *Joint Statement on Recent Developments in the Bolivarian Republic of Venezuela*, U.S. DEP’T OF STATE, Aug. 11, 2016.

³⁷ Diego Oré & Brian Ellsworth, *Venezuelan Opposition Floods Caracas in Vast Anti-Maduro Protest*, REUTERS, Sept. 1, 2016.

after January 10, 2017 – the halfway mark of Maduro’s term – eliminating the possibility that Maduro’s party’s would be removed from power.³⁸ The opposition rejected the CNE’s unreasonably delayed timeline and attempted to schedule the second stage of the recall referendum for October 26-28, 2016. On October 20, 2016, the Supreme Court responded by invalidating the original signatures delivered on May 2, 2016, thus upending the entire recall referendum process.³⁹ With limited options for constitutional recourse for a change in government, the Venezuelan opposition started to plan peaceful protests again.

21. On March 29, 2017, the Supreme Court issued two unconstitutional rulings that purported to strip the opposition-led National Assembly of legislative powers, assume these powers for itself, and call into question the Assembly members’ parliamentary immunity.⁴⁰ The Court justified its actions by citing to its previous rulings holding the National Assembly in contempt for swearing in the Assembly members who had been stripped of their seats.⁴¹ The Court claimed that it would exercise all parliamentary powers itself as long as the National Assembly was held in contempt.⁴² Its ruling further claimed to authorize Maduro to suspend elections, imprison Assembly members, withdraw Venezuela from the OAS, and enter into economic joint ventures without prior National Assembly approval, even though that approval was explicitly required in the Constitution.⁴³

22. Responding to the Supreme Court’s action, opposition leaders called for renewed street protests to express disapproval with Maduro’s “self-inflicted coup d’état.”⁴⁴ The Supreme Court’s decision was also condemned internationally, with the OAS Secretary General claiming the Government had dealt the “final blows to democracy in the country,” and calling immediately for an urgent OAS meeting to discuss Venezuela’s violation of the organization’s “Democratic Charter.”⁴⁵ Argentina, Brazil, Chile, Colombia, and Mexico also expressed disapproval, while Peru withdrew its envoy to Venezuela.⁴⁶ Following this intense domestic and international pressure, the Supreme Court annulled its decision officially on April 1, 2017 and reinstated the National Assembly’s parliamentary powers and immunity, though Maduro retained many of his new powers.⁴⁷

³⁸ Andrew Rosati & Fabiola Zerpa, *Venezuela Says Recall Vote Could Be Held in First Quarter 2017*, BLOOMBERG, Sept. 21, 2016.

³⁹ Ralph Ellis & Julia Jones, *Venezuela Halts Effort to Recall President*, CNN, Oct. 21, 2016.

⁴⁰ *Venezuela Supreme Court Takes Over Legislative Powers from National Assembly*, DEUTSCHE WELLE, Mar. 30, 2017 and Racheael Boothroyd Rojas, *Venezuela’s Supreme Court Annuls Controversial Decisions on Legislature*, VENEZUELA ANALYSIS, Apr. 1, 2017.

⁴¹ *Venezuela Supreme Court Takes Over Legislative Powers from National Assembly*, *supra* note 40.

⁴² *Venezuela Ends House Arrest of Judge Maria Afiuni*, BBC, June 14, 2013.

⁴³ Ayatola Núñez, *TSJ Authorizes Maduro to Increase Repression and Suspend Elections*, EL NACIONAL, Mar. 30, 2017 and Andrew Rosati, *Venezuela Lurches Toward Dictatorship as Top Court Seizes Power*, BLOOMBERG, Mar. 30, 2017.

⁴⁴ Rafael Romo, *Venezuela’s High Court Dissolves National Assembly*, CNN, Mar. 30, 2017.

⁴⁵ Editorial Board, *Venezuela’s Descent to Dictatorship*, NEW YORK TIMES, Mar. 31, 2017.

⁴⁶ *Venezuela Accused of “Self-Coup” After Supreme Court Shuts Down National Assembly*, BUENOS AIRES HERALD, Mar. 31, 2017.

⁴⁷ Hanna Dreier & Fabiola Sanchez, *Venezuela’s Supreme Court Reverses Own Move to Strip Power from Congress*, THE CHICAGO TRIBUNE, Apr. 1, 2017 and Christof Lehmann, *Venezuelan Supreme Court Partially Annuls Most Controversial Parts of Constitutional Coup*, MSNBC INTERNATIONAL, Apr. 2, 2017.

23. The national outrage resulting from the Supreme Court's attempts to assume the powers of the National Assembly sparked a deadly wave of unrest in Venezuela.⁴⁸ From April to August 2017, hundreds of thousands of protestors took to the streets to peacefully protest the Supreme Court's overreach. Even after the Supreme Court's reversal, protests continued, as the populace demanded early general elections, the immediate release of political prisoners, the establishment of a UN humanitarian relief channel in Venezuela, respect for the National Assembly, and the appointment of unbiased and independent Supreme Court justices and CNE members.⁴⁹ Opposition demonstrators regularly clashed with National Guard soldiers, police officers, and pro-government supporters who regularly robbed and beat peaceful protestors and deployed tear gas, gunfire, and military tanks against them.⁵⁰ As of August 2017, 162 Venezuelans had been killed, more than 150,000 had been injured,⁵¹ and over 5,000 had been detained by government forces.⁵² Additionally, since the start of the protests, the number of political prisoners increased from 82 to a high of over 600.⁵³

24. On May 1, 2017, Maduro responded to these waves of protests by calling for the establishment of a Constituent Assembly that would have unchecked power to formulate a new Constitution. This was needed, according to Maduro, to "restore peace" in the country.⁵⁴ Opposition leaders recognized this move as a strategy to delay elections indefinitely and sideline the National Assembly.⁵⁵ Furthermore, the Constitution required Maduro to hold a national referendum to authorize the election of a Constituent Assembly, but he simply bypassed this requirement in a move to expedite efforts to solidify his own power under a new Constitution.⁵⁶ Maduro's move to convene an illegal Constituent Assembly provoked rare criticism⁵⁷ from his Attorney General Luisa Ortega, who broke with the Government and filed an unsuccessful challenge to its establishment with the Supreme Court, which was rejected. Numerous parties then boycotted the Constituent Assembly elections, criticizing it as an effort to further curtail democracy and restructure the constitutional order against the will of the people.⁵⁸

25. To demonstrate Venezuelans' opposition to the Constituent Assembly, the opposition organized a plebiscite vote on July 16, 2017, in which over seven million Venezuelans voted against its establishment.⁵⁹ Despite this outcome, Maduro still held the unconstitutional election for members of the Constituent Assembly on July 30, 2017, which was condemned as neither free

⁴⁸ *Thousands Take to Streets to Protest Venezuelan President Nicolas Maduro*, CBC NEWS, Apr. 8, 2017.

⁴⁹ *Protestors in Venezuela Demand Elections*, FINANCIAL TIMES, May 4, 2017.

⁵⁰ *Amnistía Internacional Instó a Aclarar Componentes del Gas Rojo*, EL NACIONAL, Apr. 8, 2017; *U.S. Official Expressed Concern over Venezuela*, ASSOCIATED PRESS, Apr. 19, 2017; and *More Injuries in Venezuela as Regime Pushes Referendum*, DEUTSCHE WELLE, June 6, 2017.

⁵¹ *Here's Your Guide to Understanding Protest Deaths in Venezuela*, TELESUR, June 13, 2017.

⁵² José Miguel Vivanco & Tamara Taraciuk Broner, *What the World Needs to Do About Venezuela*, CNN, June 11, 2017.

⁵³ *Foro Penal: Se Contabilizan 439 Presos Políticos en Venezuela*, EL NACIONAL, Oct. 3, 2017.

⁵⁴ *Venezuela's Embattled Socialist President Calls for Citizen's Congress*, USA TODAY, May 1, 2017.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Lucas Koerner, *Venezuela Attorney General Rejects National Constituent Assembly in Leaked Letter*, VENEZUELA ANALYSIS, May 22, 2017.

⁵⁸ *Id.*

⁵⁹ Corina Pons & Brian Ellsworth, *Venezuela Opposition Says 7 Million Voted in Anti-Maduro Poll*, REUTERS, July 16, 2017.

nor fair.⁶⁰ Days later, the new government-controlled Constituent National Assembly dismissed Attorney General Ortega and replaced her with a Government loyalist.⁶¹ And on August 18, 2017, the Constituent National Assembly voted to assume the powers of the National Assembly, thus putting all branches of Government under Maduro's direct control.⁶²

26. After establishing the Constituent National Assembly, Maduro moved to consolidate his power further through electoral fraud. In October 2017, the Government held regional elections to elect state governors after illegally delaying them for months. The Constitution required these elections to be held before January 2017, but the Government waited for a more favorable political climate to convene them.⁶³ These elections were also marred by numerous irregularities,⁶⁴ including the relocation of hundreds of polling centers in areas historically favorable to the opposition;⁶⁵ harassment and intimidation of voters to pressure them to vote for government candidates;⁶⁶ and abuse of CNE-controlled channels of communication to promote government candidates.⁶⁷ Despite pre-election polling projecting an overwhelming win for the opposition, the Government won 18 of 23 governorships.⁶⁸ The Government then forced the five opposition candidates who had won governorships to be sworn in by the illegal Constituent National Assembly and announced a "redo" election in the state of Zulia when its newly-elected opposition governor refused to do so.⁶⁹

27. In the aftermath of the electoral fraud perpetrated by the Government, several major opposition parties boycotted municipal elections held in December 2017 because the Government again failed to ensure fair and transparent elections.⁷⁰ On December 20, 2017, the Constituent National Assembly barred opposition parties that had boycotted the municipal elections from participating in future elections, including the presidential elections, which were constitutionally required to be held in 2018.⁷¹

28. Eager to take advantage of the Government's recent – but fraudulent – electoral victories, the Constituent National Assembly then moved to consolidate the power of Maduro's party by

⁶⁰ Nicholas Casey, *Venezuela Reported False Election Turnout, Voting Company Says*, NEW YORK TIMES, Aug. 2, 2017.

⁶¹ Mary Mogollan & Chris Kraul, *Venezuela's Attorney General is Ousted by New Assembly and Replaced With a Maduro Loyalist*, LOS ANGELES TIMES, Aug. 5, 2017.

⁶² Rachelle Krygier & Anthony Faiola, *Venezuela's Pro-Government Assembly Moves to Take Power from Elected Congress*, THE WASHINGTON POST, Aug. 18, 2017.

⁶³ *El CNE Aplaza por Seis Meses las Elecciones Regionales en Venezuela*, BBC, Oct. 18, 2016.

⁶⁴ *El Parlamento Venezolano Declara Fraudulento el Resultado de las Elecciones Regionales*, RTVE, Oct. 19, 2017.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Francisco Toro, *Venezuela's Democracy is Fake, But the Government's Latest Election Win Was Real*, THE WASHINGTON POST, Oct. 17, 2017.

⁶⁸ *Las Divisiones de la Oposición en Venezuela: 4 de sus 5 Gobernadores Electos se Juramentan Ante la Controvertida Asamblea Constituyente*, BBC, Oct. 24, 2017.

⁶⁹ *Id.* and Isaac Urrutia & Eyanir China, *Venezuelan Anti-Maduro Governor Sacked, Opposition in Chaos*, REUTERS, Oct. 26, 2017.

⁷⁰ Ludmila Vinogradoff, *La Mayor Parte de la Oposición Venezolana No Participará en las Municipales*, ABC, Oct. 31, 2017.

⁷¹ Ana Vanessa Herrero, *Venezuela Puts Up Roadblock for Opposition in Next Presidential Vote*, NEW YORK TIMES, Dec. 20, 2017.

accelerating the schedule for the presidential elections. Though normally held in the end of the year, the Constituent National Assembly announced on January 23, 2018, that the presidential elections would be held before the end of April.⁷² The CNE finally scheduled them for May 20, 2018. The opposition condemned the Maduro government's call for early elections, citing a lack of electoral guarantees, including an independent CNE and credible international observers. Additionally, the Government had jailed, forced into exile, or barred most popular opposition candidates from running for office.⁷³ Consequently, the main coalition of Venezuela's opposition parties announced it would boycott the presidential elections, calling them "an electoral fraud."⁷⁴

29. Despite widespread international pressure and condemnation, Venezuela insisted the elections were legitimate and proceeded with them as planned. On May 20, 2018, Maduro was "re-elected" for another six-year term with two-thirds of the vote.⁷⁵ The opposition, the National Assembly, and much of the international community rejected the results of the elections and called for new and fair elections.⁷⁶

30. Maduro's fraudulent re-election occurred at the height of a humanitarian emergency in Venezuela, leading to historically low Government approval ratings. By 2019, Venezuela's economic crisis had taken a turn for the worse and created the worst humanitarian crisis in the Western Hemisphere.⁷⁷ The Venezuelan economy has shrunk by 35% since 2013.⁷⁸ The country's inflation rate topped ten thousand percent in 2019.⁷⁹ In addition, 90% of Venezuelans now live below the poverty line.⁸⁰ This desperate economic situation has resulted in countrywide shortages of basic supplies, including medicine, rice, sugar, and cooking oil.⁸¹ An August 2016 survey revealed that 76% of hospitals had a severe shortage of basic medicines, a 9% increase since 2015 and a 21% increase since 2014.⁸² Along with decreased access to medicine and effective healthcare, data from 2016 showed that infant mortality increased by 45% since 2013 and maternal mortality increased by 79% since 2009.⁸³ A study by the Government from 2017 showed that infant mortality and maternal mortality rates had risen 30% and 65%, respectively. Preventable diseases such as malaria are also on the rise⁸⁴ and patients with HIV and cancer are going without

⁷² Kirk Semple, *Venezuela Calls for Early Elections, and Maduro Aims to Retain Control*, NEW YORK TIMES, Jan. 23, 2018.

⁷³ *Id.*

⁷⁴ *Voluntad Popular No Participará en Elecciones Presidenciales*, RUNRUN.ES, Feb. 16, 2018.

⁷⁵ *Elecciones en Venezuela: Nicolás Maduro Gana las Presidenciales Según el Consejo Nacional Electoral y Henri Falcón Cuestiona el Resultado*, BBC NEWS, May 21, 2018.

⁷⁶ *Id.*; *Guaidó a Maduro: El 10 de Enero Este Parlamento no te va a Juramentar*, EL NACIONAL, Jan. 5, 2019 and Moises Rendon, *Venezuela's Presidency in Jeopardy*, THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, Oct. 22, 2018.

⁷⁷ *Quick Facts: Venezuela's Humanitarian Crisis*, MERCY CORPS, Jan. 30, 2019.

⁷⁸ Rebecca M. Nelson, *Venezuela's Economic Crisis: Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE, Jan. 10, 2018.

⁷⁹ *Venezuela's Hyperinflation Drags On For A Near Record—36 Months*, FORBES, Nov. 13, 2019.

⁸⁰ *Quick Facts: Venezuela's Humanitarian Crisis*, *supra* note 77.

⁸¹ Mery Mogollon & Chris Kraul, *Shortages, Inflation, and Long Lines have Venezuelans Grumbling*, LOS ANGELES TIMES, Jan. 24, 2015.

⁸² WORLD REPORT 2016: VENEZUELA, HUMAN RIGHTS WATCH, 2016.

⁸³ *Id.*

⁸⁴ *Venezuela's Infant Mortality, Maternal Mortality and Malaria Cases Soar*, THE GUARDIAN, May 9, 2017.

treatment.⁸⁵ Moreover, malnutrition is rampant – data from 2015 indicated that 87% of survey respondents had difficulty buying food and a quarter of Venezuelans were eating two meals or fewer per day.⁸⁶ Additionally, the average Venezuelan lost 24 pounds in 2017.⁸⁷ The high levels of destitution and disease have forced millions of Venezuelans to flee their country. In October 2019, the UN High Commissioner for Refugees announced that at least four and a half million refugees and migrants had fled Venezuela since the start of the crisis.⁸⁸

31. Despite the ongoing humanitarian disaster in Venezuela, Maduro has continued to deny the existence of a crisis and refused humanitarian aid from the international community on many occasions.⁸⁹ His inaction in the face of such widespread suffering has garnered heavy criticism from the international community,⁹⁰ which has accused Maduro of using humanitarian aid as a weapon for “social control” and of stealing humanitarian funds for the benefit of the members of his Government in the limited instances when he has allowed aid to enter the country.

32. To date, Maduro has ignored calls from the opposition and international community to schedule new and fair presidential elections.

(b) Venezuela in International Fora

33. The Government has ignored repeated condemnations from the United Nations, the OAS, the IMF, and other bodies. It retains power not through consent of the people but through well-documented and systematic suppression of political opposition and other human rights violations.

34. The Security Council has expressed increasing concern over the situation in Venezuela. In an emergency session held on January 26, 2019, it voted to place the situation in Venezuela on its permanent agenda, following widespread protests and heightened political tensions in Venezuela since Juan Guaidó assumed power as interim President.⁹¹ During the session, the Under-Secretary-General for Political and Peacebuilding Affairs lamented that “the protracted conflict in [Venezuela] has had a grave impact on the population, with high levels of political polarization, growing humanitarian needs and serious human rights concerns.” Previously, Security Council

⁸⁵ Rachele Krygier & Anthony Faiola, *A Humanitarian Crisis in Venezuela? Nothing to See Here, Government Says*, THE WASHINGTON POST, Oct. 13, 2018.

⁸⁶ WORLD REPORT 2016: VENEZUELA, *supra* note 82.

⁸⁷ Moises Rendon, *Venezuela’s Crisis Is Now a Regional Humanitarian Disaster*, CENTER FOR INTERNATIONAL AND STRATEGIC STUDIES, Mar. 23, 2018.

⁸⁸ *Opening Remarks at the International Solidarity Conference on the Venezuelan Refugee and Migrant Crisis*, UNITED NATIONS HIGH COMM’R FOR REFUGEES, Oct. 28, 2019.

⁸⁹ Nicholas Casey, *Concern as Venezuela Refuses to Accept Aid*, THE NEW YORK TIMES, Sept. 27, 2016; Jim Wyss, *Venezuelans Are Going Hungry. Why Won’t the Country Accept Aid?*, MIAMI HERALD, Feb. 8, 2018; and *A Humanitarian Crisis in Venezuela? Nothing to see Here, Government Says*, *supra* note 85.

⁹⁰ *Colombia, EEUU, México, Panamá Acusan a Gobierno Venezuela de Robar Fondos de Programa Alimentario*, REUTERS, July 12, 2018.

⁹¹ *With Venezuela Buckling Under Severe Shortages, Security Council Emergency Session Calls for Political Solution to End Crisis, as Divisions Emerge Over Path Forward*, UNITED NATIONS SECURITY COUNCIL, Jan. 26, 2019.

members have also held several Arria formula briefings to discuss Government corruption and repression in Venezuela.⁹²

35. The Organization of American States has also expressed strong support for Guaidó and condemned Maduro's illegitimate election. OAS Secretary General Luis Almagro congratulated Guaidó on assuming the interim presidency of Venezuela, saying: "He has all of our recognition to achieve the return of democracy to [his] country."⁹³ On January 10, 2019, the OAS Permanent Council adopted a resolution 19-6-8 in which it agreed to "not recognize the legitimacy of Nicolás Maduro's new term."⁹⁴ Later, on April 9, 2019, it approved another resolution 18-9-6 in which it formally recognized Ambassador Gustavo Tarre, who had been appointed by Guaidó, as the legitimate representative of Venezuela before the OAS.⁹⁵ Previously, on June 5, 2018, following Maduro's fraudulent re-election, the OAS adopted a resolution declaring that the presidential elections lacked legitimacy and urging the Government to allow international humanitarian aid to enter the country.⁹⁶

36. The International Monetary Fund has also adopted a critical stance toward the Maduro regime. On March 17, 2020, the IMF announced it would refuse to consider a request by the Maduro regime for \$5 billion to deal with the coronavirus pandemic, citing the regime's lack of clear recognition.⁹⁷ Commenting on this decision, an IMF spokesperson stated: "IMF engagement with member countries is predicated on official government recognition by the international community, as reflected in the IMF's membership. There is no clarity on recognition [of the Maduro regime] at this time."⁹⁸

37. The situation in Venezuela has been the subject of concern for the UN Human Rights Council. This led it to adopt a landmark resolution on Venezuela on September 27, 2018.⁹⁹ With a vote of 23-7-17, the Human Rights Council called on the Venezuelan government to accept humanitarian aid in order to address the "scarcity of food and medicine, the rise of malnutrition, [and] the outbreak of diseases that had been previously eradicated or kept under control in South America."¹⁰⁰ It also requested the UN High Commissioner for Human Rights "prepare a comprehensive report on the human rights situation in Venezuela and to present it to the Human Rights Council at its forty-first session . . . and to present an oral update on the human rights situation to the Council at its fortieth and forty-second sessions."¹⁰¹

⁹² *Remarks at a UN Security Council Open Arria-Formula Meeting on Venezuela as a Case Study in Corruption, Peace, and Security*, UNITED STATES MISSION TO THE UNITED NATIONS, Sept. 10, 2018.

⁹³ *Almagro Reconoce a Guaidó Como Presidente Encargado de Venezuela*, EL HERALD, Jan. 23, 2019.

⁹⁴ *OAS Permanent Council Agrees "To Not Recognize the Legitimacy of Nicolas Maduro's New Term"*, ORG. OF AMERICAN STATES PERMANENT COUNCIL, Jan. 10, 2019.

⁹⁵ *OAS Accepts Guaidó Ambassador as Representative of Venezuela, Ousts Maduro Appointee*, *supra* note 3.

⁹⁶ Daniel Castropé, *La OEA Aprueba Resolución Contra Maduro Su "Gobierno" es Ilegítimo*, DIARIO LAS AMÉRICAS, June 5, 2018.

⁹⁷ *IMF Won't Lend to Venezuela Because Maduro Lacks Recognition*, *supra* note 3.

⁹⁸ *Id.*

⁹⁹ *Human Rights Council Adopts 10 Resolutions and One Presidential Statement*, UNITED NATIONS HUMAN RIGHTS COUNCIL, Sept. 28, 2018.

¹⁰⁰ *Id.* and *Venezuela: Landmark UN Rights Council Resolution*, HUMAN RIGHTS WATCH, Sept. 27, 2018.

¹⁰¹ *Human Rights Council Adopts 10 Resolutions and One Presidential Statement*, *supra* note 99.

38. The Office of the United Nations High Commissioner for Human Rights has documented and condemned the Government's repression and human rights violations. On September 9, 2019, High Commissioner Michelle Bachelet said that extrajudicial killings and torture appeared to be continuing in Venezuela.¹⁰² On January 25, 2019, the High Commissioner "condemned and called for effective investigations into the violence that has led to several deaths and injuries" in the protests since Guaidó become interim President.¹⁰³ On September 10, 2018, during her opening statement before the Human Rights Council, High Commissioner Bachelet lamented that the Government "ha[d] not shown openness for genuine accountability measures regarding issues documented by the Office during the 2017 mass protests."¹⁰⁴

39. The Office of the United Nations High Commissioner for Refugees has monitored the worsening refugee crisis in Venezuela. In December 2018, it launched a regional refugee and migrant response plan, in coordination with the International Organization for Migration, "to respond to the needs of Venezuelans on the move and secure their social and economic inclusion in the communities receiving them."¹⁰⁵

40. Numerous international bodies have condemned the Maduro government's repression and joined efforts to investigate its abuses and hold perpetrators to account. On February 8, 2018, the International Criminal Court (ICC) Prosecutor, Fatou Bensouda, announced that the ICC would open a preliminary examination into whether the Maduro government has committed crimes against humanity in Venezuela.¹⁰⁶ The preliminary examination is focused on crimes committed by the Government from April 2017 onwards, particularly the arbitrary detention of opposition members, excessive use of force, and ill-treatment of prisoners.¹⁰⁷ As of December 2019, the ICC stated it had almost concluded its assessment of subject-matter jurisdiction in the situation in Venezuela – the second of four successive phases through which the ICC conducts preliminary examinations before deciding whether to initiate a formal investigation in a given situation.¹⁰⁸ On May 29, 2018, the OAS published a nearly 400-page report by a panel of independent international experts that found reasonable grounds to believe that Venezuelan government officials are committing crimes against humanity.¹⁰⁹ The report identified 11 high-level government officials, including Maduro, as key perpetrators with command responsibility¹¹⁰ and detailed over 12,000

¹⁰² *Killings, Torture Still Going on in Venezuela: U.N. Rights Chief*, REUTERS, Sept. 9, 2019.

¹⁰³ *Daily Press Briefing by the Office of the Spokesperson for the Secretary General*, UNITED NATIONS, Jan. 25, 2019.

¹⁰⁴ *Human Rights Council Adopts 10 Resolutions and One Presidential Statement*, *supra* note 99.

¹⁰⁵ *Daily Press Briefing by the Office of the Spokesperson for the Secretary-General*, UNITED NATIONS, Dec. 14, 2018.

¹⁰⁶ *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on Opening Preliminary Examinations into the Situations in the Philippines and in Venezuela*, INTERNATIONAL CRIMINAL COURT, Feb. 8, 2018.

¹⁰⁷ *Id.*

¹⁰⁸ REPORT ON PRELIMINARY EXAMINATION ACTIVITIES, OFFICE OF THE PROSECUTOR OF THE INT'L CRIMINAL COURT, Dec. 5, 2019, ¶ 83.

¹⁰⁹ 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, ORG. OF AMERICAN STATES, May 29, 2018.

¹¹⁰ *Los 11 Chavistas a los que la OEA Acusa de Crímenes de Lesa Humanidad*, EL COMERCIO, May 31, 2018.

cases of arbitrary detention and imprisonment.¹¹¹ OAS Secretary General Luis Almagro called the crimes against humanity in Venezuela an “affront to the conscience and well-being of humankind,” and announced that the OAS report would be sent to the ICC to support a full investigation into crimes against humanity in the country.¹¹² Similarly, on June 22, 2018, the Office of the United Nations High Commissioner for Human Rights released a 54-page report condemning human rights abuses by the Venezuelan government.¹¹³ The report was based on interviews with about 150 witnesses and victims and detailed over 500 instances of extrajudicial killings by military officers since July 2015.¹¹⁴ The UN also announced that the report would be sent to the ICC to support the investigation into crimes against humanity in Venezuela.¹¹⁵ The following year, on July 5, 2019, the Office of the United Nations High Commissioner for Human Rights released another report in response to Human Rights Council Resolution 39/1, which requested that the High Commissioner travel to Venezuela on a fact-finding mission and produce a report including information from this trip.¹¹⁶ The report, which included information from 558 interviews with victims and witnesses of human rights violations and 159 meetings with various other stakeholders, reviewed violations of Venezuelans’ economic and social rights, civil and political rights, and right to access justice. Finally, on September 27, 2019, the United Nations Human Rights Council adopted Resolution 42/25, which established an Independent International Fact-Finding Mission on Venezuela with a year-long mandate to “investigate extrajudicial executions, enforced disappearances, arbitrary detentions and torture and other cruel, inhumane or degrading treatment since 2014 with a view to ensuring full accountability for perpetrators and justice for victims.”¹¹⁷ Upon completing this investigation, the Mission will produce a report on their findings, to be presented at an interactive dialogue at the forty-fifth session of the Human Rights Council in September 2020.

41. As Venezuela’s humanitarian, economic, and political crisis has worsened over the years, numerous leaders of these organizations have expressed serious concerns about the deteriorating situation in the country. On August 1, 2017, at the height of a wave of protests and arbitrary arrests in Venezuela, UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein urged the Government “to immediately release all those being held for exercising their rights to freedom of peaceful assembly, association and expression.”¹¹⁸ In August 2016, UN Secretary-General Ban Ki-moon said Venezuela was facing a “humanitarian crisis” and spoke out against the human rights abuses, shortages of food and other necessities, and Government-sponsored censorship of the opposition through intimidation and violence.¹¹⁹ Secretary General Luis Almagro has spoken out

¹¹¹ Andrew Rosati & Jose Enrique Arriola, *Venezuela is Committing Crimes Against Humanity, OAS Panel Says*, BLOOMBERG NEWS, May 29, 2018.

¹¹² Luis Almagro, *Statement by the Secretary General of the OAS on the Report that Found ‘Sufficient Basis’ of Crimes Against Humanity*, ORG. OF AMERICAN STATES, May 29, 2018.

¹¹³ HUMAN RIGHTS VIOLATIONS IN THE BOLIVARIAN REPUBLIC OF VENEZUELA: A DOWNWARD SPIRAL WITH NO END IN SIGHT, U.N. OFFICE OF THE HIGH COMM’R ON HUMAN RIGHTS, June 22, 2018.

¹¹⁴ *Venezuela Crisis: UN Says Security Forces Killed Hundreds*, BBC NEWS, June 22, 2018.

¹¹⁵ *Rule of Law ‘Virtually Absent’ in Venezuela, UN Report Says*, THE GUARDIAN, June 22, 2018.

¹¹⁶ *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in the Bolivarian Republic of Venezuela*, UNITED NATIONS HUMAN RIGHTS COUNCIL, July 5, 2019.

¹¹⁷ *Situation of Human Rights in the Bolivarian Republic of Venezuela (Res. 42/25)*, UNITED NATIONS HUMAN RIGHTS COUNCIL, Sept. 27, 2019.

¹¹⁸ *Comment by UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein on Venezuela*, UNITED NATIONS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, Aug. 1, 2017.

¹¹⁹ WORLD REPORT 2016: VENEZUELA, *supra* note 82.

frequently against the Government, calling for it to “respect the voice of the people” after the Supreme Court stripped the National Assembly of its power¹²⁰ and pushing the OAS to suspend Venezuela from the organization due to “grave alterations of democratic order” in 2016.¹²¹

C. Venezuela Legal Analysis

42. To understand the applicability of the domestic legal framework that provided authority for the National Assembly to declare Maduro as having abandoned his position by circumventing the requirement he be democratically elected, it is important to examine in more detail both how the 2018 presidential elections were conducted and the response of the international community.

43. As the 2018 presidential elections approached, it was clear they would be neither free nor fair. The illegitimate Constituent National Assembly, which was not properly constituted by a referendum of the people, lacked the competency to order elections; the electoral schedule was manipulated; the opposition political parties’ participation was unconstitutionally banned or seriously interfered with; key opposition figures such as Leopoldo López were imprisoned and arbitrarily disqualified from running for president; and there was a lack of time for standard electoral functions. After multiple postponements, the elections were scheduled for May 20, 2018.¹²²

44. On February 21, 2018, the opposition coalition confirmed it would not participate in the elections as they would “not comply with democratic conditions or guarantees.”¹²³ On February 23, 2018, at a special session supported by Secretary General Luis Almagro, the Permanent Council of the Organization of American States adopted a resolution¹²⁴ urging the Government of Venezuela to reconsider its announcement of presidential elections. Later, the Inter-American Commission on Human Rights concluded the CNE was biased and that the election would not meet “the minimal conditions needed for the realization of free, fair, and reliable elections in Venezuela.”¹²⁵ On March 23, 2018, the United Nations announced it would not offer electoral assistance for the election.¹²⁶ UN High Commissioner for Human Rights Zeid Ra’ad Al Hussein noted serious concerns about the election’s potential fairness, stating “this context does not in any way fulfill minimal conditions for free and credible elections.”¹²⁷ In addition, the Lima Group¹²⁸ concluded it would not recognize the results of the presidential elections due to their lack of transparency.¹²⁹ And the European Union, through the European Parliament on a vote of 480-51-

¹²⁰ *Statement from the OAS Secretary General*, ORGANIZATION OF AMERICAN STATES, Apr. 9, 2017.

¹²¹ *OAS Head Calls for Vote on Venezuela’s ‘Grave Alterations’ to Democracy*, THE GUARDIAN, May 31, 2016.

¹²² *See, e.g., Venezuela’s Presidential Crisis and the Transition to Democracy*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, Jan. 25, 2019.

¹²³ *La Oposición Venezolana Rechaza Concurrir a Las Elecciones Chavistas*, EL PAIS, Feb. 22, 2018.

¹²⁴ The resolution was supported by 19 countries, including Argentina, Bahamas, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Lucia, the United States, and Uruguay.

¹²⁵ *El Proceso Electoral de Venezuela es Llevado Ante la CIDH*, EFE, May 10, 2018.

¹²⁶ *UN Official: No Aid for Controversial Venezuela Election*, ASSOCIATED PRESS, Mar. 23, 2018.

¹²⁷ *UN Seeks Inquiry Into Killings in Venezuela, Says Poll Not Credible*, REUTERS, Mar. 7, 2018.

¹²⁸ This included the participating nations of Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, and Saint Lucia.

¹²⁹ *Colombia Desconocerá Resultado de Elecciones en Venezuela, Dice Santos*, LA PATILLA, Jan. 25, 2018.

70, called for sanctions against Maduro because of his role in the “aggravation of the crisis.”¹³⁰ On May 3, 2018, it later called for an immediate suspension of the May 20th election until “free and fair elections are held on a schedule agreed upon with the participation of all relevant actors and parties.”¹³¹

45. On May 20, 2018, Venezuelans went to the polls. Voter turnout was reported to have been at a record low, with only 46.02% of eligible voters participating, compared to almost 80% in the 2013 elections.¹³² Maduro was declared the victor, with 67.84% of the vote; his closest opponent had 20.93%. On May 24, 2018, Maduro took the oath of office in front of his illegitimate Constituent Assembly.¹³³ Even setting aside the fact that the presidential election was neither free or fair, this action was also in clear violation of Venezuela’s Constitution, which under Article 231 says:

The candidate elected shall take office as President of the Republic on January 10 of the first year of his constitutional term, by taking an oath before the National Assembly.

This bizarre action by Maduro left many in the international community very confused as even if he had been legitimately elected, his next six-year term was not supposed to begin until January 10, 2019.

46. There was widespread condemnation of Maduro’s election, with numerous domestic and international institutions and governments refusing to recognize the results.¹³⁴ On May 21, 2018, the National Assembly approved a resolution that rejected the election results and declared Maduro a usurper.¹³⁵ On May 28, 2018, the Council of the European Union refused to recognize the election results and called for new democratic elections.¹³⁶ The leaders of the G7 group –Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States – joined the European Union in rejecting the elections and denounced that they did not “comply with international standards” and did not grant “basic guarantees.”¹³⁷ On June 5, 2018, the OAS adopted a resolution on a vote of 19-4-11 to take the first step to suspend Venezuela from the organization.¹³⁸ The Lima Group announced it would not recognize the results.¹³⁹ And it later issued a statement urging

¹³⁰ *Union Europea Prepara Nuevas Sanciones Contra la Dictadura en Venezuela y la Estatal PDVSA*, PANAMA POST, Feb. 14, 2018.

¹³¹ *Eurocamara Pide la Suspensión Inmediata del Proceso Ilegítimo del 20 Mayo en Venezuela*, LA PATILLA, May 3, 2018.

¹³² *Elecciones en Venezuela: Nicolás Maduro Gana las Presidenciales Según el Consejo Nacional Electoral y Henri Falcón Cuestiona el Resultado*, *supra* note 75.

¹³³ *Venezuela’s President Maduro Takes Oath as President-Elect*, ASSOCIATED PRESS, May 24, 2018.

¹³⁴ *Venezuela’s Sham Election*, Editorial Board, NEW YORK TIMES, May 21, 2018.

¹³⁵ *Guaidó a Maduro: El 10 de Enero Este Parlamento no te va a Juramenta*, *supra* note 76.

¹³⁶ *Venezuela: Council Adopts Conclusions*, EUROPEAN COUNCIL, May 28, 2018. This included 28 countries – Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.

¹³⁷ *G7 Rechazó Resultados de las Votaciones del 20 de Mayo*, EL IMPULSO, May 23, 2018.

¹³⁸ *OAS Calls Extraordinary Assembly to Vote on Suspending Venezuela*, REUTERS, June 5, 2018.

¹³⁹ *Grupo Lima, Formado por 14 Paises, Desconoce Resultado Electoral en Venezuela*, EL UNIVERSAL (MX), May 21, 2018.

Maduro not to take the oath of office and to instead cede power to the National Assembly.¹⁴⁰ More than 50 countries around the world ultimately decided not to recognize the election results.¹⁴¹

47. On January 10, 2019, Nicolás Maduro purported to take the oath of office before the Supreme Court of Venezuela.¹⁴²

48. Article 187 of Venezuela's Constitution describes the function of the National Assembly, which include:

1. To legislate in matters of national competence and as to the functioning of the various branches of National Power . . .

3. To exercise control functions over the government and the National Public Administrative, on the terms established in this Constitution and by law . . . [and]

24. Any others indicated in this Constitution or by law.

49. By its plain language, the Constitution provides the National Assembly with the means to secure a legal exit from the current crisis. Article 233 of the Constitution says in pertinent part:

The President of the Republic shall become permanently unavailable to serve by reason of any of the following events: death; resignation. . . abandonment of his position, duly declared by the National Assembly; and recall by popular vote.

When an elected President becomes permanently unavailable to serve prior to his inauguration, a new election by universal suffrage and direct ballot shall be held within 30 consecutive days. Pending election and inauguration of the new President, the President of the National Assembly shall take charge of the Presidency of the Republic. . . .¹⁴³

Over the last several years, Maduro has tightened his grip on power by flouting numerous provisions of the Constitution, especially those requiring his Government to adhere to human rights norms and standards under both Venezuelan and international law. And he has abandoned the requirement that he be elected in a free, fair, and democratic manner. In response, the National Assembly has adopted resolutions with majority votes stating that his unconstitutional actions

¹⁴⁰ *Latin American Governments, Urge Maduro to Cede Power*, ASSOCIATED PRESS, Jan. 4, 2019.

¹⁴¹ *Venezuela's Presidential Crisis and the Transition to Democracy*, *supra* note 122.

¹⁴² *Venezuela's Nicolás Maduro Begins New Term as 'Illegitimate' President*, MIAMI HERALD, Jan. 10, 2019.

¹⁴³ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Dec. 30, 1999, Art. 233 (emphasis added).

constituted his abandoning his position and his duties as President, which require him to uphold the Constitution, including on January 9, 2017,¹⁴⁴ August 8, 2018,¹⁴⁵ and November 13, 2018.¹⁴⁶

50. The Constitution emphasizes in Article 5 that:

Sovereignty resides untransferable in the people, who exercise it directly in the manner provided for in this Constitution and in the law, and indirectly, by suffrage, through the organs exercising Public Power. The organs of the State emanate from and are subject to the sovereignty of the people.¹⁴⁷

51. And in Article 7, the Constitution emphasizes:

The Constitution is the supreme law and foundation of the legal order. All persons and organs exercising Public Power are subject to this Constitution.¹⁴⁸

52. Furthermore, under Article 138, one of general provisions of the Constitution: “A usurped authority is of no effect, and its acts are null and void.”¹⁴⁹ This provision reaffirms that acts undertaken by Maduro purportedly as President, but after he was declared to have abandoned his position, are null and void.

53. There are also two other relevant provisions in the Constitution that relate to the duties of citizens to reject unconstitutional and illegitimate governments. In Article 333, it states:

This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because of repeal in any manner other than as provided for herein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect.¹⁵⁰

And in Article 350 of the Constitution, it states:

The people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights.¹⁵¹

¹⁴⁴ *Acuerdo Sobre el Abandono de las Funciones Constitucionales de la Presidencia de la República en que ha Incurrido el Ciudadano Nicolás Maduro Moros*, ASAMBLEA NACIONAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Jan. 9, 2017.

¹⁴⁵ *Acuerdo de Ratificación de la Decisión de la Asamblea Nacional de Declarar el Abandono del Cargo de Nicolás Maduro Moros, y Sobre su Responsabilidad Penal por Hechos de Corrupción*, ASAMBLEA NACIONAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Aug. 21, 2018.

¹⁴⁶ *Acuerdo con el Objeto de Impulsar una Solución Política a la Crisis Nacional, Fortaleciendo las Fuerzas Democráticas del Pueblo de Venezuela con el Respaldo de la Comunidad Interna*, ASAMBLEA NACIONAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Nov. 13, 2018.

¹⁴⁷ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, *supra* note 143, Art. 5.

¹⁴⁸ *Id.*, Art. 7.

¹⁴⁹ *Id.*, Art. 138.

¹⁵⁰ *Id.*, Art. 333 (emphasis added).

¹⁵¹ *Id.*, Art. 350 (emphasis added).

54. In accordance with these provisions, on January 15, 2019, the National Assembly adopted *The Declaration of Usurpation of the Presidency of the Republic by Nicolas Maduro Moros and the Restoration of the Validity of the Constitution*. In this Declaration, the National Assembly carefully and specifically explains precisely why Maduro is no longer President and why the President of the National Assembly, Juan Guaidó, has assumed office as interim President, until there are free and fair elections for a new democratically-elected President in Venezuela.

55. In the preamble to this Declaration, the National Assembly explains that given this precise situation was not envisioned by the Constitution, that “as the only legitimate authority of the State and representative of the Venezuelan people, [it] must adopt decisions to proceed to re-establish the constitutional order, with foundation in Articles 5, 187, 233, 333, and 350 of the Constitution.”¹⁵² It added that the usurpation of the powers of the Presidency has emanated from Maduro’s failure to abide by the Constitution, and especially from his installing a “fraudulent national constituent assembly.”¹⁵³ And it explained that under Article 333 that all citizens and those serving the state have a duty to help re-establish the validity of the Constitution and that Article 350 recognizes a right to civil disobedience. On this basis, the National Assembly explains that the National Armed Forces are allowed to disobey Maduro’s orders and obey the orders of the National Assembly “all for the purpose of restoring the effective validity of the Constitution.”¹⁵⁴ In addition, it noted that Maduro’s actions have aggravated the effects of a complex humanitarian emergency because it has been “unable to attend to the security and prosperity of Venezuelans, whose life, liberty, property, and security are in danger.”¹⁵⁵

56. In the Declaration’s operative provisions, the National Assembly took the following actions:

1. It declared that Maduro had usurped the Presidency and therefore all his actions are null and void under Article 138 of the Constitution.¹⁵⁶
2. It adopted under Article 233 measures to create a transitional government and to say it intended to “proceed to the . . . holding of free and transparent elections . . . in the shortest possible time” in accordance with the Constitution’s requirements.¹⁵⁷
3. It approved a legislative framework for a political and economic transition to temporarily transfer the powers of the Executive to the Legislative Branch, stating the President of the National Assembly “will be responsible for ensuring

¹⁵² *Declaratoria de Usurpación de la Presidencia de la República por Parte de Nicolás Maduro Moros y el Restablecimiento de la Vigencia de la Constitución*, ASAMBLEA NACIONAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Jan. 15, 2019.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*, at First.

¹⁵⁷ *Id.*, at Second.

compliance with the approved legal regulations until the democratic order and the rule of law in the country are restored.”¹⁵⁸

4. It established a legislative framework to enable civil and police officials and the National Armed Forces to obey the decisions of the National Assembly.¹⁵⁹

5. It authorized the taking of measures to protect the assets of Venezuela nationally and internationally, so they can be used to address the complex humanitarian emergency.¹⁶⁰

6. It said necessary measures must be taken to ensure Venezuela remains represented with multilateral organizations and ensures their connection with the protection of human rights in Venezuela.¹⁶¹

7. It reported that the diplomatic corps accredited to Venezuela will be notified of this declaration.¹⁶²

57. On January 23, 2019, grounded in the legal authorization of the National Assembly, Juan Guaidó was sworn into office as the interim President of Venezuela.¹⁶³ He swiftly announced a three-part plan for the restoration of democracy in Venezuela: ending Maduro’s usurpation of power, creating a transitional government, and convening free and fair elections.¹⁶⁴

58. On January 5, 2020, Juan Guaidó was re-elected to another term as President of the National Assembly with a clear majority of 100 of the 167-member legislature’s votes.¹⁶⁵ On January 7, 2020, Guaidó was sworn in as the legislature’s president, thus also extending his mandate under the Constitution as interim President of Venezuela.

59. Since assuming office, nearly 60 countries— including Albania, Andorra, Australia, Austria, the Bahamas, Belgium, Bolivia, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, the Czech Republic, Denmark, the Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Ireland, Israel, Jamaica, Japan, Kosovo, Latvia, Lithuania, Luxembourg, Malta, the Marshall Islands, Micronesia, Montenegro, Morocco, the Netherlands, North Macedonia, Panama, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, South Korea, Spain, St. Lucia, Sweden,

¹⁵⁸ *Id.*, at Third.

¹⁵⁹ *Id.*, at Fourth. This provision references Article 328 of the Constitution, which says the National Armed Forces are a “professional institution, with no political orientation, organized by the State to guarantee the independence and sovereignty of the Nation”

¹⁶⁰ *Id.*, at Fifth.

¹⁶¹ *Id.*, at Sixth.

¹⁶² *Id.*, at Seventh.

¹⁶³ *Maduro Defiant as Venezuelan Opposition Leader Declares Himself Acting President*, CNN, Jan. 23, 2019.

¹⁶⁴ *Guaidó: “Cese de Usurpación, Gobierno de Transición y Elecciones Libres*, MSN NOTICIAS, Jan. 26, 2019.

¹⁶⁵ *Guaido Re-Elected National Assembly President*, VOA, Jan. 10, 2020.

Ukraine, the United Kingdom, and the United States¹⁶⁶ – have both recognized Guaidó’s Government as the exclusive sovereign power of Venezuela and withdrawn recognition of Maduro’s regime. The OAS and the European Parliament also recognized Guaidó’s government, by votes of 18-9-6 and 439-104-88 respectively, and the IMF has refused to lend money to the Maduro regime because it lacks recognition.¹⁶⁷

60. There is one additional issue regarding the timing of a new presidential election being undertaken in light of Maduro’s refusal to acknowledge he was removed from office by the Declaration of the National Assembly on January 15, 2019. Specifically, as noted earlier, under Article 233 of the Constitution, upon a president being declared as having abandoned his position “a new election by universal suffrage and direct ballot shall be held within 30 consecutive days.” With Maduro still holding on to power illegally and controlling the National Electoral Council, this is simply impossible. The Constitution, however, does not explicitly address what happens if that 30-day period expires without an election. But it is clear that general provisions of the Constitution implicitly authorize the interim President to continue to hold office until new elections are held and a new president is sworn in. Specifically, under Article 333 of the Constitution:

This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because or repeal in any manner other than as provided for therein. In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect.¹⁶⁸

Maduro is continuing to hold on to power illegally through his control of the military and this is an ongoing act of force. And the only practical way to bring the Constitution back into actual effect is the holding of a new free and fair presidential election and the swearing in of a democratically elected president. Any other approach beyond having the interim President continuing to hold office until this is achieved not only would lack support from the Constitution but also, because of its lack of legitimacy, would create an even more chaotic situation that would make the restoration of democracy even more difficult. Finally, it should be recalled that in its Declaration, the National Assembly had already stated that the new presidential elections should be held “in the shortest time possible,” anticipating an election might not be possible within 30 days.

D. Summary of Credentials Challenge and Relevant Procedures

61. While the process for determining credentials challenges is not governed by clear rules, in cases of sufficient gravity, the UN Credentials Committee has considered criteria other than effective control. In these cases effective control has not been the determinative factor. Rather, the Committee has given weight to other factors, such as the willingness of the relevant entity to

¹⁶⁶ Dave Merrill and Carolina Millan, *Map: All the Countries Recognizing Guaidó as Venezuela’s New President*, BLOOMBERG, Jan. 24, 2019; Ed Johnson, *Australia Joins U.S. in Recognizing Venezuela’s New Leadership*, BLOOMBERG, Jan. 27, 2019; and *European Nations Recognise Guaidó as Venezuela’s Acting President*, AL JAZEERA, Feb. 4, 2019.

¹⁶⁷ *OAS Accepts Guaidó Ambassador as Representative of Venezuela, Ousts Maduro Appointee*, *supra* note 3; *EU Parliament Recognizes Guaidó as Venezuelan Interim President*, REUTERS, Jan. 31, 2019; and *IMF Won’t Lend to Venezuela Because Maduro Lacks Recognition*, *supra* note 3.

¹⁶⁸ CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, *supra* note 143, Art. 333.

meet its international obligations, particularly in the area of human rights, and the extent to which it represents the will of the people of the Member State concerned, especially as reflected in free and fair elections.

62. As noted earlier, the new Government of Venezuela has democratic legitimacy. Specifically, the National Assembly was democratically elected in December 2015, with the opposition coalition winning 67% of the 167 seats. Juan Guaidó was himself democratically elected President of the National Assembly. In accordance with the operation of the Constitution, the National Assembly declared Maduro permanently unavailable to serve because he abandoned his position by his actions taken in violation of Venezuela's Constitution and laws. And, also in accordance with the Constitution, the National Assembly authorized its President to assume the powers of the interim President of Venezuela until free and fair elections are held as soon as possible.

63. Under Rule 27 of the Rules of Procedure of the General Assembly:

The credentials of representatives and the names of members of a delegation shall be submitted to the Secretary-General if possible not less than one week before the opening of the session. The credentials shall be issued either by the Head of the State or Government or by the Minister for Foreign Affairs.

And under Rule 28:

A Credentials Committee shall be appointed at the beginning of each session. It shall consist of nine members, who shall be appointed by the General Assembly on the proposal of the President. The Committee shall elect its own officers. It shall examine the credentials of representatives and report without delay.

64. In September 2019, the General Assembly appointed nine Member States to serve on the Credentials Committee, including: Barbados, Botswana, China, Mauritius, Nepal, the Russian Federation, San Marino, the United States, and Uruguay.¹⁶⁹ In accordance with Rules 27-28, the Credentials Committee adopted a report approving the delegations presented by all Member States, including those of Maduro, and issued them their appropriate credentials.¹⁷⁰

65. The consideration of credentials by the Credentials Committee is normally a formality, as it was last year. To revoke the credentials of a Member State after they were approved, however, requires an affirmative majority vote in the General Assembly itself. There are two ways this can be achieved. According to a 1970 Opinion of the UN Legal Counsel, the substantive issues regarding the status of governments should not generally arise in the credentials process. The only exception was when rival claimants existed and there was some question as to which claimant represented the "true Government." In this situation, the Opinion stated, it was permissible to consider the question within the context of credentials verification or as a separate agenda item in

¹⁶⁹ *Item 3 of the Provisional Agenda: Credentials of Representatives to the Seventy-Fourth Session of the General Assembly*, A/74/PV.1, Sept. 17, 2019.

¹⁷⁰ *Credentials of Representatives to the Seventy-Fourth Session of the General Assembly*, G.A. Res. 74/179, U.N. Doc. A/RES/74/179, Adopted Without a Vote, Jan. 17, 2020.

the General Assembly. But Counsel did not address whether one approach was more or less preferred.¹⁷¹

66. Therefore, there are two potential ways forward. First, a group of Member States could present the credentials challenge to the Credentials Committee. If a majority of the Credentials Committee voted to revoke the credentials of Maduro's delegation and to replace them with those of Guaidó's delegation, then the case would be brought before the General Assembly. A simple majority vote would be required there to affirm the Credential Committee's recommendation. Neither vote is subject to a veto by the five permanent members of the UN Security Council. This approach would be following the usual order for the consideration of credentials. Second, it would also be possible for the group of Member States to bypass the Credentials Committee entirely and to have the question considered as a separate agenda item of the General Assembly, where it would also require a majority vote, not subject to a veto. While either option is legally available according the longstanding opinion of the UN Legal Counsel, securing a majority vote in the Credentials Committee first could strengthen the legitimacy of the final outcome, but to be clear it is not required for the Member States to take the challenge to the Credentials Committee. Of course, it would not be advisable to make a credentials challenge through either path unless Member States were confident they would prevail in the required votes.

E. Benefits of Prevailing in a Credentials Challenge

67. There would be at least three immediate benefits for the new Government of Venezuela if the credentials challenge succeeded. First, the United Nations is the only multilateral institution with the legitimacy conferred by having universal membership of all the countries in the world. As such, speaking as a government's authorized representative at the United Nations bestows a unique platform that can persuade other states to take action. It would be both a symbolic and highly substantive step towards the restoration of democracy in Venezuela for the new Government to be recognized by the United Nations as the exclusive sovereign power in the country. Such a decision would also undoubtedly have enormous impact on the National Armed Forces, which are, for the moment, keeping Maduro in power. Second, the new Government could immediately make formal representations to the Secretary-General, other organs of the United Nations, and the UN humanitarian agencies. This would enable the Government to rapidly work to secure assistance to address the humanitarian emergency, to ask for support in raising funds through a multilateral fund, and to authorize access for UN agencies to address the needs of the Venezuelan people on the ground. And finally, with the new Government's recognition by the United Nations, global banks would cut off Maduro's access to the Government's assets and income streams and place them under the exclusive control of the new Government.

¹⁷¹ *Opinion of UN Legal Counsel*, U.N. GAOR, 25th Session, Annexes, Agenda Item 3, U.N. Doc. A/8160 (1970).

Appendix – The Practice of the UN Credentials Committee¹⁷²

68. In most cases, accreditation at the United Nations is a formality whereby the General Assembly approves individual delegates to represent UN Member States. According to this procedure, the Head of State or Minister for Foreign Affairs of a Member State submits documentation to the UN Secretary-General stating that the named individuals are entitled to represent that Member State.¹⁷³ The documentation is referred to a Credentials Committee appointed by the General Assembly at the beginning of each regular session. Thus, the review of the credentials of Member States is an annual process. The Credentials Committee examines the credentials and determines whether they are complete and have been issued by the proper authority, but it does not generally inquire into the legitimacy of the issuing authority. The Committee then submits a report to the General Assembly recommending either rejection or approval of the credentials.¹⁷⁴ Typically, the General Assembly adopts the Committee's recommendations without discussion.

69. In making its recommendation to the General Assembly, the Credentials Committee will generally not look beyond the credentials of the nominated representatives of a Member State to consider the legitimacy of the issuing entity. But practice reveals at least two situations in which the Credentials Committee may feel compelled to do so – First, when the Government of a Member State is voted out in a democratic election, but refuses to relinquish power. And second, where two rival delegations originating from the same State, each claiming to be the representative government of the Member State, submit competing credentials. Ultimately a delegation's credentials can only be revoked and replaced with those of a new delegation by a resolution of the General Assembly. A Member State may challenge the credentials of the government of another Member State either through the Credentials Committee and then by a vote in the General Assembly or through a separate agenda item in the General Assembly. Alternatively, where rival delegations are each vying to be the representative of a single Member State at the beginning of a General Assembly session, those delegations may submit competing credentials to the Secretary-General, which will then be referred to the Credentials Committee and then on to the General Assembly to consider the Committee's recommendation.

(a) Credentials Practice 1945-1990

70. In its first 45 years, the UN General Assembly was faced with eight major credentials contests. Each will be briefly reviewed.

¹⁷² This summary of the practice of the UN Credentials Committee is substantially reproduced from the excellent opinion entitled *Challenge to the Credentials of the Delegation of the State Peace and Development Council to Represent Myanmar/Burma* (2008). Signatories to that opinion included Professor Christine Chinkin, Profess Luigi Condorelli, Professor James Crawford, Professor John Dugard, The Honorable Florentino Feliciano, Professor Rein Mullerson, Professor Alain Pellet, Professor Nigel Rodley, and Professor Sompong Sucharitkul. As noted earlier, while the practice of the Credentials Committee is instructive, Member States that wish to revoke the credentials of the delegation of Nicolás Maduro and grant credentials to the delegation of interim President Juan Guaidó can bypass the Committee entirely and seek a resolution to secure this result under a separate agenda item in the General Assembly.

¹⁷³ *Rules of Procedure of The General Assembly*, U.N. Doc. A/520/REV.15, Oct. 30, 2000, at Rule 27.

¹⁷⁴ *Id.*, at Rule 28.

71. South Africa (1970-1994): The General Assembly took up the question of racial discrimination in South Africa at its first session in 1946.¹⁷⁵ Over the next quarter-century, both the General Assembly and the Security Council repeatedly urged the Government to abandon the “inhuman and aggressive”¹⁷⁶ racist policies of apartheid and conform to the human rights provisions of the Charter and the Universal Declaration of Human Rights.¹⁷⁷ South Africa insisted that the existence of apartheid was a purely domestic issue outside the scope of the UN’s competence. Recognizing that the Government was unrepresentative of the people as a whole, the Credentials Committee rejected the credentials of the South African delegation in 1970.¹⁷⁸ This was interpreted by the President of the General Assembly as not barring it from participating in the work of the Assembly, and from 1970-1972 the General Assembly neither accepted nor rejected the delegation’s credentials but did not interfere with South African participation.¹⁷⁹ In 1973, the General Assembly voted to “reject the credentials of the representatives of South Africa.”¹⁸⁰ This denial of credentials was reaffirmed by the Assembly in 1974.¹⁸¹ The President of the 1974 session interpreted the rejection of the credentials of the South African delegation as a bar from participation in the work of the Assembly, a ruling confirmed by the General Assembly “leaving open the question of the status of the Republic of South Africa as a member of the United Nations, which . . . is a matter requiring a recommendation from the Security Council.”¹⁸² The Security Council did not expel South Africa from the United Nations.¹⁸³ But it did impose an arms embargo in 1977¹⁸⁴ and went so far as to declare its Constitution “null and void” in 1984.¹⁸⁵ The democratic elections in South Africa in April 1994 normalized South Africa’s relations with the UN, and it was officially welcomed back to the General Assembly in July 1994.¹⁸⁶

72. China (1949-71): In 1949, Communist forces were in control of the Mainland and Nationalist forces controlled the island of Taiwan and certain other islands. The UN was presented with a choice between two governments, each in control of a (far from equal) portion of territory

¹⁷⁵ See Resolution Adopted on the Report of the Joint First and Sixth Committee, G.A. Res. 44 (I), Dec. 8, 1946, regarding the treatment of Indians.

¹⁷⁶ Resolutions Adopted on the Reports of the Special Political Committee, G.A. Res. 2506 (XXIV), Nov. 21, 1969 (noting with concern “that the government of South Africa continues to intensify and extend beyond the borders of South Africa its inhuman and aggressive policies of apartheid”).

¹⁷⁷ See U.N. Doc. S/11532, Oct. 18, 1974, ¶ 17.

¹⁷⁸ Statement by the President of the General Assembly, Mr. Edvard Hambro (Norway), concerning the credentials of the delegation of South Africa, United Nations General Assembly, Twenty-Fifth Session, 1901’st Plenary Meeting, U.N. Doc. A/PV.1901, Nov. 11, 1970, ¶ 285-86

¹⁷⁹ Credentials of Representatives To the Twenty-Fifth Session of The General Assembly, G.A. Res. 2636 (XXV), Nov. 13, 1970 (The Assembly approved all credentials except those of the representative of South Africa).

¹⁸⁰ 28 UN GAOR (2141st plen mtg), Oct. 5, 1973, at 7.

¹⁸¹ Credentials of Representatives to the Twenty-Ninth Session of the General Assembly, G.A. Res. 3206 (XXIX), Sept. 30, 1974.

¹⁸² Ruling by the President of the General Assembly, Mr. Abdelaziz Bouteflika (Algeria), concerning the credentials of the delegation of South Africa, U.N. Doc. A/PV.2281, Nov. 12, 1994, at 159-160, ¶ 185.

¹⁸³ Suspension or expulsion of South Africa from the UN was blocked by the veto of three Permanent Members (France, United Kingdom, United States). 29 SCOR, 1808th Meeting of the Security Council, Oct. 20, 1974.

¹⁸⁴ S.C. Resolution 418, U.N. Doc. S/RES/418, Nov. 4, 1977.

¹⁸⁵ S.C. Resolution 554, U.N. Doc. S/RES/554, Aug. 17, 1984.

¹⁸⁶ Elimination of Apartheid and Establishment of a United Democratic and Non-Racial South Africa, G.A. Res 48/258, U.N. Doc. A/RES/48/258, July 6, 1994.

and population, each claiming to represent the single state of China.¹⁸⁷ It took until 1971 to achieve the two-thirds vote requirement and seat the People's Republic of China.¹⁸⁸

73. Hungary (1956-63): In November 1956, Warsaw Pact forces intervened in Hungary to remove the established Government and to install the rival Kadar government. In 1956, the Credentials Committee adopted a proposal made by the representative of the United States that it refuse accreditation to the Hungarian delegation.¹⁸⁹ The General Assembly approved the Committee's report.¹⁹⁰ Opposition to the credentials was finally dropped in 1963 as the regime had by then demonstrated its ability to maintain effective control without assistance from foreign forces.¹⁹¹

74. Congo-Leopoldville (1960): Congolese President Kasavubu dismissed Prime Minister Lumumba on September 5, 1960. The Parliament convened to vote full powers to the Prime Minister and to declare illegal any competing government. President Kasavubu responded by authorizing the Army Chief of Staff to disperse the Parliament "temporarily." Upon submitting delegation credentials to the General Assembly, Kasavubu had neither full de facto control nor a constitutionally-ordered government. The Credentials Committee accepted the Kasavubu delegation, ruling that to entertain Lumumba's constitutional objection would constitute "an intervention in the domestic affairs of the Republic of the Congo . . ." ¹⁹²

75. Yemen (1962): On September 26, 1962, a coup d'état was carried out by the armed forces against the monarchy. When the two contestants issued competing credentials, the Committee accepted those of the Republican delegation, a decision ratified by the General Assembly.¹⁹³

76. Cambodia (1973-74): In March 1970 the Cambodian Head of State was ousted by the Prime Minister, General Lon Nol, who established the "Khmer Republic." In May 1970, Prince Sihanouk announced in Beijing the formation of a government-in-exile, the Royal Government of National Unity of Cambodia. The international community was divided in response to the Cambodian crisis. At its 1973 and 1974 sessions, the General Assembly voted to defer determination of the matter to the following year, concluding that although the Royal Government had established authority over a portion of the territory, the Lon Nol Government "still has control

¹⁸⁷ See J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 198-221 (Oxford University Press, 2nd edn. 2006).

¹⁸⁸ See *Restoration of the Lawful Rights of the People's Republic of China in the United Nations*, G.A. Res. 2758 (XXVI), Oct. 25, 1971 and B. ROTH, *GOVERNMENTAL LEGITIMACY IN INTERNATIONAL LAW* 261-263 (Oxford: Clarendon Press 1999).

¹⁸⁹ 1956 Report of the Credentials Committee, U.N. Doc. A/3536, Feb. 13, 1957, at 1.

¹⁹⁰ Credentials of Representatives to the Eleventh Session of the General Assembly, G.A. Res. 1009 (XI), U.N. Doc. A/3536, Feb. 21, 1957.

¹⁹¹ 1961 Report of the Credentials Committee, U.N. Doc. A/5055, at 2; 1962 Report of the Credentials Committee, U.N. Doc. A/5395, at 2.

¹⁹² 1960 Report of the Credentials Committee, ¶ 8, at 10. The General Assembly confirmed this decision (GA Res 1498 (XV), Nov. 22, 1960). See ROTH, *supra* note 188, 268-274.

¹⁹³ Credentials of Representatives to the Seventeenth Session of the General Assembly, G.A. Res. 1871 (XVII), U.N. Doc. A/5395, Dec. 20, 1962.

over a preponderant number of the Cambodian people.”¹⁹⁴ The status quo was maintained until the Lon Nol government’s resistance ended with the fall of Phnom Penh in April 1975.

77. Cambodia (1979-90): In December 1978 the Vietnamese army captured Phnom Penh and installed a new government of Kampuchean Communists. However, the Khmer Rouge maintained a foothold within the national territory along the Thai border, and presented themselves as the Government of Kampuchea in resistance to foreign occupation. International opposition to the Vietnamese invasion was overwhelming. Security Council condemnation was blocked only by the veto.¹⁹⁵ The General Assembly demanded an “immediate withdrawal” of Vietnamese forces.¹⁹⁶ The Credentials Committee voted to accept the delegation of the Khmer Rouge above that of the People’s Republic, a decision confirmed by the General Assembly.¹⁹⁷ The credentials contest was repeated from 1979 until 1991, when the parties reached an accord.¹⁹⁸

78. No clear answers emerge from this experience as to the principles to be adopted in evaluating a challenge to the credentials of the nominated representative of a Member State. The Chinese case ultimately supported effective control as the primary determinant of representation. In the cases where effective control was closely contested – Congo-Leopoldville, Yemen, and Cambodia/Khmer Republic – the most significant common denominator appears to have been control of the capital and the state apparatus. The presumption in favor of the established government was indeterminate in the Congo case, was disregarded by half the membership in the first Cambodian case and did not attract significant support in the Yemen case. On the whole, these earlier credentials controversies appear to have been dominated by the traditional criterion of recognition of effective control. But the practice showed that the Credentials Committee retained a discretion to decline to recognize the credentials of a government imposed by force, external or internal, or otherwise demonstrably unrepresentative. It did so whether or not there was a rival government whose credentials could be recognized. Evidently these decisions did not themselves operate to change the internal political situation, but they had significance in marking the international illegitimacy of the questioned regime, and they added to the pressure to remedy the situation, whether by democratic elections or some form of national reconciliation agreement.

(b) Credentials Practice Since 1990

79. The 1990s saw an increased willingness on the part of the Credentials Committee to accredit governments not in territorial control. In its decisions regarding Haiti, Sierra Leone, Afghanistan, Cambodia, and Libya, the Committee was prepared to depart from the default rule of effective territorial control where this could be justified by other factors.

80. One example is **Afghanistan**. From 1996-2000 the Credentials Committee affirmatively deferred decisions regarding Afghanistan. This excluded the Taliban from UN representation despite that group’s general control over Afghanistan, and instead accredited the representatives

¹⁹⁴ Restoration of the Lawful Rights of the Royal Government of National Union of Cambodia in the United Nations, G.A. Res. 3238 (XXIX), Nov. 29, 1974.

¹⁹⁵ U.N. Doc. S/13027, Jan. 15, 1979.

¹⁹⁶ The Situation in Kampuchea, G.A. Res. 34/22, Nov. 14, 1979.

¹⁹⁷ 1979 Report of the Credentials Committee, U.N. Doc. A/34/500, Sept. 20, 1979; The Situation in Kampuchea, G.A. Res. 34/22, Nov. 14, 1979.

¹⁹⁸ U.N. Doc. S/21732 & A/45/490, Sept. 17, 1990. See ROTH, , *supra* note 188, 280-283.

of ousted President Rabbani.¹⁹⁹ This process continued until 2001, when the Interim Authority was appointed for Afghanistan in the aftermath of the U.S.-led invasion, and the Afghan relationship with the UN began to normalize. In its 2001 report, the Committee noted that the Interim Authority was due to take office on December 22, 2001, in accordance with the agreement on provisional arrangements on Afghanistan endorsed by the Security Council in Resolution 1383 (2001). Formal credentials would be submitted on or after that date.²⁰⁰

81. Another example concerns the third credentials dispute involving **Cambodia**. The 1997 dispute arose when credentials were submitted by both Ranariddh's Royalist Party and Hun Sen's CCP to represent Cambodia. Ranariddh, supported by the U.S., opposed Hun Sen's government on the basis of his violent usurpation of power. The Credentials Committee, "having considered the question of the credentials of Cambodia, decided to defer a decision on the credentials of Cambodia on the understanding that, pursuant to the applicable procedures of the Assembly, no one would occupy the seat of that country at the fifty-second session".²⁰¹ The two parties eventually agreed to form a coalition and, in December 1998, the General Assembly accepted the Committee's recommendation to seat Cambodia's new coalition government.²⁰²

82. The case of **Haiti** in particular demonstrates that effective control is not necessarily the deciding factor in cases where rival governments exist for a single state, especially where one of the rivals was democratically elected. In September 1991, the Haitian military took over the Government of Haiti in a coup led by General Raoul Cedras.²⁰³ The coup ousted President Jean Bertrand Aristide, who had been elected in December 1990. Despite the effective control exercised by the military government, the Credentials Committee did not accept the credentials issued by that government.²⁰⁴ In July 1994, expressing concern at the deterioration of the humanitarian situation in Haiti and condemning the military regime's refusal to cooperate with the United Nations, the Security Council acted under Chapter VII of the UN Charter to adopt Resolution 940. The key operative provision authorized:

Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership . . . the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti"²⁰⁵

¹⁹⁹ See First 1996 Report of the Credentials Committee, U.N. Doc. A/51/548, Oct. 23, 1996, ¶ 6; 1997 Report of the Credentials Committee, U.N. Doc. A/52/719, Dec. 11, 1997, ¶ 10; First 1999 Report of the Credentials Committee, U.N. Doc. A/54/475, Oct. 18, 1999, ¶ 9; First 2000 Report of the Credentials Committee, U.N. Doc. A/55/537, Nov. 1, 2000, ¶ 9.

²⁰⁰ Credentials of Representatives to the Fifty-Sixth Session of the General Assembly: Report of the Credentials Committee, U.N. Doc. A/57/724, Dec. 20, 2001, ¶ 4.

²⁰¹ See the 1997 Report of the Credentials Committee, ¶ 4.

²⁰² U.N. Doc. A/53/PV.80, Dec. 7, 1998, at 2.

²⁰³ Letter dated Nov. 20, 1991 from the Permanent Representative of Haiti to the United Nations addressed to the Secretary General, U.N. Doc. A/46/695, Nov. 20, 1991.

²⁰⁴ 1992 Report of the Credentials Committee, U.N. Doc. A/47/517, Oct. 9, 1992.

²⁰⁵ Authorization to Form a Multinational Force Under Unified Command and Control to Restore the Legitimately Elected President and Authorities of the Government of Haiti and Extension of the Mandate of the UN Mission in Haiti, S.C. Res. 940, U.N. Doc. S/RES/940, July 31, 1994, at 2.

Following deployment of this force, Aristide was returned to office in October 1994.

83. Furthermore, in the case of **Sierra Leone**, Ahmed Tejan Kabbah was popularly elected to power in 1996. These were the first free, multi-party elections to be held in the country in decades. When the military drove President Kabbah from power less than a year after the elections, it was not so much a revolutionary takeover as a step back to the type of military dictatorship that had previously ruled Sierra Leone. Nevertheless, the people of Sierra Leone rejected the coup, responding with civil disobedience and demanding the restoration of the democratically elected government. The Credentials Committee recognized the credentials issued by the Kabbah government.²⁰⁶

84. Finally, the case of **Libya** involved a dispute between the government of Muammar al-Gaddafi, who had ruled as the country's de facto leader for more than 40 years, and the National Transitional Council (NTC), a rebel leadership group formed in February 2011 during the Libyan Civil War. During that month, the Arab Spring's wave of pro-democracy protests had reached Libya, where anti-government protestors held rallies to demand Gaddafi's resignation. As demonstrators took control of key cities in eastern Libya, Gaddafi responded with lethal force, deploying warplanes, tanks, and artillery against protestors.²⁰⁷ The international community strongly condemned this violent repression and atrocities against civilians. The Security Council unanimously adopted Resolution 1970,²⁰⁸ which imposed an arms embargo on the Libyan government, applied targeted sanctions against Gaddafi and other senior officials, and referred the situation in Libya for investigation to the International Criminal Court. A few weeks later, it adopted Resolution 1973,²⁰⁹ which established a no-fly zone over Libya and authorized an international military intervention to protect civilians. In an unprecedented decision, the General Assembly suspended Libya's membership from the Human Rights Council.²¹⁰ During the next several months, a stalemate occurred between the warring factions, but by August the NTC's rebels gained an upper hand and took the city of Tripoli, forcing Gaddafi into hiding. In September 2011, although the NTC had not yet established control over the entire country, the UN Credentials Committee nonetheless unanimously recommended to the General Assembly the NTC should be issued the credentials to represent the Government of Libya.²¹¹ Countries that had supported the NTC's claim highlighted the suffering of the Libyan people at the hands of Gaddafi, the NTC's focus on supporting Libya's people, and commitments made by the NTC to international bodies,

²⁰⁶ First 1997 Report of the Credentials Committee, *supra* note 201, ¶ 7.

²⁰⁷ David D. Kirkpatrick & Mona El-Naggar, *Qaddafi's Grip Falters as His Forces Take On Protesters*, NEW YORK TIMES, Feb. 21, 2011.

²⁰⁸ S.C. Resolution 1970, U.N. Doc. S/RES/1970, Feb. 26, 1970.

²⁰⁹ S.C. Resolution 1973, U.N. Doc. S/RES/1973, Mar. 17, 2011.

²¹⁰ Suspension of the Rights of Membership of the Libyan Arab Jamahiriya in the Human Rights Council, G.A. Res. 265 (LXV), U.N. Doc. A/RES/65/265, Mar. 3, 2011.

²¹¹ Credentials of Representatives to the Sixty-Sixth Session of the General Assembly: Report of the Credentials Committee, U.N. Doc. A/66/360, Sept. 14, 2011.

as the rationale for recognizing it as the true representative of the will of the Libyan people.²¹² A short time later, the General Assembly accepted the Credentials Committee's recommendation.²¹³

85. To summarize, the Credentials Committee has been willing to approve the credentials of democratically elected governments and groups in restored democracies even in circumstances where they did not have effective control of the territory of the country concerned. It is true that the overwhelming majority of credentials issued by Member States are accepted by the Committee and the General Assembly without question. But where a situation arises from internal or external repression – the Credentials Committee may consider other factors such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record.

²¹² Statements by the Representatives of Egypt and Gabon concerning the credentials of the National Transitional Council of Libya, United Nations General Assembly, Sixty-Sixth Session, 2nd Plenary Meeting, U.N. Doc. A/66/PV.2, Sept. 16, 2011, at 11-12.

²¹³ Credentials of Representatives to the Sixty-Sixth Session of the General Assembly, G.A. Res. 66/1, U.N. Doc. A/RES/66/1, Oct. 18, 2011.